EMPLOYMENT TRIBUNALS

Claimant: **T Binesmael**

Respondent: **Cardiff and Vale University Local Health Board**

Heard at: **Cardiff**

On: **10 March 2021 (by video), 13, 14, 15 March 2021 (in person), 17 March (by video), 20, 21, 22, 23, 24, 27, 28, 29 and 30 March 2021 (in person), 20 April (Tribunal only for deliberations)**

Before: **Employment Judge R Harfield**
Mr P Bradney
Mrs L Bishop

Representation
Claimant: Days 1 to 4 Mr Morgan KC (Counsel); thereafter the claimant represented himself as a litigant in person

Respondent: Mr Walters (Counsel)

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal, direct disability discrimination, discrimination arising from disability, harassment related to disability and failure to make reasonable adjustments are not well founded and are dismissed.

REASONS

1. Introduction

History of the proceedings

1.1 There are two claims which have been consolidated. The first claim form was presented on 5 May 2021. Early conciliation both started and finished on 9 March 2021. The second claim was presented on 28 September 2021, with early conciliation between 30 July 2021 and 10 September 2021. The claimant says he is a disabled person by reason of Obsessive Compulsory personality Disorder ("OCPD"), Obsessive Compulsive disorder ("OSD"), anxiety and depression. Disability is, in part, in dispute. The second claim follows the termination of the claimant's employment following a successful application for ill health retirement. The claimant says that this amounts to a dismissal, whether actual or constructive. The respondent says there was termination by mutual agreement

and no dismissal, whether actual or constructive. There is therefore an unfair dismissal claim or alternatively a constructive unfair dismissal claim. There are complaints of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability. Time limit issues are also raised.

1.2 A case management hearing took place before EJ Brace on 25 July 2022. EJ Brace directed this hearing be liability only. Following the hearing the parties filed an agreed list of issues.

1.3 A further case management hearing took place before EJ Jenkins on 1 February 2023. By then an updated list of issues had been agreed and the dispute on disability had narrowed. The respondent accepts that the claimant has been disabled by anxiety and depression since October 2019 but disputes the claimant is disabled by reference to OCD/OCPD or that the claimant was disabled at all at the time the majority of the accessing of medical records took place. The parties were to complete an "agreed facts" document by 6 February 2023.

Adjustments

1.4 The claimant's counsel identified at the case management hearing on 1 February 2023 that the claimant would need by way of adjustments:

(a) regular breaks mid morning and mid afternoon;
(b) recognition that his processing of information may be slower, resulting in delayed responses, allowing time for responses to be given or requiring a question to be put and/or re-phrased;
(c) As the he is not a native English speaker, he did not require the assistance of an interpreter but recognition that it may have an impact on his answers to questions.

1.5 These adjustments were agreed. No other participants requested adjustments. In an administrative hearing on 10 March 2013 a further request was made for adjustments for the claimant. This included that the claimant could take notes when giving his own evidence to help him focus. The claimant was to be referred to documents to be given the context when answering questions and time to refamiliarise himself with the documents (which could potentially extend over a break time if appropriate). It was agreed the claimant could take breaks whenever needed, including at short notice, with regular breaks also being scheduled. The claimant was to be given time when answering to allow him to undertake an internal translation as English is not his first language. These adjustments were agreed and accommodated. When the claimant was giving his oral evidence we broke, for 10 minutes, approximately every hour.

1.6 It was requested that when discussing in evidence the events of 8 December 2019 with the claimant it be referred to as a "health incident." This was accommodated. It was also requested that questions, as far as possible, be asked in a manner which was non combative and non confrontational. It was said that such conduct would be likely to exacerbate the claimant's continuing medical conditions. There was some discussion about this because there are issues in this case where the respondent had to challenge the claimant to be able to fairly advance their own case. The claimant's leading counsel acknowledged this. EJ Harfield drew attention to the Equal Treatment benchbook and the Advocate's Gateway toolkits regarding the questioning of vulnerable witnesses which were

already known to both parties' experienced counsel. The respondent's counsel confirmed he would be mindful in cross examination subject to the need to challenge the claimant where necessary. In due course the respondent's counsel did cross examine the claimant in a careful manner, which the claimant's then leading counsel, acknowledged at the time.

The course of the hearing before us

1.7 Day 1 of the hearing was Tribunal reading time other than the administrative hearing in the afternoon, referred to above. On days 2 and 3 we heard evidence from the claimant. On day 4 the claimant's leading counsel said an ethical issue had arisen, and he needed time to try to resolve it. The respondent and the Tribunal gave that time, reconvening for case management, by video, on the afternoon of day 6. By that time the claimant's solicitors (and therefore with them, counsel) had come off the record as representing the claimant. The claimant said he wanted to, and was well enough to, continue with the hearing as a litigant in person. We checked that with him again, to make sure that he was not requesting a postponement. The claimant was encouraged to bring individual(s) with him to the hearing to support him and assist with taking notes. He was told he could not be permitted to record the hearing. The claimant said he would look into bringing someone with him to take notes, albeit ultimately he attended the remainder of the hearing alone. The claimant's attention was drawn to the List of Issues in the case and attention continued to be drawn to it as the case progressed, particularly with regard to the questioning of witnesses.

1.8 Unfortunately, the agreed timetable of witness attendance had been thrown into disarray, but the respondent worked to rebuild it. This meant hearing from witnesses out of sequence. It was agreed witness evidence could be completed by day 14 to allow time for closing submissions on day 15. It was explained to the parties this would result in the Tribunal being unable to complete their deliberations and give oral judgment on day 15, meaning that Judgment would be reserved to be delivered in writing on a future date. It was explained there was likely to be some delay due to the difficulties in finding a date when the Tribunal panel could meet again to conclude our deliberations.

1.9 On day 7 we heard evidence from Ms Bayoumi (who at the time was an external barrister and was chair of the Inquiry Panel). On day 8 we heard from Mr Webb (at the time Information Governance Manager) and Mr Pritchard (at the time Head of Workforce and OD for Medicine and Specialist Clinical Boards). During the course of the claimant's questioning of Mr Pritchard it became evident that the claimant may be seeking to rely upon points not contained in the joint List of Issues. The claimant was directed to, overnight, set out in writing any amendment application he was making to his pleaded case and in turn the joint List of Issues. The claimant did so but on a very high level basis. This caused considerable disruption to the start of day 9 as the Tribunal took the claimant orally through the detail of his amendment application. Submissions were heard from both parties and the Tribunal then gave an oral decision, with reasons, at the start of the afternoon, rejecting the claimant's amendment application. In very short summary one set of amendments related to allegations of breach of trust and confidence that post-dated the date the claimant had already decided to resign. We rejected that category on the basis as a matter of law they could not form part of a constructive unfair dismissal claim. The second category were allegations that pre-dated the claimant's decision to resign but were rejected principally on the basis that they raised new allegations of fact very late in the litigation about matters the claimant and his representative had known about for

some time and would considerable disrupt a final hearing that had only just been brought back on track. The third application was to expand the complaint about the failure to obtain psychiatric evidence to a wider time period. We rejected this on the basis that the pleaded case/List of Issues had been carefully written to focus on the key events complained about. To seek to add a relatively vague argument over a period from April 2020 to December 2020 (or later) did not appear to us to be in the interests of justice to add. The respondent would not know the particular complaint it was being asked to meet.

1.10 On the afternoon of day 9 we then heard evidence from Mr Gidman (Directorate Manager for Cardiothoracics) and Ms Marvelly (then Assistant Head of Workforce). On day 10 we heard evidence from Professor Walker (then Medical Director). On day 11 we heard from Mr Wheeler (Consultant Cardiologist) and Ms Williams (external barrister who chaired the Appeal Panel). During the course of Ms Williams' evidence it came to light there was a dispute about the purpose to which a report from Dr Brow, dated 17 October 2022, was before the Tribunal and whether the claimant could reply on it in support of his claimed link between the accessing of medical records and OCD/OCPD. The claimant was directed to re-read his former solicitor's application relating to Dr Brow's report and the correspondence that had passed between the parties' solicitors at the time of the case management hearing before EJ Jenkins. It was identified that the issue could then be discussed again the following week.

1.11 On day 11 we heard evidence from Mr Meta (Lead Surgeon for Cardiothoracics) and Mr Mohammed (Speciality Doctor in Cardiothoracic Surgery and at the time in question was also the Rota Coordinator for cardiothoracic surgery). The position in relation to Dr Brow's report was discussed again. It was brought to the Claimant's attention that Dr Brow's instructions as summarised in his report were about: (a) questions relating to the issue of disability and; (b) questions relating to the claimant's losses were he to succeed in part or all of his claims. Looking at the report, Dr Brow had not been asked to comment on the link between the claimant's OCPD/OCD and the claimant's conduct in accessing medical records. Furthermore, the claimant's solicitor's application to rely on the report was not made to ask for permission to rely on it for that causation purpose. The respondent had agreed to the report being placed before the Tribunal (albeit its contents not agreed) at a liability hearing only on questions relating to disability. It had not been agreed by the respondent that the report could be before the Tribunal on the question of the link between the claimant's medical conditions and his conduct in accessing medical records. Were the claimant to seek to rely on the report for an additional purpose potentially caused real prejudice to the respondent in being deprived of the opportunity to instruct their own expert or indeed to cross examine Dr Brow. The claimant, on reflection, therefore decided not to pursue an application to widen the purpose on which Dr Brow's report is before us.

1.12 On day 12 we heard evidence from Mr Scott-Coombes (Case Manager, and at the time Assistant Medical Director for Professional Affairs and a Consultant General Surgeon). On day 13 we heard evidence from Professor Hope-Gill (Case Investigator, Assistant Medical Director for Medicine and a Consultant Respiratory Physician) and Mr O'Callaghan (Consultant Cardiologist and up to February 2020 Clinical Director for Cardiac Services). The respondent's counsel was able to provide his written closing submissions that afternoon to allow the claimant reading and preparation time. On day 14 we heard closing submissions. The claimant had prepared written submissions and

also spoke separately. We were able to start our deliberations that day, which we completed on 20 April 2023.

What we had before us

1.13 We had before us a bundle of documents extending to 1716 pages. References in brackets [ ] are references to page numbers in that bundle. To that bundle we added by agreement a side by side comparison of parts of the Inquiry Panel report, an extract from an Acas document entitled "Conducting workplace investigations" and a letter from the claimant to Mr Gidman dated 13 July 2021. We had a joint statement of Agreed Facts and a cast list. We had a bundle of witness statements. The claimant's then leading counsel also provided a claimant's chronology. We had written closing submissions.

2. The List of Issues

2.1 The agreed List of Issues is as follows (as mentioned above we refused the Claimant's amendment application made part way through the hearing):

"A General matters

The Claimant's claims are for unfair dismissal; discrimination arising from disability; a failure to make reasonable adjustments; harassment because of the Claimant's disability and direct disability discrimination

A. Disability discrimination

1. *Was the Claimant disabled within the meaning of Section 6 of the Equality Act 2010?*
2. *The Claimant contents that at all material times he was disabled by means of:*
   a. *OCPD/OCD (from childhood);*
   b. *Depression (from 2014);*
   c. *Anxiety (from 2014).*

The Respondent's position on disability

OCPD/OCD

The Respondent denies that the Claimant meets the test of disability in respect of the above condition. The symptoms of OCPD did not have a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.

Anxiety

The Respondent denies that the Claimant met the test of disability in respect of the above condition from 2014. The Claimant's medical records show that there were no symptoms of anxiety until after October 2019. Thereafter, whilst the Claimant did suffer symptoms of anxiety, they did not last more than 12 months, nor were they likely to last more than 12 months given that they were a reaction to his personal circumstance at the time. The Respondent does concede that the Claimant was disabled by virtue of anxiety from October 2020[1].

Depression

The Respondent denies that the Claimant met the test of disability in respect of the above condition from 2014. The Claimant's medical records show that there

[1] By the date of the hearing this had changed to October 2019

were no symptoms of depression until October 2019. Thereafter, whilst the Claimant did suffer symptoms of depression, they did not last more than 12 months, nor were they likely to last more than 12 months given that they were a reaction to his personal circumstance at the time. The Respondent does concede that the Claimant was disabled by virtue of depression from October 2020.[2]

C. Discrimination arising from disability

3. For the avoidance of doubt, the Claimant relies upon all of his conditions as being the basis of the unfavourable treatment set out below.

4. Did the following occur in consequence of the Claimant's disability?

(a) The Claimant breached the Respondent's confidentiality policy (Claim 1);

(b) The Claimant had a need or compulsion to check on his family's health and well being by accessing their medical records (Claim 1);

(c) The Claimant was unable to carry out his substantive role as a result of the exacerbation of his disabilities caused by the Extended UPSW and the Respondent's conduct throughout that procedure (Claim 2).

5. Did the following occur:

a. between 07 November 2019 to 11 March 2020, both Professor Ben Hope-Gill (case investigator) and Dr Scott-Coombes (Case Manager) failed to give any due consideration or weight to the content of the Claimant's letters of the same dates, in which the Claimant explained that he suffered from obsessive compulsive traits which had prompted him to check his family's medical records;

b. On 11 March 2020 and at all material times thereafter, failing to adopt the UPSW capability procedure instead of the conduct procedure, alternatively failing to adopt the Standard UPSW procedure instead of the Extended UPSW procedure;

c. On 2 April 2020, Dr Scott-Coombes determining that the matter should proceed under the Extended Procedure of the UPSW policy; he denied the Claimant's request to be referred to an independent psychiatrist.

d. Between November 2019 and January 2020, the Respondent failing to refer the Claimant to OH or otherwise throughout the period obtaining professional independent advice (for example a psychiatric opinion) regarding the Claimant's condition;

e. The Respondent failing to act on OH recommendations dated:

(i) 13 March 2020;

(ii) 6 May 2020.

f. Between November 2019 and 9 February 2021, the Respondent failing to provide support to the Claimant despite the Claimant being increasingly unwell;

g. On or around 2 April 2020 and at all material times thereafter, the Respondent failing to halt or consider halting the Extended UPSW Procedure;

h. On or around 2 April 2020 and at all material times thereafter, the Respondent failing to modify or consider modifying the Extended UPSW Procedure;

[2] [2] By the date of the hearing this had changed to October 2019

i. Putting the Claimant through an Extended UPSW Procedure including a full Inquiry Hearing despite the Claimant having admitted the allegations and having explained that his OCPD was a factor in his conduct;

j. On or around January 2021, deciding to pursue a Disciplinary Hearing against the Claimant;

k. On 10 February 2021, giving the Claimant a final written warning;

l. Carrying out the UPSW procedure over a 15 month period from October 2019 to February 2021, thereby exacerbating the Claimant's disabilities;

m. Refusing to or otherwise failing to give any weight to the Claimant's OCPD as mitigation at the Inquiry Hearing on 21 October 2020;

n. Refusing or otherwise failing to give any weight to the Claimant's OCPD as mitigation at the Disciplinary Hearing on 9 February 2021;

o. Subjecting the Claimant to an unnecessary Extended UPSW procedure, such that the Claimant became too unwell to perform his substantive role as a surgeon.

p. Failing to provide any or any adequate support which would have avoided dismissal.

q. Failing to consider any alternative roles for the Claimant

r. Dismissing the Claimant

6. If so, do the above incidents constitute unfavourable treatment?

7. If so, was that unfavourable treatment because of something arising in consequence of the Claimant's disability?

8. When did the Respondent know or when would it reasonably have been expected to know of the Claimant's disabilities?

9. If the Tribunal finds that there has been unfavourable treatment because of something arising in consequence of the Claimant's disability, were the Respondent's actions justified? The Respondent contents that it had legitimate aims i.e. the fundamental need for the NHS to comply with its legal duties in connection with the security and safeguarding of sensitive personal data and to safeguard sensitive personal data from unauthorised and unlawful access and the fundamental need for the NHS to employ individuals to undertake work on behalf of the Health Board who are capable of undertaking that work.

D. Failure to make reasonable adjustments

10. When did the Respondent know or when would it reasonably have been expected to know of the Claimant's disabilities?

11. Did the following amount to a provision, criterion or practice (PCP)?

a. Treating as misconduct all breaches of patient confidentiality

b. Adopting the Extended UPSW procedure for matters which may result in a final warning or dismissal

c. Having an extended UPSW which makes no provision for employees with disabilities;

d. Having an extended UPSW policy which places no time limits on the phases of the procedure

e. Having an extended UPSW policy which makes no provision for supporting employees following the outcome of the procedure, and in particular no provision for employees with disabilities likely to be exacerbated by the procedure

f. Not considering alternative roles in circumstances where an employee has applied for ill-health retirement from their substantive post

g. Not considering alternative to dismissal in circumstances where an employee has applied for ill health retirement from their substantive post.

12. Did the PCP put the Claimant at a disadvantage in the following ways:

a. exacerbated the Claimant's disabilities;

b. resulted in the Claimant suffering a suicide attempt;

c. resulting in the Claimant being too unwell to perform his substantive role;

d. left the Claimant without support following a stressful procedure during which he became extremely unwell;

e. resulted in the Claimant's dismissal

13. Did the Respondent fail to make reasonable adjustments by:

a. Failing to use the capability procedure instead of the extended UPSW procedure;

b. Failing to adopt the Standard UPSW procedure instead of the Extended procedure;

c. Failing to truncate to extended UPSW procedure and instead carry out the procedure over 15 months despite the Claimant being unwell because of his disabilities;

d. Failing to modify the Extended UPSW procedure despite the Claimant being unwell as a result of his disabilities;

e. Failing to make any provision in the Extended procedure for considering the impact of the Claimant's disabilities upon is conduct;

f. Failing to take into account the Claimant's disabilities in issuing a final written warning;

g. Failing to provide any or any adequate support to the Claimant to allow him to return to work following conclusion of the Extended UPSW procedure from February 2021 onwards, and in particular:

(i) On or before 21st April 2021, when the Claimant had his application for ill health retirement accepted;

(ii) On or before 23rd June 2021 when Nick Gidman on behalf of the Respondent met with the Claimant prior to his dismissal

h. Failing to consider alternative roles

i. Failing to consider alternatives to dismissal including a career break under the Respondent's career break policy.

E. Harassment

14. Did the following occur:

On 21st October 2020, the Inquiry Panel finding that the Claimant's explanations did not bear any scrutiny and that the same were disingenuous attempts to justify his actions after the event. In addition, the Panel finding that the Claimant's condition of Obsessive Compulsive Personality Disorder was not to be causative of his actions.

15. If the alleged conduct occurred, was the conducted unwanted?

16. If the conduct occurred did it relate to the Claimant's disability?

17. If so, did it have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating and/or offensive environment for him?

18. Was it reasonable for the conduct to have that effect?

F. Direct Discrimination

19. For the avoidance of doubt, the Claimant relies on all of his conditions as being the basis for the direct discrimination.

20. Was the Claimant dismissed?

21. If so, was this less favourable treatment because of his disability?

22. The Claimant relies on a hypothetical comparator. In particular, the Claimant contends that the appropriate hypothetical comparator is Cardio-thoracic surgeon with the same experience as the Claimant who does not have the Claimant's disabilities but who was subject to the Extended UPSW procedure.

G. Constructive unfair dismissal (s98(4) ERA 1996)

23. Did the Claimant resign? If so was it in response to a fundamental breach of his contract of employment as set out below?

24. The terms of the contract relied upon by the Claimant is the implied term of trust and confidence.

25. In particular did the Respondent, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage trust and confidence?

26. For the avoidance of doubt, the Claimant relies on the following matters as individually or cumulatively amounting to a repudiatory breach of his contract:

a. On 11 March 2020, Dr Scott-Coombes failing to give any due consideration or weight to the content of the Claimant's letter of the same date and the letter on 7 November 2019, in which the Claimant explained that he suffered from obsessive compulsive traits which had prompted him to check his family's medical records;

b. On 11 March 2020 and at all material times thereafter, failing to adopt the UPSW capability procedure instead of the conduct procedure, alternatively failing to adopt the Standard UPSW procedure instead of the Extended UPSW procedure;

c. On 2 April 2020, Dr Scott-Coombes determining that the matter should proceed under the Extended Procedure of the UPSW policy; and refused referring the Claimant to an independent psychiatrist.

d. Between November 2019 and January 2020, the Respondent failing to refer the Claimant to OH or otherwise throughout the period obtaining professional independent advice (for example a psychiatric opinion) regarding the Claimant's condition;

e. The Respondent failing to act on OH recommendations dated:

(i) 13 March 2020;

(ii) 6 May 2020.

f. Between November 2019 and 9 February 2021, the Respondent failing to provide support to the Claimant despite the Claimant being increasingly unwell;

g. On or around 2 April 2020 and at all material times thereafter, the Respondent failing to halt or consider halting the Extended UPSW Procedure;

h. On or around 2 April 2020 and at all material times thereafter, the Respondent failing to modify or consider modifying the Extended UPSW Procedure;

i. Putting the Claimant through an Extended UPSW Procedure including a full Inquiry Hearing despite the Claimant having admitted the allegations and having explained that his OCPD was a factor in his conduct;

j. Subjecting the Claimant to an unnecessary Extended UPSW procedure, such that the Claimant became too unwell to perform his substantive role as a surgeon by December 2020;

k. Carrying out the UPSW procedure over a 15 month period from November 2019 to February 2021, thereby exacerbating the Claimant's disabilities;

l. Refusing to or otherwise failing to give any or any appropriate weight to the Claimant's OCPD as mitigation at the Inquiry Hearing on 21 October 2020;

m. On 21st October 2020, the Inquiry Panel finding that: "Dr Binesmael's explanations bear any scrutiny and that the same are disingenuous attempts to justify his actions after the event... In addition, the Panel found that Dr Binesmael's [sic] condition of Obsessive Compulsive Personality Disorder to not be causative of his actions"

n. Failing to make reasonable adjustments in respect of the Extended UPSW procedure; despite the serious impact it was having on the Claimant's disabilities and overall health;

o. Failing to provide any or any adequate support which would have avoided dismissal as a result of the Claimant's disabilities and ill-health.

p. The Respondent failing to take into account the Claimant's amendments to the Inquiry Panel's report on or around 27 November 2020.

27. The final straw for the Claimant was the Respondent's failure to take into account the Claimant's amendments to the Inquiry Panel's report and the findings in that report on 27 November 2020.

28. If so, did this amount to a breach of the implied term of trust and confidence and was it sufficiently serious to have justified the Claimant's resignation?

29. Did the Claimant waive or affirm any of the alleged breaches of the implied term of trust and confidence?

30. Insofar as the Tribunal finds that there has been a constructive dismissal, was this an unfair dismissal?

H "Ordinary" Unfair Dismissal – s98 Employment Rights Act 1996

31. Was the Claimant dismissed by the Respondent? If so, what was the reason for the Claimant's dismissal under s98 ERA 1996?

32. Was it one of the potentially fair reasons falling within section 98(2) of the ERA 1996, or for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (s98(1)(b) ERA 1996?

33. If the reason was a potentially fair one, did the Respondent act reasonably in treating it as a sufficient reason for dismissal?

34. Was the dismissal both procedurally and substantively fair?

Remedy

35. The Tribunal has ordered that remedy will not be considered at the hearing but it can address contributory fault and/or Polkey issues but no other remedy issues can be properly considered including whether there should be an uplift on compensation under s.207A TULCRA 1992.

36. If the Claimant was unfairly dismissed, did he cause or contribute to his dismissal by blameworthy conduct?

37. If so, would it be just and equitable to reduce the Claimant's compensatory award? If so, by what proportion?

38. If the Claimant's employment ended because of any unlawful actions of the Respondent what is the chance he would have remained in employment had that conduct not occurred and for how long a period?

Jurisdiction (Time Limited)

39. Are any of the Claimant's claims for disability discrimination out of time? If so, are they part of a continuing series of acts the last of which is in time and/or is it just and equitable to extend time to allow those matters otherwise out of time to proceed?

40. In any event, is it just and equitable in all the circumstances to extend time

3. The legal principles

Unfair Dismissal

Is there a dismissal?

3.1 Section 94 of the Employment Rights Act 1996 ("ERA") provides the right for an employee not to be unfairly dismissed by his employer. Section 95 sets out the circumstances in which an employee is dismissed which include:

(a) The contract under which he is employed is terminated by the employer (whether with or without notice)…;

(b) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

3.2 There must therefore be a dismissal for there to be an unfair dismissal claim: i.e. either termination of the employment contract by the employer, or termination of the contract by the employee in circumstances that amount to a constructive dismissal. A mutual termination of the employment contract will therefore not amount to a dismissal. Nor will a resignation by an employee that is not a constructive dismissal.

3.3 There is an issue in this case as to whether the claimant (who left employment on completion of an ill health retirement process) left his employment through (a) mutual termination, (b), a dismissal by the respondent, (c) resignation by the claimant that amounts to a constructive dismissal, or (d) resignation by the claimant which is not a constructive dismissal.

3.4 There is not a wealth of case law about the circumstances in which an ill health retirement does or does not amount to a dismissal (and ultimately each case turns on its own facts). Healey v Bridgend County Council 2002 EWCA Civ 1996 concerned a teacher who made an application for ill health retirement benefits and who told a director she had made a decision to retire on ill health grounds. After assessment the application to retire on ill health grounds was granted. A retirement date needed to be agreed. The employer tried to contact Mrs Healey but she did not respond. The employer wrote to Mrs Healey saying the contract had ended on the date her sick pay/pensionable service came to an end, saying it was by reason of retirement on ill health grounds. Mrs Healey argued the letter was notice of termination of her employment, i.e. a dismissal.

3.5 The tribunal found that Mrs Healey, in informing the employer of her decision to retire and apply for ill health benefits, was impliedly agreeing to retire from her employment upon becoming entitled to payment of those benefits. The tribunal found on the evidence there was an implied agreement that the employment would end through retirement upon the claimant becoming entitled to payment of ill health retirement benefits and when her sick pay ceased. The unfair dismissal claim did not succeed. The court of appeal upheld the decision there was no dismissal but on alternative grounds. The court of appeal held that Mrs Healey, in saying she had decided to retire on ill health grounds and in then agreeing she would apply for ill health retirement, was giving notice of a resignation to take effect when her sick pay ceased and when she became entitled to be paid ill health retirement benefits. The terms of the resignation were sufficiently certain. On the facts, it was a resignation, not a dismissal or mutual agreement to terminate.

3.6 In Birch and Humber v University of Liverpool [1985] EWCA Civ 8 the claimants applied under an early retirement compensation scheme. The claimants made provisional applications which had to be assessed. Once they

were approved the claimants had to then make a formal written application to retire which was then formally confirmed with a request for the claimants to retire on a given date. The claimants then sought redundancy payments. The tribunal found the claimants had been dismissed on the basis that the claimants had offered to retire and the final letters from the employer accepted those offers and was the step which put an end to the claimants' employment.

3.7 The employment appeal tribunal and court of appeal disagreed. They held it was not correct to say it was the letters from the employer which put an end to the employment. Instead, the employments were terminated by the combined effect of the offer to retire and the acceptance of that offer. It was said: "*Every contract results from an offer and the acceptance of that offer, but it cannot be right to say that the contract is made by the party who accepts rather than by the party who offers."* It was not right to isolate the acceptance of the applications from the formal application to retire as it was both of these together which brought about the terminations. The contracts of employment were terminated by the freely given mutual consent of the employer and employees. It was held to be mutual termination and not a dismissal or resignation. The court of appeal approved a statement that there is a distinction in law between a contract that is terminated unilaterally (albeit without objection, and perhaps even with encouragement from the other party) and a contract which is terminated by mutual agreement.

3.8 Ultimately in each case it is necessary to determine what it is that has had the effect of terminating the particular contract/who really terminated the contract of employment.

Fairness of a dismissal

3.9 Section 98 ERA provides:

"(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee…

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Constructive unfair dismissal claims

3.10 In the field of constructive unfair dismissal claims, case law has established the following principles:

3.10.1 The employer must have committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract. This is the abiding principle set out in Western Excavating v Sharp [1978] ICR 221.

3.10.2 A repudiatory breach can be a breach of the term implied in to every contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 and Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL.)

3.10.3 Whether an employer has committed a breach of that implied term must be judged objectively. It is not enough to show merely that an employer has behaved unreasonably. The line between serious unreasonableness and a breach is a fine one. A repudiatory breach does not occur simply because an employee feels or believes they have been unreasonably treated. Likewise, the test does not require the tribunal to make a factual finding as to what the actual intention of the employer was as the employer's subjective intention is irrelevant.

3.10.4 The employee must leave, in part at least, because of the breach. However, the breach does not have to be the sole cause. There can be a combination of causes provided an effective cause for the resignation is the breach; the breach must have played a part (see Nottingham County Council v Meikle [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).

3.10.5 The employee must not waive the breach or affirm the contract by delaying resignation too long.

3.10.6 There can be a breach of the implied term of trust and confidence where the components relied upon are not individually repudiatory but which cumulatively consist of a breach of that implied term.

3.10.7 In appropriate cases, a "last straw" doctrine can apply. If the employer's act which was the proximate cause of an employee's resignation was not by itself a fundamental breach of contract the employee can rely upon the employer's course of conduct considered as whole in establishing that he or she was constructively dismissed. However, London Borough of Waltham Forest v Omilaju [2005] IRLR 35 tells us that the "last straw" must contribute, however slightly, to the

breach of trust and confidence. The last straw cannot be an entirely innocuous act or be something which is utterly trivial. Moreover, the concepts of a course of conduct or an act in a series are not used in a precise or technical sense; the act does not have to be of the same character as the earlier acts.

3.10.8 In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the court of appeal set out the questions that the tribunal must ask itself in a "last straw" case. These are:

(a) What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?

(b) Has he or she affirmed the contract since that act?

(c) If not, was that act (or omission) by itself a repudiatory breach of contract?

(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach.

(e) Did the employee resign in response (or partly in response) to that breach?

Disability under the Equality Act 2010

The legislative test

3.11 Under section 6 of the Equality Act 2010 a person (P) has a disability if –

(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities.

3.12 Under section 212(2) substantial means "more than minor or trivial."

3.13 Under paragraph 2(1) of Part 1 of Schedule 1 to the Equality Act, the effect of an impairment is long term if –

(a) it has lasted for at least 12 months,

(b) is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

3.14 Under paragraph 5(1) an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. "Measures" include medical treatment. When determining substantial adverse effect on normal day to day activities, we therefore have to assess what the effects of any condition would be as if the person is not taking medication or other medical treatment.

3.15 "Likely" should be taken to mean "could well happen."

3.16 We should also take into account, where relevant, the "Guidance for matters to be taken into account in determining questions relating to the definition of disability" ["the Guidance"].

Impairment

3.17 It was accepted in Ministry of Defence v Hay UKEAT/0571/07/CEA that it is possible to be disabled due to the cumulative effect of more than one impairment. The EAT adopted an approach to "impairment" from earlier case law saying the term should be given its ordinary and natural meaning and that it is not necessary to consider the cause of it. Further it was said that: "*the essential question in each case is whether, on sensible interpretation of the relevant evidence, including the expert medical evidence and reasonable inferences that can be made from all the evidence, the applicant can fairly be described as having a physical or mental impairment*."

3.18 In J v DLA Piper UKEAT/0263/09 Mr Justice Underhill stated:

"40 Accordingly in our view the correct approach is as follows:

(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long term basis), and to consider the question of impairment in the light of those findings …"

3.19 Mr Justice Underhill further stated, on identifying whether there is an impairment at all, particularly in relation to mental health conditions:

"42: "The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – 'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use terms such as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties

often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long lived."

Day to day activities

3.19 The Guidance states:

3.19.1 The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. [B1]

3.19.2 The time taken by a person with an impairment to carry out a normal day-to-day activity should be considered when assessing whether the effect of that impairment. It should be compared with the time it might take a person who did not have the impairment to complete an activity [B2].

3.19.3 The way in which a normal day-to-day activity is carried out may also be relevant. Again the comparison should be with the way that the person might be expected to carry out the activity compared with someone who does not have the impairment. An example given in the Guidance is of a person with OCD who needs to constantly check and recheck electrical appliances are switched off and doors are locked [B3].

3.19.4 The cumulative effects of an impairment or impairments should be taken into account when working out whether it is substantial. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, taken together, could result in an overall substantial adverse effect. [B4]

3.19.5 Account should be taken of where a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment or avoids doing things because of a loss of energy and motivation. It is important to consider the things that a person cannot do, or can only do with difficulty [B9] (see also Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12.)

3.19.6 *"In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can also include general work-related activities …such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents and keeping to a timetable or a shift pattern…".* [D3]

3.19.7 However, it is "*not intended to include activities which are normal only for a particular person, or a small group of people. In deciding whether an activity is a normal day-to- day activity, account should be taken of how far it is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning.*" [D4]

3.20 "Day to day activities" includes activities which are relevant to participation in professional life as well as participation in personal life; Chief Constable of Norfolk v Coffey [2019] IRLR 805

Expert medical evidence

3.21 The question of whether a claimant meets the definition of disability is not a medical question but a legal one ultimately for the tribunal to assess: Paterson v The Commissioner of Police of the Metropolis [2007] I.C.R. 1522.

Burden of Proof under the Equality Act 2010

3.22 The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides:

"(2) if there are facts from which the Court (which includes a Tribunal) could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

3.23 Consequently, it is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the Equality Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

3.24 In Hewage v Grampian Health Board [2012] IRLR 870 the supreme court approved guidance previously given by the court of appeal on how the burden of proof provisions should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the tribunal has heard all the evidence. Furthermore, in practice if the tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct disability discrimination

3.25 Direct discrimination is defined in section 13(1) Equality Act as follows

> *"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

3.26 The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

3.27 Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparator can be with a hypothetical person.

3.28 The employment appeal tribunal and appellate courts have also emphasised in a number of cases including Amnesty International v Ahmed [2009] IRLR 894, that in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator. It may be possible for the tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

3.29 In order to satisfy the "because of" test, it is not necessary for the protected characteristic to be the whole of the reason, or even the principal reason, for the treatment. In Nagarajan v London Regional Transport [1999] ICR 877 Lord Nicholls said, (in the context of a complaint of race discrimination but the same principles apply):

"*Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others…If racial grounds…had a significant influence on the outcome, discrimination was made out."*

Discrimination arising from disability

3.30 Section 15 of the Equality Act states:

"15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know that B had the disability."

3.31 The approach to determining Section 15 claims was summarised by the employment appeal tribunal in Pnaiser v NHS England and Another [2016] IRLR 170. This includes:

3.31.1 The first stage is to assess the "because of". In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;

3.31.2 The "something" that causes the unfavourable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;

3.31.3 Motives are not relevant;

3.31.4 The second stage is to determine whether as a matter of fact the "something arising in consequence" was a consequence of the disability.

3.31.5 The expression "arising in consequence of" can describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link;

3.31.6 This stage of the test is an objective question and does not depend on the thought processes of the alleged discriminator.

3.31.7 Knowledge is only required of the disability. Knowledge is not required that the "something" leading to the unfavourable treatment is a consequence of the disability.

3.31.8 It does not matter precisely in which order these questions are addressed.

3.32 In assessing whether something is "unfavourable" treatment there must be a measurement against "an objective sense of that which is adverse as compared to that which is beneficial"; Trustees of Swansea University Pension & Assurance Scheme v Williams [2018] UKSC 65.

3.33 The respondent will successfully defend the claim if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. This is often termed "objective justification." The burden of proof is on the employer to establish objective justification.

3.34 The supreme court in Ministry of Justice v O'Brien [2013] ICR 449 re-stated the general principles of objective justification that:

(a) firstly, the treatment must pursue a legitimate aim;
(b)second, it must be suitable for achieving that objective; and
(c) third, it must be reasonably necessary to do so.

3.35 The Equality and Human Rights Commission Code of Practice on Employment contains guidance on objective justification, to reflect some of the case law in the field. It terms the first issue as being determination of whether the aim is legal and non-discriminatory and one that represents a real, objective consideration. In Bilka-Kauhaus GmBH v Weber von Hartz [1987] ICR 110 it was termed: "*correspond to a real need on the part of the undertaking.*"

3.36 In Chief Constable of West Yorkshire Police and anor v Homer [2012] ICR 704, the supreme court reiterated that the measure in question has to be both an appropriate means of achieving the legitimate aim, as well as being reasonably necessary in order to do so. Some measures may simply be inappropriate to the legitimate aim in question or they may be appropriate but go further than is reasonably necessary and so be disproportionate.

3.37 As to the third stage, the EHRC Employment Code notes: "*Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts."* We pause here to note that in a section 15 claim, it is of course the treatment that is being justified, not a provision, criterion or practice (the terminology from an indirect discrimination complaint).

3.38 It was said by the employment appeal tribunal in Ali v Drs Torrosian, Lochi, Ebeid & Doshi t/a Bedford Hill Family Practice [2018] UKEAT0029 18 0205 (which was a section 15 case) that:

> 3.38.1 Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer;
>
> 3.38.2 When determining whether or not a measure is proportionate it will be relevant for the tribunal to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim;
>
> 3.38.3 More specifically, the case law acknowledges that it will be for the tribunal to undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer;
>
> 3.38.4 As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied;
>
> 3.38.5 When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification.

3.39 In Hardy and Hansons Plc v Lax Pill LJ stated: *"It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate."*

3.40 Further, Pill LJ said: *"I accept that the word 'necessary' .... has to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject [the employer's] submission ... that, when reaching*

its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."

3.41 The court of appeal said in O'Brien v Bolton's St Catherine's Academy:

"…it is well-established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the Tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship."

3.42 The employment appeal tribunal in Birtenshaw v Oldfield [2019] UKEAT 0288 18 1104 repeated the above but added that it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or otherwise caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

3.43 Therefore the test is ultimately an objective one and at the other end of the scale it remains potentially open to an employer to justify the treatment after the event, even if in fact it was not properly articulated or thought through by the decision maker at the time. So it was said by the employment appeal tribunal in Chief Constable of West Midlands v Harrod:

> *"I consider also that [Counsel for the employer] is right in his contention that the Tribunal focussed impermissibly on the decision making process which the Forces adopted in deciding to utilise A19. When considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact. Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a Tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted. But the fact that there may be such an impact does not convert a Tribunal's task from determining if the measure in fact taken can be justified before it, objectively, into one of deciding whether the alleged discriminator was unconsidering or irrational in its approach."*

3.44 Whilst justification under section 15 has to be established at the time when the unfavourable treatment was applied, the tribunal when making its objective assessment may take account of subsequent evidence; City of York Council v Grosset.

3.45 The more serious the discriminatory impact, the more cogent must be the justification for it; Macculloch v Imperial Chemical Industries plc [2008] UK EAT 0119/08.

3.46 When conducting the balancing exercise required, the tribunal is entitled to give weight to the fact an employer did not make reasonable adjustments as required by sections 20 and 21; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265. However, this does not mean that, where a reasonable adjustment cannot be made, the treatment cannot still amount to discrimination within the meaning of section 15. They are separate provisions with their own legislative requirements.

Reasonable Adjustments

3.47 The duty to make reasonable adjustments appears in Section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3)

> *"(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage.*"

3.48 Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

3.49 In Environment Agency v Rowan [2008] ICR 218 it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

3.50 The words "provision, criterion or practice" ["PCP"] are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In Ishola v Transport for London [2020] EWCA Civ 112 it was said:

> "*all three words carry the connotation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."* It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

3.51 The PCP must put the disabled person at a substantial disadvantage compared to non disabled persons. Simler P in Sheikholeslami v University of Edinburgh [2018] IRLR 1090, EAT, held:

> *"It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question … For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances.*
>
> *The Equality Act 2010 provides that a substantial disadvantage is one which is more than minor or trivial: see s 212(1). The EHRC Code of Practice states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people: see para 8 of App 1. The fact that both groups are treated equally and that both may suffer a disadvantage in consequence does not eliminate the claim. Both groups might be disadvantaged but the PCP may bite harder on the disabled or a group of disabled people than it does on those without disability. Whether there is a substantial disadvantage as a result of the application of a PCP in a particular case is a question of fact assessed on an objective basis and measured by comparison with what the position would be if the disabled person in question did not have a disability."*

3.52 Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove the disadvantage; Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.

3.53 In County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the EAT summarised the following additional propositions:

3.53.1 It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;

3.53.2 It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;

3.53.3 The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;

3.53.4 Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s);

3.53.5 The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include[3]:

- The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
- The extent to which it is practicable to take the step;
- The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
- The extent of its financial and other resources;
- The availability to it of financial or other assistance with respect to taking the step;
- The nature of its activities and size of its undertaking;

3.53.6 If the tribunal finds that there has been a breach of the duty; it should identify clearly the “provision, criterion, or practice” the disadvantage suffered as a consequence of the “provision, criterion or practice” and the step(s) the respondent should have taken.

Harassment related to disability

3.54 Section 26 of the Equality Act defines harassment under the Act as follows:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic and

(b) the conduct has the purpose or effect of –

(i) violating B’s dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

(a) the perception of B;

(b) the circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

3.55 In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 the EAT set out a three-step test for establishing whether harassment has occurred:

[3] Taken from the EHRC Code of Practice

(i) was there unwanted conduct;

(ii) did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and

(iii) was it related to a protected characteristic.

3.56 It was also said in the case that the tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for her, then it should not be found to have done so.

3.57 In Grant v HM Land Registry [2011] IRLR 748 the court of appeal reiterated that when assessing the effect of a remark, the context in which it is given is highly material. A tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment. The court of appeal also said "*It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.*"

3.58 In Betsi Cadwaladr University Health Board v Hughes [2014] UKEAT/0179/13 it was said: "*The word violating is a strong word. Offending against dignity; hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.*"

3.59 The phrase "related to" a protected characteristic is a different test from whether the conduct is "because of" a protected characteristic. It is a broader, more easily satisfied test. It encompasses conduct associated with the protected characteristic even if not caused by it; Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] ICR 1234. It does however have limits. The conduct complained about must relate to the protected characteristic which is a matter for the tribunal to determine based on all the facts as found. It was said in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and Heads UKEAT/0039/19 the "related to" test may be satisfied by looking at the motivation of the individuals concerned but it is not the necessary or only possible route. It was also said: *"Nevertheless there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim."*

The time limit for disability discrimination complaints.

3.60 The initial time limit for complaints under the Equality Act 2010 is 3 months starting with the date of the act of discrimination complained about. The effect of

the early conciliation procedure is that, if the notification to ACAS is made within the initial time limit period, time is extended, at least, by the period of conciliation.

3.61 Under Section 123(3) of the Equality Act conduct extending over a period is to be treated as done at the end of the period. A continuing course of conduct might amount to an act extending over a period; Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96.

3.62 Under Section 123(3) a failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on a failure to do something when either P does an act inconsistent with doing it, or if P does not do an inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

3.63 In relation to complaints about a failure to make a reasonable adjustment, sections 123(3) and 123(4) therefore establish a default rule that time begins to run at the end of the period in which the employer might reasonably have been expected to comply with the relevant duty. The period in which the employer might reasonably have been expected to comply with its duty is assessed from the claimant's point of view, having regard to facts known or which ought reasonably to have been known by the claimant at the relevant time; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640.

3.64 A tribunal may consider a complaint out of time if it considers it just and equitable to do so in the relevant circumstances.

4. Findings of fact

Introduction

4.1 It is not necessary for us to making findings of fact on every matter put before us. We need only make findings where necessary to decide the issues before us. Where there is a dispute, we apply the balance of probabilities.

4.2 The claimant commenced employment with the respondent as an Associate Specialist Cardio-Thoracic surgeon in April 2009.

Ex-wife's complaint

4.3 On 26 September 2019 the claimant's ex-wife telephoned and sent an email to the respondent's complaints team [177 and 582]. She attached a complaint form. The form said the date the events occurred were between May and September 2019. The claimant's ex-wife said her concern was that the claimant had accessed her medical file. She alleged: "*He confirmed to the court*[4] *in his statements that I am in a good health about my ability to work. He can only get this information by access to my medical record as I didn't have any contact with him in the last 4 years, and he didn't know that I had a private scan an treatment at Spire Hospital after I had an accident at work, Mr Binesmael accused me of pretending to decrease my working hours just to extend my maintenance. I started physiotherapy at Heath Hospital on the 10th of September 2019. I want to protect my medical record from being seen by Mr Binesmael to stop him to spy on me.*" She also complained about: "*Access to my health record without my permission and without me knowing where it is being used. This could be in breach of GDPR rules.*" She asked for her medical records to be protected and said she wanted to know if the claimant had accessed her records and when.

[4] I.e. the family court in spousal maintenance proceedings

She said she wanted to show this to the court and said that the claimant kept asking "*unrelative questions in our case, such as how many holidays I got from work and where I spent them, and also he asked if I had any sick leave from my work and how many?!!!! To comparing my answers with my medical record that he already accessed.*"

4.4 The concern was sent on to Ms Fox, the Director of Nursing. Ms Fox asked Mr Webb to look at whether the medical records of the patient had been accessed by the claimant [180]. Ms Fox asked the claimant's management team not to share this with anyone including the claimant at that initial time.

4.5 On 10 October 2019 Mr Webb confirmed that IT had completed their searches [178]. He said: "*Unfortunately the Cardiff Clinical Portal search shows that TB has accessed [his ex-wife's] record 250 times. The most recent was the 3rd October 2019. Full audit enclosed."* Mr Webb said he would need to discuss it with Professor Walker and it may need to go to the ICO. Mr Webb was relying on information he had been given by Mr Clee the Cardiff local Clinical Portal (CCP) systems manager [592-693, 654 -657, 662].

4.6 On 10 October 2019 Mr Webb forwarded the email on to Professor Walker and said that, if confirmed, he would like consideration of a report to the ICO. Mr Webb, with authorisation, then made the referral to the ICO that same day [182-186]. The referral said that the suspicion was that the access was not legitimate but that this was being investigated.

Claimant informed of investigation

4.7 On 10 October 2019 Mr Pritchard telephoned the claimant and told the claimant there was a complaint against him. The claimant was told to meet the Medical Director on 11 October. The claimant was surprised and anxious and could not sleep that night thinking of the patients he had treated recently and could not think of any circumstances that would have led to a complaint.

4.8 On 11 October 2019 the claimant met with Professor Walker. The claimant was accompanied by his BMA representative. Also present were Dr Durning, Associate Medical Director and Mr Pritchard. The claimant was told the respondent had received a written concern from his ex-wife where she alleged he may have been accessing her medical records without her consent in the context of spousal maintenance. The claimant admitted that he had accessed his ex-wife's records. Mr Pritchard describes the claimant as appearing quite contrite. The claimant was told there would be an investigation under Upholding Professional Standards in Wales ("UPSW") and Mr Pritchard explained the procedure and that he would email a copy to the claimant. Initially the claimant felt slightly relieved that the complaint came from his ex-wife rather than a patient, albeit that was short lived.

4.9 Mr Durning said that during the investigation he would act as the claimant's professional support and the claimant could contact him if he wanted to have a meeting or a discussion. The claimant was told no restrictions were being placed on his clinical activity. He was told not to contact his ex-wife about the matter and only to access patient records as part of his normal duties. He was asked to disclose if he had accessed any other records outside of his normal duties as soon as possible. He was told that the matter had not been referred to the GMC on a formal basis but that their informal advice would be sought. Professor Walker told the claimant the Employee Wellbeing Service was there to provide support if needed.

4.10 The allegation was confirmed in a letter dated 14 October 2019 [588-589] stating the claimant had: "*accessed your ex-wife's medical records without her consent on numerous occasions between 30 August 2008 and 3 October 2019."* The letter said that due to the seriousness of the allegation, the respondent would instigate an investigation in accordance with UPSW. The respondent would not be making a formal referral to the GMC but would discuss the matter with them and take their advice as to any future Fitness to Practice referral. The letter said the respondent had reported the matter to the ICO and would discuss the matter with the then National Clinical Assessment Service for advice (NCAS). It was suggested the claimant could also contact them for advice and support. The letter said that Mr Pritchard had explained that although UPSW required completion of an investigation within 28 days it was not always possible and that they would keep the claimant informed of any delay. The letter confirmed Mr Durning would act as the claimant's professional support and that Mr Durning had asked the claimant to contact him if the claimant wished to have a meeting or discussion. The claimant was again told not to contact his ex-wife about the matter and not to access any patient records other than part of the claimant's normal duties. The claimant was advised to consider taking advice and he was referred to the Employee Wellbeing Service if he felt he would benefit from counselling. The letter said in conclusion that Professor Walker wanted to reassure the claimant that he would endeavour to complete the process as quickly as possible and if the claimant had any queries he could contact Professor Walker.

4.11 The claimant was given a copy of the terms of reference for the investigation [590]. Professor Hope-Gill was appointed as Case Investigator and Mr Scott-Coombes as Case Manager. The terms of reference said: "*Following a review of the electronic access… there is an audit trail identifying that Dr Binesmael accessed his ex-wife's medical records on 249 occasions between 30 August 2008 and 3 October 2019…*

The allegation can be summarised as follows:

*That Dr Taha Binesmael accessed his ex-wife's medical records without her consent on numerous occasions between 30 August 2008 and 3 October 2019" [*2008 as a typographical error was later hand amended to 2006, the agreed correct start date].

4.12 On 14 October 2019, Ms Fox confirmed that a safeguarding referral was being made. This was because the claimant's ex-wife had raised a separate historical allegation [195]. On 16 October 2019 the claimant met with Mr O'Callaghan and Mr Pritchard and was told the respondent was making a safeguarding referral. Mr Pritchard confirms that the claimant was very anxious to hear this and asked how quickly a strategy meeting would be arranged and when he would get further information. Mr Pritchard said the same in an email to the head of safeguarding on 17 October 2019 [207]. Mr Pritchard said in oral evidence that the claimant demonstrated the level of anxiety that would be expected from an employee in the situation. After the meeting Mr O'Callaghan emailed the claimant [402] saying: "*As your line manager I will support you and help any way I can.*" Mr O'Callaghan gave the claimant his personal mobile number and said the claimant was free to call him if the claimant had concerns. The claimant did not in fact ever telephone Mr O'Callaghan for support.

4.13 In the meantime, Professor Hope-Gill interviewed Mr Webb on 14 October [635] and on 15 October 2019 Professor Hope-Gill emailed the claimant inviting

him to a meeting on 22 October 2019 [591], albeit the date was later moved to 7 November.

Claimant takes special leave

4.14 On 21 October 2019 the claimant saw his GP [1431] who noted "*Anxiety states Describes symptoms low mood, chronic anxiousness, always worries esp about family. Features of obsessive compulsions, rechecking ++, poor sleep. Has been [redacted]. Imp low mood anxiety OCD symptom start fluoxetine review for long consult and possible psychiatry referral."* The claimant referred himself to Professor Tahir's clinic. On 23 October 2019 the claimant attended a further GP appointment. The notes record (amongst other things): *"[X] Obsessional personality disorder… Says his meticulousness can be an issue. Says obsessional…"* It was noted the claimant had a case investigation the following week and was seeing a psychiatrist on 13 November.

4.15 On 23 October 2019 the claimant emailed Ms Deglurkar (Lead Cardiac Surgeon), copying in Mr O'Callaghan, apologising for taking unexpected urgent special leave that week and saying he was planning to return to work the next week with the hope there would be no further interruption unless it was really unavoidable. The claimant thanked them for their support [209]. Mr O'Callaghan says, which we accept, that he had some discussions with Ms Deglurkar and Mr Gidman and it was agreed they needed to support the claimant as much as possible. Mr O'Callaghan asked Ms Deglurkar to see if they could rework the rota to take the claimant off on call duties and the claimant later asked Ms Deglurkar to only do thoracic theatres and not cardiac theatres, which was agreed.

Investigation meeting with ex-wife

4.16 Professor Hope-Gill met with the claimant's ex-wife on 5 November 2019 [210]. The claimant's ex-wife said they had divorced in 2015 and she showed Professor Hope-Gill a copy of a letter she said she had sent to the Information Governance team on 13 November 2015 saying she did not want the claimant to access her records and asking if the claimant had accessed her records in the previous two years. She said she had not received a response at the time. Professor Hope-Gill failed to take a copy of that earlier letter. He said in evidence he thought either Ms Fox had taken it, or that the claimant's ex-wife had taken it away with her. The claimant's ex-wife told Professor Hope-Gill she had made her subsequent written complaint on 26 September 2019 and that she was very concerned that information gained from unauthorised access to her medical records could be used by the claimant to disadvantage her. She was also concerned that colleagues could access her records on the claimant's behalf. It is an agreed fact that this prior complaint of 2015 was not acted on by the respondent at the time and was therefore unknown to the claimant.

Claimant requests further special leave

4.17 On 5 November 2019 the claimant made a request to take further special leave from 20 November to the first week of January. He spoke with Mr Gidman and the request was discussed and granted [213] by Mr O'Callaghan, Ms Deglurkar and Mr Gidman, with the respondent hiring a locum when needed. Mr O'Callaghan commented the approach was preferable to the claimant going on sick leave and the respondent still needing a locum. He said in his email at the time: "*It also shows that at Directorate level we're doing everything we can to support him through this difficult period."* Mr Gidman's understanding was that

the claimant had requested the leave because of the stress of, and to help him prepare for, the forthcoming spousal maintenance hearing.

First investigation meeting

4.18 The claimant met with Professor Hope-Gill on 7 November 2019. The claimant readily admitted to having viewed his ex-wife's records on multiple occasions between the dates highlighted. Professor Hope-Gill says that the claimant explained he felt anxious because of the divorce and because of his perfectionist personality which meant he wanted to check things repeatedly. Professor Hope-Gill recalls the claimant saying that he believed it influenced him wanting to access the records and was almost a coping mechanism given the divorce proceedings. The claimant told Professor Hope-Gill he had not undergone any formal psychiatric assessment in order to diagnose a psychiatric condition but was in the process of seeking this.

4.19 The claimant also gave Professor Hope-Gill a statement [637-644] which Professor Hope-Gill read briefly in the meeting and in greater detail after the meeting. In this first written statement in the disciplinary proceedings the claimant said he deeply regretted his actions. He said it was not his intention to use the information to gain any advantage or disadvantage any member of his family and he did not share the information with anyone. He said that have reflected and analysed his behaviour he: "*can now accept that it was an unnecessary and purposeless act, undertaken during a particularly difficult and stressful period of my life."* He said he did not medically treat a close family member and he would not repeat his behaviour.

4.20. The claimant volunteered that he had also accessed the medical records of his three children, his own health records and that of two friends, with the friends' consent.

4.21 The claimant also said in his written statement that there had been a lengthy, stressful and costly civil divorce case 2014-2016 which had restarted again that year with a claim for the extension of spousal maintenance which had been due to end on 31 May 2019. His ex-wife had applied to extend the spousal maintenance on 23 May 2019. He explained he had married his current wife on 22 October 2018.

4.22 The claimant said the current legal action to extend spousal maintenance had involved the acrimonious exchange of correspondence. He said he had evidence that confirmed his ex-wife had deliberately withheld information about her assets and income and had been employed for longer than she had claimed, which he had challenged. He said that she had voluntarily provided details of her shoulder injury dating back to 2017 and other medical records as a basis for her extension of spousal maintenance. The claimant said he did not challenge this information, had not been aware of this information, and he had made it clear to her solicitor he did not intend to request further information about her health, which he had said in an email on 7 October 2019 before he knew about his ex-wife's complaint.

4.23 The claimant said in his first statement that during their marriage he used to look after his ex-wife's health issues, accompanying her for medical appointments. He said that during their marriage he had her consent to deal with her personal issues. The claimant said his initial reasoning for accessing his ex-wife's records was: *"a continuation of a habit of checking on her health which I had for a long time and continued after the divorce. It seemed to a consented*

habit from the past that was difficult for me to recognize or change, as if there was a blind spot that hid the mistake from me. My actions were unwise, purposeless and unplanned."

4.24 The claimant said he did not use, divulge, or print any medical records or use the information about his ex-wife's health in any proceedings and he did not use any information about anyone for any kind of gain or advantage. He said: "a *deep scrutiny of my overall personality allowed me to see that my actions in accessing the records is part of my Obsessive Compulsive Disorder and my stress and depression due to the prolonged series of unfortunate events in my life over the last nine years. The family medical records worked for me like an old photo album. Whenever a reason appears to check for one member of my family (when they ask for any medical advice), I get compelled to check on the others, or whenever a reminder of the family health surfaces I find myself going back to see the old pictures. I did not realize the number of times I did this, but I think that the pattern I followed confirms that I had no intention or planned purpose, and the timing did not always relate to certain events other than illness in the family, which seems to trigger my OCD and partially blocks my professionalism. I believe, it was like a curiosity to check on the family that I lost by the divorce, or like nostalgia to relive old memories again, like seeing old personal photos. This was an action out of habit and out of the feeling of comfort when I remember that I used to be a good husband and father who stood by his ex-wife in so many illnesses and that my feeling of bitterness of her unexplained hostility is briefly relieved. Whenever my children made me feel that their mother was unwell or when one of my family or ex-wife was ill, I checked on her and their investigations to reassure myself that my children and their mother was OK. It was a compulsive behaviour that made me check my ex-wife's records occasionally."*

4.25 The claimant said when one of his three children approaches him or tells him they are ill he will check on the whole family. He gave some examples of that, referring to when one child had knee surgery and when another child had chest pain and a chest x-ray. He also gave an example of his daughter having symptoms and being investigated by her GP. He said he was concerned his daughter had inherited a condition from his ex-wife, so he had checked his ex-wife's old result to remind himself of her condition to keep an eye on his daughter.

4.26 The claimant also spoke about other stressors in his life including the ill health and passing of his mother between 2015 and 2017 and difficulties over the years in his relationships with his children. He said that work could be challenging and demanding and he had other issues at work in 2017-2018. He said he felt he had a degree of subclinical depression. The claimant also referred to his personal psychological profile of INFJ . He also said he had suffered all his life from OCD which forces him to do things in repeated patterns and once adopted it was hard to change or stop. He said he had to follow a list of steps or order, to monitor everything, and he could not tolerate chaotic, disorganised living style. The claimant gave some examples such as cleaning common spaces in work, keeping detailed records of his on-calls and work activities, and paying for petrol by credit card where he would make sure the sum includes the figure 85 (a number that has meaning for the claimant). He said he did not live with his new wife and her family due to his inability to cope with others' different style of living. He would monitor his spending in detail in an excel book with multiple worksheets.

4.27 The claimant referred to traumatic experiences from his childhood that he said made him worry about accidents and when a loved one travelled abroad he would ask them to keep in touch at all times and he would monitor them on "find my friends." He would take screenshots for their location abroad and follow their planes on Flightradar 24.

4.28 The claimant said his self reflection had enabled him to accept he should seek professional help. He said: "*I have a good understanding and control most of the time of my symptoms, but a sudden or unexpected incident, including emotions or stressful and depressive times can take my off my guard and cloud my judgment.*" The claimant said he had sought professional help to cope with his OCD and depression and had consulted his GP, and had self referred to a psychiatrist specialising in OCD. The claimant said he was undertaking learning on confidentiality and GDPR.

4.29 Professor Hope-Gill's view was that his terms of reference were whether or not the data breaches had taken place or not. He said he thought it was beyond his expertise as to whether the mitigations raised would have any material bearing on the claimant accessing the records. He was of the understanding that the claimant was in the process of obtaining a psychiatric opinion and that a formal diagnosis would emerge, or not, in due course. Professor Hope-Gill agreed with the claimant and the claimant's BMA representative at the time that he would reference the claimant's mitigations in the report, append the claimant's statement, and they could be considered in due course. Neither the claimant nor the claimant's BMA representative disputed that course of action at the time.

First draft of case investigation report

4.30 By 9 November 2019 Professor Hope-Gill had completed his case investigation report in relation to the accessing of the claimant's ex wife's records [221]. On 12 November Mr Scott-Coombes emailed Mr Pritchard saying: "*In my view: 1) The doctor should be shown the report for comment (14 days period) 2) There appears to be clear evidence of unlawful access to medical records (ICO principles) 3) There is insufficient evidence that the doctor disclosed this information 4) Unless the doctor changes the report substantially I would recommend on the basis of 1.23 UPSW that: a. That the doctor has continued medical support (referral to OH) b. There are serious concerns about a breach in the law and as such the matter should be referred to the GMC c. These same concerns should be determined at a hearing in accordance with Section 4 of UPSW.*" Mr Scott-Coombes said in evidence the reference to Section 4 was a typo and he had intended to refer to Section 5 (the Extended Procedure). We accept his evidence on that point. We are satisfied that Mr Scott-Coombes had always seen the claimant's conduct as potentially very serious and indeed he said in his email that there were serious concerns about a breach in the law.

Extending the investigation

4.31 In the meantime, on 11 November 2019 Mr Pritchard had emailed Mr Webb asking for a further search to be done as to how many times the children's records had been accessed. Mr Webb replied on 12 November 2019 [218] with a report. Mr Pritchard then forwarded to Mr Scott-Coombes the update in relation to the claimant accessing his children's records and asked for them to discuss whether this allegation should be added to the investigation and the claimant given an opportunity to respond. In the meantime Professor Hope-Gill's report was held back. Mr Pritchard also identified the need to report it to the ICO which

Professor Walker authorised. Mr Webb updated the ICO on 14 November 2019 [226]. There was some discussion ongoing as to how to proceed, in terms of widening the investigation which culminated in Mr Pritchard preparing draft amended terms of reference [231].

Professor Tahir's first clinical letter

4.32 On 13 November the claimant met with Professor Tahir, Consultant Psychiatrist. Professor Tahir prepared a clinical letter to the claimant's GP dated 14 November 2019 [1041]. Professor Tahir said the claimant was reporting feeling low in his mood dating back to May 2019 when his ex-wife applied to continue the maintenance arrangement. Professor Tahir noted the claimant was representing himself and was due to go to court on 6 December 2019. Professor Tahir said the workplace investigation had put additional strain on the claimant to the point he was planning to take a period of unpaid leave to recover. Professor Tahir said: "*He described some longstanding symptoms of hoarding plastic bottles and plastic bottle caps, cleaning his on call room in hospital or keeping home clean, worrying about and checking on the safety of his family members and friends and being organised in his general environment and life. This has made him think that he has suffered from longstanding OCD. He reports that he does not like surprises and he likes his life to be structured. He reports a happy childhood but reports three specific incidents where he had witnessed fatalities in two accidents and his father came home with facial injuries in another incident. This he thinks played on his mind because of his concerns about safety of near and dear ones."*

4.33 Professor Tahir said he thought the claimant was moderately low with anxiety associated with obsessive thoughts and some preoccupation by the claimant on the claimant's personal circumstances including upcoming attendance at civil court and the ongoing investigation for the complaint with his employers. Professor Tahir said the current diagnosis was of anxiety and depression although there is a longstanding history of an obsessive nature which perhaps is part of his personality traits rather than OCD or Obsessive Compulsive Personality Disorder. Professor Tahir said the claimant would benefit from some psychological work to help with personal traits in dealing with stress in the form of CBT. He encouraged the claimant to discuss his personal circumstances leading to stress with his employers with an aim for an assessment with occupational health ["OH"]. There is no reference in the report to the claimant raising any concern or question of whether he might have been accessing medical records unwittingly or whether he had done so because of OCD. The claimant did not give the respondent a copy of Professor Tahir's clinical letter at the time.

Request for referral to occupational health

4.34 On 14 November 2019 the claimant emailed Mr O'Callaghan, copied to Mr Gidman and Ms Deglurkar [232], requesting a referral to OH saying the waiting time could be three weeks. The claimant said he had seen his GP on 21 October who started him on Fluoxetine and that he had seen a psychiatrist, Professor Tahir, the day before. He said Professor Tahir had suggested the claimant be referred to occupational health. He said: "*Overall I feel ok, but occasionally I feel overwhelmed and stressed. Thinking and preparing for the current civil court divorce spousal maintenance case with my ex-wife and the internal hospital investigation, both are draining me excessively*." The claimant said he did not know if not working was the right thing to do or not and he may be in touch again

if he felt he was getting worse by staying at home. He said: "*Once again many thanks for your support and hopefully matters settle soon.*"

4.35 Mr O'Callaghan responded on 15 November 2019 to say he would find out how to refer the claimant to OH and sort it asap [238]. Mr O'Callaghan emailed Mr Nicholls and Mr Gidman asking for advice about how to refer someone to OH [243]. Mr Nicholls, the Service Manager in the Cardiothoracic Directorate sent, on 18 November 2019, Mr O'Callaghan a link to access a form and guidance [243]. Mr O'Callaghan says he cannot now recall receiving this email and he can find no record of having acted on it. He says his usual practice was to act on emails immediately or delegate it, but he cannot now recall what happened and cannot find any evidence he made the OH referral. We accept his evidence and accept it was likely due to an oversight on Mr O'Callaghan's part. Mr Gidman was copied into the emails and therefore presumed the claimant had been referred by Mr O'Callaghan.

Extending the terms of reference

4.36 On 15 November Mr Webb asked Mr Clee to check the claimant's access to the medical records of the two friends, which was confirmed on 19 November [603,659]. On 19 November 2019, following a meeting between Mr Pritchard and Professor Walker, Mr Pritchard asked Mr Webb to organise two further searches as to whether the claimant had accessed his own medical records and that of a colleague [245]. The result found was that the claimant had accessed his own records but not that of the colleague [246].

4.37 On 19 November Professor Walker wrote to the claimant saying that following the claimant's further disclosures, information had been received that the claimant had accessed his children's medical records a total of 68 times between 2007 and 2019. Data was awaited about the claimant accessing medical records of his two friends and his own data. The claimant was told 3 further allegations were being added to the terms of reference for the investigation and that a further disclosure had been made to the ICO [600]. The letter said: "*The investigation will now need to also address the further allegations and I require you to contact Professor Hope-Gill to inform him whether you would want a further opportunity to be interviewed about this matter, provide a further statement, or for him to proceed with the statement that you have already submitted.*" The letter also said that the original letter contained a typing error with regard to the date of the first allegation running from 20 August 2006 and not 2008 [600-601]. The letter again said that Professor Walker would endeavour to complete the process as quickly as possible, the claimant could contact him with queries, and with details of the Employee Wellbeing Service and Dr Durning's role as professional support.

4.38 On 27 November 2019 the claimant emailed Professor Walker acknowledging receipt of the letter dated 19 November 2019 saying he had emailed Professor Hope-Gill to arrange another interview. He said: "*Thank you for your concern and advice. I have had a professional health consultations and treatment to help me during this difficult period, and in addition I will contact UHB's Employee Wellbeing Service as well. I am sincerely sorry for all the time that is being spent by all of you on my case, unfortunately I cannot change the past, but certainly I am working hard to prevent similar things from happening again*" [248]. The claimant also emailed Professor Hope-Gill saying he wanted to take the opportunity to have a further interview [250]. The claimant said in evidence that he considered he had no option to comply with a further interview. However, Professor Walker's email and the claimant's email to Professor Hope-

Gill show it was an option that the claimant himself decided to take up. They arranged to meet on 3 December 2019 [249] and the claimant originally said he would attend without his BMA representative if they could not make it. Ultimately the meeting did not take place on 3 December as the claimant's BMA representative could not attend and she did not consider it advisable for the claimant to attend alone.

Spousal maintenance hearing and commencement of first period of sick leave

4.39 On 6 December 2019 the claimant attended a hearing in relation to the spousal maintenance proceedings. He represented himself. The hearing did not go well. The hearing had to ultimately be postponed because the claimant broke down. The claimant was particularly upset about the suggestion he could be ordered to pay a lump sum rather than regular spousal maintenance because of the risk that the claimant may lose his job because of his actions in accessing his ex-wife's medical records. The Judge had also implied that option could be to order the claimant to sell his house. He also felt humiliated by his ex-wife's barrister asking him about his spending on food.

4.40 On 8 December 2019 the claimant had a serious attempted self harm incident. A concerned friend contacted the police who attended the claimant's home. The claimant had left a document which he called his will which said: *"I cant pay money to the woman who made my life misery. She humiliated me in front of everyone She ruined my life and my life at work. She wanted to get everything of me…"* The claimant was taken to A&E, assessed and later discharged.

4.41 Later on 8 December the claimant messaged Mr Durning [253] saying: "*I need the best divorce lawyer urgently. I tried to kill myself early this morning."* Mr Durning said: "*OK calm down – where are you now*." The claimant replied to say *"I'm much better now. I'm at home. The court on Friday was humiliating."* Mr Durning said: "*So just think a minute – what has made you get to this point?"* They then spoke. The claimant recalls Mr Durning saying that life would continue and the claimant had to wait for the procedure and not be anxious and that Mr Durning was trying to calm him down. He says that they met for a coffee at work and spoke about many things including the medical care the claimant was receiving. Mr Scott-Coombes said that at some point Mr Durning told him about the self-harm incident. Mr Pritchard said the same. Mr Scott-Coombes also knew the claimant had commenced sick leave.

4.42 On 9 December 2019 the claimant commenced sick leave. At around this time Mr Gidman started managing the claimant's sickness absence and arranged a meeting with the claimant for January 2020. On 10 December 2019 the claimant had his first CBT session [1044]. He had contacted the BMA and Health for Health Professional (HHP) to book a course of CBT. He had a second CBT session on 18 December 2019. Other sessions followed after that.

Self-referral to Occupational Health

4.43 On 16 December 2019 the claimant contacted OH to find out if a referral had been made and to chase the appointment. He was told there was no referral. He made a self referral [255]. The reason for request is recorded as: "*off sick with stress & anxiety/depression – divorce. Wants advice re extending sick leave – has contacted "EWS for Doctors". Urgent."* On 20 December 2019 the claimant

received a letter saying he would have an OH appointment on 8 January 2020 [256].

4.44 On 30 December 2019 the claimant's GP signed him off as unfit for work until 12 January 2020 due to "anxiety states."

Arranging second investigation meeting

4.45 On 6 January 2020 Professor Walker chased up what was happening with the investigation. Professor Hope-Gill replied to say that the first report had been to time but he had been struggling getting an appointment with the claimant that the BMA rep could attend, and he was still waiting for a date [263]. Mr Pritchard advised that as Professor Hope-Gill had been waiting 7 weeks for the BMA representative's availability it was reasonable to write to her with a couple of dates and tell her that the meeting would go ahead on one of them, and that the claimant could bring with him an alternative rep or workplace colleague. Professor Hope-Gill did so on 7 January 2020 offering dates of 14 and 21 January [607].

Mr Gidman's referral to Occupational Health

4.46 On 7 January 2020 the claimant's GP increased his medication dose to 40mg daily and provided a further fit note for "anxiety states" [221]. The GP entry records "*[C] is getting counselling for OCD, would like to try bigger dose fluoxetine agreed and review 4 weeks."* The claimant also attended a further CBT session.

4.47 On 8 January 2020 the claimant had an OH appointment with an OH nurse. He was told he needed to be referred by a manager in order to see a consultant. The claimant met with Mr Gidman on 9 January. Mr Gidman gave the claimant his personal telephone number and told the claimant the claimant could contact him by phone or email at any time. The claimant told Mr Gidman that he had recently been diagnosed with OCD and that he had seen a psychiatrist on a personal, private basis that the claimant had arranged. He told Mr Gidman about his self-harm incident. Mr Gidman, now knowing the management OH referral had not been made, prepared a OH referral form (but it was not sent until the claimant texted Mr Gidman again on 27 and 28 January 2020 [265-268] to remind Mr Gidman and chase it up.) The referral said Mr Gidman was concerned for the claimant's ongoing psychological state and the implications for the claimant's return to work. Mr Gidman referred to the claimant dealing with a number of personal issues outside of work as well as an internal disciplinary process. Mr Gidman said: "*Dr Binesmael is currently suffering from episodes of acute anxiety and has recently been diagnosed with a form of Obsessive Compulsive Disorder."* He based what he said on what the claimant had told him. Mr Gidman said in the referral he believed the claimant would benefit from medical support from OH and he would like to understand how to manage the claimant's heath issues and his potential return to work.

Claimant's second investigation meeting

4.48 On 9 January 2020 the respondent sent a letter to the claimant's ex-wife with a schedule of his access to her medical records, following Ms Fox and Professor Walker meeting with her [1149].

4.49 On 14 January 2020 the claimant met again with the Professor Hope-Gill [608-609]. Professor Gill-Hope sent out meeting notes that same day [271]. The claimant acknowledged that he had accessed the records of his wife, his

children, his two friends, and his own records. He said he had accompanied his wife to medical appointments and had been strongly involved in her health care problems historically and had indirect consent to access her records initially. He said he accessed his children's records as he had been involved in their care as a parent historically. He said one friend had asked the claimant to review her care and he was subsequently involved in her care in his department. He said the other friend had asked the claimant to explain his medical history. The claimant asked for mitigating factors to be included in the investigation report. These were that he had been under considerable personal stress relating to the case investigation and the divorce proceedings which had a substantial negative impact on his mental health. He had been reviewed by his GP, a consultant psychiatrist and referred to occupational health. He was receiving treatment and on sick leave. He said he considered that his mental health and his personality type had contributed substantially to his pattern of behaviour in accessing the medical records of his family. He said he was awaiting a formal occupational health review and report which may contain additional mitigating information. The claimant did not provide a copy of the clinical letter that Professor Tahir had sent to the claimant's GP. The claimant suggested in cross examination that may have been on advice from the BMA.

4.50 Professor Hope-Gill again told the claimant that his terms of reference were to establish whether the allegations were correct and therefore determining the impact of the mitigating factors was beyond the scope of the current investigation and his expertise as case investigator. He recorded that it had therefore again been agreed that the mitigating factors would be noted in the case investigation report. Professor Hope-Gill said in oral evidence that there was also insufficient evidence to draw a conclusions about the mitigating factors raised at that time. Professor Hope-Gill was told in the meeting about the deterioration in the claimant's mental health and sought assurances they were being addressed. He received assurances from the claimant and the BMA representative that the claimant had been reviewed by his GP, there had been a referral to OH, the claimant had been reviewed by a psychiatrist and was getting appropriate support for his mental ill health at the time. Professor Hope-Gill cannot now recall whether he was specifically told of the claimant's self-harm attempt at that meeting or whether he read it in the claimant's subsequent statement. Professor Hope-Gill's understanding was that the claimant was obtaining a psychiatrist's opinion about any formal diagnosis and its role in mitigation as it had been mentioned in both the meetings with him. He believed that such mitigation could be looked at further in the UPSW procedure.

Completion of spousal maintenance proceedings

4.51 The final hearing in the civil court spousal maintenance case took place on 17 January 2020. The claimant was order to pay a lump sum of £50,000 by March 2020 or otherwise face an order to sell his property.

ICO response

4.52 On 18 January 2020 the ICO confirmed no further action was necessary [610-612]. The ICO said there was insufficient evidence at that time to substantiate a criminal offence. It was noted that the investigations were ongoing and may take some time and the case would be closed in the meantime but an update should be provided when the disciplinary process was concluded. The ICO noted that the incident appeared to be an isolated case involving a lone member of staff.

Late January/early February 2020 and the Claimant's second written statement

4.53 On 21 January 2020 the claimant's BMA representative sent through some amendments to the meeting notes [271]. She said the claimant also wanted to submit a further statement which the claimant was currently drafting and there may also be a written statement from Ms Luen.

4.54 On 27 January 2020 the claimant messaged Mr Gidman to say he had called occupational health and there was no referral yet and he asked Mr Gidman to call them asap to sort it out [260]. Mr Gidman said he would follow it up first thing the next day.

4.55 On 3 February 2020 [276] Professor Hope-Gill provided an internal update saying he had met with the claimant three weeks earlier after a considerable delay in being able to meet. He recorded that the claimant wanted to submit a further statement and that he had set a deadline for that Thursday.

4.56 The claimant submitted a second written statement on 5 February 2020 [279-282]. The claimant said he wanted to emphasise that until the divorce proceedings in 2014 he had his wife's consent to deal with all her personal issues which included health care. He said the data disclosed as part of the matrimonial proceedings did confirm records were accessed a higher number of times during the period of the marriage up to 2014. He relied on his earlier witness statement as setting out the reasons for his actions after 2014 and said: *"At particularly stressful times I seem to lapse into the old habit of checking on my ex-wife's health."* He said again that he did not use, divulge to anyone, or print any medical records he checked for his ex-wife and did not keep the information in any form. He said he did not use any information in the divorce or spousal maintenance proceeding and did not access the records in the current spousal maintenance case of May to September 2019 [279]. In relation to his children he said: "*As I explained in my first statement, I over worry about the health of my close family, my children have gone through different illnesses and they still text me and ask my advice about their health issues. My actions are promoted by an underlying psychological need to check that my children are ok and have no new health problems. I had have never treated them in person, my role was complementary to the NHS to ensure that their investigations were within normal limits, or I advise them to contact the GP or A&E department. I have printed all my texts with my children that prove this point."* He said he had the written consent of his two friends to access their health records, and he attached copies. He said he had on occasion checked his own results before having the opportunity to see his GP which had avoided the need to take sick leave. He set out a summary of stressors in his life and a timeline of events.

4.57 The claimant provided a statement from Ms Luen, Cardiothoracic Surgical Care Practitioner and friend of the claimant dated 4 February 2020 [275]. She said: "*Taha has always cared for his family. We would often talk about our children and partners (including his ex-wife when he was still married). If any of his family were ill, Taha would get anxious and upset."* She said: "*Taha's marriage ended in 2014. This was not a surprise to me as over the years we had confided in each other regarding relationship issues. Taha would often discuss the issues he has with his ex-wife. The divorce has put Taha under a lot of stress due to the prolonged court proceedings, his relationship with his children and the financial stress. As Taha's McKenzie friend, I witnessed Taha cross examine his ex-wife in court. He did this in a gentle manner, and she confirmed that Taha*

had not provoked, threatened or used any of his medical knowledge of her conditions in any way."

The final investigation report

4.58 On 7 February 2020 Professor Hope-Gill completed his report [627-653] and sent it to Mr Scott-Coombes [285]. Professor Hope-Gill said the claimant had described accessing the medical records during the marriage in a supportive capacity and that the claimant agreed he should not have done so and had reflected on it. The report noted the claimant had provided reasons for continuing to access the records after the divorce including habit and the records being a reminder of his earlier and more amicable family relationships. Professor Hope-Gill noted that the claimant considered ongoing checking of the wellbeing of current and ex-family members, including his ex-wife, were a reflection of his own mental health and personality traits. Professor Hope-Gill noted that the claimant was currently awaiting mental health evaluation with respect to this. He noted the claimant denied using information to disadvantage the claimant's ex-wife. He noted the claimant had provided confirmation of consent to access records from two friends and had also provided statements of support about his integrity. Professor Hope-Gill wrote that it was beyond the scope of the investigation to determine if there were mitigating circumstances for the claimant accessing the medical records of his ex-wife which included stress relating to personal circumstances, his mental health, his personality type and pattern of behaviour. Professor Hope-Gill said it was also out of scope to determine whether information had been used to the disadvantage of the claimant's ex-wife.

4.59 On 7 February 2020 the claimant's GP signed him off work for a further 28 days with "anxiety states" [284].

Decision to proceed under UPSW

4.60 Mr Scott-Coombes emailed Professor Walker on 9 February 2020 [285]. He said his conclusions were:

> "*1) it is clear that the doctor has breached his ex-wife's confidence and infringed the Data Protection laws.*
>
> *2) It appears that he has consent from the two other individuals to access their medical records.*
>
> *3) He admits that he has looked at this own medical records. He acknowledges that this was wrong and has demonstrated reflection.*
>
> *4) The breach of access to his children's records is admitted.*
>
> *On the basis of (1) and possibly (4), in light of the seriousness of the legal infringement and against the express wishes of the third party, I would recommend to you that consideration should be given towards progressing to a formal hearing."*

4.61 On 11 February 2020 the claimant sent Mr Gidman an updated sicknote and an update about an eye condition. He asked Mr Gidman to expedite the claimant's appointment with OH. He said that he had attended one trauma MDT meeting and two thoracic MDT meetings in the last few weeks to familiarise himself with the work atmosphere and to see how he coped with non stressful work. He referred to the divorce case being out of the way, but that there was a lot of effort he needed to make to borrow money from friends to meet the award

made to his ex-wife, and in addition to the work related investigation and the tremendous stress on him due to it.

4.62 The claimant telephoned Mr Durning on 17 February 2020. He says he told Mr Durning he was extremely anxious and panicked when he received a letter, thinking it was about the UPSW process (in fact it was not). Mr Durning emailed Professor Walker [287] seeking advice, saying the claimant had said he had a panic attack thinking a letter was about the UPSW and asking where they were in the process as the claimant seemed terrified about getting a letter cold. Mr Durning recorded he had told the claimant he would ask Professor Walker, but that Mr Durning thought Professor Walker would probably call the claimant in.

4.63 On 25 February 2020 Mr Scott-Coombes wrote to the claimant to confirm the investigation was complete, sent a copy of the investigation report, and gave the claimant the opportunity to provide any comments by 12 March 2020 [614]. Mr Scott-Coombes explained he would then decide what action should be taken and the claimant would be informed in person.

First OH report

4.64 On 4 March 2020 the claimant attended a telephone mental health assessment with the Primary Mental Health Support Services. The practitioner declined to refer the claimant to a psychiatrist as it was unlikely a referral would be accepted on the basis the claimant's difficulties were not severe enough. The practitioner commented that he considered the claimant's difficulties appeared more reactive to the claimant's current stressful circumstances [1423].

4.65 The claimant saw an OH consultant on 5 March 2020 [617-618].

4.66 On 6 March 2020 the claimant was signed off for a further 28 days [290]. On 10 March 2020 the claimant met with Mr Gidman. Mr Gidman continued to offer the claimant support and again said the claimant could contact him any time if the claimant had issues or problems. The claimant and Mr Gidman did over time exchange various text messages. On 11 March the claimant sent Mr Gidman his updated sicknote. He asked Mr Gidman to email over the OH letter when it was available [292].

Claimant's comments on the investigation report

4.67 The claimant sent a letter on 11 March 2020 [615-616 and 295] at 9:33am with his comments on the investigation report. He said he had an appointment with the OH consultant on 5 March 2020 and a one hour phone consultation with the primary mental health support service on 4 March. The claimant said he would forward a copy of the OH letter when he received it. The claimant asked to add to the mitigating factors in his case. He said he understood his actions and had taken steps to prevent them happening in the future. He said he had reflected, enquired, studied and pursued systematic professional help to address his actions including medication, and CBT. He said again he had not divulged, printed, copied or benefited from his actions. He said he had married at 23 and came to the UK at age 30 and according to the culture and background of the country they came from he was responsible for the whole outside world correspondences of his ex-wife for more than 20 years including her healthcare and official correspondence. He said the divorce and personal conflicts did not affect his personal habits of checking on her and his family's safety and wellbeing. He said he realised he did that subconsciously without premeditation or to gain any advantage. He said he trusted he had proved he did not try to influence any divorce proceedings by his medical knowledge of his ex-wife.

4.68 At 10:38am Mr Scott-Coombes emailed Professor Walker saying the content did not alter his previous recommendation [294]. Professor Walker asked Mr Pritchard if they could progress to an extended panel now and Mr Pritchard advised that UPSW policy needed to be followed which involved Mr Scott-Coombes writing to the claimant to request a meeting to inform the claimant of the outcome of the investigation, and to then confirm the decision in writing together with a right of appeal against the decision to go to an inquiry hearing under the extended procedure. Mr Pritchard anticipated the BMA would encourage the claimant to appeal. He said they should start looking for external panel members in the meantime to save time later on. He also asked Mr Scott-Coombes to keep a copy of his decision making framework, referring to para 1.24 UPSW [293].

Decision making framework

4.69 The decision making framework is at [305]. Mr Scott-Coombes recorded that the claimant had accessed his ex-wife's medical records without her consent 249 times between 2006 and 3 October 2019 and on 80 occasions since the initial letter to the Heath Board on 13 November 2015. He said in evidence that he thought he had seen the letter from 2015 early on in the investigation. Mr Scott-Coombes said the claimant had accessed the medical records of his three children on 68 occasions between 26/12/2007 and 08/08/2019. The claimant had accessed the medical records of his two friends on 108 occasions between 17/3/2009 and 24/9/2019. The claimant had accessed his own records 150 times between August 2006 and 4/09/2019. Mr Scott-Coombes recorded that this access was in contravention of the Data Protection Act 2018 and 1998. He said his conclusions were that the claimant had accessed personal medical records on a huge scale over a prolonged period of time in contravention of the Data Protection Act. He said it was clear the claimant had breached the claimant's ex-wife's confidence and infringed Data Protection laws and that the ex-wife was explicit in the fact she did not consent to the infringement. He said the claimant had consent from the two friends, but this still breached data protection laws as the claimant did not follow due process. Mr Scott-Coombes said the claimant had admitted looking at his own records and acknowledged it was wrong and had demonstrated reflection, but it still breached data protection laws in not following process. Mr Scott-Coombes noted the breach of access to the children's records was admitted. He said: "*TB has provided mitigations in his letter of comment, but this is irrelevant to breaking the law and does not alter my recommendation.*" Mr Scott-Coombes concluded that there was evidence the law was infringed and was admitted by the claimant, and noted the seriousness of the legal infringement. He said the scale and the fact it was against the express wishes of a third party led him to recommend that the next step was to proceed to a formal hearing.

4.70 Mr Scott-Coombes' evidence was that he did consider the claimant's letter of 7 November 2019 before making his decision how to proceed. He said he had spent a considerable amount of time considering everything when referred to him. We accept Mr Scott-Coombes' evidence that he did so. Having heard Mr Scott-Coombes in cross examination, we find that the main factors for Mr Scott-Coombes, in terms of seriousness, was the claimant accessing his ex-wife's records on a large scale and which she was saying was against her express consent and which Mr Scott-Coombes understood to be breaking the law. Mr Scott-Coombes took into account what the claimant was saying about health issues but took the view that what he had before him did not provide obvious, absolute exoneration for breaking the law. He therefore considered that the

allegations raised sufficient concern and were of sufficient seriousness to justify going to a hearing under the Extended Procedure where all of the arguments could be aired before and assessed by an independent panel which would include whether the health issues mitigated or excused the conduct and what weight should be given to the mitigation. He did not consider it was appropriate for him to simply take what the claimant was saying at face value and just, for example, decide to take no further action. He considered that given the seriousness of the claimant's admitted conduct it was important for the panel to have the full range of potential sanctions open to them.

4.71 We also accept Mr Scott-Coombes' evidence that he gave consideration as to whether the claimant's mitigation gave rise to a capability issue rather than a conduct issue. However, his view was that the heart of the issue was a conduct issue as it involved an allegation of large scale accessing records potentially without consent. In particular, he had noted the claimant's references to being able to control his behaviour most of the time, that it was a habit, the claimant's references to accessing the records to gain gratification, and that the claimant had not raised mental health related issues in work/had maintained working as a surgeon prior to the misconduct coming to light. He believed those kinds of factors militated against it being a pure capability issue/ something that entirely exonerated the claimant's actions. He also had in mind that it was on the face of it difficult to attribute all of the conduct to any potential mental health condition, particularly the timing of the claimant's access to his ex-wife's records and the access of the claimant's friends records. There is a lack of clarity as to who actually made the formal decision to progress under the Extended Procedure. Professor Walker said in evidence it was his decision on the recommendation of Mr Scott-Coombes. UPSW says it is the Case Manager's decision. Mr Scott-Coombes did the detailed analysis, and wrote the decision making framework and did not shy away from explaining his decision making when cross examined. He accepts he liaised with Mr Pritchard and Professor Walker, particularly about which procedure it was appropriate to follow. He says, and we accept, it was felt that the alleged conduct was on the face of it extremely serious and could potentially result in a final written warning or dismissal. Mr Scott-Coombes was also clear in his views that it was appropriate for findings of fact to be made by an independent Inquiry Panel based on all the evidence available, including medical evidence presented. The claimant's additional comments of 11 March 2020 were taken on board by Mr Scott-Coombes but he did not consider they took matters any further than what he had already read and considered (hence his email to Professor Walker). The reality of the situation was, we find, that Mr Scott-Coombes undertook the analysis (with advice from Mr Pritchard) that was endorsed by Professor Walker and they were all in agreement as to the essential reasons why it should proceed under the Extended Procedure.

4.72 An OH report was produced dated 13 March. It said the claimant was not fit to return to work in any capacity and: "*A substantial proportion of his current ill health is in my opinion directly related to the internal investigation and the associated uncertainty regarding his career. I am optimistic that on conclusion of the investigation he will see a significant improvement in his symptoms.*" The OH doctor said she would see the claimant again in 2 months' time but should the claimant's symptoms improve significantly prior to this she was happy for him to return to work with agreement from his GP and other health professionals. She recommended a phased return to work on 50% of hours undertaking meetings and clinic duties only, with then a return to ward work, then theatre and finally on call duties.

Notification of the extended procedure and request for referral to psychiatrist

4.73 By 19 March 2020 the demands of the covid 19 pandemic were biting. Mr Pritchard emailed Professor Walker referring to this but also identifying that they had not yet fed back to the claimant about the decision to proceed to an Inquiry Panel under the Extended Procedure. Mr Pritchard said he had been planning for 31 March which could be by Skype [297]. There were difficulties arranging HR support because of pandemic related staffing complications [296].

4.74 On 1 April 2020 the claimant met with Mr Scott-Coombes. Mr Pritchard and the claimant's BMA representative were also in attendance. The claimant was told of the decision to proceed to a hearing under the Extended Procedure. No issue was taken with the process that was being applied. At the meeting the claimant asked for a referral to an independent psychiatrist. Mr Pritchard said it was his understanding this was not the standard procedure in the health board but he would go and check.

4.72 There were different viewpoints from the respondent's perspective as to what was the purpose of that request. Mr Scott-Coombes' evidence was that he understood the claimant to be asking the respondent to fund more psychiatric help from Professor Tahir and fund a further report. He looked to Mr Pritchard for advice. Mr Pritchard told us he understood the purpose of a separate psychiatric report, funded by the Health Board, to be for mitigation purposes. Mr Pritchard then spoke with Mr Driscoll the Workforce and OD Director. Mr Driscoll said Mr Pritchard's understanding was correct and that would normally be the individual who would obtain a report as it would act as mitigation in their case and the Health Board would not fund a psychiatrist report in these circumstances. Normally the respondent would only obtain a psychiatric opinion if it was recommended by OH which it had not been here. Mr Pritchard's view was that it was open to the claimant to go back and obtain a report from Professor Tahir or from another psychiatrist. We return to this point in our conclusions below.

4.73 On 2 April 2020 Mr Scott-Coombes wrote to the claimant [619]. Mr Scott-Coombes confirmed that he had decided that due to the seriousness of the allegations the matter should proceed to a hearing under the Extended Procedure of the UPSW policy. The claimant was notified of his right of appeal within 14 days. Mr Scott-Coombes confirmed that due to the pressures of the pandemic they could not comply with the UPSW timescales but would do their best to conclude matters as soon as practicable. The claimant was encouraged to use the Wellbeing services or equivalent services via the BMA. Mr Scott-Coombes said in the letter "*unfortunately, we would not be able to offer you the services of a Psychiatrist as you requested.*" The decision was not further challenged at the time.

4.74 The claimant did not exercise his right of appeal again the decision to take him through the Extended Procedure. Neither he nor his BMA representative raised at the time that the claimant should be dealt with under the Standard Procedure. Likewise, no suggestion was made by at the time by the claimant or the BMA that the process should have just halted. No request was made to modify the procedure in any way.

4.75 On 3 April 2020 the claimant's GP signed him off for 2 months with anxiety states [307].

4.76 On 27 April 2020 the claimant emailed Mr Gidman with his latest GP certificate and said he had an OH appointment on 7 May 2020. He said he had been worse after the passing of a close colleague [315].

Claimant's second appointment with Professor Tahir and second OH report

4.77 On 6 May the claimant had a further appointment with Professor Tahir [1056]. Professor Tahir sent a clinical letter to the claimant's GP. Professor Tahir recorded the claimant's self-harm attempt in the context of the court proceedings. Professor Tahir noted the claimant currently remained anxious about another ongoing important issue in his professional life related to the potential disciplinary hearing that was outstanding. Professor Tahir reported: "*He had accessed the medical records of his ex-wife and she had complained to the health board. He firmly believes that he did that over a period of years whilst in marriage and whilst going through divorce when he had come to know that she was unwell. This he reports was due to his obsessive nature to ensure he knew the wellbeing of his wife*." Professor Tahir said: "*He described some longstanding symptoms of hoarding, cleaning his surroundings in hospital and home, typing his own letters at work to avoid mistakes and delays, worrying about and checking on the safety of his family members and friends and being organised in his general life such as keeping spreadsheets for expenses. Although the previous diagnosis was documented as anxiety and depression, I also remain of the view that underlying are personality traits that fulfil the criteria for Obsessive Compulsive Personality Disorder (DSM 5) with preoccupation with details, perfectionism, over-conscientiousness, inability to discard worn out material and reluctance to delegate tasks."* Professor Tahir encouraged the claimant to remain on medication and continue with CBT.

4.78 On 6 May 2020 the claimant was also reviewed by OH with the report sent on 7 May 2020. Dr Smallcombe noted: "*Mr Binesmael reports that there is an investigation ongoing and that this is likely to take several months, with a set back due to the coronavirus pandemic. However, he himself is feeling better, more resilient with no negative thoughts of self harm. He is now aiming to return to work in mid June 2020."* Dr Smallcombe recorded: "*He is considering seeking a psychiatry opinion again, to establish if there is any additional underlying psychological issue but this in itself will not impact upon his ability to return to work."* Dr Smallcombe was supportive of a return to work in mid June 2020 on a phased basis. She said: "A *swift conclusion to the investigation process was recommended to help reduce further psychological impact."*

Claimant's return to work

4.79 On 1 June 2020 the claimant emailed Mr Gidman [319] saying he wanted to discuss preparation for a phased return to work. He said he was aware the department was moving to Llandough hospital and it seemed to be ideal for him. This was the peak of the Covid 19 pandemic and cardiothoracic services were being moved to Llandough hospital, away from the Heath hospital, to set up a "green zone". The claimant and Mr Gidman then met to agree a phased return to work plan where the claimant would initially do light duties with no on-call work. It was agreed the claimant would liaise with Dr Mohammed, the Rota Coordinator for cardiothoracic surgery and Mr Mehta, the lead surgeon. On 4 June Mr Mehta contacted Dr Mohammed about making the phased return arrangements for the claimant [1692]. Dr Mohammed discussed duties with the claimant before issuing the rota. For the first two weeks from 8 June 2020 the claimant shadowed another doctor with no clinical commitments. At the time they were still at the Heath hospital site. Dr Mohammed met with the claimant on his first day back to

reassure the claimant and talk him through the changes to practice due to the pandemic. Dr Mohammed explained to the claimant he would initially be supernumerary. Dr Mohammed told the claimant that he could go home at any time and did not need to stay with Dr Mohammed until the end of the day. The claimant asked to move to the thoracic theatre. His main area of expertise prior to his absence had been cardiac surgery. Dr Mohammed acceded to the claimant's request to be allocated to the thoracic theatre on the rota.

4.80 In early June the claimant also met up with Mr Mehta. Mr Mehta recalls the claimant mentioning some issues he had prior to his sickness absence including mental health difficulties, difficulties with the claimant's ex-wife and their divorce proceedings. Mr Mehta recalls the claimant saying he had found out that he had a condition like OCD which he thought he may have had for a number of years. Mr Mehta sympathised and told the claimant they would do what they could to support the claimant's return to work. He understood that the claimant's condition was being well managed and did not understand from the claimant that there was any element of the role that needed to be adjusted. Mr Mehta recalls the claimant mentioning he had accessed his ex-wife's medical records and that the UPSW process was ongoing. Mr Mehta told the claimant that they would support him through the process and did not get into the issues with the claimant beyond that.

4.81 In the week of 22 June the department move sites. Services resumed at Llandough in the week starting 29 June 2020. The claimant worked two shifts, one where he was independent and one where he was coupled with a colleague. The claimant then moved to work three shifts a week, most of which time he was coupled with a colleague for support. The claimant was not doing night shifts or weekend duties. On 3 August 2020 the claimant resumed normal duties and did his first night shift.

4.82 Dr Mohammed would regularly see the claimant and told the claimant that if he was feeling pressure he should speak to Dr Mohammed at any time. Dr Mohammed did not pick up from the claimant any concerns that the claimant did not feel safe to practice or that the claimant as unhappy with his duties at all. Dr Mohammed told the claimant that if he ever felt uncomfortable with the rota allocations then Dr Mohammed could change them. For the first two months Dr Mohammed discussed the rota allocations with the claimant on a weekly basis. After that they still saw each other fairly frequently. Mr Mehta also did not receive any feedback from the claimant or from colleagues about any concerns and believed that the reintegration was going smoothly.

CBT therapist report

4.83 On 18 August 2020 the claimant's CBT therapist prepared a report [1058]. Mr Simpson said: "*He is very agitated by the potential consequences of these allegations and his personality traits of obsessional rumination mitigate against a rational approach to these difficulties*." Mr Simpson noted Mr Tahir's opinion that the extreme traits and chronicity of behaviours such as hoarding, ruminating and checking fulfil criteria for a diagnosis of OCPD. Mr Simpson said he concurred and that the claimant should remain on medication and seek further help from an appropriate therapist. Mr Simpson said the claimant's moral, ethical and cultural beliefs are very important to him and that the claimant states he feels he is particularly affronted by his ex-wife's behaviour in raising these allegations. He commented: "*He has assured me that he did not use any information gained in his accessing of his family's medical records in the legal processes of his separate and divorce. I have found him to be an honest person and his perfectionism and attention to detail tend to be consistent features of his anxious*

thinking. I have not found any evidence of maleficence in his cognitions and consequent behaviour and am pleased that my opinion might be able to help him through this very difficult period in his life."

The first Inquiry Panel

4.84 On 15 September 2020 the claimant was sent a letter stating the Inquiry Panel hearing would be held on 16 October 2020. It had been a time consuming process for the respondent to appoint individuals to the panel and to find a date when everyone was available [308-309, 320-322, 325, 337, 339-345, 348 -350, 352-357, 368, 371]. The letter said it was alleged the claimant had breached his contract of employment and set out the individual allegations relating to the access to medical records [623 – 626]. The process was explained in the letter.

4.85 The Extended Procedure requires a full hearing with representation before a 3 member independent panel (the Inquiry Panel). In short form, the Inquiry Panel makes findings of fact and recommends whether there should be a disciplinary hearing and what the potential sanctions could be. There is then a separate Disciplinary Panel hearing following the Inquiry Panel hearing (where appropriate) by a different panel.

4.86 The first Inquiry Panel hearing was due to take place on 16 October 2020. On the day, the respondent's counsel asked the panel to recuse themselves when the panel had been overheard, by the claimant's BMA representatives, discussing the case in private at the start. The concern expressed was about the risk of apparent bias. The claimant's counsel at the time submitted the hearing should go ahead, identifying the psychological pressures the claimant was facing. The first Inquiry Panel ultimately decided to recuse themselves. The respondent tried to arrange a fresh panel as quickly as possible and were able to find new contacts who were able to assist on the following Wednesday. Mr Pritchard messaged the claimant that evening to confirm the arrangements [392].

4.87 The claimant was granted emergency annual leave for the interim period. This was done by Mr Gidman as a supportive measure because if the claimant took sick leave he would not be on full pay. The claimant was given professional leave for the hearing date itself [421]. Mr Gidman said to the claimant he wanted to support him as much as he could and wished him luck saying he was sure things would work out. The claimant had said to Mr Mehta and Mr Gidman [422] that the effect of the postponement was instant and very bad on him but luckily Mr Pritchard had texted him on the Friday night to say the meeting would take place the following Wednesday. The claimant said that in light of new correspondence between his defence and the trust legal side he had a lot of work to do over the next few days and that he also felt that due to his very preoccupied mind doing clinical work would not be safe or wise.

Claimant's further witness statement

4.88 On 19 October the claimant submitted a further statement [404]. He said he had the insight and ability to judge the previous incidents. He said: "*I now understand that accessing the medical records of myself, my family and my friends was wrong and should not have occurred. I did not divulge, e-mail, print, process or use the medical data that I saw on the hospital computer screens in any way and did not obtain or gain from it. The only purpose was to ensure the medical wellbeing of those seven close persons (myself included), to give them informed professional medical advice, and to refer them to the appropriate speciality through the normal pathways.*"

4.89 The claimant in his statement said at the time of accessing the health records he considered himself to be one of the doctors looking after the health of those people and he did not consider them differently than ordinary patients. He said he was aware of GMC guidance for doctors only to treat and prescribe themselves and close relatives in strict circumstances but that he was not prescribing. He said he referred himself and others to the appropriate specialists when required and that he raised concerns to specific points to the treating doctors and over the years his actions proved to be helpful and essential to their treatment.

4.90 The claimant said, in his statement, his understanding of data protection and confidentiality at the time was that access to medical data should be for justified medical purposes and not for a personal reason, should be legitimate and legal (which he considered he did by using his own login details), usage should be minimised to the required purpose only, the data of a patient should not leave the hospital premises and should not be divulged or communicated unnecessarily without a clinical reason. He said he had only seen internal policies recently in the proceedings, but he had interpretated the internal policy that prohibited checking your own data or relatives or friends to mean the restriction only applied to non-clinical workers. He said his understanding was that the GMC had never specifically prevented doctors from doing so.

4.91 The claimant said: "*I looked at myself as a doctor who is involved directly and indirectly in ensuring the medical wellbeing and the safety of oneself and family partially due to the complex personality disorder that I have, but mainly due to my high sense of responsibility and attachment to my profession, and to some extent to the different background and long career with old understandings. I even warn my friends when walking from tripping on a step or a stone in the street. I keep my colleagues' belongings safe if left unattended. I always shred or threw clinical data or handover sheets appropriately.*" He said he had never knowingly or intentionally or purposefully breached the law or GMC guides or trust policy.

4.92 The claimant said when married he took care of all his ex-wife's correspondences. He said that the long relationship made the divorce in 2015 irrelevant to his subconscious and his doctor thinking. He said he therefore did not exclude her in his thoughts as being a family member and mother of his children such that he was still caring for her health and wellbeing and continued with his usual doctor routine for her. He said his trigger to ensure their health wellbeing was illness in the family or request for a medical opinion. The claimant said he had accompanied his then wife to almost all of her hospital visits which were numerous and were why he looked at her records more than he did his own. He gave some examples of such occasions when they were married and said that on one occasion he had referred his ex-wife to Mr Scott-Coombes. The claimant said he had the understanding he had consent from his ex-wife to participate in her medical management.

4.93 The claimant said he did not appreciate his ex-wife's consent was jeopardised by the divorce. He said she had emailed him at the end of 2015 and early 2016 about other matters and had not prohibited him to see her medical investigations, when she could have set that out rather than complaining to the respondent. The claimant said the pattern of access illustrated his genuine medical concerns, for example, he had accessed records three times on 18 August 2008 as he was waiting for a blood test result to exclude a serious condition. He said his children had told him that his ex-wife was going through

difficult health issues in 2015 and 2016 and had subsequently had a surgical procedure and so, despite the divorce, he kept an eye on her results aiming to advise if required. He said that when she was doing well in 2017 and 2018 his checks on her became minimal. He said that in 2019 he checked his results and at the same time checked on hers and the record confirms he did not open any record as there was no new test to see. He said that in October 2019 he revised 7 of her blood results as he was looking for a specific blood test that had a genetic predisposition as an illness of his daughter had initiated him to think his daughter may have the same disease as his ex-wife.

4.94 In his written statement the claimant said he had text messages from his three children confirming they had asked him about their health issues and he had included messages with his daughter from September 2019 to December 2019 as an example to show the degree to which his children sought advice from him and to justify his clinical need to access her and his ex-wife's blood records in October 2019.

4.95 The claimant said he had originally been told that he had accessed his ex-wife's records on 249 occasions and that he did not at the time deny or doubt this figure as it came from the highest authority in the Trust. He said: "*This in itself was severely stressful information, to realise that I do things without a purpose and without remembering them. I thought I was crazy or seriously mentally ill and eventually pursued this direction to treat and defend myself. I knew I used to check on my family, including my ex-wife, but I did not realise that the number of times I accessed her records was that numerous, about 20 times a year or twice a month."* The claimant said after reviewing the documents he did not think that 249 was the correct number and his analysis was that he accessed the medical records 46 times in 14 years. He had accessed his own 26 times, his eldest son twice, his younger son 5 times and his daughter 5 times. He said: "*There is no obsession as I thought initially. I could almost remember most of the occasions and medical reasons for my clinical search."*

4.96 The claimant said he could see that now, after the divorce, it was inappropriate to check his ex-wife's results but there was no malicious intent or motive other than excessive medical sense and care. He apologised profusely and said he would never do it again and he had proved in the past year his ability to refrain from doing so. He said this proved that his medical treatment and CBT sessions had been effective and successful in supressing/controlling his OCPD behaviour. The claimant said that during the divorce civil proceedings he had also been conscientious not to include any knowledge about his ex-wife that came through his work and had not pursued health questions of her despite the fact he had information he could have used, as he did not want to risk his position as a doctor.

4.97 The claimant said that on 13 September 2019 he sat an online test about his personality type. He said he always thought of himself as having a degree of OCD. He said he realised after seeking professional help that in fact: "*either I have the full manifestation or a powerful trait of OCPD… which is different from [OCD] in that the patient does not recognise her/his atypical behaviour, in fact she/he will present justifications for his/her actions. OCPD characterises by excessive attention to details, making lists, adherence to common steps, laws, habits, hoarding, obsession with details, difficulty in delegating tasks to others, and misery or dislike spending unnecessarily."* He also referred to some childhood experiences he thought contributed to his worrying personality and to some physical health conditions.

4.98 The claimant said that the period since his ex-wife's complaint of 25th September 2019 had been an extremely difficult time for him and the impact of the investigation on his mental health led to a self-harm attempt on 8th December 2019 and severe anxiety-depression period for more than six months, during which time he received medical treatment, CBT and psychiatrist consultations. He said he still did not feel well. The claimant said his depression, stress and anxiety were compounded by having a "strong trait" of OCPD, the work complaint and investigations, the acrimonious divorce in 2015-16, his mother's ill health and subsequent death, financial strain caused by the divorce settlement and spousal maintenance, meaning he needed to borrow money from friends as he had been ordered to pay £50,000 to his ex-wife by a deadline of 13 March 2020.

4.99 The claimant said: "*Of note, the civil court judge had told me on 6th December 2019 that a lump sum order rather than monthly maintenance was more likely due to the possibility that I may lose my job. As my ex-wife's barrister had implied to the judge due to my actions at work. The judge implied that an order to sell my house to pay her was an option. The judge had made in the court order of 17th January 2020 that if I do not pay my ex-wife, she will make an order to sell my house, despite my attempts to convince the court that I could not live with my new wife as my personality does not make the living with others an easy task.*"

4.100 The claimant referred to his previous good record and that in the past year he had been faced with the prospect of losing his job. He said he had taken steps to learn about his personality traits that impact his actions. He said, since his return to work in June 2020, he considered he had performed his duties to patients professionally and skilfully. The claimant provided a bundle of documents he was relying upon that included the two clinical letters from Dr Tahir.

Second inquiry panel hearing

4.101 The second Inquiry Panel hearing took place on 21 October 2020. The panel was made up of Ms Bayoumi, a barrister, Dr Blackford a consultant dermatologist from a neighbouring trust and Ms Robinson, head of Operational HR at a different neighbouring trust. The transcript starts at [426].

4.102 The claimant was presented by counsel who provided some written submissions in advance [416]. The claimant's counsel argued the claimant had not acted unlawfully as he acted in the reasonable belief he had in law the right to obtain the data accessed and did not know at the time the access was unauthorised. It was argued that his family relationships meant he had consent to access their records which was not withdrawn after the divorce. It was said the claimant had unknowingly breached the Trust's data protection policies as the claimant at the time believed he had a genuine legitimate care relationship with the individuals concerned. It was said in mitigation the claimant relied on his medical condition of OCPD compounded by his INFJ personality type and that the claimant had undergone CBT to try to overcome his symptoms and had not felt it necessary to access records again. The claimant's counsel set out that the claimant relied on his good character, clean disciplinary record, and the profound impact the proceedings had had on him.

4.103 Mr Webb attended the Inquiry Panel hearing as a witness. Mr Webb confirmed that there were 46 separate occasions with 249 records accessed in total over the period.

4.104 The claimant also gave evidence to the Inquiry Panel. He gave evidence of traumatic childhood experiences, which he said made him very cautious and conscious of human errors and mistakes and how as a doctor he felt so responsible for his family and friends and those who asked for his medical advice. He said he had done a personality test after he received statements from his ex-wife and children in the matrimonial proceedings in September 2019 where, for example, his son had said "*living with my dad is as if you are walking on egg shells."* The claimant said he thought at the time he had a very rare personality which made him very concerned about people living around him. He said that later he thought a more accurate description of him, in addition to this personality, is symptoms of OCPD. He said he only learnt about OCPD at a later date. He said OCPD meant he did things like making lists, gathering data, making excel spreadsheets, being agitated when things go wrong or are a surprise, hoarding, and frugality. He said it meant he was very keen to keep people around him in very good health especially his children and ex-wife and his brain did not recognise that she had become his ex-wife. He kept her a part of the family and part of his routine check. He said he had good medical reasons to make sure she was alright. He said he accessed his daughter's record on the 16 October and did not open any record as he just checked and found she had no new investigations. He said that on 3 October he had been looking for the medical condition in his ex-wife's records that his daughter might be carrying. He said: "*at that time I wanted to remind myself with the results of her mother so my OCPD put me, first blinding me about that my ex-wife became ex-wife I still considered her family and second made me very anxious very alert about the wellbeing of my family."* The claimant said, when asked about accessing his ex-wife's records: "*most of the time there was medical reason a good medical reason has to make sure that she is alright I cant recall anytime that I looked at it just to look at it."*

4.105 The claimant said that it was after the court session on 6 December and the conduct of his ex-wife's barrister and his ex-wife complaint's had affected his life so badly to the extent he tried to take his life on 8 December and his GP in January had then doubled his medication dose.

4.106 The claimant said in cross examination at the Inquiry Panel he had done the mandatory courses for revalidation in 2014 and 2019. He accepted that he had seen the policies before the investigation took place but said he had interpreted them differently [435]. He said he considered himself at the time to be part of the treating team of doctors. The claimant was asked in cross examination at the Inquiry Panel whether he was (now knowing the number of dates on which he had accessed records) still saying he felt compelled to look at records even though there was no good reason to do so. The claimant said it was difficult, and gave the example of when he looked at his daughter's blood results and his ex-wife's in 2019. He also said: "*if my children tell me their mother is not doing well and I checked and she's waiting for surgery and I check on her every month that means I'm waiting for the operation to be done to check on her. I am compelled in the same time at that time I was justifying these actions medically so am I right or wrong I don't know the answer but that's how I feel now differently from what I felt in November and February based on new data new information I'm analysing myself as my psychiatrist as the panel here so I don't know the real answer.*"

4.107 It was put to the claimant in cross examination at the Inquiry Panel that he knew what he was doing was wrong all the time and that he had controlling behaviour over his family which was why he accessed the records. The claimant

accepted that it was possible, but he did not agree with the word controlling, saying it was about for example checking blood results. It was put to the claimant that having been through an acrimonious divorce he could not have thought his ex-wife would consent to accessing her medical records. He said: "*I didn't ever think of that because the relationship between me and her was so long when I was thinking of her as a person or as a patient or as very close relative family member whom I want to make sure that she's alright okay if this is obsession I accept that but I was at that time I was thinking that I was doing it for her own good and for my rest of mind and children peace of mind that they know their mother is alright I accept that I was wrong…*"

4.108 In relation to the application to extend spousal maintenance he said: "*The court order of 2015 ends in May 2019, and when I didn't hear from my ex-wife in April, I expected that she was not going to pursue anything. So I was waiting until April. And that's why in April I started to buy a new house with my current wife. So I re-mortgaged my small house and we bought a new house in June, so started looking for houses in April 2019, so yes there was a small shock but I was expecting it because the court order will end in May.*"

4.109 It was put to the claimant in cross examination at the Inquiry Panel that he had accessed his ex-wife's records on 3 October 2019 and had then on 7 October written to her solicitors saying he did not intend to request any further information about her health. It was said the claimant was able to write this because he knew what her health was. The claimant said: "*Because I don't want to put myself in trouble…*" and that if he had started to talk more medically in the spousal maintenance proceedings he would be in the same situation that he was now in. He denied that he had checked the records on 3 October for that purpose. When he was asked what would have happened if he had seen his ex-wife's letter of complain in 2015 he said he would have stopped immediately if he had known he had no consent.

4.110 The claimant talked about the will he wrote on 8 December 2019 and said that he was expressing his feelings at the time about the humiliation he had in the civil court where he had been asked how much he spent on his food. He spoke about his reputation in work and in his community that his ex-wife was hurting. He said he was not aware at the time that accessing records without printing was against the law.

4.111 It was put to the claimant that if he was accessing the records for clinical reasons, why he had looked at all four records on 16 April 2019. The claimant had said when he wrote his statement in November 2019 that had been the most vivid in his memory. The claimant said he thought that the original person he had looked at for some reason was his own and in relation to his family: "*Yes, its obvious that I wanted to make sure that everybody is alright.*" He denied that it was nosiness or curiosity and said that if that was the case then the accessing of the whole family's records would have been more frequent.

4.112 It was put to the claimant that he had changed his tack in defending the allegations and that the initial defence had been that the claimant was suffering from a mental health impairment which rendered him unable to stop himself from accessing records. But that the records since revealed that there were huge gaps between access so that this argument was no longer sustainable. It was put to the claimant he had then changed his defence to argue a patient/ doctor relationship. The claimant said that he initially thought he was defending a different allegation because the records of his access were not originally made available to him and that his interpretations over time had been based on the

logical analysis he was doing at the time and the data before him had been changing.

4.113 The claimant mentioned at the Inquiry Panel, against the background of being asked about the clinical letter from Professor Tahir of May 2020, his earlier request to Mr Scott-Coombes for referral to an independent psychiatrist. He said: "*so I wanted a different opinion from your side, from the trust side if it was possible, because I thought you might consider, someone might consider that my psychiatrist is biased by what maybe say to him or so I requested independent psychiatrists but my request was denied…"* The claimant was asked why he had disclosed Professor Tahir's letters and he said: "*To prove that after the effort, to check why I did what I have done what efforts that I did to prevent it from happening again and actually what did I actually access any medical reports after that or not."*

4.114 The claimant said to the Inquiry Panel chair he was maintaining that OCPD played a part in his access to the records because of his need to ensure his family members were fit and healthy. He said: "*but not under the compulsive part, under the bit of being very…meticulous, being very precise or punctual*." He agreed his case was that on most of the times he had a clinical reason why he accessed the records.

4.115 The claimant was asked if he kept a record of the number of times he accessed and what he found, for his own peace of mind, given his evidence about his use of spreadsheets. He said he had kept a record only for himself not others but that it was not taken from records but from his own recollection of for example, a date he visits his GP. The chair also put to the claimant that Professor Tahir had not gone as far as saying the diagnosis was causative of the claimant's actions in accessing the records. The claimant accepted this saying: "*I don't know myself if it was causative. It is possible, very possible."*

4.116 In closing submissions at the Inquiry Panel Ms Bayoumi said to the claimant's counsel it did not look like there was anything other than the claimant's assertions that would link his OCPD to the conduct in question. Ms Keogh accepted that the reports were very brief but submitted that if the panel listened to the claimant's evidence the pieces fit together as the picture portrayed is that of OCPD. She said of the report (use of the word report is her terminology): "*So even though the report doesn't go that far, what the is trying to get to is showing the treatment was undertaken, so it's for different purpose."* There was no specific submission put to the Inquiry Panel about disability discrimination.

4.117 On 26 October 2020 the claimant then returned to work.

Inquiry panel part one decision

4.118 On 6 November 2020 the Inquiry Panel produced the first draft of their part one report. The Inquiry Panel upheld the allegations. Their part one report containing their findings and facts is at [461]. They found the claimant did access the records as alleged, which he had admitted. They said they accepted that 46 occasions appears to be less than 249 but they accepted the undisputed evidence of Mr Webb that simply relying on the number of occasions, rather than the number of records or documents accessed does not accurately reflect the gravity of what in fact occurred. They found on the evidence before them that the claimant was not acting with his wife's consent, within the meaning of informed consent, prior to the breakdown of their marriage. The panel found that after the breakdown of the marriage there was no basis on which the claimant could

reasonably have thought he was still acting with implied consent. They also found the claimant was not acting with the consent of his children when accessing their records as opposed to the claimant informing them of what he did after the event. It was accepted the claimant had the consent of his two friends.

4.119 Following the hearing the claimant's representative had written to the panel chair seeking permission to rely on further evidence which was email evidence from the claimant's daughter about seeking his advice about medical matters and various references from colleagues. The claimant was permitted to provide this evidence by 2 November with the trust having the opportunity to make submissions in response. The Inquiry Panel considered the references but found that they were not of relevance to their decision as it was accepted that the claimant was a well respected member of the department with no concerns raised about him or his clinical abilities, and also that on the face of the references they had no way of knowing that the authors were aware of the allegations the claimant faced. The Inquiry Panel were concerned about the provenance of the email from the claimant's daughter and also that the management side had been deprived of any opportunity to cross examine the claimant about it.

4.120 The Inquiry Panel found that the claimant's conduct was a breach of an express term of his employment contract and a breach of the implied term of mutual trust and confidence. They did not accept that the claimant had a legitimate specific purpose to access the records. They rejected the claimant's interpretation of the Trust's policies and found that on any reading it was clear the policies (which required employees accessing patient data to have a legitimate care relationship with the patients or legitimate administration reason to do so) were aimed at all employees and not those with a non-clinical role as the claimant had suggested. The panel quoted from the various policies which included, under the 2017 Data Protection Procedure, that staff were not permitted to access their own, a relatives or friend's personal data for their own purpose. They noted that the claimant had not denied knowledge of the internal policies or that he was not aware of them at the material time. They said: "*The Panel do not consider that Dr Binesmael's explanations bear any scrutiny and that the same are disingenuous attempts to justify his actions after the event. Further, the Panel do not accept that Dr Binesmael had a genuinely held belief that he had a legitimate care relationship with any of the individuals concerned, such as to justify his access of their records."* The panel found this was the case even with the two friends who gave their consent, as if the claimant had genuinely believed he was part of the care or treatment team they considered he would have documented his findings and communicated with other physicians.

4.121 In terms of assessing whether there were relevant mitigation factors, the panel said they had taken into account the claimant's long service, and otherwise clean disciplinary record. They accepted he was a well respected member of the department. They said they had looked at the 20 references the claimant had sent in and said again it was not disputed that the claimant was a well respected clinician. They said: "*The Panel therefore do not consider that the references (which notably do not appear to suggest that any of the authors are aware of the allegations Dr Binesmael faces) are of relevance to the Panel's findings and recommendations."* They also said: "*The Panel also accepts Dr Binesmael's evidence of the personal difficulties he has endured following the breakdown of his marriage and that he suffered with an acute period of mental health difficulties that culminated in the events of December 2019 and his attempt to take his own life. The Panel wish to express their genuine concern for what he has gone*

through during that time." They also noted it was to the claimant's credit that he had admitted fault immediately and cooperated fully with the investigation. It was to his credit he had volunteered the information about his two friends. The Inquiry Panel also accepted it was relevant the claimant had undergone his mandatory Information Governance training, albeit it was only done in October 2020.

4.122 The Inquiry Panel said they did not have any evidential basis to doubt the diagnosis of OCPD. They noted the diagnosis was only made in May 2020 despite an earlier consultation in November 2019 where at that stage the only reference was to possible underlying personality traits rather than a recognised medical condition. They said that it could only be relevant mitigation if there was some evidence to support the contention that the OCPD was causative of the actions in accessing the records over the period of years and they could not accept that it was. The panel relied on the fact that Professor Tahir did not suggest this causative link in his letter which the claimant had accepted. The Inquiry Panel also concluded the claimant's explanation of his need to check on the health of his family and his description of his condition was inconsistent as the claimant did not keep any written record of the times he accessed the medical records of his ex-wife and children. They also observed the claimant was able to stop his conduct when confronted with it despite not having received treatment prior to October 2019. At what is presumably the final version of the part one report at [478] it is recorded that the evidence provided showed he had started on Fluoxetine 20mg daily since October 2019 (which was later increased) and that he commenced CBT at the same time. Ms Bayoumi added in her witness evidence that whilst it was not expressly referred to in the Inquiry Panel report, it was also considered the claimant's condition could not be of relevance to his actions in accessing the records of his two friends, as the claimant's case was that they had asked him to do so, not that he was compelled to check them.

4.123 The part one report was sent to the claimant on 6 November 2020 [480] with the opportunity for any corrections of factual matters. Some suggested amendments were raised on the claimant's side which we understand related to some typographical errors and also treatment received by the claimant. The final version of the part one report was then sent to him on 25 November 2020 which included amendments to note the CBT sessions attended and the medication the claimant had been taking [482]. On 25 November 2020 Professor Walker sent an email [490] to Mr Pritchard saying he had no proposed amendments to raise and: "… as *strongly a worded outcome as we might have hoped for… I just wish he would start actually showing some contrite behaviour and acceptance of his error. That does not come across at all here…"* Mr Pritchard responded to say [489]: "*I would say at the Hearing, Taha was very clear that he did wrong and I felt assured that he would never do it again however he did provide a lot of mitigation which I assume was to try and reduce the sanction against him."*

Inquiry panel part two decision

4.124 The second part of the panel report is dated 27 November 2020 [484] and was concerned with the panel's conclusions as to whether the claimant was at fault and to set out their recommendations for disciplinary action. They found the claimant was responsible for the actions and that they amounted to breaches of the Data Protection Act and UHB policies. The panel said that given the nature of the conduct and their findings they recommended that a disciplinary hearing take place, but that was ultimately a matter for the Medical Director.

4.125 In terms of sanction the panel noted that the disciplinary panel would be unable to exceed the recommendation regarding sanction. The Inquiry Panel

reminded themselves of the range of options available and recommended that the disciplinary panel, if convened, ought to consider whether dismissal was an appropriate sanction. They referred to the conduct taking place over an extended period of time, that it involved the access of several patient records and that the claimant was well aware his actions were in breach of good practice, the Caldicott Principles, Data Protection Act, UHB policies, and his terms and conditions of contract. They said a decision to take no action would not be appropriate or reasonable in the circumstances and nor would be an oral statement requiring improvement or a written warning, which would not reflect the gravity and seriousness of the conduct in question. They said: "*As per our findings of fact, the Panel do not accept the justification and reasons put forward by Dr Binesmael for his conduct. The Panel do not consider that Dr Binesmael's explanations bear any scrutiny and that the same are disingenuous attempts to justify his actions after the event. Further, the Panel do not accept that Dr Binesmael had a genuinely held belief that he had a legitimate care relationship with any of the individuals concerned, such as to justify his access of their records."*

4.126 The inquiry panel repeated again they did not find OCPD to be causative of the claimant's actions. They said it was appropriate and reasonable for the disciplinary panel to consider whether dismissal is an appropriate sanction but that the Medical Director may disagree that a disciplinary panel is required and he or any disciplinary panel may disagree with their recommendation on sanction, particularly in view of the mitigating factors.

4.127 When the part 2 report was received Professor Walker commented to Mr Pritchard: "I *am relieved to see that they have actually done the right thing. I am also saddened that one of my colleagues has acted in this way throughout. Let's convene a disciplinary panel…" [*494].

Convening of disciplinary hearing

4.128 On 2 December Mr Pritchard emailed the claimant saying that a disciplinary hearing would be chaired by Professor Walker and the claimant was invited to say if he preferred for it to be before or after Christmas [497]. The claimant said he would take advice from the BMA but most probably after Christmas.

Claimant's absence on sick leave and request for ill health retirement

4.129 On 15 December 2020 the claimant emailed Mr Mehta [501] saying: "*I had finished work today with great difficulty. I do not feel safe to continue to work. I called Aidil to inform him as well. I will get in touch with my GP ASAP…*" He copied in Mr Gidman.

4.130 When Mr Mehta received the claimant's email of 15 December he replied to say he was sorry the claimant was feeling unwell and referred the claimant to Mr Gidman to manage the claimant's sickness absence. He said he and the claimant could speak when the claimant felt well enough to return to work. At the time Mr Mehta anticipated the claimant would have some time off on sick leave and then return.

4.131 On 16 December 2020 the claimant then spoke with Mr Gidman. The claimant told Mr Gidman he had made a decision he wanted to take ill health retirement and would not be returning to work. This came as a complete shock to Mr Gidman. He says in his witness statement, which we accept: *"It was a total shock that such a respected and valued colleague would make such a*

monumental decision so quickly without any prior discussion." Mr Gidman told the claimant that he wanted the claimant to stay and would help and support the claimant through the difficult period. He said that surely there was something they could do to change the claimant's mind. He said he felt it would be awful to see someone who had trained at that level and who had provided such a high level of service to patients for so long to leave under those circumstances. He said again that the claimant could not leave on those grounds and surely there was something that they could do, whatever that might look like.

4.132 Mr Gidman says, and we accept, that the claimant remained absolutely determined that he wanted to leave the organisation and Mr Gidman's attempts did not make any difference to the claimant. The claimant made no suggestion at all then, or later on, that he could or wanted to do something else within the health board as an alternative. The claimant did not raise any complaints with Mr Gidman or say that he felt unsupported. The claimant just remained adamant he had made the right decision and that by making the decision he was already feeling more positive about himself and the future.

4.133 Mr Gidman felt shocked, saddened and concerned the claimant may be making a significant decision without full consideration. He contacted OH and made arrangements for the claimant to have an urgent appointment on 23 December [500]. Mr Gidman said in the referral he was concerned for the claimant's ongoing psychological state and the implications for the claimant's future employment [504].

4.134 On 17 December Mr Gidman emailed Mr Mehta and Mr Wheeler saying the claimant had contacted him the previous day and had followed it up that day with HR, initiating the ill health retirement process. Mr Gidman said he felt the claimant may be making some irrational decisions which he may regret in time due to his current state of mind. He said: "*I tried to coach during our conversation yesterday however he seems fixated on going down this route. Could one of you contact Taha and provide him with some professional support please? I won't action anything in relation to this request until I receive feedback following your discussion with Taha."*

4.135 Mr Wheeler did not initiate contact with the claimant. His recollection is that there was an exchange of emails in which Mr Mehta said Mr Mehta would be better placed to do it. Mr Mehta accepts he has no recollection of speaking with the claimant and said that if there was no email correspondence in reply to Mr Gidman then it may be that he did not reply to Mr Gidman. He says he believes that Mr Wheeler spoke to the claimant. Mr Mehta was asked about email correspondence between him and Mr Wheeler but said he was not aware of what the last email between them was. Mr Gidman said in cross examination that he had spoken to Mr Wheeler and Mr Mehta as well as sending the email requesting them to contact the claimant. He said that neither Mr Wheeler nor Mr Mehta had come back to him with feedback after a discussion with the claimant (which in his email he said he would wait for). He said he started actioning the paperwork for the claimant's ill health retirement application having spoken to the claimant, probably on around three occasions, in which the claimant had remained adamant that he wanted to leave.

4.136 As it happens the claimant himself actually then emailed Mr Wheeler on 19 December [560] saying he had applied for early retirement and that Mr Wheeler had always been a great friend and colleague and a fantastic clinical director. Mr Wheeler replied to ask if the claimant wanted to talk about it as he would like to be able to change the claimant's mind and that he was saying that in a very

positive sense as he would like to offer as much help as he could in the really difficult situation [559]. The claimant replied to say: "I *know that you would have helped, and I would have asked if I thought that there is any glimpse of hope. So far I had more than seven years of serious depressing events in my personal life and approaching seventeen months of stress at work. The damage became permanent. Talking to you is always great and helpful, but I would not take you from your responsibilities knowing that I have made up my mind. However, a friendly chat with you at your convenience is always a pleasure*." Mr Wheeler replied to say: "*lets have a chat anyway when you can."* He says, and we accept, that it was clear to him from the claimant's email that the claimant's decision had been made and he recognised the claimant had made up his mind.

4.137 Mr Mehta's evidence is also that at some point after the claimant had started his phased return to work in June 2020 they had a conversation in which the claimant said he might resign from the health board. Mr Mehta is unable to help further with the date although it was earlier than December 2020. He says he recalled the claimant saying words to the effect he did not want to work there anymore and made reference to resigning. At the time, the conversation did not strike Mr Mehta as odd. He said the claimant had always had an entrepreneurial streak and they had discussed ideas in the past. He says they had a discussion about the claimant being young and there being many avenues for him to pursue. He says the claimant at the time spoke in a positive way and so Mr Mehta had accepted it was something that the claimant wanted to do, it was not for him to argue against. He came away from that earlier discussion with the impression there was a question mark whether the claimant wanted to stay in his role. He says that on 15 December he was expecting the claimant to return after a period of sick leave and was surprised to learn, despite the nature of their earlier discussion, that the claimant had taken such a major decision so quickly. He says that he sympathised with the claimant's predicament and did not think he would make such a major decision so lightly.

4.138 Quite what happened between Mr Gidman, Mr Wheeler and Mr Mehta is difficult to piece together after all this time. On the balance of probabilities we consider it most likely that there was some confusion or misunderstanding as to who would be best placed to speak to the claimant and it resolved itself by the fact the claimant contacted Mr Wheeler shortly thereafter in any event. It also seems likely that Mr Mehta thought the claimant was making a considered decision given their earlier discussion.

4.139 In the meantime on 17 December 2020 the claimant had telephoned Mr Pritchard and told Mr Pritchard that he was going to resign and claim ill health retirement. Mr Pritchard told the claimant it was a long process and applications were not always approved. Mr Pritchard tried to reassure the claimant and said he should not rush into difficult decisions and perhaps should wait and see how he felt. The claimant told Mr Pritchard he had been thinking about his situation over the last 24/48 hours and had realised his role did not suit his OCPD. He said the fact he had made the decision the night before already left him feeling a lot better. Mr Pritchard's evidence, which we accept, is that he felt the claimant was clear in saying he had reached a point of realisation and therefore Mr Pritchard did not push the claimant further to reconsider the decision once the claimant had stated this because Mr Prichard respected the claimant's decision. The claimant did not raise discrimination or disability, but Mr Pritchard does recall the claimant saying he felt he had been treated badly by the health board in relation to the UPSW process. Mr Pritchard told the claimant that they always wanted to complete the process as quickly as possible but the timescales and use of IT

because of covid had complicated matters. Mr Pritchard told the claimant that if he had genuinely felt the claimant was being unfairly treated he would have spoken up.

4.140 Following their conversation Mr Pritchard emailed Dr Skone and Professor Walker about the claimant commencing sick leave and then saying he wished to apply for ill health retirement because, whatever the outcome of the disciplinary hearing, the claimant no longer wanted to work as a surgeon. His email recorded him telling the claimant that the process could be difficult, particularly for psychological conditions, and that the claimant said if it was not approved he would go anyway with a reduced pension [508]. The claimant had also said he would still attend the disciplinary hearing on 9 February. Mr Pritchard noted in his email: "*I asked him to really consider the decisions he was making and to not doing anything rash without the appropriate advice. He did seem however that he had made his mind up and realised that due to his OCD etc, the role as a surgeon was not good for his health. I have contacted pensions and asked them to send the application form to Nick Gidman to move this forward. TB has an Occupational Health appointment next week."* [508]. Mr Pritchard then emailed the pensions team asking them to send the application form to Mr Gidman [558].

4.141 Mr Mohammed's evidence, which we accept, is that, often if a member of the team called in sick they would call him first as Rota Coordinator but when the claimant went off sick the claimant did not call. He says around that time the claimant either emailed him or sent a whatsapp asking him to remove the claimant's email address from all work related correspondence. Mr Mohammed recalls the claimant commenting that it was a sad day for him. Mr Mohammed telephoned the claimant and says they spoke generally as friends. He says he asked the claimant what had happened, and the claimant had said he was leaving the health board. He says he asked the claimant what he was going to do from here and the claimant did not say. He says the claimant sounded stressed and it was upsetting as it was a big, stressful decision for the claimant to have made. He says the claimant did not give him much detail and he did not want to upset the claimant further as he was trying to support the claimant as a friend.

4.142 On 21 December the pensions officer wrote to Mr Gidman with an ill health retirement application form to complete [509]. There was a section for the line manager to complete, a part for the applicant, and a part for occupational health. The letter said: "*Please advise the applicant that any decision concerning ill health retirement is at the discretion of the NHS Pensions Agency and there is no set timescale for the decision to be made as all cases are dealt with independently. If the application is accepted, the relevant forms to claim payments of benefit will be sent to the applicant accordingly."*

4.143 On 23 December the claimant was assessed by Dr Smallcombe in OH [1155]. She recorded that the claimant reported his mental health had continued to deteriorate and had been struggling with clinical practice and with episodes of freezing. She recorded the claimant saying he was taking excessive time to perform partial tasks and note writing and would second guess himself constantly. He had developed some paranoid thoughts that consultations were being recorded. She noted that the disciplinary investigation had been ongoing for over 12 months which had been stressful and the claimant had faced a significant amount of personal stress in recent years. Dr Smallcombe noted the claimant's treatment history and that he had reached a point where he felt he could no longer work autonomously and had real concerns he could unintentionally harm a patient. She noted that the claimant had taken a decision

to retire but he would seek ill health retirement in the first instance. Dr Smallcombe advised the claimant was unfit for work in any capacity at that time and she was supportive of the application for ill health retirement.

4.144 On 31 December the claimant's half pay sick pay came to an end [1157].

4.145 On 6 January 2021 the claimant saw his GP who recorded: "*Obsessive – compulsive disorder… Awaiting outcome of investigation in February. Feels as though he has been on death row awaiting execution.. investigation has dragged on and on*." The claimant also attended an appointment with Professor Tahir who said: "In *the background is a disciplinary hearing which took place in October 2020 and there is another hearing due in February. His last experience of attendance at the hearing had left him feeling vulnerable and doubtful of the process. He is fearing the worst possible outcome. Therefore, irrespective of the outcome he appears to have made up his mind to take an early retirement on ill health grounds*."

4.146 On 14 January 2021 the claimant confirmed to Mr Gidman that he had emailed part B of the ill health retirement application form [1157]. On 21 January 2021 Mr Gidman and Ms Marvelly met with the claimant. Ms Marvelly's evidence is that there was a general discussion about the ill health retirement process and that the claimant made no suggestion that he was unhappy or felt he had been forced down the route or that he wanted to consider other options such as redeployment. She recalls the claimant again confirming he had decided he wanted to take ill health retirement because he felt he could no longer do his job because of his health concerns.

Disciplinary Panel hearing

4.147 The date that everyone was available for the Disciplinary Panel hearing was 9 February 2021. The respondent had originally suggested the 6 January 2021 but the claimant's BMA representative only had limited availability [499]. The claimant produced a statement dated 22 January 2021 [1161-1168]. The claimant set out his mitigating circumstances for the disciplinary panel which include his remorse and his commitment to ensuring breaches were not repeated. He said he had contacted his ex-wife and apologised. He said he had co-operated throughout and admitted fault immediately. He said never intended to personally gain. He said his actions were not pre-meditated and he did not know he was breaching his contract. He said his purpose was to ensure the wellbeing of his family. He said he had a clean disciplinary record and had committed no further breaches. He referred to his character references. He said he was willing to learn and had re-familiarised himself with key documents and attended courses. He also asked for his medical conditions to be taken into account as mitigation. He said he strongly believed his actions were, at least partly, attributable to his OCPD. He said he had also struggled from anxiety and depression for the last 7 years and had always been an anxious person, especially when it came to his loved ones. He referred to his treatment and said he considered the 8 CBT sessions with medication provided substantial help to supress any compulsive urges he had.

4.148 The claimant said he acknowledged Professor Tahir's letters did not go as far as stating the breach was caused by the claimant's personality disorder, but he considered the Inquiry Panel failed to attribute any weight to his OCPD which Professor Tahir viewed his personality traits fulfilled the criteria for. The claimant said he did not initially attempt to get a report to link his disorder to his breach because he was looking for diagnosis and treatment and because, at the time, he

did not consider it would be appropriate to instruct that such a specific correlation be made. The claimant said, having received the Inquiry Panel's report, he approached Professor Tahir on 6 January 2021 and asked Professor Tahir whether he was able to link OCPD to the breach. The claimant said Professor Tahir said he was not able to comment for reasons of conflict of interest as being the treating psychiatrist and working in the same trust the claimant was being investigated by.

4.149 The claimant had also asked his children to provide letters confirming their consent. His ex-wife wrote a letter to say the purpose of raising her concern was to maintain confidentiality and to protect her records. She said the claimant had apologised and would improve his awareness of confidentiality and data protection which would be sufficient to resolve her concerns [1174]. The claimant's son confirmed he had asked in the past for medical advice and that after he had knee surgery in 2016 his father would have wanted to check there were no complications. He said that training on data protection and confidentiality would be an ideal course of action. The claimant's other son said he had given his father permission to check on his wellbeing in April 2019 about recurrent chest pain [1176]. The claimant's daughter said she regularly asks her father for health advice and he had always had her consent when checking her results [1177].

4.150 The Disciplinary Panel hearing took place on 9 February 2021. The claimant indicated in advance that he would not attend the hearing in person due to health reasons but wished to attend remotely and would advise the panel on the day if he was in a position to answer questions [1170]. There is a transcript at [1200-1209]. The panel members were Professor Walker, Dr Skone (Associate medical director), and Mr Driscoll (executive director of workforce & OD). Ms Waites (Acting Head of Workforce & OD) was present to provide workforce advice to the panel. The claimant was represented again by counsel. Mr Scott-Coombes attended to present the management case. Mr Pritchard attended as an observer.

4.151 At the start of the Disciplinary Panel hearing the claimant's counsel made an application for the procedure to be terminated under UPSW Rule 3.10. There had been no forewarning of this application. The claimant's counsel submitted that the claimant's actions were the result of his own health, maybe his OCPD condition, and that he had asked for an independent psychiatric evaluation that had been refused. Professor Tahir said he could not provide an indication because of a conflict of interest. She submitted that the OCPD amounted to a disability and the failure to refer amounted to discrimination. It was said the claimant was denied the opportunity of defending himself properly. It was said the proceedings should have proceeded by way of ill health evaluation as health was underlying the conduct.

4.152 It was also argued that the process itself had now caused considerable ill health and the claimant had no choice now but to leave his job and had applied for ill health retirement. The claimant's counsel again submitted that the proceedings should not continue and should be terminated with the option of referral to occupational health.

4.153 After an adjournment to consider the application, it was refused by the Disciplinary Panel. Professor Walker said that if the disciplinary hearing continued then dealing with the claimant's case as a health issue remained open to the Disciplinary Panel as one option under the UPSW policy in any event under paragraph 5.18 which allowed the panel, if appropriate having heard all the

evidence, to convert the process to a health related outcome. Further the Disciplinary Panel considered that, bearing in mind the claimant was saying the process was exacerbating his ill health, that prolonging the process by an adjournment for a referral to OH was on the claimant's own comments detrimental to his health. It was also felt the application had come very late in the day and that it would have been open to the claimant to request a further OH referral earlier had he felt it would have been beneficial.

4.154 The claimant's counsel had argued that the claimant's ill health had led to the misconduct but the Disciplinary Panel noted that had been considered by the Inquiry Panel who had rejected the contention and whose responsibility it was to make the findings of fact. Their view was they were bound by the Inquiry Panel's conclusion on that point unless they considered it to be outside the range of reasonable responses, which they did not. So, the Disciplinary Panel did not see how that was relevant to a request to halt the UPSW, particularly when no new medical information had been presented. They noted that the claimant had been seen by OH in January, March, May and December 2020 and had undergone a psychiatric assessment by Professor Tahir. They felt that a referral to OH at that stage was not necessary in order to fairly assess the appropriate outcome, particularly bearing in mind that the Inquiry Panel had not made the finding of a link between the claimant's health and the accessing of the records and, in the wider context, that a health related outcome, if appropriate, would still remain open to them. The panel took into account that the claimant was struggling with his mental health because of the longevity and complexity of the UPSW process but considered that did not mean they should just stop the process and refer to OH. They considered that the concerns remained serious, and could not simply be negated by relying on a personality disorder (which the Inquiry Panel had found not be causative of the conduct). They considered that there was mitigation to be taken into account it did not in the circumstances remove the need for the matter to be considered a disciplinary one. They decided it was right to proceed with the disciplinary hearing, and the best way forward was to proceed that day which would also bring it to a conclusion for the claimant.

4.154 As stated, the claimant attended the Disciplinary Panel hearing remotely. The claimant was given the option of speaking and did so. The claimant's counsel again argued on his behalf that the act of checking medical records repeatedly was caused or at least to a considerable extent was compounded by OCPD. It was said there was no evidence before the panel that OCPD would have caused the claimant to keep records of the times he accessed medical records. The claimant argued his medical treatment had given help in supressing compulsive urges. It was argued by way of mitigation there was no personal gain and the claimant's long service and clean record. Further, the claimant had cooperated, had shown remorse, and there had been no further breaches. The claimant's counsel asked for no further action or a referral for a health consideration.

4.155 The Disciplinary Panel found that the offence was a serious one and was proven. They considered that the UPSW process had been followed appropriately. The Disciplinary Panel considered that the allegations were serious enough to warrant dismissal but took account of the references, clean disciplinary record, the claimant's remorse, his immediate acceptance of guilt, his compliance with the process, the fact the claimant had stopped the breaches as soon as he became aware of the allegations, and the personal development the claimant had undertaken, and decided the claimant should receive a final written warning, to be on file for a year. It was said they recognised that the claimant was

a hardworking and dedicated surgeon and it was never the intention of the process that the claimant's career should be terminated and if there was a way back for the claimant to recommence clinical work they would like to do so and to support the claimant with any additional healthcare support that was in their gift to give.

4.156 On 10 February 2021 the claimant received the outcome letter [1215-1218]. It provided a summary of the Disciplinary Panel's decision to proceed with the disciplinary hearing and the mitigations that were then taken into account. The listed mitigations were the claimant's remorse, co-operation with the proceedings, unblemished disciplinary record, the claimant ceasing the breaches, the positive character references, the personal development undertaken by the claimant, and that the panel were assured the claimant had learned from the process and would not commit such breaches again. It said: "*The proven allegations, in themselves, would normally result in dismissal, due to the seriousness of the offence and at the advice of the Inquiry Panel. However, due to the mitigations you have provided detailed above, which I have taken into account, I am issuing you with a Final Written Warning… Following conclusion of the Disciplinary Hearing, I also advised that we would support your return to work and that we will work with your Clinical Director to ensure that your health issues are fully supported and explored as far as it is within our gift to do so.*"

4.157 The letter did not refer to the claimant's health in terms of the mitigations that were taken into account. Professor Walker's evidence, which we accept, was that they did consider the claimant's health and it took up a significant part of their deliberations. They considered Professor Tahir's clinical letters which they accepted and considered to be robust and reasonable. They accepted the diagnosis of OCPD. However, the Disciplinary Panel were satisfied that the Inquiry Panel had explored in depth the nature of the claimant's ill health and had found no causal connection between it and the conduct and that was a factual finding for the Inquiry panel to make. They noted that there was no information presented to the Disciplinary Panel about this other than that which was already before the Inquiry Panel. The Disciplinary panel did not consider that there was a proper basis to challenge the findings of the Inquiry Panel on this point. Therefore, as the causative link had not been established between OCPD and the conduct, the Disciplinary Panel did not consider that the claimant's OCPD was a ground of mitigation that contributed to the downgrading of the sanction.

4.158 Further, the Disciplinary Panel did consider the claimant's wider mental health issues. However, they considered these had all occurred after the offences had taken place and so they did not consider that using that to justify or mitigate the offences was straightforward. They therefore decided it was not a contributory factor for them downgrading the sanction from dismissal to a final written warning. Professor Walker said, and we accept his evidence, that the reason why OCPD and anxiety/depression do not appear in the outcome letter was because the advice from Mr Driscoll was, in the interests of simplicity, to only record those points of mitigation that were accepted by the panel as valid mitigation points. Unfortunately, and this is of course said with the power of hindsight, it may have created the impression that these things were not considered at all.

Claimant lodges appeal

4.159 On 2 March 2021 the claimant's solicitors lodged an appeal against the final written warning [1221]. The appeal argued that the disciplinary panel was wrong to reject the submission to terminate the process under rule 3.10. It was

argued that requirement to refer to OH for assessment is mandatory. It was argued that given the accepted history of acute mental health difficulties and an attempted suicide with a confirmed diagnosis of OCPD the failure to make the referral was unreasonable and was a significant departure from UPSW. It was submitted that the Inquiry Panel had failed to place sufficient weight on the heath reports and the diagnosis in relation to the possibility that they may be causally relevant to the allegations, or that the condition may provide mitigation for the allegations that were found proven. It was pointed out it was possible to have a mitigating factor such as ill health without it being causative of the underlying allegation. It was said the Inquiry Panel were in error in concluding the timing of the diagnosis somehow undermined or called into question the diagnosis of OCPD or its relevance. It was said the absence of the claimant making records was irrelevant. It was argued the position on the claimant being able to stop was illogical. It was submitted the failure to take into account the claimant's ill health was a failure to make reasonable adjustments and the decision to issue a final written warning was discrimination arising because of disability.

Claimant completes Acas conciliation

4.160 The claimant completed Acas early conciliation on 9 March 2021 by obtaining a certificate without going through conciliation.

Ill health retirement Medigold decision

4.161 On 21 April 2021 the NHS Pensions Administration team at Medigold Health wrote to say that the application for ill health retirement benefits had been successful at tier 1 [1235]. The NHS pensions doctor said that due to the personality disorder and an eye condition the claimant had, the claimant's condition had reached the stage where he was not able to provide regular and effective service in his substantive role for like duration which was likely to continue to scheme pension age. It was said the natural history of a personality disorder is of further persistence and spontaneous resolution was unlikely to occur in someone at the age of 52. The doctor considered it unlikely even with specific treatment for a personality disorder that the claimant would gain sufficient capacity to undertake his very responsible substantive role. It was said the claimant would be able to undertake alternative non patient facing gainful employment such as writing medico legal or insurance medical reports.

4.162 The pension officer wrote to Mr Pritchard on 26 April 2021 asking him to arrange for a termination form to be sent in order to issue the retirement paperwork to the claimant to access his pension benefits. Mr Pritchard forwarded this to Mr Gidman [1240] asking him to meet with the claimant to agree a termination date. Mr Pritchard noted that the claimant's appeal hearing would still proceed on Wednesday that week. Mr Gidman forwarded it to Mr Wheeler and Mr Mehta. Mr Mehta said he would touch base separately with the claimant. In fact Mr Mehta did not contact the claimant and the claimant did not contact Mr Mehta. Mr Mehta said in evidence that on reflection he did not feel it was appropriate because the claimant had alluded to leaving in the past and he did not feel it was his place to try and talk the claimant out of it at a late stage. He says there were other middle grade doctors around the time interested in taking retirement and his feeling was that the claimant had his own reasons why he had reached such a significant decision.

Disciplinary appeal hearing

4.163 The appeal took place on 28 April 2021. It was chaired by Ms Williams, a barrister. The other two members of the panel where Ruth Walker and Dr Simon Poulter. The transcript is at [1245]. The claimant was represented by his solicitor. It was argued, amongst other things, that either or both panels should have adjourned the hearings to take advice on the claimant's health whether from occupational health as envisaged in part 3 UPSW or perhaps by involving Professor Tahir.

4.164 It was also argued that the proceedings should have moved away from the Standard Procedure or Extended Procedure and into part 3 of UPSW. It was argued one option then would be to terminate the proceedings. It was said that the Inquiry Panel and Disciplinary Panel should have delayed or terminated the process so that there could be a referral to OH for further investigations to be carried out in respect of the health conditions, and then further consideration of what sanction if any should be imposed. It was argued that the crucial question was not being answered and the Inquiry Panel was deprived of important information.

4.165 The claimant's solicitor was unable to identify at the appeal panel hearing what the PCP was said to be for the failure to make reasonable adjustments complaint but said that the claimant's health condition should have been taken into account and the health condition should have been investigated. The solicitor also submitted that he did not think the appeal panel was empowered to make decisions under the Equality Act and that the primary argument was about a failure to action part 3 UPSW and then to investigate matters properly.

4.166 The claimant flagged up that he recalled at the meeting on 1 April raising the possibility of instructing a psychiatrist to assess his health. Mr Scott-Coombes said he did recollect the claimant asking if the respondent would be able to provide for him to continue to see a psychiatrist and said that: "*The interpretation being for ongoing treatment more than assessment And I sought advice from the machinery within the heath board, and we felt that it was not the appropriate thing to do, given that as stated in the letter we also addressed other ways previously said other ways to protect his wellbeing."* The claimant said that the issue had been also raised at the disciplinary hearing.

4.167 The Appeal Panel also separately interviewed Professor Walker [1256]. Professor Walker had not had any warning he was going to be interviewed. Professor Walker said that the independent Inquiry Panel had already made a finding on the issue of whether ill health led to the claimant's actions. He said it also seemed paradoxical on health grounds to prolong the procedure when the claimant was saying the longevity and complexity of the procedure was causing ill health. He explained the Disciplinary Panel had also considered that under UPSW rule 5.18 they could also make a referral to OH in any event if they considered that was the right way forward so that overall they felt the right approach was to continue and complete the process that would help the claimant in terms of his mental health situation. Professor Walker said that it was also felt a further OH assessment was unlikely to build anything further into the health assessment on top of what was already available to them.

4.168 Professor Walker said in interview his understanding was that when the claimant had met Mr Scott-Coombes the claimant was offered the opportunity to see a UHB psychiatrist and it was turned down. It was put to him that Mr Scott-Coombes had said that it was the board who turned down the request from the

claimant not vice-versa. Professor Walker said he would accept that Mr Scott-Coombes would have better recollection than him having had the opportunity to review the information. Professor Walker accepted he may have got it the wrong way round in his mind as he had not had the opportunity to prepare.

4.169 Professor Walker said Professor Tahir's assessment had appeared a very robust and reasonable psychiatric assessment. He said the panel were happy with the psychiatric assessment they had and did not feel they needed a further psychiatric assessment to make a judgement. He said when a request came for further general health care support it was difficult to know what more the organisation could offer when there had been OH assessments. He said he would expect an OH assessment to identify if specialist opinion was required. He said they did not agree to stop the process and the next alternative would be to adjourn and consider off line and then come back and the Disciplinary Panel were worried that would further worsen the claimant's health.

4.170 Professor Walker said they had made a deliberate decision not to comment on the claimant's underlying health in their decision letter. He said the external Inquiry Panel had found the underlying health problems not to be a mitigation and the Disciplinary Panel found no reason to go against their findings. He said they considered the claimant's health at length in their deliberations but did not find there was cause to change the finding of the external Inquiry Panel and so did not consider it a relevant mitigation. He said the advice from Mr Driscoll had been to keep things simple and only mention in the decision letter the mitigations that they had ultimately decided were valid.

Ill health retirement process continues

4.171 On 29 April an email was sent between unknown individuals [1260] saying: *"I have received the response below from [x] and had a chat with a couple of people [x] would very much like to pay TB his notice and terminate his employment on Weds. It seems from [x] that this wouldn't impact on his pension and would be a CB decision. Typically we would dismiss prior to Pensions approving the application but it feels that due to the parallel formal process it was more of a management decision not to hold the meeting at this time. Are you comfortable with this approach?* On the same date [1305] again an email was sent between unknown individuals saying: "*I have checked with [ ] and [] and it should be fine if we terminate TB on Weds and pay him his 3 months notice in Lieu. As long as you/the CB are ok with this.*" As far as we understand it these are emails the claimant received via a subject access request and were redacted as part of that process.

4.172 [1261] is a letter in Mr Gidman's name dated 29 April asking the claimant to attend a final sickness meeting on 5 May 2021. The letter says: "*The purpose of this meeting will be for me to discuss with you your attendance record with the recent letter you have received from Pensions written on 21st April 2021 confirming that your application for Ill Health Retirement has been approved. Whilst we empathise with your current medical problems, your non-attendance has been a cause for concern and accordingly I have to consider whether your employment can continue or whether it will have to be terminated. A decision regarding your employment situation will only be reached after I have considered all of the details at the meeting from yourself and/or your representative. The meeting is being held in accordance with the Managing Attendance at Work Policy.*" Ms Marvelly's evidence was that this looked like standard wording that HR sometimes used. The meeting on 5 May 2023 did not in fact go ahead as the claimant's BMA representative was not available.

Appeal decision

4.173 On 6 May 2021 the claimant's solicitors commented on Professor Walker's interview [1266]. They said that the Disciplinary Panel could and should have considered the extent to which the health issues were mitigating factors and it should have informed their deliberations about part 3 of UPSW. But it was said that the primary challenge was that the case as a whole should have been dealt with as a health matter under UPSW part 3. They said that a factual error that the Disciplinary Panel believed the claimant had refused an offer of a referral to a psychiatrist seemed to have influenced the decision. Further, it was said that the Disciplinary Panel should have at least sought advice on the points as to whether the health issues were causative and no views had been sought from OH in light of the May 2020 report from Professor Tahir. It was said the panel should at least have sought advice on the points by referring the claimant to OH for their input or onward referral to a psychiatrist. The solicitors said that the medical information before the disciplinary panel was incomplete.

4.174 On 17 May 2021 the claimant was told that his appeal was unsuccessful. The decision is at [1270]. The Appeal Panel decision was that UPSW 3.10 required an appellant to put forward a case on health grounds which was sufficient to justify delaying, modifying or terminating the proceedings and that it was for the claimant, as appellant, to persuade the Disciplinary Panel to delay, modify or terminate the proceedings. In practice this meant adducing evidence or making submissions justifying the course of action suggested. They said that if the information before the Disciplinary Panel was incomplete it was for the claimant to ensure it was complete to advance his case under 3.10.

4.175 The Appeal Panel noted that the suggestion of the termination of the disciplinary process for a referral to OH came at a very late stage of the proceedings and against a backdrop that the Inquiry Panel and Disciplinary Panel had considered a good deal of medical information. They did not agree that the Disciplinary Panel had proceeded on an erroneous basis that the claimant had refused a referral to a psychiatrist. They said Professor Walker had only subsequently misremembered it.

4.176 The Appeal Panel held it was reasonably open to the Disciplinary Panel to reject terminating the proceedings under UPSW 3.10 in accordance with the powers open to it under 5.18. The Disciplinary Panel was entitled to conclude a sufficient case had not been made out for a termination of the disciplinary proceedings and a referral to OH. They considered there was no credible evidence before the Disciplinary Panel that the claimant's ill health had caused or contributed to the misconduct proved.

4.177 The Appeal Panel held that the Disciplinary Panel were entitled to conclude that delaying or modifying the disciplinary proceedings would have been detrimental to the claimant's health and it was reasonable for them to conclude they had before them a competent psychiatric assessment. They agreed that delay for a referral to OH would have had a deleterious effect on the claimant's health for no real gain. It was said Professor Tahir's opinion was not in dispute and a referral to OH would have been unlikely to produce new information that could reasonably have led to the termination of the disciplinary process. At best it would have resulted in a recommendation for a psychiatric assessment when a recent assessment was already in evidence.

4.178 The Appeal Panel said that Professor Tahir's attendance before the Inquiry Panel or Disciplinary Panel would not have made any difference to the

decisions the panel needed to make, and it was not the case that in his absence the panels should have adjourned for additional evidence to be obtained. They said the burden was on the claimant to make out his case on health grounds and Professor Tahir's reports had made no causal link between the conduct and OCPD. They said that medical evidence suggesting a causal link between the claimant's ill health and his misconduct would likely have been necessary in order to persuade the panel to invoke UPSW 3.10 and that evidence did not and still did not exist.

4.179 The Appeal Panel held that it was reasonably open to the Inquiry Panel to conclude there was no causal link between the misconduct and OCPD. The Appeal Panel said there was some substance in the argument that the claimant's ability to stop his conduct when challenged was irrelevant to the causation question but on its own failed to establish the panel was wrong to conclude there was no causal connection between the misconduct and ill health. It was said again Professor Tahir's report did not make the link and without positive evidence it was very unlikely either panel would find a causal connection proved.

4.180 The Appeal Panel also accepted there was force in the submission that it was unreasonable of the Inquiry Panel and Disciplinary Panel to conclude that without the causative link being established such ill health did not constitute relevant mitigation. The Appeal Panel said the Disciplinary Panel should have taken into account the claimant's ill health in assessing the appropriate sanction. However, they considered that the weight to be given to it was comparatively limited. The claimant was aware of the policy provisions which prohibited all employees accessing medical records unless the access was for the purposes of performing their duties under their contract of employment. The claimant's attempts to explain his conduct after the event were considered to be disingenuous. The misconduct was on any view serious. Their view was that even allowing some weight to be afforded to the claimant's ill health and in particular his condition of OCPD as a mitigating factor, the decision to issue a final written warning was fair and reasonable and no lesser sanction was realistic.

4.181 The Appeal Panel noted that complains of disability discrimination had not been raised before and were not the primary thrust of the submissions to them. They considered it would not have been a reasonable adjustment to terminate, modify or delay the process to refer to OH and that the decision to impose a final written warning would be justified as a proportionate means of achieving a legitimate aim.

Ill health retirement process completes

4.182 On 21 June 2021 the claimant's half pay came to an end.

4.183 On 23 June the claimant met with Mr Gidman and Ms Marvelly. Mr Gidman followed it up with an email [1309]. The email says: "*We agreed that we would support your choice to resign and retire on the grounds of ill health from today. As you aware your application for Ill Health Retirement has been approved by the Pension Agency. As discussed, I explained that, whilst typically, we would only pay in lieu of notice in dismissal situations, I have agreed that discretion will be used on this occasions and that you will receive 3 months' pay in lieu of notice."* The email also said: *"You agreed to submit your resignation, following receipt of this e-mail and so as soon as I receive this I will action as agreed and confirm acceptance via a letter as soon as possible."* Mr Gidman concluded by saying: *"I would formally like to recognise your efforts whilst working for the Directorate of Cardiothoracics and thank you on behalf of all the staff that have*

worked with you, delivering exemplar levels of care to many, many grateful patients. I wish you all the best in whatever future brings you and once again from me personally thank you Taha."

4.184 Mr Gidman's written witness statement says this was a discussion about mutual termination and that there was no suggestion at the meeting from the claimant that he did not understand his employment was being terminated by agreement. Mr Gidman says in his statement that the claimant was absolutely clear that he was not being dismissed from the Health Board and that there was no suggestion the decision was anything other than an entirely voluntary decision to leave via ill health retirement. He says the claimant's experienced BMA representative also did not make any suggestion that the claimant was being dismissed or forced out and that it was an amicable, administrative meeting to finalise the arrangements for ill health retirement. In oral evidence Mr Gidman said that his understanding was that the claimant was resigning on health grounds and that the claimant needed to resign and leave the health board for the ill health process to be supported, He said he was not looking to terminate the claimant's contract and it was clear in the meeting on 23 June they were not looking to dismiss the claimant. He said he was supporting the claimant's ill health retirement request and the claimant was agreeing to resign to seek ill health retirement.

4.185 The claimant's BMA representative responded to raise a question about annual leave calculations [1308]. She raised no other query or objection to the suggestion the claimant was leaving by way of ill health retirement.

4.186 There is however no documentary evidence and no witness gave evidence to say that the claimant had in fact submitted a formal letter or resignation.

4.187 On 12 July 2021 Mr Gidman wrote to the claimant saying [1318]: "*Further to your application for Ill Health Retirement, as you are aware it has been approved at Tier 1. In order to process this, we now need to agree a termination date and I would be happy to agree for this to be from 23rd June 2021. As discussed in the meeting on the 23rd June 2021, I can confirm that discretion will be used on this occasion and you will receive 3 months' pay in Lieu of notice. You will also be paid for your outstanding annual leave for the year 2020-21 and 2021-22… Please confirm in writing that you are in agreement with the above at your earliest convenience. I will then arrange with Payroll to process the payments accordingly."*

4.188 On 13 July the claimant wrote back to Mr Gidman [document added to the bundle by consent], saying he was in agreement with the letter of 12 July 2021 and that his understanding was his employment will be terminated on grounds of ill health from 23rd June 2021 following his application for ill health retirement that was accepted by NHS Pensions on 21 April 2021.

4.189 Ms Marvelly said that the ill health retirement process could vary from case to case and often they would dismiss prior to a decision from OH. Hence the template letter. She said there were occasions on which they would look to terminate on a mutual basis and that is what they were doing with the claimant to agree a mutual end date. She said Mr Gidman was very supportive of the claimant and was concerned about using terminology such as dismissal and also wanted to make sure the claimant got his paid notice period. She said at the meeting on 23 June there were general discussions around the process and about whether the claimant would resign or they would give notice themselves

but a follow on from the meeting was an agreement that they would mutually terminate. Ms Marvelly however could not recall specifically what had happened. She said she did not think it was that anyone was objecting to the idea of there being a resignation (including the BMA) but that there had not been a letter of resignation and there was a need to end the contract so the way forward was to agree an end date.

4.190 [1322] is a "termination form" completed by Mr Gidman on 19 July 2021. Against reason for leaving there are the options of dismissal, end of fixed term contract, redundancy, voluntary resignation and other. Against "voluntary resignation" is written "Health." There is a separate box headed retirement against which is written retirement ill health. Section 3 is called termination dates and says date notified to manager is 07/01/2021. The claimant's ill health retirement was backdated to 23 June 2021.

5. Discussions and Conclusions

5.1 We start our conclusions by addressing two preliminary issues that have a significant knock on effect in general on the complaints before us: the issue of disability and the issue of dismissal/resignation/mutual termination. In relation disability it is important to observe that the only conditions placed before us anxiety and depression and OCD/OCPD. The claimant's evidence refers to other medical conditions but in our analysis on disability we do not address them because they were not the pleaded impairments relied upon. We would also emphasise that our conclusions in general do not cover every argument made by the claimant whether in cross examination, his witness statement or his closing submissions. This is because our responsibility is to address the pleaded issues in the case as set out in the List of Issues and to give our key reasoning why we have reached our decision on those specific points. It is not possible for us to cover every piece of evidence or every argument put before us.

Disability

5.2 The respondent submits the claimant functioned as a surgeon at a high level until October 2019. The respondent argues that the first recorded detail of how the claimant was impacted by OCPD was the account to Professor Tahir in November 2019 when the obsessive/compulsive behaviours were simply described as traits and no formal diagnosis made. It is said that the claimant's description of the effects of his condition have become more florid and profound as time has passed and the issue of disability became more important to the claimant. The respondent goes on to say that if, however, the claimant's evidence about the deterioration of his OCPD is accepted then they accept the tribunal could find disability by OCPD from October 2019. It is said Dr Brow's opinion should be treated with caution as it gives an opinion without actually identifying what the long term effects on day to day activities are said to be. The claimant's case is that he has suffered from OCPD since childhood but was only professionally diagnosed between 2019 and 2020.

5.3 In relation to anxiety and depression, the respondent concedes that from 11 October 2019 the claimant was disabled by depression and anxiety. The respondent asserts that prior to that date the claimant was able to work without difficulty in his role as a surgeon and there is a lack of any suggestion in contemporaneous records of a mental health problem prior to October 2019. The respondent points out that the claimant denied any suggestion of depression prior to October 2019 when he saw Professor Tahir in November 2019. It is also observed that Dr Brow's report at paragraphs 70-75 recounts the claimant's

medical history making no reference to previous psychiatric history, yet it is said that Dr Brow goes on to speculate there may have been some anxiety and depression in 2011 and from 2014. The respondent submits there is no evidence to support Dr Brow's opinion or that the symptoms were severe or prolonged enough to satisfy the test of disability at the time.

5.4 The claimant asserts he has suffered from periods of anxiety and depression from 2007 onwards (although in his written closing submissions he changed that to 2014). The claimant also asserts that anxiety is an integral part of his OCD and OCPD so must have been part of his personality from childhood.

5.5 The claimant's GP records show that he attended his GP on 13/02/2007 complaining of a poor sleep pattern, said to have been exacerbated by a work colleague shouting and slamming a door in his face the week before. The GP records the claimant as constantly thinking about the situation and unable to sleep. He was advised to try a low dose of temazepam. There is no formal diagnosis of anxiety and depression made at the GP at the time. The claimant did not attend again on his GP about this problem. He was not signed off work. He saw his GP again the following month but that was about ongoing back pain.

5.6 The claimant fairly regularly attended his GP but the next entry we can see that refers to his medical health is not until 22/05/2019 [1431] where the claimant had a follow up appointment about a physical health matter from the previous month which had settled and the GP recorded: "*Was under a lot of stress work and [redacted] divorce etc. Bloods OK. No further action at present*." The next entry is for 21/10/2019 (after the claimant had learned about his ex-wife's complaint) with a GP entry stating: "*Anxiety states Describes symptoms low mood, chronic anxiousness always worries esp. about family, features of obsessive compulsions, rechecking ++, poor sleep. Has been [redacted]. Imp low mood anxiety and OCD symptoms start fluoxetine review for long consult and possible psychiatry referral.*"

5.7 The GP records record Professor Tahir's first clinical letter. This records the claimant saying he had been feeling low in his mood dating back to May 2019 when contacted about continuing maintenance. On 23 October 2019 the GP recorded: [X*] Obsessional personality disorder. Review of symptoms. Says lives on his own, remarried June, does not feel that he can live with her. Says his meticulousness can be an issue. Says obsessional. Does not feel that he has been down, depressed or hopeless. Says there were difficulties in his [redacted] and stresses and divorce was stressful. No clear symptoms of depression. Main issue around personality, feels has to be in control. Wanted family to have find my friends esp. when children travelled. Constant worry about family. When they travelled abroad would wake at night to ensure arrival and progress of travel. Children removed program. Says he has always been fastidious about cleanliness and organisation. Has read about OCBD and in his attic he has been hoarding all sorts of things even though they have no use. No repeated action. Rechecks belongings, personal belonging, pictures etc. keeps checking that they are there. Does not like any scratches, car, watch, phone must be scratch free. Everything must be arranged on the desk. Has started to type his clinical letters, because he likes to be in control. Recounts stories from childhood. [Redacted] was always punctual and one he was late and arrived covered in blood as had been in car accident ? cause of the way he feels Says always worried about loneliness. As a child saw crane fall and witnessed man who lost leg in front of him as a result. Also collapse of building with people inside, he also witnessed.*

Case investigation next week [redacted]. See psychiatrist 13 November review telephone consult week after."

5.8 The claimant had a telephone review on 20 November 2019 where the GP noted the claimant had taken annual leave and was awaiting an OH assessment and may be able to issue a sick note if OH was delayed. There was a discussion about perhaps trying a bigger dose of medication but the claimant was reported as managing day to day life ok at that time but may consider if mood/anxiety worsens. On 8 December 2019 the GP then records the self-harm incident. On 13 December the GP spoke with the claimant and recorded that the claimant was feeling embarrassed and did not have any suicidal thoughts and would continue with medication. On 10 January 2020 there was a further review with the claimant recording that he was getting counselling for OCD and would like to try a bigger dose of fluoxetine which was agreed. On 10 February 2020 it was noted that he had ongoing stressors in his life with having to pay a large sum in the divorce settlement. The GP noted the claimant continued to have low mood and OCD symptoms and was attending CBT. It was noted the claimant was still awaiting the outcome of the case related to accessing records.

5.9 On 10 March 2020 the GP noted the claimant was still awaiting his case review for work and was re-mortgaging his house to pay for the divorce settlement. The GP said: "*Despite all this seemed optimistic*." The claimant was to continue treatment and remain off work for now.

5.10 The GP records Professor Tahir's second clinical letter on 6 May 2020. There are then no mental health entries until 06/1/2021 where it is recorded "[*X*} *Obsessive – compulsive disorder. Has not been to work. Has applied for ill health retirement as feels unable to work. Has appt. booked with Professor Tahir issues with panic, anxiety, low mood and OCD [redacted] found this very humiliating, found it like a court, felt like killing himself. Awaiting outcome of investigation in February. Feels as though he has been on death row awaiting execution [redacted] however investigation has dragged on and on. Total loss of confidence, fearful of work. Has suicidal ideation, says he has no current suicidal plans, Feels safe."*

5.11 The final version of Dr Brow's report is dated 17 October 2022, having assessed the claimant on 12 March 2022 [1473]. The specific questions Dr Brow was asked are set out at [1475- 1477] and relate to diagnosis, questions relating to the test of disability, the date conditions existed from, the causation of any decline in mental health, prognosis and treatment. We read the whole report but its length means it is not possible for us to precis the whole report here. We also of course have Professor Tahir's clinical letters and the report from the claimant's CBT therapist. We also have the claimant's impact statement and main witness statement for the proceedings.

5.12 We accept the diagnosis by Professor Tahir and Dr Brow of OCD and OCPD; they are qualified medical professionals. The claimant therefore had the impairment of OCD and OCPD. It is, however, important to bear in mind that the relevant test for disability is whether there is a substantial long term adverse effect on ability to carry out normal day to day activities. It is not simply about having an impairment. It is here that we struggle to find that for the majority of the period in question the claimant's OCD and/or OCPD had such a qualifying effect. We focus in particular on the period 2006 onwards because this is the period of time when the claimant was checking the medical records of his family, himself and friends (which is the thing he says arose in consequence of disability).

5.13 A need for order, or perfectionism, or to follow fixed routines or lists, or to be punctual and precise, or to keep schedules of things such as spending, or to like symmetry in things, or to buy matching items, or to stock up on goods, or to have a number with a special meaning, or to have a preference where to park a car, or what order to buy things in at a supermarket, or to not like surprises, or to dislike spending money, or being offended easily are not of themselves normal day to day activities that are being affected. The focus has to be on what these kind of things mean in the practical sense of the impact on normal day to day activities/ normal day to day living. The claimant gives evidence of some hoarding in his attic of things like clean plastic containers [58] but again we do not consider that by itself to either be in itself a day to day activity or impact on a normal day to day activity. There is no evidence it took up an extensive amount of time.

5.14 The claimant has audio sensitivity but there is no evidence of its impact on day to day activities other than him saying he on occasions left or did not attend meetings if the noise was unbearable. There is no suggestion of frequency in that regard; on the evidence we heard the claimant's colleagues had never noticed anything unusual about the claimant's behaviours in work.

5.15 The claimant says that he is obsessed with ensuring the safety and wellbeing of himself and his loved ones. We accept he has concerns (as many people do) but there are limits upon that and upon whether that impacts on the ability to carry out normal day to day activities. He does not like flying and gives examples of driving long distances in 2007 and 2015. He does however fly as he flew at other times. He says he once called the police to a friend's house who he became worried about (the friend in fact had gone away), and he warns friends of hazards in the street. But we do not consider these to be a substantial adverse effect on normal day to day activities. He says if a family member is abroad he will follow them on an app day and night to check they are safe (at least until his children deleted the app). He says he once flew to Spain to check on his now wife. Many parents are concerned for the safety of their loved ones, especially when travelling abroad activity. Although the claimant's conduct in this regard may have at times been more extreme, it in itself is adhoc and sporadic. The claimant gives two examples of his family being reluctant to tell him of health concerns but these are two incidents over a long period of time and are not of themselves an impact on day to day activities (and he was involved in his family's health at other times). In terms of the claimant being concerned about the health of his family and children, we again did not consider that to be a substantial adverse effect on day to day activities. Indeed, in the text messages he disclosed between him and his daughter the claimant was giving pragmatic, factual advice as a father who is also a doctor (and was advice his daughter was seeking from him as opposed to, for example, telling him he was over involved). In relation to whether OCD/OCPD caused the claimant to access health records in work, we (for the reasons set out below) were not satisfied on the balance of probabilities this was made out. But in any event, it is difficult again to see how it is of itself a day to day activity that has been adversely effected.

5.16 The claimant does say that preparation time for going out takes longer because he would follow a mental checklist but we do not consider that this took up any significant amount of time or was a significant disruption to activities of daily living. The claimant was functioning in life going to work and undertaking the daily activities of home life, shopping, and socialising. His spreadsheet of expenses at [1451] shows he was undertaking these kind of activities such as shopping, eating out and visiting the cinema. Likewise, we did not consider the

claimant following a detailed list in a supermarket or having to go round the store despite only needing a few things was a significant impairment on a day to day activity. Many people follow a detailed list in the shopping aisles. Likewise we have little evidence of the claimant's practice of keeping spreadsheets, for example of personal expenditure, actually interfering in the substance of daily living.

5.17 The claimant gives evidence as his personal cleansing routines and then tidying of the bathroom (albeit that is in part also influenced by another physical condition), following rising at around 5am. He also gives evidence as to his need for order at home, when cooking for example.

5.18 The claimant says he would attend work 30 minutes to an hour early so that he could clean and be prepared for the day. it is not uncommon for people to attend work early (or stay late). He says he would leave work late to make sure he did not miss anything. He says he would (particularly as type handovers of patients to avoid the risk of missing anything in an oral handover. As time went on, he liked to type clinical letters rather than dictating them which he says took more time. The claimant says he was the only one who behaved like this. but his claimant's colleagues had never noticed anything unusual about the claimant's behaviours in work. Indeed, we think it likely, as Mr Scott-Coombes observed, some elements of these kinds of perfectionism are common in the medical profession and the claimant's specialism. We therefore do not consider that these practices had a particularly significant disruptive impact on the claimant's day to day living. He says that he finds it difficult to delegate and it resulted in him representing himself in his 2014 divorce proceedings.

5.19 Prior to October 2018, taking a step back and looking at the picture all in the round, we are not satisfied on balance that the cumulative adverse impact there may have been on normal day to day activities (such as preparation for leaving the house, cleaning routines whether personal or in the kitchen, routines at work, difficulties delegating etc) reached the point of being a substantial adverse effect on the ability to carry out normal day to day activities.

5.20 We consider that this finding accords with the substance of Dr Brow's report where he notes at paragraph 166 of his report that the claimant had functioned at a high level throughout his career, so was able to compensate with coping strategies, and essentially only became destabilised by the confluence of the investigation procedure and the claimant's significant financial obligations. Dr Brow makes a similar observation at paragraph 169. Dr Brow does also say: "*In my opinion, OCPD has had a substantial and long-term effect on Mr BinEsmael's ability to undertake neurotypical "normal" day to day activities for many years."* The difficulty is however that this is an opinion and made without setting out what that adverse effect is actually said to be in terms of actual impact at a granular level on normal day to day activities [1520].

5.21 After 22 October 2018 onwards we accept that the impact of the claimant's OCD/OCPD did start to have a substantial and long term adverse affect on his ability to carry out normal day to day activities. This the date when the claimant married his now wife, but the claimant kept living in his own separate home. We accept the claimant's evidence that this was because it was difficult for them, even as a newly married couple, (and with his wife's children) to live together all of the time because of the claimant's preferences for order and routine etc. We accept that being able to live with your spouse/partner must be a normal everyday activity and that, and its knock on impact on the normal activity of forging family relationships, together with everything else in the round, did by this

time amount to a substantial adverse affect on the claimant's ability to carry out normal day to day activities. We also accept that this was likely to be long term (i.e. likely to last 12 months or more). OCD and OCPD are long term developmental conditions and the lifestyle strategy the claimant and his wife had put in place was, we accept, a long term plan on their part. By that point the claimant's OCD/OCPD had become sufficiently impactful on day to day activities to become a disability under the Equality Act.

5.22 We were not satisfied on the balance of probabilities there was substantial impact on the ability to forge and maintain family relationships due to the claimant's OCD/OCPD prior to October 2018. The claimant speaks of difficulties in his relationship with his ex-wife, the breakdown of their marriage, the acrimonious legal proceedings that followed, and difficulties in relationships with his children. He gives an example of his son saying that living with him was sometimes like walking on egg-shells. The difficulty we have is with being satisfied, on the balance of probabilities, what the cause of those relationship difficulties was. In particular, when the claimant's relationship with his ex-wife broke down he had formed a relationship with his now current wife (he gave evidence to that effect at the Inquiry Panel). He also gives evidence of the impact of that relationship breakdown and divorce on his relationships with his children. We do not consider we can on the evidence before us be satisfied that it was the impact of OCD or OCPD that adversely affected these familial relationships. We took the date of October 2018 because that is the date the claimant gave for his marriage to his second wife in his first witness statement in the disciplinary process. There are other dates given at different times but as this was the claimant's first witness statement we took it as being the most reliable account.

5.23 In relation to the claimant's anxiety and depression, we do not find the claimant had an impairment that was having a substantial adverse effect on normal day to day activities prior to October 2019 (the date the respondent admits the claimant became disabled) or that any such affect was long term in the sense of at that time being likely to last at least 12 months. There is simply insufficient evidence. There is one attendance on the GP in 2007 and then nothing until April/May 2019. Whilst we accept the claimant would have had the stress of divorce proceedings, associated financial proceedings and pressures, the impact on his family relationships and the care of his mother, who ultimately passed away, we do not find that such stressors reached the point prior to October 2019 of having a substantial adverse effect on normal day to day activities. The claimant was not attending his GP. He was not receiving treatment. He was in work. We agree with the respondent that it was as of October 2019, when the claimant was facing both the complaint from his ex-wife and the pressure of fresh matrimonial financial proceedings that he became unwell to the extent that he needed time away from work.

5.24 We consider that our conclusions in this regard are supported by the substance of Dr Brow's report. Dr Brow says at paragraph 184 of his report that the claimant reported suffering from depression and anxiety from 2014 onwards and he would broadly agree with this statement but it was not to a degree which required intervention by specialist services. Dr Brow says it is likely the claimant was suffering from fluctuating depression and anxiety during this time but it is based on very little by way of contemporaneous medical records [1526]. This is not a finding of long term substantial adverse effect on normal day to day activities. Dr Brow says at paragraph 169 of his report that it would seem the

psychological burden associated with OCD and ASD[5] was manageable until the claimant reached a "breaking point" at the time of his ex-wife's complaint and the court decision he should pay extended maintenance. Dr Brow says it was the additional burden of anxiety and depression arising from the prospect of professional and financial ruin that rendered the claimant unable to function. At paragraph 179 Dr Brow makes similar comments in relation to the claimant's anxiety whilst nothing that due to OCD/OCPD and development issues the claimant will have suffered some level of concomitant anxiety for most of his life. He says the claimant had developed a high tolerance for anxiety as the claimant's level of function, despite ASD, OCD/OCPD was consistently high up until around October 2019.

5.25 In summary the claimant was disabled by OCD/OCPD from October 2018 onwards. He was disabled by OCD/OCPD and anxiety and depression from October 2019 onwards once he had learned of his ex-wife's complaint. We also agree with the respondent's position in terms of constructive knowledge of disability which is 7 November 2019 for the OCD/OCPD (when reported by the claimant) and December 2019 for anxiety and depression (when the claimant had and reported the self-harm incident).

Dismissal/ resignation/ mutual termination?

5.26 We find that the claimant resigned rather than there being a dismissal or a mutual termination. We consider separately below whether that resignation was a constructive dismissal.

5.27 We have to look at what it is that had the effect of terminating the contract /who really terminated the contract. We took into account here that it was the claimant who raised and pursued the fact that he wanted to take ill health retirement. It was led by him throughout. When the claimant first raised ill health retirement, Mr Gidman sought to dissuade the claimant, as did Mr Pritchard. It was in the face of the claimant's continuing adamance that the referral process was started. In the Tribunal's view this was still the claimant driving the process forward, albeit reluctantly supported by the respondent once the claimant remained adamant it was what he wanted. The claimant was in effect saying from the very start that if his ill health retirement application was signed off by the pensions agency then he would be terminating his employment and taking payment of his ill health pension. The evidence of Mr Pritchard, which we accept, was that the claimant could have withdrawn his application until the final arrangements came into effect, but that the respondent could not refuse to let the claimant go on ill health retirement if the claimant ultimately met the qualifying criteria. Again, it was a process driven by the claimant.

5.28 When the Medigold doctor approved the claimant's ill health retirement application a termination date then had to be agreed. Unfortunately the evidential picture of what then happened is not entirely clear. There appears to be no unredacted version of some of the documents. The claimant also gave very little evidence about the process in his own witness statement and did not cross examine the respondent's witnesses about it. The Tribunal ourselves asked some clarification questions of the respondent's witnesses because otherwise we risked having insufficient evidence to make a decision. The claimant seemed so unappreciative of the importance of the issue that we paused our questioning to make sure he understood the importance of the issue (and it was then that the letter of 13 July was later produced by the parties).

[5] ASD is not an impairment before us in this case

5.29 We noted that the email of 29 April referred to "typically we would *dismiss* prior to pension approving" which on one analysis would suggest the respondent had a dismissal in mind. However, the email also goes on to state that it was felt by management not appropriate to hold a dismissal meeting at the time. The email exchanges instead talk about a termination with notice pay being paid. The letter of 29 April in Mr Gidman's name is also written in a way that suggests a decision was going to be made on 5 May potentially to terminate the claimant's contract due to non attendance at work i.e. a dismissal by the respondent. However, we accept Ms Marvelly's evidence that this was a HR template letter. We do not think that its language really reflects what was going on. The claimant's non attendance had not been a cause for concern. The claimant's non attendance at work on ill health grounds had been understood and supported by those managing him whilst the claimant went through the UPSW processes. We do not consider that Mr Gidman ever truly intended to dismiss the claimant; in fact he was against the notion. Mr Gidman said that very clearly in cross examination and Ms Marvelly also confirmed that Mr Gidman was very sensitive to being supportive to the claimant and as to the terminology used. It was also not a process that was being driven by Mr Gidman. The meeting on 5 May also in any event did not go ahead.

5.30 A meeting did then take place on 23 June 2021. The email Mr Gidman then produced referred to there being an agreement that the respondent would support the claimant's choice to resign and retire on that day. The email is very much couched in the language of resignation and Mr Gidman said in evidence it was clear in the meeting the claimant was agreeing to resign to seek ill health retirement. However, the oddity that follows is that the email required the claimant to submit a resignation that the respondent would formally accept, but nobody suggests that the claimant did then produce a written resignation. We have no real evidence as to why that is. Ms Marvelly stated in evidence that it was not the case, for example, that the claimant or the claimant's BMA representative on his behalf, was objecting to the suggestion that the claimant was resigning.

5.31 Administratively it culminated in Mr Gidman writing to the claimant on 12 July saying in order to process the ill health retirement a termination date needed to be agreed and he was happy to agree 23 June. The claimant's written agreement to that was sought which he provided on 13 July. Ms Marvelly said that this was done because it had to be brought to a close and everybody was in agreement the claimant was taking ill health retirement from 23 June so there was a mutually agreed end date.

5.32 This was not a dismissal. This leaves it being either a mutual termination or a resignation. We ultimately concluded that to focus on the correspondence of 12 and 13 July (which was most suggestive of a mutual termination) did not look at the complete overall picture. We considered that this was ultimately a unilateral termination of the contract by the claimant. He initiated the process and clearly stated all along he was leaving employment on ill health retirement conditional on his ill health retirement application being approved (or would otherwise retire). The respondent could not prevent the claimant taking ill health retirement provided he met the qualifying criteria. The contract was terminated unilaterally by the claimant, albeit ultimately without objection by the respondent, and indeed with the respondent's facilitation of the referral to NHS pensions and the administrative arrangements to agree a termination date at the end. But it was a unilateral termination of the contract itself by the claimant, without objection by the respondent, rather than a contract terminated by mutual

agreement. It was the claimant who really terminated the contract of employment through his giving notice of his intent from the very start, which the respondent ultimately went along with.

5.33 Having decided these preliminary issues we now turn to the substance of the claimant's complaints in the list of issues.

Discrimination arising from disability

Did the following occur in consequence of the Claimant's disability?

(a) The Claimant breached the Respondent's confidentiality policy (Claim 1);

(b) The Claimant had a need or compulsion to check on his family's health and wellbeing by accessing their medical records (Claim 2);

5.34 In reality these two concepts are intertwined in the sense that claimant is saying that in consequence of his disability he had a need to or compulsion to check on his family's health and wellbeing by accessing their medical records which placed him in breach of the respondent's confidentiality policy.

5.35 This is for us to objectively assess for ourselves. We do not find it has been established before us on the balance of probabilities such accessing of records was in consequence of the claimant's disability. Strictly speaking we are only concerned here with the period from October 2018 onwards as that is the point at which the claimant, on our findings, became disabled by OCD/OCPD. After that date he accessed his friends' records on 23/11/18, 12/12/18 and 01/03/2019. He accessed his own record on 10/4/19. He accessed his own records, his ex-wife's and all 3 children's on 16/4/19. He accessed one son's records on 27/4/19. The claimant then accessed his friends' records on 13/5/19, 13/6/19, 19/6/19, 18/7/19, 31/7/19 and 8/8/19. He also accessed his daughter's records on 8/8/19. He accessed his friends' on 9/8/19 and 01/09/19. The claimant accessed his own records on 4/9/19 and his friends' on 24/9/19. He accessed his ex-wife's records on 3/10/2019. That said it is possible that the claimant's OCD/OCPD could not meet the test of being a disability and yet still cause the claimant to access medical records during the earlier time period. As such the entire picture of the claimant's accessing of medical records is potentially relevant and in our deliberations we did not lose sight of the overall pattern.

5.36 We do not have any medical evidence that specifically tells us that the claimant's OCD and/or OCPD produced a need or compulsion to check on his family's health and wellbeing by accessing their medical records. As the claimant ultimately accepted Dr Brow's report was not obtained and put before us for that purpose. The claimant had also accepted throughout the UPSW process that Professor Tahir's clinical letters did not confirm this. We are left with the claimant's evidence, the general medical evidence and the evidence of the pattern of behaviour itself. On the balance of probabilities we do not find that to be sufficient.

5.37 Firstly, the OCD/OCPD cannot explain the claimant accessing his friends' records as the claimant has always said that was done at their request/with their consent. We therefore know the claimant was willing to access medical records, on some occasions at least, not out of an OCD or OCPD driven need but because he thought it was a justifiable or acceptable action. That points against the claimant accessing records because of a need or a compulsion.

5.38 Second, we are not satisfied that bearing in mind the claimant had been through acrimonious divorce proceedings and financial remedy proceedings from 2014 onwards how and why it can be said the claimant's OCD/OCPD produced a need or compulsion to check on his ex-wife's health and wellbeing from that point on. Again, there is no medical evidence explaining the dichotomy between this being on the one hand the claimant's his ex-wife, (who he had been through acrimonious proceedings with), and on the other hand stating there was an obsessional or compulsive need to check on her wellbeing.

5.39 Third, (whilst appreciating the claimant at the outset did not have the breakdown of his pattern of accessing records) the claimant has given conflicting explanations for his conduct over time. In his first statement he said, in effect, that during his marriage he had his wife's consent to deal with her personal issues including health (which in itself is suggestive not of a compulsion or need but instead again the claimant considering it was a justifiable or acceptable action).

5.40 The claimant said in his first statement that after the breakdown of his marriage the access was a continuation of a habit that was difficult for him to recognise or change. He said that when he had a reason to check for one family member when they asked for medical advice he was compelled to check on the others. However, there is only one occasion on 16 April 2019 where the claimant checked across the whole family including himself.

5.41 The claimant also originally said when his children told him that his ex-wife was ill or his family were ill he checked on their investigations to reassure himself that they were ok. He said in his first statement in the UPSW process that it was a compulsive behaviour. In his second statement in February 2020 he said he over worried about the health of his children and, they would ask him for advice, and his actions were promoted by an underlying psychological need to check his children were ok and had no new health problems. Professor Tahir in May 2020 recorded the claimant telling him (albeit Professor Tahir does not go so far to say he agrees with the claimant) he had accessed his ex-wife's records when he learned she was unwell due to his obsessive nature to check her wellbeing. By the time of the claimant's statement of October 2020 he was saying that the only purpose of any of his access was to ensure the medical wellbeing of all involved and to give medical advice. He said he considered himself to be part of the medical treating team and that in relation to his ex-wife, their long relationship made the divorce irrelevant to his subconscious and his doctor thinking. He said he understood he still had his ex-wife's consent to participate in her medical management. He said he was triggered by illness in the family or a request for a medical opinion. He specifically said: "*There is no obsession as I initially thought. I could almost remember most of the occasions and medical reasons for my clinical search.*" So by the time of the Inquiry Panel the claimant was saying this was not about obsession or under the compulsive part of OCD/OCPD but that he was legitimately accessing his ex-wife's records and his children's records due to clinical need and under a doctor/patient relationship.

5.42 The claimant also originally said whenever a reminder of family health surfaces he also found himself going back to look at family medical records that worked for him like an old family photo album that he was going back to look at. He termed it as being a curiosity or nostalgia like looking at old photos and reminded him of times before the family hostilities. He said he did not realise the number of times he did this accessing, and it did not always relate to certain events other than illness in the family. The claimant later rowed back from this

explanation once he had seen the pattern of access; because he had thought originally that he had accessed records on a substantial scale that he could not remember. But it remains a contradiction in the different explanations the claimant has given over time. The pattern of access in itself is difficult to obviously correlate with general obsession or compulsion as some years there was no access whatsoever (hence the claimant's change of position).

5.43 The claimant did also say to the Inquiry Panel that his OCPD meant he was keen to keep people around him in good health, including his ex-wife and was very anxious about their wellbeing. He said it also blinded him to the fact his ex-wife was now his ex-wife in that regard. He said the conduct fell under OCPD because it was part of being very meticulous or very precise or punctual. But again as already said we have no medical evidence in support of that (including how OCD/OCPD blinded the claimant to the fact this was his ex-wife despite their acrimonious split) and it is not something we can accept on the word of the claimant alone.

5.44 Fundamentally the pattern of the different types of access (including the claimant accessing his ex-wife's records following an acrimonious divorce) and the differing explanations given, leave us (in the absence of convincing medical evidence in support) unable to conclude on the balance of probabilities that there is a link between the claimant's OCD/OCPD and the accessing of the medical records. Even if we weigh into the equation the wider evidence the claimant gives about being concerned about the wellbeing of his family when they are, for example, abroad, we simply cannot say with sufficient certainty that it was OCPD/OCD driven behaviour such as meticulosity (which is not in fact how the case is pleaded) or compulsion or need as opposed to other potential explanations such as the claimant simply engaging in self-justification that he was entitled to look at the medical records on the back of whatever was motivating him on any particular occasion of access. In the latter period when the claimant became disabled, this could have potentially included for example the claimant checking familial records in the run up to what he anticipated could be the end of his financial maintenance to his ex-wife, and/or because he was about to take on a new mortgage, or because his ex-wife's fresh spousal maintenance application referred to ill health, and/or because his children or others raised ill health questions that the claimant simply decided to check out. To be clear we are not making any specific findings as to those possibilities. The point is that we are not sufficiently convinced on the balance of probabilities, (and without on the particular facts here medical evidence specifically addressing these complexities, potential causes and the granular pattern of the access over the years), that the claimant had due to his OCD/OCPD a need or compulsion to check on his family's health and wellbeing by accessing their medical records. We also noted in this regard the absence of the claimant accessing the health records of his new wife or her children.

5.45 We would also add that to the extent the claimant may suggest that the real link is the suggestion that OCD/OCPD prevented the claimant from seeing what he was doing was wrong (or indeed that he has difficulty accepting personal criticism or that he had committed wrongdoing), this is not the way in which the case has been pleaded and put before us.

(c) The Claimant was unable to carry out his substantive role as a result of the exacerbation of his disabilities caused by the Extended UPSW and the Respondent's conduct throughout that procedure (Claim 2).

5.46 The phrase: "*The Claimant was unable to carry out his substantive role as a result of the exacerbation of his disabilities caused by the Extended UPSW and the Respondent's conduct throughout the procedure*" is written in somewhat pejorative language. But looking neutrally and as generously to the claimant as possible we accept that the claimant had periods of absence from work where he was unable to carry out his substantive role due to the symptoms of his disability. In due course he was also certified, by the Medigold doctor, as being permanently unfit to carry out his substantive role. We accept is this something arising in consequence of disability.

5.47 We do not, however, accept that it was as a result of his disabilities *caused by* the Extended UPSW *and* the respondent's conduct throughout that procedure. That statement is an oversimplification, misleading in tone, and potentially unnecessary in terms of setting out the thing arising in consequence of disability. It implies inappropriate conduct on the part of the respondent that we do not accept for reasons set out in the sections of our Judgment below that look at the process followed. The claimant's absence in 2019/2020 was more the result of the claimant's reaction to his ex-wife's complaint, the fresh matrimonial finance proceedings/stress in his personal life, the claimant then facing misconduct proceedings (born of his own original conduct in accessing the medical records) and the knock on effect of all of these things coming together in terms of the claimant's finances, his fears for his career, the importance to the claimant of his own reputation combining with the fact of the claimant's pre-existing personality type. His becoming permanently unable to perform his substantive role came against that background and appears to have been largely triggered by the claimant's personal reaction to what was said at the Inquiry Panel and in the Inquiry Panel's two reports, but that does not mean that the respondent was necessarily at fault. The impact ultimately of all these things was that he felt unable to safely continue in what was obviously an incredibly high pressure job. Being subject to the Extended UPSW was not a cause or contributing factor to the initial ill health and absence from work (because he was only under investigation and not yet under the Extended UPSW). In the longer term being subject to the Extended UPSW did play a more than trivial part the overall complicated mix contributory factors to the claimant becoming permanently unable to perform his substantive role, but not in a way that implies fault on the part of the respondent. Any disciplinary process was going to prove stressful to the claimant as it would for anyone facing it, and he was in general well supported (again we address that further below).

<u>Did the following incidents occur?</u>

<u>If so did it constitute unfavourable treatment?</u>

<u>If so, was it because of something arising in consequence of the claimant's disability?</u>

<u>If so, where the respondent's actions justified?</u>

a. Between 7 November 2019 to 11 March 2020, both Professor Hope-Gill and Dr Scott-Coombes failed to give any due consideration or weight to the content of the claimant's letters of the same dates, in which the claimant explained he suffered from obsessive compulsive traits which prompted him to check his family's medical records?

5.48 We did not find this allegation was made out as a matter of fact and as such would not constitute the unfavourable treatment pleaded. Our finding is that

Professor Hope-Gill did give consideration/weight to the claimant's submissions and decided that it was potential mitigation that he would flag up in his investigation report to be assessed as the disciplinary case progressed. The claimant and his experienced BMA representative agreed to this at the time. Professor Hope-Gill was at that time expecting a psychiatric opinion to be produced by the claimant (there being none at the time in support of the claimant's submission). It was therefore not something that was just, for example, ignored or not flagged up. Mr Scott-Coombes we find that he did likewise give due consideration or weight to the claimant's submissions before making his decision how to proceed. But he decided on what was before him that it was not enough for him by himself to conclude that it completely exonerated the claimant. Therefore, he decided the appropriate way forward was to continue with the disciplinary process of the UPSW as part of which the claimant's mitigation could be assessed by the appropriate panel under the UPSW.

5.49 In any event, we would not find that Professor Hope-Gill's and Mr Scott-Coombes actions were because of something arising in consequence of the claimant's disability. In terms of their mental processes, both fundamentally considered the conduct that needed to be looked by following through the UPSW process. They believed that whether such traits existed and whether they provided mitigation were issues to weighed in that process. They did not decide to proceed in the way they did because the claimant had a need or compulsion to check on his family's health and wellbeing by accessing medical records in breach of confidentiality. Even if it could be said the "because of" is made out because Professor Hope-Gill and Mr Scott-Coombes were taking action under UPSW because of the claimant accessing the medical records, we have in any event already found that accessing *not* to be something arising in consequence of disability. They also did not proceed in the way they did because the claimant had some absence from work and/or absence from undertaking his substantive clinical duties.

5.50 Even if we are wrong about all this, we would also have in any event found their actions to be justified. It is a legitimate aim for the respondent to have a fundamental need for the NHS to comply with its legal duties in connection with the security and safeguarding of sensitive personal data and to safeguard sensitive personal data from unauthorised and unlawful access. Health information is the most sensitive of personal data in respect of which significant trust is place by the public in the hands of the NHS and NHS staff. It is an important legitimate aim. The claimant's conduct in accessing records was on the face of it was extremely serious and needed investigating. It was not Professor Hope-Gill's role to decide on the next course of action as he was the Case Investigator not decision maker. His job under UPSW [994] was to undertake thorough and impartial investigation (inquiring into matters which may exonerate the practitioner a well a matters which may determine fault on their part) and to prepare a written report detailing the scope of the enquiry, the information gathered, the findings reached and advise the Case Manager whether the allegations in the terms of reference have been established to justify the instigation of formal action and the convening of a panel hearing.

5.51 As part of that task it was proportionate for Professor Hope-Gill to note and record the claimant's mitigation to be assessed by the appropriate decision makers in the disciplinary process in due course. In terms of the impact on the claimant, the claimant would always have had to go to the next stage in the process as Professor Hope-Gill did not have the power to just stop the process; he was not the decision-maker. He could not, for example, convert the process to

a capability process as suggested by the claimant. It should also be note that at the time of the first meeting/ statement given to Professor Hope-Gill the claimant was not signed off sick but was taking special leave predominantly in the face of the matrimonial proceedings. By the time of the second meeting/statement the claimant was in the OH process and Professor Hope-Gill took steps to ensure the claimant was being supported in terms of the claimant's mental health. Further, in terms of the proportionality of Professor Hope-Gill's investigatory actions and the criticism that he did not obtain medical evidence about the claimant's assertions, we consider that Professor Hope-Gill's action in noting and recording the claimant's mitigations was proportionate. This is particularly in view of the fact that he understood the claimant was in the process of obtaining a psychiatric opinion/diagnosis; the claimant and his experienced BMA representative had not objected to the course of action; all that currently existed was the claimant's own assertions; and in the Tribunal's own industrial knowledge and experience it is usual for the employee to go and obtain their medical evidence in support of mitigation (that the employer can then consider and decide how best to approach). As already stated, it is important to bear in mind that Professor Hope-Gill did not dismiss or ignore the claimant's assertions; he summarised them and flagged them up and passed them on to the next stage. The claimant makes various other criticisms of Professor Hope-Gill's investigation and report (and indeed other complaints about the process that was followed), but we do not address them here as they do not go to the issue of the weight given to the claimant's assertions that obsessive compulsive traits prompted him to access the medical records. But to be clear we do not consider that he was part of some fixed pre-judged mindset (or that there was such a mindset at all) that the claimant was going to be disciplined at all cost and the claimant's submissions about his OCD/OCPD disregarded. We find that Professor Hope-Gill took his own considered approach and decided individually to do what he did, which as we have said was agreed to by the claimant and the BMA at the time.

5.52 Turning to Mr Scott-Coombes, our view is similar. He undertook his own, considered approach. He decided that the ultimate weight to be given to the claimant's submissions about the impact of OCD/OCPD should be evaluated by a panel under UPSW. It meant that the claimant faced the continued pressure of those proceedings. But we find that even taking that impact into account it was a proportionate decision by Mr Scott-Coombes (as endorsed by Professor Walker). The legitimate aim is a significant one for the respondent as an NHS Trust. There was no medical evidence in support of the claimant's submissions and it was reasonable for Mr Scott-Coombes to not be satisfied on what he had before him that the claimant who on had on the face of it broken the law, should simply be exonerated and the process just stopped because of what the claimant was saying about the role of his mental health condition. Mr Scott-Coombes was not denying the claimant the legitimate consideration of the claimant's line of defence. Mr Scott-Coombes was simply saying that it should be considered on the evidence by the appropriate panel; that was a proportionate position to take. We consider separately below the claimant's arguments relating to following the Standard Procedure, or dealing with it as a capability issue, or dealing with it as a health issue, or agreement to refer to an independent psychiatrist. But to the extent these issues are linked we would not consider (for the reasons given below) that they were a more proportionate way to proceed.

b. On 11 March 2020 and at all material times thereafter, failing to adopt the UPSW capability procedure instead of the conduct procedure;

Alternatively failing to adopt the Standard UPSW procedure instead of the Extended UPSW procedure

5.53 The UPSW can be found at [984-1020] and we took its content fully into account. It is a long and complication process that makes it difficult to precis. But in essence the Medical Director (Professor Walker) assigns the role of Case Manager (Mr Scott-Coombes) who undertakes an initial assessment on whether a formal investigation is required as opposed to informal resolution. On page 1 [986] it says that where possible NHS organisations will seek to address capability and/or performance concerns through training or other local remedial action. The section on "*Action when a concern arises*" says in its introduction at 1.1. [991] that "*Initially, concerns regarding the capability or conduct or performance of a practitioner should be addressed through local mechanisms e.g. appraisal and one to one meetings with the practitioner's consultant/lead clinician*." UPSW also provides that the case manager will seek the guidance of the Workforce and OD Director when deciding the appropriate course of action in each case, including seeking the views of NCAS where appropriate. It says at the initial assessment stage before determining whether a formal investigation is required consideration should always be given to scope for resolving concerns through informal remedial action, drawing on guidance and support from, for example NCAS.

5.53 If the Case Manager considers that a formal investigation is required then he formulates terms of reference for the investigation and (in consultation with the Medical Director and Workforce &OD Director) appoints a Case Investigator (Professor Hope-Gill) [994]. Under paragraph 1.13 UPSW [996] after the investigation report is complete (addressed above) and the practitioner has provided their comments the Case Manager makes a decision whether –

- There are concerns about the practitioner's capability or performance that should be addressed with assistance from NCAS/or equivalent body;
- There are concerns about the practitioner's health that should be considered in accordance with Part 3 of the Procedure;
- There are concerns which should be determined at a hearing in accordance with section 4 or 5 of the Procedure [Standard Procedure and Extended Procedure respectively];
- Restrictions on practice or exclusion from work are considered under Part 2;
- There are serious concerns that should be referred to the GMC;
- No further action is called for;
- Or combination of such actions.

5.54 Under paragraph 1.27 UPSW [997] the practitioner can appeal against the Case Manager's decision on the process to be followed. The appeal is made in writing to the Chief Executive within 14 days of receiving written confirmation from the Case Manager as the process to be followed. The appeal is then heard by a panel. Part 3 UPSW is headed "*handling concerns about a practitioner's health*" and we return to that separately below. Part 4 sets out the Standard Procedure. There is a 3 person hearing panel. There is a range of potential outcomes from no action required, issuing an oral statement, issuing a written warning (about conduct or clinical performance), addressing the situation through

another procedure such as the health procedure, or exceptionally referring it on to the Extended Procedure. There is a right of appeal to an appeal panel.

5.55 Part 5 sets out the Extended Procedure [1014] which is described as being used *"when handing more serious issues, where the outcome of disciplinary procedure could potentially lead to the dismissal of the medical… practitioner… or the issuing of a final written warning."* It is a longer process with the appointment of an independent Inquiry Panel. The Inquiry Panel, after a hearing, prepares two reports. The first part sets out the Panel's findings and all relevant facts of the case but contains no recommendations as to action. The second part contains a view as to whether the practitioner is at fault and recommendations as to disciplinary action. The Medical Director then decides whether to convene a separate disciplinary hearing. There is then a 3 person Disciplinary Panel who decide the outcome, which cannot be more severe than that recommended by the Inquiry Panel. The outcomes available include those available under the Standard Procedure but additionally includes dismissal and a final written warning. There is an appeal process.

5.56 We accept that placing someone on the extended UPSW procedure would amount to unfavourable treatment. We do not, however, find the claimant was placed on the extended UPSW because of something arising in consequence of disability. The claimant's actions in breaching confidentiality caused the extended UPSW to be followed but this was not (due to our above finding about the lack of an established link between OCD/OCPD and the claimant's breaching behaviour) something arising in consequence of disability. The placing of the claimant on the extended UPSW was also not because the claimant had some absence from work and absence from undertaking his substantive duties.

5.57 If we are wrong about that, we would in any event find the respondent's actions to be objectively justified. It is a legitimate aim for the respondent to have a fundamental need for the NHS to comply with its legal duties in connection with the security and safeguarding of sensitive personal data and to safeguard sensitive personal data from unauthorised and unlawful access. Health information is the most sensitive of personal data in respect of which significant trust is place by the public in the hands of the NHS and NHS staff. The claimant's conduct on the face of it was extremely serious. It was appropriate and proportionate to that aim to classify and address the allegations as being a matter of conduct to be considered through a conduct process rather than a capability issue for a capability process. These were allegations about the claimant's behaviour in the workplace. They were not allegations about the claimant's ability or qualifications to do his substantive job. Indeed, it was evident from all the respondent's witnesses how highly rated the claimant was as a clinician. The claimant's experienced BMA representative did not assert at the time that this was not a conduct matter. The claimant was not saying that he had lost all free will. The claimant also asserts that there was a fixed mindset to deem his actions as gross misconduct and not consider them as capability. We do not find there was a fixed mindset, whether individually or collectively. But the fundamental point is and was that the claimant's actions were on the face of it very serious and were reasonably and appropriate seen as being a matter of conduct (subject of course to assessment of the defences the claimant would run).

5.58 It was also appropriate and proportionate to take the claimant through a formal conduct procedure rather than addressing the concerns through training or

other informal remedial action (such as an appraisal or a one to one meeting with a consultant/lead clinician), or Practitioner Performance Advice – formerly National Clinical Advisory Service (PPA/ NCAS) performance assessment bearing in mind the serious nature of the conduct and on the face of it what was a gross and sustained breach of patient trust and confidentiality in accessing the records. NCAS did not suggest that this was a matter for a performance assessment rather than a conduct process. For example the record at [1353] is ticked as suspected misconduct. The letters from Mr Boyle at the PPA (for example at [1361] contain no advice that in the circumstances it should be dealt with as a performance matter or referred to them for a performance assessment. Likewise the email note at [1366] when the claimant was referred to the Extended Procedure does not suggest this was inappropriate. Taking the claimant through such a formal conduct process also did not constrain the ultimate decision makers as to the sanction they could impose; it left the widest range of options on the table for them to consider (which could have, for example, included training). It was proportionate and appropriate to take this course of action.

5.59 It was also appropriate and proportionate to take the claimant through the Extended Procedure rather than the Standard Procedure. The respondent had a legitimate aim as already identified. The claimant's conduct was on the face of it serious and on the face of it gross misconduct and potentially a dismissible offence. Both Mr Webb and Mr Pritchard gave evidence of other employees being dismissed for accessing patient records. In terms of impact on the procedure, the claimant would face the stress of the Extended Procedure but he would face stress under the Standard Procedure too and as Mr Scott-Coombes said in evidence in most disciplinary cases the employee will suffer stress and often have an impact on mental health, including going on sick leave. There were more stages to the procedure but that brought with it the involvement of an Inquiry Panel stage designed to bring some independence into the process for the benefit of those facing more serious allegations.

5.60 It was proportionate to the aim, the impact on the claimant, and the seriousness of the potential conduct that the claimant face the Extended Procedure with the range of outcomes available under that procedure. In that regard the same range of outcomes remained open to the disciplinary panel that would be open under the Standard Procedure but with the addition of the additional potential sanction of dismissal and a final written warning. It is therefore not the case that the claimant lost, for example, the possibility of lower level outcomes (albeit of course the potential sanctions at the higher end were more serious). It is also notable in this regard that the claimant did not appeal the decision to refer him under the Extended Procedure at the time. He cites his health and a wish to get the process completed. However, he had an experienced BMA representative advising him who did not pursue an appeal. In our judgement in all likelihood the BMA probably understood the seriousness of the allegations and why they were being pursued under the Extended Procedure.

5.60 The claimant also submits that the Extended Procedure was not appropriate because it was known he had admitted the access, he had a clean disciplinary record and was highly regarded and it must have been known that he had not acted maliciously. The claimant, however, had admitted access but had not admitted he acted unlawfully, in breach of policy or in breach of contract (in

fact he went on to deny these things). Moreover admitting something does not of itself make it no longer serious. The claimant making early admissions and his good character and record were mitigations to be taken into account but it did not mean that the proportionate step was instead to place the claimant on the Standard Procedure rather than the Extended Procedure. Likewise the causative factors such as the link with OCD/OCPD were there to be considered as part of the Extended Procedure process and that was a proportionate step. In terms of whether the claimant used the information in the matrimonial proceedings Mr Scott-Coombes decided that point in the claimant's favour, finding there was insufficient evidence.

c. *On 2 April 2020, Dr Scott-Coombes determining that the matter should proceed under the Extended Procedure of the UPSW;*

He denied the Claimant's request to be referred to an independent psychiatrist

5.61 The first part of this is a repetition of b above and we have addressed it immediately above.

5.62 We accept the refusal to refer to an independent psychiatrist was unfavourable treatment. It would be reasonable for someone in a disciplinary process who actually requested a referral to an independent psychiatrist to view a refusal as a disadvantage.

5.63 There was, we have found, confusion as to the purpose behind the request. The claimant's own evidence on this was confusing. In his witness statement the claimant says it was so that Mr Scott-Coombes "*would have a complete picture of my disability",* which is a very broad statement. At the time of the Inquiry Panel the claimant said he wanted a different opinion from the Trust side if possible because the Trust may consider his own psychiatrist was biased. In evidence before us he confirmed his witness statement was accurate in saying it was so that Mr Scott-Coombes would have a complete picture of his disability but he also said he wanted the report to exonerate himself and was to convince his employer that it was due to his ill health.

5.64 If the claimant's request at time was on the basis of the respondent having a complete picture of his disability it would explain, in turn, the confusion on the part of the respondent. Mr Scott-Coombes understood it was to request more psychiatric help from Professor Tahir. At the appeal stage he said he had understood that to be for a wellbeing/treatment purpose. He understood the advice he was given from HR was that the respondent did not ordinarily fund such reports, at least without a recommendation from occupational health. Mr Pritchard's belief was that the request was for the general purpose of mitigation and that his view, supported by Mr Driscoll was that it was the claimant's duty to obtain that kind of medical evidence in mitigation. As set out in our findings of fact it is likely that Mr Pritchard's belief then drove Mr Scott-Coombes' response, even if they had different understandings of the purpose of the request. It was likely the request was poorly communicated at the time on the claimant's behalf. We do not consider that the claimant directly and expressly said at the time he was asking for such a report to specifically consider the link between OCD/OCPD and his conduct in accessing the medical records.

5.65 The refusal of the request was not because of something arising in consequence of disability. Mr Scott-Coombes rejected it because he believed it was for psychiatric/wellbeing help, that the claimant wanted help funding, and he did not believe the respondent would ordinarily fund without an OH

recommendations. He did not reject it because of the claimant accessing the medical records (which we have already found in any event was not a thing arising in consequence of disability), or because the claimant had been absent from work/unable to perform substantive duties. Mr Pritchard rejected it because he thought it was the employee's responsibility to obtain that kind of medical evidence in mitigation. Again, that was not because of either of the things identified as being in consequence of disability.

5.66 We would in any event find the refusal to be objectively justified. The respondent had a legitimate aim in taking action to safeguard sensitive personal data, including by taking employees who have breached data protection responsibilities through the UPSW. It was proportionate to that aim for the respondent in these circumstances to place the onus on obtaining medical evidence in mitigation in such UPSW proceedings on the employee seeking to rely on that mitigation. The Tribunal here relies on our industrial knowledge that it is standard practice in misconduct proceedings for employees (particularly those represented by a trade union or staff association) to obtain medical evidence in mitigation, where relevant. An employer will then consider what weight to give to it or whether they wish to, for example, ask further questions of the doctor or make their own referral to OH or elsewhere. Here the claimant had not made available to the respondent any medical evidence about mitigation (Professor Hope-Gill had understood the claimant was obtaining some). The claimant had not given the respondent Professor Tahir's clinical letter, albeit it did not set out the link between OCD/OCPD and the behaviour in question in any event. In terms of the impact on the claimant, it remained open to the claimant, and to those advising him throughout to obtain medical evidence in support of the alleged link or other relevant mitigating factors. The claimant says the respondent never told him to do this, but the claimant was represented throughout by an experienced BMA representative and latterly had legal representation.

5.67 It would also be proportionate to the legitimate aim of the disciplinary process as identified to refuse to obtain or fund medical evidence about wellbeing or treatment from an independent psychiatrist unless a particular need had been identified that was relevant to the disciplinary process, for example, as recommended by OH. OH never made that recommendation. Any particular wellbeing reason that was relevant to the disciplinary process was not set out to the respondent. Further the claimant was receiving support from his GP, his psychiatrist, his therapist and OH.

d. Between November 2019 and January 2020, the Respondent failing to refer the Claimant to OH or otherwise throughout the period obtaining professional independent advice (for example a psychiatric opinion) regarding the Claimant's condition

5.68 It is important to note that this particular complaint relates only to the period November 2019 through to January 2020.

5.69 We have already addressed this point in relation to Professor Hope-Gill's first meeting with the claimant who had been told the claimant was obtaining a psychiatric opinion about any diagnosis and the claimant at that time was not on sick leave. The claimant or the BMA had not asked for such a referral. We do not consider there was any unfavourable treatment by Professor Hope-Gill in this regard.

5.70 As the claimant says on 12 November Mr Scott-Coombes suggested the claimant should have continued medical support (referral to OH). To the best of

our understanding this was not actioned, albeit two days later the claimant contacted Mr Durning to ask him to make such a referral. We do not consider this lack of referral on behalf of Mr Scott-Coombes was unfavourable treatment as the claimant did not know about it at the time as it was not something done at his request (including via his BMA representative). But if we are wrong about that, it was not, however, because of something arising in consequence of disability. Most likely it was not actioned because the decisions in total in that email did not proceed at that time because of the further investigations required due to the claimant disclosing he had accessed other records (and therefore the claimant did not know at the time about the decision to take him through the Extended Procedure). (By the time the claimant was later told about the decision to take him through the Extended Procedure he was already in the OH process) This action/lack of action did not happen because the claimant had accessed the records in consequence of disability (which we have found not to be in consequence of disability in any event) or because the claimant was absent from work on special leave and not performing substantive duties.

5.71 After 15 November 2019 the respondent did not refer the claimant to OH or for other medical advice such as a psychiatric opinion because it was thought that Mr O'Callaghan had initiated a referral to OH and it was his intention to do so. OH would be the first port of call before getting any other psychiatric opinion if recommended. This did not happen because of admitted error on the part of Mr O'Callaghan. It was just that, an error or a mistake or an oversight. The same applies for Mr Gidman's delay after he had completed the initial paperwork, which he submitted once the claimant chased him up, and who the claimant accepted had his interests at heart. It was unfavourable treatment, but it was not because of something arising in consequence of disability. It was not a mistake made by Mr O'Callaghan (or Mr Gidman) because the claimant had accessed the medical records in question (which in any event we have not accepted was arising in consequence of OCD/OCPD). It was also not a mistake made because the claimant had been absent from work or absent from duties.

5.72 The claimant also refers to Mr Durning not referring him to OH when the claimant contacted Mr Durning after this self-harm incident. Mr Durning did however make immediate contact with the claimant, met with him and offered him support and the claimant accepted in evidence that he had discussed many things with Mr Durning including that the claimant was seeing his GP, was on medication and was accessing CBT. The claimant said he could not remember if he had told Mr Durning that Mr O'Callaghan was making a referral to OH. He accepted he felt at the time Mr Durning was supporting him. The claimant accepted at the time he himself thought the referral had been made. In the circumstances we consider on the balance of probabilities Mr Durning, like everyone else at the time probably thought that the OH referral had been made and that he also probably thought the claimant was receiving appropriate medical support. In any event, even if there was unfavourable treatment by Mr Durning, for the reasons already given, it was not because of something arising in consequence of disability.

e. The Respondent failing to act on OH recommendations dated:

i. 13 March 2020

ii. 6 May 2020

5.73 The OH report of 13 March 2020 [617-618] said a substantial proportion of the claimant's current ill health was directly related to the internal investigation

and associated uncertainty regarding his career. The doctor was optimistic that on conclusion of the investigation the claimant would see significant improvement in his symptoms. At that time Dr Hopkins spoke encouragingly about a phased return to work. The OH report of 6 May 2020 [621] recorded the claimant reporting that the investigation was ongoing and was likely to take several months with a set back due to the pandemic. It was reported that the claimant, however, was feeling better, more resilient with no negative thoughts of self harm and was aiming to return to work in mid June 2020. It was noted that the claimant was being supported by his GP and with CBT and was considering a psychiatry opinion again to establish if there was any additional underlying psychological issue but it would not impact on a return to work. It was said: "*A swift conclusion to the investigation process is recommended to help reduce any further psychological impact*."

5.74 We have no evidence of these OH reports, that went to Mr Gidman, being shared with Mr Scott-Coombes or others involved in organising the UPSW side of things. The two things were handled in two separate silos. The UPSW was kept away from and managed outside of the claimant's directorate. This was a real positive in the sense that it allowed those in the directorate such as Mr Gidman and the claimant's other colleagues to concentrate on supporting the claimant. The claimant could have shared his OH reports with Mr Scott-Coombes himself. Indeed, he wrote saying he would forward the OH report when he received it [615]. We say this with the benefit of hindsight, but we do consider, however, that it would be helpful to the respondent to have a system in place that allowed appropriate and relevant sharing of OH reports between a directorate and those responsible for managing the UPSW (which would of course require the specific consent of the employee given it is confidential health information).

5.75 That said we do not consider that in fact there was in fact a failure to act on the substance of the OH reports, even if Mr Scott-Coombes did not have sight of them. Mr Scott-Coombes, and others involved such as Mr Pritchard, were aware the claimant was unwell and was absent from work and that the UPSW was likely to be a maintaining factor and a source of stress. As they said in evidence it is not unusual for those facing disciplinary proceedings to have anxiety and depression and to be absent from work. The comments made by OH would be exactly what they would have been expecting and envisaging.

5.76 Further, we do not find there were unreasonable delays in the UPSW procedures following receipt of the OH reports. At the time of the first report the pandemic was beginning to bite which made it more difficult to arrange the meeting that was required with the claimant under paragraph 1.25 of UPSW [996] to explain the decision to proceed under the Extended Procedure and to outline the process which would follow. This did, however, happen on 1 April 2020 with the claimant promptly being sent the follow up letter on 2 April 2020. The respondent then had to give the claimant 14 days in which to appeal.

5.77 Thereafter we are satisfied that arranging the Inquiry Panel was reasonably delayed due to the impact of the Covid 19 pandemic. There were also the administrative arrangements to be made involving the selection of and appointment of external individuals to the panel. The claimant himself expressed an understanding of the impact of the pandemic as recorded in the OH report of 6 May 2020 and indeed did so again in cross examination. The claimant was also able to return to work in early June 2020 despite the UPSW remaining outstanding. There was no complaint at the time from the claimant or his BMA representative as to the time it was taking to convene a hearing.

5.78 We therefore were not satisfied that there was, as a matter of objective fact, a failure to act on OH recommendations and do not find that there was unreasonable treatment. Further, even if there was any delay, it was not because of the things said to be arising in consequence of the claimant's disability but due to the complications of the covid 19 pandemic and the complex arrangements for convening a panel (which included the claimant's representatives availability too).

5.79 We also consider that any delay would be objectively justified. The respondent had a legitimate aim in pursing serious allegations through the Extended Procedure. The time taken would, as already stated, inevitably have some impact on the claimant's health and wellbeing as faced by employees in disciplinary processes, but in view of the wider circumstances, particularly that of the pandemic, the process followed including the timescales was viewed objectively a proportionate step as against the importance of the legitimate aim and the impact on the claimant.

f. Between November 2019 and 9 February 2021, the Respondent failing to provide support to the Claimant despite the Claimant being increasingly unwell.

5.80 There was a failure by Mr O'Callaghan to refer the claimant to OH as promised, as already dealt with above in the period November 2019 to January 2020. There was then a further delay by Mr Gidman in sending off the referral paperwork. Apart from that we would wholesale reject the contention that the respondent failed to provide support to the claimant.

5.81 The claimant had support from Mr Durning until Mr Durning retired. Mr Durning was not officially replaced but notwithstanding this the claimant had extensive and regular support from Mr Gidman throughout the period in question. The claimant had support from the wider team around him such as Mr Meta and Mr Mohammed. He was supported in his initial requests for time off work, and his sick leave was then supported. The claimant had various adjustments made to his work on his request, such as the type of theatre the claimant was doing. On the claimants return to work in June 2020 his return to work was extremely well supported and adjusted. Continued referrals were made to OH. In truth we considered this allegation, as a whole, was poorly thought through or set out.

5.82 In terms of the initial delay/mistake in the referral to OH, we have already set out that this was not because of the things said to arise in consequence of disability.

g. On or around 2 April 2020 and at all material times thereafter, the Respondent failing to halt or consider halting the Extended UPSW Procedure

h. On or around 2 April 2020 and at all material times thereafter, the Respondent failing to modify or consider modifying the Extended UPSW Procedure

5.83 To the best of our understanding, these complaints appear to relate to Part 3 UPSW (and in particular 3.10) which says:

> "*3. HANDLING CONCERNS ABOUT A PRACTITIONER'S HEALTH*
>
> *Introduction*
>
> *3.1 The key principle for addressing practitioners with health problems is that, wherever possible and consistent with the need for reasonable public protection, such individuals should be allowed time for treatment, rehabilitation or re-training as appropriate (for example if they cannot*

undertake exposure prone procedures) and kept in employment rather than be lost from the NHS.

Retaining the Services of Individuals with Health Problems

3.2 Whenever possible the organisation will attempt to support the practitioner remaining at work provided this does not place patients or colleagues at risk. In particular, the organisation will consider the following actions for staff with ill-health problems:

- *Modifying the practitioner's duties;*
- *Reassigning the practitioner to a different area of work;*
- *Adjusting the practitioner's working environment having regard, if applicable to the requirements in the Equality Act 2010 and guidance contained in the relevant codes of practice.*

Reasonable Adjustment

3.3 At all times the practitioner will be supported by the organisation and the Occupational Health Service (OHS) which will ensure that the practitioner is offered every available resource to get back to practice where appropriate. The organisation will consider what reasonable adjustments could be made to their workplace or other arrangements and where applicable, in line with the Equality Act 2010. For example…[There is then a list of potential adjustments that we do not need to set out here]

Handling Health Issues

3.5 Where the outcome of an investigation may point to a problem with the practitioner's health, appropriate inquiry should be undertaken to determine whether there is a health problem. If the report recommends OHS involvement, the Case Manager must immediately refer the practitioner to a qualified physician with the Occupational Health Service.

3.6 NCAS may be approached to offer advice on any situation and at any point where the employer is concerned about the health of a practitioner. Even apparently simple or early concerns can be referred as these are easier to deal with before they escalate.

3.7 The occupational physician will recommend a course of action with the practitioner and send his/her recommendations to the Medical Director. A meeting will be convened with the Workforce and OD Director or nominated deputy, the Medical Director or Case Manager and the practitioner to agree a timetable of action and rehabilitation (where appropriate). Confidentiality must be maintained by all parties at all times.

3.7a The practitioner may be represented in the "health" process by a workplace colleague or representative who may be from (or retained by) a trade union or defence organisation…

3.9 In cases where there is impairment of performance solely due to ill health, disciplinary procedures are not considered an appropriate mechanism for managing such situations. The aim is to consider all options for rehabilitation and it would only be in the most exceptional of circumstances, e.g. if the individual concerned refuses to co-operate with the employer to resolve the underlying situation or refuses a referral to NHS or NCAS/equivalent body then the organisation would have to resort

to the formal process under this procedure. In these circumstances the procedures in parts 4 or 5 will be followed. Additionally, the Medical Director should consider the appropriateness of referring the matter to the GMC/GDC under the respective Council's Health Procedures.

3.10 There will be circumstances where an employee who is subject to disciplinary proceedings puts forward a case, on health grounds, that the proceedings should be delayed, modified or terminated in such cases the organisation will refer the practitioner to OHS for assessment as soon as possible. Unreasonable refusal to accept a referral to, or to co-operate with the OHS under these circumstances, may give separate grounds for pursuing disciplinary action.

5.84 Mr Scott-Coombes initially decided to progress through the Extended Procedure because of his view of the seriousness of the alleged conduct and that the claimant's mitigation, including the claimant's health, could be considered through that process. As already stated at that time neither the claimant nor the BMA on his behalf appealed that course of action or said another course of action should be followed such as halting the process completely or halting it and following a health process.

5.85 Section 3 UPSW is not well drafted. Paragraphs 3.5 to 3.9 read in conjunction with 1.23 and 1.9 UPSW appear to create a "health process" which a case can be taken down either at initial assessment stage or decision stage after the formal investigation. It appears to be different to a capability process under part 4 or part 5 (which it must be remembered can cover clinical performance issues as well as conduct issues) or indeed capability or performance concerns that are suitable to being addressed with the assistance of the PPA/NCAS. Under the health process there is a referral to OH who recommend a course of action to the Medical Director and a meeting is held to agree a timetable of action and rehabilitation (where appropriate). Paragraph 3.9 says that where there is impairment of performance *solely* due to ill health, disciplinary procedures are not considered the appropriate mechanism and the aim is to consider all options for rehabilitation.

5.86 For reasons already given the claimant's situation was reasonably not considered to be a capability/performance issue. It was not a case where there was impairment of performance solely due to ill health. It was not unfavourable treatment for Mr Scott-Coombes to not convert to the health process. Further, he did not do so because he considered the claimant's circumstances did not qualify. It was not because of something arising in consequence of disability. In any event we would consider his course of action to be objectively justified for the reasons set out already above.

5.87 Paragraph 3.10 of UPSW sets out another way in which health related issues may be considered. It specifically applies where the practitioner "*puts forward a case on health grounds"* that the proceedings should be delayed, modified or terminated. There is then to be a referral to OH. In the claimant's case the putting forward a case that the proceedings should be terminated/halted was not raised until the start of the Disciplinary Panel hearing on 9 February 2021. That application to terminate the process was made on the day without prior warning.

5.88 The Disciplinary Panel considered the application to terminate the process and rejected it deciding to proceed with the disciplinary hearing. Their reasoning, in short terms, was that getting the proceedings concluded may assist the

claimant in his recovery and that they could in any event consider a health related outcome if appropriate under paragraph 5.18 UPSW. The independent Appeal Panel later upheld that decision.

5.89 We accept the decision to proceed rather than halting could be considered to be unfavourable treatment. But the decision was not made because the claimant accessed the medical records in consequence of his disability. We have already found we are not satisfied the claimant accessed the records in consequence of his OCD/OCPD. It could potentially be argued that the Disciplinary Panel's decision to proceed was because of something arising in consequence of the claimant's disability in the sense that they took into account the affects the claimant was saying the situation was having on his mental health when deciding to proceed. However, that does not directly accord with the other pleaded "thing arising in consequence" of: "*The Claimant was unable to carry out his substantive role as a result of the exacerbation of his disabilities caused by the Extended UPSW and the Respondent's conduct throughout that procedure.*" However, in any event we would find the decision not to terminate the process but instead proceed with the disciplinary hearing was objectively justified.

5.90 The respondent had the legitimate aim identified of safeguarding and enforcing the important confidentiality of patient records and maintaining public confidence in that. The Inquiry Panel had found the claimant had acted in serious breach of data protection law, the respondent's policies and the claimant's contractual duty of trust and confidence. The claimant was submitting that he was disabled and that the process was detrimentally affecting his health. However, in terms of proportionality if the Disciplinary Panel continued the disciplinary process was going to conclude that day. Furthermore, the Disciplinary Panel were not rejecting a health related outcome, they instead said that they could consider it as part of their powers they had to determine the outcome. We therefore would find that the decision was proportionate and objectively justified.

5.91 In relation to the complaint about the respondent failing to modify or consider modifying the Extended Procedure the claimant did not at the time and has not since ever identified what that modification is said to be. It must mean something other than halting/terminating. It is for the claimant to properly plead and evidence his case at least on a prima facie basis. Unfavourable treatment because of something arising in consequence of disability has not been identified by the claimant on a prima facie basis. The complaint therefore cannot succeed.

5.92 However, we would additionally observe, if it is about the sanction imposed by the Disciplinary Panel then we address that separately below. If it is about adopting the Standard Procedure we have addressed that above. If the allegation is about the length of time the Extended Procedure took (which potentially is suggested in the latter part of paragraph 58 of the claimant's witness statement) we are satisfied (for the reasons already given) that in the circumstances the process proceeded as reasonably expeditiously as it could.

5.93 If it is about the number of steps that are involved in the Extended Procedure (which is lengthy and multi-faceted) then we cannot see how steps could sensibly have been left out. This is a contractual policy negotiated by NHS employers in partnership with trade unions /professional associations. Many of the steps, such as communicating decisions to the claimant in person with a representative present, or having an independent Inquiry Panel producing a two part report (with comments being provided in between then), or having a separate Disciplinary Panel, and the offering rights of appeal at various stages are there to introduce checks and balance and an element of independence into

the decision making and protect the practitioner. But the consequence is it creates a long process. There was never a proposal by the claimant or the BMA that there was some step that could be left out to speed things up. There was no unfavourable treatment and it was not because of something arising in consequence of disability. To the extent we can tentatively identify what this is getting at the respondent's actions were objectively justified.

i Putting the Claimant through an Extended UPSW Procedure including full Inquiry Hearing despite the Claimant having admitted the allegations and having explained that his OCPD was a factor in his conduct

5.94 We have already addressed the decision to put the claimant through the Extended Procedure above as opposed to the Standard Procedure or any other process or step. We would add that the Inquiry Panel was a necessary part and consequence of the contractual Extended Procedure and, as we understand it, a part of a desire to incorporate some independence into disciplinary processes for the benefit of practitioners. We can see no obvious mechanism by which the respondent could just fast forward, in the Extended Procedure, to the Disciplinary Hearing (if this is what the allegation is getting at). Such a "fast forward" was also not requested at the time by the claimant or his BMA representative.

5.95 Furthermore, as the respondent observes, the claimant did not in fact admit the full charges against him. As such he needed the Inquiry Panel process. He admitted the fact of access to the records. He did not admit the full allegations he faced as he denied that his access was unlawful or in breach of his contract or that it constituted gross misconduct. Certainly, by the time of the Inquiry Panel the clamant was saying that the access was consented to, and he was acting as a treating doctor when accessing the records. The claimant said he was seeking full exoneration. Indeed, he accepted that even at the Disciplinary Hearing (which under UPSW was only concerned with the outcome, as the Inquiry Panel had already decided the facts and whether the claimant was at fault) he was still seeking full exoneration. Whether OCPD was a factor in the claimant's conduct was something for the Inquiry Panel to assess, as it was to assess the other reasons and factors that the claimant put forward.

5.96 We have accepted already that the placing of the claimant on the Extended Procedure would amount to unfavourable treatment. But we do not accept the pejorative way in which is allegation is drafted is correct and therefore amounted to unfavourable treatment in the way that is alleged in the allegation. It was also not unfavourable treatment because of something arising in consequence of the claimant's disability. We would also find the decision to adopt and follow the Extended Procedure objectively justified for the reasons already given.

j. In or around January 2021, deciding to pursue a Disciplinary Hearing against the Claimant

5.97 We accept that the decision to convene a Disciplinary Panel hearing was unfavourable treatment. It is not a process that someone in the claimant's position would be happy about, albeit it was a consequence in part of his own actions. The decision to convene the Disciplinary Hearing was made by Professor Walker. He did so because the Inquiry Panel had found on the face of it serious misconduct on the part of the claimant. The decision was not because of something arising in consequence of disability. We have already found that we are not satisfied the accessing of records was in consequence of the claimant's

disability. The decision to convene the Disciplinary Hearing was also not because the claimant was unable to carry out his role/had periods of absence.

5.98 In any event we would find the decision to convene the Disciplinary Panel hearing to be objectively justified. The respondent had the legitimate aim already identified. The facts and fault found by the Inquiry Panel were on the face of it serious misconduct on the claimant's part. It was proportionate to take that to a Disciplinary Panel hearing for the respondent to consider mitigation and decide on the outcome. There would inevitably be an impact on the claimant in doing so but the seriousness of the conduct found made this proportionate. It would also serve to bring the process to an end for the claimant. Moreover, in terms of proportionality the decision to call a Disciplinary Panel hearing was not a sanction in itself. The claimant would still have the opportunity to present his case in mitigation the hearing.

k. On 10 February 2021, giving the Claimant a final written warning.

5.99 The respondent accepts that giving a final written warning is unfavourable treatment. The decision to give a final written warning was not because of something arising in consequence of disability. We have already found that we are not satisfied the accessing of records was in consequence of the claimant's disability. The decision to give a final written warning was also not because the claimant was unable to carry out his role/had periods of absence.

5.100 In any event we would find the decision to give a final written warning to be objectively justified. The respondent had the legitimate aim already identified. The facts and fault found by the Inquiry Panel were on the face of it serious misconduct on the claimant's part. The claimant had been given access to health data in a system that worked on trust. The NHS and NHS staff are the custodians of public trust in the safeguarding of, and ensuring there is only legitimate and proper access to, the most sensitive and confidential of data in terms of health records. The respondent had a responsibility to safeguard and restore that public trust by taking action where a breach is found. In our objective judgement (bearing in mind we are ultimately assessing this for ourselves) the decision to administer a final written warning fairly and appropriately balanced the importance of that legitimate aim, the importance of public trust, the serious conduct found on the part of the claimant, as against the impact on the claimant and the claimant's mitigation. It is important to remember here in terms of proportionality that this was a decision to administer a final written warning; *the claimant was not dismissed.* We accept Mr Webb's and Mr Pritchard's evidence that there are comparable cases where staff had been dismissed. We accept that it has not been sufficiently established that the claimant's OCD/OCPD was causative in terms of his conduct in accessing the medical records. The claimant's mitigation about his wider health in general did not in our judgment render the administration of the final written warning as being disproportionate.

l. Carrying out the UPSW procedure over a 15 month period from October 2019 to February 2021, thereby exacerbating the Claimant's disabilities

5.101 This is a complaint that basically asserts that 15 months was too long without actually setting out what it is said the respondent did wrong. We do not find that the time taken to conclude the disciplinary process amounted to unfavourable treatment. The time taken to complete the individual stages was not unreasonable in the circumstances that existed. A reasonable worker in the claimant's position properly informed of the reason why the process took as long as it did would not consider the timeframe unreasonable.

5.102 The claimant was promptly told of the allegation and that there was to be an investigation under UPSW. The terms of reference were promptly drawn up. Professor Hope-Gill undertook his initial investigation promptly and very promptly prepared the first version of his investigation report by 9 November. The delay in finalising his investigation report was because of the claimant's disclosure on 7 November 2019 that the claimant had accessed other records. This meant the terms of reference had to be extended and further investigations undertaken. By 19 November 2019 the claimant had been given the option of indicating whether he wanted a further interview, or to provide a further statement or to proceed with the statement already given. It was the claimant's own option to have a further interview. That interview would have taken placed in early December but for the claimant's BMA representatives' non availability which meant the interview did not happen until 14 January 2020. That was not the fault of the respondent. By 3 February 2020 Professor Hope-Gill was still awaiting further information from the claimant which was provided on 5 February 2020. Professor Hope-Gill then very promptly finalised his investigation report by 7 February 2020.

5.103 We did not consider the period between then and Mr Scott-Coombes letter of 25 February 2020 to be unreasonable. Under UPSW the claimant then had to be given the opportunity to comment on the investigation report. He provided the comments on 11 March 2020 and a decision was promptly made to progress under the Extended Procedure. We have dealt already above the short delay in calling the claimant to the meeting on 1 April 2020 which related to the pandemic. The meeting itself was required under UPSW. The respondent then had to give the claimant time to consider an appeal. We have already also addressed above the delay in convening the first Inquiry Panel on 16 October 2020 which again related to covid and the complications of booking an external panel and making sure everyone was available. The recusal of the first Inquiry Panel related to the claimant's representatives observing the private discussions of the panel. The second panel was promptly set up for 21 October 2020.

5.104 Thereafter the part one report was promptly produced by 6 November. Under UPSW it had to be sent out to the claimant for comment before the part two report could be produced. The part two report was then produced on 27 November 2020. Within days Mr Pritchard was then in contact with the claimant to inform him that a disciplinary hearing was to be arranged and it was the claimant who opted for that to take place after Christmas. It was arranged for 9 February 2021 largely because of the claimant's BMA representative's availability.

5.105 The length of time of the process was not unfavourable treatment. In any event it was not because of something arising in consequence of disability. We have not found it established that the claimant accessed the medical records (which led to the disciplinary process) in consequence of his disability. The length of time of the process was also not because the claimant had not been completing his substantive duties/absent from work. It happened because of the prevailing circumstances at the time and because the UPSW process has so many stages built into it.

5.106 We would also find the timescale objectively justified. The respondent had the legitimate aim already identified. Being subject to the process inevitably caused the claimant stress (as did the matrimonial proceedings, the impact on his family, and his personal difficulty in coming to terms with his own actions and situation he then faced). It is evident that the claimant found the Inquiry Panel particularly distressing. However, the process followed is the one set down by

UPSW and which the respondent had to follow. In all the circumstances the process and the timescales were proportionate to the legitimate aim.

m. Refusing to or otherwise failing to give any weight to the Claimant's OCPD as mitigation at the Inquiry Hearing on 21 October 2020.

5.107 The Inquiry Panel did not find it established that there was a causative/contributory link between the claimant's OCPD and the accessing of the records and therefore could not amount to mitigation in terms of assessing culpability/exoneration. We would note on our reading of their decision and Ms Bayoumi's evidence the Inquiry Panel they did not in fact expressly say the claimant's mental health in general (which presumably includes OCPD as the Inquiry Panel accepted the diagnosis) could not be wider relevant mitigation as they did in fact mention the claimant's general mental health in their section on mitigating factors.

5.108 The decision that the causative/contributory link was not made out and that the OCPD could not amount to mitigation on that basis, would be unfavourable treatment. But we do not find that the Inquiry Panel made their decision as to how to assess the alleged causative/contributory link because of something arising in consequence of disability. The decision was not made because the claimant accessed the records in consequence of his OCPD/OCD; that is counterintuitive. In any event we have ourselves not found it established that the claimant accessed the records in consequence of his OCPD/OCD. The Inquiry Panel also did not reach their decisions because the claimant was unable to carry out his substantive role/had periods of absence. They reached the decision because that was their assessment of the evidence before them as an independent panel.

5.109 The respondent, through the Inquiry Panel, had the legitimate aim already identified. Deciding that they were not satisfied that the link between OCPD/OCD and the breaching conduct and it therefore could not be mitigation in terms of culpability/exoneration was objectively justified. The respondent had a legitimate aim. It was proportionate to that aim to make the finding that the causative link was not made out; we have reached that same conclusion ourselves.

n. Refusing or otherwise failing to give any weight to the Claimant's OCPD as mitigation at the Disciplinary Hearing on 9 February 2021.

5.110 The Inquiry Panel had found as a fact that there was not a causative/contributory link between OCPD and the breaching conduct in question. That factual finding bound the Disciplinary Panel under UPSW. The Disciplinary Panel hearing also considered that the claimant's mental health in general was not relevant mitigation. Accepting that this could be considered unfavourable treatment, it did not happen because of something arising in consequence of disability. The decisions were not made because the claimant accessed the records in consequence of his OCPD/OCD; that is counterintuitive. In any event we have ourselves not found it established that the claimant accessed the records in consequence of his OCPD/OCD. The Disciplinary Panel also did not reach their decisions because the claimant was unable to carry out his substantive role/had periods of absence. They simply believed that because OCPD was not causative it was not a relevant mitigating factor and that the Inquiry Panel's conclusions bound them in that regard (and which they considered was a conclusion within the reasonable range). As set out in Professor Walker's evidence they thought the claimant's wider mental health situation was also difficult to use to mitigating down the sanction.

5.111 The respondent had the legitimate aim already identified. The decision that they were not satisfied that the link between OCPD/OCD and the breaching conduct was objectively justified. We have reached that same decision ourselves and the Disciplinary Panel was constrained by the fact finding of the Inquiry Panel. We would accept that the Disciplinary Panel could have identified the claimant's general mental health as a general point in mitigation, even if not considered causative/contributory to the conduct in question. But in terms of the balancing of relevant factors, its contribution (absence the causative link being made out) would be very minor and marginal and we do not consider, in our own objective assessment, it would have made a difference to the imposition of the final written warning (and did not on our objective analysis on this point above).

o. Subjecting the Claimant to an unnecessary Extended UPSW procedure, such that the Claimant became too unwell to perform his substantive role as a surgeon

5.112 In substance this allegation does not raise anything new. It is about subjecting the claimant to the Extended Procedure. We have addressed this already above. It was not an unnecessary procedure. It was not done with the aim of making the claimant unwell.

p. Failing to provide any or any adequate support which would have avoided dismissal.

5.113 The claimant was not dismissed whether actual or constructive. However, giving this allegation the most benevolent analysis, we do not in any event finding that the respondent failed to provide any or any adequate support that would have avoided the claimant's resignation/application for ill health retirement.

5.114 The claimant was, in general, well supported by his directorate during the process. His absences and his returns to work were supported and understood. The claimant was never pressurised to return to work or undertake duties he did not consider himself fit for. Mr Gidman, Mr Pritchard and Mr Wheeler all took steps to try to convince the claimant not to pursue ill health retirement. Mr Gidman reached out to OH and to colleagues to try to ensure the claimant was not making a rash decision. The Disciplinary Panel having administered the final written warning spoke of supporting the claimant back to work and Mr Gidman was there to provide that support. The claimant could have withdrawn his ill health retirement application at any time, including once the UPSW was over (subject to his appeal) and the final written warning imposed if he had wished to/was well enough to. We address the particular complaints relating to alternative employment separately below. But in general we do not find there was a lack of support and there therefore was no unfavourable treatment.

q. Failing to consider any alternative roles for the Claimant

5.115 The claimant, whether directly himself or through his BMA representative, never expressed any interest in taking up an alternative role. The claimant in evidence said the offer of an alternative role could only have been made by Professor Walker and it was an unlikely miracle. He also said the other miracle he would have looked for from Professor Walker, as the highest authority in the trust, was a decision to fully exonerate the claimant.

5.116 We find that the only thing that would have tempted the claimant to consider a return to work, rather than pursuit of ill health retirement, would have been these things in combination. The claimant was seeking absolute exoneration to restore his honour and self-esteem together with an offer of amends by way of, for example, the offering of a research role. This outcome that

included exoneration was never going to be offered by the Disciplinary Panel. For reasons already addressed above, including the seriousness of the claimant's conduct, the administration of a final written warning was reasonable, fair and proportionate.

5.117 In those particular circumstances we do not consider that a failure to ask the claimant whether he was interested in alternative roles amounted to unfavourable treatment. The claimant had firmly and repeatedly stated that he wanted to leave on ill health grounds and had rejected all efforts to dissuade him from this course of action. He said in evidence the BMA had also tried to persuade him to change his mind. He said the making of the decision itself had made him feel a bit better. Mr Gidman and Mr Pritchard therefore ultimately decided to respect the claimant's decision about his wellbeing and facilitate the ill health retirement process. The claimant was never going to be given the "miracle" he said in evidence he was seeking.

5.118 To have then spoken to the claimant about alternative roles would have flown in the face of the ill health retirement process and the decision to support the claimant through that application process. Indeed, it could have potentially harmed it given the NHS Pensions doctor had to make an assessment against the various tiers one of which was assessing fitness for regular employment.

5.119 The claimant was then successful in his ill health retirement application. Again, in the particular circumstances we do not find that a failure to ask the claimant whether he was instead interested in alternative roles was unfavourable treatment. There were various meetings and exchanges between the claimant and Mr Gidman. The claimant never once expressed an interest instead in staying and exploring an alternative role. He knew what Dr Raynal had advised about his residual earning capacity. We do not consider that the claimant in truth had any interest in exploring an alternative role, because it would not have been the "miracle" circumstances he envisaged. His BMA representative likewise did not raise it on his behalf. Mr Gidman was trying very hard to support the claimant and treat the claimant with dignity. Against the very particular background we do not find that this was unfavourable treatment. It is not unfavourable treatment to not offer something that the individual never had any interest in in any event. The claimant says the respondent never would have had the funding for a research role or teaching role and so he did not ask. But in doing so he never gave the respondent the opportunity to consider it and we do not find that it was reasonable on his part to just presume it would not be granted (and indeed as already said our finding is in fact that any such role would have had to be in addition to exoneration which was never achievable. - The claimant was not interested in alternative duties alone). The claimant also referred to his ill health, but the BMA would have been well placed to lead such a discussion about alternative employment.

r. Dismissing the Claimant

5.120 We have not found that the claimant was dismissed by the respondent whether actually dismissed or constructively dismissed (as analysed below in the constructive unfair dismissal claim). Instead, the claimant resigned for the purposes of ill health retirement. As a result, this particular complaint cannot succeed.

5.121 For all these reasons the complaints of discrimination arising from disability do not succeed and are dismissed.

Reasonable Adjustments

Did treating as misconduct all breaches of patient confidentiality amount to a PCP?

Did adopting the Extended UPSW procedure for matters which may result in a final warning or dismissal amount to a PCP?

Did having an extended UPSW which makes no provisions for employees with disabilities amount to a PCP?

Did having an extended UPSW policy which makes no provision for supporting employees following the outcome of the procedure, and in particular no provision for employees with disabilities likely to be exacerbated by the procedure amount to a PCP?

Did not considering alternative roles in circumstances where an employee has applied for ill health retirement from their substantive post amount to a PCP?

Did not considering alternative to dismissal in circumstances where an employee has applied for ill health retirement from their substantive post amount to a PCP?

If so did the PCP put the Claimant at a substantial disadvantage in that it:

(a) Exacerbated the Claimant's disabilities;
(b) Resulted in the Claimant suffering a suicide attempt;
(c) Resulting in the Claimant being too unwell to perform his substantive role;
(d) Left the Claimant without support following a stressful procedure during which he became extremely unwell;
(e) Resulted in the Claimant's dismissal

If so did the Respondent fail to make reasonable adjustments to ameliorate that disadvantage by:

(a) Failing to use the capability procedure instead of the extended UPSW procedure;
(b) Failing to adopt the Standard UPSW procedure instead of the Extended procedure;
(c) Failing to truncate the extended UPSW procedure and instead carry out the procedure over 15 months despite the Claimant being unwell because of his disabilities;
(d) Failing to modify the Extended UPSW procedure despite the Claimant being unwell as a result of his disabilities;
(e) Failing to make any provision in the Extended procedure for considering the impact of the Claimant's disabilities upon his conduct;
(f) Failing to take into account the Claimant's disabilities in issuing a final written warning;
(g) Failing to provide any or any adequate support to the Claimant to allow him to return to work following conclusion of the Extended UPSW procedure from February 2021 onwards and in particular:
    i. On or before 21st April 2021, when the Claimant had his application for ill health retirement accepted;
    ii. On or before 23rd June 2021 when Nick Gidman on behalf of the Respondent met with the Claimant prior to his dismissal
(h) Failing to consider alternative roles;

(i) Failing to consider alternatives to dismissal including a career break under the Respondent's career break policy

PCPs

5.122 The respondent argues that there is no evidence that the respondent treated **all** breaches of patient confidentiality as misconduct. They say there is no evidence that an inadvertent or technical breach of confidentiality would have resulted in an allegation of misconduct. They therefore deny there was such a PCP.

5.123 We consider that this is an over literalist approach to the complaint. The evidence of Mr Webb was that generally breaches of patient confidentiality were treated seriously and, in his experience, often resulted in dismissal. The seriousness with which the respondent would generally treat breaches of patient confidentiality is self-evident from the important position of trust that the NHS and NHS staff are in when dealing with the most confidential and sensitive of personal data. We accept that there was a PCP of the respondent generally treating breaches of patient confidentiality as misconduct and that it was applied to the claimant. A PCP does not have to be absolutist to be a PCP. It was a PCP that was applied to the claimant.

5.124 The Extended Procedure under UPSW inherently covers matters that may result in a final warning or dismissal. That is what it is designed for (i.e. on the face of it the more serious misconduct allegations). The expressed PCP is therefore somewhat circular. But again, not being overly literalist, we accept that the Extended Procedure itself (which is under its very terms generally applied to what is potentially considered to be more serious misconduct allegations that may result in a final or written warning) is a process that amounts to a PCP that was applied to the claimant.

5.125 We do not accept that there was a PCP of "having an Extended UPSW which makes no provision for employees with disabilities." There are various discretionary stages and elements to the process. For example, a health related outcome is possible under the Extended UPSW.

5.126 We do not accept that there was a PCP of "having an extended UPSW policy which places no time limits on the phases of the procedure." There are time limits in parts of the process. For example, the practitioner has to be given not less than 21 days notice in order to prepare their case and must be provided within at least 14 days the documents relied upon. There is a time restriction for the parties to comment on the part one Inquiry Panel report. The part two report must be made available at least 14 days before any disciplinary hearing. The decision is to be communicated as soon as possible and normally within 7 days of the hearing. If the purpose of this PCP was, for example, to say there was no overall long stop timescale, then that is not how the PCP had been set out. We consider that it would be beyond a benevolent interpretation of what has been pleaded. We would be rewriting this PCP to take it as such, particularly bearing in mind the claimant was represented when the case was pleaded and the list of issues agreed. We therefore find that the pleaded PCP was not a PCP.

5.127 We do not consider that there was a PCP of "having an extended UPSW policy which makes no provision for supporting employees following the outcome of the procedure, and in particular no provision for employees with disabilities likely to be exacerbated by the procedure." As the respondent observes the

UPSW is a disciplinary procedure. It came to an end (subject to the appeal) when the claimant was given the final written warning. The complaint is in fact that the extended procedure does not support employees after its conclusion. But the UPSW has by then come to an end; it is no longer engaged and no longer applies to any employee. If the claimant is in fact seeking to rely on an alleged PCP of there not being support mechanisms in place for employees who have come to the end of a disciplinary process, then that is a complaint that is again outside a benevolent interpretation of the pleaded PCP. It would also not be something on which we would have sufficient evidence to find that there was such a PCP in existence in any event.

5.128 We are not satisfied on the evidence before us that there was a PCP of "not considering alternative roles in circumstances where an employee has applied for ill health retirement from their substantive post." As set out in our analysis above in relation to the discrimination arising from disability complaint, we consider that the way in which the claimant was handled was very specific to his particular circumstances and sensitivities. We heard no evidence about how other applications for ill health retirement are handled. We are not satisfied that we can conclude that in other cases there would not be consideration of alternative roles where an individual has applied for ill health retirement.

5.129 We do not find that there was a PCP of "not considering alternatives to dismissal where an employee has applied for ill health retirement from their substantive post." It was evident from the evidence of Ms Marvelly that ill health retirement applications can follow different processes depending on the facts. But in the claimant's case there was no dismissal. He resigned to take ill health retirement. He could have withdrawn from the process if he wished/was in a position to do so.

Substantial disadvantage

5.130 As the respondent observes considering the reasonable adjustments complaints is hampered by an absence on the claimant's part of setting out what substantial disadvantage is said to have been caused by which PCP, when, and then which adjustments it is said would have ameliorated which disadvantage (and when the failure to make each adjustment occurred). It is, in particular, not clear to us whether some of the substantial disadvantages that are pleaded are pleaded, in terms of substantial disadvantage, as a cause or an effect.

5.131 But accepting that the claimant moved from being represented to unrepresented in the course of the hearing we have strived to analyse the complaints as best as we are able, focusing on the most obvious line of argument, where we have accepted that there was a PCP which existed and was applied.

5.132 In terms of substantial disadvantage, we do not as a matter of fact find that the claimant was: "left without support following a stressful procedure during which he became extremely unwell." For the reasons already given above, there was support. It may be that this point is intended to particularly focus on the period after the Disciplinary Panel concluded and (subject to appeal) the disciplinary process had come to an end. If so, then, again, we do not find (for the detailed reasons set out above in the discrimination arising from disability complaints) as a matter of fact that the claimant was left without support. There was conscientious and careful support, particularly from Mr Gidman.

1.133 We also do not find that the application of the PCPs placed the claimant at a substantial disadvantage in being dismissed; he was not dismissed.

5.134 The substantial disadvantage otherwise pleaded is that the application of the PCPs resulted in the claimant suffering a suicide attempt; exacerbated the claimant's disabilities; resulted in the claimant being too unwell to perform his substantive role.

5.135 We find the claimant's suicide attempt in December 2019 was as a result of interconnecting pressures. The claimant's ex-wife had made the complaint which made him feel acutely humiliated. He was facing a misconduct investigation and, in all likelihood, misconduct proceedings thereafter. The claimant was facing the fact it was his own conduct which had triggered it all. The claimant was also facing the emotional and financial pressure of the fresh matrimonial proceedings when he had bought a new house with his new wife. The stresses all fed into each other as the data breach was being used in the matrimonial proceedings to justify a request for a lump sum payment/an insinuation the claimant could be forced to sell his house, because of a stated risk that the claimant could end up losing his job (and therefore be unable to pay periodic payments). The consequences the claimant was facing would have all become very clear to him at that matrimonial court hearing. The claimant felt stressed, angry, overwhelmed and humiliated by all this and humiliated by the type of arguments raised in court in the matrimonial proceedings such as querying how much he spent on food. The combination of these things that came to a head at that matrimonial court hearing caused a mental health crisis.

5.136 This cannot have been the result of the Extended Procedure as the claimant had not yet been placed on it. Placing the claimant under a misconduct process played a small part in the overall picture. However, the respondent at this point in time did not have constructive knowledge of the claimant's anxiety and depression. It was through the claimant's reaction to the events that day that the respondent gained their constructive knowledge. In terms of the claimant's OCD/OCPD, the claimant was disabled by this at the time and the respondent had constructive knowledge of that disability. However, we do not consider that the respondent had actual or constructive knowledge that the misconduct process and what the claimant had said about his personality traits would lead the claimant to attempt suicide or was at risk of such. The claimant at the time was on special leave, not on sick leave and to the respondent's reasonable understanding it was predominantly because of the pressures of and distraction of (bearing in mind the degree of concentration etc the claimant's substantive role entailed) the matrimonial proceedings and the need to prepare for them.

5.137 The claimant had said he was receiving care from his GP and had self-referred to a psychiatrist specialising in OCD, and latterly that he was also contacting the wellbeing service for support. The claimant had on 14 November 2019 also made a request to Mr O'Callaghan for a referral to OH saying he had seen his GP on 21 October and had been commenced on Fluoxetine, and had seen Professor Tahir the day before who had suggested a referral to OH. He also said: "*Overall, I feel ok, but occasionally I feel overwhelmed and stressed. Thinking and preparing for the current civil court divorce spousal maintenance case with my ex-wife and the internal hospital investigations, both are draining me excessively.*" But we do not consider that gave the respondent reasonable cause to suppose the claimant would attempt suicide. He was not on sick leave at the time and in fact talked in the email about the potential to return to work. Further, the medical practitioners actually treating the claimant had not identified

the claimant as being a suicide risk at the time so it is difficult to see how the respondent could reasonably have envisaged this or envisaged how the claimant would ultimately react to the matrimonial hearing which was the main catalyst. The respondent could not reasonably have known about the substantial disadvantage pleaded (if its focus is on the cause of the claimant's attempted self-harm).

5.138 In terms of the pleaded substantial disadvantage of exacerbating the claimant's disabilities and the claimant becoming unfit for substantive duties, as above, at the very start of the process the respondent did not have constructive knowledge of either impairment. The claimant became disabled by anxiety and depression in October 2019 (when told of the complaint), the respondent had constructive knowledge of this in December 2019. The claimant was disabled by OCD/OCPD, but the respondent did not have constructive knowledge of this until 7 November 2019. But by mid December 2019 the claimant was disabled by anxiety and depression and OCD/OCPD and the respondent had constructive knowledge of that. We accept that over time the misconduct process/ the Extended Procedure did affect the claimant's health/his disability. It played a part (in a wider picture) of the claimant's absence in December 2019 to June 2020. The process applied played a background part in the claimant's subjective reaction to the Inquiry Panel including what was said at that hearing and the decisions produced. We do not consider that the respondent could reasonably anticipated the particular aggravators for the claimant at the Inquiry Panel; but they knew in general that the process was playing a part in maintaining the claimant's ill health and therefore his absence from work/inability to perform at times his substantive duties. The respondent's witnesses said as much in evidence.

5.139 We accept the placing of an employee under investigation/under the Extended Procedure would cause stress, worry and distress to anyone, including the non-disabled. But we also accept it is likely the claimant bore this more heavily because of his impairments. As time went on the respondent knew of the claimant's health situation, his suicide attempt and that being under investigation/under a disciplinary process was a maintaining factor to the claimant's ill health, particularly the anxiety and depression. As the respondent's witnesses conceded, it was common for employees facing disciplinary investigation to become unwell and take sick leave.

5.140 We also accept that placing the claimant under a misconduct investigation and then subjecting him to the Extended Procedure was a factor (amongst many others, including the claimant's own conduct, his loss of status, the matrimonial proceedings and financial pressures) in the claimant becoming too unwell to perform his substantive role. He had sick leave from December 2019 to June 2020 and from October 2020 until his ill health retirement. The ill health retirement itself was based on an inability to perform his substantive role.

Failure to make reasonable adjustments?

5.141 We do not, however, find that the respondent failed to make reasonable adjustments to reduce or remove the disadvantage. Our analysis here is very similar to that undertaken about in the discrimination arising from disability complaints. Notwithstanding the pressures the claimant faced, we do not find that it was reasonable for the respondent to use a capability procedure instead of the Extended Procedure for conduct. The claimant's actions were not capability related; they were misconduct. As the respondent says, there was no lack of capability in the claimant's substantive role to address.

5.142 We do not find that it would have been reasonable to adopt the Standard Procedure instead of the Extended Procedure. The claimant's conduct on the face of it was serious. It was reasonable for the respondent to have the full range of sanctions available to them, particularly where there was no clearly established link between the conduct and the OCD/OCPD. There was no appeal as to the process adopted at the time, despite the claimant having an experienced BMA representative. We also do not find that the use of the Extended Procedure necessarily bore more heavily on the claimant than the Standard Procedure would have done such that it would make it a reasonable step, or one that had a sufficient prospect of reducing the disadvantage suffered. The claimant would still have had to be subject to an investigation, a disciplinary hearing, unwelcome findings and comments made against him and a sanction given. He would still have faced the humiliation and pressure of that.

5.143 In terms of truncation of the Extended Procedure, if this is asserting that the respondent should have, for example, removed certain stages of the process, then we do not find that would have been a reasonable step. As we have said already above, it is a contractual procedure and one that has built into it various procedural safeguards designed to act as check and balances for the benefit of the practitioner. Unilaterally changing the process would have been a breach of contract by the respondent. The Extended Procedure was well known to the BMA, but the claimant's representative made no proposal for truncation. Further, how would the respondent know what part it is supposed to remove or what was, for example, at the Inquiry Panel stage going to cause the claimant difficulties? The Inquiry Panel stage was necessary because the claimant was arguing that he had not committed any misconduct and that he had consent to access the records and was acting as a treating medical practitioner. The facts needed to be found and the Inquiry Panel stage is designed to build some independence in this for the benefit of the practitioner.

5.144 If this allegation is aimed at the time it took to complete the Extended Procedure, then we do not consider the Extended Procedure could reasonably have been shortened in the circumstances. We have addressed the timescales concerned already above in our assessment of the discrimination arising from disability complaint. The timescales were attributable to the required stages of the process, on occasion waiting for documents from the claimant, availability (including on several occasions significant delays in the claimant's representative being available) and the impact of covid.

5.145 In respect of the complaint of failure to modify the Extended Procedure, as above it has never been identified what this modification is said to be. The complaint would therefore fail on that basis. But we have dealt with what we potentially understand it to be about already above in the discrimination arising from disability complaints, and we would in any event adopt the same observations on reasonableness here.

5.146 The next claimed failure to make a reasonable adjustment is "failing to make any provision in the Extended Procedure for considering the impact of the Claimant's disabilities upon his conduct." This is incorrect. The Extended Procedure does accommodate this. The Inquiry Panel expressly considered the impact of the claimant's disabilities on his conduct. The simple point is that they, having assessed it, did not find there was a proven link. It was similarly raised and considered at the Disciplinary Hearing (which was able to consider a potential health outcome) and Appeal Hearing stages.

5.147 The next pleaded failure to make a reasonable adjustment is "failing to take into account the Claimant's disabilities in issuing a final written warning." The Disciplinary Panel considered that as the Inquiry Panel had found the causative link between OCPD and the breaching conduct had not been established that finding bound them and it could not be mitigating. When considering culpability/exoneration that was the appropriate approach and it would not have been a reasonable adjustment to find otherwise.

5.148 In terms of the claimant's wider, general health/disabilities, the Disciplinary Panel spent some time considering this. They ultimately decided it was not relevant mitigation because they did not see that it militated the conduct in question, as opposed to looking at it in wider, general mitigation. To the extent that amounts to not taking into account the claimant's disabilities in issuing a final written warning, it is not clear how it is said this adjustment could have reduced or removed the disadvantage flowing from the PCPs found. The claimant still would have faced the disciplinary process and the strains involved with that. Indeed, by the time of the Disciplinary Panel hearing the claimant had already recommenced sick leave and made his application for ill health retirement.

5.149 Complaints about failure to make reasonable adjustments are about substantive outcomes rather than about a failure to consider or to consult. This is because those kinds of steps by themselves do not usually resolve the disadvantage; the disadvantage is addressed by the actual substantive action that should have been taken following the consideration or consultation. Whilst we can accept it would arguably have been reasonable for the Disciplinary Panel to take general health mitigation into account, it would not have addressed any disadvantage identified. This is because the claimant would have, in our judgement, faced a final written warning in any event. The role the claimant's general health could play in terms of assessing sanction was very marginal, absent the proven link that disability was causative of the breaching behaviour. The situation was remedied at the appeal stage where it was included in the assessment and the sanction of final written warning confirmed. But we have to assess the case for ourselves. Objectively, we do not consider that taking the claimant's wider health situation into account as mitigation would have led to a lesser sanction than the final written warning imposed in any event. The final written warning was an eminently reasonable, proportionate sanction in view of the seriousness of the conduct and the wider circumstances weighed in the balance. It is often the case that disciplinary processes cause employees to become unwell or exacerbate ill health or disabilities. But it does not necessarily flow (whilst accepting that every case must turn on its own facts) that this very fact means there should be an exoneration or lesser sanction. The substantial disadvantage attributable to the application of the pleaded PCPs (the claimant facing maintaining or exacerbation of his condition/ being unfit for substantive duties) would not be ameliorated by the pleaded adjustment of taking the claimant's disabilities into account when issuing a final written warning. It would have been issued anyway. Absent the proven link between the disabilities and the breaching conduct, taking into account disability would not have resulted in the claimant being given a lesser sanction that a final written warning/exoneration.

5.150 For the reasons already given, we also do not find there was a failure to provide any or any adequate support to the claimant to allow him to return to work following conclusion of the Extended Procedure from February 2021 onwards. The claimant was well supported, particularly by Mr Gidman. We also do not consider there was a failure to make a reasonable adjustment in terms of

a failure to consider alternative roles. We adopt our findings above in relation to the discrimination arising from disability complaint. The claimant was seeking his combined “miracle” of Professor Walker exonerating him and offering him amends of alternative duties such as a research role or teaching role. The claimant never communicated this double miracle, but in any event it was not reasonable for Professor Walker or the Disciplinary Panel to exonerate the claimant (and indeed they did not have the direct power to do so in those terms given the factual findings and findings on fault made by the Inquiry Panel).

5.151 The respondent at the time was respecting the claimant’s express request to be considered for ill health retirement and the claimant was being well supported through that process by Mr Gidman. To have offered the claimant a return to work/ job alternatives during that time would have been in contradiction and detrimental to the claimant’s stated position about his health and his application for ill health retirement. If it was something he genuinely wanted whilst the ill health retirement application was going through, it could have and should have been raised by the claimant at the time and/or on his behalf by the BMA.

5.152 Once NHS pensions doctor made her decision, the claimant on the basis of her assessment could not return to his substantive role. But he was aware of what her position was on his residual earning capacity. Again, the claimant could have raised alternative roles with the respondent if he wished to do so including via his BMA representative. He had multiple meetings and exchanges with Mr Gidman. Mr Gidman was working hard to support the claimant and treat the claimant with dignity and respect. A request would have been considered if the claimant had raised it. In the particular circumstances here, there was not a failure to make reasonable adjustments. In truth the claimant was not interested in alternative employment, at least not without his exoneration. In the particular circumstances raising alternative roles on the respondent’s own initiative without any indication from the claimant/BMA was not a step it was reasonable for the respondent to take.

5.153 The final pleaded adjustment is “failing to consider alternatives to dismissal including a career break under the Respondent’s career break policy.” The claimant was not dismissed. We heard pretty much no evidence at all about the career break policy. It was not put to the respondent in cross examination. It was not requested or suggested by the claimant or the BMA at the time. We do not consider that the claimant had any interest in a career break. A career break would have left the claimant without an income. There is no evidence it would have addressed the pleaded disadvantage. There was no failure to make reasonable adjustments.

5.154 For these reasons the complaints of failure to make reasonable adjustments are not well founded and are dismissed.

Direct Disability Discrimination

5.155 The direct disability discrimination claimed is dismissal. We have not found that the claimant was either actually dismissed or constructively dismissed. Instead, our finding is that the claimant resigned. Our analysis on the constructive dismissal complaint is set out below. The direct disability discrimination complaint is not well founded and is dismissed.

Harassment related to disability

<u>On 21 October 2020, the Inquiry Panel finding that the Claimant's explanations did not bear any scrutiny and that the same were disingenuous attempts to justify his actions after the event.</u>

<u>In addition, the Panel finding that the Claimant's condition of Obsessive Compulsive Personality Disorder was not to be causative of his actions</u>

5.156 The Inquiry Panel's conclusions were clearly unwanted conduct from the claimant's perspective.

5.157 We do not, however, find that the Inquiry Panel's conclusions related to the claimant's disability. In our judgement, it is not sufficient to establish "related to disability" by simply saying that the claimant was disabled, or disabled by reason of OCPD, or that the claimant presented an argument that his OCPD was causative of his actions, or that what was said bore more heavily on him because he had OCPD. The Inquiry Panel's findings related to their assessment of the case before them on the evidence before them which led them to reject the claimed link, and to their assessment and views of the claimant's differing accounts for his conduct in accessing the medical records and their expressing of their reasons for their decisions. They were not findings "related to disability."

5.158 In any event we also do not find that the Inquiry Panel's findings were unwanted conduct related to disability that had either the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating and/or offensive environment for him.

5.159 The Inquiry Panel did not have that purpose. What they were doing was assessing the case before them, setting out their findings of fact and conclusions and giving the reasons for their findings. Amongst other things that had to include an assessment of whether they found the link to be made out, and to give reasons for their findings as to why they considered it was not.

5.160 In terms of the effect then the claimant was deeply offended by the expression his explanations were disingenuous attempts to justify his actions after the event. He was deeply unhappy that the Inquiry Panel found the causative link was not made out. He would therefore have the subjective view point that the Inquiry Panel's findings violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him and it weighed heavily on him. But we have to determine whether it was reasonable for the claimant to have that view. We do not find that it was.

5.161 The Inquiry Panel's job was to decide whether the OCD/OCPD had caused or contributed to the claimant's breaching conduct. The claimant had specifically raised the argument. There was always a risk that the finding would be adverse to the claimant not least because there was no medical evidence to support the causation argument the claimant was running (as both he and his counsel accepted at the Inquiry Panel hearing). The risk the Inquiry Panel would not accept the claimant's argument was inherently part of the Inquiry Panel process and the defence that the claimant had run. Likewise, that brought with it the inherent risk the claimant would be deeply upset by the outcome. There was a reasonable rationale behind the Inquiry Panel's decision making on the issue. In those circumstances, where disciplinary body is simply carrying out the task it has been given to do, it cannot in our judgement be correct to saying the finding had the impugned effect and amounted to unlawful harassment. As the respondent's counsel observes such a conclusion could have a chilling effect on

decision makers tasked with disciplinary proceedings who would risk facing harassment claims when simply doing their job and making findings of fact in a case where the employee is disabled. That cannot accord with the purpose of the legislation.

5.162 We reach the same conclusion about the Inquiry Panel's finding that the claimant's explanations did not bear any scrutiny and they were disingenuous attempts to justify his actions after the event. As already stated, the Inquiry Panel's job was to assess the evidence on the causative link. They had to consider the evidence before them, reach a reasoned decision and given an explanation for their decision. That is what they were doing. They did not accept the causative link was made out and part of their decision making in that regard related to their assessment of the claimant changing his defence. The claimant accepted he had done so but asserted this was because he was responding to an unfolding situation and unfolding evidence. The Inquiry Panel considered the claimant's arguments, but they were entitled to ultimately reject them. Their finding was part of their explanation for their decision making. It was not a gratuitous unnecessary insult. It is inherently part of a disciplinary process that an employee, including a disabled employee, is at real risk of hearing things said about them or conclusions made about them that they object to and find offensive. But we do not consider that means that there has been unlawful harassment.

5.163 The harassment related to disability complaints are not well founded and are dismissed.

Constructive Unfair Dismissal

5.164 We found that the claimant resigned rather than there being a mutual termination. For the reasons that follow (which in turn draw on analysis already undertaken above in the discrimination complaints), we do not, however, find that the claimant's resignation was in response to a fundamental breach of the implied term of trust and confidence. It therefore was not a dismissal.

5.165 The conduct complained about that the claimant says caused him to resign must have influenced in some way that decision to resign. It must also be conduct that the claimant knew about when deciding to resign. The claimant had decided to leave by 16 December 2020 when he said he was going to pursue ill health retirement, but if unsuccessful, would retire anyway. As such only conduct prior to 16 December 2020 is relevant to the constructive unfair dismissal claim.

On 11 March 2020, Dr Scott-Coombes failing to give any due consideration or weight to the content of the Claimant's letter of the same date and the letter on 07 November 2019, in which the Claimant explained that he suffered from obsessive compulsive traits which had prompted him to check his family's medical records

5.166 We have found that Mr Scott-Coombes did give consideration to the claimant's letters. There was no medical evidence in support of the assertions on the causative link. Mr Scott-Coombes also considered that the assertions did not inevitably automatically excuse the conduct but was a matter for consideration as mitigation. He therefore decided it should be assessed as part of the disciplinary process. We adopt our analysis already set out above. Viewed objectively there was reasonable and proper cause for Mr Scott-Coombes approach. The respondent did not act in a manner, without reasonable and proper cause calculated or likely to harm trust and confidence.

On 11 March 2020 and at all material times thereafter, failing to adopt the UPSW capability procedure instead of the conduct procedure, alternatively failing to adopt the Standard UPSW procedure instead of the Extended UPSW procedure

5.167 The allegations against the claimant were conduct allegations not capability allegations. Viewed objectively the respondent did not act in a manner, without reasonable and proper cause calculated or likely to harm trust and confidence in adopting the conduct procedure rather than a capability procedure.

5.168 We adopt our essential analysis in relation to the discrimination arising from disability complaint. The respondent had reasonable and proper cause to proceed under the Extended Procedure rather than the Standard Procedure (or indeed any other process) and were appropriate to be dealt with under the Extended Procedure. The allegations against the claimant were on the face of it serious. Viewed objectively the respondent did not act in a manner, without reasonable and proper cause calculated or likely to harm trust and confidence in adopting the Extended Procedure.

On 2 April 2020, Dr Scott-Coombes determining that the matter should proceed under the Extended Procedure of the UPSW policy; and refused referring the Claimant to an independent psychiatrist

5.169 We have already dealt with the decision to follow the Extended Procedure. In relation to the refusal to refer to an independent psychiatrist, this was ultimately refused, in the face of a request that had not been clearly set out, because it was considered the responsibility lay with the claimant's side to obtain medical evidence in support of general mitigation arguments. As discussed above in the discrimination arising from disability claim, it is the tribunal's industrial experience that that is standard practice. The claimant was represented by an experienced BMA representative. As far as the respondent knew at the time the claimant was seeing Professor Tahir and the claimant had spoken of obtaining a report from him. There was reasonable and proper cause for the respondent's decision. Viewed objectively the respondent did not act in a manner, without reasonable and proper cause calculated or likely to harm trust and confidence.

Between November 2019 and January 2020, the Respondent failing to refer the Claimant to OH or otherwise throughout the period obtaining professional independent advice (for example a psychiatric opinion) regarding the Claimant's condition

5.170 The claimant did not know about Mr Scott-Coombes email of 12 November 2019 at the time of his resignation. For the reasons already set out above, we also do not consider that there was a failing by Mr Durning to refer the claimant to occupational health. Mr Durning, on the claimant's own evidence, had spent considerable time with the claimant ensuring he was supported and at that time everyone including the claimant believed he had been referred by Mr O'Callaghan. There was a failure, due to mistake, to refer the claimant to OH during this period by Mr O'Callaghan. There was also a delay by Mr Gidman. Viewed objectively there was no reasonable and proper cause for this because viewed objectively the mistake should not have happened. It was conduct likely to harm trust and confidence to an extent. The claimant was unwell and the referral had been promised. That said, it is also relevant to note the referral was ultimately actioned on 27 January 2020 and that in the meantime the claimant had (perfectly appropriately) self referred to OH and had seen the OH nurse and

was accessing support from his GP. The claimant also recognised at the time that these things were oversights.

5.171 There was not a failure to obtain independent psychiatric evidence during that period. In terms of UPSW, Professor Hope-Gill understood the claimant was obtaining a psychiatric opinion on diagnosis that would be forthcoming. In terms of general welfare, it would be reasonable to go to OH as the first port of call. Viewed objectively the respondent did not act in a manner, without reasonable and proper cause calculated or likely to harm trust and confidence.

The Respondent failing to act on OH recommendations dated: (i) 13 March 2020; (ii) 6 May 2020

5.172 As set out above we do consider that the respondent could have better systems in place for the sharing of relevant OH reports between the directorate that obtains them and the Case Manager (provided there is individual consent). That said the claimant himself said he would send the 13 March 2020 OH report to Mr Scott-Coombes but did not do so. Further, as set out above in relation to the discrimination arising from disability complaint, we find that in practice the respondent did not fail to act on the OH recommendations. This is because we do not find that the respondent failed to act, in the particular circumstances it was faced with, without reasonable diligence in progressing the case through the disciplinary process. It is notable in this regard that the claimant's BMA representative was not, for example, chasing up progression of the process. Viewed objectively and looking at the actual actions of the respondent we therefore do not find that they acted without reasonable and proper cause in a manner calculated or likely to damage trust and confidence.

Between November 2019 and 9 February 2021, the Respondent failing to provide support to the Claimant despite the Claimant being increasingly unwell

5.173 Only the period November 2019 to 16 December 2020 is relevant. As set out already above we do not find that the respondent failed to provide support to the claimant. Extensive support was provided. The respondent did not act without reasonable and proper cause in manner calculated or likely to damage trust and confidence.

O*n or around 2 April 2020 and at all material times thereafter, the Respondent failing to halt or consider halting the Extended UPSW Procedure*

5.174 Mr Scott-Coombes decided to progress under the Extended Procedure for the reasons already given and for which he had reasonable and proper cause and that reasonable and proper cause continued to apply. Thereafter a request was not made to halt the procedure until the Disciplinary Hearing which is outside of the relevant period. The respondent did not act without reasonable and proper cause in manner calculated or likely to damage trust and confidence.

On or around 2 April 2020 and at all material times thereafter, the Respondent failing to modify or consider modifying the Extended UPSW Procedure

5.175 Again it has never been said what the modification to the Extended Procedure should have been whether at the time or during the course of this litigation. As set out already above we do not consider that it would have been reasonable for the respondent to, for example, miss out stages of the contractual procedure on its own unilateral initiative. There was reasonable cause for the process that was followed. The respondent did not act without reasonable and proper cause in manner calculated or likely to damage trust and confidence.

Putting the Claimant through an Extended UPSW Procedure including a full Inquiry Hearing despite the Claimant having admitted the allegations and having explained that his OCPD was a factor in his conduct

5.176 We have already addressed this in respect of the discrimination arising from disability complaint. In short, the claimant had admitted the accessing of the records, but he did not admit misconduct. He said he had consent to access the records and/or that he accessed them as part of a treating medical team. The role of OCPD in his conduct was something that needed addressing. There was reasonable and proper cause to follow the Extended Procedure including the Inquiry Panel stage. Indeed, that Inquiry Panel stage exists as a safeguard for practitioners. The respondent did not act without reasonable and proper cause in manner calculated or likely to damage trust and confidence.

Subjecting the Claimant to an unnecessary Extended UPSW procedure such that the Claimant became too unwell to perform his substantive role as a surgeon by December 2020

5.177 We have already dealt with the essence of this point. The Extended UPSW was not unnecessary. The respondent did not act without reasonable and proper cause in a manner calculated or likely to damage trust and confidence.

Carrying out the UPSW procedure over a 15 month period from November 2019 to February 2021, thereby exacerbating the Claimant's disabilities

5.178 Again, we have already addressed this above. The relevant period only runs from November 2019 to 16 December 2020 (and therefore is 13 months). The respondent reasonably progressed the UPSW in this timeframe for the reasons already given. The respondent did not act without reasonable and proper cause in manner calculated or likely to damage trust and confidence.

Refusing or otherwise failing to give any or any appropriate weight to the Claimant's OCPD as mitigation at the Inquiry Hearing on 21 October 2020

5.179 As set out above, if the Inquiry Panel's report is looked at, they did note the claimant's general health as point of general mitigation. They separately legitimately rejected the causative link between the OCPD and the claimant accessing the medical records for good reason. In either approach, they did not act without reasonable and proper cause in a manner calculated or likely to damage trust and confidence. They gave matters appropriate weight (even though they were not in fact determining sanction). Even if we are wrong about the general mitigation point any damage to trust and confidence would be to a minor extent because the main point about the claimant's OCPD relied upon as mitigation was the claimed causative link between it and the claimant's breaching conduct. As stated, the Inquiry Panel had reasonable and proper cause to conclude that link was not made out on the evidence before them.

On 21 October 2020, the Inquiry Panel finding that: "Dr Binesmael's explanations do not bear any scrutiny and that the same are disingenuous attempts to justify his actions after the event… In addition, the Panel found that Dr Binesmael's condition of Obsessive Compulsive Personality Disorder not to be causative of his actions." The Claimant was sent the report on 6 November 2020

5.180 We have addressed the substance of this in the harassment claim above in relation to the disingenuous comment, and in our discrimination arising from disability analysis in respect to the causation point (which appears to overlap with the allegation immediately above in any event). For the reasons set out, there

was reasonable and proper cause for the Inquiry Panel's findings. The respondent did not act without reasonable and proper cause in a manner calculated or likely to damage trust and confidence.

Failing to make reasonable adjustments in respect of the Extended UPSW procedure despite the serious impact it was having on the Claimant's disabilities and overall health

5.181 For the reasons set out above, we have not found the respondent failed to make reasonable adjustments. The respondent did not act without reasonable and proper cause in manner calculated or likely to damage trust and confidence.

Failing to provide any or any adequate support which would have avoided dismissal as a result of the Claimant's disabilities and ill-health

5.182 The claimant resigned/applied for ill health retirement. For the reasons given already above, we do not find that the respondent failed in general to provide any or any adequate support to the claimant in the period up to 16 December 2020. The respondent did not act without reasonable and proper cause in manner calculated or likely to damage trust and confidence.

The Respondent failing to take into account the Claimant's amendments to the Inquiry Panel's report on or around 27 November 2020

The final straw for the Claimant was the Respondent's failure to take into account the Claimant's amendments to the Inquiry Panel's report and the findings in that report on 27 November

5.183 These two complaints are somewhat confusing as to what they intend to cover. The claimant's second ET3 grounds of complaint said: "*The second report further failed to take into account comments and amendments by the Claimant. This was incredibly distressing for the Claimant."* The claimant's witness statement, however, does not set out what these comments and amendments were. It says at paragraphs 73 that the last straw were the panel reports dated 6 and 27 November 2020, going on to refer to the medical evidence before the panel, the fact the claimant had admitted the allegations at the outset, his exemplary service and that he became unable to continue attending work from 15 December. Paragraph 70 says he was concerned that he had to remind the panel on receipt of the draft report that he had been taking medication and CBT sessions which he says he feels was indicative of the negative impression of him and he believes was because of his disability. Paragraph 81 also speaks of the respondent not taking in to account the claimant being on medication and undertaking CBT in the draft report having a significant and detrimental impact on his health.

5.184 It is not clear if the allegations are referring to two separate things or the same thing.

5.185 The respondent's closing submissions take the allegation "the Respondent failing to take into account the Claimant's amendments to the Inquiry Panel's report on or around 27 November 2020" to refer to further information submitted by the claimant by way of an email from his daughter and further references from colleagues.

5.186 The Inquiry Panel's duty was to make findings of fact. If that is what is being referred to, it was information that was provided late in the process. The Inquiry Panel was concerned about the provenance of the email because of its formatting. The claimant says this was genuinely the way the email looked. The

Inquiry Panel were also concerned that its late submission prejudiced the respondent's ability to respond and ask questions in cross examination. In the circumstances, the Inquiry Panel had reasonable and proper cause not to give weight to that email.

5.187 In terms of the doctor's references the Inquiry Panel said that they had accepted unreservedly the good character and unblemished record of the claimant; it was a legitimate point to go forward in terms of mitigation. The Inquiry Panel themselves were not determining sanction. The Inquiry Panel therefore said that the references did not alter or affect or further help them with that finding. (The references were then in fact looked at by the Disciplinary Panel in support of mitigation). The respondent, through the Inquiry Panel, had reasonable and proper cause to act as it did, and it was not conduct calculated or likely to destroy or seriously damage trust and confidence. They accepted the claimant had good character and an unblemished record.

5.188 In respect to the alleged last straw of "the Respondent's failure to take into account the Claimant's amendments to the Inquiry Panel's report and the findings in that report on 27 November 2020" the respondent points out that it is odd that this claimed final straw seems to be different to the last alleged breach of the implied term of trust and confidence. They also point out that it seems to differ to paragraph 73 of the claimant's witness statement.

5.189 The Respondent suggests that this allegation might be a reference to the claimant's proposed amendments to the first report. At [484] the part two report notes at paragraph 4 that the claimant's representatives had raised some typographical errors which were adopted and: "*There was one further more substantial amendment to record when Mr Binesmael commenced treatment for his condition in October 2019, which was accepted in part.*" We do not know exactly what was not accepted but the claimant's solicitor emailed him on 25 November with the final part 1 report [482] saying: "*As you will see, the Panel have now noted the CBT session you attended as well as the medication you had been taking (para 54(iii)).*" The email gives every impression that the essence of the point that had been made had been incorporated in the amendment. On the evidence before us we therefore do not find that the Inquiry Panel failed to take into account the claimant's amendments to the first report. The respondent did not act without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage trust and confidence.

5.190 Turning to the findings in the report of 27 November 2020, the Inquiry Panel had already made factual findings that the claimant was responsible for his actions in accessing the records in breach of the claimant's contract of employment, breach of the Data Protection Act and the respondent's policies. It was inevitable this would be found to be a finding of fault on the part of the claimant.

5.191 In terms of recommendations, the Inquiry Panel recommended that a disciplinary hearing should take place but identified that was a matter for the Medical Director. They said that if a disciplinary panel is convened, they recommended that it ought to consider dismissal as an appropriate sanction in the circumstances. They noted their reasoning for not recommending "no further action" included the conduct taking place over an extended time, involved several patients and they were satisfied that the claimant was aware his actions were in breach of good practice, the Data Protection Act, UHB policies and in breach of contract. These were legitimate factors to take into account. The claimant disputes it now, but he accepted at the Inquiry Panel he was aware of the policies

and they were entitled to take into account what he said at the time. The Inquiry Panel set out their similar reasoning for why they did not consider an oral statement or written warning would be appropriate. They set out again their observations on their rejection of the claimant's justification and reasons for his conduct and their finding that OCPD was not causative of the claimant's actions, which for reasons already stated, they had reasonable and proper cause to reach. They concluded by saying they considered it appropriate for the disciplinary panel to consider whether dismissal was an appropriate sanction, but that the Medical Director may disagree that a disciplinary panel was required and he and the panel may disagree with the recommendation, particularly in view of the mitigating factors they had outlined.

5.192 As stated by Ms Bayoumi in evidence the Inquiry Panel did not in fact recommend dismissal. They recommended that the sanctions available to the Disciplinary Panel should include dismissal. They made it very clear that ultimately it was a matter for the Medical Director/ the Disciplinary Panel. For reasoning already rehearsed above, the recommendations were reasonable and appropriate in view of the seriousness of the claimant's conduct as found and the rejection of OCPD as being causative. The Inquiry Panel in their findings in the second report did not act without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage trust and confidence.

Constructive unfair dismissal in summary

5.193 We have found the respondent acted without reasonable and proper cause in respect of the delay in referring the claimant to OH in the period November 2019 to January 2020. It covers the period of a mental health crisis for the claimant, albeit at that point everyone including the claimant thought he had in fact been referred. It also has to be viewed in the context that the claimant was then referred to OH by Mr Gidman at the end of January 2020 and those OH referrals continued. The claimant was receiving medical care from his treating practitioners.

5.194 We consider that the delay at the time damaged trust and confidence to an extent but that it was not sufficient by itself in context to amount to a fundamental breach. Even if we are wrong about that in view of the passage of time between then and the claimant's resignation the claimant would have waived the breach. Furthermore, on the balanced of probabilities we do not consider that the point at the time in reality featured in the claimant's decision to resign. We have not found, following an objective analysis that there were other matters that damaged trust and confidence as at the point the claimant decided to resign. The constructive unfair dismissal claim is therefore not well founded and is dismissed.

Outcome

5.195 The claims therefore do not succeed on their merits. In view of this we have not addressed the time limit issues set out in the List of Issues in respect of the disability discrimination complaints.

Employment Judge R Harfield
Date - 17 July 2023

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 19 July 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche