EMPLOYMENT TRIBUNALS

Claimant: Prof N Haboubi

Respondent: Aneurin Bevan University Local Health Board

Heard at: Cardiff — On: 12, 13, 14, 15, 16, 20, 21, 22 (in chambers) & 23 September 2022

Before: Employment Judge S Jenkins
Mrs M Humphries
Mr M Vine

Representation:
Claimant: Mr S Myerson (One of His Majesty's Counsel)
Respondent: Mr J Walters (Counsel)

JUDGMENT having been sent to the parties on 27 September 2022 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to deal with the Claimant's claims of direct race discrimination, direct age discrimination, and victimisation, the Claim Form having been submitted on 12 July 2021.

2. We heard evidence in the form of witness statements and oral answers to questions from the Claimant on his own behalf and also from two of his colleagues, both doctors he supervised; Dr Syam Sadanandan, Medical Registrar; and Dr Naeem Aziz, Associate Specialist. We also considered the written statements of two other colleagues; Nicola Paget, Nurse

Specialist; and Diane Thomas, Ward Manager; the contents of which were accepted.

3. On behalf of the Respondent we heard evidence in the form of witness statements and oral answers to questions from Dr Deborah Wales, Consultant Respiratory Physician and previously Divisional Director for the Respondent's Unscheduled Care Division; Shelley Williams, Head of Human Resources and Workforce Business Partnering and previously Workforce Business Partner; Gareth Lavington, previously Local Counter Fraud Specialist; Dr James Calvert, Medical Director; Martin Edwards, Head of Counter Fraud; and Dr Stephen Edwards, Deputy Medical Director. We also considered the written witness statement of Cara Bradley, Workforce Business Partner, the content of which was accepted.

4. We considered the documents in the hearing bundle containing 1,403 pages to which our attention was drawn, and a small number of additional documents brought to our attention during the course of the hearing. We also considered the representatives' written and brief oral closing submissions.

Issues and Law

5. A list of the issues we had to address had been agreed by the parties in advance of the hearing, and that is set out in the Appendix to this Judgment.

6. The main factual focus in relation to the discrimination claims revolved around the referral of the Claimant to the Respondent's Counter Fraud Team for investigation, and the way in which that investigation was carried out. They were contended to involve less favourable treatment of the Claimant on the ground of either his race or age, the Claimant being of Iraqi ethnicity and aged 68 at the time of the events under consideration.

7. The factual focus of the victimisation claim, which had been permitted to be added after the submission of the Claim Form, and where the protected act was accepted to have been the issuing of the Claimant's Tribunal Claim, focused on the suspension of the Claimant from on call work on 20 July 2021, and the way in which that was dealt with. Those matters were also advanced as claims of direct race or age discrimination.

8. In terms of the relevant law Mr Walters on behalf of the Respondent had set out a summary of the relevant legal principles in his closing submissions, with which Mr Myerson KC, on behalf of the Claimant, confirmed he was in agreement. We do not therefore repeat them.

9. We did however pay particular regard to the appellate authorities dealing with the burden of proof. We noted that the Court of Appeal, in ***Madarassy -v- Nomura International PLC [2007] ICR 867***, confirmed that the statutory provisions dealing with the burden of proof require something more than less favourable treatment compared with someone not possessing the Claimant's protected characteristic. In that case, Mummery LJ noted, at paragraph 56, that, "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*".

10. We also noted that Sedley LJ, in ***Deman -v- The Commission for Equality and Human Rights [2010] EWCA Civ 1279***, had confirmed that the "more" needed to create a claim requiring an answer need not be a great deal. In some instances it may be furnished by the context in which the act has allegedly occurred. We further noted that the Employment Appeal Tribunal ("EAT"), in ***Home Office -v- Kuranchie (UKEAT/0202/16)*B,** had noted that the "something more" can comprise statistical evidence suggesting an unconscious bias, stressing that tribunals should be alive to the possibility of unconscious discrimination as well as overt discrimination.

11. The EAT also confirmed, in ***Essex County Council -v- Jarrett (UKEAT/0045/15)***, that it is not enough for a claimant simply to show that he or she has been treated badly in order to satisfy the tribunal that he or she has suffered less favourable treatment. A claimant must adduce evidence to support the contention that the treatment was less favourable in comparison with the treatment of others who did not share the same protected characteristic. In reaching its decision in that case the EAT drew on the earlier House of Lords decision of ***Glasgow City Council -v- Zafar [1998] ICR 120***, which confirmed that the subjection of a claimant to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination.

12. That point was also made by Simler J, as she then was, in ***Chief Constable of Kent Constabulary -v- Bowler (UKEAT/0214/16)***, where she said that, "*Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic*".

13. Finally, we noted that there can be occasions, particularly where a claimant is relying on a hypothetical comparator, where it is appropriate to dispense with the first stage of the burden of proof test and to focus on the second stage, the reason why the respondent treated the claimant in the way that it

did. The utility of that approach was first pointed out by the House of Lords, in ***Shamoon v Chief Constable of the Ulster Royal Constabulary [2003] UKHL 11***, which in fact pre-dated the statutory burden of proof rules, where Lord Nicholls noted that, "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was.

14. That approach was endorsed by Elias J, as he then was, in ***Laing -v- Manchester City Council [2006] ICR 1519****,* where he noted that, "*it might be sensible for a Tribunal to go straight to the second stage…where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator - whether there is a prima facie case - is in practice often inextricably linked to the issue of what is the explanation for the treatment*". The Judge had made the same point in ***Brown -v- London Borough of Croydon (UKEAT/0672/05)*** which was subsequently endorsed by the Court of Appeal in that case.

Findings of Fact

15. Our findings of fact, relevant to the issues we had to address, which we reached on the balance of probability where there was any dispute, were as follows.

16. The Claimant is a consultant employed by the Respondent in its Care of the Elderly Directorate, based at Nevill Hall Hospital in Abergavenny. He was born in Iraq and qualified as a doctor there in 1974. He moved to the UK in 1978, and became a consultant in 1991. He has worked for the Respondent since then. He was aged 68 at the time of the events under consideration in this case. At all relevant times the Claimant lived in Carmarthen, a journey of some 1.5 hours to his usual workplace.

17. As well as being a consultant in the Care of the Elderly Directorate, the Claimant has a sub-specialty in gastroenterology, and an interest in endoscopic procedures. Whilst therefore the core of the Claimant's work was in the Care of the Elderly Directorate, he also undertook additional work, or "sessions", in the Gastroenterology Directorate. That Directorate was one which has a particular need for additional work of two types. First, it has a need for "backfill" work, where procedures are scheduled and appointments made for patients, but where the scheduled clinician is unavailable, sometimes due to sickness, where the need arises on a short term basis, but more regularly due to annual leave where the need can be identified several weeks in advance. Secondly, it operates waiting list initiatives ("WLI"), where additional work is scheduled, either in gaps in the

weekday schedule or at weekends, in order to see more patients more quickly to try to reduce overall waiting times.

18. Requests for volunteers to work backfill and WLI sessions (where in this Judgment we refer to WLI, we do so generally to cover potentially both types of work), are sent out by the relevant Directorate, in this case the Gastroenterology Directorate, giving the dates on which assistance is required, with the clinicians then noting the days on which they are able to assist. Both systems are entirely voluntary and clinicians receive additional payments, at the relevant time of approximately £600 per session, for any backfill or WLI session undertaken.

19. At the time of the events giving rise to these claims, initially late 2018 to late 2019, Dr Deborah Wales was the Respondent's Director of its Unscheduled Care Division, within which both Care of the Elderly and Gastroenterology sat.

20. The contractual position of consultants, obviously for our purposes including the Claimant, is governed by a model All Wales Consultant contract agreed between the Welsh Government, NHS Wales and the BMA. The contract is supplemented by an individual job plan for each consultant. That is an agreed record, prepared annually, in agreement with the consultant's line manager, of how the consultant is going to deliver their contractual commitment to their employer.

21. A job plan operates on the basis of "sessions", each between three to four hours in length, which therefore appear to equate approximately to a half day, i.e. a morning or afternoon, and an anticipated 37.5 hour week for a full time consultant working ten sessions.

22. Sessions are principally made up of either Direct Clinical Care ("DCC") work, which includes operating sessions, ward rounds, outplacement clinics, multi-disciplinary team meetings where patient care is discussed, and on call work; or Supporting Professional Activities ("SPA"), which includes training and continuing professional development, teaching and appraisal.

23. A standard job plan comprises ten sessions, seven DCC and three SPA, over a standard working week. The contract provides that, by mutual agreement, one SPA session can take place outside normal working hours, for example at a weekend, leaving a similar period free in the working week, during which there are no contractual obligations. There is no ability under the contract to move or "displace" a DCC session.

24. In the case of the Claimant, he agreed a job plan in August 2018 with his Clinical Director which involved a twelve session week and an anticipated

45 hour weekly total, made up of ten DCC sessions and two SPA sessions. In August 2019 the job plan was revised by agreement. Whilst it remained a twelve session job plan, the anticipated weekly hours were increased to 49, made up of nine DCC sessions and three SPA sessions. At all times the Claimant was paid additionally, i.e. an effective 20% supplement, for the additional two sessions he worked.

25. Dr Wales, whose Division included both Care of the Elderly and Gastroenterology, had budgetary responsibility for the Division. In order to be aware of expenditure on WLI and Backfill sessions, she received spreadsheets detailing the payments made, and to whom they were made, on a monthly basis. In 2018 however, Dr Wales stopped receiving those spreadsheets and, despite asking for them, did not receive any until May 2019.

26. When she reviewed those spreadsheets, spanning several prior months back to November 2018, she noted that two consultants had worked significantly more sessions than others. One was the Claimant, and the other was "DS", a Consultant Gastroenterologist who had started at the Respondent in August 2018.

27. In relation to the Claimant, Dr Wales observed that there were weeks where he had undertaken three or four additional sessions, and that some had been undertaken during the working week, where, on checking the Claimant's job plan, she could see that the Claimant had DCC commitments. In the most recent month, April 2019, Dr Wales could see that the Claimant had undertaken nine WLI sessions, only two of which had been worked at weekends, meaning that seven had been undertaken in periods where the Claimant already had contractual commitments.

28. In light of that information, Dr Wales informed the Gastroenterology Directorate managers that consultants should not be doing multiple Backfill or WLI sessions each week, as the contract only allowed for the displacement of one SPA session each week. She anticipated that the managers would address her concerns and prevent the working of multiple WLI sessions. However, they did not do that, and nor did Dr Wales receive further copies of the relevant spreadsheet until November 2019.

29. Dr Wales did not address the amount of WLI work being undertaken by both the Claimant and DS with them, commenting in her evidence that she was giving them the benefit of the doubt. DS left the Respondent in June 2019 having spent much of his last few weeks there on annual leave, so his ability to work WLI sessions did not extend beyond May 2019. The Claimant however continued to work WLI sessions on a regular basis, and in fact increased the amount of that work, e.g. he worked 24 additional sessions in November 2019.

30. Dr Wales received the relevant spreadsheets again in November 2019 and saw that the Claimant's practice of working additional sessions had continued, and had indeed increased. She arranged for an email to be sent by the Directorate managers to the consultants, noting that only one SPA session could be displaced each week with agreement, and that DCC sessions could not be displaced.

31. Dr Wales reviewed the Claimant's WLI activity against his job plan at the start of December 2019. She noted that, from mid-October to mid-November, the Claimant had worked without a single day off, as he had worked four additional sessions across each weekend during that period.

32. Dr Wales was concerned that the amount of additional work being undertaken by the Claimant, in the context of an already heavy job plan, meant that his planned job duties were being neglected. She contacted Shelley Williams, a member of the Respondent's HR Team for advice on how to proceed. It was agreed they would meet with the Claimant to explain the concerns.

33. Before that meeting took place however, Dr Wales discussed her concerns with Dr Stephen Edwards, the Respondent's Deputy Medical Director. They subsequently agreed, on 13 December 2019, that the Claimant should be asked not to undertake further WLI sessions whilst the issue was being investigated.

34. Following the contact from Dr Wales, Dr Edwards examined the Claimant's job plan. He then spoke to Mr Martin Edwards, Head of Counter Fraud, and forwarded the Claimant's job plan to him on 12 December 2019. Mr Edwards in turn forwarded the job plan to his two investigators, Joanne Bodenham and Gareth Lavington, asking them to look at the case jointly, and noting that Dr Wales would get back to them in the following week once she had spoken to the Claimant.

35. The Respondent's Counter Fraud Bribery and Corruption Policy requires managers to report instances of actual or suspected fraud immediately to the Respondent's Counter Fraud Team, who would then investigate. The Policy notes that interviews under caution or to gather evidence will only be carried out by the Counter Fraud Team.

36. The meeting between Dr Wales, Ms Williams and the Claimant took place on 16 December 2019. At this stage neither Dr Wales nor Ms Williams were aware that Dr Edwards had referred the matter to the Counter Fraud Team.

37. The meeting was one of the few areas where there was a material dispute between the parties. A very brief handwritten note was taken by Ms

Williams at the time. That recorded that Dr Wales had explained the reason for the meeting, that the Claimant had commented that he had only seen the email "last week" (we presumed by that that he meant the email sent by the Gastroenterology managers on Dr Wales' direction). The note also recorded that the Claimant had offered to write a cheque for any money owed, had said, "*Please don't make an example out of me*", and had referred to his son having just qualified as a doctor and that he did not want to affect his reputation.

38. In a statement, produced on 2 June 2020 as part of the Counter Fraud investigation, Dr Wales recorded additionally that the Claimant had said that he had not been aware that he could only displace one SPA per week, and that the Directorate managers had not suggested to him that doing more than one WLI session each week presented a problem. She noted that the Claimant had asked her not to destroy his reputation and that he had offered to pay the money back.

39. Ms Williams, in a statement produced on 4 June 2020 as part of the Counter Fraud investigation, recalled that the Claimant had been very apologetic, had appeared worried, and had said that he was not aware that what he had done was wrong. She also recalled that the Claimant had offered to write a cheque for whatever money was owed, and that the Claimant had mentioned that his son had recently qualified as a consultant and that he did not want the issue to affect his son's reputation.

40. In their witness evidence for this hearing, both Dr Wales and Ms Williams additionally recorded that when the Claimant had stated that he did not want his reputation to be ruined, he did so by stooping forward with his hands clasped together, in what Dr Wales described as a "begging" pose.

41. The Claimant, in his witness evidence at this hearing, noted that he could not remember the exact words of the conversation, but that he had said that if it transpired that he owed any money that he would pay it back. He stated that he never said, "*Please don't make an example out of me*". We noted that in the transcript of his subsequent interview under caution the Claimant had confirmed that he had said that he did not want to be humiliated and that his reputation was paramount.

42. On balance, due to the contemporaneity of the handwritten note, the relative independence, i.e. as a notetaker and not as a principal participant, of Ms Williams, the broad congruence of the evidence of Dr Wales and Ms Williams, and the Claimant's comments in his interview under caution, we preferred the Respondent's version of events. We considered that the Claimant had said something along the lines of asking not to be made an example of, and/or for his reputation not to be ruined, and had offered to pay any money that he might have owed back.

43. We noted also that the Claimant had maintained that he did not think that he had done anything wrong. We did not consider that his offer to pay money back was itself an admission of wrongdoing. As Ms Williams had noted, the offer was to pay back whatever money was owed, which did not, in our view, amount to an acceptance that money was in fact owed.

44. No caution was given by Dr Wales at the start of this meeting, but, as we have noted, she had no knowledge that any investigation was to be undertaken by Counter Fraud, and, in any event, she was not empowered to deliver a caution.

45. Following the meeting, Dr Wales reported to Dr Edwards by email. She confirmed that there had been many weeks since June 2019 when the Claimant had displaced DCC sessions and more than one SPA session, and that he had had no day off between mid-October to mid-November. She noted that the Claimant had stated that he was not aware that he was working outside the provisions of his contract, and that he had moved his DCCs around to be available for WLI work. She confirmed that she wanted to hand the case over to Dr Edwards to investigate.

46. In view of the Claimant's status as a doctor, that investigation had to be undertaken under the auspices of Upholding Professional Standards in Wales ("UPSW"), agreed between NHS Wales and the BMA. That applies whenever there are concerns about a doctor's conduct, capability or performance. It involves the appointment of a Case Manager, usually a Deputy, Associate or Assistant Medical Director, who undertakes an initial assessment to determine whether a formal investigation needs to be carried out. There are then specific steps which must be followed if a formal process is instigated.

47. On the same day as the meeting between Dr Wales and the Claimant took place, 16 December 2019, Mr Lavington, in an email to Mr Edwards noted that he had done an audit trail in relation to the Claimant, and that from 1 September 2019 the Claimant had undertaken 137 additional sessions equating to approximately £82,885 gross pay. Mr Lavington also noted that, discounting sessions worked, annual leave days and weekends, 87 had been worked on weekdays.

48. Mr Edwards then, very soon after receiving Mr Lavington's email, emailed Dr Edwards, noting that his team had undertaken some remote analysis and that the initial findings were "*quite startling*". The two subsequently spoke, and Mr Edwards indicated that Counter Fraud would proceed with a full investigation. Dr Edwards agreed with that course of action.

49. Mr Lavington then undertook the Counter Fraud investigation. He met with Dr Wales on 16 January 2020, and following that he informed Mr Edwards that he thought that it was appropriate for a full formal fraud investigation to be undertaken in relation to the period 18 December 2018 to 27 November 2019, to ascertain whether any fraudulent activity had occurred.

50. Mr Lavington met with Dr Edwards on 28 January 2020 so that the latter could clarify that his opening an initial assessment under UPSW and having an initial conversation with the Claimant would not interfere with any Counter Fraud investigation. No concerns were raised about that by Mr Lavington at that time.

51. Dr Edwards then met with the Claimant, together with his BMA representative, on 30 January 2020, as part of the UPSW initial assessment process. The Claimant indicated that he had not omitted any duties but had just readjusted his work to undertake WLI sessions. He confirmed that no clinics had been displaced, but that he had displaced ward rounds into SPA sessions, and had then done his SPA sessions outside core hours. He also confirmed that he had a private practice which he described as a very small commitment, seeing no more than two or three patients per month, on Tuesday evenings and occasionally Friday evenings.

52. Dr Edwards then had further email exchanges with the Claimant's BMA representative, in which further explanations were given for the displacement of specific job planned sessions on particular days. This included combining a ward round and a multi-disciplinary team meeting into one session, where each had been allocated an individual session in the job plan, and doing a ward round between two endoscopy lists.

53. Dr Edwards attempted, with the assistance of the Respondent's HR team to obtain confirmation that the Claimant had logged on to the Respondent's electronic patient record system at the relevant times, but the electronic records had been automatically deleted due to the passage of time.

54. Dr Edwards was not entirely satisfied with the explanation that the Claimant had provided, but he was informed, in May 2020, that he should not undertake any further action under UPSW pending the completion of the Counter Fraud investigation.

55. Mr Lavington progressed his investigation by meeting the Gastroenterology managers on 24 April 2020, and by obtaining data from a performance analyst employed in that Directorate. He then met the Claimant's Clinical Director and line manager on 5 May to discuss the Claimant's job plans.

56. Mr Lavington also obtained emails from the Gastroenterology Directorate which noted that, whenever the Claimant claimed payment for his additional

work, he always stated that it had been performed in his SPA time. He also obtained an email exchange between the Claimant and his secretary on 3 July 2019. That noted that Dr Syanandan had asked when the Claimant was going to do the multi-disciplinary team meeting that week, and that the Claimant had replied that Dr Syanandan had to do the session with the nurse specialist.

57. Mr Lavington then produced a schedule of the additional sessions worked by the Claimant in the relevant period, noting the sessions worked on particular days and whether the Claimant had been scheduled to do a DCC or SPA session on those days.

58. On 13 August 2020 Mr Lavington wrote to the Claimant, confirming that he had been investigated in relation to alleged offences contrary to the Fraud Act 2006, and that it was alleged that the Claimant had made claims for extra duties payments during his contracted hours, which were suspected to have been fraudulent. He stated that it was necessary to formally interview the Claimant in relation to those matters. The interview was arranged for 22 September 2020.

59. In advance of the meeting, Mr Lavington provided disclosure of various documents to the Claimant's solicitor via several emails with attachments. The interview then took place as scheduled. The Claimant was accompanied by his solicitor, and Mr Lavington and Mr Edwards were present on the Respondent's side. The interview was recorded and a transcript was in the hearing bundle.

60. The Claimant was given the anticipated caution at the outset of the meeting, and the essence of the suspected offences was explained, i.e. that it was suspected that the Claimant had been working additional productivity sessions during his contracted hours, essentially being paid twice in respect of the same time frames.

61. The Claimant denied any dishonesty or wrongdoing. He referred to the job planning process as a formality, and as something done to tick the boxes. He maintained that he did all his SPA sessions at home, completed all his clinics as scheduled, but at times moved his other DCC commitments, such as ward rounds and multi-disciplinary team meetings, into his SPA time, enabling him to undertake Backfill or WLI sessions at those times.

62. The Claimant was asked about his private work, and he replied that it was very limited and was an evening clinic at St Joseph's Hospital in Newport on a Tuesday evening, starting at 5.00pm or 6.00pm for an hour, not more than twice a month.

63. The Claimant's solicitor intervened on several occasions during the interview, including over the admissibility of the note of the meeting on 16 December 2019. We did not consider, on reading the transcript, that the solicitor's interventions were excessive, but equally we did not consider that Mr Lavington and Mr Edwards behaved inappropriately during the interview, something asserted by the Claimant.

64. During the interview, the Claimant produced emails from Dr Sadanandan and Ms Paget and Ms Thomas regarding his work, and, subsequent to the meeting, Mr Lavington wrote to the three of them seeking confirmation that they had sent the emails and asking questions about ward rounds and multi-disciplinary team meetings.

65. All three replied, Ms Paget and Ms Thomas with more detail than Dr Syanandan. All confirmed that the Claimant would undertake ward rounds and multi-disciplinary team meetings, although the days and times on which they would take place would vary. It was confirmed that notes of discussions in ward rounds and in multi-disciplinary team meetings would be included in individual patients' notes, that ward rounds typically took around two hours, and that multi-disciplinary team meetings would typically take around one hour. The indication from Ms Paget, who provided the most comprehensive response, was that the Claimant attended ward rounds and multi-disciplinary team meetings, but she confirmed that records of attendance at multi-disciplinary team meetings were not kept. She also noted in her email that a multi-disciplinary team meeting had taken place on 3 July 2019, which was the date when the Claimant's email exchange with his secretary suggested he was not in attendance.

66. Mr Lavington also sought clarification from St Joseph's Hospital about the extent of the Claimant's work there. Its Chief Executive Officer provided a schedule of the clinics booked and carried out by the Claimant there between 1 December 2018 and 1 December 2019. The Chief Executive also confirmed in a subsequent statement that, whilst he had no personal knowledge of the clinics taking place, the records were authentic.

67. The information showed that the Claimant had attended at St Joseph's on 25 Tuesdays and 10 Fridays during the relevant period. Most of the Tuesday sessions started at 3.30pm, but on occasion did start as early as 2.00pm, and the Claimant saw between two and four patients, and on occasions five patients during them. The commencement times of the Friday clinics varied between 1.00pm and 5.00pm, and the Claimant also saw one patient on a Thursday at 1.00pm.

68. After the interview in September 2020, correspondence continued to pass between the Claimant's solicitors and Counter Fraud. That included a lengthy letter from the solicitors on 23 October 2020, in which

representations were made about the test for dishonesty and that the Respondent would not be able to satisfy it, and that the Crown Prosecution test for pursuing prosecution would not be met. Mr Lavington replied to that letter by email dated 27 October 2020, in which he confirmed that he would make sure that the representations would be forwarded to the CPS upon submission of the advice file.

69. Mr Lavington then submitted his file to Counter Fraud Wales on 19 November 2020, who in turn submitted it to the CPS. Exchanges took place between the CPS and Mr Lavington, which included an action plan from the CPS sent to Mr Lavington on 16 February 2021. This raised various questions and requests for further information, and noted that a full review was unable to be completed as material remained outstanding.

70. Mr Lavington replied to that request and then attended a case management conference with the CPS lawyers on 5 March 2021. Their decision was that there was not sufficient evidence to provide a realistic prospect of conviction. They stated that, "*the fundamental issue in the case is proving the suspect's actions were dishonest and in the context of an employment history with the trust. A significant weakness in the case is that the issue of claiming sessions was first identified in April but not actioned until November and in the intervening period the subject had also been asked to undertake further sessions or at least enquiries were made about his availability*".

71. Following the decision not to prosecute the Claimant, Dr Edwards sought to move forward with the initial assessment under UPSW. A lengthy hiatus ensued, which Dr Edwards in his witness statement felt had arisen due to the threat, and presumably the subsequent pursuit, of these proceedings. Only recently, in June 2022, was Dr Edwards provided with documentation relating to the Counter Fraud investigation for review, and the matter currently remains at the initial assessment stage under UPSW. The Claimant subsequently issued these proceedings on 12 July 2021 and they were served on the Respondent by the Tribunal on 10 August 2021.

72. In the meantime, an email was received by Dr Edwards on 9 July 2021 from a consultant physician, raising a number of concerns about the Claimant's performance, which were stated to have come from a large variety of sources in relation to three main incidents which had occurred in recent months. The main concerns appeared to relate to the Claimant's actions during a particular on call session.

73. On receipt of the email, Dr Edwards checked with the Respondent's HR department as to whether the Counter Fraud documentation was available, on the basis that, if it was, he could potentially add the new clinical concerns to his initial investigative assessment. The Head of HR at that

point informed Dr Edwards that the Claimant was taking the Respondent to an employment tribunal, and we understood that the Claimant's solicitors had provided a copy of the proposed claim on a pre-action basis. The Head of HR queried whether Dr Edwards was conflicted, due to his involvement in the initial assessment in relation to the Claimant's conduct, particularly as the material produced by Dr Edwards in that process had been submitted to the CPS as part of the counter fraud investigation.

74. At this stage Dr Calvert, the Medical Director, was on annual leave, and Dr Edwards was the Acting Medical Director. He felt that, bearing in mind that the concerns appeared to relate to the Claimant's management of acute and emergency situations, an appropriate interim solution would be to remove the Claimant's on call work, but to allow him to continue with his normal duties. Dr Edwards sought advice from NHS Resolution, the organisation which provides advice to Trusts and Health Boards when faced with conduct or capability issues, and they confirmed, in a letter dated 20 July 2021 following a telephone conversation on 14 July 2021, that Dr Edwards's proposed action was proportionate.

75. By that stage Dr Edwards was himself about to go on leave, and he therefore asked the recently appointed Divisional Director to inform the Claimant that he was to be temporarily relieved of his on call duties whilst there was an informal discussion to understand whether on calls were causing him particular stress. Unfortunately it transpired that the Divisional Director simply informed the Claimant that he was not to do any on call work without providing any context.

76. That led to the Claimant complaining about the action taken to Dr Calvert in an email on 20 July 2021. Dr Calvert, who had by then returned from annual leave, spoke to the Claimant by telephone on the same day, and, after discussing the issues that had been raised as concerns, felt that it was not necessary to relieve the Claimant from his on call duties. Dr Calvert confirmed in his evidence before us however that he did not consider that the action taken by Dr Edwards had been wrong, he had just formed a different view following his discussion with the Claimant.

77. Dr Calvert then asked an Associate Divisional Director to undertake an initial assessment into the concerns that had arisen. She undertook that assessment, which included a further concern raised in September 2021, and concluded, in December 2021, that no further action should be taken. Dr Calvert confirmed that to the Claimant in a letter dated 21 December 2021.

78. Having outlined our findings in relation to the narrative of events giving rise to the claims in this case, we made findings on broader background matters, which potentially had relevance for our conclusions, particularly in

relation to our assessment of whether there were facts from which, in the absence of an explanation from the Respondent, inferences of discrimination could be drawn. We considered that two areas were relevant; the ethnic background of the Respondent's medical workforce at large, and the ethnic background of the consultants who had been investigated by Counter Fraud in recent years and the outcomes of those investigations.

79. With regard to the Respondent's medical workforce generally, the undisputed evidence provided by Ms Williams was that there are, at present, and her statement was signed on 15 August 2022, 2,059 medical staff members. Of those 1,105 had chosen not to record their ethnicity, leaving 954 who had. Of those who had recorded their ethnicity, 340 were non-white. 217 of those, a little over two-thirds of the non-white medical staff, are employed at a senior grade, i.e. consultant, associate specialist or specialty doctor. The Respondent' medical workforce is therefore, as we would anticipate is the case across the NHS, proportionately more non-white in comparison with the population at large.

80. With regard to the Counter Fraud investigation of consultants, Mr Edwards had produced, for the purposes of this hearing, a schedule of investigations of six Consultants, not including the Claimant, between 2014 and 2020. Of those six, five were recorded as of white British ethnicity, whilst one was recorded as of Asian British ethnicity. Adding the Claimant to that table would then mean that two of the seven Consultants investigated were of non-white ethnicity, some 28%, broadly in line with the overall ethnicity of the Respondent's medical workforce.

81. Of the six investigations included in the schedule, five, including the case of the Asian British consultant, did not proceed as far as the interview under caution stage. One of those, involving a White British consultant, seemed to have similarities with the Claimant's case, as the allegation was that they were routinely running two WLI sessions simultaneously. The outcome recorded that instances of "doubling up" had been identified, but that there had been no scope for criminal proceedings as the work was being undertaken. It was also noted that the relevant consultant resigned from their employment.

82. The one investigation which went as far as the interview under caution stage, one involving a White British consultant, also had some similarities with the Claimant's position. It involved an allegation that the consultant had been working for another Health Board during contracted job plan sessions for the Respondent. The outcome again noted that instances of doubling up had been identified, but that, following the interview under caution, there was no scope for criminal proceedings as it was established that some work had been undertaken during free sessions and annual leave. It was again noted that the consultant had resigned from their employment with the

Respondent. Mr Edwards under cross-examination stated that a significant proportion of the relevant consultant's work had been undertaken in free sessions and in annual leave.

83. The final point we made in our findings, although it was more an observation, was that no other allegation of discriminatory treatment, whether related to race or age, appeared to have been made by the Claimant. The Claimant in his witness statement stated that, going back a number of years during a period when Dr Wales had been his line manager, he now believed that he had been harassed on a racially discriminatory basis by her through using others, in effect, to spy on him. Under cross-examination, the Claimant confirmed that he had not understood at the time that he was being racially harassed, and that nothing prior to December 2019 had made him think that he had been the subject of discrimination.

84. When the matter was put to Dr Wales in cross-examination, it was put on the basis that there had been previous occasions when she had accused the Claimant of something and where he had corrected her. She replied that, in 2015, she had received information from a site manager which called into question the Claimant's actions, that she had then had a duty to check the point out with the Claimant and had done so, and that when the Claimant clarified the matter she had replied, "*That's great*". We did not consider that the evidence provided about any prior incident gave any support for a contention that there had been any prior discrimination against the Claimant of any kind.

Conclusions

85. In assessing and reaching our conclusions on the identified issues we were mindful, in relation to the discrimination claims, of the guidance provided by Elias J in the ***Laing*** case, that it might be sensible to go straight to the second stage, i.e. the "reason why", where a claimant is seeking to compare their treatment with a hypothetical comparator.

86. We considered that that would indeed be a sensible approach in this case. We noted that the Claimant compared himself to a fellow consultant, DS, as an actual comparator, and, insofar as both the Claimant and DS had undertaken unusual amounts of Backfill and WLI in the months leading up to May 2019, their circumstances were the same. However, no less favourable treatment took place, or indeed was pleaded to have taken place, at that time, and DS left the Respondent's employment shortly afterwards. By the time of the events giving rise to the Claimant's claims therefore, i.e. the period from December 2019 onwards, DS's circumstances were materially different and he was not a valid comparator. The focus was therefore on a hypothetical comparator or hypothetical comparators.

87. We were conscious of the warning Elias J gave in ***Laing*** that if a Tribunal misses out the first stage it will have to bear in mind the risks to the employer of being found not to have discharged the burden which ought not to have been placed on it in the first place. However we noted that many of the asserted acts of less favourable treatment were not disputed. For example it was not disputed that there was a determination to investigate the Claimant (Issues 2(a) and (b)), there was a decision made to refer the Claimant to Counter Fraud before hearing from him, although that decision was not in fact made by Dr Wales (Issue 2(c)), and the Claimant was suspended from on call work, albeit on 20 July 2021 not 20 October 2021 (Issue 2(h)). Whilst other issues, notably the specific elements of Issue 2(d) were disputed, we did not consider the Respondent would be materially prejudiced by a focus on the second stage of the analysis, i.e. the Respondent's explanation for its actions. its "reason why".

88. In that regard, the Respondent's position, both in terms of the clinicians, Dr Wales and Dr Edwards, and the Counter Fraud investigators, Mr Edwards and Mr Lavington, was that it was faced with concerns that double claiming, i.e. claiming for payment for additional WLI or Backfill sessions undertaken at the same time as work scheduled to be undertaken in return for normal salary, had taken place.

89. In our view, those concerns were understandable. The evidence, particularly that relating to the period from mid-October to mid-November 2019, called into question whether the Claimant could have completed all his contractual commitments. The Claimant was already committed to a heavy job plan, broadly equivalent to a six-day week. During that period, the Claimant undertook two additional sessions on both weekend days for four consecutive weekends, and he did, consecutively, three, two, four and three additional sessions in the weekdays leading up to those weekends.

90. Even therefore accepting that the Claimant, whilst not contractually allowed, had swapped DCC commitments into SPA sessions, it was difficult to see how the Claimant could have undertaken the displaced SPA work when he was working full weekends. The fact that the Claimant spent in excess of three hours commuting each day was also to be factored in. It must also be noted that the Claimant from August 2019 onwards only had three SPAs that could be displaced, and indeed only had two SPAs that could be displaced prior to that.

91. The Claimant may not have been criminally dishonest in terms of obtaining payment for work not done, i.e. to be done in return for his regular salary. It was not disputed that he did the additional work and therefore was contractually entitled to payment for that, as there was only limited evidence, e.g. in relation to 3 July 2019 multi-disciplinary team meeting, that

a DCC commitment may not actually have been fulfilled at all. There was however sufficient in our view to justify an investigation, indeed to justify an investigation exploring potential criminality.

92. We found items of evidence advanced by the Claimant in internal discussions noteworthy in that regard. One such item was information provided to Dr Edwards by the Claimant's BMA representative in February 2020 following the initial assessment meeting, in which it was explained that, on 29 October 2019, the Claimant had done both a ward round and a multi-disciplinary team meeting in the afternoon, and that, on 16 August 2019, the Claimant had done a ward round between two endoscopy lists, one of which he was scheduled to do as a DCC, with the other being a Backfill or WLI session.

93. The Claimant had agreed in August 2019 that ward rounds and multi-disciplinary team meetings would each make up a session, i.e. a period of some three to four hours, and whilst both may have been able to have been completed at times in shorter amounts of time, the Claimant had been allocated additional hours in his job plan to undertake his contractual duties. Yet here the Claimant, via his representative, was expressly saying that he had combined two sessions into one, and had done one session, presumably over a lunch period, between two theatre sessions.

94. We considered that examination of whether the Claimant was indeed fulfilling his contractual commitments was therefore appropriate. We also considered that the additional evidence regarding the Claimant's private practice commitments, which contrasted with his indication that he did very little such work, also justified the investigation, and indeed the referral to the CPS.

95. We considered whether there was any evidence which might suggest that the Respondent's approach would not have been the same had the person under consideration been white or younger, but did not consider that there was any.

96. First, with regard to age, we did not consider that the claim went beyond an assertion. Very little questioning was made of the Respondent's witnesses as to whether any asserted less favourable treatment had been referable to the Claimant's age. Mr Myerson KC's closing submissions also made very little reference to age, and when that was put to him when making his brief oral supplemental submissions, he confirmed that the Claimant's race case was stronger, although he was not abandoning the age claim.

97. With regard to race we noted that the questioning put to the Respondent's witnesses about the connection of the Claimant's treatment with his race focused largely on the possibility of sub-conscious bias, principally drawing

on the Claimant's reactions in the meeting on 16 December 2019 and noting that that may have been a reflection of his cultural background.

98. We did not consider however that there was anything to suggest that any of the decision makers; Dr Wales, who had decided to refer the Claimant internally; Dr Edwards, who referred the matter to Counter Fraud and who later decided to relieve the Claimant from his on-call duties; and Mr Edwards and Mr Lavington, who pursued the Counter Fraud investigation and decided to refer the matter to the CPS; were influenced by any such matter. It appeared to us that they were always motivated by the view that a serious concern had arisen which needed investigation.

99. We also noted the significantly ethnically diverse make-up of the Respondent's medical workforce and the indication from the Claimant that he had not felt that he had been subjected to discrimination prior to December 2019, over a career with the Respondent which had by then spanned some 28 years. We did not consider that concerns he alluded to in his witness statement about earlier discriminatory treatment from Dr Wales were in any way substantiated.

100. We considered closely the schedule produced by the Respondent of the investigations undertaken by Counter Fraud into consultants. We noted that two of the White consultants had been subjected to investigation in relation to concerns similar to the Claimant's, and where the noted outcome had suggested that some wrongdoing had occurred. We noted however that both those consultants had resigned from their employment, which we felt involved a material difference to the Claimant's situation.

101. Overall therefore, we did not consider that there was anything to indicate that the investigation of the Claimant had been motivated by anything other than a genuine concern that wrongdoing had taken place, or that a different view would have been taken had the Claimant been White or indeed younger.

102. We then considered whether the conduct of the investigation, as particularised at paragraph 2(d) of the List of Issues, involved anything which could be said to have been motivated by the Claimant's race or age. Whilst there was clearly confusion internally within the Respondent over the roles of those meeting with the Claimant, particularly in the context where a Counter Fraud investigation was under way, we again did not consider that any such confusion, and any possible subsequent missteps had been motivated by the Claimant's race or age.

103. Much was made in evidence about the meeting held with the Claimant on 16 December 2019, which was a meeting where the Claimant was not under caution but where referral to Counter Fraud had been made a few

days earlier. We noted that Dr Wales and Ms Williams had no knowledge of such a referral, and therefore had no reason to consider that the meeting, and their conduct of it, should in any way have been circumscribed.

104. We also noted that only a referral to Counter Fraud had been made at that time, and that the decision to formally pursue the Counter Fraud investigation was not reached until the New Year, after Mr Lavington's meeting with Dr Wales on 16 January 2020.

105. The Claimant may be right in saying that he should not have been interviewed without being cautioned, and that the use of any tacit admission from an interview not under caution may have been improper or inadmissible, but there may also have been arguments about admissibility which could have been explored had the case gone forward to a criminal trial. However it was not our role to adjudicate upon such matters. Our role was to consider whether the actions taken amounted to less favourable treatment on the grounds of race or age, and for the reasons we have already expressed we did not consider that they did.

106. With regard to the other asserted deficiencies set out at paragraph 2(d) of the List of Issues, some were made out as having occurred in fact. For example, there was a failure to utilise existing contemporaneous records in the form of patient notes as asserted by paragraph 2(d)(vii). Others were not made out as having occurred in fact. For example, from our reading of the transcript of the interview under caution, it did not appear to us that the interview had been conducted in an overly aggressive manner. However even if deficiencies occurred, we did not see that they were in any way motivated by the Claimant's age or race or, to put it another way, that any different action would have been taken had the Respondent been faced with a White or younger consultant.

107. Our view overall was that the Respondent had been motivated by the concerns that had arisen, and that its "reason why" was those concerns.

108. With regard to the asserted acts of less favourable treatment which did not involve the investigation into the Claimant, they were his suspension from on-call activities in July 2021, and the fact that those involved in that decision, essentially Dr Edwards, had been involved in the prior investigation. We noted that the Respondent's explanation for the action taken was that a serious clinical concern had arisen which required investigation which was viewed as having arisen in an acute situation and could therefore be addressed in the short term by the curtailment of the Claimant's on-call work. The involvement of Dr Edwards was then down to his position as Deputy Medical Director when the Medical Director, Dr Calvert, was away on leave.

109. We accepted that that was the Respondent's genuine reason for the action taken. Our earlier comments about our view that there was nothing to indicate that the Respondent would have taken a different approach had the person about whom the complaint had been raised been White or younger apply equally here.

110. We considered that the concerns raised, whilst ultimately not pursued further, were ones which merited investigation under UPSW. They were also ones which raised possible patient safety issues. We did not consider that Dr Edwards's decision, whilst poorly implemented, as the Respondent acknowledged then and now, was an improper one, or that there was anything to suggest that it had been motivated by the Claimant's race or age or would have been different had the Claimant been White or younger. We noted that Dr Edwards had taken the step of seeking input from NHS Resolution on his proposed course of action, and that it had been agreed that it was proportionate.

111. With regard to the involvement of Dr Edwards in the decision-making process, he was clearly aware of the conduct allegations against the Claimant, and indeed was attempting at that time to understand how they could be addressed as part of his initial assessment. However, we saw nothing to indicate that his actions were improper, let alone had been motivated by race or age. We also observed, with regard to the detail of this allegation, that the reference in paragraph 2(i) to the involvement of the designated board member was misplaced, as that only arises under UPSW where a complete exclusion or suspension is proposed.

112. We turned finally to the victimisation claim, where the asserted detrimental treatment was the same as the asserted less favourable treatment we have just considered, i.e. the suspension with the Claimant from on-call work and the involvement of Dr Edwards in that decision.

113. We noted that it was accepted that the Claimant's Tribunal claim was a protected act. We also noted that, whilst the formal claim had not been served on the Respondent by the Tribunal by that time, Dr Edwards was aware, from his discussions with his HR Advisers, that the Claimant proposed to pursue a Tribunal claim. Whilst there may have been an argument as to whether Dr Edwards' knowledge of that amounted to knowledge of the protected act itself, we proceeded on the basis that it did.

114. However, for the same reasons as led us to our conclusion that the incidents did not amount to less favourable treatment on the ground of race or age, we also considered that they did not involve detrimental treatment because of the protected act. As we have noted in relation to the discrimination claims, we considered that Dr Edwards acted in the way that he did because of the serious clinical concerns that had arisen, and that it

was not inappropriate for him to make that decision, bearing in mind that he was the Acting Medical Director at the time.

115. We did not consider that Dr Edwards was motivated to take that action by his knowledge that the Claimant was pursuing a Tribunal claim against the Respondent. We found support for that view from the fact that Dr Edwards did not act unilaterally, but took advice from NHS Resolution, and from the fact that Dr Edwards did not seek to exclude the Claimant totally, but only to relieve the Claimant of his on-call duties. Had he intended to retaliate against the Claimant in response to a protected act, we considered that he would have been likely to have gone further.

116. Overall therefore, we did not consider that any of the Claimant's claims had been substantiated, and therefore they fell to be dismissed. In the circumstances, we did not need to consider the issue of time limits.

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Employment Judge S Jenkins
Dated: 22 November 2022

REASONS SENT TO THE PARTIES ON 23 November 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche

APPENDIX

AGREED LIST OF ISSUES

A Schedule of alleged less favourable treatment and detriments is included in the final hearing bundle at pages 68-79 ("**The Schedule**")

Claims

1. The Claimant brings the following claims:

   A. Direct discrimination on grounds of race under section 13 of the Equality Act 2010 **("EqA")**

   B. Direct discrimination on grounds of age under s.13 EqA.

   C. Victimisation under s.27 of EqA

LIABILITY

Direct discrimination

2. Did the matters alleged in the Schedule and which are set out below occur?
   a. determining to investigate the Claimant
   b. selecting the Claimant for investigation
   c. Ms Wales' decision to refer the Claimant to counter-fraud, made before hearing from him
   d. departure from best practice, conduct of investigation, failure to properly investigate or consider, treatment of witnesses, (the facts of which are set out at paragraph 9b, d, e, f, g, h, k, l, p, q, r, s, u of the Statement of Case as follows:

i. either deciding to report the Claimant for dishonesty following the informal meeting (which was thus utilised as an opportunity to obtain some kind of "admission" without putting proper safeguards in place), or deciding to report the Claimant for dishonesty prior to any informal meeting (in which case no meeting which did not commence with a caution was appropriate) (9b)

ii. relying on the "tacit admission" allegedly obtained, and thereby making 3 separate departures from good practice. First, a caution should clearly have been administered. Secondly the Respondent should never have relied, and should not now be relying on any "admission" as it was plainly improperly obtained. Thirdly, the Respondent still intends to try to benefit from improperly obtained evidence, having pleaded reliance upon it in these proceedings. (9b)[1]

iii. failing to follow the guidance on disclosure issued by the College of Policing Guidelines and/or PACE Code C. (9d)

iv. failing to adduce or consider whether there was any evidence that the Claimant undertook additional work during contracted hours and neglected his contractual obligations in consequence. (9e)

v. interviewing the Claimant on the basis that he had to establish his innocence. (9l)

vi. failing to investigate the Claimant's actual state of knowledge or belief, followed by objectively assessing that evidence as the Respondent *allegedly* accepts. (9f)

vii. failing to utilise or rely on the existing contemporaneous records or seek the Claimant's response to what they showed. (9f)

viii. failing to identify any factual basis for accusing the Claimant of dishonesty, both during the investigation (and now).[2]
(9g, h)

[1] This allegation clearly refers to a time which was post-commencement of the proceedings
[2] This allegation includes a contention that the complaint is continuing.

ix. the reliance on a document which was not disclosed prior to interview is a substantial departure from good practice. It is an attempt at ambush. (9h)

x. attempting that ambush by asserting the Respondent had evidence which it did not. (9h)

xi. attempting to suggest that the advice the Claimant received from his solicitor was to his detriment. (9h)

xii. alleging that Claimant's evidence about the job plan is untrue in the face of witness evidence supporting it. Further, failing to obtain those accounts (9k, p, q)

xiii. conducting the investigation in an overly aggressive manner. (9k)

xiv. adopting a different tone depending on the ethnicity of the witness. (9p)

xv. failing to respond when the Claimant specifically pointed out the discrepancy between his treatment and that of other consultants (9r).

xvi. pleading that there is no information that other consultants have been guilty of fraudulent conduct. (9r)

xvii. failing to consider or respond to the Claimant's correspondence of 23rd October 2019 and misrepresenting the position when ultimately replying, in that 4 weeks passed between the Claimant's letter and the submission of the file (9u), which time was spent firming up Dr Wales' evidence, which took over 3 weeks (9s), whereas the Claimant was told that the investigation required review by the CPS.

e. the process of the Respondent's investigation leading to referral to the CPS.

f. failing to respond to correspondence after 26 April 2021.

g. asserting in the Grounds of Response that the CPS did not determine that no offence was committed.

h. the Respondent suspending the Claimant from on call work on 20 October 2021

i. the Respondent has ensured that the matter i.e. the above suspension has been dealt with by those staff already implicated in the Claimant's mistreatment, notwithstanding that a designated Board Member is mandated by the standards document.

3. If so, was this less favourable treatment because of his race or age?

4. The Claimant relies on DS as being an actual comparator and hypothetical comparators in respect of all the complaints of direct discrimination as identified in the Schedule. The Respondent does not accept that DS is an appropriate comparator as his circumstances were materially different to the Claimant.

Victimisation

5. It is not disputed that the issuing of the first set of proceedings by the Claimant on or about 10 August 2021 was a protected act within the meaning of section 27 EqA.

6. Did the Respondent act as set out below?

a. The Respondent suspending the Claimant from on call work on 20 0cober 2021
b. The Respondent has ensured that the matter i.e. the above suspension has been dealt with by those staff already implicated in the Claimant's mistreatment notwithstanding that a designated Board Member is mandated by the standards document.

7. If so, did such matters amount to detriments?

8. If the Claimant was subject to detriment, were such detriments done because he did the protected act?

Limitation

9. In respect of the matters alleged by the Claimant has he proved that the less favourable treatment and detriments were part of a continuing act the last of which was brought in time?

10. In respect of any less favourable treatment and detriments that are found to be out of time, is it just and equitable to extend time?