,

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**
MEENA AGARWAL **AND** **CARDIFF UNIVERSITY**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF **ON: 16TH/ 17TH/ 18TH / 19TH /20TH / 23RD/ 24TH / 25TH / 26TH / 27TH/ 28TH / 30TH / 31ST OCTOBER 1ST / 2ND/ 3RD NOVEMBER 2017**

EMPLOYMENT JUDGE MR P CADNEY **MEMBERS: MRS M WALTERS**
MRS M HUMPHRIES

APPEARANCES:-

FOR THE CLAIMANT:- **MR A BOUSFIELD (COUNSEL)**

FOR THE RESPONDENT:- **MR D MITCHELL (COUNSEL)**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims of:-

1. Automatic Unfair Dismissal;
2. Unfair Dismissal;
3. Direct Race Discrimination;
4. Harassment;
5. Victimisation;
6. Breach of Contract.

Are dismissed

Reasons

1. The claimant was dismissed from her employment by the respondent on 29 February 2016. She initially brought a number of claims against the current respondent and also Cardiff and Vale University Health Board (CVUHB). A number of those claims including all those against CVUHB were subsequently withdrawn. The remaining claims before this tribunal which are solely against Cardiff University are unfair dismissal, automatic unfair dismissal, race discrimination contrary to section 13 (direct discrimination) Equality Act 2010, section 26 (harassment) Equality Act 2010, and section 27 (victimisation) Equality Act 2010, and a claim in respect of the underpayment of notice pay. Claims which are no longer pursued are claims of disability discrimination (following the earlier determination of the tribunal that she was not at the relevant time that a disabled person within the meaning of the Equality Act 2010), sex discrimination, age discrimination, and unlawful deduction from wages in respect of arrears of pay all of which have been withdrawn.

2. On behalf of the claimant we heard from the claimant herself, and Mr Christopher Yewlett (Chair of the UCU negotiating committee at the time of the merger between Cardiff University and the University of Wales College of Medicine), Prof Elspeth Webb, Professor Colin Dayan, Mr Brian Jenkins (Consultant Urological Surgeon), Ms Rachel Hargest (Clinical Consultant Surgeon) , Dr Bronwen Evans, and Dr Christopher Graves (UCU). In addition she produced witness statements from a number of witnesses whose statements were agreed and who were not called to give evidence.

3. On behalf of the respondent that we heard from Professor Ian Weeks (Acting Head of the School of Medicine), Professor Christopher Pepper (formerly Dean of Research in the School of Medicine), Professor Michael Lewis (Professor of Oral Medicine), Professor Wen Jiang (Director Cardiff China Medical Research Collaborative (CCMRC)), Elizabeth Connolly (Head of HR), Janet Richardson (HR Project Manager Medic Forward), Gabe Treharne (Pro Vice Chancellor) and Alex Lock (Partner DAC Beachcroft – Appeal Officer).

Procedural Issues

Ms Isabella Santamaria.

4. There was one witness whose evidence the claimant sought to call which we did not admit, Ms Isabella Santamaria. The purpose of Ms Santamaria's evidence, as was set out explicitly in the application for a witness order was that she was said to be an expert in relation to Equality Impact Assessments (EIA). The respondent had conducted an EIA in respect of the redundancy selection exercise which had

ultimately resulted in the dismissal of the claimant. The claimant asserted that it had not been properly or adequately carried out, in particular it had failed to take into account the impact on the ultimate users of the claimant's and others services whilst performing duties as practising clinicians for CVUHB. This is one of the pieces of evidence which are not directly related to the claim but from which the claimant invites us to draw inferences. For the reasons set out below this is not a proposition we in the final analysis have accepted, and thus even had we admitted the evidence of Ms Santamaria it would have had no bearing on our decision.

5. However at the point at which we determined not to admit the evidence of Ms Santamaria we had not yet reached that conclusion and so for the sake of completeness we set out the reasons at the time for our decision. The basis for excluding her evidence was that we were not satisfied that she was in truth an expert, a conclusion we drew following preliminary questions from the respondent. She certainly did not satisfy the requirements of r35 CPR. As she had no factual evidence that she could give as she had not been involved in the preparation of the equality impact assessment there was no admissible evidence that she could give to the tribunal. In addition had we permitted her evidence we took the view that we would have been bound to have allowed the respondent the opportunity to call expert evidence, and that given that this was tangential at best that it would be disproportionate to allow the evidence of Ms Santamaria to be admitted. In the end we determined that the evidence of Ms Santamaria even if admissible was insufficiently probative of any issue in the case to make it proportionate to admit it with the potential of the case going part heard to admit evidence from the respondent.

Professor Bligh

6. In the course of the hearing itself the claimant sought to obtain a witness order for Professor John Bligh. The essential basis of the application was that the evidence of other witnesses, in particular that of Professor Pepper, had led claimant to the conclusion that she believed that the guiding force behind the acts of discrimination in relation to her selection for redundancy was Professor Bligh. She believed that the whole process had been manipulated by somebody, whom she now believed to be Professor Bligh, in order to protect those who were not made redundant and to ensure that her own employment was terminated. Accordingly she initially applied for a witness order to her to allow her to call Professor Bligh. The difficulties of this course, that if she were to call Professor Bligh she would be bound by any evidence that he gave and as her witness that she would not be allowed to cross-examine him, were pointed out to the claimant. As a result she altered her position and withdrew the application for a witness summons to call him herself, but sought to persuade the tribunal that we should call Professor Bligh ourselves. It was said that this would be proportionate in that it would allow both parties to cross-examine Prof Bligh on his part in the redundancy selection process. On the basis of the evidence before us we could not find any evidence in support of the theory that the process had been manipulated, and equally none that if it had been that that person was Professor Bligh. In our view we had sufficient evidence as to the redundancy selection process

to draw fair conclusions as to it, and were not persuaded that we should call Professor Bligh ourselves.

Inferences

7. Before dealing with the facts and the claimant's specific allegations it's convenient at this stage to deal with matters which are in the main not directly relevant to our decision (indeed the respondent submits totally irrelevant) but from which the claimant submits that we are entitled to draw inferences as to the matters which are directly in issue.

Athena Swan Award

8. An Athena Swan award recognises an academic institution's work to address gender inequality. It began in the fields of Science Technology Engineering Medicine and Mathematics and has subsequently expanded into other academic fields. The claimant's case is that the respondent failed in an application for an Athena Swan Bronze accreditation. From this she invites us to draw the inference that the respondent is either insufficiently concerned with gender equality, or at least unable or unwilling to achieve it to the extent necessary to achieve an Athena Swan award. Although the claimant has made no claim for sex discrimination she invites us to draw the inference that if the respondent is insufficiently concerned about gender inequality to ensure that it meets the criteria for the Athena Swan Bronze award, that it follows that it is equally unconcerned about other forms of discrimination and that this is some something from which we can draw inferences in respect of the race discrimination claim.

9. The respondent submits that the factual basis of the claimant's case is flawed in that the respondent has not been refused an Athena Swan Bronze award but rather is in the process of making the application. Thus the respondent firstly submits that this is not something from which we can draw any inference insofar as the factual basis for it is not true, and secondly that in any event the absence or presence of an Athena Swan Award can have no bearing on the issue of on whether the claimant was or was not the victim of discrimination.

10. In our judgement this is a matter about which it is impossible for us to draw any firm conclusions. It must be borne in mind that in order to draw an inference we must first make primary findings of fact. Even assuming the claimant is correct we have no evidence as to why the respondent failed to obtain the award and no evidence as to the process or factors which lead to the award of or failure to receive an Athena Swan award. Even if the claimant is correct we only have evidence as to one fact, that the respondent did not obtain the award. In the absence of having any such evidence or knowledge it appears to us impossible to draw any specific inferences as to the respondent's commitment or absence of commitment to gender equality from the absence of any such award (again assuming that the claimant's evidence is correct). If that is correct it follows that in the absence of being able to draw any inference as to the respondent's commitment to gender equality it necessarily follows

that we cannot draw any further inference as to its attitude to other forms of discrimination based upon this.

The Professor Bhugra Review

11. The next matter from which the claimant invites us to draw an inference are the events which gave rise to, and the conduct of the Professor Bhugra review. The background is that a group of third year medical students performed a review in which they apparently intended to spoof a number of their tutors. However, whatever their objective the review this was perceived by a number of members of the audience as being racially discriminatory, homophobic and misogynistic. As a result of complaints received by the University Professor Bhugra was commissioned to investigate and report which he did. The claimant invites us to draw a number of inferences from these events. Firstly the claimant submits that unless there was a culture of the acceptance of racial and/or homophobic discrimination that the students themselves would not have thought their activities acceptable, and therefore the fact that they put on a racist and homophobic review it is in and of itself something from which we can draw an inference. Secondly they say the evidence revealed by the Bhugra review suggests that a number of members of staff were unhappy at the commitment of the respondent to diversity, and that we should accept their views and draw inferences from them.

12. The respondent firstly submits that this is irrelevant. Whatever the rights and wrongs of the content of a student review, it can have no bearing on the issue of whether the claimant did or did not suffer discrimination as she alleges, and is not something from which any inference can be drawn. Even if an inference could be drawn it invites us to draw the opposite conclusions; firstly the fact that a number of students put on a review which went beyond what is acceptable proves nothing in and of itself other than the students own a lack of appreciation of appropriate boundaries; and secondly the fact that the University established the review demonstrates its commitment to diversity and equality; and thirdly the self-evident seriousness and thoroughness with which the review was carried out leads to the same conclusion. Accordingly the respondent submits neither from the background facts, nor from the review itself, is it possible to draw any inferences as to the events in this case directly concerning the claimant.

13. In our judgment the respondent is correct. The evident seriousness with which the respondent treated the complaints means that it would not be possible, in our view, to draw any inference of a lack of concern about allegations of discrimination. Equally drawing inferences as to the culture of the whole institution simply from the fact of one offensive and discriminatory student review would in our view be unjustified.

Equality Impact Assessment

14. Although equally logically part of the factual analysis of the Medic Forward programme it is convenient to deal with the Equality Impact Assessment at this stage

as it is one of the matters from which the claimant invites us to draw inferences. As will be set out in greater detail later in the initial stages of the Medic Forward programme it was believed that some 69 members of staff were at risk of redundancy. The initial EIA was based upon the assumption that all 69 would be made redundant and concluded that if that were to be the case that there would be a reduction in the BME component of the medical school of 0.5% (6.4% to 5.9%). This was regarded as a sufficiently small effect to be statistically insignificant. In any event as Medic Forward progressed there was a very substantial reduction in the numbers of potentially affected staff and in the final analysis that number was reduced to five. A decision was taken not to revisit the EIA as the numbers concerned were now so small that it would be impossible to have any statistically significant effect.

15. The claimant's case was that the EIA was fundamentally flawed in that it only considered the effect of redundancies on the respondent's staff diversity figures. Specifically it did not take any account of the effect of the potential redundancies on the wider community. She asserted that an if she were made redundant, as one of, if not the sole provider of specialist urological bladder reconstruction surgery in the whole of Wales, there would be a knock-on effect to the wider community which should have been taken into account. These criticisms come from claimant herself and from one of her witnesses Professor Elspeth Webb. There is, in our judgment, one central difficulty with this analysis which is that the evidence before us is that despite the fact that she is not in fact providing any services at present to CVUHB due to a dispute between her and CVUHB (a dispute about which we have heard no evidence and which has no relevance to these claims) she is still employed by it. Her dismissal from the University has not in fact resulted in her losing her position with CVUHB. Accordingly the redundancy itself has had no effect upon the provision of medical services to the community in general by the claimant.

16. It follows in our view that the criticism of EIA is misplaced. Even if we had accepted the criticisms the only conclusion we would have drawn is that those who conducted the EIA had taken too narrow a view as to its remit. It is a very long leap from that to the inference that the treatment of the claimant was discriminatory.

17. Looked at overall we are not satisfied that we are able to draw any inferences from the matters relied on by the claimant, and that the issues must be decided by reference to the primary facts, and any inferences that could be drawn from those facts from the direct evidence relating to the claimant's claims.

Background Facts

18. In this section we shall set out simply the background facts that provide the outline of the case. The specific findings of fact in relation to the individual claims will be dealt when dealing with and setting out the claims themselves.

19. The claimant was born in India. She came to this country at 29 years of age and is now a British citizen. She describes herself as having been born into a middle-class traditional Indian Hindu family. Before she came to United Kingdom she was a fully

trained surgeon having qualified in India. She was originally appointed as a locum working in Cardiff for a period of 20 months. She was then offered a permanent post in either the NHS hospital or in the University, and she chose to be appointed as an academic surgeon. As a consequence her substantive employer was what is now Cardiff University (formerly the University of Wales College of Medicine) where she was employed as a clinical academic. In addition she was appointed as an honorary consultant in the CVUHB (or technically its then predecessor). She was paid by the University which was recompensed by CVUHB for the percentage of her time which is spent in her clinical practice. The effect was that she was appointed as a substantive Consultant Urological Surgeon and Senior Lecturer performing duties for both the University and the Health Board. Her specialist area of clinical practice was bladder reconstruction arising from a number of medical conditions or from injury.

20. The events which concern us begin in 2010. In outline the claimant asserts that she as the victim of harassment and/or victimisation in that she was the subject of false and "professionally damaging" allegations in respect of training in 2010; and there were issues in relation to a pre-appraisal meeting and the appraisal itself in March and June 2011.

21. In December 2011 she submitted a grievance in part in relation to those matters. The grievances were investigated by Professor Stephen Denyer (Deputy Pro Vice Chancellor Cardiff University) and Ms Susan Hill (Consultant Surgeon CVUHB) who produced a report dated 24th August 2012 (which rejected the grievances). The claimant lodged an appeal against the conclusions of the grievance investigation in October 2012. The appeal was conducted by Ms Karen Elcock who reported in December 2013 having not been able to meet the claimant. The claimant complains both of the fact of attempts to meet her to discuss the appeal whilst she was off sick, and of the decision to conclude the appeal without having held such a meeting.

22. On 19th November 2012 the claimant had a meeting with Professor Mason at which she alleges that she was asked to provide the equivalent of full time research output despite working for the University only part time.

23. In April 2013 the claimant was advised that she would be line managed by Professor Kynaston. He was one of those against whom she had lodged the grievance. In consequence she made an application for a transfer to the School of Dentistry which was rejected.

24. In May 2013 allegations were made against her in relation to her clinical duties for CVUHB and apparently it was intended to suspend the claimant, although in the end she was not suspended. She maintains that the underlying allegations were false.

25. In June 2013 the claimant complained of sex and race discrimination and victimisation to MS Melanie Wortham, the Dignity at Work Officer of the University.

26. From 5th August 2013 until 30th September 2014 the claimant was on long term sickness absence.

27. On 7th November 2014 the claimant submitted a second grievance, complaining of the investigation and conclusions of the first grievance and the appeal and making further allegations.

28. At around this time The Medic Forward Programme commenced, eventually leading to the dismissal of the claimant. The process and the facts in relation to it will be set out in full in the section below dealing with it.

Harassment / Victimisation

29. The first matters about which the claimant complains (harassment and victimisation) are set out in paragraphs 39 and 40 in her amended Particulars of Claim which are very similar although not identical. The allegations of harassment are:-

1.

a) *In December 2010 the local Specialist Training committee made professionally damaging allegations against the joint unit of the claimant and her white colleague consultant Surgeon Mr Brian Jenkins. Whereas Mr Jenkins was later told there was no problem with him, claimant was pursued. The specialist training committee works under the aegis of Wales Deanery which is under the College of Biomedical and Life sciences of Cardiff University.*

b) *Irregularities in the claimant's appraisal. There were issues regarding the claimant's pre-appraisal meeting on 7 March 2011 and appraisal on 27th June 2011 raised in the claimant's grievance submitted in December 2011.Subsequently further irregularities in the appraisal were detailed in the claimant's second grievance submitted in November 2014 concerning previous appraisal documents and repeat appraisal. The Dean of School of medicine Prof Morgan of the first respondent was involved.*

c) *In a meeting with Professor Mason of the University on 19 November 2012 claimant was asked to give research output equivalent to a full-time academic even though the University was paid by the NHS for two thirds of the claimant's time for clinical work and it would be impossible to produce a full academic output on one-third time.*

d) *Indirect involvement of the University in episode of attempted suspension of the claimant. Although the claimant's Health Board colleagues initiated the matter to suspend the claimant in May 2013, the University line managers were agreeable to this without asking any clarification from the claimant. The suspension letters were prepared by both organisations. When it became apparent there was no basis for suspension and that it would not go ahead, the University as the claimant substantive employer did not seek any report/further for further investigation into why these false allegations had been made. This episode was simply swept under the carpet by both employers.*

e) *(This allegation has been withdrawn)*

f) The claimant wrote to the Vice Chancellor of the University second of May 2013 requesting her transfer away from her then University line managers Prof Kynaston and Prof Morgan (Dean of the School of Medicine) who were respondents in her grievance investigations. The Vice Chancellor simply delegated the matter the pro-Vice Chancellor who rejected this request.

g) This not only meant that the claimant could not apply for an MRC grant to progress academic career it also meant that bullying and harassment continued unabated and led claimant sickly with work-related stress on 5 August 2013. This also prevented her from returning to work after six months of sick leave in February 2014 as her line manager had not changed.

h) The University to continue to pursue the claimant to agree for a review of her grievance investigation during her sick leave. When she was unable to do so the investigation was closed unilaterally.

i) Dismissal for redundancy. The claimant wrote to the University and Health Board several times in her letters dated 12 February 2013, 2nd June 2015, 24th June 2015, 21st July 2015, 9th October 2015, 29th of October 2015, 4th January 2016 and during the appeal hearing on 28th of April 2016 that she was discriminated by her employers but was still made redundant.

2. The failure to investigate and address finally both grievances as pleaded above. That failure is ongoing.

3. The matters set out in the claimant's letters of 12th February 2013, 2nd June 2015, 24 June 2015, 21 July 2015, 9th October 2015, 29th October 2015, 4 January 2016.

4. All matters set out in this claim above leading to the claimant's dismissal.

5. The matters set out in the claimant's appeal against redundancy.

30. For the avoidance of doubt we do not regard 3) 4) and 5) above as separate claims of harassment, and do not regard it as part of our task (and nor would it be fair to the respondent) to trawl through those documents to attempt to discover whether there are events not set out specifically as acts of discrimination. We have confined ourselves to the claims expressly set out.

31. The allegations of victimisation expressly include all the matters set out above at 1) (a) – (l) (but not 2) – 5)) and a separate claim :-

i) All the matters set out in this claim above leading to the claimant's dismissal, including but not limited to the selection for redundancy, the failure to find suitable alternatives, the disparity of treatment with white non-disabled comparators during the redundancy consultation process, and all matters pleaded above.

32. In respect of victimisation there is a dispute between the parties as to whether any of the claimants asserted disclosures amount to protected acts within the meaning of

s27. It is accepted that in a number of the claimants complaints, in particular her grievances and in communications with the respondent in respect of the redundancy selection process that the claimant complained of being the victim of discrimination. The respondent submits, however, that nowhere prior to these proceedings did the claimant complain specifically of race discrimination. This, it submits, is fatal to the victimisation claims where the only allegations of discrimination remaining are based on the protected characteristic of race (See Fullah v Medical Research Council EAT in which the EAT held that a "complaint of bullying, harassment, discrimination and victimisation" did not amount to a protected act where the specific protected characteristic was not identified.).

33. The claimant submits that at the very least the disclosure made to Melanie Wortham the University's Equality and Diversity Officer in June 2013 made specific allegations of race discrimination (being treated as a "stupid Indian girl"), which is reflected in an e-mail Ms Wortham sent on 14th June 2013 in which she refers to the claimant wanting to take legal action "..on possibly sex discrimination, race discrimination and victimisation…". Thus the claimant submits that from that date she had not only alleged discrimination on the grounds of race but that the respondent clearly understood her complaints to include complaints of race discrimination. In respect of the respondent's submissions as to the other disclosures simply making generalised allegations of discrimination the claimant describes this as "hair splitting" and which, if correct, undermines the protection provided by the Act.

34. In our judgment the claimant is correct that the disclosure to Ms Wortham is a protected disclosure within the meaning of s27 which explicitly sets out allegations of race discrimination. However we are bound by *Fullah* and in our judgement the respondent is correct in its analysis of the other alleged disclosures which appear to fall squarely within the principles set out in Fullah. That gives the claimant a practical difficulty as there is no evidence that any of those who carried out the acts of alleged victimisation were ever aware specifically of her communication with Ms Wortham and there is, therefore no evidential basis for any finding of any link between the protected disclosure and the acts complained of which would be fatal to the complaints of victimisation. We do, however, see merit in the claimant's point that the *Fullah* interpretation would deprive this part of the Act very significantly of its force and accordingly we will consider the claims to guard against the possibility that we are wrong as to the application of *Fullah*.

35. At this stage we will deal with the allegations set out above except those relating to the redundancy selection process which will be dealt with when discussing that part of the claim.

36. In respect of the earlier matters there is relatively little direct evidence before us. On behalf of the claimant Mr Jenkins has given evidence in respect of the first allegation. Beyond that there is simply the evidence of the claimant. The respondent has called no direct evidence in respect of these matters. The claimant's position is that as the respondent has called no direct evidence her factual allegations are effectively unchallenged in relation to the earlier matters and must therefore be accepted. The respondents position, as is set out in greater detail later is that all the earlier matters

are out of time, and cannot be said to be part of a continuing act, and that no basis has been advanced by the claimant for the exercise of our discretion to extend time. Moreover the earliest allegations were part of a grievance which was investigated in exhaustive detail and that, whilst the claimant may not accept it, that it is plain that the allegations which were subject to investigation were without merit.

37. Allegation (a) - In respect of the allegations themselves the evidence of the claimant and of Mr Jenkins follow closely that summarised above. The claimant's case is that unfounded allegations in relation to training were made and that, as Mr Jenkins was told that they were not directed at him follows automatically that they must be directed at her. As they were unfounded it follows automatically that there must be some other reason for them and she invites us to conclude that that are the reason must be her race, or at very least that if the those facts are sufficient to raise a prima facie case of race discrimination and that in the absence of the respondent calling any direct evidence that her claim must succeed.

38. On 12 December 2011 the claimant lodged a grievance setting out six complaints (see pages 4/5 of the Investigation Report for the full list) which included this complaint. The grievances were investigated by Professor Stephen Denyer (Deputy Pro Vice Chancellor Cardiff University) and Ms Susan Hill (Consultant Surgeon CVUHB) who produced a report dated 24th August 2012. That report and its appendices amounted in total to some five hundred pages. Their conclusions are set out in detail in the report, but in summary they concluded that the comments relayed to the claimant were not "allegations" but "feedback" which was appropriately provided. Moreover they were not unfounded in that they were based on genuine feedback received from the STC training director whose views were not misrepresented.

39. The respondent points out that the claimant did not allege race discrimination in her grievance of 12 December 2011, and moreover that the grievance report comprehensively rejected her claims. Although we have no direct evidence Professor Denyer and Ms Hill investigated the claimant's claims and concluded that the allegations were entirely genuine and that those who raised them were entitled, indeed obliged, to do so. We simply have the report itself and neither Prof Denyer nor Ms Hill, nor those directly involved were called to give evidence.

40. The tribunal has not found this an easy issue to resolve. Whilst no direct evidence has been called by the respondent we do have the detailed and thorough findings of the investigation, and there is therefore relatively contemporaneous evidence that the complaints had genuinely been made. Whatever the merits of those underlying complaints, it followed that the claimant's complaints as to the conduct of her colleagues was misplaced. What we are in effect left with is an allegation that complaints were made as to the training provided by the claimant, but not of that provided by Mr Jenkins. The claimant invites us to conclude that that is enough in and of itself to satisfy stage one of the Igen v Wong test and to transfer the burden of proof. In our view that is not a sufficient evidential basis to do so; the simple fact of a difference in treatment is not in our view in and of itself sufficient. As this claim pre-dates the earliest alleged disclosure it must automatically fail as a claim of

victimisation in any event. (For the reasons set out below even had we reached the opposite conclusion in our judgment this allegation is out of time and it would not be just and equitable to extend time).

41. Allegation (b) - The second allegation once again was not alleged in the claimant's her grievance to be a claim of race discrimination, and once again was rejected by Professor Denyer and Ms Hill. The two matters the claimant relies on in her grievance in respect of those appraisal meetings are firstly that the claimant had requested to be accompanied at a pre-appraisal meeting on 7 March 2011. She went with Mr Jenkins, but Professor Morgan did not allow Mr Jenkins to accompany her. Secondly following the appraisal which was carried out by Professor Morgan on 27 June 2011 the claimant alleges that she did not receive the outcome of the appraisal. The conclusion of the grievance investigation was that the reason she had not received it was quite simply that she had not followed the usual procedure and collected it from the office. In respect of this matter even on the claimant's evidence there appears to be nothing from which we could conclude taken on its own the exclusion of Mr Jenkins or the failure to provide her with the outcome even if it was such a failure was an act of race discrimination. Once again in our judgment it is not sufficient to set out a decision or event with which the claimant is unhappy, to satisfy without more stage one of the Igen v Wong test. Again this allegation pre-dates the earliest disclosure and so must fail as an allegation of victimisation (Again even had we reached the opposite conclusion we would not have extended time in respect of this allegation.)

42. Allegation (c) - There is then a gap of some fifteen months to third allegation, "*In a meeting with Prof Mason of the universe on 19 November 2012 the claimant was asked to give research output equivalent to a full-time academic even though the University was paid by the NHS two thirds of the claimant's time clinical work and it will be impossible to produce a full-time academic output on one third time."* This in and of itself does not appear to raise any inference that this request was in anyway discriminatory. However the claimant's allegation is that "*so far as I'm aware no other clinical academics were treated in this way and the only explanation that I can come to for this treatment was either my race or the complaints of discrimination that I had raised.*" This, if true might well be sufficient.

43. However, one of the claimant's witnesses was Rachel Hargest. Having confirmed the truth of the contents of her witness statement, she was asked a number of supplemental questions by Mr Bousfield on behalf the claimant, one of which questions was whether she had ever had a similar conversation, and she answered that she had in 2011. Professor Morgan who was then Dean of the School of Medicine held a meeting with her in which he made clear that his expectation was that clinical academics, who by definition were not full time researchers, should be achieving full-time research outputs. Rachel Hargest gave evidence that she understood he had spoken to all the clinical academics about this and this was something about which they were all extremely unhappy. They however understood from this time onwards that the position of the clinical academic dividing his or her time between academic work including research and clinical work for the NHS trust was not something that the University would be likely to look on favourably going

forward. Given that this is the evidence of the claimant's own witness it is extremely curious that the claimant herself maintains that for her to be told precisely the same thing twelve months later by Professor Mason is an act of discrimination. If Ms Hargest is correct the claimant was very likely to be aware of the respondent's view already, or even if she was not it is extremely surprising that she did not discuss this with colleagues afterwards which, had she done so, would have inevitably led to her becoming aware that others had been told the same thing. Even if the claimant had not had a similar conversation with Professor Morgan at that stage it is hard to believe that she was unaware of the respondent's position that they wished research to be a full time activity with the potential consequential effect on her position. The only two alternatives are that the claimant was somehow entirely unaware that similar remarks had been made the year earlier and has concluded, without discussing them with anybody, that Professor Mason's remarks were directed personally at her and that the reason for that was discriminatory, both of which are unwarranted assumptions in the light of Ms Hargest's evidence; or the claimant was perfectly well aware of the respondent's position and has made an allegation she knew perfectly well to be unwarranted. We do not quite believe that on the evidence we can go as far as to hold that this allegation was made in bad faith (although this may be a little generous to the claimant) knowing it to be unfounded, but it is a curious allegation which does not bear much scrutiny, and which is unquestionably not well founded factually even on the basis of the evidence called by the claimant.

44. Allegation (d) - This allegation is difficult to follow. The allegation following it (e) which relates to the events which led to the proposed suspension has been withdrawn and appear to relate solely to the Health Board. As against the current respondent the allegation appears to be that it failed to question the basis for the proposed suspension by the Health Board from the claimant's clinical duties, and failed to investigate afterwards. On the face of it these events appear exclusively to involve the Health Board, and it is hard to see what duty or authority the University would or could have to interfere with or investigate events over which it had no control. In our view there is nothing in this allegation that would transfer the burden of proof to the respondent under the Igen v Wong test.

45. Allegation (f) – This relates to the claimant's request to transfer to the School of Dentistry, in May 2013 which was refused. It is not at all clear why the claimant asserts that the Vice Chancellor was wrong to delegate the response to the Pro Vice Chancellor, nor why the refusal is alleged to be discriminatory, particularly given that the evidence of Professor Michael Lewis is that a request was made to the School of Dentistry which it rejected on the grounds that the claimant, not being dentally qualified, was not a good fit for the School of Dentistry. It would not, on the face of it, appear unreasonable to require a member of the School of Dentistry to be dentally qualified, and is certainly a view it would be difficult to challenge. In those circumstances it hard to see what either the Pro Vice Chancellor or the Vice Chancellor could have done to advance the claimant's request, and impossible in our view to see any evidential basis that the refusal was an act of discrimination on the part of either or both of them.

46. The next allegation (g) appears in reality not to be a separate allegation of discrimination but a complaint as to the consequences of the failure to transfer her to the School of Dentistry.

47. Allegation (h) – This is a difficult complaint to follow in the context of a claim for racial harassment/victimisation, as the allegation itself places it squarely as being unreasonable by reference to her being on sick leave. At the time the claim was formulated the claimant was also bringing claims for disability discrimination, and it is not hard to see, if the claimant was a disabled person, how claims that it was discriminatory to seek to meet with her and/or to conclude the investigation whilst she was unable to participate by reason of her disability (if such a finding had been made) could be pursued. However it is in our judgment impossible to see that there is any evidence sufficient to satisfy stage one of the Igen v Wong test that this could possibly be discriminatory on any other basis. Ms Elcock was bound to invite the claimant to meet to discuss her appeal, and in the absence of the claimant agreeing to do so it was clearly open to her to conclude the investigation.

48. The final allegation relates to the client's two grievances. It is alleged the respondent failed to investigate and finally address both grievances. In relation to the first (2011) grievance this is in our view factually incorrect. There was a detailed grievance investigation and report, as is set out above. Whilst the claimant may not have accepted its conclusions the grievance was self-evidently investigated. For the reasons given above the claimant did not participate in the appeal process. As a matter of fact, therefore the claimant's first grievance was investigated and finally determined, albeit not to her satisfaction.

49. The claimant's second (2014) grievance reiterated her earlier complaints as they had not been resolved to her satisfaction, and made a number of new complaints. It is correct that this grievance was not resolved prior to the claimant's dismissal. It is however equally clear that very significant steps were taken by the respondent to resolve this grievance. They are set out in the witness statement of Elizabeth Connolly whose evidence we accept as factually accurate. During that process there were a number of points of dispute. In particular, early in the process there was a dispute as to whether the claimant had or had not accepted that the earlier complaints had been dealt with; and subsequently there was a dispute as to whether the claimant would engage in mediation and if so at what point in the process. Put simply the two parties never reached agreement on the parameters of any mediation process, nor the ambit of the grievance. Whatever the rights and wrongs of each party's position, in our judgment this was the genuine reason for the grievance process stalling and not being completed prior to the claimant's dismissal. It follows that we cannot find any evidence of any causal link either between the claimant's protected characteristic for the purposes of the harassment claim, nor any protected disclosure for the victimisation claim.

50. Those are the specific allegations prior to the events of the process leading to her dismissal; and for the reasons set out above we do not find that any of them is an act of harassment or victimisation.

Time Limits

51. The events outlined above occurred between 2010 and 2013. Her employment terminated on 29th February 2016 and the ET1 was presented on 25th July 2016 (in time at least in relation to dismissal because of the ACAS EC extension of time provisions). These events are therefore between some five years and two years out of time. (The potential exception to this is the allegation in relation to the failure finally to conclude both grievances which the claimant alleges is an ongoing act and therefore in time) It is not in dispute that the claimant was aware of the time limits for presenting claims as early as June of 2013 when she spoke to Melanie Wortham. She did present a claim for unpaid wages in 2015, and she was represented throughout by Dr Graves who confirmed that both he and the claimant were aware of the time limits for bringing claims. In her witness statement the claimant relies on the fact of the ongoing grievances and her fear that to bring these claims might harm her career. It is not in essence in dispute therefore that the claimant chose not to bring these claims within time. Although the respondent no longer relies on the doctrine of quasi res judicata (Henderson v Henderson type claims) in relation to the matters preceding the 2015 proceedings, the essence of its submission is that it is not open to the claimant deliberately to ignore time limits of which she is aware, and to bring proceedings at a time of her own choosing many years later. If she can it deprives the time limits of any purpose.

52. In determining this issue we have to bear in mind that the exercise of the discretion is the exception not the rule, and that the burden lies on the claimant to persuade us that it is just and equitable to do so (*Robertson v Bexley Community Centre t/a Leisure Link)*; and that we are required to consider the well known s33 Limitation Act factors. These require us to determine the balance of prejudice in the light of the length of and reasons for the delay, the effect of the delay on the cogency of the evidence, the promptness with which the claimant acted, and the steps taken obtain advice (a further factor of the co-operation of the party sued is not relevant to this case). In our judgement all of those factors in this case are clearly unfavourable to the claimant, and we are not persuaded it is just and equitable to extend time. As is set out above this may in any event be somewhat academic as we have not upheld those claims on their merits.

Medic Forward

53. The process which ultimately led to the dismissal of the claimant was known as Medic Forward. A number of the claimant's claims relate to the process and its result.

54. As set out above the claimant alleges that her dismissal and the process leading to it was directly discriminatory (s13 EqA 2010). The specific allegations of direct discrimination are that :-

a) The composition of the pool for selection (surgery research);

b) The failure to include in the pool Ms Hargest and Professor Kynaston;

c) The transfer of Ms Hargest to CCMRC and the failure to transfer the claimant;

d) The transfer of Dr Bronwen Evans to CCMRC and the failure to transfer the claimant;

e) The transfer of Professor Kynaston to CVUHB and the failure to transfer the claimant;

f) Her selection for dismissal by reason of redundancy.

55. The claimant also alleges that her selection for dismissal by reason of redundancy was alternatively an act of harassment (s26 EqA 2010) and/or victimisation (s27 EqA 2010)

56. Finally her dismissal is alleged to be automatically unfair (s 104 ERA 1996) as the real reason was the fact of her having brought earlier tribunal proceedings in respect of claims for unlawful deductions from pay; and/or ordinary unfair dismissal.

57. Medic Forward emerged from an overarching strategy produced by the University in 2013 ”The Way Forward”. Each of the schools within the University were required to take steps to align themselves with the overarching strategy of The Way Forward and in accordance with that the School of Medicine produced a project initiation document in the period September to November 2014. In November 2014 approval was granted by the University Executive Board to begin the process of Medic Forward. The Medic Forward programme board consisted of seven people, with three others attending the programme board meetings, including Janet Richardson the HR Project Manager.

58. In terms of the strategy of Medic Forward and its implementation a number of themes were identified. In assessing the contribution of existing fields of activity there were four criteria. These were firstly, research area resilience (areas of significant research power and sustainability characterised by good peer review publications and esteem indicated by grant income); second strategic vision (the school strategy was to consolidate and focus on strength areas of research to maximise impact on the selected strength areas); thirdly innovation and impact (in order to attract commercial interest amongst other things); and fourthly financial resilience (to increase the tendency for funders to want to invest in bigger research groups with good track records in key areas thus improving the prospect of continued external research funding).

59. At this stage we will outline the process which resulted in the claimant’s dismissal. We will deal with the claimant’s allegations in respect of the process individually and set out the relevant facts at that point.

60. The process itself was very extensive. It lasted from 14th November 2014 until 18th September 2015. There some sixteen collective meetings. As set out above at the start of the process some twelve areas of existing activity were identified for “disinvestment” potentially placing some sixty nine members of staff at risk of

redundancy, although by the end this had reduced to five. In respect of each area potentially to suffer disinvestment a "Business Case was prepared, which subject to revision as the process continued. One of the areas identified for disinvestment was "Surgery Research". The reason for that is that it did not satisfy the criteria set out above. In particular it did not have resilience in that there was no cohesive team creating a critical mass; no common strategic vision; no evidence of research being translated into "impact"; and no financial resilience essentially as the research projects depended upon key individuals.

61. The claimant attended four consultation meetings; an informal consultation meeting on 19th March 2015, and formal consultation meetings on 23rd June 2015, 2nd October 2015, and 16th October 2015. A final decision was taken on 1st October 2015 to disinvest in seven areas of research activity including surgery research. As no alternative alignment with a research project to be funded going forward had been identified the claimant s role was identified for redundancy. This was considered by the respondent's redundancy committee which on 2nd November 2015 recommended that the claimant e dismissed by reason of redundancy. This recommendation was approved by the Chair of the Council 0n 24th November 2015. The claimant appealed and the appeal was heard by Mr Lock on 29th April 2016, but was unsuccessful.

62. We will deal now with the claimant's specific criticisms of the process.

63. Performance Management - The claimant's first point is that the dismissal was not in fact by reason of redundancy, but a performance management procedure, and that the respondent has not made out a potentially fair reason for dismissal. For the avoidance of doubt, we do not accept this, but it is logically best considered in relation to the individual performance issues such as the research dashboard which we consider below.

64. Selection Pool / Surgery Research - One the claimant's fundamental complaints is that the wrong selection pool was chosen, in that the grouping "Surgery Research" did not and had not existed prior to the Medic Forward process. Whilst this is true, in our judgement this criticism is misplaced. As is set out above it was evidence of the claimant's own witness at Rachel Hargest that it had been known since 2011 that the Department of University was unhappy at employing researchers who were not able to devote themselves to full time research projects. The same point was made to the claimant in 2012. Moreover those identified as falling within Surgery research clearly shared at least one common feature, which was that their area of research was closely aligned with their surgical specialism, resulting in a number of stand alone research projects. It is therefore unsurprising that in considering which research projects to fund going forward that "Surgery Research" should have been identified as a group. In our judgment it is a perfectly logical grouping and one that the University was entitled to identify in the Medic Forward process

65. Selection Pool/ Composition of Pool – The claimant's next submission is that even if surgery research was justifiably identified as a grouping for disinvestment, that composition of the pool was unfair as it should have included more people. The first

Business Case for disinvestment was produced in May 2015 and identified only the claimant and Professor Mansell as falling within the group. The claimant was supported by Prof Dayan who stated that assuming one would group employees based on their work, Surgery Research should have included Professor Kynaston and Ms Hargest. The respondent does not in essence dispute that according to its own definition both the work of Professor Kynaston and Ms Hargest would fall within the category surgery research. However Professor Kynaston had moved in June 2014 to work substantially for CVUHB (10 sessions out of 12) in order to focus on clinical work. The remaining two sessions performed for the respondent were for the purpose of supervising post-graduate students. Ms Hargest had been integrated into the CCMRC team from at the latest November 2013 (in fact Professor Jiang's evidence is that he considered her part of the team from 2008). Thus by May 2015 Professor Kynaston was no longer involved in research and the question of his participation in a field which would or would not be subject to disinvestment did not arise, and Ms Hargest was already located within a group identified for investment. It followed that the claimant and Professor Mansell were correctly identified as the only members of the group Surgery Research at that point, and this remained true for the whole of the Medic Forward process. (We will deal with the question of whether they, and Dr Bronwen Evans were appropriate comparators for the discrimination claims below). However we accept that as at May 2015 the pool correctly comprised only the claimant and Professor Mansell, or at very least that it was reasonable of the respondent to reach that conclusion.

66. Failure to provide information during process – The claimant asserts that the selection process was unfair in that she was provided insufficient information during the process to properly participate in it, and properly or fully understand and challenge the reasons for her selection. Central to this assertion is the Research Dashboard. This was a database which set out in respect of each member of staff information as to grant awards received, annual grant spend; teaching records; supervision records; and research publication records. The claimant contends that it was not until she saw the witness statement of Professor Pepper that she was aware of the existence of the dashboard or its importance n the context of Medic Forward, and she contends that the content of the dashboard as it relates to her is fundamentally wrong and incomplete. If this correct it follows, submits the claimant, that a process which relied on flawed and incomplete information was necessarily unfair.

67. The respondent submits that this is to misunderstand the purpose of the dashboard. Whilst it provided the raw information from which the Business Cases were produced, it was not used for individual selection because the process did not involve individual selection. This was not a redundancy selection process in which the respondent was seeking to reduce the number of researchers in a particular field and making a selection between individuals. It involved identifying areas of investment and disinvestment. If a researcher's work fell within an area of disinvestment and he or she could not be aligned with an area of investment that person would face redundancy irrespective of their research and publication history as reflected in the contents of the dashboard. In any event even if the term "Research dashboard" was not known to the claimant the issue of her research and publication history was

raised by her in the letter of 21st July 2015 and answered in a letter from Paul Howarth on 20th August 2015 (albeit that Professor Pepper accepted that he probably drafted that section of the letter.)

68. If the respondent is correct this also answers the claimant's submission that the process was one of performance management, not redundancy (see above). We accept the respondent's evidence in respect of this. In our view unless we were to come to the conclusion that the whole Medic Forward process was a gigantic conspiracy designed for the sole purpose of engineering the dismissal of the claimant (which we have not) it is inevitable that the respondent's evidence as to this is accepted as it reflects the whole underlying ethos and purpose of Medic Forward.

69. The second aspect of the failure to provide information is the alleged failure to inform the claimant that the CCMRC was to be subject of investment going forward or to assist her in aligning herself with the CCMRC. The evidence of the respondent, in particular Professor Pepper, is that individuals were encouraged to make suggestions as to groups to which their work could be realigned. The reason for this is that the individuals themselves were much better placed to know with whom they collaborated, and with whose work their own research was best aligned. Whilst Dr Evans actively (and ultimately successfully) sought to be realigned with the CCMRC, the claimant at no time during the consultation mentioned the CCMRC, but rather focussed on a wish to be realigned with the School of Dentistry. We are satisfied that the claimant is clearly correct to assert that fundamentally the responsibility lies on an employer to identify suitable alternative employment, which translates in this case to a suitable alternative research area. However in our judgement that responsibility was discharged. The claimant was invited in the consultation process to identify any alternative areas of research to which she could be aligned, and in the absence of her identifying the CCMRC we cannot see on the evidence how the respondent could have identified it. In any event (for the reasons given below) on the basis of the evidence before us there is little if any alignment between the claimant's research and that of the CCMRC, and even had it been suggested at the time there is in our view no realistic prospect that it would have resulted in the claimant being realigned to the CCMRC.

70. It is convenient at this stage to deal with two other related complaints; that the process was unfair as it failed to take into account in assessing the claimant's research output her lengthy sickness absence in 2013/2014; and that the claimant's grievances were not taken into account in the Medic Forward process. Clearly if the process had involved an individual assessment of the claimant's research output it would be necessary to consider the effect on it of her sickness absence, and/or the matters about which she complained in her grievances, if and to the extent that they may have affected the research output. However the converse is also true. If the assessment was not based on individual performance (as we have held for the reasons above) then of necessity matters which may affect individual performance are equally not relevant considerations.

71. As we have accepted the respondent's evidence about this it follows that we also accept that the criticisms of the process are not well founded.

72. Failure to consider the claimant's grievances :- The claimant further contends that it was unfair not to take into account her grievances in deciding to make her redundant and/or to delay the process to allow the grievances to be investigated and determined, and to take into account any conclusions. The respondent maintained throughout, that in its view the merits or otherwise of the grievances were irrelevant to the Medic Forward process. Whatever their merits they could not affect the issue of disinvestment in a particular field, could not affect whether the claimant's research was or was not aligned to an area that was being funded, and could therefore have no bearing on the decision in the Medic Forward process. For the same reasons as set out above, given that the process was not based on an assessment of individual performance this must inevitably be correct.

73. Failure to re-align - One of the claimant's primary complaints is the failure to redeploy/re-align her to another school or area of specialism. The primary alternative suggested by the claimant herself during the redundancy selection process was to move to the School of Dentistry as she had requested in 2013. This request was repeated in 2015 as part of the Medic Forward redundancy selection process. The response of Professor Lewis of the School of Dentistry, as had been the case in 2013, was quite simply that the claimant could not transfer to the School of Dentistry as she had no dental training, skill, or expertise and there was therefore no business case for her to transfer. It is perhaps worth noting that this was also the case in respect of Dr Evans was one of the claimant's comparators and that in the course of Medic Forward there was no individual redeployed to the School of Dentistry. It is difficult in our view to gainsay this proposition. The claimant was a specialist urological surgeon with no dental training, experience, or expertise and is very hard to see how she could on any analysis have been subsumed within the School of Dentistry. Certainly it cannot be said that it was unreasonable not to allow her to transfer if the School of Dentistry itself objected, and did not support it.

74. The second contention is the claimant should have transferred to the CCMRC. In fact no application was made to Professor Jiang of the CCMRC and, therefore was not considered at the time. As set out above, it is the claimant's case responsibility for identifying a suitable location for transfer was and remained with the respondent, and it was not for her o identify an area to which she could have transferred. If therefore the CCMRC could have been a suitable venue for transfer she should have been transferred irrespective of any failure on her part to request or pursue any such transfer herself.

75. On the face of it the claimant's research specialism had no specific relation to work in the CCMRC, whose primary focus is cancer research. The evidence of Prof Jiang is that neither he nor his team had collaborated with the claimant on any research topics. One of the claimant's contentions is that she and Professor Jiang shared a common interest in tissue repair. Professor Jiang's evidence is that whilst this is true, he had a personal research interest in cutaneous and skin wound healing, which formed the basis of a 23 year collaboration between himself and Professor Keith Harding. He sets out in his witness statement (paragraph 31) the extent of that research goes on to state "*My own interest has been in skin and cutaneous wound*

healing. I've not worked on wounds of other tissue types. Had there been an approach to me for work in tissue repair (and I have been approached many times in the past in the area of lung and kidney oral mucosal liver repair which I have had to decline) I would have had to discuss and consult my close collaborators who have the respective skills in the subject area is my work in this area cutaneous wounds has always been via collaborations."

76. It follows in our judgement that there is no evidence that the claimant's research was compatible with the main areas of research within the CCMRC which is based around cancer research. The only a related area even on the claimant's case is the field of tissue repair, in which her research interest and Professor Jiang's appear to be significantly different in any event. The first consequence of this in our opinion is that even if the responsibility for suggesting re-alignment with the CCMRC was the responsibility of the respondent, as the claimant did not work in the field of cancer research or anything related to it they could have had no reason to suppose that there was any prospect of alignment with it. Secondly even had they done so there is no obvious alignment between the work of CCMRC and the claimant's research. (The question of whether the failure to re-align was discriminatory will be dealt with specifically later. However for the avoidance of doubt had we found it discriminatory that would necessarily affect the fairness of the decision not to realign within the Medic Forward procedure. For the reasons set out below we have in fact not found the failure discriminatory).

77. In summary therefore we are satisfied that :-

a) This was a genuine redundancy selection procedure;
b) That the identification of the pool for selection was a logical one which it was open the respondent to adopt;
c) The members of the pool were correctly identified in the process;
d) The selection did not depend upon personal characteristics or research output but was based entirely on the area of research;
e) The conclusion that the claimant's research work was not aligned with either of the other areas identified before us is .a reasonable and rational conclusion open to the respondent.

Direct Discrimination

78. The first complaint is that composing the pool Surgery Research to include only the claimant and Professor Mansell was directly discriminatory on the grounds of race. It is difficult in truth to see how this claim is advanced. However, as is set out above we accept the respondent's evidence that it was perceived (reasonably in our view) to consist of people whose work could properly be considered comparable and that the reason it consisted only of the claimant and Professor Mansell was that they were the only clinical academics involved in Surgery Research by May 2015.

79. The second complaint is that it was discriminatory not to include either Professor Kynaston, Rachel Hargest in the pool. This criticism appears misplaced. As set out

above Professor Kynaston moved effectively full time to CVUHB in the summer of 2014, and Ms Hargest had been aligned with CCMRC from 2013. Again we accept the respondent's evidence as to why they were not included in the pool.

80. The third and fourth allegations relate to two of the claimant's comparators Rachel Hargest and Bronwen Evans.In his witness statement Professor Jiang deals with both. In respect of Ms Hargest, she is a Consultant Ssurgeon specialising in colorectal cancer who had worked in collaboration with the CCMRC since 2008. He sets out the research activity and outputs from Ms Hargest at paragraph 15 of his witness statement which is not necessary to repeat here. More pertinently he states, "*I have considered Ms Hargest an integral part of my team since at least May 2008 to the extent when we physically move location from the Department of Surgery where we were based until 13 November 2013 she came with us. As a Consultant Surgeon and Senior Lecturer in Surgery ordinarily Ms Hargest would have stayed with Surgery, but such was the extent of her activities with us at the time that she chose to move with us. No one challenged move at the time. Ms Hargest and I shared a partitioned office from May 2008 to 13 November 2013. On 14/15 November 2013 and together with the entire CCMRC team Ms Hargest moved to our current location…..where she has her office with the rest of the team*…."

81. It appears to us an inevitable conclusion that the links between Ms Hargest and the CCMRC were of long standing and were profound. The contrast between her and the claimant who had effectively no or very few links with the CCMRC is very marked. In our judgement Ms Hargest cannot properly be considered a comparator against whom the treatment of the claimant can be judged. Even if she could, we accept that the process which led to that transfer wasas outlined by Professor Jiang.

82. Dr Bronwen Evans is perhaps a more appropriate comparator in that she specifically was realigned to the CCMRC as an alternative to redundancy as part of the medic forward process. To that extent she is clearly a direct comparator of the claimant. Professor Jiang's evidence is that the reason for that was that Dr Evans research themes of cancer biology and bone metastases aligned very closely with the work in the CCMRC, and that there were existing collaborations between her and the CCMRC prior to Medic Forward. She also had experience and expertise in supervising PhD students. He states, "*These skills were (and are) important to us because a substantial portion of the CCMRC has been working on bone metastasis from breast, prostate, and lung cancer for almost two decades. We have been constantly searching for expertise in bone and biology and Dr Evan Evans expertise in osteocyte and bone biology is rare in the subject area and fully complimentary to CCMRCs expertise and research theme."*

83. In January 2015 Dr Evans emailed Professor Jiang to ask whether there was a potential to realign into his team on a permanent basis as she was at risk of redundancy. He agreed to that realignment for the reasons set out above. The distinction between Dr Evans and the claimant as established by Professor Jiang's evidence is that there was clear alignment between Dr Evans work and that of the CCMRC, which is not the case with the claimant's research. Whilst there are

similarities between the claimant's position and that Dr Evans in the selection process, ultimately our view is that she is not a comparator from whom any inferences can be drawn as to the treatment of the claimant. Put simply Prof Jiang's evidence is a complete answer as to why she transferred her to the CCMRC whereas the claimant did not.

84. The fifth allegation is of allowing Professor Kynaston to move to CVUHB but not allowing the claimant to do so. We have very little evidence about that move save that it happened, and that it resulted in Professor Kynaston focussing on his clinical role, leaving no research work and only two sessions of supervision for the respondent. The comparison between the claimant and Professor Kynaston is in this regard a little curious in that there is no evidence that the claimant ever wanted to relinquish her research work and concentrate on her clinical work. Her primary case is that she should have been allowed to transfer either to the School of Dentistry or the CCMRC to continue her research work. However the allegation is that Professor Kynaston was allowed or encouraged to leave in order that he should avoid the risk of redundancy in the Medic Forward process, whereas no such assistance was provided to the claimant. The difficulty with this proposition is that there is no evidence to support it. It is in our view simply suspicion based on the fact that Professor Kynaston transferred at or shortly before the commencement of Medic Forward. We have no evidence as to whether the move came about at the instigation of Professor Kynaston, CVUHB, or the respondent; or why Professor Kynaston himself decided to move. In our judgment that is an insufficient evidential base from which to conclude that there is a prima facie case that satisfies stage one of the Igen v Wong test .

85. It follows that we must dismiss the claimant's claims of direct discrimination.

Automatic Unfair Dismissal

86. Prior to the current proceedings the claimant had, in case number 1600692/2015 brought a claim against the current respondent and Cardiff University Health Board in respect of a claim for unlawful deduction from wages. The basis of the claim of automatic unfair dismissal is that the true reason for dismissal was the bringing of that claim. For the reasons given above we are entirely satisfied that the respondents evidence is genuine honest and reliable and that the claimant's selection for redundancy was for the reasons given by the respondent. There is in reality no evidence supporting this claim.

Ordinary Unfair Dismissal

87. For the reasons set out above we are satisfied hat the claimant's dismissal was genuinely by reason of redundancy and accordingly the respondent has satisfied the burden of showing a potentially fair reason for dismissal. We do not accept that the claimant's criticism of the process were well founded, for the reasons set out above, and nor was the any element of the process discriminatory. Put simply the

respondent had identified the field of surgery research, to which the claimant was reasonably allocated, for disinvestment, and was not able to find an alternative area to which to allocate the claimant. In those circumstances the decision to dismiss by reason of redundancy was in our judgement fair.

Notice Pay

88. The dispute between the parties is whether the claimant is entitled to three months notice/notice pay which she received, or twelve months notice/notice pay which, she contends was her contractual entitlement.

89. There is no dispute that her original contract provided for three months notice. However the claimant contends that the notice period was extended as part of the merger between Cardiff University and the University of Wales College of Medicine. The claimant has called Mr Christopher Yewlett whose evidence is that terms and conditions of the two institutions would be harmonised upwards so that the more generous of the terms of either institution would apply to all the merged staff. In accordance with Ordnance 12 for the pre-merger Cardiff University "academic staff" were entitled to twelve months notice. Thus if the principle contended for by Mr Yewlett applied to the claimant she would be correct in asserting that her notice period had been extended to twelve months. Mr Yewlett asserts that it did apply as clinical academics fell within the definition of academic staff.

90. It is not in dispute that there was not in fact any formal variation of the claimant's contract to reflect this variation. The respondent contends that this because no such variation occurred, and that Mr Yewlett is wrong, essentially for two reason, the first being that clinical academics did not fall within the definition of academic staff. Prior to the merger the University did not employ any clinical academics and there was therefore no comparable group of existing members of staff with whom the clinical academics contracts could be harmonised. As a consequence, whatever the result for other staff, the merger did not cause any variation to the contract of any clinical academic. Secondly the claimant had an honorary contract with CVUHB. It is important where the employee holds two roles that the terms match, and the claimant's honorary contract provides for three months notice.

91. Although it is not contemporaneous there is one piece of evidence which supports the respondent's position. In 2010 a fixed term working group drew up proposals which are not in themselves relevant. However, in the document "Key Proposals" they state "The terms and conditions for clinical academics, are largely set through national agreements including the new consultant contract and will remain at 3 months notice either way". If this is correct it suggests that the contracts of clinical academics fall outside contractual negotiation between them and the university, and it supports the contention that there has been no variation to the original contract.

92. In support of the claimant's contention that such a variation did occur she relies on two post merger contracts issued to "Clinical Senior Lecturers (one of whom is Ms

Hargest) which do provide for twelve months notice. The claimant submits that unless there had been a variation for existing members of staff at the time of the merger there would have been no purpose in the respondent giving newly employed staff members' contracts providing twelve months notice. The respondent provides no specific evidence as to how this occurred, but the evidence of Ms Connolly is that it was either a mistake, or resulted from an earlier contract with a twelve month notice period.

93. In our judgement the respondent is correct. If it is true, which we accept that prior to the merger the University employed no clinical academics then there was no group with whom the terms would automatically harmonise. If the notice period were to be increased it follows that a specific decision to do so would have to have been made in respect of clinical academics, and we have no evidence any such decision was made. Although as set out above, there are points which can be made in favour of both parties positions, on the balance of probability we are not satisfied that the evidence supports the contention that there was a contractual variation in 2004 and it follows that the claimant's claim for unpaid notice pay must also be dismissed.

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EMPLOYMENT JUDGE Cadney

Dated: 27 April 2018

Judgment entered into Register
And copies sent to the parties on

.....01 May 2018.....

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for Secretary of the Tribunals