EMPLOYMENT TRIBUNALS

Claimant: Mr M M Rabie Ahmed

Respondent: Wirral University Teaching Hospital NHS Foundation Trust

Heard at: Liverpool **On:** 31 July, 1,2 and 3 August 2023

Before: Employment Judge Aspinall

Representation
Claimant: Mr Mitchell, Counsel
Respondent: Mr Gibson, Solicitor

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal fails.

REASONS

Background

1. By a Claim Form dated 9 February 2022 the claimant brought a complaint of unfair dismissal. He was employed as a locum consultant on a series of fixed term contracts by the respondent from 9 October 2017. He was given notice to terminate his fixed term contract which expired on 31 August 2021.

2. The claimant says he was unfairly dismissed, that the reason for dismissal related to (i) his call for an investigation into a patient matter relating to a patient of his Consultant colleague Miss Rowland and (ii) his allegations of bullying against his Consultant colleague Mr Ramasamy and (ii) 18 behavioural concerns that Mr Smith said his colleagues had about him but that were never put to him fairly.

3. The respondent says the reason for termination of his fixed term contract was that it had made a decision only to appoint Consultants on the Specialist Register at GMC (Consultants) going forward, that it no longer needed a locum consultant having recruited and appointed Consultants and that amounted to some

other substantial reason within section 98 Employment Rights Act 1996.

The List of Issues

4. Following a case management hearing the parties had agreed a List of Issues.

(1) It was agreed that the claimant was dismissed.

(2) What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely in or about December 2020 a decision was made to recruit permanent consultants to the team.

(3) Was the claimant dismissed for a potentially fair reason within the meaning of section 98 ERA 96?

(4) If the claimant was dismissed for a fair reason, did the respondent act reasonably in treating that reason as the reason for dismissal?

(5) If the claimant was unfairly dismissed what basic award should the claimant be awarded?

(6) If there is a compensatory award, how much should it be?

(a) What financial loss has the dismissal caused the claimant?

(b) Has the claimant taken reasonable steps to replace their lost earning, for example by looking for another job?

(c) If not, for what period of loss should the claimant be compensated?

(d) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

(e) Did the respondent unreasonably fail to comply with it by:

(i) Unreasonably delaying meetings to hear the claimant's grievance appeal, decisions and confirmation of those decisions made by the respondent? the claimant lodged his appeal on 18 March 2022 and a decision was not communicated until 17 October 2022; and/or

(ii) Its unreasonable handling of the claimant's grievance?

(7) If so, it is just and equitable to increase or decrease any award payable to the claimant? By what proportion up to 25%?

The Hearing

Documents

5. The parties had prepared a bundle of 691 pages to which further pages were added so that there was a total bundle of 753 pages.

Oral evidence

6. The Tribunal heard oral evidence from Darren Smith, Interim Associate Medical Director of Surgical Division. The Tribunal also heard oral evidence from Paul McNulty, Divisional Director of Surgery and Nicola Stevenson, Executive Medical Director and Deputy Chief Executive Officer who determined the claimant's stage 3 grievance.

7. Garry Sweeney, Head of HR had prepared a witness statement but was no longer employed by the respondent and not able to attend the hearing and so it was agreed that the Tribunal would read his statement and attach such weight to it as it deemed appropriate.

8. The Tribunal heard oral evidence from the claimant. He gave his evidence in a clear and helpful way.

Applications

9. The Tribunal heard applications for the inclusion of documents from the claimant and respondent that had not previously been disclosed. The Tribunal decided that the documents were relevant and necessary for the determination of the claim and that prejudice to a party in not having them included would outweigh prejudice to the other party occasioned by their late disclosure. The parties were pragmatic in their approach which saved time.

10. One document was adduced to support an allegation that Ms Stevenson who heard the third stage grievance appeal was not impartial because the letter showed she had had oversight of a matter relevant to the claimant earlier in the process. Given that this was new, the Tribunal gave time overnight for the respondent to take instruction and for Ms Stevenson and the respondent's representative to confer before Ms Stevenson gave evidence. The Tribunal allowed supplemental questions to the evidence in chief to address the point.

Terminology and judicial notice

11. The claimant was engaged on a locum consultant contract. The claimant was not on the Specialist Register at the GMC. The term consultant with a lower case "c" in this judgment means those occupying job titles that may include the word consultant but do not have the status of being on the Register. Such titles may include Trust Grade consultant, locum consultant or permanent consultant (as in the case of Mr Gashut, more of which later). Consultants, in this judgment with a capital "C", are on the Register.

12. The Tribunal takes notice that are two routes to being entered on that

Register. The first is the approved training programme known as CCT and not relevant to the claimant. The second is the Certificate of Eligibility for Specialist Registration (CESR), relevant to the claimant. It is for those who have not followed an approved CCT training programme. The GMC oversees an intercollegiate evaluation by The Joint Committee on Surgical Training of doctors seeking entry onto the Register through CESR . The Committee assesses whether the doctor is eligible to be included in the Specialist Register through the (CESR) equivalence (as in equivalent to an approved training programme) pathway. The process involves submitting evidence of equivalent experience, skills and competences to those doctors who have followed the approved training programme. GMC in its own guidance says that the outcome of application is unpredictable. Not all applicants for CESR are appointed to the Specialist Register. Many are not appointed on first application. The process of application itself can take months, and even years.

13. GMC say that candidates whose CESR application is still in process should not be shortlisted for Consultant posts. GMC say, *"If a Trust wishes to proceed against this advice then as the employing body they are ultimately responsible …taking into account the risk that the appointee cannot begin work as a Consultant until they are on the Specialist Register, which is dependent on a GMC decision and is not guaranteed".*

The Facts

14. The claimant was engaged by the respondent as a Fellow in Vitreo-Retinal Surgery by a contract dated 27 November 2017 for a fixed term until 3 December 2018. The contract recited that his continuous employment began on 9 October 2017. The claimant had previously worked at an NHS Foundation Trust at Swansea Bay. He worked there from 2015 until a date in September or October 2017.

15. In July 2019 the claimant submitted his application to the GMC for specialist registration through the CESR process.

16. On 9 October 2019 the claimant expressed interest in performing the role of Clinical Governance Lead for the respondent, a role usually awarded to a Consultant, and was appointed to this role. On 28 November 2019 he entered a new 12 month fixed term contract as a locum consultant. In December 2019 a Consultant, Mr Kumar, left. The claimant did some of the work that had previously been done by Mr Kumar. The claimant was performing surgery.

17. In February 2020 following a period of unrest about what work the claimant should do, (a Consultant Mr Ramasamy had been concerned about the claimant doing the work of a Consultant), a mediation meeting took place and a protocol was agreed. In April 2020 a Consultant FC joined the department. In September 2020 a Consultant LC resigned. He had been absent from his post for a long time.

18. The Directorate was run by Mr Smith Associate Medical Director of Surgical Division, Mr McNulty the Divisional Director of Surgery and the Divisional Director of Nursing, Mr Edwards. They were known as the Directorate Triumvirate.

19. In 2020 there was a Workforce Review of the skill set that would be needed across all sub-specialties within ophthalmology. On 4 September 2020 the claimant heard that there was to be a meeting of Consultants that day to discuss service provision and future staffing plans. The claimant had not been invited to the meeting. He assumed he had been missed off the distribution list in error. He had not. A statement FC gave to a later investigation revealed that FC, in consultation with Mr Ramasamy, decided to include only the Consultants as it would be inappropriate to have a locum consultant present at that meeting because locum consultants may wish to apply for any future posts they were considering.

4 September Consultants' meeting

20. The claimant attended the meeting. There was a short discussion whilst the claimant was present and confirmation that the department needed to recruit 2 extra doctors. There was discussion that this might be a middle grade or SAS specialty doctor and a locum consultant. The claimant was asked to leave the meeting and was told that it was because the Consultants would discuss future posts.

21. Later that day he spoke to FC about why he had not been invited to the meeting and why he had been asked to leave. FC explained that some of his colleagues had asked her not to invite him to the meeting. The claimant approached Consultant colleagues who had been at the meeting, including two female colleagues TR and Salma. He learned that the Consultants' view from the meeting to feed into the Workforce Review was that the department should recruit a specialty grade SAS doctor and a Consultant. The claimant was angry at having been excluded from the meeting and accused them of being in on a "game" to exclude him. He told TR he would block her from taking on a role that he held, in that he would not give it up just because Mr Ramasamy believed it was a role that should be held by a Consultant. He sent an email to all of his colleagues setting out what he believed had been discussed, which was replacing his role with that of a Consultant.

18 September meeting

22. On 18 September 2020 the claimant met with Mr Smith. He asked him to investigate a concern raised by another Consultant Miss Rowland regarding what she thought may have been his mismanagement of a patient. Miss Rowland had expressed concern that the claimant, in her absence, had treated one of her patients. Mr Smith did not feel there was anything that needed investigating. The claimant wanted this looking into.

23. The claimant talked about his relationship with Mr Ramasamy and said he was experiencing repeated bullying from him. The claimant said he wanted to make a formal bullying complaint. He also complained about the 4 September meeting which he had been asked to leave and which he said had discussed replacing his role. Mr Smith told him he could go down the formal route and would be supported to do so but to take time to think about things and that if the claimant wanted he would arrange an informal mediation meeting with Mr Ramasamy.

24. The claimant had some annual leave and sent an email on 16 October 2020

to Mr Smith saying that he was grateful to Mr Smith, had had time to reflect, would hold off a formal bullying allegation but would like mediation with Mr Ramasamy.

25. On 21 September 2020 Mr Smith attended the Division of Surgery Management Board Meeting. The decision to appoint a Consultant to ophthalmology was discussed at that meeting. On 21 October 2020 there was an ophthalmology team planning meeting which the claimant attended and which resulted in an expressed preference to recruit a Consultant with glaucoma specialism. On 30 October 2020 there was an exchange of emails between Mr Ramasamy and the claimant regarding a patient care matter. Mr Atkinson was copied in as was Mr Gashut. The claimant had been told to cancel two of his patients so that Mr Ramasamy could operate on a patient. The claimant challenged this as not being in line with the February agreed protocol which he says was for the patient who needed surgery to be added to his list. Mr Ramasamy said *clearly there is a need for a discussion about your role in VR service in order to avoid confusion.* The claimant replied:

> *"Clearly Ram you are not in a position to discuss my role in VR Service* and *if there's any confusion it's because the unilateral wrong information / image you try to pass to different people regarding my role which needs to stop immediately."*

26. In November 2020 the claimant asked his direct line manager Mr Atkinson about his contract. The claimant knew it was due to expire. Mr Atkinson agreed to look into this and came back a few days later to tell him that it had been extended. The claimant assumed this to have been for a further twelve months. No one wrote to the claimant to confirm this extension or its duration.

Meeting 11 December 2020

27. Mr Smith asked the claimant to meet with him. He asked how the claimant was, following on from their last meeting in September. His intention was that the meeting was a catch up about the claimant's bullying allegations and about the decision to recruit a Consultant and the advertisement that was to go out for that post.

28. Mr Smith said that the respondent was going to advertise for a Consultant and a specialty doctor. He said words to the effect that *if* we appoint Consultants you can expect that your contract won't be extended. The claimant was angry. He challenged Mr Smith, saying *why are you replacing me* ? He argued that he was a good surgeon, that all his colleagues would confirm that and that he should not be replaced. Mr Smith engaged with the claimant's assertions about how good he was and sought to refute them. He made a remark to the effect that *"that's not what your colleagues say"*. The claimant challenged Mr Smith asking *"what do you mean?"* Mr Smith then referred to a list he had made of concerns raised about the claimant by his colleagues. He told the claimant that there were 18 items on the list. The claimant wanted to see the list, wanted to know what had been said. Mr Smith refused to share it or provide any detail.

29. The meeting concluded with Mr Smith reiterating that if they appointed a Consultant then the claimant should not expect to be there after the end of March

2021.

30. In December Consultant FC spoke in confidence to her managers to explain that she was planning to reduce her hours. On 16 December the respondent advertised for a Consultant and a specialty doctor post. The claimant applied for the Consultant role and was not shortlisted. The claimant did not apply for the specialty doctor role. At some point prior to interviews the respondent became aware that it had funding and could appoint two Consultants from this recruitment exercise, if appropriate.

31. On 19 January 2020 GMC emailed the claimant who had phoned to chase up his CESR application and said that there was a queue of similar applications waiting to be assigned an adviser and that this was due to a pandemic backlog. The claimant chased again. On 24 January 2022 the claimant received a letter from GMC in response to his chase up and was told that GMC were not yet ready to issue a decision on his CESR application. GMC gave no indication as to how long the decision would take.

32. During January 2021 the interviews took place and the Trust appointed two Consultants, due to start in April and a specialty doctor.

33. In early February the claimant heard that FC was wishing to resign. When the claimant heard of this he emailed his line manager and Mr McNulty offering to cover for six months, seeking an extension of his contract beyond the date of 31 March 2021 that Mr Smith had intimated in December. He went to see Mr McNulty and offered to cover for six months. Mr McNulty told him any cover for FC must go out to advert as there had been a decision that all appointments to Consultant must be substantive appointments.

34. The claimant had family issues to address at this time and was desperately concerned to preserve his employment. On 5 Feb 2021 the claimant went to see Sharon Landrum, the Diversity and Inclusion Lead and Freedom to Speak up Guardian. He told her he had been told by Mr Smith his contract would not be renewed if they appointed, they had appointed but FC was resigning so he had requested a six month extension to his contract.

35. She wrote to Paul McNulty. She got a reply and then wrote to the claimant. Her letter relays responses from Paul McNulty. The claimant replied, inserting his text into the letter, to challenge some of the information he had been given by Ms Lundrum from Mr McNulty. Firstly, Mr McNulty had said that the claimant had had 18 months to submit his CESR application but had only submitted it in late 2020. The claimant corrected this, he had submitted in July 2019 and had chased GMC and copied the chase ups to Mr McNulty. The second point related to Mr McNulty saying that the other fixed term contract in the department, Mr Gashut's post, was not due to expire but that when it did they would be looking to advertise a substantive post. The claimant corrected the position that Mr Gashut already had a Job Plan going forward and had had conversations about a substantive post.

36. The claimant himself then wrote to Paul McNulty and copied his letter to others including Jay Atkinson and Sharon Landrum. He said there was very disappointing misinformation in the letter he had had from Sharon Landrum about

his CESR application. The claimant said, *"I still feel all types of discrimination, victimisation, bullying, misleading and punishments are happening to me with this decision".* He was not well enough to complete his clinic and asked for an OH referral. He said, *"I know VR work is always the main problem with one of my colleagues trying to keep me out of it and hence I am in this trouble".*

37. The claimant said in his email of 2.03 pm that there definitely will be a gap in the retina service even with the two new consultants joining, *"which I'm offering to cover for six months before advertising it".* He said Mr Atkinson and Mr Gashut knew he had offered to fill for six months with FC leaving. Mr Gashut had told him the two new consultants do not do retina work. The claimant was distressed, unwell and went off sick.

First Grievance

38. On 5 February 2021 the claimant lodged a grievance about:

(1) Bullying by Mr Ramasamy;

(2) Mr Smith not having arranged the mediation meeting he promised and not having arranged an independent review of bullying incidents;

(3) The meeting of 11 December 2020 with Mr Smith;

(4) Decision to recruit two consultants outwith the department plan to appoint one, and job security given to other fixed term staff (meaning Mr Gashut);

(5) Refusal of his request to fill the gap left by FC resignation / reduction in hours for six months pending GMC outcome.

39. In the "outcome or remedy sought" section the claimant indicated that he would like his contract extending for 6 months.

40. On 8 February 2021 the claimant updated his grievance about the 11 December 2020 meeting and sent it to Mike Ellard. He specifically alleged that he had been given notice to terminate his contract verbally on 11 December 2020. He said that the reason for termination related to concerns he had expressed (the bullying allegation he had made about Mr Ramasamy to Mr Smith on 18 September 2020).

First Termination letter

41. On 17 February 2021 the claimant received a letter from Mr Smith terminating his contract with effect from 31 March 2021 and saying that the rationale for this had been shared in meetings with himself and with Mr McNulty.

The Second Grievance

42. On 17 February the claimant lodged a second grievance. There were two main allegations in this grievance. The first area was around repeated bullying incidents by Mr Ramasamy with an ongoing agenda to remove the claimant from

retina work including the meeting of 4 September and Mr Ramasamy's alleged role in getting FC to call a meeting without the claimant, the failure to investigate the wrong clinical concerns being raised by Miss Rowlands and Mr Ramasamy pushing to replace the claimant. The claimant alleged a collusion, (without a date or any evidence) that Mr Ramasamy had met with Mr Smith and Mr McNulty and put in place a plan to dismiss the claimant.

43. The second area of grievance related to Mr Smith:

(1) ignoring the claimant's reports of bullying;

(2) failing to set up the mediation meeting;

(3) ignoring the Miss Rowland issue and failing to investigate it as requested;

(4) ignoring the claimant's report of having been excluded from the 4 September meeting;

(5) Mr Smith meeting with substantive consultants to discuss planning for the department;

(6) Mr Smith terminating his contract on 11 December 2020;

(7) Mr Smith changing the reasons for ending the claimant's contract from behavioural concerns raised by all consultants collectively and individually to *clinical* concerns – a list of 18 clinical concerns;

(8) Mr Smith failing to give notice of the meeting on 11 December 2020 that ended the claimant's contract and not allowing him time to be accompanied to that meeting;

(9) Mr Smith ignoring the claimant's emails following the meeting;

(10) Mr Smith sending a letter of dismissal on 17 February 2020.

44. The claimant wanted a remedy of addressing the bullying so that it stopped and if appropriate disciplinary action was taken. He wanted the Miss Rowland concern to be investigated.

45. On 19 February 2021 Mr Smith wrote to the claimant setting out his rationale letter for termination which was:

> *"We have recently advertised and recruited to two substantive consultant's positions within the department in order to reach funded establishment and provide stability to the workforce moving forward. Unfortunately you were not in a position to apply as you did (not) satisfy the requisite eligibility criteria of being on the specialist register."*

<u>First Grievance Hearing</u>

46. Simon Lea Associate Medical Director Clinical Support, was to hear the grievance supported by Harold Purvis from HR. He asked for data regarding the claimant's employment dates and contracts. They had arranged a meeting for 2 March 2021 but it was postponed by consent to allow time for the claimant to be represented. Mr Purvis asked Mr McNulty in writing what was the reason for termination of the claimant's contract.

47. On 4 March 2021 Mr McNulty replied saying:

"The reason for not extending his contract further was that following a service review it was deemed in order to ensure the long-term stability of the service and consultant grade. We advertised for a substantive consultant in December, having the funding for two....we appointed two consultants".

48. On 16 March 2021 the claimant chased up the first grievance. He wrote to Mr Purvis saying:

> *"All external routes of challenging this notice cannot be accessed unless the internal ones are approached and completed."*

49. Harold Purvis wrote to the claimant on 23 March 2021 to say that the key outcome the claimant was seeking of a six month extension needed senior executive approval so he had escalated the grievance to the Head of HR. He said that he and Simon Lea had met with Head of HR Gary Sweeney and Jacqui Grice and that they would be the claimant's immediate and future contacts.

50. Jacqui Grice, Executive Director of Workforce wrote to the claimant on a without prejudice basis on 23 March 2021 saying that she was aware that there were two grievances. She said:

> *"In order to understand your current situation and to establish whether a common position can be found …which may facilitate a resolution to your grievances….I would like to invite you to a meeting with myself and Garry Sweeney head of HR."*

51. The claimant agreed to the meeting and it took place on 29 March 2021.

Without prejudice meeting

52. The meeting took place and the outcome was that the notice of termination given by Mr Smith verbally on 11 December 2020 and in writing on 17 February 2021 was rescinded so that the claimant's employment would continue beyond 31 March 2021. Garry Sweeney wrote to the claimant on 29 March 2021 confirming, *"your employment is continuing beyond 31 March and Jacqui and I will look at your contract next week with a view to putting an offer to you".*

Second Termination letter

53. On 19 May 2021 Garry Sweeney wrote to the claimant to give notice of termination of the fixed term contract. He says the reason for dismissal is not the

claimant's bullying allegations or Mr Smith's 18 Concerns but because:

> *"…substantive consultant positions which you were helping to cover as a locum, have now been filled. For clarity, locums have no automatic entitlement to be appointed to the substantive post when it is filled because all consultant appointments are subject to the statutory consultant appointment procedure."*

54. Mr Sweeney invited the claimant to a meeting to discuss alternate roles. He told the claimant his Second Grievance would be investigated by Mr Shabbir Poonawala.

55. Mr Poonawala supported by Joe Hill from HR then began meeting to discuss the claimant's Second Grievance. On 21 May 2021 Mr Poonawala wrote to the claimant regarding the Second Grievance but also refers to the content of the grievance submitted on 5 February 2021 (which was the First Grievance).

56. On 23 May 2021 the claimant returned to work after having been off sick for over 15 weeks. Helen Brislen, Interim Directorate Manager, managed his phased return.

Part of the First Grievance upheld 25 May 2021

57. Garry Sweeney wrote to the claimant to confirm that the aspects of his grievance that related to the notice of termination of his contract had been upheld. He set out that the bullying and harassment grievance issues were to be addressed by Mr Poonawala. He notified the claimant of his right to appeal against the decision to terminate his fixed term contract.

58. The Grievance Procedure provides for three stages, the third stage being the final appeal.

59. On 26 May the claimant wrote to Mr Purvis saying that he had not had a conclusion to his First Grievance. The claimant asked for minutes of a formal grievance meeting, a decision outcome letter from the meeting and referred to his time limits in which to appeal. On 26 May the claimant wrote to Mr Sweeney acknowledging his 25 May letter and seeking two pieces of evidence. The first, he said, is evidence that fixed term contracts should be limited to one year and the second is evidence that his contract had been extended in around October 2020 for six months until 30 April 2021.

60. The claimant then contacted Sharon Landrum again as he was concerned that his time for appeal was running out. He also said, *"I was wondering if it's time to explore the external options since I don't feel I'm being heard enough".*

61. On 1 June the claimant wrote a long letter entitled "A formal response to the letter of my dismissal sent by Mr Sweeney dated 19/5/21" to Mr Sweeney. It raises the following points:

- No outcome to First Grievance (other than notice to terminate on 31 March 2021 was rescinded).

- The claimant says the First Grievance dealt with *more than 10 grounds of unfair and wrongful dismissal plus discrimination, victimisation, bullying and covid punishment* yet only the notice point has been addressed

- No meeting to find common ground as had been promised following the 29 March 2021 meeting.

- Darren Smith dismissed him on 11 December 2020 due to behavioural concerns and other non investigated clinical concerns / the substantive Consultant post rationale was added after his dismissal.

- Guidance on locum appointments has changed and that he should be dealt with under the old policy – if short term appointments then why another consultant who has been there over ten years.

- Contract renewal date for 6 month extension to 30 April 2021 – documentary evidence please.

- He was appointed on a long term basis / not to provide locum cover.

- Decision to dismiss was taken before the recruitment process – recruitment was to be for 1 consultant then after the claimant's dismissal on 11 December 2020 two were recruited.

- The claimant's qualifications: the claimant says that Mr Sweeney is wrong when he states that the claimant does not have some required qualifications for the Consultant post. The claimant says *my qualifications are not less, perhaps more, than any other consultant in the department. The CESR ….is basically a GMC admin process.*

62. The claimant concludes saying. *"it's not right that this happens to a whistleblower".*

63. On 1 June Garry Sweeney invited the claimant to a meeting with him and Helen Brislen to review his circumstances and look at staffing needs leading up to the termination of his contract on 31 August 2021.

64. On 2 June the claimant wrote to Deborah Smith, Interim Director of Workforce largely restating his case as had been put in his grievances and letters to Mr Sweeney.

65. The meeting with Helen Brislen and Garry Sweeney took place on 15 June 2021 to allow time for the claimant to be accompanied by his BMA representative Mr Carver. Garry Sweeney clearly said that the purpose of the meeting was to discuss the notice that had been given and consider alternate positions. The meeting would not consider issues arising in the First Grievance or Second Grievance.

66. The claimant then gave a presentation of 30 slides at this meeting, raising issues from his grievances, and sent his slides after the meeting to the attendees.

They included allegations of discrimination and whistleblowing victimisation and referred to the ACAS Code. His request at the end of this presentation was:

A. Let me continue my employment till the end of October and then I will be able to apply for a substantive (Consultant) post.

B. Offer me the part time Consultant post that you are planning to recruit as a conditional offer to be on the Specialist Register for six months.

C. Offer me the part time Consultant post that you are planning to recruit on a fixed term till my registration process finishes.

67. Helen Breslen outlined posts available:

1: Two permanent SAS specialty doctor posts, non-operating position.

2: A permanent Consultant position part time.

68. The claimant wanted to discuss his bullet point positions at A, B and C above. Mr Sweeney said A was not applicable as the claimant was now on notice that his contract will end on 31 August 2021 and that B and C cannot be given to the claimant as he does not have Specialist Registration. The claimant said he wanted to reassure Mr Sweeney that he does have the qualifications for a Consultant post and that CESR is "just an administration process". The claimant said he wanted at least until the end of his fixed term to 31 October 2021 to get his registration completed.

<u>The Second Grievance process</u>

69. Mr Hill, the HR Representative supporting Mr Poonawala in the Second Grievance wrote in response to a letter from the claimant to tell him that they were looking at the bullying in the Second Grievance and bullying aspects of the First Grievance but that the notice point had been dealt with by Mr Sweeney.

70. The claimant replied to this with new a set of 34 slides setting out his position and concluding with a section called "Remedy". He called for acknowledgment of the bullying he had suffered and disciplinary action against those involved.

71. The fact finding hearing took place on 21 June 2021. The claimant was again accompanied by Mr Carver. The claimant presented his slides. There was discussion of them, and the notes of the meeting subsequently embedded the slides in the flow of the discussion.

72. On 28 June 2021 the claimant wrote a two page letter to Mr Sweeney restating his case but also protesting that he had not been allowed to discuss the reason for his dismissal at the 15 June 2021 meeting. The claimant persisted in saying that his First Grievance had not had an outcome.

73. On 1 July the claimant was invited to an appeal against his dismissal hearing to take place on 6 August 2021.

74. The claimant prepared a new submission entitled "My Journey with WUTH: the ripple effect" for the appeal and sent it the respondent on 16 July 2021. He indicated that there would be more emails with more evidence attached.

75. On 5 July 2021 Mr Sweeney sent a letter to the claimant following the meeting on 15 June 2021. It said:

> *"I repeatedly tried to explain to you why your fixed term contract was ending in that there was no longer a requirement for a locum consultant in ophthalmology following the recruitment of two substantive Consultants."*

76. It went on to explain that as he wasn't on the Specialist Register the claimant was not qualified to apply for Consultant posts and that Mr Sweeney had brought to his attention two posts that he is qualified to apply for. The details of those posts, the specialty doctor posts, were set out. Mr Sweeney said that the posts could not be held indefinitely so the claimant should advise him in writing by 5pm on Monday 12 July 2021 if he wished to apply for one of those posts.

77. Mr Sweeney said the claimant was put on the redeployment register and it was hoped a suitable alternative post could be found before 31 August 2021.

78. Mr Sweeney acknowledged that the claimant had already appealed against his dismissal and that the hearing was to take place on 6 August 2021. Mr Sweeney enclosed a copy of the Fixed Term Policy and reminded the claimant of the respondent's employee assistance programme.

79. On 9 July 2021 the claimant replied:

> *"Accepting a non-operating SAS post is a downgrading to my experience, qualification and skills. The Trust has a duty to explain why I am offered such a demoting post compared to the other locum in the department. In fact this could be part of the discrimination and victimisation started previously and mentioned in my grievances."*

80. The claimant said that he had asked Helen Breslen to hold back other recruitment processes in ophthalmology (the two SAS posts and 1 part time Consultant post) until he comes to the end of his grievance and appeal process and that not to do so would be very risky. He went on to say that if his grievances and appeals are not upheld then he will accept the SAS post rather than have his employment end.

81. The claimant missed the deadline of 12 July 2021 of applying for the post. It was extended for him to 1 August 2021.

82. In late July Mr Sweeney was working to put together the management statement of case for the claimant's appeal against dismissal. He asked Mr Smith and Mr McNulty to provide detail around the discussion on 11 December 2020.

83. Mr Smith replied on 2 August 2020. He gave an account of the meeting as set out in the facts above. He wanted to give the claimant forewarning that it was highly likely that his contract would not be extended when it expired at the end of

March 2021, as *if* successful (in recruitment) the department would be full. He recounted that only in response to assertions of the claimant's ability did he refer to a list of bullet pointed informal incidents (for which he said there had not been any patient information). He described the claimant's anger and referred to him as being incandescent and wanting to know who was the author of each of the concerns. He expressed the opinion that the respondent might be losing an asset but that the claimant lacked humility and insight. He said he had asked the claimant to demonstrate that he was a good surgeon to him but had had no response.

84. On 4 August Mr Sweeney wrote to the claimant setting out that he had not applied for the SAS post, even though the deadline had been extended for him to 1 August 2021, and therefore the posts would now be advertised.

Progress in the Second Grievance- independent investigation

85. On 1 July Mr Poonawala had appointed an independent investigator, Mr Thorburn, to investigate the bullying and other allegations in the First and Second Grievance, but not the contract issue. Mr Thorburn had written terms of reference which spanned bullying allegations in both grievances and tasked him with looking into the bullying allegations. Mr Thorburn met the claimant on 6 July 2021 and again on 18 August 2021. He interviewed Mr Ramasamy, Mr Smith, Ms Cuthbertson (FC), Mr McNulty, Miss Rowlands and Ms Rajhbeharrysingh (TR).

10 August 2021 Appeal hearing against dismissal

86. The claimant attended his appeal against dismissal with Mr Carver from the BMA. Mr Michael Ellard, Deputy Medical Director heard this appeal along with Natalie Park, Divisional Director Women and Children. The claimant presented his "My Journey with WUTH" document including content on bullying allegations which Mr Ellard said was not relevant to the appeal against termination of his fixed term contract.

87. The claimant made his arguments about having been appointed on a long - term basis. Helen Breslen who was present at the appeal said she had been the recruiting manager at the time and it was clearly, as the contract showed, a 12 month fixed term contract.

88. The claimant alleged that his contract had been terminated by Mr Smith on 11 December 2020 because he had raised concerns at the 18 September meeting about bullying. He raised the issue of Mr Gashut, the permanent locum in the department. He raised the extension point, that it had been 12 months from October 2020 and not six.

Continuous service raised at appeal

89. At the appeal the claimant raised his continuous service. The claimant said he had continuous service from September 2015 as he had previously been employed at another Trust. His argument was that he should have been treated the same as Mr Gashut.

90. Mr Ellard wrote on 12 August 2021 rejecting the claimant's appeal. He set

out his reasons in full. Mr Ellard acknowledged that mistakes had been made in giving notice to the claimant and that he had had an apology for that.

On the long-term appointment point:

91. Mr Ellard found there was no evidence for this at all. The contract was clearly a 12 month fixed term locum cover contract.

On the notice point:

92. He concluded that the claimant's employment had been terminated by verbal notice from Mr Smith on 11 December 2020 and confirmed in writing and that there were mistakes made. He acknowledged that an apology had been given by Mr Sweeney, and the notice rescinded, corrective action taken to allow the claimant's employment to continue beyond 31 March 2021. He acknowledged that "favourable" notice had then been given on 19 May 2021 (i.e. more than three months' notice to which the claimant was entitled) such that the contract was due to expire on 31 August 2021.

On the reason for termination point:

93. He concluded that the reason for the notice given by Mr Smith in December and subsequently in writing on 17 February with the rationale provided on 19 February 2021 (then rescinded) and given by Mr Sweeney on 19 May 2021 was:

> *"The management made a fair and reasonable decision ending the fixed term contract based on the financial situation of ophthalmology, the service review."*

On the continuous service point:

94. Mr Ellard had looked at the claimant's contract which recited a start date of 9 October 2017 and the dates of previous employment that he had given on his application form which were September 2015 to July 2017. He concluded that as there was more than a one week gap between the claimant leaving the previous Trust and starting with the respondent his service was broken so that he had less than 4 years' service at the date of expiry of his notice on 31 August 2021.

On the Mr Gashut point:

95. The claimant had pointed to Mr Gashut's ongoing employment as evidence of unfairness to him. Mr Ellard concluded that Mr Gashut was a permanent employee and the claimant was not. Mr Ellard had regard to the claimant's length of service relying on the dates then available from the previous employing Trust.

The extension period point:

96. The claimant said he had been given false and misleading information. Mr Ellard said that there was an absence of evidence either way as to whether the extension had been 6 months or 12 months and he could not reach a conclusion on it.

97. Mr Ellard recorded that the claimant had been offered the SAS specialty doctor post and despite the deadline having been extended for him the claimant had not applied for the post. He informed the claimant that the posts were still open for external application and he could still apply.

98. The claimant applied for the SAS post. His application was considered by people not otherwise involved in his case and he was not appointed.

99. On 31 August 2021 his employment ended.

Part of First Grievance and Second Grievance Hearing – stage 1

100. However, the Second Grievance was still outstanding. Mr Thorburn had reported, his report and its many appendices were sent to the claimant on 26 October 2021 and a hearing was convened before Mr Poonawala on 3 November 2021. That hearing addressed the bullying concerns from both the 5 February (amended 8 February 2021) First Grievance and the 17 February 2021 Second Grievance. The claimant claimed he had been bullied by Mr Ramasamy, Miss Rowlands and Mr Smith. He said he had suffered unfair dismissal, wrongful dismissal, victimisation of a whistleblower, discrimination and covid punishment. The covid punishment referred to the delay in his getting his CESR.

101. Mr Poonawala agreed with the recommendations of the investigating officer Mr Thorburn. He concluded that there had been a breakdown in relationship with Mr Ramasamy though there was no evidence of bullying. In relation to Ms Rowlands there was no evidence of bullying and no evidence of bullying by Mr Smith.

102. Mr Poonawala was concerned that there had been a delay after the claimant had expressed concerns to Mr Smith and follow up by Mr Smith (September to December 2020). He found Mr Smith should have made it a priority to ensure a follow up meeting in an appropriate time frame and HR advice should have been sought. Mr Poonawala found there was no evidence to support victimisation of the claimant. Overall Mr Poonawala was satisfied that the reason for the decision to terminate the claimant's employment was not as he had alleged, because he had raised concerns about bullying or the Miss Rowlands issue but because:

> *"It is evident that the Trust wanted substantive Consultants to provide the best service possible."*

103. Mr Poonawala accepted the recommendations of the report around learning outcomes and support for staff and recognized that some of the claimant's conduct had had a detrimental effect on his colleagues. He recommended training in the management of grievances.

104. The claimant's grievance was not upheld and he was given information about stage 2.

Claimant goes to ACAS

105. The claimant consulted ACAS on 29 November 2021, achieving an early

conciliation certificate on 9 January 2022 and brought his Tribunal complaint on 9 February 2022.

106. The claimant appealed the Stage One Grievance outcome. A stage 2 hearing was held on 14 February 2022. On 15 February 2022 , in response to an enquiry, the Swansea Trust informed the respondent that they have a leaving date for the claimant of 18 September 2017. Mr Carver continued to support the claimant.

107. The stage two grievance appeal was not upheld. Ms Brodbelt sent her written reasons for upholding the management decision at stage 1 and rejecting the claimant's appeal and gave details as to the process for further appeal to stage 3. The claimant appealed the stage 2 outcome. Ms Brodbelt prepared a management statement of case for stage 3.

108. The final stage 3 grievance hearing was convened on 29 September 2022 before a panel comprising Deputy Chief Executive Nikki Stevenson, Chief Finance Officer Mark Chidgey and Nick Jones HR Business Partner. The claimant was again accompanied by Mr Tom Carver of the BMA. The claimant chose to have a Teams hearing. He had been sent the management statement of case and a full set of appendices to it and the relevant Trust policies including the Fixed Term Policy.

109. The appeal was a Review hearing focusing on fairness of the grievance process and the reasonableness of the outcomes reached. The claimant had made wide ranging written grounds of appeal. They were consolidated by Ms Stevenson into the following seven areas:

(a) The original case investigator at stage 1 did not consider the huge amount of evidence that the claimant provided as part of the investigatory process.

(b) The case investigator ignored the claimant's request to interview other members of the ophthalmology team

(c) The case investigator chose only to interview those witnesses the claimant had named in his bullying allegations and failed to challenge their version of events

(d) The report contained inaccurate information and the investigator readily accepted excuses from those involved in the bullying behaviour

(e) The unfair circumstances by comparison with Mr Gashut, that the claimant was being replaced with a Consultant but Mr Gashut was not.

(f) The reason for the decision to end the claimant's locum contract

(g) The circumstances around addressing his first grievance

110. The stage 3 appeal panel heard from Ms Brodbelt presenting the

management statement of case and from the claimant and Mr Carver.

111. The appeal outcome letter was 6 pages long and was sent to the claimant on 17 October 2022. The appeal found:

(a) The investigatory process was robust and the outcomes appropriate.

(b) The claimant had wanted other Consultants. Nurses, opticians and theatre staff to be interviewed. The appeal panel found that Ms Brodbelt had looked into why the investigator had not spoken more widely to colleagues in the department and concluded that there had been valid reasons for this including the fact that some had been contacted and not responded and others had left the Trust. The appeal panel concluded that there had been sufficient witness evidence to investigate his concerns and consider his bullying allegations.

(c) The appeal panel found that Dr Brodbelt had looked in detail at who had been interviewed and who had not and found that that investigator had interviewed people other than those named in the claimant's grievance. The panel was satisfied that Dr Brodbelt had considered the issue about who was interviewed fully and that her outcome, that the investigation had been balanced in terms of addressing the claimant's concerns and giving people the opportunity to respond, was appropriate. The panel upheld the issue at stage 2 about appropriateness of who was and wasn't interviewed.

(d) The stage 3 panel noted the Stage 2 finding that the meeting on 11 December 2020 with Mr Smith could have been handled better by him. It was critical of communications in the department but it upheld the stage 2 decision to reject the claimant's complaints on this point.

(e) The stage panel emphasized that during the course of the hearing and in his documentation the claimant had accepted that he was not eligible to be appointed as a Consultant. It considered the claimant's complaint that he had been treated differently to Mr Gashut and it found that his circumstances were "entirely distinguished" and "markedly different" from the claimant's in terms of length of service and role and duties. The panel was clear that the correct process for terminating the claimant's fixed term contract had been followed (after the 11 December 2020 and 17 February 2020 notice issues had been rectified). The panel upheld the stage 2 decision.

(f) The fair reason for terminating the contract was considered. The stage 3 panel acknowledged that the process followed at the 11 December 2020 meeting to give notice fell short of what would be expected at the Trust and it offered its apology for that. The panel recited the steps taken by Mr Sweeney to rescind notice, reissue notice, offer alternate roles, ring fence one for the claimant to be redeployed to and considered that he had not been placed at any disadvantage but had been given proper notice and opportunities within the policy. It then turned to consider the reason for termination of his contract and accepted that the reason was the appointment of Consultants obviating the need for any locum consultant

posts. The panel found this decision did not relate to any bullying or harassment of him. It concluded that the decision was made following operational input and not driven by anyone the claimant named in his bullying complaint.

(g) The panel rejected the claimant's arguments that the first grievance had not been properly addressed and that content had been ignored.

112. The appeal also commented on the continuous service point. The claimant had told the hearing he had only a 5 day break in service between Swansea and the respondent so in effect had continuous service of over 4 years when his contract was terminated. The panel knew that the continuous service and break in service points had been raised at the August appeal against dismissal but that at that stage the alleged break had been more than 5 days. The panel considered the relevant documentation and concluded that it would not have made any difference to the decision to terminate his locum contract even if he had more than 4 years service because it said achieving more than 4 years service does not require the Trust to automatically make a member of staff permanent, rather that it the case where a fixed term contract is not *objectively justified*. The panel considered that because of the decision to appoint Consultants going forward there was no longer a need for a fixed term locum consultant so the decision would have been objectively justified. The panel also considered the argument that the Trust could not objectively justify termination / non renewal of the claimant's contract when Mr Gashut was retained and again stated that the situations were "markedly different" in relation to length of service, role and duties.

113. His appeal was denied. The claimant sought employment elsewhere. He achieved CESR Registration. He continued with his Tribunal complaint.

Relevant Law

114. Section 94 Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed by his employer.

115. Section 95 sets out the circumstances in which an employee is dismissed. Section 95(1)(a) provides that an employee is dismissed if the contract under which he is employed is terminated by the employer with or without notice.

116. At Section 95(1)(b) the statute provides that an employee is dismissed if he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract.

117. Section 98 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) or 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;**
>
> **c) Is that the employee was redundant; or**
>
> **d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.**

118. The burden of proof lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2). According to Cairns LJ in Abernethy v Mott, Hay & Anderson [1974] ICR 323:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

119. This requires the Tribunal to consider the mental processes of the person who made the decision to dismiss. In Linfood Cash and Carry v Thomson

> **"The Tribunal must not substitute their own view for the view of the employer, and thus they should be putting to themselves the question -could this employer, acting reasonably and fairly in these circumstances properly accept the facts and opinions which it did? The evidence is that given during the disciplinary procedures and not that which is given before the Tribunal".**

120. In ASLEF v Brady 2006 IRLR 576 the EAT found that the fact that the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding that the dismissal was for a fair reason. There is a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords.

121. In Tansell v Henley College Coventry [2013] IRL 174 the EAT held that an employment tribunal dismissing an unfair dismissal complaint does not discharge its statutory responsibility to give reasons unless it states firstly that it is satisfied that the employer has proved a reason for the dismissal, secondly what that reason is and thirdly that the reason is one of those provided by the statute.

122. The Tribunal must take care not to elide the mode of dismissal, that is to say the termination of a fixed term contract by expiry and without renewal, with the reason for that dismissal.

123. The expiry of a fixed term contract can be a substantial reason for dismissal. In North Yorkshire County Council v Fay [1985] IRLR 247 the Court of Appeal held

that the temporary nature of engagement is capable of constituting a substantial reason but the tribunal must consider whether there was a genuine reason for the contract being of limited duration.

124. In Beard v St Joseph's School Governors [1979] IRLR 144, the EAT found that the expiry of a fixed term contract was capable of being a substantial reason for dismissal but in that case the respondent's failure to consider alternate employment rendered the dismissal unfair.

125. Although whimsical or capricious reasons cannot be 'substantial', if the employer has a fair reason which he genuinely believes to be substantial the case will fall within this category: Harper v National Coal Board [1980] IRLR 260*, EAT*.

126. Whether the reason was a substantial one is for the tribunal to answer, using its common sense and experience, and this can only be attacked on appeal if the tribunal's decision is so obviously wrong that it must have misdirected itself: Priddle v Dibble [1978] 1 All ER 1058.

127. Where the employer does show a potentially fair reason for dismissing the claimant the question of fairness is determined by section 98(4).

> **"(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 on 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."**

128. In Iceland Frozen Foods Limited v Jones [1982] IRLR 439**,** Browne-Wilkinson J formulated the correct test in the following terms

> **"…the correct approach for the Industrial Tribunal to adopt in answering the question posed by Section 98(4) Employment Rights Act 1996 is as follows:**
>
> **(1) The starting point should always be the words of Section 98 (4) themselves;**
>
> **(2) In applying the section the Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;**
>
> **(3) In judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;**
>
> **(4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take the one view, another quite reasonably take another;**

> **(5) The function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."**

129. The Tribunal must determine whether dismissal was a response that no reasonable employer could have adopted in the circumstances. It is not for the tribunal to substitute its own opinion as to what was reasonable for that of the employer Alidair Ltd v Taylor, [1978] IRLR 82**.** The Court of Appeal later held that the range of reasonable responses test applies not just to the substantive fairness of the decision to dismiss but also to the fairness of the procedure Whitbread plc v Hall [2001] EWCA Civ 268. In Tayeh v Barchester Healthcare Limited 2013 EWCA Civ 29, the Court of Appeal affirmed the "band of reasonable responses" test.

130. The Court of Appeal in Salford Royal Northern Foundation Trust v Roldan 2010 IRLR 721 determined that more will be expected of a reasonable employer where the allegation is one of misconduct and the consequences to the employee if they are proven, are particularly serious. In London Ambulance Service NHS Trust v Small 2009 EWCA Civ 220 Mummery LJ reminded tribunals that it is all too easy to slip into a substitution mindset. A tribunal must avoid conducting its own fact-finding forensic analysis. The real question is whether the employer acts fairly and reasonably in all the circumstances at the time of the dismissal.

131. In some other substantial reason cases the reasonableness will itself be linked to the nature of the reason for dismissal. Although doubt has been cast on the application of The ACAS Code on Disciplinary and Grievance Procedures to some other substantial reason dismissals, commentary in Harvey on Industrial Relations considers it is likely to apply so that the Tribunal will have regard in assessing reasonableness to whether or not consultation took place, warnings were issued, alternates considered and whether there was consistency in the employer's decision making. The Tribunal will also have regard to whether or not the employee was given the opportunity to appeal.

132. The ACAS Code on Disciplinary and Grievance Procedures provides at paragraph 4:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.'

133. In some other substantial reason cases the Tribunal should consider the reasonableness at the time of dismissal St John of God Care Services Limited v Brooks 1992 IRLR 546 and all the way to expiry of the notice to terminate Alboni v Inde Coope Retail Limited.

134. Polkey v AE Dayton Services Limited [1987] IRLR 50 HL established that where a claimant is successful a reduction may be made to an award on the basis that if the employer had acted fairly the claimant would have been dismissed in any event at or around the same time. This may take the form of a percentage reduction, or it may take the form of a tribunal making a finding that the individual would have been dismissed fairly after a further period of employment (for example a period in which a fair procedure would have been completed). The question for the tribunal is whether the *particular employer* (as opposed to a hypothetical reasonable employer) would have dismissed the claimant in any event had the unfairness not occurred.

135. The Employment Rights Act 1996 at section 122 and section 123 provides for a reduction in compensation because of contributory fault by the claimant.

Submissions

136. Mr Mitchell provided a written Skeleton Argument and Mr Gibson gave oral closing submission. Both advocates are thanked for their assistance to the Tribunal in navigation of the bundle and their pragmatic approach to the evidence.

137. The claimant submitted that the Tribunal should not confuse *mode* of dismissal with *reason* for dismissal and cited Tansell, Brady, Kuzel v Roche and Royal Mail v Jhuti in the Supreme Court. All of which authorities were familiar to the Tribunal and the respondent. Mr Mitchell sought to equate the claimant's position with (i) that of Consultant, borrowing the claimant's own argument that Mr Smith had decide to *replace* him with a Consultant and (ii) that of Mr Gashut arguing that as Mr Gashut's employment had not been terminated when a decision was made to appoint Consultants the respondent was unreasonable in terminating the claimant's. Mr Mitchell put it this way to Ms Stevenson in cross-examination *if you accept Mr Gashut was different from the claimant because he was permanent then once the evidence is before you that the claimant has 4 years plus then he should have been treated the same.* The submission was that they were comparable cases.

138. The respondent submitted that the reason for dismissal was clear; there was a decision to appoint Consultants, the claimant was not a Consultant, there was no need for a locum consultant, and that the reason amounted to some other substantial reason that justified dismissal. Mr Gibson submitted that the Tribunal did not need to make a finding on the claimant's continuous srvice, it need only determine if the respondent had acted reasonably in treating the reason as sufficient to justify dismissal. That could mean having regard to strikingly similar comparable cases (by analogy with misconduct cases) which Mr Gashut's was not. He relied on Ms Stevenson's evidence in her appeal outcome letter that the cases were "markedly different" in service, role and duties. Mr Gibson cautioned against the dangers of substitution if the Tribunal were to stray into the territory of the respondent's rationale for the decision to appoint Consultants.

Applying the Law to the Facts

Dismissal

139. The List of Issues recorded that it was agreed between the parties that the claimant was dismissed. The claimant was given notice of termination on 17 February 2021 which was less than the contractual notice to which he was entitled. He does not bring a breach of contract complaint. That notice was rescinded by Mr Sweeney.

140. The Tribunal finds that his contract was terminated by the notice given by Mr Sweeney on 19 May 2021 which took effect on 31 August 2021. The claimant's effective date of termination was 31 August 2021. There is no breach of contract claim here but it is noted in relation to the claimant's arguments that there was an agenda to replace him that he was given more than the contractual notice to which he was entitled.

Why there was no dismissal on 11 December 2020

141. The Tribunal heard evidence from the claimant and Mr Smith as to the content of a meeting on 11 December 2020 at which the claimant says he was dismissed on notice and Mr Smith says he forewarned the claimant that his contract would not be extended if a Consultant or Consultants were appointed in the forthcoming recruitment exercise. The Tribunal prefers the evidence of Mr Smith as to the content of this meeting. The claimant was not dismissed at that meeting nor was he given notice of dismissal. Mr Smith gave an indication of what was likely to happen and a best guess of the timescales involved. The Tribunal preferred his evidence because Mr Smith explained the sequence of events at that meeting. Mr Smith said that he said *if* we appoint Consultants you can expect that your contract won't be extended.

142. An issue arose as to whether Mr Smith said the respondent was going to recruit one Consultant or two Consultants at that meeting. Mr Smith said he said one, the claimant says he said two. The Tribunal prefers the evidence of the respondent that Mr Smith on 11 December 2020 referred to one appointment at Consultant level. The Tribunal accepts the respondent at that date planned to advertise for one Consultant and one specialty doctor. That is what it in fact advertised for on 16 December 2020. Further, the claimant in his letter to Mr Sweeney on 1 June 2021 said *the recruitment plan was for only one consultant leaving me and the fixed term consultant in the department. After my unfair/wrongful dismissal in December the plan changed to recruit another consultant for my post.* It is implausible on even the claimant's case that as the plan only changed after the 11 December meeting Mr Smith would have said two posts at that meeting.

143. Mr Smith had looked at the Fixed Term Contract Policy and understood that it was best practice to let a person know if their contract was likely to come to an end. He told the claimant the end of March. It wasn't definite but the likelihood was that the claimant would not be needed after that date. Mr Smith was credible on this point because he gave evidence that this was a difficult conversation, that

it is difficult to tell someone that they may not be needed but that what he wanted to do was to forewarn.

144. The claimant's evidence in part corroborated this position. He accepted that Mr Smith had said *if.* However, the claimant, hearing that his contract might come to an end reached the conclusion in his own mind that there were to be two appointments, the first to replace LC, Consultant who had retired in September 2020 and that the second, and he leapt to this conclusion, would replace him. This was a false leap in two regards, one that there was certain to be an appointment, no one could know at that point what the interest might be and whether any appointable candidates would apply and if offered, accept and two, that he was being replaced. He equated his role as locum consultant with the soon to be advertised role of Consultant which the respondent wanted to recruit to. This is apparent from his oral evidence. He said that he challenged Mr Smith, *saying why are you replacing me*. That shows the Tribunal that what he understood was a) certainty that he was going and b) that the new role was the same as his. That is not what the Tribunal finds had been said.

145. What the claimant wanted, by his own admission in evidence, was to stay in post as locum consultant until he got his CESR approved and was entered on the Specialty Register, and then he would write to HR and tell them to *convert,* this was his word in evidence in response to a question from the Tribunal, *convert* his contract to that of Consultant. He may have equated himself with a Consultant but that was not his contractual position nor his position with GMC.

146. He made a further false assumption which was that achieving CESR would automatically lead to his appointment by the respondent as a Consultant. There was no evidence from either the claimant or the respondent that this would be the case. The Tribunal notes the evidence of Mr Sweeney in his written statement. He did not attend the hearing and could not be cross-examined. The Tribunal attaches weight to his evidence on this point from his statement as it is corroborated by his letter of 19 May 2021 that he explained to the claimant on 29 March 2021 in a meeting that *there is no automatic entitlement for locums to be appointed {to a Consultant post} because all Consultant appointments are subject to the statutory consultant appointment procedures.*

Why there was no long-term contractual arrangement

147. The claimant gave evidence at Tribunal that he was appointed on the assurance that he would stay in post as locum consultant until he got his CESR then become Consultant. He did not say who told him this. He had no documentary evidence to support that position. Helen Breslen gave evidence to the appeal against his dismissal meeting in August 2021 that she had had been involved in his recruitment and he was recruited to a 12 month fixed term. His position is not credible. Firstly, because when he is told by Mr Smith *if* they appoint Consultants he won't be needed he does not say *what do you mean I won't be needed… I am on this contract until I get CESR and then I will be a Consultant.* Secondly, it is not credible in the face of express evidence to the contrary because that is not what his contract says. His contract is clear that it is a 12 month fixed term contract as locum consultant. In October 2021 when the renewal was due, on his own evidence, he raised the renewal with Mr Atkinson. Why would he have done that

if he believed himself to have been on a rolling renewal until he got CESR ? The Tribunal rejects the claimant's assertion that he was or believed himself to be appointed on a long term basis.

148. Understandably, from his perspective, on 11 December 2020 the claimant, who made his CESR application over 17 months earlier and had been waiting patiently for it to be approved so that he could become the Consultant he aspired to be, felt aggrieved. He became angry. The Tribunal accepts the evidence of Mr Smith that the claimant then sought to persuade Mr Smith that replacing him was a bad decision, that he, the claimant, was a good (C)/consultant, a good surgeon and was valued by his colleagues.

149. The respondent accepts that the next part of the conduct of that 11 December meeting by Mr Smith was ill judged. Mr Smith engaged with the claimant's assertions about how good he was and sought to refute them. He made a remark to the effect that *that's not what your colleagues say*. The claimant was further aggrieved by this remark and again challenged Mr Smith asking *"what do you mean?* Mr Smith then referred to a list he had, of his own making, of behavioural concerns raised about the claimant by his colleagues. He told the claimant that there were 18 items on the list. The claimant, understandably, wanted to see the list, wanted to know what had been said and who had said it. Mr Smith refused to share it or provide any detail. It was not disclosed and has not been in evidence before the Tribunal. The Tribunal accepts the evidence of Mr Smith and Mr McNulty that it was not part of the Triumvirate decision to appoint Consultants going forward.

150. The Tribunal can understand but rejects the claimant's perception of this meeting as an accurate account of what happened. Mr Smith's evidence as to the sequence or chronology of that conversation made him the more credible witness. The claimant was told we plan to recruit a Consultant, *if* we recruit your contract won't be renewed. The claimant argued against recruitment and assumed he was being replaced and protested as to his strengths, unwisely Mr Smith engaged in discussion about potential behavioural issues but concluded saying *If* we recruit, that is likely to mean someone starting in April so you are forewarned that you may not be needed after the end of March.

151. At each stage of the grievance process the decision makers were critical of that meeting and offered apology to the claimant for the way in which it was conducted by Mr Smith.

<u>Reason for dismissal</u>
<u>Was the claimant dismissed for a potentially fair reason within the meaning of section 98 ERA 96?</u>

152. Section 98 requires the respondent to establish the reason or principal reason for dismissal. The respondent says the reason was a substantial reason capable of justifying dismissal, namely that in or about December 2020 a decision was made to recruit Consultants.

153. The claimant says that the reason for his dismissal at that meeting was that he had raised concerns about bullying, the Miss Rowlands issue re patient safety

and that Mr Smith was influenced by the "18 Concerns" document that Mr Smith had at that meeting. The claimant goes so far as to say Mr Smith attended the meeting equipped with the 18 Concerns and that they were part of the reason for dismissal. The Tribunal has found that there was no dismissal in December 2020.

154. The notice of termination was in the letter dated 17 February 2021 from Mr Smith. Mr Smith was the decision making officer. It is the factors operating on his mind at the time he gave that (short) notice that are relevant to the assessment of the reason for dismissal.

155. The Tribunal accepts the oral evidence of Mr Smith and Mr McNulty that the Directorate Triumvirate, that is Mr Smith as Associate Medical Director, Mr McNulty as Divisional Director of Surgery and Divisional Nursing Director Mr Edwards had decided that they needed to appoint a Consultant and would appoint only Consultants in the department going forward. Applying Harper v National Coal Board [1980] IRLR 260, the Tribunal finds that Mr Smith and Mr McNulty genuinely believed that the decision to appoint Consultants and therefore to terminate fixed term locum cover was fair and substantial in the context of the Workforce Planning Review.

156. There was a background to this decision which was far reaching. The Triumvirate was aware that there had been consultation. The Consultant group had met on 4 September 2020 and concluded that only Consultants should be appointed going forward. There had been a Workforce Planning meeting on 21 October 2020 which the claimant had attended and at which Mr Ramasamy a Consultant had said that the department wanted only Consultants going forward. There had also been the results of a Workforce Planning Review that had been undertaken.

157. Applying Tansell, which Counsel for the claimant cited in submissions, the Tribunal is satisfied that the respondent has proved a reason for dismissal. The Tribunal accepts the evidence of Mr Smith, Mr McNulty and the evidence of the letter of dismissal of 17 February 2021 and the rationale for dismissal given on 19 February 2021 and Mr Sweeney's letter of 19 May 2021, by way of corroboration, as to the reason in the mind of Mr Smith for the claimant's dismissal. It was the decision to appoint Consultants and consequent removal of the need for locum consultant cover.

Why the claimant's submissions on reason for dismissal are rejected

158. The Tribunal then considers whether the reason is one of those provided by the statute. Before turning to that the Tribunal comments on the claimant's submissions and his case that the reason was because he had complained of bullying and because of the 18 Concerns.

159. The Tribunal rejects those submissions as being wholly unfounded. The claimant had gone away from the 18 September 2020 meeting with Mr Smith to think about what to do next having had an offer of support either with a formal bullying complaint or mediation and the claimant came back thankful and wanting to mediate. Mr Smith was slow to arrange that, it had not been done by the time of the December meeting.

160. Colleagues had been raising concerns with Mr Smith about the claimant but there was no patient data and nothing had been done to investigate those issues other than that Mr Smith had made a list of 18 concerns. There had been issues raised in the past by the claimant and there had been a mediation with Mr Ramasamy in February 2020. The Tribunal finds that Mr Smith was not motivated to dismiss by either the claimant having raised concerns on 18 September 2020 (bullying, Miss Rowlands issue, patient safety), wanting mediation, or by the concerns that may have been raised by the colleagues about the claimant that became the 18 Concerns list when he forewarned the claimant on 11 December and when on 17 February 2021 he gave notice of termination.

161. If the Tribunal were wrong about the date of decision, then the Tribunal reasons in the alternative that as a fact Mr Smith was not motivated in December 2020 to dismiss the claimant for any reason other than the decision to recruit a Consultant obviating the need for a locum consultant going forward.

162. Applying Aslef v Brady nor was there any evidence of opportunism at play here, neither in December nor February 2021. It is incredible that if there had been motivation to dismiss the claimant the respondent would have gone to the lengths of a Workforce Review involving all departmental colleagues and cross Directorate and cross Trust financing decisions and then external advertisement so as to remove the claimant. Certainly not when, if that motivation had existed, more and maybe much could have been made of the Miss Rowlands concerns issue or, potentially, the items individually or taken together on the list of 18 Concerns. The absence of action on those matters flies in the face of a suggestion that there was an agenda to get rid of the claimant because he had complained about bullying or patient safety or the Miss Rowland issue.

163. Further, it is incredible to suggest that the reason was not the real reason and there was an agenda to remove the claimant from the department because of his issues when the claimant was told he could apply for the SAS specialty role that was being advertised in December 2020 and that in 2021 he was offered redeployment into an SAS role and invited again to apply for an SAS role when he missed the extended deadline for redeployment into it.

164. Mr Sweeney considered that both Mr Smith's verbal notice in December 2020 and his letter of 17 and 19 February 2021 were botched attempts to give notice and he apologised for them. Mr Sweeney sent a letter dated 19 May 2021 giving notice to terminate and setting out the reason for dismissal. He explained that the claimant had been:

> *"…providing locum cover in ophthalmology whilst the Trust recruited two substantive qualified consultants. This planned recruitment exercise has now taken place.*
>
> *Accordingly, the reason for terminating your locum contract is not behavioural concerns and that you had previously expressed concerns as you allege but it is because the substantive consultant positions, which you were helping to cover as a locum, have now been filled."*

165. The Tribunal accepts the reason set out in Mr Smith's letter of 19 February 2021 and re-stated in Mr Sweeney's letter of 19 May 2021 that the reason for dismissal was the recruitment of Consultants so that there was no further need for locum consultant cover.

Potentially fair reason

166. Returning then to Tansell and Section 98. Was the reason one of those provided by the statute ? Section 98 provides that a reason will be potentially fair if it is:

> **(c) …some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**

Substantiality

167. Was the reason for ending the claimant's contract a substantial reason? Substantial means not whimsical or capricious. The respondent ended his contract because it did not need locum consultant cover any more having recruited Consultants. The reason was substantial; it had personal, financial and legal implications. It had implications for the staffing of the department and patient care. It was a consequence of a strategic decision to recruit Consultants only going forward.

168. Having regard to North Yorkshire County Council v Fay [1985] IRLR 247 the Tribunal considered the reason for the fixed term contract at its outset. The contract itself stated that it was for 12 months (as had the previous Fellow contract). It stated that it was a locum consultant role (i.e. not a permanent nor substantive nor Trust Grade consultant) appointment but a temporary contract to cover some of the roles and duties that might also be performed by a Consultant.

169. The decision to recruit Consultants, which gave rise to the reason for dismissal was itself a substantial decision. The process for the decision to recruit Consultant(s) was lengthy. It was made on the back of consultation and a Workforce Review. It had financial implications and required cross department input within the respondent to consider funding the structures. There was a meeting on 21 October 2020 to consider the structure with opportunity for contribution. The claimant was there and could contribute. The decision had impact on contractual arrangements, recruitment and selection and future contracts and on service delivery and professional relationships and patient care. It was made, following consultation, by the Directorate Triumvirate and approved tacitly through the provision of funding by the senior executive. The Tribunal finds that the reason for ending the claimant's contract, because he was no longer needed, the respondent having recruited two Consultants following its decision to staff its department with Consultant's going forward was substantial.

Justifying dismissal

170. Further, applying Section 98, the reason was of a kind that justified his dismissal. The Tribunal accepts the oral evidence of Mr Smith and Mr McNulty, in

the absence of sight of the Workforce Review document, that there was no longer a need for locum cover.

Why the claimant's submissions on the Consultant decision not justifying termination of his contract are rejected

171. The claimant argued that he ought to have been retained until he got his CESR and could *convert* into a Consultant. He says the decision to have new Consultants did not justify dismissing him. He wanted to be kept on. The Tribunal had regard here to Salford Royal Northern Foundation Trust v Roldan 2010 IRLR 721 and accepts the claimant's submission that this case is not directly relevant as it is not a case of misconduct that might preclude the claimant from working again. However, and by no more than analogy, the Tribunal looked at the implications of non-renewal for the claimant and considered that termination of the contract under which the claimant was performing surgery and offers of application for or redeployment to SAS Specialty doctor posts in which the claimant could not perform surgery is a factor in the consideration of whether or not the reason justified dismissal. Having taken that into account the Tribunal considers that a respondent Trust making a decision to have Consultants only going forward is a substantial decision that justifies the termination of locum cover contracts even where that means those locums may not be able to perform surgery going forward. The respondent was justified in dismissing the claimant.

172. The claimant was dismissed for a potentially fair reason in Section 98 being some other substantial reason justifying dismissal.

Was the dismissal fair or unfair?

If the claimant was dismissed for a potentially fair reason, did the respondent act reasonably in treating that reason as the reason for dismissal?

173. Having established the reason and that it was a potentially fair reason justifying dismissal the Tribunal then considered 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.

174. The respondent is a large NHS Foundation Trust with a large ophthalmology department and with significant HR Resource. One of its resources is the ability to use fixed term contracts to provide flexible cover to meet patient need. Another resource is the potential availability of alternate posts.

The range of reasonable responses

175. Iceland sets out the correct test which is to look at the reasonableness of the employer's conduct. The Tribunal finds that the decision to end the claimant's contract on notice because there is no longer a need for a locum falls within the range of reasonable responses. That is to say it is not a decision that no reasonable employer could have reached. Having recruited two Consultants the respondent no longer needed fixed term locum consultant cover and gave notice

to terminate that contract. That was a reasonable response. It was not for the Tribunal to further interrogate or conduct a fact finding analysis to see if there really was a need to terminate that contract. The claimant argued that he had replaced Mr Kumar, then LC had resigned leaving a gap, then FC cut her hours or resigned so that the department still needed him. It was not for the Tribunal to step into substitution mind set and make a decision for the respondent as to whether or not it did or didn't have ongoing need for a locum and could or should have kept the claimant. It is enough that the decision to terminate a locum contract where permanent recruitment obviates the need for it falls within the range of responses of a reasonable employer.

Reasonableness

176. The Tribunal had regard to the words of the statute and to the guidance in Harvey as to some of the factors that may be relevant in assessing reasonableness in some other substantial reason (SOSR) cases.

- *Consultation:* the extent of consultation can be relevant in a SOSR case. The claimant had been part of the 21 October 2021 Workforce Review planning meeting and had had an opportunity to contribute his thoughts to the shape of the department going forward both at that meeting and at the start of the Consultants meeting on 4 September 2020 which he had attended. He had made his views clear on 11 December 2020, that he was being *replaced* and continued to make those views clear in his grievances and letters to managers.

- *Warning:* this can also be a factor in SOSR cases. Mr Smith warned the claimant on 11 December 2020 that if an appointment was made he would not be needed. The claimant knew this was a risk, if not a likelihood.

- *Investigation:* This is a factor in unfair dismissal reasonableness generally and in SOSR cases. The claimant's concerns about the notice given to him, the reasons for that notice, his allegations that he was being dismissed because he had raised bullying or asked for the Miss Rowland issue to be investigated or because of Mr Smith's 18 concerns, were investigated. Mr Sweeney stepped in and rescinded the short notice given by Mr Smith. This showed the Tribunal that the claimant's concern about the notice to terminate his contract were investigated and that prompt action was taken, and an apology given, when Mr Sweeney accepted that the claimant was right about his notice.

177. Mr Sweeney and Ms Grice had a meeting with the claimant on 29 March following which the notice was rescinded, that part of his grievance about the notice having been given wrongly was upheld. His grievance about bullying by Mr Ramasamy and or Mr Smith, that the reason for his dismissal was some motivation by them to get rid of him because he had raised concerns, was looked into by Mr Thorburn's investigation and went to a hearing before Mr Poonawala. The first stage outcome found no bullying. There was nothing to undermine the reason for

dismissal given by Mr Smith and reiterated by Mr Sweeney in the notice given on 19 May 2021.

178. The grievance went to a stage 2 hearing with Ms Brodbelt, who upheld the first stage decision that found no evidence of bullying. It went to a stage 3 hearing and Ms Stevenson and her panel found no evidence of bullying.

179. The Tribunal notes that the claimant had not made an allegation of bullying against Mr Smith, Mr Mcnulty or Mr Edwards prior to the decision made by them to terminate his contract. His argument was that Mr Ramasamy was against him, but he did not say that Mr Ramasamy had done more than influence the decision to have Consultants going forward. Mr Smith was a credible witness that he had not been influenced by Mr Ramasamy and that the Triumvirate made its decision based on the outcome of the Workforce Review as a whole. Mr Ramasamy and the Consultants had had a voice in that, so too had the claimant.

180. Considerable time and effort and HR and management resource was expended in investigating the claimant's allegations of bullying, victimisation, whistleblowing and covid punishment. His grievances evolved and were wide ranging and made sweeping accusations. They were investigated and although there were errors, addressed below, the respondent acted reasonably, within the band of reasonable responses in thoroughly exploring the allegations and in ensuring the claimant's engagement with that process. He was interviewed by the Head of HR and Deputy, twice by the independent investigator for his grievance, Mr Thorburn, and he had support from Ms Landrum the Freedom to Speak Up Guardian. He had BMA representation and support and he wrote often and repetitively and at length to his managers. He was allowed to give lengthy power point presentations which included indications of his intention to bring legal action and he received update replies and substantive replies to the issues he raised.

181. He persisted in saying that the bullying part of his First Grievance had not been addressed. The Tribunal finds that it had as part of the broader bullying investigation conducted by Mr Thorburn. The Tribunal read the notes of Mr Thorburn's investigatory interviews including the notes of the interview with Mr Ramasamy and noted the detail in those interviews. Mr Thorburn had put to Mr Ramasamy that he had suggested the claimant go back and practice in the Middle East. This showed the Tribunal that the investigation engaged with the detail of the claimant's allegations.

Look at alternatives:

182. The consideration of alternatives is also a factor in reasonableness of a decision to dismiss in a SOSR case. Applying Beard v St Joseph's School Governors [1979] IRLR 144 the Tribunal finds that the claimant was offered alternate employment. As early as the September 2020 meeting it was being flagged that there would be a need for a SAS specialty doctor role. In the December meeting Mr Smith said there would be recruitment for a specialty doctor role. The claimant did not apply. In the 29 March meeting Mr Sweeney outlined that there would be further discussion about other roles. He went on to provide details of a specialty doctor role to which the claimant could be redeployed if only

he would express interest. Mr Smith explained that the Trust *could not* recruit him to a Consultant post because he did not have GMC Specialist Registration. The Tribunal takes judicial notice of the GMC guidance not to shortlist a doctor to a Consultant post if he is not on the Register. Mr Sweeney extended the deadline for the claimant to be redeployed into one of the two specialty roles and still the claimant did not respond. The claimant then applied for a specialty role as part of open competition and was not appointed by an independent panel. He made no allegation that the independent panel was in any way biased against him.

Consistency:

183. This is also a factor to be taken into account in the reasonableness of a SOSR decision to dismiss and brings the Tribunal to the claimant's arguments on comparability with Mr Gashut. In 2020 the respondent employed Mr Gashut with a job title, consultant. Again, the Tribunal deliberately uses the lower case c. Mr Gashut was not on the Specialist Register. He had initially been appointed, so far as those managers now employed by the respondent can ascertain, about ten years before the claimant as a locum consultant. By passage of time and renewal of his fixed term contracts he had acquired more than 4 years' service and so the respondent understood that he became legally entitled to a permanent contract.

184. Mr Gashut therefore acquired a permanent role with the title consultant. Elsewhere his post is referred to as a Trust Grade consultant or consultant but whatever the nomenclature the respondent used the Tribunal finds that Mr Gashut was not a Consultant on the Specialist Register. The respondent decided as part of its Workforce Review in 2020 that going forward it did not want to have any consultants other than Consultants on the Specialist Register. It accepts the oral evidence of Ms Stevenson that the respondent did not want to repeat the error of the past in allowing time to pass and locum consultants to acquire permanent employment rights.

185. The respondent had reasons for that decision. They included wanting Consultants because they take on leadership roles, conduct research, train and develop their colleagues, create long term stability as Consultant posts are ordinarily lifetime appointments and because the title Consultant is understood by the public to mean a senior person, a specialist, ordinarily someone who has followed the approved training programme, someone who is on the Register. The title Consultant carried with it the confidence of the profession and the public.

186. There is no complaint in this case about discriminatory treatment based on fixed term contract status. The claimant has pointed to Mr Gashut throughout the unfair dismissal case to argue that the respondent has been unreasonable in treating the reason for dismissing him as a sufficient reason (and as to reasonableness and consistency generally) when it did not dismiss Mr Gashut. The claimant has also pointed to roles that he performed such as Clinical Governance Lead and to his research ability as a Phd Doctor to seek to equate himself with a Consultant. The fact remains that throughout his employment with the respondent he was not on the Specialist Register.

187. The Tribunal rejects the argument that failing to treat the claimant in the same way as Mr Gashut, allow effluxion of time so that the claimant gained permanent tenure, was unreasonable. The Tribunal rejects the argument that the in order to be consistent (and not unreasonable in being inconsistent) the respondent must repeat an error of the past. No disrespect is intended to Mr Gashut. The legacy of assimilation of Mr Gashut by effluxion of time into a permanent role with the title consultant does not render the decision to terminate the claimant's limited term contract on notice unfair or unreasonable in circumstances in which it no longer wished to engage permanent consultants.

What did the respondent know about how comparable the claimant and Mr Gashut were in terms of continuous service ?

188. On the knowledge point, Mr Ellard in his appeal against dismissal outcome letter carefully explains that in reliance on the information given to him by the claimant and the respondent at the time of his decision on appeal in August 2021 he understood the claimant to have had a break in service so that he did not carry service with him to the respondent. He had seen the claimant's contract and heard from Helen Breslen who appointed the claimant. The letter of appointment dated 24 November 2017 said *the start date of your period of continuous employment is 9 October 2017. For these purposes your employment with any previous NHS Trust is not included.* He had seen the locum consultant contract statement of particulars dated 1 November 2019 which recited the continuous service date of 9 October 2017. The claimant did not challenge these dates. Applying Abernethy v Mott, Hay & Anderson [1974] ICR 323 these were the set of facts known to the respondent. They were put to the claimant at the appeal hearing in August 2021 and he did not challenge the break in service point with any other dates or information at that point.

189. It is not until 15 February 2022, during the third stage grievance appeal, that the previous Trust informs the respondent that they have a leaving date for the claimant of 18 September 2017. The requirement of fairness runs all the way to the end of the processes Taylor v OCS Group. The Tribunal finds that even that date would not give him continuous service because with a start date of 9 October 2017 there would have been more than one week's break. The Tribunal finds that the facts known to the third stage appeal mean that the claimant and Mr Gashut were not strikingly similar cases.

190. The claimant's evidence at Tribunal was that he thought he attended work until 4 October 2017 though alternately he said he thought he had taken some outstanding leave. He did not disclose payslips or calendar entries or even bank statements showing where he was, Swansea or Wirral, at that time.

191. The Tribunal finds his evidence, uncorroborated by any documentation despite him knowing this was in issue, and not having disclosed anything on this point until the final hearing when the Swansea letters were admitted, opportunistic at best. He was saying that he may have had less than a week's gap in service and therefore would have been comparable to Mr Gashut. The Tribunal finds that even if factually that now transpires with the benefit of hindsight to be probable,

this remains unproven on the balance of probabilities as at the date of final hearing and was not within the knowledge of the respondent at the time of dismissal.

192. The respondent was not unreasonable at the hearing in February 2022 in relying on the correspondence from the Swansea trust given that

(i) the claimant himself when joining the respondent had stated his end date with Swansea at July 2017, the Tribunal saw the entry on the respondent's record to this effect; and

(j) the claimant entered a contract as a Fellow and later locum consultant which cited continuous service as beginning on his start date with the respondent in 9 October 2017

(k) the continuous service point is raised at August appeal but without corroborating documentary evidence from the claimant

(l) even at third stage grievance appeal the claimant had done nothing more than make an assertion that that he had over four years' service. The documents, from Swansea and from the contracts on the break in service point contradicted that assertion.

(m) The respondent knew the claimant to be someone who very much wanted to be "kept on" so that he could "convert" to a Consultant post when he got his CESR GMC registration, despite that he had not proven to them, Ms Stevenson's evidence, that he had less than a week's gap in service.

193. Even if the claimant had had more than four years' service as at the date of his termination of employment on 31 August 2021 in order to establish unreasonableness based on inconsistency he must show that his and Mr Gashut's situations were truly comparable. Allegedly similar situations must be truly similar Hadjoiannou v Coral Casinos Limited [1981] IRLR 352. By analogy with this SOSR case, an employer may distinguish between two cases where there is a rational basis for the distinction made and consistency may have to give way to flexibility. The Tribunal accepts Ms Stevenson's evidence on this point and finds that the cases of Mr Gashut and the claimant were not sufficiently similar in terms of service or roles and duties performed to found an argument on inconsistency in their treatment. Ms Stevenson described the roles as "markedly different".

194. The claimant referred to the respondent's Fixed Term Policy and the iteration of that policy that required objective justification for non-renewal of a fixed term of over four years. The claimant's case was not about less favourable treatment as a fixed term worker. He pointed to the Fixed Term Policy as a further example of the respondent's unreasonableness in terminating his contract and not Mr Gashut's. The Tribunal rejects the claimant's submissions that the termination of his contract was not objectively justifiable. The appointment of Consultants and consequent removal of need for a locum consultant makes termination of that locum consultant contract objectively justifiable. There was argument as to whether the iteration of the Policy requiring objective justification applied to the

claimant. If it did not, then the reasoning above about his and Mr Gashut's cases not being comparable is repeated.

Equity and substantial merits of the case

195. The Tribunal is required by statute to have regard to equity and the substantial merits of the case in assessing reasonableness. The respondent in submission invited the Tribunal to "step back and look at what happened". The claimant's overarching position is that it is unfair that he wasn't allowed to carry on and like Mr Gashut acquire permanent status so that he could then, unlike Mr Gashut, get his CESR and *convert* to Consultant status. That rested on flawed assumptions set out above.

196. The respondent did not promise the claimant that he would become a Consultant. It was not within its gift. There are national requirements. It recruited him on a temporary locum contract. It gave him opportunity to apply for appropriate posts for which he was qualified. It gave him an assurance of redeployment into a specialty doctor post, the most senior for which he was qualified, but he did not apply for redeployment into that post even on an extended deadline. It could not stop him applying for Consultant posts for which he was not qualified though it could not, on GMC advice, shortlist him for them. It supported his CESR application process, it forewarned him about its strategic decision to recruit a Consultant and the impact of that on his contract. It rescinded the short notice that was given and gave more than the contractual notice to which the claimant was entitled. When he raised concerns it considered them.

197. Mr Smith offered him informal resolution through mediation to his bullying allegation though did not set it up. Mr Smith could have done more following the 18 September 2020 meeting with the claimant and Mr Smith's retort in referring to the "18 Concerns" at the 11 December meeting was ill-judged but nothing that Mr Smith did or failed to do made a material difference that undermined the reason for the decision to dismiss.

198. The claimant attended each stage of his grievance process, he had the opportunity to be heard, was represented, was allowed to make lengthy power point presentations, make wide ranging allegations, describe himself as being victimized, a whistleblower and punished for covid (that related to the delay in the CESR decision by GMC and again revealed the claimant's aspiration to get his Registration during the currency of his locum consultant contract and *convert* to Consultant) with little if any evidence to substantiate those allegations, and was given a final appeal against his dismissal hearing. He enlisted support from Ms Landrum and had Tom Carver to represent him. The respondent engaged with both of those people advocating for the claimant.

Some errors of the respondent's that made no material difference

199. There was delay in the process to third stage grievance, it took a long time but throughout the claimant was represented by the BMA. That delay made no material difference to the outcome.

200. There were errors made by Mr McNulty and Mr Sweeney as to the claimant's level of qualification and the date of his submission for CESR. They showed a lack of attention to detail and lack of regard for the claimant, it was unkind not to take care to get those dates right when they knew the claimant was wanting permanent tenure through Consultant status, but they made no material difference to the reason for dismissal or its fairness.

201. The letter from Mr Smith to Garry Sweeney and copied to Mr McNulty on 2 August 2021 was unkind in that it speculated about the claimant *"we might be losing an asset but a lack of humility and insight is a concern"* when speculation had not been invited and it said *his colleagues had concerns about his clinical abilities* which was different from the behavioural concerns that had been intimated in the 18 Concerns list in December 2021. Each of behavioural and clinical concern is a serious allegation to make about a doctor. There has been nothing before this Tribunal to show who raised those concerns, if any, nor that any such concerns were ever put to the claimant or that any such concern was ever substantiated. Mr Smith also said in that letter that he had asked the claimant *to demonstrate to me that he is a good and safe surgeon*. If Mr Smith had concerns himself or had heard that the colleagues had behavioural or clinical concerns about the claimant and if he they called into question how good or how safe the claimant was as a surgeon then they needed answering and he should have acted on them and not put them on a list and left them on his desk and only referred to them in response to protest from the claimant. The fact that he did not address them and that the claimant continued in post, apart from a 15 week period of sickness absence, informs the Tribunal that Mr Smith did not believe there was any substance to those concerns. They were not a factor in the decision to terminate the claimant's contract.

202. The third stage grievance acknowledged the failings of the respondent, the apology offered to the claimant and identified a need for culture change in the department and training.

203. The Tribunal finds that neither the delay nor any of the errors or unkindness or unsubstantiated alleged "18 Concerns", either individually or taken together made any material difference to the fairness of the decision to terminate the contract.

204. Accordingly, the claimant's complaint of unfair dismissal fails.

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Employment Judge Aspinall

Date: 15 August 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

6 September 2023

FOR EMPLOYMENT TRIBUNALS

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