EMPLOYMENT TRIBUNALS

Claimant: Mr P Sridhar

Respondent: Kingston Hospital NHS Foundation Trust

Heard at: London South
On: 24, 25, 26, 27, 28 July 2023 and 9 August 2023 and 9 October 2023 in chambers.

Before:
Employment Judge Heath
Mr S Townsend
Mr A Fairbank

Representation
Claimant: Mr A Adamou (Counsel)
Respondent: Mr R Moretto (Counsel)

RESERVED JUDGMENT

The claimant's claims of detriment for making protected disclosures and of victimisation are not well founded and are dismissed.

REASONS

Introduction

1. The claimant is a general surgeon with a special interest in vascular, wound care and surgical dermatology, who was employed by the respondent trust as an Associate Specialist doctor. This is the determination of the claimant's claims of whistleblowing detriment, and victimisation for having done protected acts. There is a substantial background, with this being one of five claims the claimant has presented to the tribunal. We will refer on occasion to pages in the bundle as follows [428] for page 428.

Protected disclosures

2. The claimant says that he has made three protected disclosures:

    a. In an email on 17 July 2018 that the respondent had breached the Public Sector Equality Duty by repeatedly failing to take reasonable steps to eliminate discrimination - protected disclosure 1 (“PD1”) [428];

    b. In an letter on 10 September 2019 that the respondent had failed, was failing or likely to fail to comply with statutory obligations on the trust to have in place fit and proper persons, as defined in legislation, on the board of directors. He says the Board included the Head of People who had victimised the claimant, and had failed properly to address his concerns (“PD2”) [442];

    c. In an email on 10 June 2020 that, in breach of statutory obligations to appoint fit and proper persons to carry out regulated activity, and in breach of the Equality Act 2010 (“EA”), the respondent appointed a locum consultant surgeon from the EU who was less qualified and experienced than the claimant. He says that respondent inserted an unnecessary condition to the appointment, and restricted it to internal candidates [485].

3. The tribunal will have to decide whether these disclosures satisfy the definition within section 43B(1) Employment Rights Act 1996 ("ERA").

Whistleblowing detriments

4. For his whistleblowing claim, the claimant says he was subjected to various detriments because he made those disclosures;

    a. The respondent failed to consider the claimant for a locum consultant surgeon role;

    b. The respondent constituted an improper and/or irregular interview panel when it appointed to the role of Acting Deputy Medical Director;

    c. The respondent failed to offer the claimant the role of Acting Deputy Medical Director;

    d. The respondent required the claimant to enter into and sign an agreement not to raise pre-existing and previous issues in order to retain his employment.

5. The respondent denies that the claimant was subjected to detriments and denies that what they did was because of protected disclosures. In short, it says that:

a. The claimant did not apply for the locum role, which was in an area outside of his expertise and experience;

b. The panel was properly constituted;

c. The claimant had no relevant experience of hospital management to bring to a senior management role, and he performed significantly worse than the other applicants at interview;

d. It proposed, at the conclusion of an independent investigation into the claimant's grievances, an agreement that the claimant would not repeatedly bring complaints about matters the trust had already dealt with, and/or which were to be determined by the employment tribunal. The trust says that this was not a condition of the claimant retaining his employment, but an honest and reasonable proposal, which the claimant was free to engage with and suggest his own terms, designed to allow the parties to work together in circumstances where the claimant was raising complaints to the most senior people in the trust, at the height of its response to the pandemic, which were historic and repetitive, and were due for determination in a tribunal listed for December 2021.

Victimisation - protected acts

6. It is not disputed that the claimant did 3 protected acts:

    a. The 17 July 2018 communication also relied on as PD1. This will also be termed "PA1"; [428]

    b. Presented a complaint to the employment tribunal on 21 November 2018 under claim number 2304144/2018 ("PA2");

    c. The 10 June 2020 communication also relied on as PD3. We will also term this "PA3" [485].

Victimisation detriments

7. In terms of victimisation detriments, the claimant relies on the following as detriments the respondent subjected him to because of the protected acts:

    a. Failing to follow a fair procedure (the failures are fully particularised in the List of Issues) in dealing with an investigation into the claimant's complaints;

    b. Telling the claimant that failing to enter into an agreement not to raise further complaints would lead to an irretrievable breakdown in trust and confidence and the potential termination of his employment;

    c. Asking the claimant not to raise new complaints subject to the impending tribunal hearing.

8. The respondent denies following an unfair procedure in investigating the complaints, and that it proposed the agreement for reasons set out above under whistleblowing detriments.

Previous tribunal claims and background

9. This is the determination of the fourth set of proceedings the claimant has brought against the respondent. His first three claims were consolidated and heard by an Employment Tribunal chaired by Employment Judge Balogun ("the Balogun tribunal", "the Balogun decision" etc). By a judgment with written reasons sent to the parties on 21 February 2022, the Employment Tribunal dismissed all of the claimant claims for direct and indirect race discrimination and race-related harassment against the respondent and a named respondent, Mr Cheatle. The Balogun tribunal further ordered, in a separate costs decision, the claimants to pay the respondent's costs in the sum of £20,000 on the grounds that the claimant acted unreasonably in bringing or conducting the proceedings and that the claimant had no reasonable prospect of success. We understand that both of these decisions are currently awaiting a Rule 3(10) hearing in the Employment Appeal Tribunal, but the parties are agreed that we are bound by the Balogun tribunal's findings of fact. We further understand that there is a fifth claim to be heard at London South relating to the claimant's claims of constructive unfair dismissal. The parties were agreed that this tribunal was not to deal with any issues relating to the claimant's termination of employment.

The issues

10. The introduction above has largely set out the issues in the case. An agreed List of Issues was recorded in the case management summary of the case management preliminary hearing conducted by EJ Macey on 24 March 2023. On the first day of the hearing Mr Moretto indicated that he had a few observations about the List of Issues. Both counsel agreed that they would discuss the matter as the tribunal read into the case on day one of the hearing. On day two an Amended List of Issues was given to us. There were still areas of disagreement between the parties at this stage about the list of issues. After further discussion Mr Adamou took instructions and agreed to remove a couple of the issues from the Amended List of Issues. On day 3 of the hearing I suggested a couple of minor amendments, which both counsel agreed with, to bring them closer to the wording of legislation. The final Amended List of Issues (with my wording added in red, and issues which were withdrawn or wording removed indicated in ~~strikeout~~) is annexed to this decision.

Procedure

11. The hearing was conducted remotely by CVP, with the first day being devoted to the tribunal reading into the case after some preliminary housekeeping.

12. We were provided with a 1329 page bundle and a bundle of witness statements, together with a respondent's reading list, a cast list and an agreed chronology.

13. The claimant provided a witness statement and gave evidence on his own behalf.

14. The following provided witness statements and gave evidence on behalf of the respondent:

    a. Dr Amira Girgis (Deputy Medical Director and Responsible Officer and Consultant Anaesthetics and Intensive Care);

    b. Mr Gary Hay (Investigator); (Mr Hay annexed to his witness statement his witness statement from the previous proceedings before the Balogun tribunal);

    c. Mr Kelvin Cheatle (Chief People Officer) (Mr Cheatle annexed to his witness statement his witness statement, and those of Dr Nadine Coull and Mr Robert Jeffries from the previous proceedings before the Balogun tribunal);

    d. Ms Linda Dyson (Deputy Chief People Officer);

    e. Ms Mairead McCormick (former Chief Operating Officer).

15. Both counsel provided written submissions and oral submissions.

16. The tribunal reserved its decision, and deliberated in chambers for a further two days. It was necessary for the tribunal to list these chambers days as two separate days, and for unforeseen reasons, the second day had to be cancelled and rearranged. It has therefore regrettably taken longer than was hoped to produce this decision, for which the tribunal apologises.

Facts

17. The claimant is of Indian origin. He started employment with the respondent on 14 November 2005 as a Locum Associate Specialist Registrar (LAS) - General Surgery. Findings of fact on the claimant's early employment and contractual position are set out in paragraphs 6-13 of the Balogun decision, which will not be repeated, other than to say that in October 2007 the claimant was appointed and Associate Specialist in the Vascular Team and General Surgery at the respondent Trust.

18. The respondent has a number of different policies which are relevant to the issues in this case. In particular there is an Equality & Diversity Policy, a Dignity and Respect at Work - Managing Bullying and Harassment policy, a Grievance Policy and a Freedom to Speak Up Policy. The grievance policy expresses itself to be applicable to individual or collective grievances. The Freedom to Speak Up Policy was actually a policy created in April 2023 following the merger of the respondent with the

Hounslow and Richmond Community Healthcare NHS Trust. The predecessor policy was a whistleblowing policy.

19. The claimant has made numerous complaints (to use a general term) over the years, some informal others formal and, as stated above, complaints to the Employment Tribunal.

20. On 11 February 2013 the claimant submitted a formal grievance about a number of matters. Following a grievance meeting, the grievance hearing officer, Mr Morley, the Divisional Director of the Surgery & Critical Care Division, sent a grievance outcome letter on 21 May 2013. Among other things, under the heading "**No contract or appropriate paperwork issued to you from 2007 to 2010, and no appraisal**" Mr Morley indicated that appropriate contracts would be retrospectively issued claimant, and where formal appraisal had not been undertaken annual progress reports would be provided on a backdated basis. Under the heading "**Request to be put on the consultant emergency on-call rota**" Dr Morley did not uphold the claimant's grievance. The Balogun tribunal made findings about these issues at paragraphs 7 to 19 and 20 to 27 of its decision.

21. On 26 September 2014 the claimant put in another grievance against a colleague who he said had falsely accused him of bullying another member of staff. A grievance outcome letter dated 2 October 2014 suggests this grievance was resolved by discussion between the claimant and other parties.

22. On 5 May 2017 the claimant complained to Mr Cheatle (then Director of Workforce whose role later became Chief People Officer) about the process by which a Locum Consultant for Surgery was appointed and employed. The claimant raised his understanding that Specialty and Associate Specialist ("SAS") doctors should be given the opportunity to be considered for locum consultant roles. The claimant was one of three SAS doctors. None of the other SAS doctors was copied into this correspondence.

23. On 24 April 2018 the claimant emailed Mr Cheatle raising a number of concerns relating to his 2013 grievance. He said that he did not have a contract from 2007 to 2010. He also expressed his belief that he was working at consultant level with no acknowledgement of such management and went into some detail about how this issue arose in the 2013 grievance. The claimant also referenced an investigation he had cooperated in, his job plan and issues of "respect and value". On the latter issue he said an SAS colleague and himself had attended a grievance meeting where they were assured that they would be respected and valued in the Department. The claimant did not see evidence of this happening, and gave examples of what he said was a culture of junior doctors being taught to disrespect SAS doctors. No other SAS doctors were copied into this email.

24. On 1 June 2018 Ms Jebb, Associate Director – Planned Care Division wrote the claimant referring to a meeting she had with him earlier that

week together with an HR Manager to discuss his 24 April 2018 complaints. This letter was lengthy, and covered the issues raised by the claimant to Mr Cheatle. The letter explained how the claimant believed he had the equivalent training and experience to other consultants and would like to be "employed" as a consultant by the trust, even though he acknowledged that he was not eligible to apply through the two recognised routes to a consultant post. He explained he felt he was being blocked from applying for certain jobs and taking part in other activities and was being treated as a junior doctor in a number of ways which she found undermining. The letter set out some agreed next steps, which included sharing the claimant's concerns with Mr Sandhu, Chief of Surgery, and exploring the contractual position.

25. On 18 June 2018 Ms Jebb wrote to the claimant again following two meetings he had had with Mr Sandhu and an HR Manager. Again, this was a lengthy letter (7 pages) setting out what had clearly been an in-depth discussion about all of the issues the claimant had raised. Ms Jebb set out a detailed analysis of the routes to work as a consultant in the NHS, outlined that the claimant, as an SAS doctor, was able to put himself forward for a number of different roles and activities, and she dealt with issues he raised about not being respected and his job plan. Again, Ms Jebb set out some next steps, including clarification about the contractual position.

26. On 16 July 2018, the claimant sent Ms Jebb a lengthy reply dealing with the contractual position, employment or appointment as a consultant, contrasting consultants with SAS doctors, roles potentially open to him, job planning, respect and consultant training. He indicated that he was finding it difficult to make management understand his position and might have to explore resolution outside the hospital in an appropriate forum.

27. On 17 July 2018, Ms Jebb emailed the claimant to let him know that his concerns could not be resolved informally, and he needed to raise these matters as a formal grievance.

28. Also on 17 July 2018, the claimant emailed the respondent's Chief Executive, Ms Radmore, subject "Breach of Equality and Diversity Policy and Act". This is **PD1** and **PA1**. The claimant referred to the ongoing remodelling of the respondent's management structure undertaken by the Board. He referred to extensive consultation and an interview process for three posts. He complained that SAS doctors were being "*systematically excluded from this process*". He referred to this not being the first time that SAS doctors were discriminated against, ill treated and disrespected. He referred to a similar process adopted for the Associate Medical Director roles. He indicated that, "*representing the SAS doctors*", he believed that the *"restructuring process has breached the Equality and Diversity Policy of the Trust, Equality Act 2010 and Public Sector Equality Duty of Equality Act 2010*". He asked the Chief Executive to confirm or deny this, and to explain why this process was not discriminatory. This was not copied to other SAS doctors.

29. On 26 July 2018 Ms Radmore emailed the claimant. She conveyed her understanding that all staff were invited to participate in the consultation process regarding the restructure. She asked the claimant to supply details to Ms McCormick, Chief Operating Officer, if he felt he was being deliberately excluded, so that she could investigate. She indicated her understanding that Ms McCormick and Mr Cheatle ran widely publicised seminars about the restructure and enquired whether the claimant had attended. She indicated where new posts and the structure had been advertised, and asked the claimant to flag up to Ms McCormick if he felt the job specifications were discriminatory in any way. She said that the advert for the Clinical Leads invited applications from anyone with relevant clinical background or experience. She also indicated that not every job could be open to all applicants as the most senior ones have specific requirements.

30. On 2 August 2018 Ms McCormick emailed the claimant indicating that there had been no deliberate design to exclude the claimant and SAS doctors in the restructure, but recognised why he felt that way. She said that Mr Cheatle would set up a meeting with the claimant, herself and Ms Girgis, Deputy Medical Director, to discuss the issues. She set out that the consultation process had been widely advertised and supported by seminars where the claimant's input would have been welcome. She accepted that the person specification for certain senior roles required extensive consultant level experience, but noted that impending adverts for clinical leads asked for suitable clinical experience. She indicated she would welcome debate about whether non-consultants can undertake senior roles and appreciated the claimant's challenging of the trust as this would help them improve.

31. There was further correspondence between the claimant and Ms McCormick, with the claimant indicating that discrimination did not have to be deliberate or intentional.

32. On 12 August 2018 the claimant put in a "Formal Grievance/Dignity and Respect at Work complaint" under four headings. First, "**Consultant and Associate Specialist (SAS doctor) – Who is superior?**" In which he complained that the trust believed that consultants were superior in the everyone should be treated with dignity and respect. Second "**Job planning transparency**" in which he complained that consultants are aware of SAS job plans but not vice versa, and that every member of the team should know team members were doing. Third, "**Consultant contract**" in which he complained that the trust believed it was not obliged to give the claimant consultant contract. He believed that he had proven that he had the knowledge and skills to work as a consultant and had been working at this level since 2007. He said his route into the specialist register for appointment as a consultant was blocked by the Trust. He expected to be given a consultant contract backdated to 2011 when a consultant job in Jersey General Hospital was denied. Finally under "**Clinical Management opportunities**" he expressed his belief that there was nothing stopping SAS doctors from taking on management roles,

including medical director roles. He said the current restructuring process and previous appointments had been in breach of the trusts equality and diversity policies, the Equality Act 2010 (including the PSED). This grievance was not copied to any other SAS doctors.

33. On 20 August 2018, the claimant had an informal meeting with Mr Cheatle, after which the claimant emailed to summarise what he said was discussed. He thanked Mr Cheatle for the "*empathy shown*". He said that Mr Cheatle agreed that if issues could not be resolved informally the formal route was available for the claimant. He referred to proposed meetings with Ms McCormick, the BMA and Mr Cheatle himself the following week. He went on to say "*Thanks for sharing your experience that it will be very difficult to win a discrimination case as the bar is set at a higher standard. I also understand when you mentioned "win the battle but lose the war". I also understand that if the issue goes before court I will need personal legal cover and as a management team you will all close ranks*".

34. Mr Cheatle's full reply the same day was as follows:

> *"Thanks for meeting today*
>
> *I think it might be more accurate to say I'm encouraging us to exhaust all informal routes before resorting to formal process. I gave you my honest HR view of your claim in terms of its likelihood of success at ET based on my experience - not to stop you proceeding if that is your wish. It is only my opinion and others may take a different*
> *view.*
>
> *Re "closing of ranks"; I was referring to the Trust needing to defend its position if it believes there hasn't been discrimination. I said this with no intent to stop you pursuing your concerns in any way you wish - not as any kind of warning, so I wouldn't want you to place that interpretation on what I said.*
>
> *My wish is that we meet with Mairead and Ami to try to resolve informally. If we cannot then of course you have the right to pursue any claim formally as you see fit, but in matters of employment law courts and tribunals actively encourage informal resolution, which is all I am advocating.*
>
> *I hope this is clear and helpful. On this basis can you confirm you are happy for me to convene an informal meeting next week?"*

35. The claimant replied the same day indicating he was in favour of informal resolution, and that he had already tried this since 2007. He invited Mr Cheatle to explain a section of the trust's equality and diversity policy.

36. Dr Wong was appointed to investigate the grievance. He conducted a grievance meeting with the claimant on 12 November 2018.

37. On 16 November 2018 the claimant presented his claim 2304144/2018. This is **PA2** and it is accepted that this was a protected act as defined in section 27 EA.

38. On 18 January 2019 Dr Wong sent claimant a grievance outcome letter. Under three of the four headings of the claimant's grievance, Dr Wong did not uphold the grievance. Under the heading "Clinical Management opportunities" Dr Wong's decision was "*You feel that the Trust supports the view that SAS doctors are not eligible for clinical management roles and that the trust is not compliant with the 2014 SAS Charter, and thus possibly in breach of the Trust's Equality & Diversity Policy. This point is upheld and it should be possible for all SAS doctors to apply for clinical management roles in open competition*". He went on to say "*I have given careful consideration to the issues you raised and have decided that your grievance has not been upheld as the Trust has not deliberately set out to breach your dignity and respect at work*". He went on to make recommendations that the respondent should amend the claimant's work records for the years 2007 - 2010 so that this could be considered for future recognition on one of the pathways to consultant status. Dr Wong also complimented the claimant on bringing to the respondent's attention that it was not compliant with the 2014 SAS Charter, and it should be possible for all SAS doctors to apply for future clinical management roles in open competition. What is not clear from the element of the grievance which was upheld, is whether Dr Wong considered that SAS doctors not being eligible for clinical management roles was a breach of the Equality Act 2010. There do not appear to be any findings or conclusions that would support such a decision.

39. On 28 January 2019 the claimant appealed against the grievance outcome.

40. On 8 July 2019 the claimant emailed the respondent's Interim Chief Executive, now Mr Farrar, to complain that allowing only consultants and not SAS doctors to use Private Health facilities in the trust was indirectly discriminatory. None of the other SAS doctors was copied in. The Balogun decision deals with this at paragraphs 45 to 48.

41. Mr Cheatle responded on Mr Farrar's behalf on 22 July 2019. There was further correspondence with the claimant on this issue, which the claimant indicated he would raise in his employment tribunal claim.

42. On 29 August 2019, the claimant presented claim 2303619/2019.

43. On 30 August 2019 a Dignity and Respect at Work Appeal Panel dismissed the claimant's appeal against Dr Wong's grievance outcome. In respect of the matter which Dr Wong had upheld, the claimant had asked for one appointment which had been made to be revoked. The appeal panel did not accede to this request. The appeal findings do not shed any

light on the question of whether Dr Wong had found discrimination, or simply that not allowing SAS doctors to apply for certain roles was against the SAS Charter.

44. On 10 September 2019 the claimant wrote to Ms Bates, the chair of the Trust, under the heading "**Eradication of the culture of bullying harassment and discrimination in the Trust**". This is **PD2**. The claimant indicated a concern with a culture of bullying harassment and discrimination in the trust and a concern that Trust policies do not apply to Board members. He said he believed that the Principles of Good Governance in Public Service had been ignored and that was his duty to formally inform the chair of this. He mentioned the 2018 restructure where SAS doctors were excluded from applying for certain roles, and he set out how he had tackled this issue. He pointed out that a significant percentage of SAS doctors were from outside the EU and all department SAS doctors from the Indian subcontinent. He said he had "*lost the trust in the employers… As Mr Kelvin Cheatle Work Force Director mentioned to me, the Board of Directors have closed ranks to protect their own. Had the Medical Director or Work Force Director been from a BAME community he/she would have been treated differently and would have been sacked long ago*". In closing submissions, Mr Adamou clarified that the information the claimant says he disclosed was that Mr Cheatle, who was a director and Board member of the Trust, and subject to the Fit and Proper Person requirement in Reg 5 H&SCA 2008 Regs, had indicated that the Board members of the Trust would band together to protect their own.

45. The claimant went on to state that the grievance upheld his claim on discrimination but concluded that no action was necessary. The claimant appears to go on to say that if the policies themselves are discriminatory then the authors are to be held responsible for that. He appears to suggest that the Medical Director was at fault for not doing anything following the finding of discrimination, whereas it should have led to disciplinary action. The claimant referenced the Fit and Proper Person test required for individuals to work as directors in the NHS which, he said was not being applied to both the Medical Director and Work Force Director (Mr Cheatle).

46. On 25 September 2019 Ms Bates responded to the claimant's letter of 10 September 2019. She indicated that contrary to the assertions in the claimant's letter, there was no finding of discrimination in the outcome letters for the grievance hearing or appeal. She considered a fair process had been followed and that the internal process for investigating the claimant's complaints was now closed as all formal steps have been completed. She raised her understanding that the claimant had issued tribunal proceedings relating to his complaint. She said that if that were the case it would be inappropriate for her to comment on matters which were currently subject to formal legal process. When the tribunal process was concluded, the trust would no doubt review the outcomes and take into any account any learning that emerges. She went on to say that the allegation that a Director is not fit to hold office was a very serious one and must be supported by evidence that would demonstrate "serious

misconduct". Ms Bates indicated that on a review of the documentation she could see nothing causing her to have concerns about the conduct or capability of any of the Trust executive team. She concluded "*I genuinely believe that every avenue has been explored with regards to your complaints and I hope you will therefore agree that it would not be helpful to continue to raise these matters. I hope you can reach a position to be able to move forward and to facilitate this I have asked Mairead McCormick to meet with you*". Mr Cheatle gave evidence to us, which we accept, that the allegation the claimant made against him of not being a fit and proper person was so serious as to be a "career-ending" allegation if found proven.

47. On 16 May 2020 the claimant emailed Mr Farrar, the Chief Executive of the respondent. The email, not copied to any of the SAS doctors, referred to his previous grievance in July 2018 which he said was "on behalf of" the SAS doctors and concerning lack of equal opportunities. The claimant complained that he had become aware that the SAS doctors in general surgery had been excluded from being given an opportunity to lead the General Surgery Section of post COVID NHS arrangements in the south-west region. By way of context, the claimant was writing this to the Trust's chief executive during the first wave of the Covid pandemic.

48. On 29 May 2020 there was a surgeons' meeting by Microsoft Teams, attended by the claimant amongst numerous other surgeons. One item on the agenda was "UGI [upper gastro-intestinal] Consultant Sickness Cover". The minutes of the meeting indicated that although there would be little elective surgery until the end of the year, emergency work needed to be covered. The respondent was proposing covering the sickness absence with a six month fixed term contract, an internal appointment if possible, which would need to go through the recruitment process.

49. An expression of interest exercise was commenced on 1 June 2020 for the Locum Consultant Upper GI surgery role. There was a requirement that all applicants should be fully registered with the GMC, hold a Licence to Practice and be on the Specialist Register all within six months of CCT at the date of interview and/or illustrate recent experience that Locum consultant level in emergency surgery. A job description was circulated. The Balogun tribunal found as a fact that Mr Cheatle had no involvement in drawing up this advert. It also found as a fact that "*there was never any possibility of the claimant applying because the role was outside of his area of practice and expertise. The claimant does not dispute this*". The Balogun tribunal concluded that the requirements in the advert to be on the specialist register was not indirectly racially discriminatory.

50. On 2 June 2020 claimant emailed Mr Farrar, the Chief Executive, copied to a number of other people (but not the other SAS doctors). The claimant alleged that the Locum consultant post had been created for Ms CB, and he passed on his congratulations. He complained that he was not included as a member of the surgical department on the job advert. He made further observations about consultants and SAS doctors.

51. On 10 June 2020 the claimant sent a letter to Mr Farrar, Chief Executive, headed "**Breach of Trust Equality and Diversity Policy – Indirect Discrimination. Breach of Trust Dignity and Respect at work policy**". This is **PD3** and **PA3.**He said that the recent appointment process of the locum consultant upper GI surgeon breached these two policies. He made reference to his tribunal proceedings, and then set out the facts as he saw them.

    a. He referred to a colleague needing to go on sick leave.

    b. He said at a surgeons' meeting the EU consultants unanimously supported CB to take on the role for a fixed term contract. Some of the surgeons indicated a willingness to give CB training to perform her duties as a consultant.

    c. He referred to the job advertisement and the expression of interest, in which the advert excluded his name, which he viewed as harassment.

    d. He stated that the requirement for the proposed post-holder to be on the specialist register was an indirectly discriminatory PCP which disadvantaged people from the Indian subcontinent.

    e. He said that the job description expects a first-class service in laparoscopic upper gastrointestinal surgery, which he questioned CB was able to deliver given that she needed training in laparoscopic gallbladder surgery. He wanted to know what other specialised expertise she lacked.

    f. He linked this incident with his grievance of 2013 with seven separate subheadings. The theme of these, put shortly, was that despite CB being on the Specialist Register since 2017 the claimant questioned her expertise and experience. He contrasted this with his own experience and suggested the requirement that the proposed post-holder be on the specialist register was indirectly discriminatory. He quoted from his own 2013 grievance and drew parallels with the situation with CB, yet contrasted the respective treatment.

    g. The claimant enclosed his CV prepared in 2010 which she had submitted when he applied for a consultant job in Jersey.

    h. He made a number of requests for disclosure of a large amount of information about CB's qualifications, experience, publications and training. He indicated that he might asked the tribunal to intervene if these were not provided.

52. On 11 June 2020 Mr Cheatle wrote to the claimant acknowledging his correspondence on 15 May and 2 June 2020 concerning allegations of discrimination.

a. He observed that the trust was under "*significant resource constraints presently in response to the Covid 19 pandemic, and this is particularly so for the executive and senior management*".

b. He told the claimant that the Chief Executive was not the appropriate person within the trust to escalate concerns to, and a range of line management routes were available to him. Two colleagues had already sought to address some of the concerns he had raised.

c. He observed that the concerns were related to issues the claimant had previously raised and which had been dealt with by the respondent. He said *"I would be keen to discuss these new concerns with you in the first instance to see if they can be resolved swiftly and help ensure a positive working relationship moving forward*".

d. He referred to the need for someone to attend external meetings, which was not a permanent role. It had not been practical to involve everyone in this decision.

e. He apologised that the claimant felt excluded in relation to the locum surgery advert.

f. He made himself available to talk through any concerns the claimant might have.

g. He observed that the formal grievance of 10 June 2020 appeared to raise similar issues. However, he said that he would be happy to talk through these issues with the claimant to understand what he sought by way of resolution.

h. Under heading "*concerns moving forward*" Mr Cheatle expressed concerns about the ongoing relationship between the claimant and the Trust. He stressed that the claimant was entitled to raise concerns, and for these to be addressed. However, he was concerned that the claimant felt the need to escalate each of his concerns immediately to the chief executive, when there were more appropriate avenues to raise these concerns. He explained that the respondent did not have the resources for very senior individuals to provide formal written responses to address everyday management decisions which the claimant did not agree with. There were processes in place for concerns to be raised, and the claimant should follow these.

53. The claimant responded to Mr Cheatle the following day. He summarised his understanding of Mr Cheatle's letter, and said that as long as Mr Cheatle was Head of Workforce he was "*forced to write to the CEO to express my concerns*". He set out an understanding of the policies which mandated writing to the CEO, and set out why his colleagues were unsuitable recipients of his concerns.

54. On 12 June 2020 Ms CB was appointed to the Locum Upper GI consultant role as the only applicant. At the hearing before us, the claimant referred to a spreadsheet [981] which contained details of the surgical procedures carried out in the emergency list in Theatre 7. The spreadsheet gives details of what procedures were carried out, which surgeons were involved and various other information. The claimant said this document demonstrated that on 13 June 2020 Ms CB was one of 3 surgeons involved in the "*Manual removal of impacted faeces from the rectum*", a very straightforward procedure. He says this demonstrates that Ms CB was being supervised to carry out simply operations, and that this demonstrates she was not skilled or experienced enough to be appointed to the role. Dr Girgis gave evidence that this particular operation was likely to be more complex, as a different column in the spreadsheet indicated that the primary procedure involved the patient needing a scan. She pointed out that the spreadsheet also showed that Ms CB was carrying out the irrigation of a peritoneal cavity the following day as the sole surgeon, which was a much more complex procedure. We accept the evidence of Dr Girgis, and we do not find that this spreadsheet demonstrates what the claimant says it does. Dr Girgis also made the point, which we accept, that the step up to being a consultant is one of the biggest steps in a doctor's career, and that all new consultants would be supported by colleagues in this transition. Evidence of a new consultant being supported does not suggest that they do not have the skills or experience for the role.

55. On 15 June 2020 the claimant presented his third claim to the tribunal 2302379/2020 in which he named Mr Cheatle as a second respondent.

56. On 20 July 2020 the respondent sought expressions of interest for an Interim Deputy Medical Director ("IDMD") role. The email notifying staff of this made clear that Dr Girgis, the Interim Medical Director would be available to discuss the post with any interested candidates. Dr Girgis had held the Deputy Medical Director role until April 2020 when she acted up into the Medical Director role.

57. Dr Girgis gave evidence that the role is "all about people" and involves dealing with human resources, employee relations and management of cases involving the capability or conduct of doctors and the GMC. The role is also heavily involved in the recruitment of consultants. The Deputy Medical Director does not sit on the respondent's Board. It is, however, a senior management position. Dr Girgis herself has a Masters in Strategic Clinical Leadership, a course aimed at senior leaders in the NHS. She also trained as a Local Negotiating Committee staff side negotiator and was a trade union representative.

58. On 31 July 2020 the claimant submitted an application for the IDMD role. The application does not show any examples of the claimant having undertaken any management roles. He talks of an interest in and an aspiration towards management demonstrated in school and university sporting and student union activities. He spoke of having enrolled in an MBA as an SHO in 2000, but did not explain that he had not finished this

course. He outlined a number of personal characteristics, skills and experience he said made him right for the role.

59. Dr Girgis' evidence was that the application made it clear that the claimant did not really understand the role for which he had applied. We would accept this, and observe that the application showed very little experience relevant to what was a senior management role.

60. Meanwhile, the respondent was making some progress with taking forward the claimant's complaints made in his 10 June 2020 letter. As the claimant had made allegations against Mr Cheatle, Ms Dyson, the Deputy Director Workforce had been tasked with commissioning an investigation. It was put to Ms Dyson that she reported directly to Mr Cheatle, had worked with him at Capstick's solicitors, and was essentially not independent of him in the way she took forward the investigation. It was put to both Mr Cheatle and Ms Dyson that Mr Cheatle was, effectively, the unseen "guiding hand" in how the investigation was taken forward. There was no evidence to substantiate this. Mr Cheadle and Ms Dyson were both resolute in their stance that as human resources professionals they were well used to managing conflicts and maintaining independence in investigations (for example by erecting "Chinese walls"). Both were keen to stress their own professionalism and integrity, and there was no evidence to undermine this. We find that Mr Cheatle did not shape or guide the investigation, and that Ms Dyson managed the process independently.

61. On 3 August 2020 Ms Dyson wrote to the claimant to say that she had been asked to commission an investigation as part of the formal grievance process into the complaints. She indicated that an external independent investigator would be commissioned to conduct an investigation under the respondent's grievance policy. She set out the proposed terms of reference of the investigation, based on the claimant's correspondence. These were fairly lengthy, and will only be summarised below:

    a. Various issues were flagged up in relation to the lack of opportunity to lead the general surgery section of the post Covid-19 NHS arrangement in the south-west region.

    b. Various issues were raised concerning SAS doctors not being included in the list of senior doctors in the advert for the locum UGI consultant role.

    c. Various issues were raised about the requirements in the person spec of the locum UGI consultant role which led to the appointment of Ms CB.

62. Ms Dyson reflected that an underlying theme in the claimant's complaints seemed to her to be his dissatisfaction at not being in the list of consultants in the Department and being treated differently to consultants. She therefore proposed asking the investigator to review various other matters:

a. What are the requirements to become a registered medical consultant with the GMC?

b. Is there any reason why the claimant has not been able or chosen to register himself as a consultant with the GMC?

c. Has the trust supported the claimant in any efforts he has made to register as a consultant with the GMC, and if not why not and what more could have been done?

d. Is there evidence of a breach of the Trust's equality or other policies?

63. Ms Dyson also expressed concern, having viewed the claimant's recent communications that it

> "*does appear that you have lost confidence in various members of the senior team. I note that your concerns with the Trust have continued for some time now, including in respect of decisions made in your department and relationships with Trust management generally. In the interest of ensuring that we are doing what we can to promote good working relationships moving forward, I therefore consider it would be useful and appropriate in the circumstances to also instruct the external investigator to review the relationships between you and your department managers, Human Resources and senior Trust management more generally, with a view to considering whether there is a breakdown, if so the extent of any breakdown, whether any such breakdown is remediable and if so, what options are available for remediation*".

64. Ms Dyson therefore proposed six further terms of reference directed towards exploring relationships with the claimant, the department managers, HR and other members of the senior management team, with a view to identifying any relationships which may be causing particular problems. Further the extent of any breakdown and the actual or potential impact in terms of the individuals, the team in the delivery of the service. Whether the breakdown was remediable and the options for remediation. Finally to make any relevant and appropriate recommendations and to report findings and recommendations with further options for next steps.

65. She identified the independent external investigator as being Mr Garry Hay, and she gave his contact details.

66. Mr Hay is a former solicitor who had latterly worked at Capstick's solicitors as a partner from 2006 until his retirement in 2017. He had worked with both Mr Cheatle and Ms Dyson, both of whom had worked at Capstick's in human resources roles. Mr Hay had set up a management consultancy business, named Law2Business, specialising in senior level investigations for largely public sector organisations. He initially set this up as a limited company, and used Capstick's solicitors office as the registered office of

this company. He disbanded the company, but still used the name as a trading name for his personal consultancy business.

67. My Hay gave evidence that on 6 April 2020 the claimant told him that he was aware that Mr Hay used to work for Capsticks. Mr Hay told the claimant that he had not worked there for 3 years. In evidence, Mr Hay referred to a letter which the claimant had written to the tribunal in the case 2304144/2018 in which the claimant referred to Mr Hay as being a former partner in Capsticks, the solicitors representing the respondent in those proceedings, and therefore conflicted. This was not, however, a line that the claimant pursued with Mr Hay himself. We accept Mr Hay's evidence that the claimant referred to his Capsticks role on 6 August 2020 but he did not ask Mr Hay to recuse himself or make any further complaint about this issue, despite taking a different line in correspondence to the tribunal.

68. Meanwhile, the claimant was shortlisted for interview along with two others for the role of IDMD. Mr Cheatle initially was due to be on the interview panel with Dr Girgis, (the former holder of that post, who would be line managing it) and Ms McCormick. It was felt that, given the claimant's complaints against Mr Cheatle, it would be inappropriate for him to be on the panel. Ms Burton, Associate Director of Workforce attended the interviews in his stead.

69. The claimant was informed of the composition of the panel and had no observations. In the hearing it was advanced on his behalf that Dr Girgis and Ms McCormick were unsuitable panel members as they had been copied into some of the claimant's previous complaints, and Ms McCormick had corresponded with him about some of them. This was not a criticism the claimant made at the time, and it is difficult to see how anyone other than Dr Girgis, who would line manage the role, could have been on the panel. In terms of Ms McCormick we do not see how her very limited involvement in the claimant's complaints would have made her unsuitable on the panel, even had the claimant complained about it. The claimant was aware that she had corresponded with him about complaints, and he was ideally placed to object to her involvement in the interview process if he felt at a disadvantage.

70. On 10 August 2020 the claimant and the two other applicants, NC and MS were interviewed. The tribunal has seen the notes of the interviewing panel members of all of the candidates interviews.

71. Dr Girgis and Ms McCormick gave evidence of the claimant's interview and were cross-examined on their evidence and their interview notes. Dr Girgis' evidence was perhaps the more detailed:

    a. Question 1: the candidates were questioned about their CVs and any experience relevant to the role. We accept Dr Girgis' evidence that the claimant's CV and his answers indicated no previous experience of a senior NHS management role. He even missed an opportunity to mention a governance role he had been involved in.

NC, by contrast gave concrete examples of setting up clinics and highlighting the opportunities that the pandemic gave the trust to learn and improve in terms of quality.

b. Question 2: the candidates were asked about what their worries would be in the role. We accept Dr Girgis' evidence that the claimant did not answer the question, but made reference to talking to people and being the eyes and ears of the medical director (which was not, in fact, a function of the role). NC gave cogent evidence about her worries about clinical outcomes, health and well-being of staff, and patient complaints. Her answer showed that she had a good understanding of the role.

c. Question 3: the candidates were asked about what they had learnt from the pandemic. The claimant spoke about a system the hospital had already implemented in using technology to call patients into the hospital from the car park. He also spoke about outsourcing work, effectively, to private practice, which would lead to an increase in cost to the trust and remove frontline doctors into private practice when they were most needed. NC spoke about health and well-being initiatives for staff and the concept of Covid-free hospitals.

d. Question 4: the candidates were asked about stakeholder engagement and what they have done to prepare for the interview. Both the other candidates had spoken to Dr Girgis herself (as the expression of interest had flagged up) and had discussed the role with a number of other managers. In contrast, the claimant had spoken to no-one.

e. Question 5: the candidates were asked about how they we knew they had been effective the claimant's answer was to mention benchmarks and targets with feedback on reflection with an acknowledgement of his own blind spots. NC gave more concrete examples of different markers of performance such as the appraisal process, clinical outcomes and compliance with statutory and mandatory training.

f. Question 6: the candidates were asked for an example of a difficult conversation. The claimant gave a reasonable answer of speaking to a fellow clinician not from this country. He indicated he had made assumptions and would make more of an effort in future if he had similar conversations. NC spoke about a clinical outcome which needed to be investigated before a conversation could took place. She spoke about the need to stay calm and not to take things personally or become defensive. She spoke about informality in conversation reducing anxiety.

72. We find that the other two candidates performed significantly better than the claimant at interview. NC, in particular, who was the Clinical Lead for General Surgery and Neurology, and who went on to be appointed to the

role, gave fuller more thought out responses which indicated a greater level of experience and knowledge relevant to the role. We find that the reason why the claimant was not appointed to this role had nothing whatsoever to do with any complaints, disclosures or protected act he had made. The reason why he was not appointed was that he performed significantly worse than the other two candidates at interview. Indeed, the claimant emailed Dr Girgis and Ms McCormick on 10 August 2020 to thank them for the opportunity to apply for the role and to say that he was "*happy that the better candidate got selected*".

73. On 11 August 2020 the claimant wrote to Ms Dyson. He agreed and indicated his understanding that the investigation was following the formal grievance process. He said it would not be appropriate to investigate issues which were being determined by the tribunal, but he accepted that the ongoing relationship with the trust needed to be investigated.

74. Mr Hay began his investigation, and had a meeting with the claimant on 11 August 2020.

75. At the meeting on 11 August 2020 Mr Hay made it clear that the respondent agreed with the claimant that the investigation should not cover the issues which the tribunal would be determining. Mr Hay then asked the claimant a number of questions about the issues the investigation was to cover. On the issue breakdown in trust and confidence, the claimant set out a history of his feeling overqualified going back to 2007 and going into some detail about difficulties getting a contract, applications to the Jersey hospital and various other matters. The claimant said that he wished to provide further documentary evidence, which he did on various dates after the meeting. Mr Hay reviewed all of the documents the claimant sent him.

76. Mr Hay then met and interviewed eight other witnesses (including the Chief Executive, senor managers and surgeons), taking notes. Mr Hay met the claimant again on 23 September 2020 to discuss matters that had arisen during the course of the investigation. The claimant and Mr Hay discussed the trust and confidence issue in some detail. The claimant indicated that he had lost confidence not only in Mr Cheatle, but in the respondent's Board as a whole. He considered that Mr Cheatle and the Trust's previous Medical Director were not "Fit and Proper Persons" under the relevant legislation. The claimant said that the tribunal ultimately would determine the relevant issues, and that he would accept its decision.

77. Following the meeting the claimant supplied further information. In particular Mr Hay requested information about the claimant's complaint that the sole reason he had not been appointed to a consultant role in Jersey in 2010 was that the respondent had declined to give him contractual documentation for the period 2007 to 2010. The documentation did not support the claimant's account. The reason the Jersey hospital did not proceed with the appointment was that the claimant was unable to confirm a date for entry on the Specialist Register.

78. On 24 September 2020 claimant emailed Mr Hay his notes of the meeting of the previous day. The very first entry was "*You mentioned that the Board of Directors have lost confidence and trust in me. This is in relation to the number of complaints and concerns raised in relation to the equality act. You mentioned that the directors , HR Director, the current Acting Medical Director and Chief Executive in particular mentioned the concerns I raised about the Fit and Proper Person Test (FPPT) application to the current HR Director and the ex-Medical Director*". The claimant also referred to the chance of the investigation leading to a dismissal on grounds of "*Some other Substantial Reason*". He said Mr Hay had said this theoretically could happen but the end result would depend on Mr Hay's recommendation.

79. Mr Hay emailed the claimant back later that day stating that he "categorically" did not say that the Board of Directors had lost confidence and trust in the claimant. He mentioned that there had been discussion about some individual board members expressing their concern that the relationship between the claimant and the Trust may have now completely broken down, which was something the claimant had acknowledged. Mr Hay made clear that he did not say that the Directors had lost confidence in the claimant due to the number of complaints raised in relation to the Equality Act. Mr Hay categorically denied that he had said that dismissal would depend on his recommendation. Mr Hay concluded "*I am sure you will agree that it is important not to mislead anyone who was not party to our conversation. The position is particularly important as I have still not concluded my investigation and all of the interviews I have conducted are and will remain confidential to that investigation. Please therefore amend your note to reflect the points above and confirm to me by email that you have done so*".

80. There was further correspondence between Mr Hay and the claimant, and Mr Hay conducted further interviews with witnesses during the course of September 2020.

81. On 8 September 2020 Dr Girgis' PA emailed the claimant to let him know that Dr Girgis and Ms McCormick were available on 10 September 2020 to meet him to deliver feedback. This would have been feedback on his unsuccessful interview for the IDMD role. The claimant's out-of-office response indicated that the claimant was on leave until the end of the month and would be unavailable to read the email. Dr Girgis and Ms McCormick did not think it appropriate to deliver feedback by email. The claimant did not contact them to request face-to-face feedback.

82. On 21 October 2020 Mr Hay completed his investigation report. On 6 November 2020 the claimant was invited to discuss the findings of the investigation with Ms McCormick on 16 November 2020.

83. There was further correspondence between the claimant and Mr Hay about the text of the notes of the claimant's interviews. Mr Hay made suggested changes, amended his report to reflect these, and produced a final report on 15 November 2020, which he sent to Ms Dyson.

84. Mr Hay's report is 20 pages long. It sets out his own background, the terms of reference and methodology. He then sets out the background to the issues, summarises the evidence, sets out the questions the investigation was to cover and makes findings. We will not set out the detail of the report, but will flag up a few matters relevant to the determination of the issues in this case.

    a. In respect of the complaint that the claimant was not included in the list of doctors in the Locum UGI consultant advert, Mr Hay concluded that the claimant was not singled out for treatment. However, SAS doctors should not be precluded from applying for roles, and the Trust should ensure that suitable jobs are open and transparent.

    b. In terms of the appointment to the Locum UGI consultant role, Mr Hay concluded that the claimant did not have relevant experience for the role, and that allowing him to apply for it would have slowed down the process but achieved the same result.

    c. In respect of whether the claimant should have been included in the list of consultants and whether he has been sufficiently supported to become a consultant, Mr Hay observed that this was a matter for determination by the tribunal, but that from the documents he had seen he felt it would be difficult for the claimant to establish that he had been discriminated on grounds of race. He observed that the claimant has successfully challenged the Trust on issues relating to SAS doctors and met some resistance from them on occasions.

    d. Mr Hay found that the decision in relation to the opportunity to lead the general surgery section in the London South West region was justified.

    e. Mr Hay found no evidence of breach of policy or procedure but observed that this will ultimately be a matter for the tribunal.

85. Mr Hay then went on to make findings on the issue of breakdown of trust and confidence. He concluded that there was a breakdown in the working relationship between the claimant and 1) the HR department, 2) members of the Board, and the Trust generally. He observed that the claimant himself agrees there was a complete breakdown of Trust between himself and the HR department.

86. Mr Hay considered whether the breakdown was remediable. He observed that if the Trust continued to receive complaints about the same issues that are to be determined by the tribunal, then the breakdown may be irretrievable. He highlighted that the CEO and the Interim Medical Director were of the view that the Trust cannot continue to deal with grievances and correspondence about whether the claimant should be given a substantive appointment to a consultant post. He quoted from Ms Bates' letter of 25 September 2019 in which she expressed the belief that every avenue for resolution of his complaints had been explored and that it

would be helpful if the claimant were able to move forward. Mr Hay also referred to Ms Bates saying that she could find no evidence to support the serious allegations put forward by the claimant about racism or the Fit and Proper Person test and that such allegations ought to be supported by evidence. Mr Hay observed that despite this, the claimant has continued to make fresh complaints, and lodge grievances about the same subject matter that was under investigation.

87. Mr Hay observed that the claimant had accepted that the outcome of the tribunal hearing in December would be determinative of issues of discrimination, whether he should be recognised as a consultant, and that allegations around Mr Cheatle's suitability for post would fall away. Mr Hay therefore proposed that there may be one last opportunity that would allow the claimant to remain in his role at the Trust which would "*neutralise the issues which the ET are due to determine until the case has been heard and a decision handed down*".

88. We will set out the terms of the proposal in full as they appear in Mr Hay's report:

> *6.7.9 The proposal is that the Trust does not at this stage begin a process on the basis of an irretrievable breakdown in working relationships - of which there is clear evidence - if SP were to agree not to bring any new complaints arising out of:*
>
> *(a) the contractual issues dating back to 2007-2010*
>
> *(b) the process of SP applying to become part of the Specialist Register*
>
> *(c) the support the Trust has given SP to apply to become part of the Specialist Register*
>
> *(d) his treatment by KC and/or the HR Department, including any suggestion that KC does not meet the FPPT as a result of these complaints*
>
> *(e) alleged race discrimination arising out of (a) to (d) above*
>
> *6.7.10 The basis for such an agreement would be that both sides agree that the ET outcome will be determinative of these issues. The Trust is no longer the forum in which those matters should continue to be played out.*
>
> *6.7.11 Of course nothing in the above agreement should prevent SP from raising legitimate concerns held in good faith around matters which are unrelated to the issues identified.*
>
> *6.7.12 If SP were to agree to continue working at the Trust on this basis pending the outcome of his ET, then the employment relationship may yet be retrievable. Colleagues within the department have indicated a willingness to continue working with*

SP. SS has indicated that he would be prepared to give up time in order to support SP in the process to secure his appointment to the Specialist Register.

6.7.13 lf on the other hand SP either insists on continuing to raise grievances and other complaints arising out these same matters; and/or if he were to breach any agreement reached on these terms at some later date, then I would conclude for the reasons stated that the breakdown in trust and confidence is now irretrievable.

89. Mr Hay included a summary and conclusions section to his report which ended with an observation that what might be considered an irremediable breakdown of trust might be retrieved if the claimant agreed to the above proposal. Mr Hay ended his report "*The intention is not to preclude SP from pursuing his legitimate claim in the Employment Tribunal but rather to prevent a continued escalation of internal complaints on the same issues pending the Tribunal's final determination*".

90. The claimant had a meeting on 26 November 2020 with Ms McCormick and Ms Dyson which was recorded and transcribed [968-976]. The purpose of the meeting was to discuss the outcome of the investigation.

    a. Ms McCormick and Ms Dyson set out Mr Hay's findings in some detail;

    b. Much of the meeting was spent discussing the proposed agreement. This to was explained at some length. Ms McCormick clearly told the claimant that if new issues arose the trust would "*absolutely have to hear them and have to discuss them, but we are not in the position and won't be in a position to go over any of the pre-existing allegations raised or things that are going to tribunal*". She made clear the trust did not have the time to commit to issues that have already been raised and had gone to tribunal. However, she made clear that the claimant was valued and respected as an employee.

    c. Ms Dyson clarified that the Trust needed to find a way of working together with the claimant with mutual respect and understanding in the next 13 to 14 months before the tribunal makes its decision. She made clear that there would be nothing stopping the claimant raising, in good faith, genuine concerns that he had. It was about putting in place an agreement that he would not continue to raise issues about the same concerns that were central to the employment tribunal complaint, as these would be determined by the tribunal. She made clear that "*it doesn't mean that you have no right to raise concerns. It's just the things that are going to tribunal, we can't keep having the conversations any more. Um, and we'd obviously need to talk about, if you do have concerns about those issues, those ought to, in the first instance, be discussed and sorted out locally*".

d. On this point, Ms McCormick clarified that if the claimant raised concerns unrelated to the tribunal issues they "*absolutely need to be heard and they need to come up through your divisional structure, as anybody else would do so as an employee, and that support is there within your divisional structure. So it won't be tolerated, left field, to go straight to the chair, to go straight to an executive member. That's not how we communicate in the organisation*". She further clarified that the claimant would be entitled to support for his health and well-being.

e. Ms McCormick concluded that the "*nub of this*" is that the parties need to make a decision on whether they can work together for the next 13 months. She made clear that if issues that had already been discussed and were in the hands of the tribunal kept on being raised this could cause problems. She said this would be "*certainly not a distraction that we need in the middle of a pandemic*".

f. Ms Dyson said that the Trust would write to the claimant and provide Mr Hay's report.

91. On 30 November 2020 Ms McCormick sent the claimant a letter summarising the meeting on 26 November 2020. She set out the findings under each heading in the terms of reference of the Hay Report. After setting out Mr Hayes proposals for an agreement, as McCormick confirmed in her letter that "*for the avoidance of doubt, any agreement reached would ensure your continued entitlement to raise legitimate concerns held in good faith about matters which are unrelated to the specific issues identified. In this regard matters should be raised locally and informally through line management with the commitment to finding a resolution. This is the trust's agreed approach. They should not be immediately escalated through a formal grievance to the Executive Team. I reiterated that the trust cannot continue to receive new complaints and grievances that arise out of the same issues, rehearsed many times by the Trust and are now for determination by the Employment Tribunal. This creates a distraction during an intensively challenging time when our focus must be on the care and safety of our patients. It is important we find a way forward to continue to work together that insures your well-being and right to respect but also that of others*". Ms McCormick emphasised that Mr Sandhu (Chief of Surgery) had indicated he would be happy to give up time to support the claimant to secure appointment on the Specialist Register. She attached Mr Hay's report and urged the claimant to reflect on the findings, and in particular the terms of the proposed agreement. She invited the claimant to attend a further meeting on 16 December 2020.

92. On 10 December 2020 the claimant emailed Ms Dyson to confirm he had received the report, but asked for the appendices to be forwarded to him. He said he needed to take independent legal advice before committing to anything, as "*one of the outcomes of this process can lead to my dismissal from my job*". He said that he wanted Mr Hay to be present at the next

meeting to clarify things in his report he had a number of questions he wished to put to him.

93. On 16 December 2020 Ms McCormick wrote to the claimant concerning his 10 December 2020 email to Ms Dyson she agreed to reschedule them meeting. She said "*I do however wish to be absolutely clear at this stage no one is considering your dismissal from employment*". She explained that Mr Hay had been tasked with examining whether there was a breakdown in relationships and if there was, to make recommendations on how the parties could continue to work together. Ms McCormick indicated she had accepted Mr Hay's findings and was prepared to proceed on the basis put forward in the letter of 30 November 2020. She asked whether the claimant could do the same and commented "*In the event that we cannot reach a resolution in this process, then the Trust may need to take a view on alternative options. However, we are not there yet*".

94. Ms McCormick said that Mr Hay would not be attending the next meeting. She agreed with the findings made following his thorough investigation. She has notified the claimant with the outcome of his agreements and had put forward a suggestion from resolutions to enable the parties to move forward positively. She said that the next meeting was for the claimant either to accept the recommendations for resolution or to discuss any proposals for the adaptation of it that the claimant might wish Trust to consider. She said that if the claimant did not accept the findings or recommendation of Mr Hay then the claimant had an option of an appeal against the grievance outcome.

95. On 2 February 2021 the claimant sent Ms McCormick a lengthy letter headed "*Response to conditional offer to continue employment*". He said he needed further information to assess the proposal and take advice. He asked what the next steps in the process were before employment is terminated if he did not agree to the conditions. He made numerous complaints of procedural failures, including a conflict-of-interest arising out of Mr Cheadle, Ms Dyson and Mr Hay having worked together at Capsticks. He made numerous complaints about the standard of the report and investigation and the conclusions in the outcome letter. Finally he made observations about the conditions placed upon him by the agreement. He mentioned that there would be a possibility that he could be victimised for raising protected acts. He said that the conditions precluded future alternate dispute resolutions. He indicated he would be happy to cooperate with the Trust in any reasonable measure to help everyone work together effectively.

96. One issue that the claimant did raise in his letter, was that the "discriminatory appointment" of Ms CB had affected patient care in that the decision to operate on the patient was incorrect, the surgeon did not call for help, and an elderly patient had been subjected to 4 hours of avoidable operation.

97. On 15 February 2021 Ms McCormick responded to the claimant. She clarified that the process she was following "*is genuinely seeking to find a*

*way forward that is mutually acceptable to both you and the Trust, that allows us to draw a line under the processes and issues arising to date (recognising that some of them will be determined by an Employment Tribunal in due course in any event), and put in place a framework under which you are able to work proactively with the Trust and avoid a situation where you are in continuous dispute with us as your employe*r". She made clear that it was not the case that he had been made a conditional offer to continue his employment. She clarified that what had been proposed to the claimant is a mechanism to manage the current situation to improve the relationship, which Mr Hay had identified had broken down. She pointed out that it "*would be helpful for you to work with us to shape that framework by engaging with us in a meaningful discussion about what has been proposed. If you are not content with what has been suggested by Mr Hay, it is open to you to put forward alternative, adjusted provisions that you consider will assist. Our meeting will be an opportunity to do so*".

98. Ms McCormick indicated that she very much hoped that between the parties an approach could be identified to facilitate improvements in the relationship. She went on "*if that is not possible, despite our best efforts, it is the case that one option available to the Trust would be to consider whether it is necessary to terminate your employment. In order to do so, I understand that the Trust would follow a formal process, appointing an independent panel to hear the case and providing you with the opportunity to make representations in hearing. However, I want to be absolutely clear that that is not my desired outcome, it is not an option that I am considering now and I do very much want to work with you to find a resolution that avoids that approach*".

99. Ms McCormick reiterated that she believed that the provisions proposed by Mr Hay would enable the parties to move forward positively and would not preclude the claimant from "*raising legitimate concerns held in good faith around matters which are unrelated to the issues identified, or that they prevent alternative forms of resolution being proposed and discussed*". She said that this intention could be made clear within an agreement.

100. Ms McCormick then went on to address certain questions the claimant had asked. She indicated that the grievance policy had been used to be the policy that best applied to the circumstances. The claimant had not proposed an alternative. There would be no material difference in approach if a different policy had been used. Ms McCormick clarified that she did not consider there had been a conflict-of-interest. She did not consider that it would be appropriate, at a stage when the parties were exploring the possibility of remediating difficulties, to share the appendices.

101. Ms McCormick said "*in respect of the concerns you have raised about a patient who has been treated by Ms [CB] , this should be raised in accordance with the Trust's clinical governance process for such matters and not part of a grievance process*".

102. On 25 February 2021 the claimant again wrote to Ms McCormick. He disagreed with the contents of her letter. He proposed options on the way forward. He proposed that the current grievance process be suspended. He felt the investigations outcome victimised him for asserting his statutory rights and raising concerns on public interest. He proposed an "*informal arrangement*" whereby "*neither party will raise issues currently in the Tribunal within the organisation and to each other. I will accept and abide by the outcome of these matters in the courts*". He offered to contribute to the respondent's commitment to eliminate racial harassment and discrimination in the institution. Finally, he proposed that "*I could be offered a paid sabbatical leave until the outcome is established in the courts*". He said he would spend that leave developing senior management and clinical skills. He indicated he would be approaching ACAS by 25 February 2021.

103. On 22 March 2021 the claimant presented the claim we are currently considering to the tribunal.

104. On 7 April 2021 Ms McCormick wrote to the claimant summarising a meeting she had had with the claimant on 31 March 2021. She indicated she was unable to agree to suspend the grievance process and then resurrect it following the hearing. She was pleased that the claimant had proposed some form of arrangement for working together pending the conclusion of tribunal proceedings. She set out in writing the proposal she had made on 30 November 2020 and she clarified that any such agreement would entitle the claimants to raise legitimate concerns held in good faith about matters unrelated to specific issues identified. She indicated that it would not be an appropriate use of resources and public funds to place the claimant on an extended paid sabbatical, "*in particular when the NHS was under tremendous resource and financial constraints, and the workforce, including yourself was central to its recovery*". She indicated, however, that the Trust would be amenable to exploring secondment opportunities which would develop the claimant's skills and offer value to the NHS. She addressed further matters the claimant had raised in correspondence.

105. There was some further correspondence between the claimant and the respondent. On 13 May 2021 the claimant had a meeting with Ms McCormick he prepared PowerPoint slides about paid sabbatical and bullying, harassment and discrimination. Ms McCormick believed at this stage that an impasse had been reached in terms of agreeing proposals for a way forward. The claimant was distressed that this meeting, and Ms McCormick urged him to explore taking some time off and referring himself or being referred to occupational health.

106. On 21 May 2021 the claimant was signed off as unfit to work by his GP.

107. On 1 July 2021 Ms McCormick wrote to the claimant setting out a summary of the meeting of 13 May 2021. She referred to the issue of sabbatical. She noted that the parties had reached an impasse in terms of

the agreement to work together. She set out the grievance outcome and next steps. She indicated a view that the breakdown in relationships identified by Mr Hay had not improved, and had in fact deteriorated further, extending beyond those initially identified and having a considerable impact on the claimant, his colleagues, external clinicians and patients. This gave Ms McCormick "great cause for concern".

108. Ms McCormick set out that she had always intended to work collaboratively with the claimant, but that she had not been able to achieve the basis for a positive working relationship with the claimant's collaboration. She set out that she was adopting the position that she was not upholding the complaints he raised his grievance for the reasons outlined in Mr Hay's report. She considered that

> "*there is very plainly a serious breakdown in relationships which now extends beyond the individuals mentioned by Mr Hay in his report, and to the whole trust as your employer, and which is therefore impacting on your relationships with clinical colleagues and the service being provided. I am very concerned that despite my efforts, this breakdown appears to be irredeemable. In order to try, once again, to find a reasonable way forward in the short-term, to enable the Tribunal proceedings to take place and to resolve those outstanding issues for you, and to ensure that absolute safety of our patients and the service we provide to them, I consider it is necessary and proportionate to issue with you with a reasonable management instructions to seek to prevent any harm or dysfunction:*
>
> 1) *you should refrain from raising any new complaints about matters that are subject to determination by the Employment Tribunal. These include:*
>   a) *the contractual issues dating back to 2007 – 2010;*
>   b) *the process of you applying to become part of the Specialist Register;*
>   c) *the support of the Trust has given you to apply to become part of the Specialist Register;*
>   d) *your treatment by Kelvin Cheatle, Director Workforce, and/or the HR Department including any suggestion that Kelvin does not meet the FPPT as a result of these complaints;*
>   e) *your appointment to a consultant contract;*
>   f) *alleged race discrimination arising out of the above*
> 2) *In addition, where you have concerns about potential bullying, harassment or any other concern with the Trust, you should raise those issues through the proper process, in accordance with Trust policy, at a local level with your line managers and with the commitment to finding a resolution. Where possible, concerns should initially be raised orally, at meetings, rather than written correspondence, to facilitate a meaningful conversation to seek resolution promptly.*

3) *You must mitigate any impact of this dispute on your clinical responsibilities and the care of patients. Any concerns you have in this respect or any changes to your previous practice, you must raise with your line manager*
As I have stressed throughout this process on multiple occasions and for the absolute avoidance of doubt, this agreement ensures your continued entitlement to reject raise legitimate concerns held in good faith about matters which are unrelated to the specific issues identified".

109. On 10 July 2021 the claimant set out a number of concerns another lengthy letter. He quoted from a letter on 7 April 2021 to suggest that he had not been offered any possibility of appeal. He set out criticisms of the findings of Mr Hay in his report. He spoke of the employer breaching its duty of care towards him under health and safety law and antiharassment policies.

110. While outside the timeframe of the issues in this case, Mr Adamou drew our attention to an email the claimant sent to Ms McCormick on 11 March 2022. In it, among other things, he alleges that Ms CB had operated on a high-risk patient which resulted in the patient spending four months in intensive care and then dying. The claimant accepted that this was a very serious allegation to make against a doctor.

The law

Detriment for making a protected disclosure

111. The Employment Rights Act 1996 ("ERA") provides as follows in relation to protected disclosures:

> *Section 43A*
>
> *In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*
>
> *Section 43B*
>
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—*
> *…*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *…*

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

112. Section 47B ERA provides in relation to detriments:

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

113. Section 48 ERA provides *inter alia*:

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.]

(2) On a complaint under subsection …(1A) … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

114. The authorities stress the importance of the tribunal taking a structured approach to determinations relating to protected disclosures. As set out in *Williams v Michelle Brown AM* UKEAT/0024/19

"First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

115. There must be a disclosure of information, that is to say the conveying of facts, and it is not sufficient for the claimant simply to have made allegations *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38. However, a disclosure may contain sufficient information to qualify for protection even if it includes allegations. The question of whether there is sufficient information will be a matter of fact for us taking into account context and background *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436.

116. In terms of the public interest element, in *Chesterton v Nurmohamed* [2017] IRL 837 the Court of Appeal set out factors to be considered by a tribunal in deciding whether there was a reasonable belief a disclosure was made in the public interest. They are the numbers whose interests the disclosure serve; the nature of the interests affects; the nature of wrongdoing disclosed; the identity of the alleged wrongdoer. Where a disclosure raises questions of a personal character, the question of whether it is reasonable to regard it as being in the public interest is to be answered by considering all of the relevant circumstances of the case.

Dobbie v Felton [2021] IRLR 679 held that a disclosure relevant to one person could nonetheless be in the public interest.

117. The tribunal is to determine whether, i) the claimant had a genuine belief that the disclosure was in the public interest, and ii) whether he had reasonable grounds for so believing. The claimant's motivation, as such, is not part of the test (*Ibrahim v HCA International* [2019] EWCA Civ 20).

118. In order to bring a claim under section 47B ERA the worker must have suffered a detriment. This must be judged from the point of view of the worker. "*There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases*" (*Jesudason v Alder Hay Children's NHS Foundation Trust* [2020] EWCA Civ 73). However, an unjustified sense of grievance cannot amount to a detriment (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337).

119. The tribunal is to determine the reason why the claimant was treated as he was, which requires an analysis of the mental processes, conscious or unconscious, which case the employer to act as they did. It is for the employer to prove that the act complained of did not materially influenced the employer's treatment of the whistleblower (*Fecitt v NHS Manchester* [2011] EWCA Civ 1190). In *Derbyshire v St Helens Metropolitan Borough Council* [2007] ICR 841 the House of Lords observed that it would be difficult to imagine circumstances where an "honest and reasonable" action by an employer could amount to a detriment.

120. In terms of time limits, section 46 ERA provides:

> *(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*
>
> > *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
> >
> > *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
>
> *(4) For the purposes of subsection (3)—*
>
> > *(a) where an act extends over a period, the "date of the act" means the last day of that period, and*

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.

Legal obligations on the respondent as an NHS Trust

121. The respondent is under various legal obligations as a service provider under The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

122. Regulation 5 provides:

(2) Unless the individual satisfies all the requirements set out in paragraph (3), a service provider must not appoint or have in place an individual—

(a)as a director of the service provider, or

(b)performing the functions of, or functions equivalent or similar to the functions of, a director.

(3) The requirements referred to in paragraph (2) are that—

(a)the individual is of good character,

(b)the individual has the qualifications, competence, skills and experience which are necessary for the relevant office or position or the work for which they are employed,

(c)the individual is able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the office or position for which they are appointed or to the work for which they are employed,

(d)the individual has not been responsible for, been privy to, contributed to or facilitated any serious misconduct or mismanagement (whether unlawful or not) in the course of carrying on a regulated activity or providing a service elsewhere which, if provided in England, would be a regulated activity, and

(e)none of the grounds of unfitness specified in Part 1 of Schedule 4 apply to the individual.

123. Regulation 19 provides:

(1) Persons employed for the purposes of carrying on a regulated activity must—

(a)be of good character,

(b)have the qualifications, competence, skills and experience which are necessary for the work to be performed by them, and

(c)be able by reason of their health, after reasonable adjustments are made, of properly performing tasks which are intrinsic to the work for which they are employed.

Victimisation

124. Section 27 Equality Act 2010 ("EA") provides:

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

125. The burden of proof provisions are set out in section 136 Equality Act 2010:-

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

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

126. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal's focus should be on whether it can properly and fairly infer discrimination (*Laing v Manchester City Council [2006] ICR 1519*). The Supreme Court has observed that provisions "*will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other*" (*Hewage v Grampion Health Board [2012] UKSC 37*).

127. Section 123 Equality Act provides:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

128. The key question in determining whether there was conduct extending over a period is whether there was an ongoing situation or continuing state of affairs which amounted to discrimination (*Hendricks v Metropolitan Police Commissioner* [2002] IRLR 96). The claimant bears the burden of proving, by direct evidence or inference, that numerous alleged incidents of discrimination are linked to each other so as to amount to a continuing discriminatory state of affairs.

129. In *Hale v Brighton & Sussex University Hospitals NHS Trust* UKEAT/0342/16 the EAT held that a disciplinary procedure consisting of several stages is an act extending over a period where the issue in question was being subject to a disciplinary procedure which led to a dismissal.

130. As to extending time, the Court of Appeal in *Abertawe Bro Morgannyg University Local Health Board v Morgan* [2018] IRLR 1050 observed that the wording of section 120(1)(b) "*such other period as the employment tribunal thinks just and equitable*" gives the Tribunal a wide discretion in considering whether to extend time. Leggatt LJ said that "*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reason for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claims while matters were fresh).*"

131. Tribunals are encouraged to "*assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular… 'The length of, and the reasons for, the delay*' " (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 22).

Conclusions

132. We will make our conclusions on the issues as set out in the Amended List of Issues, but not always in the order of that document.

PD1

Disclosure of information

133. Our findings of fact are at paragraph 29. The claimant stated in his email that SAS doctors were "systematically excluded" from the process whereby the Board of the respondent remodelled its management structures. He set out that he believed "*"restructuring process has breached the Equality and Diversity Policy of the Trust, Equality Act 2010 and Public Sector Equality Duty of Equality Act 2010*".

134. On balance we find, just, that there is sufficient specificity of information to satisfy section 43B(1) ERA. The claimant alleges that equalities law is being broken by SAS doctors being excluded from the restructuring process.

Belief that disclosure in public interest

135. In a case such as this, it is no easy matter to determine what the claimant believed. It is clear from the totality of the evidence that the claimant has maintained a narrative over many years which is that he has been unfairly held back from assuming his rightful status as a consultant. He has been unwavering in sticking to that despite internal and (later) judicial findings to the contrary. He maintains that his race played a part in that. We find that, subjectively, he did believe that he was unfairly excluded from a restructure. We therefore find that the claimant genuinely believed that his disclosure was in the public interest.

Reasonable belief that in public interest

136. The real issue was whether the belief was reasonable.

a. In terms of the numbers whose interests the disclosure serves, we note that the claimant expresses himself in the email of 17 July 2018 as "*representing the SAS doctors*". It is strange, therefore, that he has not chosen to copy them into his email (as is the case with every other email in which he claims to take up the interests of the SAS doctors).

b. The nature of the wrongdoing is unlawful discrimination against staff by allegedly excluding them from a restructure. The identity of the alleged wrongdoer is an NHS Trust, a body that occupies a prominent position in the public interest.

137. While the claimant's motivation is secondary, it appears to us that this disclosure was very much part of his own personal agenda that he, himself, was being held back unfairly by the respondent. There is a complex picture here. Further complication is added by our conclusion below that the claimant did not reasonably believe that the disclosure tended to show wrongdoing. He has disclosed information that he should have known showed no wrongdoing, and as such this impacts whether there was a reasonable belief that such a disclosure was in the public interest. On balance, we find the claimant did not have reasonable belief that the disclosure was in the public interest.

Belief in wrongdoing

138. Again, subjectively the claimant very much believed that the respondent was discriminating against him, and possibly his fellow SAS doctors. It fitted his narrative.

Reasonably held belief in wrongdoing

139. All three SAS doctors were from the Indian subcontinent. We note that Dr Wong upheld the claimant's grievance that SAS doctors were not eligible for clinical management roles. Dr Wong's conclusions are opaque on the question of whether this was discriminatory. Our conclusions are that Dr Wong certainly did not identify a factual basis for a finding that the exclusion was discriminatory, and none was apparent to us. It appears that the Balogun tribunal did not find any discrimination in respect of applying for management posts either (see paragraphs 106-108). In the Costs Judgment of the Balogun tribunal this claim is referred to (para 17) and that the claimant should have known that this claim had no reasonable prospect of success. It is difficult, if not impossible, for us to find that the claimant reasonably held a belief in wrongdoing when an earlier tribunal has found he should have known that a claim relating to it stood no reasonable prospect of success.

Conclusion on PD1

140. This disclosure did not qualify for protection.

PD2

Disclosure of information

141. Our first point about the document in which the disclosure of information is alleged to have been made (the letter to Ms Bates of 10 September 2019) is that it is extremely difficult to understand what is being said in it. It is also difficult to extract what "information" is being relied on. Mr Adamou clarified in submissions that the information relied on was of board members closing ranks to protect their own. The sentence "*Kelvin Cheatle Work Force Director mentioned to me the Board of Directors have closed ranks to protect their own*".

142. The agreed List of Issues suggests that the information tended to suggest that Board Members did not satisfy the statutory fit and proper person test in that there were Board Members, including Mr Cheatle, who, it is said, victimised the claimant for having initiated tribunal proceedings.

143. It is not for us to construct the claimant's claim for him. Mr Cheatle is the only Board Member identified in the List of Issues, and what the List of Issues suggests as making him not a fit and proper person is that he victimised the claimant. Victimisation is not mentioned in PD2. The closing of ranks is.

144. On balance we consider that the claimant has disclosed information that Mr Cheatle said the Board would close ranks to protect their own.

Belief that disclosure is in the public interest

145. Given that the claimant is a man with a cause, he inevitably subjectively believed that this was in the public interest.

Reasonably held belief that disclosure is in the public interest

146. Essentially, the factual information that the claimant said he disclosed, setting it in its proper context, is as follows:

a. Mr Cheatle, the Chief People Officer, at a meeting on 20 August 2019 to discuss a grievance the claimant had raised on 12 August 2019 said that the Board would close ranks to protect its own.

b. Mr Cheatle had emailed the claimant on 20 August 2019 to clarify that by "closing of ranks" (which he put in speech marks) he was referring to the Trust needing to defend its position if it believes there has not been discrimination.

147. We find that the likelihood is that Mr Cheatle did make, possibly a poorly worded, comment about how the Trust would defend itself against what it saw as an unfounded claim of discrimination. We do not find that he said anything that could reasonably be interpreted as the Trust acting unlawfully, dishonestly or unreasonably, and that he was not warning the claimant off from airing his allegations. An employer telling an employee

that any claims will be defended, even robustly defended, is not "serious misconduct".

148. There is no wider interest to the public in this. Again, this is fortified by our conclusion below that there was no reasonable belief in the section 43B(1)(b)(d) "wrongdoing". This is all about the claimant's ongoing issues with the respondent.

Belief in wrongdoing

149. Again, the claimant subjectively had constructed a narrative, built up over the years, that the respondent was persistently unreasonable in its dealings with him. He probably believed that there was wrongdoing here.

Reasonably held belief in wrongdoing

150. We do not consider that anyone would reasonably believe that the comments made by Mr Cheatle at the meeting of 20 August 2019 were "serious misconduct" such as to render him not a fit and proper person to serve as a director of an NHS Trust. The contemporaneous correspondence shows the claimant thanking Mr Cheatle for his "empathy" and shows Mr Cheatle explaining what he meant by the "closing of ranks" comment the claimant attributes to him. This was clearly an appropriate, but possibly straight-talking, conversation about a longstanding workplace issue and how it might pan out. The explanation that best fits the facts is that the claimant did not reasonably believe that his disclosure tended to show Mr Cheatle was not a fit and proper person for having made the closing ranks comment (or, for that matter, anything else).

Conclusion on PD2

151. It follows that this does not qualify as a protected disclosure under section 43B ERA.

PD3

Disclosure of information

152. The claimant's complaint to Mr Farrar of 10 June 2020 is said to contain the disclosures of information. At paragraph 9 the claimant asserts that a PCP requiring the proposed Locum UGI Consultant to be on the Specialist Register is indirectly racially discriminatory towards the three SAS doctors from the Indian subcontinent, and cannot be justified.

153. The claimant also made reference to surgeons at a surgeons' meeting on 29 May 2020 saying that they would be prepared to provide training to Ms CB if she were appointed and another consultant would provide backup. The claimant asserted that "*the conference emphasised that Ms [CB] was not ready to perform the role of a consultant independently*".

154. We find that these assertions amount to disclosures of information.

Belief that the disclosures in the public interest

155. Subjectively we find that the claimant believed that the disclosures were in the public interest.

Reasonable belief that the disclosures are in the public interest

156. There are two aspects to these disclosures; 1) that the respondent was applying racially discriminatory appointment processes, and 2) that the respondent was proposing to appoint a locum consultant who was not sufficiently skilled or experienced to carry out the role.

157. On the issues of discriminatory appointment processes, we note that once again the claimant did not copy in the other SAS doctors whom he says were impacted by the practices. Nonetheless, we consider that there is a strong public interest that an NHS Trust will adopt practices that mean that the staffing profile will both reflect the community it serves and allow equality of opportunity to staff from all communities.

158. We find that it is very much in terms of the nature of the alleged wrongdoing, there is a public interest in the respondent appointing medical specialists with the appropriate levels of skills and experience to carry out their work. However we find (see below) that the claimant did not reasonably believe that there had been wrongdoing, and was using this issue to further his own personal complaint. We conclude that the claimant did not reasonably believe this disclosure was made in the public interest.

Belief in wrongdoing

159. Subjectively the claimant probably believed that the respondent was adopting a discriminatory appointment process and appointing someone without the requisite level of skills and experience.

Reasonable belief in wrongdoing

160. In terms of discriminatory appointment processes, we note that the Balogun tribunal found that the reference in the UGI locum consultant advert to being on the specialist register was because the advert was adapted from the job description in a previous job advert (paragraph 63). The Balogun tribunal concluded that the explanation for this requirement had nothing to do with race (paragraph 104). His case that the respondent directly discriminated against him by adding the requirement to the job description in order to exclude him from applying because of his race was rejected (paragraph 105).

161. Paragraph 9 of PD3 sets out a PCP (to be on the specialist register), which the claimant asserts was unnecessary, which favours one EU candidate over 3 candidates from the Indian subcontinent. The claimant did not run his case before the Balogun tribunal as indirect discrimination. Had he done so, he would not have succeeded as the tribunal would have found that he experienced no particular disadvantage

as there was never any possibility of the claimant applying for the role as it was outside his area of practice and expertise.

162. Is it then, reasonable for the claimant to believe that the respondent was indirectly discriminating against non-EU professionals in circumstances where he himself was not put at a disadvantage, and he did not even copy into his complaint the other people who might be disadvantaged? The fact is that this complaint was all of a piece with his perennial gripe that his career was being thwarted by the respondent. He is complaining about an unfairness that does not disadvantage him and he does not seek to assist others who, if this were discriminatory, might be impacted. He later pursues his complaint as one of direct discrimination, ie that he was less favourably treated because of his race. He does not seek to put forward a claim alleging a group disadvantage.

163. In terms of the assertion that Ms CB does not have the skills and experience for the post she was likely to be appointed to, we remind ourselves of the wrongdoing the claimant says he was focussed on. His case is that he disclosed information that tended to show that Ms CB did not "*have the qualifications, competence, skills and experience which are necessary for the work to be performed by them*".

164. The basis upon which he asserts this is that a couple of other surgeons have offered to give her training, and his impression that the meeting suggested she was not ready to perform the role.

165. However, we accept Dr Girgis' evidence that the step up to a consultant role is a huge one in any doctor's career and that support is to be expected, and does not indicate that a doctor does not have the skills or experience. This sounds eminently sensible, and would have been obvious to all experienced doctors.

166. The fact is that Ms CB was on the specialist register, and as the Balogun judgment sets out, this itself demonstrates that a doctor has the skills and experience to work at the level of consultant (paragraph 31-37).

167. At paragraph 12 of PD3 the claimant set out a linkage between his current complaint and his 2013 grievance. This indicates what this complaint is really about. The claimant is using the imminent appointment of Ms CB as a stick to beat the respondent in his long running campaign. This is all about him. He did not have a reasonable belief that Ms CB was not a fit and proper person to be appointed to the role of locum consultant, he was seizing on her appointment as a chance to further his complaint.

Conclusion on PD3

168. This disclosure does not qualify for protection under section 43B ERA.

Whistleblowing detriment

169. Although we have not found that any of the disclosures are protected disclosures, we will make conclusions on the basis that all three disclosures qualified for protection. We will deal with the detriments chronologically.

Locum UGI consultant (3.1.2)

170. We will take the detriments slightly out of order.

171. This matter can be dealt with swiftly, based on our findings above at paragraph 48-54 and the findings of the Balogun tribunal at paragraphs 60-64.

172. Ms CB was appointed on 9 June 2020, which means the disclosures which the claimant says caused the respondent to fail to consider him for the role were PD1, almost two years previously, and PD2, nine months previously.

173. We are bound by findings that there would never have been any possibility of the claimant applying for the role (if it did not require any applicant to be on the specialist register) as it was outside his area of expertise, a fact he did not dispute. On the other hand, it very much was within Ms CB's area of expertise.

174. This was no detriment to the claimant. It was something he seized upon as he saw it fitting in with the narrative that he had constructed of the respondent holding him back and unfairly favouring others.

175. There is no evidence of any linkage between any previous disclosures and his non-consideration for the locum role. We accept that the reason why he was not considered for the role is that he did not satisfy the requirement to be on the specialist register (which the Balogun tribunal held was nothing to do with race, paragraph 105) and because he did not apply for it as it was outside his field of expertise and experience. It had nothing to do with complaints made many months and even years previously.

Improper panel IDMD (3.1.3)

176. Our findings at paragraph 70 are that Dr Girgis, the previous role-holder who would be managing the role, more or less had to be on the interviewing panel. Ms McCormick, as a senior manager, was also an appropriate person, about whom the claimant did not complain at the time. The respondent was alive to the possibility of a perception of unfairness in the make-up of the panel and removed Mr Cheatle from it. We do not find that the claimant suffered a detriment by the panel being constituted as it was. Also there is no evidence whatsoever that any past disclosures of information influenced the respondent's decisions on who would be interviewing the claimant, apart from the decision that it would not be Mr Cheatle.

177. We conclude that the respondent did not subject the claimant to any detriment because he had made any protected disclosures in this regard. The reason why these individuals were on the panel was because they were appropriate persons, and no complaint was made about their involvement.

Failing to offer the claimant the IDMD role (3.1.4)

178. Our findings of fact are at paragraphs 72-74. The evidence overwhelmingly points to the fact that the claimant was not offered this role because, on the basis of his application and interview, he did not show sufficient management experience for a senior management role and performed significantly worse than the other candidates. This had absolutely nothing to do with any previous disclosures he had made, and everything to do with the respondent's dispassionate assessment of his skills and experience, judged on application and interview, in comparison with others.

Requiring the claimant to enter into an agreement (3.1.1)

179. At the risk of repetition, we will set out the agreed issue before setting out our conclusions:

> *Requiring the Claimant to enter into and sign an agreement not to raise concerns related to pre-existing and previous issues in order to retain his employment with the Respondent.*

180. As set out above, the List of Issues was the subject of discussion and refinement, and this is the way the claimant put his case on this alleged detriment. Our findings are at paragraphs 85-108 above.

181. The genesis of the proposed agreement is in the terms of reference to the investigations. Ms Dyson suggested that the investigation should look into the claimant's loss of trust and confidence in the interests of promoting good working relationships (paragraph 64). The claimant agreed that the working relationship needed to be examined and he pointed out that it was not appropriate to cover ground that would be covered by the tribunal (74). He himself agreed that he had lost trust (paragraph 77).

182. During the investigation it was the claimant himself who introduced the prospect of his losing his job for some other substantial reason (paragraph 79). He suggested that the Board lost trust with him because he had raised complaints. Mr Hay corrected this impression.

183. Mr Hay concluded that there had been a breakdown in the working relationship, but critically (and contrary, for example, to the views of Mr Cheatle) he concluded that it was remediable. But not if the claimant continued to escalate matters which were the subject of investigation at the tribunal (paragraph 87). Mr Hay therefore put forward a proposal set out at paragraph 89. It was clear that this was a proposal to remediate the

broken down relationship, neutralise the issues to be determined by the tribunal and would not prevent the claimant from raising legitimate concerns in good faith about separate matters.

184. As we have set out above at paragraph 91, Ms McCormick and Ms Dyson were clear that the proposed agreement was to remediate the broken down relationship and find a way of working pending the determination of issues at the tribunal. They were clear that there would be nothing to stop him from raising separate issues in good faith. All these matters were made clear in the follow up letter of 30 November 2020 (paragraph 92) and it was set out that the Trust could not continue to deal with the same matters raised to the highest levels at an intensely challenging time.

185. Again, it was the claimant who raised the question of dismissal in his next letter of 10 December 2020 (paragraph 93), but Ms McCormick could not be clearer in her response that this was not the direction of travel the Trust was going in. Again, it was the claimant who characterised the respondent's position as a "*conditional offer to continue employment*" (paragraph 96). This was denied by Ms McCormick (paragraph 98) who clarified what the Trust was trying to achieve, and invited the claimant to help shape the outcomes. It is right to say (paragraph 99) that she did indicate a worst case scenario which would lead to an independent panel considering the possible termination of the claimant's employment, but she made clear this was not an option she was considering then.

186. We do not find that the claimant is fair in his characterisation of what we have outlined her as requiring him to sign an agreement "*in order to retain his employment*".

187. A breakdown in trust and confidence is a situation which may allow either party to take steps to terminate an employment relationship. The claimant was obviously aware that this could constitute the potentially fair "some other substantial reason" an employer could seek to rely on. But what is apparent from the terms of reference onwards is that the employer is seeking to put in place a framework to remediate any breakdown. To go in the opposite direction to termination. Even when Ms McCormick fairly acknowledged a worst-case scenario of a formal process considering termination, she was at pains to clarify that this was not where she was intending to go.

188. "*Requiring*" or more accurately "*proposing*" that the claimant enters into the agreement is not a detriment. He was in a situation where both parties to the employment relationship acknowledged a breakdown – a state of affairs that could lead to the termination of employment by either. What the respondent was proposing was a mechanism to avoid that.

189. If we are wrong that there was no detriment, we find that there is nothing to undermine the extensive contemporaneous documentation as to the reason why the respondent was proposing the agreement. It was not because the claimant had made any of the disclosures. It was to put in

place a mechanism to allow the parties to work together pending the tribunal's determination of the claimant's three complaints. It sought to prevent the claimant repetitively raising historic complaints, outside of the established procedures, to the very top echelons of management at the height of the pandemic. It did not seek to restrict him from airing separate complaints in good faith. We find that in the complex and difficult circumstances in which the parties found themselves in, the respondent was taking honest and reasonable action that was not materially influenced by any protected disclosures.

190. On this latter point, we are very much aware of the perspective a tribunal has of the employment dispute. The alleged disclosures are labelled PD1, PD2 and PD3 and highlighted in the pleadings and List of Issues. The parties focus on them in their evidence as do the advocates in their questioning. The tribunal then subjects the alleged disclosures to further scrutiny in its deliberations. Our armchair view of the industrial dispute risks giving the alleged disclosures a prominence they may not have merited within the workplace, simply by the way litigation works. Trying as best we can to shift perspectives, PD3 is perhaps a document with a reasonable profile as it was sent to the chief executive and contained accusations of breach of equalities policies and legislation. However, in the context of an extremely difficult working relationship over a number of years, with numerous allegations set out in reams of correspondence, it is difficult to pick out disclosures of information in this letter or any of the other communications relied on, which materially influence allegedly detrimental action. We find the respondent's explanations for their actions more reliable.

Conclusion on whistleblowing detriments

191. The respondent did not subject the claimant to any of the detriments set out at paragraphs 3.1.1 to 3.1.4 because he had made (a) protected disclosure(s).

Victimisation

Protected acts

192. The respondent accepts that the acts relied as PA1, PA2 and PA3 (List of Issues 5.1.1, 5.1.2 and 5.1.3) amount to protected acts. The focus for the tribunal will be whether the respondent subjected the claimant to detriments as alleged, and if so, whether the reason was because he had made the protected disclosures. We will address those questions together.

Fail to follow fair procedure in respect of investigation

193. The claimant presents issues 5.2.5 to 5.2.16 as particularisations of the alleged unfairness of the investigation procedure. We make some broader observations before looking at the detail.

194. This was an investigation set up to look at the claimant's complaints raised in a grievance on 10 June 2020. There was a background of the claimant having made complaints and grievances over a long period of time and presenting complaints to the employment tribunal. There were three consolidated complaints to be heard in the tribunal during the currency of the investigation which the respondent had to consider how best to disentangle from the investigation. At the time of the investigation, the respondent was at the forefront of the response to the pandemic, and many of its most senior managers and surgical specialists were involved in the investigation. On any view this was far from a standard workplace investigation. We also take Mr Moretto's point that we are not hearing an unfair dismissal claim. Finding unfairness in the process is not the end of the story for us. For the claimant to succeed we must also be satisfied that the reason for any unfair treatment was because he had done a protected act. That said, we focus in on matters specifically raised by the claimant.

195. Failure to follow whistleblowing procedure (5.2.5). It is clear from our findings that the claimant was very experienced at raising complaints. We note also that in his application for the IDMD role he spoke of his "*in-depth knowledge of employment laws*". The claimant did not raise his complaints under the respondent's Freedom to Speak Up policy or follow any of the steps in the policy for raising issues. The 10 June 2020 letter itself specifically referred to the Equality and Diversity policy and the Dignity and Respect at Work policy but not the Freedom to Speak Up policy. The claimant clearly linked any complaint about the appointment of Ms CB with his complaints going back many years. It was put to Mr Hay that the claimant was raising a governance issue best dealt with under the Freedom to Speak Up policy. He disagreed, stating that governance was about how the organisation governed itself. We accept this. Put shortly, this document was not crying out "Protected Disclosure" which ought to be sent down the Freedom to Speak Up route. The claimant was not at the time suggesting it went down that route either.

196. Thereafter, Mr Cheatle and then Ms Dyson communicated with the claimant about the complaint, and he was given the opportunity to shape its progress. He took active steps to do this and his observations about potential overlap with the tribunal process were taken on board and actioned.

197. What the claimant failed to do before us is to show how he was disadvantaged by the investigation going forward as a grievance. The important point was that his allegations were considered, put into terms of reference, which he actively helped to shape, and which were investigated by an external investigator. It is not clear how things would have gone differently, or detrimentally, under a different procedure.

198. Also unclear is quite how it is said that any decision to follow the grievance procedure as opposed to the Freedom to Speak up procedure was because he had done protected acts. We are satisfied on reading the contemporaneous documents and hearing from the respondent's

witnesses, that the reason why the respondent investigated matters as it did was because, in dialogue with the claimant, it determined, reasonably from the face of the complaints, that this was the most appropriate method of investigating them. It had nothing to do with the fact that he had done protected acts.

199. Investigation conclusions opinions unsupported by evidence, and evidence not shared with the claimant (5.2.6.1 and 5.2.6.2). It was put to Mr Hay in cross examination that he had expressed opinions in his report at 6.3.2 (that allowing the claimant to apply for the UGI post would have slowed the process down and led to the same result) and 6.4.3 (that on the documents he had seen, he believed it would be difficult for the claimant to establish race discrimination relating to his wish to be on the list of consultants and not being supported to be a consultant).

200. On the former point, we accept Mr Hay's evidence that he was simply accepting evidence put forward by the Trust's witnesses on this point and not expressing an unwarranted opinion. In circumstances where the claimant's acceptance that he did not have the skills or experience for the role and never would have applied (see the findings of the Balogun tribunal) even if this was an opinion, it was an uncontroversial one.

201. In respect of the latter conclusion on race discrimination, we can see that the claimant may have felt that Mr Hay was expressing a view on the underlying merits of the claim going to the tribunal. However, Mr Hay had prefaced the point by clearly indicating that the question was a matter for the tribunal's determination and it was inappropriate to form a definitive conclusion on the point. A suggestion that any such opinion was unsupported by evidence is not appropriate here, as Mr Hay's point was in fact that there was a complete absence of evidence pointing to race discrimination.

202. Crucially, in relation to opinions, it was not suggested to Mr Hay that the reason why he approached the matter as he did was because of the claimant's protected acts.

203. Our conclusion is that, in a wide-ranging and complex report, Mr Hay made findings from the evidence put before him. We do not find that he expressed opinions unsupported by evidence. On one occasion he may have strayed close to expressing a view on matters he agreed were matters for the tribunal. However, the was no evidence linking his approach to any protected acts. His mental processes were not even explored on this issue by the claimant. We would finally add, that the two "opinions" picked up by Mr Adamou in his cross examination of Mr Hay were on two points on which the Balogun tribunal found against the claimant. This might suggest that if Mr Hay might have been straying towards expressing opinions, they were ones which were following the evidence and not borne of victimisation.

204. In terms of not sharing evidence with the claimant, this was not explored at the hearing and we are difficulty knowing what exactly is

meant. He was provided with the investigation report and numerous annexes of evidence. Neither are we clear on what basis it is said that this was because he had done protected acts. The claimant has not established facts from which we could conclude in the absence of an explanation that he had been victimised.

205. Details on stages of the process and chance to question it (5.2.7.) As we have set out in our findings of fact the claimant had significant input into shaping the investigation process. He made suggestions about the scope of the investigation (paragraphs 73 and 75), provided further information (paragraph 77), engaged in correspondence about various issues (paragraph 78 to 80) and was invited to discuss the finalised report (paragraph 82). We can detect no failure to give the claimant information about how the investigation was progressing or a fair chance to question the process. Quite the contrary, we conclude that this was a process where the claimant was given plenty of information about how the process would run and ample opportunity to question it. He was an active participant in this process.

206. There is no evidence from which we could conclude that the way the claimant was communicated with during the investigation process had anything to do with him having done protected acts.

207. Conflicting information regarding his right to appeal and write subject to qualification that the conclusion of the investigation could not be delayed (5.2.8 and 5.2.9). Again, we have struggled to understand this issue. We do note, however that the respondent on 16 December 2020, in the course of lengthy correspondence with the claimant, gave the claimant the opportunity to discuss any proposals he might have should not accept the respondent's recommendations for resolution. He was clearly told that he had the option of appealing against the grievance outcome, which would then proceed to a hearing. Resolution could not be reached after extensive correspondence over a number of months, and the claimant was offered the opportunity to appeal the grievance outcome, which he declined to do.

208. We conclude that the claimant was not subjected to a detriment in this regard, and that any communication about appeals had nothing whatsoever to do with the fact that he had done protected acts.

209. Reaffirming outcome of the investigation without following steps set out in grievance policy (5.2.10). Again, we are not entirely certain what is being suggested here, not least because nothing was put to Ms McCormick to suggest that the way she dealt with the investigation report was because of protected acts. We note that the grievance policy itself is silent about how an investigation report should be dealt with. However, in the Dignity at Work policy a process is outlined which is remarkably similar to the one followed here.

210. We do not find that the claimant was subjected to a detriment. Ms McCormick corresponded with him at extraordinary lengths to try and

reach agreement as to how to take matters forward. There was no evidence whatsoever from which we could conclude that she approached this in the way she did because the claimant had made protected acts.

211. Unfair impartial investigation (5.2.11). Our findings relevant to impartiality set out at paragraph 60, 66 to 67 above. We have not found anything to suggest that Mr Hay approached his task with anything other than impartiality and fairness. His connection, through previous employment, with two key members of personnel was something that was known to the claimant before the investigation was underway. He raised this with Mr Hay, who assured him of his independence, and thereafter the claimant did not take issue with Mr Hay continuing to investigate.

212. We find no evidence from which we could conclude that the way Mr Hay approached any issue was detrimental treatment because the claimant had made a protected act.

213. Remit and scope of investigation determined by Mr Cheatle. Individuals prejudiced against the claimant because they reported to Mr Cheatle (5.2.12). Our relevant findings are paragraph 60 above. This we found no evidence to suggest that Mr Cheatle was shaping the investigation in any way. We were impressed with both his and Ms Dyson's evidence on this point, and have little difficulty accepting that Ms Dyson was independent of mind and herself provided the HR input to the investigation. There was no evidence that she or anyone else involved in the investigation was prejudiced against the claimant because they reported to Mr Cheatle. As set out above, there were times when the claimant put forward suggestions on remit and scope which the respondent, and/or Mr Hay accepted.

214. There was no evidence put before us from which we could conclude that the determination of the scope and remit of the investigation was because the claimant had done protected acts.

215. Respondent stating in the course of investigation that the claimant's complaints were linked and he regularly raised the same issues (5.2.14). If this observation was made by anyone within the respondent organisation, it is an entirely fair one. The very essence of the written complaint that sparked the investigation (see findings of fact at paragraph 51 above) and the way the claimant articulated his complaint in his first meeting with Mr Hay (see findings at paragraph 75 above) make it entirely clear that this complaint was all about his complaint that from 2010 onwards the respondent has thwarted his attempts to become a consultant. His letter of 10 June 2020 even attaches a CV prepared in 2010 and sets out in seven numbered paragraphs how the present complaint is linked with one he raised in 2013.

216. It is because the claimant keeps raising the same sort of issues that the respondent proposed setting in place the agreement to refrain from re-raising historic issues. Any observation that the claimant was raising linked

and is the same issues was based on well evidenced fact rather than because he had made protected disclosures.

217. Was the scope of the investigation widened to include matters raised in claim 2304144/2018 and consider the alleged breach of mutual trust and confidence? If so, was this discussed at any meeting with the claimant before the external investigation was undertaken? Was this a breach of the grievance policy? Our findings in relation to how trust and confidence first arose is set out at paragraphs 63 to 64 and 73 above. Ms Dyson has raised the issue of breakdown in trust and confidence shortly after the claimant had presented his third claim to the tribunal. The claimant was to agree on 11 August 2020 that trust and confidence should be investigated in the investigation, and Mr Hay considered the issue. The respondent cannot be faulted for bringing this issue forward for consideration in the investigation. On any view of this employment relationship it was obviously strained to breaking point with the claimant having made numerous complaints within and outside of the workplace. Expanding the investigation to consider this was not detrimental to the claimant and had nothing to do with the fact that he had made protected disclosures. A reading of the lengthy correspondence on the issue amply demonstrates that the respondent was viewing the question of breakdown in trust and confidence with a view to remediating any broken relationship. This comes across loud and clear from virtually all of the communication on this issue.

218. We find that there is no detriment here and there was nothing in the respondent's approach to considering trust and confidence was because he had made protected disclosures.

219. Concluding that there had been a breakdown in trust and confidence because of the first tribunal claim and or other protected acts. Did this give rise to a risk of dismissal if the claimant raised similar concerns in the future? (5.2.16) Again, , the claimant himself appeared to accept that there was a breakdown in trust and confidence. He was making career ending allegations against the head of HR's and serious allegations against colleagues. A reading of the correspondence demonstrates:

a. The respondent was not viewing a breakdown in trust and confidence as a means of dismissing the claimant.

b. It was the claimant who raised "some other substantial reason".

c. Ms McCormick could not have been clearer that she was looking to remediate the broken employment relationship and that dismissal was not the direction of travel she was engaged in.

d. The claimant was not being asked not to bring "similar" complaints, but not to bring complaints that arose out of the same issues.

e. Ms McCormick was crystal clear that the respondent was not seeking to prevent him from raising, in good faith, complaints about unrelated issues.

220. The claimant's characterisation of what was happening as placing him at risk of dismissal if he raised similar concerns is a misrepresentation of the position. Mr Hay, an independent investigator, had concluded that there was a breakdown in the employment relationship. This information alone could have led the respondent to go down some sort of procedure that would end in the claimant's dismissal for some other substantial reason. What they chose to do is to go in the opposite direction. They sought to put in place a framework that would allow the parties to continue with the employment relationship.

221. We conclude that there was no detriment here, and that the reason why the employer was approaching the breakdown in trust and confidence issue in the way it did was not because he had done protected acts. It was to put in place a means of the parties working together and for the respondent, at the most intensely pressing of times, not being obliged to deal with repetitive historic complaints.

222. Being asked not to raise any further new complaints on topics subject to the first tribunal claim (5.2.1). This is covering very similar ground to the previous two issues. The proposal was for the claimant to agree not to raise matters subject to the first employment tribunal. The rationale for this is easy to understand. The respondent was at the frontline of dealing with the effects of the pandemic. The claimant was raising concerns which he had been raising for many years and which would be subject to the determination of the tribunal. The respondent was transparent in its reasoning that it could not continue to deal with these complaints at the highest level when they would be determined by the tribunal.

223. The reason why the respondent made this proposal was not because the claimant had done protected acts. It was, as stated in our conclusions on the previous issue, because it was attempting to find a framework whereby it could continue to work with the respondent pending the outcome of the tribunal.

224. If the claimant did not give an undertaking it would lead to an irretrievable breakdown of trust and the potential termination of his employment (5.2.2). Again, this is a mischaracterisation of what the respondent was proposing. The independent investigator had found that there was a breakdown of trust and confidence. He had suggested a way of remediating this. The respondent accepted this proposal and sought, in extensive dialogue with the claimant, to try to implement it. The claimant was asked for his proposals if he could not agree to those put forward by the respondent. His proposals, which included paid sabbatical, were not acceptable. The respondent set out on numerous occasions that it was not looking to dismiss him. The claimant is attempting to paint this as some sort of pressurised ultimatum the respondent was subjecting him to. We

do not conclude that it was. The reason why the claimant was being asked to give an undertaking was to try and repair the broken relationship.

225. We do not find that the claimant was subjected to a detriment because he had made protected disclosures.

Overall conclusion

226. It follows from our conclusions above that

a. The claimant has not established that he made protected disclosures:

b. If we are wrong, and the disclosures are protected, the respondent did not subject the claimant to any of the detriments he asserts, for having made a protected disclosure.

c. The claimant did three protected acts.

d. The respondent did not subject the claimant to any of the detriments he asserts, for having done a protected act.

227. In the circumstances, we do not consider the issue of time limits.

228. None of the claimant claims are well-founded and will be dismissed.

Employment Judge **Heath**
11 October 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
13 October 2023

.....
FOR EMPLOYMENT TRIBUNALS

ANNEXE

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NUMBER**: 2301132/2021**

BETWEEN

PARAMESWARAN SRIDHAR

Claimant

AND

KINGSTON HOSPITAL NHS FOUNDATION TRUST

Respondent

AMENDED LIST OF ISSUES

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1. ***Time limits***

1.1 In respect of any alleged act or deliberate failure to act, has the Claimant presented his claim within the time limits set out in s.123(1), Equality Act 2010 or s43(3)-(4A) of the Employment Rights Act 1996? The Respondent will contend that given the dates the Claimant commenced ACAS Early Conciliation and lodged her ET1 form, the Claimant cannot rely on any acts or deliberate failures to act that occurred before 26 November 2020.

1.2 If not, do any of the alleged acts of actions or detriments that are prima facie out of time form part of conduct extending over a period to which the last act in that series took place in time (for the purpose of the EA 2010) and/or constitute part of a series of similar acts or failures the last of which is in time (for the purpose of the ERA 1996).

1.3 In respect of each act, if found to be out of time and not forming part of conduct extending over a period / a series of similar acts or failures:

1.3.1 Why was the claim/s not brought in time?

1.3.2 (For the EA claim) Would it be just and equitable for the tribunal to extend time in all the circumstances?

1.3.3 (For the whistleblowing claim) was it not reasonably practicable for the claim to be lodged in time and was the claim brought within a reasonable period thereafter.

2. ***Protected disclosure***

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 Did the Claimant on 10 June 2020 raise a concern about the appointment of Ms CB as a Locum Consultant Surgeon?

2.1.2 If so, did that concern amount to a qualifying disclosure for the purpose of Section 43B of the Employment Rights Act 1996 ("ERA") in that:

2.1.2.1 Did the concern amount to a disclosure of information?

2.1.2.2 If so, did the Claimant reasonably believe that the disclosure showed the Respondent had failed, was failing or was likely to fail in complying with a legal obligation within the meaning of Section 43(B)(1)(b) of the ERA namely the requirement to appoint a 'fit and proper person' under Regulation 19 the Health and Social Care Act 2008 (Regulated Activities Regulation 2014 and the Equality Act 2010) in that the Respondent had inserted a PCP to choose a less suitable candidate from the EU who had less experience than the Claimant or other candidates with similar qualifications to the Claimant inside and/or outside the Respondent's organisation by inserting an unnecessary mandatory condition and restricting the advertisement to internal candidates?

2.1.2.3 If so, did the Claimant reasonably believe that the disclosure was in breach of Section 43B(1)(b) of the ERA in that the appointment was racially discriminatory and breached the Equality Act 2010 – including the public sector equality duty under the Equality Act 2010?

2.1.2.4 If so, did the Claimant reasonably believe that the disclosure was in the public interest in that the Respondent had failed to comply with the Regulations, had endangered the patient's health and safety thereby and had breached its public Sector duty under the Equality Act 2010 for the reasons set out in paragraphs 2.1.2.2 and 2.1.2.3 above?

2.1.3 Did the Claimant make a disclosure of information on 10 September 2019 that ~~showed, and~~ he reasonably believed tended to show that the Respondent had failed, was failing or was likely to fail in complying with a legal obligation within the meaning of Section 43B(1)(b) of the ERA:

2.1.3.1 in that the Respondent had failed to follow the fit and proper person regulation, namely Regulation 5 of the

Health and Social Care Act 2008 (Regulated Activities);

2.1.3.2 in that the Respondent had personnel as Board Directors who did not comply with those Regulations, including Mr Kevin Cheatle who had victimised the Claimant in August 2018 for initiating Tribunal proceedings and continued to do so until the Claimant's resignation on 17 May 2022; and

2.1.3.3 the manner in which the Chair of the Board addressed the Claimant's concerns.

2.1.4 Did the Claimant make a disclosure of information on 17 July 2018, and he reasonably believed that the disclosure was a qualifying disclosure under Section 43B(1)(b) of the ERA in that the Respondent being a public sector body, had breached the public sector equality duty under the Equality Act 2010 by repeatedly failing to take reasonable steps to eliminate harassment, discrimination and victimisation in day to day activities?

2.1.5 Did he reasonably believe the disclosure of information in paragraphs 2.1.3 and 2.1.4 above was made in the public interest?

2.2 If the claimant made a qualifying disclosure, was it made:

2.2.1 to the claimant's employer?

If so, it was a protected disclosure.

3. ***Detriment (Employment Rights Act 1996 section 48)***

3.1 Did the respondent do the following things:

3.1.1 Requiring the Claimant to enter into and sign an agreement not to raise concerns related to pre-existing and previous issues in order to retain his employment with the Respondent;

3.1.2 Failed to consider the Claimant for the Locum Consultant Surgeon position (by racial segregation), and that he had raised whistleblowing concerns on a number of occasions, in particular breaches of the public sector duty under the Equality Act, for repeatedly failing to take reasonable steps to eliminate harassment, discrimination and victimisation (as set out in paragraph 16 of the Claim)?

3.1.3 An improper and/or irregular constitution of the interview panel for appointing the Acting Deputy Medical Director?

3.1.4 Failed to offer the Claimant the role of Acting Deputy

Medical Director on a fixed-term contract?

~~3.1.5 The way the said criteria was applied to the Claimant by Dr Amira Girgis, Acting Medical Director, at the material time? [The Respondent says this is too vague and in any event adds nothing to 3.1.4, the detriment being not getting the role]~~

~~3.1.6 Making its decision being influenced by the Claimant's previous complaints relating to the Equality Act 2010 and/or his protected disclosures specified above. [The Respondent says there should be no reference to the EA as this part of the claim is dealing with protected disclosures. In any event, this is too vague and adds nothing to 3.1.4, the detriment being not getting the role]~~

3.2 By doing so, did it subject the claimant to detriment?

3.3 If so, was it done on the ground that he made a protected disclosure?

4. ***Remedy for Protected Disclosure Detriment***

4.1 What financial losses has the detrimental treatment caused the claimant?

4.2 If not, for what period of loss should the claimant be compensated?

4.3 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

4.4 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

4.5 Is it just and equitable to award the claimant other compensation?

4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.7 Did the respondent or the claimant unreasonably fail to comply with it?

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

4.9 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?

4.10 Was the protected disclosure made in good faith?

4.11 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

5. ***Victimisation (Equality Act 2010 section 27)***

5.1 Did the claimant do a protected act/s as follows:

5.1.1 Raise concerns] about the lack of equal opportunities roles in his email of 17 July 2018.

5.1.2 Presented a complaint of race discrimination to the Tribunal on 21 November 2018 under claim number 2304144/2018.

5.1.3 Raise a grievance on 10 June 2020.

5.2 Did the respondent do the following things:

5.2.1 Was the Claimant asked not to raise any further new complaints on topics which were the subject of the First Employment Tribunal Claim (2304144/2018), including but not limited to issues dating back to 2007-2010, the process of applying to become a specialist register, a consultant contract and/or the conduct of Kelvin Cheatle?

5.2.2 Was the Claimant told that if he did not give an undertaking in the form set out under paragraph 10(a)(i) of the claim, it would lead to an irretrievable breakdown of trust and potential termination of his employment?

~~5.2.3 Was there a breakdown in the relationship of trust and confidence between the Claimant and Mr Kelvin Cheatle [HR Director] and other Board members? [The Respondent says this is not a properly pleaded detriment, nor does the question make sense. Rather, it is a description of the state of affairs / alleged effect of some other alleged detriment. In any event it is too vague to be understood as a detriment]~~

~~5.2.3.1 If so, did this arise as a result of the Claimant successfully having added Mr Cheatle as the Second Respondent in his First Employment Tribunal Claim? [As above, and now understood to be part of 5.2.3, this is not a detriment, it is a description of the state of affairs / alleged effect of some other alleged detriment. In any event it refers to a protected act not relied upon (Claim 3/Application to amend to include C)]~~

5.2.4 Did the Respondent fail to follow a due procedure (the Respondent's grievance procedure and the ACAS Code and the Respondent's organisation's policy guidelines in relation to the investigation? [In respect of this alleged detriment, and those set out below to 5.2.16, the essential understanding of R is that C says that the procedure followed was not fair]

Paragraphs 5.2.5 to 5.2.16 set out the claimant's particulars of unfairness of the procedure.

5.2.5 Did the Respondent fail to follow its whistleblowing procedure in relation to a concern raised by the Claimant in June 2020? If so, why?

5.2.6 With reference to the investigation outcome report dated 21 October 2020, of which the Claimant was advised on 26 November 2020:-

5.2.6.1 Did that report consist of opinions unsupported by evidence to substantiate its conclusions?

5.2.6.2 Was the evidence to support the conclusions not shared with the Claimant? If so, why?

5.2.7 Did the Respondent fail to give details on the stages of the process and give the Claimant a fair chance to question the process? If so, why?

5.2.8 Was the Claimant given conflicting information regarding his right of appeal?

5.2.9 Was the Claimant offered a right of appeal subject to the qualification that the conclusion of the investigation could not be delayed?

5.2.10 Did the Respondent reaffirm the outcome of the investigation without following the steps in the grievance procedure as set out in the grievance policy?

5.2.11 Was the investigation carried out in an impartial, fair and independent manner?

5.2.12 Was the remit and scope of the investigation determined by the Respondent's HR Director

5.2.13 Were individuals involved in the prejudiced against the Claimant by virtue of their duty to report to the HR Director? [This allegation does not make sense]

5.2.14 Did the Respondent state in the course of the investigation that all of the Claimant's complaints were linked and that he regularly raised the same issues? [The Claimant does not say who this allegation is against]

5.2.15 Was the scope of the investigation widened to include matters raised in the Employment Tribunal Claim 2304144/2018 and consider the alleged breach of mutual trust and confidence arising out of those Claims? If so, was this discussed at any meeting with the Claimant before an external investigation was undertaken? If so, did the widening of the remit of investigation amount to a breach of Sections 14 and 15 of the Respondent's grievance policy?

5.2.16 Did the Respondent conclude that there had been a breakdown in trust and confidence as a result of the Claimant's First

Employment Tribunal Claim (as amended) and/or other protected acts and did this give rise to a risk of dismissal or potential dismissal for enforcing the Claimant's statutory rights if the Claimant raised similar concerns in the future?

5.3 By doing so, did it subject the claimant to detriment?

5.4 If so, was it because the claimant did a protected act?

6. ***Remedy for victimisation***

6.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

6.2 What financial losses has the discrimination caused the claimant?

6.3 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.4 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

6.5 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.6 Did the respondent or the claimant unreasonably fail to comply with it?

6.7 If so, is it just and equitable to increase or decrease any award payable to the claimant?

6.8 By what proportion, up to 25%?

6.9 Should interest be awarded? How much?