Case Number:- 3305385/2020, 3311894/2020.

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Cheryl Gentry	**v**	(1) West Hertfordshire Hospitals NHS Trust; (2) Dr Michael van der Watt; and (3) Dr Marcellina Coker

Heard at: Norwich (by CVP)

On: 17, 18, 19, 20, 25, 26, 27, 31 July 2023 and 1 August 2023

In Chambers: 2, 3, 14 August 2023

Before: Employment Judge M Warren

Members: Ms S Williams and Ms D Ballard

Appearances

For the Claimants: Dr E Morgan, KC

For the Respondent: Mr S Cheetham, KC

RESERVED JUDGMENT

The Claimant's complaints of harassment, direct race discrimination, victimisation, detriment for having made a protected disclosure, dismissal for having made a protected disclosure and unfair dismissal fail and are dismissed.

REASONS

Background

1. Dr Gentry was employed by the Respondent as a Consultant Obstetrician and Gynaecologist. She was dismissed by letter dated 27 May 2020. She issued the first of these two claims, case number: 3305385/2020 on 8 June 2020 claiming whistle blowing detriment, automatic unfair dismissal for having made a protected disclosure and, "ordinary" unfair dismissal as defined in s.98 of the Employment Rights Act 1996.

2. Dr Gentry issued the second of these two claims, case number: 3311894/2020 on 23 September 2020, including claims of whistle blowing detriment, direct race discrimination, harassment and victimisation contrary to the Equality Act 2010.

3. There was an unsuccessful application for Interim Relief.

4. There was a Case Management Hearing before Employment Judge Hyams on 1 April 2021. In his Hearing Summary, Employment Judge Hyams identified the issues in the case as set out below.

5. The case was listed for hearing over 12 days from 17 July to 1 August 2023. We lost three of those days; two to what one might describe as, "life events" in respect of Counsel for each party and a third day on which the Tribunal was unable to sit. Having heard closing submissions on 1 August 2023, the Tribunal was able to reconvene in Chambers to consider its reserved Judgment on 2, 3 and 14 August 2023.

The Issues

6. As I have mentioned, the issues were identified at a Preliminary Hearing before Employment Judge Hyams on 1 April 2021 and set out in his Hearing Summary. At the outset of this Hearing, the Representatives confirmed that the Tribunal may rely upon that List of Issues. A cut and pasting of the List of Issues as agreed will appear in the paragraphs immediately below, utilising the original numbering.

Introduction; time limits

1 As a result of the application of section 48(3)(a) of the ERA 1996, the first claim is in time only in respect of acts or failures to act which occurred on or after 9 March 2020, unless the act(s) or failure(s) to act were part of a series of similar acts or failures and the final one occurred on or after that date, or (in the case of an act) the subject-matter of the claim is part of an act extending over a period and the period ended on or after 9 March 2020.

2 The early conciliation certificate concerning the second claim was issued on 23 September 2020, ACAS having been contacted only on that day. Accordingly, the second claim is in time in respect of acts or omissions occurring on or after 23 June 2020.

3 In respect of the claims of detrimental acts or failures to act within the meaning of section 47B of the ERA 1996 which were made more than three months after the claimed detrimental act or failure to act, the tribunal will need to decide whether or not it was reasonably practicable to make the claim within the period of three months after the act or failure to act in question and, if it was not, whether the claim was made within a reasonable period of time after the ending of that period.

4 In respect of claims of discriminatory treatment in the form of one or more acts and/or omissions contrary to the EqA 2010 which were made more than three months after the claimed discriminatory treatment, the tribunal will need to decide whether

4.1 the claimed discriminatory treatment formed part of conduct extending over a period within the meaning of section 123(3)(a) of the EqA 2010, or, if it did not do so,

4.2 it is just and equitable to extend time for the making of the claim about that claimed discriminatory treatment.

The public interest disclosure claim

5 It is the claimant's case that she made the following statements and that they were public interest disclosures within the meaning of section 43A of the ERA 1996:

5.1 In January 2017 the claimant told the second respondent that she believed him to be racist.

5.2 In January 2017, the claimant said to the second respondent that she believed that he had, while acting in his capacity of Medical Director of the first respondent, deliberately targeted ethnic minority black and brown doctors with disciplinary action.

5.3 In January 2017, the claimant said to the second respondent that under his leadership more ethnic minority, black and brown doctors were subjected by the first respondent to disciplinary action than doctors who were outside those ethnic groups.

5.4 On 4 or 5 May 2017, the claimant said to the first respondent's Divisional Director, Dr Andy Barlow, that on or around 3 May 2017, the third respondent's behaviour had endangered the health of a patient (referred to in the pleadings as "Patient A") by the prolongation of an operation being conducted on that patient and the resultant exposure of that patient to unnecessary risk.

6 It is the claimant's case that the following conduct constituted detrimental acts within the meaning of section 47B of the ERA 1996 (all of them being stated in the amended grounds of the first claim, so that the following list is of claimed conduct, the place where the conduct is claimed being stated by reference to the paragraph number of the amended grounds of claim where the conduct is alleged, the relevant paragraph number being in square brackets).

6.1 The second respondent becoming very agitated and threatening recourse to lawyers [5].

6.2 The second respondent's decision to review the claimant's appraisals [6].

6.3 Subjecting the claimant to a disciplinary investigation in June 2017 [13].

6.4 The third respondent's threat, made in or around December 2017, to "deal with" the claimant [15].

6.5 The complaints of the two matrons made to the second respondent in or around December 2017 as described in [17].

6.6 If and in so far as those complaints were instigated by the third respondent, such instigation [17].

6.7 The second respondent's decision made in or around December 2017 to organise a serious incident review and/or the failure by him to arrange a preliminary investigation before arranging such a review [18].

6.8 The fabrication by two midwives in early 2018 of an allegation that the claimant was so aggressive towards them that they felt intimidated [19].

6.9 If and in so far as that allegation was instigated by the third respondent, such instigation [19].

6.10 The assertion by the second respondent that three rather than two midwives had made the allegation in paragraph 13.8 above. [19]

6.11 The decision to cause an external investigator to review the claimant's practice and the communication by the second respondent of that decision to the claimant on her return to work after her sister's funeral on 6 February 2018 [20].

6.12 The following conduct of the disciplinary/capability process against the claimant:

6.12.1 the third respondent giving the second respondent false information [21];

6.12.2 the choosing by the third respondent of witnesses [21];

6.12.3 the coaching of witnesses against the claimant [21];

6.12.4 interference by the second respondent with the process, and/or the procuring by the second respondent of the replacement of Dr Wood as the Case Manager by Dr Borckett-Jones, the latter being a close associate of the second respondent [23];

6.12.5 the failure to interview witnesses proposed by the claimant [24];

6.12.6 changing the scope of the investigation, including by changing the terms of reference and extending the period of review [24];

6.12.7 the rejection of the claimant's objection to the inclusion on the disciplinary/capability panel of the external specialist member of the panel (Dr Douglas Salvesen), such objection having been based on the relationship of that member with the third respondent [27];

6.12.8 on 6 February 2020 hearing the first respondent's management's case against the claimant without the claimant being present [29]; and

6.12.9 conducting subsequent hearings without the claimant being present [30].

6.13 Holding a meeting in June 2018 with the parents of a child who had died without consulting the claimant or other medical staff who had been present at the material time and informing or giving the impression to the parents that the claimant had missed an opportunity to save the child's life [35].

6.14 Given an account to those parents which was different from that set out in the original Root Cause Analysis Investigation Report concerning that death (including in particular in regard to the third respondent's involvement in the same) [35].

6.15 Revising that report so as to make it critical of the claimant, when the original version of the report had not been critical of the claimant [35].

6.16 Giving that revised report to the inquest in February 2020 without any explanation for the revisions [38].

6.17 Failing to provide legal advice or assistance to the claimant in respect of that inquest [36].

6.18 Failing to take any action against any other person involved in the care of the child in question [40].

7 The following questions will accordingly arise for determination in regard to those claimed public interest disclosures:

7.1 Were the alleged statements set out in paragraph 12 above in fact made?

7.2 Did the claimant in each case reasonably believe that the statement fell within the meaning of section 43B(1) of the ERA 1996 and that it was in the public interest to make it? It is the claimant's case that each of those statements satisfied the requirements of paragraphs (b) and (d) of that subsection.

7.3 If so, was one or more of the claimed detrimental acts or failures to act set out in paragraph 13 above done on the ground that the claimant had made the protected disclosure(s) in question?

The "ordinary" unfair dismissal claim

8 The following questions will arise in the course of the determination of the claimant's claim of unfair dismissal within the meaning of section 98 of the ERA 1996:

8.1 What was the reason, or the principal reason for the claimant's dismissal? It is the respondent's case that it was the claimant's capability.

8.2 If the reason for the claimant's dismissal was not her capability, was it for another reason falling within section 98(1) and (2) of the ERA 1996?

8.3 Was the procedure followed by the first respondent in deciding that the claimant should be dismissed (including the investigation of the allegations made against the claimant) one which fell outside the range of reasonable responses of a reasonable employer?

8.4 Was the decision to dismiss the claimant for the reason (within the meaning of *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323, at 330B-C) one which it was outside the range of reasonable responses of a reasonable employer to make?

The claim of unfair dismissal within the meaning of section 103A of the ERA 1996

9 Was the reason, or the principal reason, for the claimant's dismissal the fact that she had made one or more of the claimed disclosures set out in paragraph 12 above?

Race discrimination

10 The claimant is a black woman of Nigerian origin. It is her case that she was treated less favourably than she would have been if she had not been black and/or of Nigerian origin, the less favourable treatment consisting in the conduct alleged in paragraph 13 above. The following questions therefore will arise for determination by the tribunal:

10.1 Has the claimant satisfied the tribunal on the balance of probabilities that there are facts from which the tribunal could draw the inference that such of the conduct alleged in paragraph 13 above as the tribunal finds occurred was to any extent less favourable treatment than the manner in which the claimant would have been treated if she had not been black and/or of Nigerian origin?

10.2 If so, applying section 136 of the EqA 2010, has the respondent satisfied the tribunal on the balance of probabilities that the claimant's treatment had nothing whatsoever to do with her race i.e. (applying *Igen v Wong* [2005] ICR 931) that the claimant's treatment was in no way influenced by the fact that she is black and/or of Nigerian origin?

10.3 Alternatively, applying *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, what was the reason for such of the conduct alleged in paragraph 13 above as the tribunal finds occurred?

Harassment

11 On the assumption that the alleged conduct referred to in paragraph 13 above was unwanted:

11.1 was such of that conduct as the tribunal finds occurred to any extent related (within the meaning of paragraphs 83-110 of the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28) to the claimant's race?

11.2 Did that conduct have the purpose of violating the claimant's dignity or creating for her an intimidating, hostile, degrading, humiliating or offensive environment?

11.3 If it did not have that purpose, did it (bearing in mind section 26(4) of the EqA 2010) have the effect of violating the claimant's dignity or creating for her an intimidating, hostile, degrading, humiliating or offensive environment?

Victimisation

12 The claimant's case is that the acts referred to in paragraphs 12.1 to 12.3 above constituted protected acts within the meaning of section 27(1) of the EqA 2010 and that the treatment described in paragraph 13 above was detrimental treatment of her because she had done one or more of the things referred to in paragraphs 12.1 to 12.3 above, and/or because the first and/or second respondent believed that she might do some other protected act within the meaning of section 27(1). Accordingly, the following issues will arise for determination by the tribunal:

12.1 Has the claimant satisfied the tribunal on the balance of probabilities that there are facts from which the tribunal could draw the inference that such of the conduct alleged in paragraph 13 above as the tribunal finds occurred was to any extent detrimental treatment to which the claimant was subjected because of one or more of the claimed protected acts set out in paragraphs 12.1 to

12.3 above, or because the person who did the conduct in question believed that the claimant might do a protected act within the meaning of section 27(1) of the EqA 2010?

12.2 If so, applying section 136 of the EqA 2010, has the respondent satisfied the tribunal on the balance of probabilities that the claimant's treatment had nothing whatsoever to do with her having done, or because she might do, a protected act within the meaning of section 27(1) of that Act i.e. (applying *Igen v Wong* [2005] ICR 931) that the claimant's treatment was in no way influenced by the fact that she had done, or might do, such an act?

12.3 Alternatively, applying *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, what was the reason for such of the conduct alleged in paragraph 13 above as the tribunal finds occurred?

Remedy

13 If the claim of unfair dismissal succeeds then the claimant will in principle be entitled to a basic award within the meaning of section 119 of the ERA 1996 and (applying the applicable case law, including *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, [1988] ICR 142) a compensatory award under section 123 of that Act. In those regards, the tribunal will need to decide whether or not the award should be reduced, or reduced to nil, because of the claimant's own conduct under section 122(2) and/or 123(6) of the ERA 1996.

14 If the claim of a breach of the EqA 2010 succeeds to any extent, then the tribunal will need to determine

14.1 What compensation should the claimant receive for the injury to her feelings (and, if applicable, personal injury) caused by the conduct which the tribunal found to have been in breach of that Act?

14.2 What financial compensation should the claimant receive for losses caused by the conduct which the tribunal found was contrary to the EqA 2010? In determining that issue, the tribunal will need to apply the relevant principles in the decision of the Court of Appeal in *Abbey National plc and another v Chagger* [2009] EWCA Civ 1202, [2010] ICR 397. Those principles will require the tribunal to decide what would, or might, have happened as far as the claimant's future employment by the respondent was concerned if the claimant had not been treated in the unlawfully discriminatory manner found by the tribunal to have occurred.

15 Should the tribunal increase or (as the case may be) reduce any compensation because of a failure to comply with the ACAS Code of Practice and, if so, by how much?

Evidence

7. A note on terms of address: in the course of the Hearing we addressed each of the witnesses as they told us they wished to be addressed. Thus, for example, the Claimant and the Third Respondent each indicated they wished to be addressed as Ms Gentry and Ms Coker respectively. By contrast Dr Barlow and Dr Van der Watt indicated that they wished to be addressed as Doctor. For the purposes of these reasons, with a view to avoiding any confusion on the part of any reader as to any sense of difference in status, we have referred to the Claimant and Third Respondent as Dr Gentry and Dr Coker.

8. In terms of the evidence before us, Dr Gentry gave evidence but she did not call any other witnesses.

9. For the Respondents, we heard evidence from:

   9.1. Dr van der Watt, Medical Director and Second Respondent;
   9.2. Dr Coker, former Clinical Director and Third Respondent;
   9.3. Dr Barlow, former Divisional Director of the Respondent's Women's and Children's Services;
   9.4. Ms Helen Brown, former Deputy Chief Executive and Interim Chief Executive of the Respondent; and
   9.5. Mr Stephen Redmond, Chair of the Appeal Panel.

10. Each of the witnesses provided full written Witness Statements and were cross examined on Oath.

11. There was to have been a seventh witness for the Respondents, Dr Stephen Quinn, who sadly died shortly before this hearing. He was responsible for an investigation into Dr Gentry's conduct and produced a report on which the First Respondent relied in dismissing her. We have read and taken into account the content of his witness statement, signed and dated 11 May 2023, keeping in mind that he was not here to have his evidence challenged and also the reason why that was the case.

12. We had before us an electronic bundle of documents which ran to page number 3,035. The Bundle was properly paginated and indexed. We are grateful to the Respondent's Solicitors for ensuring that the electronic pagination coincided with the paper pagination and that all documents within had optical character recognition.

13. The Tribunal spent day one and day two reading the witness statements, reading or looking at in its discretion, the documents referred to in the witness statements and reading key documents from a reading list provided by the representatives.

14. At the beginning of day three, 19 July 2023, Dr Gentry applied for leave to amend her witness statement. The application had been flagged up the day before and a copy of the proposed amendments provided to Mr Cheetham. No objection was made to the application, although it was made clear points would be made to Dr Gentry in cross examination and in closing submissions in relation to those proposed amendments. We granted the application.

The Law

Race Discrimination

15. The relevant law is set out in the Equality Act 2010.

16. Section 39(2)(c) proscribes an employer from discriminating against an employee by dismissing the employee or, at (d) by subjecting the employee to any other detriment.

17. Section 40 prohibits harassment by an employer.

18. Race is one of a number of protected characteristics identified at s.4.

19. Race is defined at s.9 and includes colour, nationality, ethnic and national origins.

Direct Discrimination

20. Dr Gentry says that she was directly discriminated against because of her race. Direct discrimination is defined at s.13(1):

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

21. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that he/she has been treated less favourably than that real comparator was treated or than the hypothetical comparator would have been treated.

22. The leading authority on when an act is because of a protected characteristic is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

> *"…in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator…*
>
> *I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race.*

> *After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."*

23. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."*

24. Sometimes the decision maker in respect of the act complained of may be innocent of discriminatory motive, but their decision may be based on information supplied by someone who did have discriminatory motives. The act of discrimination in such circumstances is that of the provider of information, not that of the decision maker. The employer, (assuming both are employees of the respondent employer) is liable, together with the information supplier. See CLFIS (UK) Ltd v Reynolds EWCA Civ 439, Metropolitan Police v Denby UKEAT/0314/16 and Alcedo Orange Ltd v Erridge-Gunn DB 9/6/23 [2023] EAT 78.

25. The treatment of non-identical comparators in similar situations can also assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00)].

26. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work. However, an unjustified sense of grievance does not amount to a detriment.

Harassment

27. Harassment is defined at s.26:

> *"(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*
>
> *(5) The relevant protected characteristics are—*
>
> *…*
>
> *race;*
>
> *…"*

28. We will refer to that henceforth as the proscribed environment. There are three factors to take into account:

    28.1. The perception of the Claimant;

    28.2. The other circumstances of the case, and

    28.3. Whether it is reasonable for the conduct to have that effect.

29. The conduct complained of that is said to give rise to the proscribed environment must be related to the protected characteristic. That means the Tribunal must look at the context in which the conduct occurred.

Victimisation

30. Section 27 defines victimisation as follows:

> *(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.*
> *(4) This section applies only where the person subjected to a detriment is an individual.*
> *(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.*

31. The meaning of, "detriment" is explained above.

32. Whether a particular act amounts to victimisation should be judged primarily from the perspective of the alleged victim, whether or not they suffered a "detriment". However, an alleged victim cannot establish detriment merely by showing that she had suffered mental distress, she has to show that such was objectively reasonable in all the circumstances; see St Helens Metropolitan Borough Council v Derbyshire [2007] IRLR 540 HL.

33. The protected act does not have to be the sole cause of the detriment, provided that it has a significant influence, (see Lord Nicholls in Nagarajan v London Regional Transport [1999]ICR 877). "Significant influence" does not mean that it has to be of great importance, but an influence that is more than trivial, (see Lord Justice Gibson in Igen v Wong cited below).

Burden of Proof

34. Section 136 deals with the burden of proof:

> *"(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.*

35. It is therefore for the Claimant to prove facts from which the tribunal could properly conclude, absent explanation from the Respondent, that there had been discrimination. If she does so, the burden of proof shifts to the Respondent to prove to the tribunal that in fact, there was no

discrimination. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was provided in Igen Limited v Wong and others [2005[IRLR 258, which sets out a series of steps that we have carefully observed in the consideration of this case.

36. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation.

37. Tribunals are cautioned against taking too fragmented an approach when there are many individual allegations of discrimination. Although we should make individual findings of fact on each allegation and consider whether they amount to an instance of discrimination, we should also stand back, look at the bigger picture and adopt a holistic view on whether the Claimant has been subject to discrimination. See Quershi v Victoria University of Manchester [2001] ICR 863, Rihal v London Borough of Ealing [2004] IRLR 642 and Fraser v Leicester University EKEAT/0155/13/DM.

Time

38. Section 123(1) requires that a claim of discrimination shall be brought before the end of the period of three months beginning with the date of the act to which the complaint relates or such further period as the Tribunal thinks just and equitable. Conduct extended over a period of time is treated as having been done at the end of that period, (section 123(3)).

Public Interest Disclosure

39. Dr Gentry says that she was subjected to detriment for having made a protected disclosure, (whistle-blowing). The relevant law is derived from the Employment Rights Act 1996, (the "ERA").

Protected Disclosure

40. Lord Justice Mummery explained the purpose of the whistleblowing legislation in ALM Medical Services Ltd v Bladon [2002]IRLR 807 CA as follows:

> *The self-evident aim of the provisions is to protect employees from unfair treatment (ie victimisation and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace. The provisions strike an intricate balance between (a) promoting the public interest in the detection, exposure and*

elimination of misconduct, malpractice and potential dangers by those likely to have early knowledge of them, and (b) protecting the respective interests of employers and employees.

41. What amounts to a protected disclosure is defined in the ERA at Section 43A as a qualifying disclosure. That in turn is defined at Section 43B as:

> *"… 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,*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *…"*

42. In summary:

42.1. There must be a disclosure of information;

42.2. The worker must reasonably believe that the disclosure is in the public interest, and

42.3. The worker must reasonably believe that the disclosure tends to show one of, in this case (b) or (c).

43. The requirement is for the disclosure of information; i.e. conveying facts. It is not enough to make an allegation, see Cavendish Munro v Geduld UKEAT/0195/09. The mere expression of an opinion does not tend to show that the Respondent is likely to be in breach of any legal obligation, see Goode v Marks & Spencer Plc UKEAT/0442/09. However, there is a need for care; information can be disclosed within an allegation. The concept of "information" is capable of covering statements which might also be characterised as allegations. The correct question is to ask whether the disclosure contained information of sufficient factual content and specificity that it is capable of showing one of the matters listed in section 43B(1). This is a matter of evaluative judgment in light of the facts and the context in which it was made. See Kilraine v London Borough of Wandsworth [2018] ICR 1850 CA**.**

44. The disclosures need not be factually correct, nor amount to a breach of the law, provided that the claimant reasonably believed them to be so, see Babula v Waltham Forrest College [2007 IRLR 346. The words used in relation to breach is, "tends to show" not, "shows". A qualifying belief may be wrong but may be reasonably held.

45. The expression, “reasonable belief” must be considered having regard to the personal circumstances of the discloser, in particular their “inside knowledge”, what they know about the field in which they work, about their employer, about the subject matter to which the disclosure relates. The test is subjective as to what belief the discloser had and objective, in terms of the reasonableness of that belief, in context, see Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4.

46. The claimant must also reasonably believe that the disclosure is in the public interest; there must be genuine subjective belief at the time of the disclosure and such belief must be reasonably held. In Chesterton Global Ltd (T/A Chestertons) v Nurmohamed & Others [2017] EWCA Civ 979, the Court of Appeal held that there were no absolute rules in deciding whether a disclosure was in the public interest; the essential point was that the disclosure has to serve a wider interest than the personal or private interest of the discloser. Relevant factors would include the numbers in the affected group, the nature of the interest affected, the extent to which they were affected, the nature of the wrongdoing and the identity of the alleged wrongdoer. That said, the number affected is not determinative; it is not a case of merely one other person being required to make it in the public interest. However, the larger the number affected, the more likely it is that it will engage public interest.

47. There is no requirement in the statute that the claimant’s motive for making the alleged disclosure must be that it is in the public interest to do so, although as Underhill LJ observed in Chesterton Global Ltd, it would be rare if a disclosure was believed to be in the public interest, that did not form at least part of the motive.

48. If the question arises as to whether one of the situations listed in section 43B(1) is, “likely” to arise, the test is whether it is, “more likely than not” to arise, see Kraus v Penna Plc [2004] IRLR 260.

49. A protected disclosure must, (per section 43A) be made to one of a number of specified persons set out at sections 43C to 43H. Section 43C provides for disclosure to the claimant’s employer.

50. There is no longer a requirement for disclosures to be made in good faith so as to qualify for protection. However, section 49(6A) of the ERA now provides tribunals with a discretion to reduce compensation by up to 25%, if the disclosure is not made in good faith.

Detriment

51. Section 47B of the ERA provides that a worker has the right not to be subjected to any detriment because he has made a protected disclosure.

52. A detriment may be inflicted by any act, or failure to act, (Section 47B(1)).

53. The term, "detriment" is not defined in the ERA. We look to the meaning attributed to that phrase in the discrimination case law, in particular as defined in Shamoon cited above.

54. It is possible in some circumstances that a detriment, (or dismissal) may be inflicted not because of the disclosure itself, but the manner in which it has been made. Care is needed to be sure that there is a sufficient degree of separation between the two, see Kong v Gulf International Bank (UK) Ltd [2022] EWCA Civ 941.

Burden of Proof

55. Section 48(2) of the ERA provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. The claimant must still first prove on the balance of probabilities, that there has been a protected disclosure and that there was a detriment to which the claimant was subjected by the respondent. Then the burden shifts to the respondent to prove that the detriment was not because of the disclosure.

56. Thus where it is established that there has been a protected disclosure, in considering whether a worker has been subject to a detriment as a result, an Employment Tribunal must ask itself:

    56.1. Whether the worker has been subject to detriment; if so,

    56.2. Whether that detriment has arisen from an act or deliberate failure to act by the employer, and if so

    56.3. Whether that act or omission was done on the ground that the worker has made a protected disclosure.

    See Harrow London Borough v Knight [2003] IRLR 140).

57. The burden of proof on the question of whether there was a legal obligation and that information provided tends to show that there may be a breach, lies with the claimant, see Boulding v Land Securities Trillium (Media Services) Ltd UEKAT/0023/06, (paragraph 24).

58. As to the link between the disclosure and the detriment, ("on the ground that") one has to analyse the mental process, (conscious or unconscious) which caused the employer to act. We should not adopt the, "but for" test sometimes utilised in discrimination cases. The Court of Appeal considered this in Fecitt, (supra) where it was held that there is a causal link if the protected disclosure materially influences, (in the sense of being more than a trivial influence on) the employer's treatment of the whistleblower. It is not the same test as that for a causal link in respect of dismissal; in considering whether there has been an unfair dismissal by reason of a protected disclosure, the disclosure must be the sole or principal reason before it is deemed to be automatically unfair.

59. It is the mental processes of the decision maker that are relevant, (CLFIS (UK) Limited v Reynolds [2015]IRLR 562, an age discrimination case).

60. The respondent then, must prove on the balance of probabilities that the act, or deliberate failure, was not on the grounds that the claimant had done the protected act i.e. that the protected act did not materially influence, (was not more than a trivial influence on) the respondent's treatment of the claimant, see Fecitt, in particular at paragraph 41

61. Ordinarily, the alleged victimiser must know of the protected disclosure, (Scott v London Borough of Hilingdon [2001] EWCA Civ 2005). However, it is possible for liability for detriment to arise where because of the protected disclosure, others, such as managers, have procured the detriment via an innocent decision maker. See Royal Mail Group Ltd v Ms K Jhuti [2019] UKSC 55.

Unfair Dismissal

62. Dr Gentry says that she was dismissed for making a protected interest disclosure. Section 103A of the ERA provides that

> *"An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

63. In an ordinary case of unfair dismissal, the burden of proof as to showing a potentially fair reason for dismissal lies with the employer. If the employer is able to show that potentially fair reason, then the burden of proof as to the test of fairness is neutral. The situation is slightly different where the reason for dismissal asserted by the employee is one which is automatically unfair. The authority on this is Kuzel v Roche Products Limited [2008] IRLR 530, Mummery LJ put it thus:

> *"When an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason."*

64. So, we look to the Claimant for some evidence that the real reason for dismissal is not that asserted by the Respondent. If she does that, we look to the Respondent to discharge the burden of proof that the reason for dismissal was the potentially fair reason contended for.

65. It will be rare for there to be direct evidence of an employer dismissing an employee because of a disclosure. A tribunal may therefore draw inferences from findings of primary fact as to the real reason for the dismissal, (see Kuzel above).

Time

66. Section 48 (3) of the ERA requires that any complaint of detriment for having made a protected disclosures must be brought within 3 months of the detriment complained of, or if there was a series of similar acts or failure to act, the last of them. If it was not reasonably practicable to bring the claim within that time frame, it may be allowed, if brought within such further period as the Tribunal considers reasonable.

Unfair Dismissal.

67. Section 94 of the Employment Rights Act 1996 contains the right not to be unfairly dismissed. Section 98 at subsections (1) and (2) set out five potentially fair reasons for dismissal, one of which is capability. Section 98(4) then sets out the test of fairness to be applied if the employer is able to show that the reason for dismissal was one of those potentially fair reasons. The test of fairness reads:

> "*Where the employer has fulfilled the requirement of subsection (1) the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)*
>
> *(a) depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

68. In applying the test of fairness set out in s98(4) the tribunal must not substitute its decision as to what was the right course to adopt and in considering the reasonableness of the employer's conduct, there will usually be a band of reasonable responses the reasonable employer could adopt and it is to that, one should have regard; a decision inside that band is fair, a decision outside that band is unfair, (Iceland Frozen Foods Limited v Jones [1983] IRLR 439).

69. The basic tenets for a fair dismissal based upon an employee's lack of ability are that there has to be a genuine belief in the individual's lack of ability based upon reasonable grounds, (Taylor v Alidair Ltd 1978 IRLR 82 CA) and the employee must have been given fair warning and an

opportunity to improve, (Polkey v A E Dayton Services Ltd 1987 IRLR 503 HL).

70. The band of reasonable responses test also applies to the question of whether or not the employer's investigation was reasonable in all the circumstances. See Sainsbury v Hitt [2003] IRLR 23.

71. We should look at the overall fairness of the process together with the reason for dismissal. It might well be that despite some procedural imperfections, the employer acted reasonably in treating capability as a sufficient reason for dismissal.

72. More serious allegations, which might have more serious consequences if upheld, call for a more thorough an investigation. The ACAS 2014 Guide to Discipline and Grievances at Work, (not the code of practice) advises as such and the EAT confirmed as such in A v B [2003] IRLR 405. This is a case where the reason for dismissal was the Claimant's conduct, but the same principles apply where a decision on the grounds of capability could have serious consequences.

73. In cases where a dismissal could blight an employees career, Tribunals should scrutinise the employers procedures all the more carefully, see the Court of Appeal decision in Salford Royal NHS Foundation Trust v Roland [2010] IRLR 721.

74. Section 207(2) of the Trade Union & Labour Relations Act 1992 provides that any Code of Practice produced by ACAS under that Act which appears to an Employment Tribunal to be relevant shall be admissible in evidence and shall be taken into account.

75. One such code of practice is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). Notwithstanding its title, the code applies to cases of poor performance as well as misconduct. We have had regard to the same in reaching our conclusions on the unfair dismissal claim.

76. In the case of Polkey v A E Dayton Services Limited [1988] ICR 142 it was made clear that employers can not argue that a procedurally improper dismissal was none the less fair because it would have made no difference had a fair procedure been followed, save in wholly exceptional cases where it could be shown that following a proper procedure would have been, "utterly useless" or "futile". At paragraph 12 of that Judgment, Lord Mackay of Clashfern adopted the reasoning of Browne-Wilkinson J in Sillifant v Powell Duffryn Timber Limited [1983] IRLR 91 later helpfully summarised by Lord Bridge of Harwich at paragraph 28 as follows:

> *"If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is* not *permitted to ask in applying the test of*

reasonableness posed by s.57(3) is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of s.57(3) this question is simply irrelevant. It is quite a different matter if the Tribunal is able to conclude that the employer himself, at the time of the dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.57(3) may be satisfied."

Reliability of Evidence

77. We found that Dr Gentry could not be regarded as a reliable witness. That is not to say that we disregarded or disbelieved all of her evidence. Where there are conflicts of evidence, we have always looked for corroborative evidence and indeed looked at the possibility that the contradictory evidence of others is also unreliable. That said, the very obvious unreliability of Dr Gentry's evidence and her propensity to exaggerate, embellish and not tell the truth, inevitably weighed in our deliberations. Non-exhaustive examples of why we formed this view of Dr Gentry's evidence is set out in the paragraphs below:

77.1. She negatively described her relationship with Dr Coker over the many years in vehement and strident terms and yet, she travelled to Marrakesh with Dr Coker in 2017 to celebrate Dr Coker's birthday.

77.2. She said at paragraph 23 of her witness statement that Dr van der Watt had lied when he had said to her in August 2016 that a patient had complained about her to the GMC. Email correspondence at the time makes it clear that he had realised his mistake and corrected it at the time.

77.3. Having signed a witness statement, a certificate of truth, on 7 July 2023, we were presented with a revised witness statement on day two of the hearing with a considerable number of amendments, some of which were without consequence and some of which were not. Doubtless Dr Gentry's legal representatives would have spent some time on day one checking with care that the amendments being made to Dr Gentry's Witness Statement were accurate and accorded with her instructions, she nonetheless during cross examination on a number of occasions said that the amendments were either incorrect or in the wrong place, when faced with awkward questions from Mr Cheetham.

77.4. Dr Gentry answered questions in cross examination a number of times by referring to what she had been told by others and yet

repeatedly refused to name them for fear of reprisal. That this response was given on a number of occasions was without credibility. It is difficult to believe that an NHS clinician of Consultant status would be scared to come forward and give evidence in relation to complaints of discrimination. The same applies to Midwives.

77.5. It was wholly incredible for the Claimant to suggest that the notes of a telephone conversation alleged to have taken place on 1 January 2018 were notes that she wrote from memory afterwards.

77.6. That the notes were an accurate record of such a conversation lacked credibility given that Dr Coker, (whose alleged conversation is the subject of the note) would have been in Nigeria at the time, as would the person she was supposed to be speaking to, the subject matter, (Dr Coker's Final Written Warning) had not been communicated to her until some weeks later and finally, because Dr Coker and Dr Gentry would not have been rostered to work together on a Bank Holiday.

77.7. When it became apparent during cross examination that some of the allegations of race discrimination were unlikely to succeed because they were allegations against Dr Coker who is also a black Nigerian woman, Dr Gentry was obviously flummoxed. It was not, on the face of it, terribly important, but the Tribunal just needed clarification of what in the List of Issues was relied upon as allegations of race discrimination and what was not. We asked Dr Gentry to reflect on that during a break. Astonishingly, after that break, she alleged that the discrimination lay in the fact that she was Igbo and Dr Coker was Yoruba. It is perfectly possible for their to be actionable race discrimination between people from Nigeria of Igbo and Yoruba ethnicity. However, for Dr Gentry to suddenly come up with this during cross examination, after a lunch break to think about it, is astonishing. Particularly bearing in mind that she has been legally represented throughout these proceedings.

77.8. An addition Dr Gentry made to her witness statement at paragraph 55 was that her colleague Dr Boret had warned her about Dr Coker and Dr van der Watt, about their intentions to provoke her and get rid of her. If that was true, that evidence would have been in her witness statement in the first place and she would have called Dr Boret to give evidence.

77.9. During cross examination, Dr Gentry came up with an implausible explanation as to why it is she says that Dr van der Watt knew on 6 March 2018 when he met with her, that day was her first day back at work after her sister's funeral. If what she said had been true, that explanation would have been in her witness statement in the first place.

77.10. Dr Gentry sought to resile from the answers she had given to the Respondent's Appeal Panel, (she did not deny that she had given the response) that she was not saying that her dismissal was pre-determined.

77.11. At the outset of the hearing, I explained to all the witnesses present the importance of having clean documents and witness statements when they were giving evidence and specifically, that they should not have any highlighting, notes, post-it stickers or anything at all to assist them in answering questions. In accordance with my standard practice, I also asked Dr Gentry to confirm that was the case at the outset of her evidence, after administering the Oath. At one point during her evidence, whilst looking for something, she held up documents which we caught sight of in the camera. The document was covered in blue highlighting and manuscript annotations. She was giving evidence from home. Dr Morgan KC subsequently arranged for her to give evidence from his Chambers the following day. She apologised profusely and promised that she was not cheating. Nonetheless, she could have been in no doubt that she was required to be working from clean documents and when she told us that she was at the beginning of her evidence, she was not telling the truth.

77.12. When there was obviously a simple mistake by Dr van der Watt about the number of complaints he had received from Midwives, (two rather than three) Dr Gentry would not accept that it was a simple mistake and said that he had done it deliberately.

77.13. Dr Gentry said in cross examination that six people had told her that Dr van der Watt referring her to Dr Quinn for investigation into her practice was racial harassment, but she refused to name them. She had not said this in her witness statement. If true it would have been. It is implausible that of six people, not a single one was prepared to come forward to give evidence to that effect.

77.14. Dr Gentry said in evidence in cross examination that she had a good professional relationship with all of her colleagues, except Dr Coker. That is evidently not true as demonstrated many times by the documentary evidence within the Bundle.

77.15. In cross examination, Dr Gentry stood by her statement to Dr Quinn that his investigation had been the first time in her 23 years that her competence had ever been questioned. However, she had to acknowledge, (because it is a matter of Public Record and as we shall see below) she had been dismissed by a previous NHS Trust employer in circumstances in which her competence had also questioned, albeit that she maintained those allegations were false.

77.16. In cross examination and for the first time, Dr Gentry accused the recently deceased Dr Quinn of racism, asserting that he had not interviewed her proposed witness, Dr Nanduri, because she was black Nigerian.

Findings of Fact

78. The Respondent is a Hospital in Watford.

79. Dr Gentry's employment with the First Respondent as a Consultant in Obstetrics began on 16 May 2011. She had been practising Obstetrics and Gynaecology since 2005. Her role with the First Respondent changed to include Gynaecology in 2016. Below are quotations from a number of the First Respondent's Policies to which we were referred.

Bullying Policy (page 192)

80. The introduction includes:

> "This Policy is underpinned by our values of Commitment, Care and Quality. It demonstrates our commitment to creating a positive culture of dignity and respect for all of our staff… The Policy provides a framework to enable employees to take action and seek resolution."

81. A list of Line Manager responsibilities included the responsibility to work to find solutions to support staff who feel bullied, harassed or treated inappropriately.

82. Similarly, a bullet point list of Human Resources' responsibilities includes to encourage and support resolution without requiring formal investigation and signposting employees to recommended facilitators to conduct facilitated conversations.

83. There is an explanation of what is understood by bullying which includes:

> "The direct impact of one individual being bullied within the workplace can have significant impacts on the entire team. Victims of bullying may have an increased absence record due to stress and anxiety."

84. Examples of bullying are listed in bullet point format including persistent and unfair criticism and apportioning unfair blame.

Whistle Blowing Policy (page 206)

85. This includes an explanation that it is a Line Manager's responsibility to ensure that staff and students understand how to raise a concern and to take all concerns seriously. The Policy also records that there is a dedicated Occupational Health Department to assist employees who may feel stressed or anxious as a result of raising an incident or practice.

Disciplinary Policy (begins at page 232)

86. The title is, “Disciplinary Policy for Medical and Dental Staff (MHPS)”. The acronym stands for “Maintaining High Professional Standards”. These are national NHS Standards. As the introduction explains at page 236, the purpose of the Policy is to ensure that the procedures operating within the First Respondent comply with the statutory requirements, “Maintaining High Professional Standards in the Modern NHS”.

87. Definitions are provided at page, including: that the Case Investigator is responsible for leading an investigation; a Case Manager oversees an investigation process; a designated Board Member is to oversee on behalf of the Board to ensure that cases are handled appropriately, and Exclusion entails exclusion from attending work, not as a disciplinary action but to prevent recurrence of an alleged incident / behaviour or to ensure that an investigation is not prejudiced by the continued presence of the individual.”

88. Explanation is given that the National Clinical Assessment Service (NCAS) is an organisation to work with Health Authorities and individuals where there is concern about the performance of a Doctor. Its aim is to clarify the concerns, understand what is leading to those concerns and support resolution. The NCAS provides expert advice and specialist intervention.

89. Key responsibilities are set out in a section of the Policy under the heading “Responsibilities”. They include the following:

    89.1. In respect of Human Resources, they are said to have a key role in decision making at each stage jointly with the Medical Director.

    89.2. The Clinical Director / Clinical Lead is responsible for identifying performance and conduct concerns through monitoring the routine activity, performance and quality information.

    89.3. A Case Manager is responsible for setting out terms of reference for any investigation, for co-ordinating receiving the Investigation Report and present options and recommendations to the Medical Director and the Director of Human Resources.

    89.4. The Case Investigator leads the investigation, establishing facts and reporting findings. The Case Investigator does not make decisions, ensures all relevant information is gathered and takes steps to determine the reliability of information gathered.

90. There is a warning at page 239, at 6.2, under the heading “Identifying Performance Concerns” as follows:

> "Unfounded and malicious allegations can cause lasting damage to an individual's reputation and career prospects. Therefore all allegations, including those made by relatives of patients, or concerns raised by colleagues, must be properly investigated to verify the facts so that the allegations can be shown to be true or false and any necessary action taken."

91. At page 240 at 6.4, there is recognition that a Case Manager should explore the potential problems and consider the options for addressing those problems, identifying that the issue may be due to a system failure or team dysfunction, rather than individual performance.

92. Under the heading "The Investigation" at page 241 at 6.8:

> "The practitioner concerned must be informed in writing by the Case Manager, as soon as it has been decided, that an investigation is to be undertaken, the name of the Case Investigator and designated Board Member and made aware of the specific allegations or concerns that have been raised (this information will be as comprehensive as possible, in terms of incidents, dates, persons involved, etc.)… If during the course of the investigation it transpires that the case involves more complex clinical issues than first anticipated, the Case Manager should consider whether an independent practitioner in the same speciality from another NHS body should be invited to assist."

93. In a section dealing with exclusions from work, the Policy states:

> "The Chief Executive has overall responsibility for managing exclusion, procedures and for ensuring that cases are properly managed. Therefore, before a decision is taken to exclude a Practitioner, the reasons for exclusion will be discussed fully with the Chief Executive."

94. At 7.6:

> "No practitioner will be excluded from work, other than through a formal procedure. They will only be excluded where the Case Manager has considered, at a Case Conference, involving the Medical Director, Director of Human Resources, designated Board Member and LNC Chair or their nominated duties, whether there is a case to answer and considered if this is a reasonable and proper course of action."

95. The Policy requires that if exclusion is to be over a prolonged period because of factors outside their control, the Case Manager should refer the case to the NCAS for advice on whether the case is being handled in the most effective way and for suggestions of possible ways forward. Exclusions should be reviewed four weekly.

96. In relation to cases where there are concerns about capability, the Policy at page 250 states that the Trust will aim to resolve issues of capability through ongoing assessment and support which might include counselling

and / or re-training. Investigation in capability procedures are to be conducted in a way that does not discriminate on the grounds of any protected characteristic. It goes on to stipulate:

> "The following procedure will be followed prior to a Capability hearing: …
>
> The Trust retains the right, after a reasonable period (not normally less than 30 working days), to proceed with the Hearing in the Practitioner's absence: the Trust will always act reasonably in deciding to do so
>
> Should the practitioner's ill-health prevent the hearing taking place, the Trust's usual sickness absence procedures will be invoked. A sickness absence procedure takes precedence over the Capability procedures and the Trust will take reasonable steps to give the employee time to recover and attend a hearing. The Practitioner will be referred to the Occupational Health Service. The Occupational Health Service will advise the Trust on the expected duration of the illness and any consequences it may have for the capability process.
>
> If, in exceptional circumstances, a hearing proceeds in the absence of the practitioner, for reasons of ill-health, the practitioner should have the opportunity to submit written submissions and / or have a representative attend in their absence."

97. Under a heading for the protocol to be followed in capability hearings, is the following statement:

> "The panel and its advisors, the practitioner, his or her representative and the Case Manager will be present at all times during the hearing."

Appraisals Policy

98. The Trust's policy on appraisals is at pages 305 and 306. This states that the primary focus of the appraisal system is motivating and retaining personnel within the organisation through maintaining and developing skills.

99. In relation to consultants, the policy explains that appraisals are also a prerequisite for revalidation by the GMC and must therefore comply with certain criteria. The policy states in its concluding paragraph:

> "If a Consultant fails to comply with requests related to the Appraisal Process, the issue will be referred initially to the Clinical Director. It will be informally reviewed and a solution identified. Continued refusal to comply with the process will, however, result in referral to the Medical Director and subsequent disciplinary action will be taken."

Facts

100. Dr Coker underwent revalidation at the end of December 2014 and we were taken to a three hundred and sixty degree review in that regard, (page 639) which does not highlight any particular concerns about her abilities raised by her colleagues.

101. In 2002 / 2003 Dr Gentry and Dr Coker knew each other at Imperial College London. Dr Coker was a Consultant Obstetrician and Gynaecologist and Labour Ward Lead at the time of Dr Gentry starting with the First Respondent. Dr Coker subsequently became Clinical Director in 2011. Dr Coker told us that she is Nigerian Yoruba but her late husband and her daughter are Igbo, so she has what she described as a, *"mixed family tribally"*.

102. Dr Gentry says that she had a poor working relationship with Dr Coker. However, we note that she went on a fiftieth birthday trip to Marrakesh with her in 2017.

103. The Third Respondent Dr van der Watt is a white South African. He was appointed Medical Director in 2015. He is a Cardiologist. Part of his role as Medical Director was as we have seen, to commission investigations into serious matters that arise. He was also the Respondent's Responsible Officer, our understanding is that is the person with the First Respondent responsible for the conduct and performance of doctors, including evaluating their fitness to practice and liaising with the GMC over relevant procedures. Dr Gentry described her working relationship with Dr van der Watt as, "not positive" and said that he had repeatedly instigated disciplinary action against her.

104. In August 2016, two issues with Dr Gentry arose that Dr van der Watt and the GMC became involved in: a complaint about an invoice for undertaking private work during NHS time and a complaint about damage to a baby's face after a forceps delivery.

105. As a consequence of the clinical issue, Dr Gentry was placed under supervision. This incident is illustrative of the difficulties with Dr Gentry's evidence. At paragraph 25 of her Witness Statement she accuses Dr van der Watt of not telling the truth as to how this arose. In cross examination she said that Dr van der Watt was a liar and that he was conspiring to harm her. In a letter that he wrote to her on 5 August 2016, Dr van der Watt referred to the Trust having explained to her that the Trust had been contacted by the GMC following a patient complaint in relation to an injury sustained by a baby during forceps delivery. He clarified in the letter that he had since established the GMC had been made aware of the issue in a discussion at a three monthly GMC Review. He had earlier clarified this in an email of 3 August 2016. She also seemed to suggest he had said the GMC had investigated the problem over the invoice. That is not what Dr van der Watt suggests at all in his letter of 5 August 2016, merely that the

complaint against her arising out of the invoice had been discussed. As the letter of 5 August 2016 explains, arising out of the discussion with the GMC and because of the concerns raised, her practice was to be restricted so that she would not undertake any interventional Obstetric surgical procedures without direct Consultant supervision. The Supervisor was to be a Dr Tony Boret and NCAS would be asked to undertake an Assessment of Practice to ascertain if she needed any further training or supportive mechanism.

106. Dr Gentry reacted in an email of 5 August 2016, (page 729) in which she protested about an invoice of two years' earlier having been raised, she wrote of feeling victimised and discriminated against and she offered up three examples of other colleagues who had been involved in, *"very serious complications in the last three years"* who had not been investigated. Dr van der Watt responded expressing concern that rather than reflecting upon the incident at hand, Dr Gentry had reacted by making accusations against colleagues. He said that he would arrange for her allegations to be investigated. He said he would in future utilise Trust HR and Legal Departments to respond to communications from her, asking Human Resources, copied in on the email, to advise in that regard.

107. On 16 September 2016, after six weeks of supervision, Dr Boret reported that during her first four weeks of supervision, Dr Gentry had performed her duties to a satisfactory standard and recommended that she should be allowed to revert to independent unsupervised practice. Concerns had been referred to the NCAS and they wrote on 28 October 2016, (page 733) that there was no requirement for a Full Performance Assessment.

108. A couple of months later, on 16 December 2016, Dr van der Watt wrote to Dr Gentry to confirm that no further action would be taken in respect of the invoice issue. The issue had arisen because a patient had complained that she had been charged privately, with an invoice raised by Dr Gentry, for treatment that was in fact provided under the NHS. Such matters are investigated independently by a unit known as the Local Counter Fraud Specialist Service (LCFSS). Their Reports are confidential. Dr van der Watt wrote a further letter on 13 January 2017, 9page 736) on this topic. From this, we learned that the referral to the Local Counter Fraud Specialist Service was made on 15 April 2015 and their final report was produced on 12 August 2015. It appears he was writing to Dr Gentry about this some 15 months after the report was produced. Dr Gentry's evidence was that the findings were that there were no concerns, but that Dr van der Watt was hostile toward her in this regard. That is not quite what the letter says. The conclusion is:

> "Whilst there appears to be some circumstantial evidence to support the allegations, this has not been substantially validated to sufficient degree to trigger a formal internal investigation or further action."

109. In the body of his letter, Dr van der Watt listed a bullet point summary of the key findings from the LCFSS Report, which included that Dr Gentry had not forwarded any declarations of private work. The patient had been given a scan and had been invoiced for it. There had been difficulties substantiating whether the work was completed within NHS time or not, but because of the documentary evidence available there was a suggestion that the scan had been conducted within NHS time. The patient's appointment had been part way through another patient's appointment and had not been allocated a thirty minute slot. Two colleagues had received payments of £10 from her as a, "thank you" for booking a private patient. There was no record of the patient in the First Respondent's systems and it was suggested that there were other examples of potential incidents when she had provided private practice service in NHS time during August 2015.

110. This led to a meeting on 17 January 2017 with Dr van der Watt, Mr de Gama HR Director and Dr Gentry accompanied by Dr Boret. The Claimant's note of this meeting is at page 738. It is important because it is asserted that three protected disclosures and protected acts were made during this meeting. According to the Claimant's note, Dr van der Watt was irritated and raised his voice almost from the start. Her note records her challenging Dr van der Watt that there were six people engaged in private practice, querying how many of thse others were referred to the Counter Fraud Office? Her note records that she complained about being treated differently from her colleagues, that others had been involved in serious injuries with babies but had not been supervised. She recites that she alleged that since he had been in post, he had been trying to get rid of her and she felt he was being racist towards her. Her note includes the following:

> *"The way you treat me makes me feel that you are being racist towards me…*
>
> *Mike banging his fist on the table: have you documented that Paul? She has just called me a racist. Is that documented?*
>
> [to Paul de Gama] *I feel that he is being racist towards me. He has been victimising and witch hunting me for no apparent reason.*
>
> *What do I have in common with the other two colleagues you have investigated in our department?... We are all blacks. How can we be 14 consultants and you have disciplined 3 and they are all blacks? Why won't that give a perception of you being a racist?"*

111. In her Note Dr Gentry also records Mr de Gama confirming that he was making notes and Dr van der Watt responding:

> *"Paul: Mike banging his fists on the table: have you documented that Paul? She has just called me a racist. Is that documented?*

> *I am not a racist. I am very offended by what you have just said. Being South African, it makes me even more offended. How can I be a racist when there are 14 of you and I have only investigated you and two others?*
>
> *To Paul: contact the lawyers* "Capsticks" *immediately because I want them to start legal action against her as soon as possible.*
>
> *To CG: I am going to sue you for calling me a racist. I am going to sue you and you will hear from the lawyers soon."*

112. The first detriment relied upon (13.1) is Dr van der Watt becoming very agitated and threatening recourse to lawyers in this meeting.

113. In cross examination, Dr van der Watt spoke of being deeply offended by what he saw as a personal attack. When it was put to him that he threatened Dr Gentry with legal consequences, he acknowledged that he had said to her that she should be aware that under British Law if she made false accusation there could be consequences. He expressly agreed that he warned her of legal consequences. With regards to the alleged reference to calling "Capsticks", he acknowledged that Capsticks were the Respondent's Solicitors at the time, he said he did not recall referring to Capsticks but he doubted that he did so. He acknowledged that he was angry and irritated, although he subsequently sought to withdraw his acknowledgement that he had been angry. He said that he was deeply offended and had reminded Dr Gentry that she cannot just say that about people without any responsibility, which is why he said to her that she needed to be careful about what she said. He denied threatening to sue her. He acknowledged that he had referred to himself as South African. He denied saying that she would hear from his lawyers and said he did not believe he would have said that in the heat of the moment.

114. So what are we to make of this? For reasons that we have already recited, Dr Gentry could not be described as a reliable witness. She is an unreliable witness.

115. The nature of the Claimant's notes are odd. They read as a transcript of a recording. As we understand it, they are offered as a handwritten contemporaneous note. The note is said to have been prepared by Dr Gentry. It is incredibly detailed. As a contemporaneous note, it is important evidence. If it was taken from a recording, that would beg the question, has the recording been disclosed and if not, query, is that because the transcript is not accurate? In any event, even if it is no more than a note made at the time, it is still vulnerable to embellishment.

116. It has been said that this meeting is so important, not just in respect of proving the alleged disclosures and protected acts, but also in support of detriment 1, one wonders why Dr Gentry did not call her witness Dr Boret, a Consult Obstetrician and Gynaecologist? Throughout cross examination

when I asked why witnesses had not been called by her, she always responded they could not risk their employment and victimisation by coming forward and giving evidence. It seems to us unlikely a consultant in the NHS would have any such concerns, particularly if the content of Dr Gentry's note were true and accurate.

117. On the other hand, if the meeting was attended by the Respondent's HR Director Mr de Gama, why wasn't he called to give evidence to support the First Respondents and Dr van der Watt? Mr Cheetham's answer on behalf of the First Respondent to Dr Morgan's point that the Respondents had not called a number of key witnesses, including Mr de Gama, was that they would not be able to give evidence relevant to the issues. That is not the case with Mr de Gama, if he was at this meeting (and there is no dispute that he was) he would be able to give direct evidence as to whether Dr van der Watt had become agitated and threatened recourse to lawyers in response to being accused of racism. Perhaps he has not been called to give evidence because it would not have been helpful for the Respondents.

118. Furthermore, why are there no notes from the Respondent about this meeting? It beggars belief that at a meeting such as this, attended by the Human Resources Director, notes would not have been taken.

119. In evidence Dr van der Watt agreed that Dr Gentry had in effect, accused him of racism and whilst saying he did not remember, acknowledged that she may have said that he had disciplined 3 black consultants out of compliment of 14.

120. Our findings are that the three alleged protected disclosures / protected acts were said. That is not disputed by the Respondents. What is disputed, whether what was said was capable of amounting to a protected disclosure and that is a matter for conclusions. We find that Dr van der Watt was angry and agitated and that he did threaten Dr Gentry with recourse to lawyers, by reminding her of potential legal consequences to her of what she was saying. Ms Brown, (who was later to chair the Disciplinary Hearing) at that time was in an office a few doors along the corridor from Dr van de Watt. She was at that time Director of Transformation, (later between June 2017 and March 2018 she became Deputy Chief Executive and after that, between July 2018 and February 2019, she was Interim Chief Executive). She confirmed that Dr van de Watt had told her at the time that Dr Gentry had accused him of being a racist. It was also acknowledged in evidence that Dr van der Watt had told Dr Barlow about this.

121. The second detriment relied upon is that Dr van der Watt decided to review Dr Gentry's appraisals. She suggested this threat was made after work in the car park some time shortly after the 17 January 2017 meeting. The decision by Dr van der Watt to review Dr Gentry's appraisals came later in 2018, as we will see below. At this time, in early 2017, there had

been an unrelated general audit of the 2016 / 2017 appraisals as confirmed in a letter to Dr Gentry dated 2 May 2017 from a Dr Quist-Therson. The letter criticises Dr Gentry for not disclosing a Serious Incident declared in 2014 and two complaints in which she had been named. It was also noted there were many incidents in her name on the DATIX system and commented that whilst acknowledging the requirement to list all entries on DATIX, there ought to have been some reflection on some of them.

122. We find that there was no threat by Dr van der Watt in a car park in the first half of 2017, (Dr Gentry was entirely unclear as to when precisely this happened) to review her appraisals.

123. On 25 January 2017, there was an incident involving Dr Gentry and her patient known as 'SA'. The details do not matter. The suggestion was that during a Caesarean Section she had removed a wedge before the baby was out, resulting in the patient becoming unresponsive and the baby needing, *"cooling"*.

124. On 13 February 2017, there was an incident involving Dr Gentry and her patient known as 'AI' in which a decision to deliver a baby early was subsequently criticised.

125. On 3 May 2017, there was an incident involving Dr Coker and a patient known as 'Patient A'. A brief outline is that this entailed a perineal cut to a patient by a Registrar in delivering a baby. Dr Gentry was called to assist. She assessed the damage and the remedial action required. Dr Coker subsequently attended, reassessed the situation and instructed the Registrar to, in part, re-do the stitches.

126. On 4 May 2017, there was a meeting between Dr Gentry and Dr Barlow at which disclosure four is alleged to have been made. Dr Barlow was a Consultant Respiratory Physician and was Divisional Director for Women's and Children's Services at the time. He says that he was specifically brought into this role as someone impartial that people could go to with their concerns. At paragraphs 9 – 11 of his Witness Statement, he suggests that he had no recollection of this meeting and the disclosures. But in cross examination, he acknowledged that he had met both Dr Coker and Dr Gentry separately and that they were both advocating their respective positions in relation to the incident involving patient A. In cross examination, he acknowledged that the disclosures were made as set out at 12.4 of the List of Issues.

127. Dr Gentry complains that she was subjected to a Disciplinary Investigation arising out of the incident involving Patient A and Dr Coker, (Detriment 13.3). In her Witness Statement, she asserts that the focus of the investigation was her on and not Dr Coker.

128. On 4 May 2017, Dr Barlow emailed both Dr Gentry and Dr Coker asking them to provide written statements. Dr Coker responded on 8 May 2017, (page 849) suggesting that Dr Gentry was, *"mischief making"* and raising her concern that Dr Gentry had been unable to correctly diagnose a third degree tear. Dr Coker copied Dr Gentry in on that email. Not surprisingly, Dr Gentry responded. She complained of Dr Coker undermining her and interfering in the Labour Ward management when she was the consultant on call. She said she felt intimidated and undermined in front of other members of staff. She complained that Dr Coker had subjected the patient to an unnecessarily extended operation time, extra blood loss and extra discomfort. She referred to the, *"mischief making"* comment as rude, condescending and undermining. She complains of being subjected to such treatment, *"for years"*.

129. Having received their respective statements, Dr Barlow decided that the matter should be escalated to the Medical Director. Dr Gentry subsequently received a letter from the Associate Medical Director, Anna Wood, to explain that there would be an Investigation. The letter is headed, *"Notification of Disciplinary Investigation"* but within the body of the letter a paragraph begins,

> *"I can confirm that the investigation does not constitute disciplinary action, and a disciplinary sanction could only be applied following a formal conduct or capability Hearing".*

130. The investigation was conducted by a Consultant, Dr Catnatch.

131. Dr Catnatch reported on 31 July 2017. The conclusion of her Report on page 917 reads as follows:

> "CG supervised the ST4 appropriately and was available to the Labour Ward when necessary in a timely fashion. She did not write up her notes contemporaneously, however, she had instructed the ST4 to write up the notes and given that this was a second degree tear, which would normally be repaired without supervision, this is appropriate. CG was clear that this was a second degree tear and that she managed this in line with standard practice."

132. On 26 September 2017, Dr Gentry was involved in the care of a patient, LP. In neutral terms, what happened was that LP had been in the hospital. There had been two unsuccessful attempts to induce labour. Dr Gentry was called by the midwife. After Dr Gentry's consultation with LP, she, the patient, went home with a view to a further attempt at induction, or a caesarean birth, the next day. That was Dr Gentry's only interaction with L, (until after the birth of her baby). When LP returned to the hospital, further attempts at induction failed. She had to wait some time for her caesarean due to the Respondent's resources being over stretched at the time. The baby was very poorly when born and tragically, did not survive.

It is not for the Tribunal to make findings of fact as to what actually happened. We believe the above summary to be uncontroversial.

133. The LP incident was investigated and a Root Cause Analysis Investigation Report was produced on 1 February 2018, page 1042. The one criticism of Dr Gentry in this report was that she should have arranged a scan of LP before she went home, although it was not thought that would have made any difference to the outcome, (pages 1050 and 1054).

134. There was another incident on 26 September 2017, this one involving a patient known as NG. The patient sustained a bladder injury which was undetected at the time. There is a Divisional Investigation Report about this in the Bundle starting at page 981. In its conclusions at page 997, an exerpt reads,

> "As mentioned above the diagnosis of bladder injury should really have been made at the time of Caesarean Section by checking the integrity of the bladder, either by filling it with saline or possibly methylene blue".

135. On 6 December 2017, Dr Gentry wrote to Anna Wood expressing how pleased she was that she had been completely exonerated in the Catnatch Report. She went on to make complaint about Dr Coker's ongoing behaviour towards her, giving examples.

136. We know that Dr Coker was issued with a Final Written Warning arising out of the 'Patient A' incident. It is not clear when that warning was issued and we were provided with no documents either about the process or the outcome. In cross examination, Dr Coker said, and we accept, that the Disciplinary Hearing was on 15 January 2018 and that she knew by the end of that month that she had been administered a Final Written Warning. She was not removed as Clinical Director, but steps were taken to separate her from having dealings with Dr Gentry.

137. Alleged detriment 13.4 is that in or around December 2017, Dr Coker made a threat to, *"deal with"* Dr Gentry. This arises out of a telephone conversation which Dr Gentry says she overheard, between Dr Coker and another person. Dr Gentry has produced a note of this conversation, which begins at page 1003. Dr Gentry's evidence about this was that she was hiding behind a door listening to the conversation and when it was over, she went away and wrote out her note. It is a remarkably detailed note taken in that fashion. It reads as if it were a transcript from a recording. The note is dated 1 January 2018. In her witness statement, one of the changes which she had made on day two of the Hearing was in the heading before paragraph 53, changing the date of the overheard conversation from December 2017 to early January 2018. The transcript records Dr Coker as saying,

> *"18 months' probation… yes, 18 months!, can you believe it?... we will deal with her… I'm not letting her off… no I won't let it go… she was not*

punished! I am going to deal with her! You will see! She won't get away with it… I can't wait for that B woman to move on".

138. The difficulty with this is not only does the conversation appear to have taken place before Dr Coker was issued with her Final Written Warning, but also it is alleged to have taken place on 1 January 2018 when Dr Coker was in Nigeria and on a bank holiday, when Dr Coker and Dr Gentry would not have been scheduled to be on call together at the same time. Our finding based on the foregoing is that this conversation did not take place.

139. On 27 December 2017, an incident occurred involving Dr Gentry and a patient known as ED. The baby was born with bruising and something known as Erb Palsy. The baby had been subjected to seven pulls with forceps, the last three pulls having been administered by Dr Gentry.

140. Two midwives were concerned about the ED delivery and raised their concerns with the Divisional Director and Divisional Manager, who in turn raised the concerns with Dr van der Watt as Medical Director. Dr van der Watt convened a Serious Incident Review Panel Meeting on 22 January 2018. The raising of these concerns by the midwives is detriment 13.5. It is said to have been instigated by Dr Coker, detriment 13.6. Dr van der Watt's decision to organise a Serious Incident Review and his failure to arrange a Preliminary Investigation before such a Review is detriment 13.7. Dr van der Watt's evidence was that there was no requirement for a Preliminary Investigation. We were taken to no policy or documentation to suggest that a Preliminary Investigation should have been conducted, we find that no such policy or practice exists.

141. On or about 17 January 2018, Dr Barlow had a meeting with Dr Gentry. Her note of this meeting is at page 1033. This reads much more like the minute of a meeting rather than a transcript of a recording. Dr Barlow said in cross examination he did not recall such a meeting. Unfortunately, that was rather typical of his evidence; there was much that he did not recall. This meeting probably did take place and in it, Dr Gentry complained about Dr Coker's behaviour towards her, victimising her, undermining her, misrepresenting her, trying to end her career, being disrespectful and a bully.

142. On 6 February 2018, Dr Gentry had a meeting with Dr van der Watt. Her note of that meeting is at page 1104, Dr van der Watt's notes are at page 110. There is a letter at page 1102 confirming the outcome of the meeting. The meeting was called to discuss the incident regarding patient ED. Dr van der Watt explained to Dr Gentry that given the history of previous incidents, there would be a Formal Review of her practice. He expressed an awareness of inter-personal issues within the department and therefore, the review would be undertaken by an external investigator. In the meantime, Dr Gentry's duties were to be restricted so that she would not do on-call, or practice in the Maternity Theatre. Dr Gentry responded

by giving examples of other colleagues who had been involved in serious incidents and queried why they were not also being reviewed. Dr van der Watt asked Dr Gentry to provide him with details of the other incidents to which she was referring.

143. Detriment 13.11 is the decision to appoint an external investigator to review Dr Gentry's practice, communicating that decision to her on 6 February 2018 when she had returned to work after her sister's funeral. We find that Dr van der Watt did know that Dr Gentry had returned to work from her sister's funeral when he held the above conversation with her.

144. Dr van der Watt instructed Dr Barlow and Ms Bhatti, (Divisional Manager for Women's and Children's Services) to investigate the complication rates of all Consultant Obstetricians. The outcome of that so called Audit, was a spreadsheet reproduced at page 1039 in the Bundle. The information was drawn from a record or a, "book" that Midwife Turner kept of what she regarded of serious or interesting incidents borne from events she either heard about, or saw entered on the Respondent's DATIX system.

145. On 12 February 2018, two midwives made allegations about the actions of Dr Gentry on 6 and 7 February 2018 when visiting the Risk and Governance Office in the Maternity Department. Three statements were produced. Three alleged detriments arise out of this: 13.8 that the two midwives' allegations are fabrication; 13.9 that the allegations were instigated by Dr Coker; and 13.10 that Dr van der Watt represented that three rather than two midwives had made the allegations. Equality Lead Midwife, Jennifer Fake provided a statement reproduced at page 1112, that on 6 February 2018 Dr Gentry had attended the Risk and Governance Office to request the file with Attendance Sheets for meetings. She reported Dr Gentry protesting to her that something was not right about the timing recorded on an Attendance Sheet. Ms Fake went on to write that the following day, Dr Gentry had gone into the office carrying a bundle of papers, saying that she was returning them and that she was going to take away some more. Ms Fake was concerned Dr Gentry was taking papers away from the office.

146. The second midwife's complaint is that of Patient Safety Midwife, Ms Kate Turner. She referred to Ms Gentry going into the Risk Office on 7 February 2018, appearing to be agitated and asking about a recent case which had been declared as an SI. She asked who had reviewed the CIRG, (Clinical Incident Review Group) Report and which Obstetrician had attended the Panel Meeting. She described Dr Gentry as, *"quite intimidating"*, being persistent in her questioning. She referred to Dr Gentry going into the Risk Office again on 8 February 2018 and stating that she was going to take the folder containing the Attendance Sheets which she would return. Ms Turner says that the folder was removed and at the time of writing her note the following day, it had not been returned. She described Dr Gentry's demeanour as intimidating and forceful, which had influenced her decision to allow Dr Gentry to remove the folder.

147. The third Report was from Associate Head of Midwifery, Ms Danielle Boyd. She referred to being in the office on 7 February 2018 with Kate Turner when Dr Gentry came into the office asking for a copy of the notes relating to the SI. She claimed that she had already heard that Dr Gentry had been in the previous day asking about the CIRG Review and who had attended the SI Panel Meeting, that she had therefore given instructions that any request for information should be referred to her. She explained that she took Dr Gentry to one side to speak to her in private and explained to her that it was not appropriate for her to enquire who had attended the CIRG and SI Panel and that she would provide her in a few days with a copy of the notes and the CIRG timeline. She records that Dr Gentry asked her to change a cover sheet which had included the phrase, *"seven pulls"* and *"in seven pulls".* She says that she responded to Dr Gentry with reference to the CIRG timeline which documented *"seven pulls"* and that this was something that would be reviewed in the Investigation.

148. The statements were provided to Dr van der Watt. He contacted the National Clinical Assessment Service, who wrote to him on 13 February 2018 to confirm their conversation, the letter is at page 1119. The conversation related to the concerns over patient ED, to discord between consultants, to their being an increased number of *"adverse clinical outcomes"* compared to peers and that there were concerns about Dr Gentry's actions in potentially compromising the process. Dr van der Watt was referred to the Guidance in the Maintaining High Professional Standards in a Modern NHS, that protection of the investigation is considered a legitimate reason for formal exclusion, though there must be clear documentation as to the rationale for such action. We also know, because Dr van der Watt told us, that he raised the matter with the GMC, although we were taken to no documentation in that regard.

149. There was a second meeting between Dr van der Watt and Dr Gentry on 13 February 2018. This was about her, "seeking notes from nurses". Dr van der Watt's note is at page 1117, Ms Gentry's note is at page 1122. Dr van der Watt followed up the meeting with a letter which is at page 1115. Dr van der Watt records that concerns had been raised that Dr Gentry was accessing notes in relation to the SI and Risk Register and had removed some of those notes from the office. He explained that under MHPS a person interfering with an investigation could be excluded and that Dr Gentry's behaviour could be construed as interfering. He said he had spoken to the NCAS which confirmed that he would be justified in excluding her. However, he did not want to have to do that. He said that in future, if she wanted access to documentation, Dr Gentry should ask for it. Dr Gentry expressed that she felt harassed, she felt that she should have been asked for her version of events before consulting the external body. In her own note, Dr Gentry recorded that she said she wanted access to attendance records because she was preparing for her appraisal.

150. Dr van der Watt says that because Dr Gentry had made reference to preparing for her appraisal as the reason she was accessing files, he decided to review her appraisals for the previous two years and noted that they contained no reference to matters that had been raised as concerns by Dr Barlow. As we saw earlier, detriment 13.2 is Dr van der Watt's decision to review the Claimant's appraisals.

151. In terms of chronology, we should record here an email of 21 February 2018 from Dr van der Watt to all consultants, which is at page 1129, in which he said that his Team would be supplying each doctor with a list of all incidents, complaints, compliments etc., formally logged on DATIX before they prepare their appraisals, to try and make life easier for everyone. Dr van der Watt acknowledged in cross examination this resulted from a conference he had attended at which it was acknowledged that nationwide, there was an issue with clinicians having a clear record of such matters to assist them in preparation of their appraisals.

152. At a meeting on 6 March 2018, Dr van der Watt informed Dr Gentry that she was to be excluded, (suspended). The meeting was attended by Mr de Gama of Human Resources and Dr Gentry was accompanied by a colleague, Mr Alfolaemi. The Respondent's notes of this meetings are at page 1140, Dr Gentry's motes at 1143. The reasons for exclusion were explained as:

    152.1. The statistics suggested that Dr Gentry had a higher rate of incidents than her colleagues.

    152.2. It had been reported to him that Dr Gentry had approached the midwives in the office seeking copies of notes in a forceful manner. There had been allegations of retrospective amendment to Medical Records in the past which gave rise to cause for concern.

    152.3. An allegation that Dr Gentry had taken a photograph of a baby using her personal telephone contrary to policy.

    152.4. A recent review of her appraisals revealed that she had not made reference to incidents or complaints therein as she should.

    152.5. Given these probity issues, it was felt that she should not continue to attend work because of fears that she might inappropriately interfere with the Investigation.

153. Also on 6 March 2018, Dr Gentry was informed by letter that the Investigation into her practice would be conducted by Dr Steve Quinn, Divisional Lead for Quality and Safety at Imperial College Healthcare Trust. Dr Quinn was a Consultant Obstetrician and Gynaecologist. Dr Gentry was informed who the designated Board Member would be and the

letter set out the matters to be Investigated, going back five years. Dr van der Watt stated that he would be the Case Manager.

154. Also on 6 March 2018, Dr van der Watt wrote to the General Medical Council Fitness to Practice Directorate with an attached Fitness to Practice Referral Form, setting out his concerns with regard to Dr Gentry.

155. Later, by email dated 29 March 2018, Dr Gentry's BMA Representative wrote to object to Dr van der Watt adopting the role of Case Manager, in light of what Dr Gentry described as false allegations and referrals made against her by him in the past, her perception of bias and that she had previously told Dr van der Watt that she perceived him to be racist. Mr de Gama replied refuting any suggestion of racism, but stating that Dr van der Watt had voluntarily agreed to step down as Case Manager. The Deputy Medical Director Dr Anna Wood was to be appointed in his place.

156. In an undated document copied in the Bundle at page 298, Dr Gentry requested of Dr Quinn that he interview eight witnesses. Issue 13.12.5 is the failure to interview witnesses proposed by the Claimant. Dr Quinn interviewed six of those witnesses. In respect of the witness named Chima Ezenwa, the reason Dr Gentry asked that she be interviewed was that Dr Gentry had been her Clinical Supervisor. Dr Quinn declined to interview her because it was not thought that her evidence would be relevant. Why Dr Vasanta Nanduri was not interviewed as requested by Dr Gentry, does not appear to be dealt with in the papers in the Bundle, at least we were not taken to any such document. However, the reason given by Dr Gentry that she had asked this person to be interviewed was because they had been Consultant Paediatrician and Divisional Director of Maternity Services for over three years until last year. In cross examination it was put to Dr Gentry that this person was not interviewed because they could not give direct evidence on the matters under investigation. Dr Gentry's reply was that Dr Quinn did not interview Dr Nanduri because they were black Nigerian. This was an allegation of race discrimination that had never been made before until cross examination.

157. On 30 May 2018, Dr Gentry was informed by Dr Wood that two further cases were to be added to the scope of the Investigation, (page 1303). One related to something arising from the investigation into the matter of complaints missing from her appraisals dating back to October 2014 and the other related to patient LP.

158. By 7 June 2018, Dr Wood had formed a view that Dr Gentry could be allowed to return to work in a limited way, in particular to Out Patient Mental Health Clinics. She thought that some of the complications that were being investigated could just be bad luck. On 13 June 2018, Dr Quinn wrote to Dr Wood to agree. He said he could see no problem with Dr Gentry returning to the Perinatal Psychiatry Clinic. Dr van der Watt was not happy with the proposal. He wrote on 27 June 2018 that the Division was extremely concerned at the prospect of Dr Gentry returning to work,

until there was a, *"verdict on her capability"*. He called for assurance from Dr Quinn that she is capable, competent and able to do Perinatal Mental Illness work unsupervised. Dr Wood replied to say that she'd had that conversation with Dr Quinn and could see no reason for her not to do those Clinics. Dr van der Watt replied that he wanted to see that in writing. Dr Wood obliged by forwarding to him the email she had received from Dr Quinn on 13 June 2018. On 21 June 2018, Dr Barlow wrote that his view, shared by colleagues in the Senior Clinical Team, was that until the Report was delivered,

> *"the long list of questions surrounding her probity, insight and clinical competence should take precedence over any nuance of employment law; patient safety first and foremost. Clearly these views do not in any way prejudice the outcome, but whilst there is doubt over crucial aspects of what constitutes safe practice we should allow the investigation to conclude first."*

159. On 28 June 2018, Dr van der Watt wrote,

> *"I am rescinding Anna's decision to allow Ms Gentry to do Clinics on any WHHT site, as the reason for her exclusion (lack of probity and attempting to influence the investigation) has not changed, and allowing her on site exposes the investigation to the same risk for which she was excluded."*

160. We note that Dr van der Watt's reasoning was expressed to be probity, whereas Dr Barlow's reasoning had been expressed to be clinical safety. A few hours after this email from Dr van der Watt, Dr Wood emailed everybody concerned to say that she had decided to withdraw from her role as Case Manager.

161. The foregoing goes to Issue 13.12.4 with regard to Dr van der Watt's alleged interference with process.

162. Also on 28 June 2018, members of the Respondent's management met with 'LP' and her family. Dr Barlow's evidence was that he and Danielle Boyd, (Deputy Head of Midwifery) attended this meeting. The final copy of the Root Cause Analysis Investigation Report, (see below) suggests that there were five attendees from the Respondent, (page 1631). It is not clear to us who the other three attendees were. A note of this meeting is at page 1390. The family wished to raise issues with regards to the Root Cause Investigation Report, amongst the matters discussed, the family expressed dissatisfaction that the Respondent had not been honest and open with them by not telling them there was an investigation under way in relation to one of the members of staff involved. That is a reference to Dr Gentry. In response the Minutes record:

> "Apologies given by the Divisional Director, update given in terms of the HR Investigation, the suspension of one of the Obstetric Consultants and time frame for completion of the Investigation then where appropriate and not

> breaching other service users' confidentiality, the findings where relevant, to their baby and the management of her care will be shared with them."

163. On 3 July 2018, Dr Gentry was informed that a Dr Borkett-Jones, Accident and Emergency Consultant, was appointed as the new Case Manager. Dr Gentry described Dr van der Watt and Dr Borkett-Jones as, *"very close"*. Dr Borkett-Jones was the most senior doctor at the Trust and had previously served as Medical Director for 10 years. He was seen as being independent, in that he was from the Accident and Emergency Department. Our finding is that he was not a close associate of Dr van der Watt.

164. On 9 July 2018, Dr Gentry's BMA Representative wrote to express concerns about Dr Wood being replaced and about Dr van der Watt continuing to being involved in the case, (page 1423).

165. On 6 July 2018, Ms Brown, at that time in the position of Interim Chief Executive, wrote to LP and her husband. She referred to a preventable death. She wrote:

> "The Division accepts that it did not explicitly acknowledge in the Investigation Report that we did not adhere to the West Hertfordshire Hospital Guidelines when your induction of labour failed and therefore missed the opportunity to offer you a caesarean section. I accept that Women's Services have agreed that had we delivered [the baby] following the failed induction of labour, by caesarean section he would have been born alive."

She said that the Respondent deeply regretted the clinical decision that was made at that time.

166. Subsequently, the wording of the Root Cause Analysis Report was reviewed, (apparently to the exclusion of its original author, see below) a final version produced on 21 September 2018 which appears at page 1626. The new report records LP as saying that she had requested of Dr Gentry a caesarean section, (Dr Gentry is adamant that she had offered a caesarean section and LP had declined it as she was determined to give a natural birth). The new report contained the following addition relevant to this case:

> "The Investigation has identified that there is no evidence that the Obstetric Team discussed and clearly documented the options and further management of the failed induction of labour. One of those options would have been to offer a caesarean section. The mother of the baby recalls requesting a caesarean section however this was not acknowledged in the Midwifery or Obstetric documentation. A caesarean section was not performed."

167. On 6 November 2018, Dr Quinn produced the first draft of his Investigation Report, page 1694. Dr Borkett-Jones then wrote to Dr Gentry on 9 November 2018, forwarding to her the report and explaining that as it contained concerns relating to capability and conduct, she was to have the opportunity to comment on the factual content within the following 10 days. Dr Borkett-Jones indicated that thereafter, he would meet with the Medical Director, (Dr van der Watt) and Director of Human Resources to decide what further action should be taken.

168. On 12 November 2018, Dr Gentry's BMA Representative wrote by email to Mr Borkett-Jones to express Dr Gentry's objections to Dr van der Watt having any involvement in the case, citing again her perceptions of bias and racism.

169. On 22 November 2018, Dr Gentry responded in writing to the Dr Quinn Report, it begins at page 1813 and runs to 28 pages.

170. Dr Quinn provided a response to Dr Gentry's response on 11 January 2019, (page 1847).

171. Dr Borkett-Jones then wrote to Dr Gentry again, on 8 February 2019, to set out the next steps. There were fourteen cases, or incidents, originally under review, five were to be considered further. The following concerns were put forward for consideration at a Capability Hearing:

171.1. Case 1 Patient SA - concerning removal of a wedge during delivery by caesarean section;

171.2. Case 3 Patient NG – failing to detect a bladder injury;

171.3. Case 6 Patient AI – inappropriate early delivery of a baby by caesarean section;

171.4. Case 7 Patient SA – induction of labour on a patient whose baby was lying transverse;

171.5. Case 13 Patient LP – in respect of which it was queried whether the Claimant had taken sufficient steps to persuade the patient to remain on the Ward rather than go home, failed to have an adequate plan for ongoing care and whether communications with the patient were, *"sub-optimal"*;

171.6. Issues of probity were to be considered in respect of alleged lack of support to a Junior Registrar performing an abortion and failure to comply with appraisal obligations to disclose incidents and complaints;

171.7. As regards attitude and behaviour towards others, the matter of her behaviour towards the midwives on 7 / 8 February 2018 to be referred; and

171.8. Generally, whether there had been an irretrievable breakdown of trust and confidence.

172. Dr Quinn's final report was produced on 21 May 2019, it begins at page 1939. Within the report, Dr Quinn records that one of the themes of Dr Gentry's statements and interviews was that apart from Dr Coker, she enjoyed a good working relationship with all of her other colleagues and had never made a complaint about anybody else. Dr Quinn observed that this was not true, citing in particular the example of a formal complaint that had been raised by Dr Gentry against the former Clinical Director described as Mr TB. Her complaint against TB had not been upheld. Dr Quinn went on to review a number of incidents of Dr Gentry complaining about and making allegations against, her colleagues during his investigation.

173. In a similar vein, Dr Quinn referred to the fact that Dr Gentry had maintained that this was the first time in 23 years of Obstetrics and Gynaecology practice, that her skills and judgement had been questioned which, she said, raised questions about the motive for the allegations. Dr Quinn noted that this too, was not true. He proceeded to recite what is a matter of public record: Dr Gentry had previously been employed in Obstetrics and Gynaecology as a Consultant at the Dartford and Gravesham NHS Trust. Concerns had been raised against her in respect of two incidents during surgery in 2006. The outcome was that she was not to undertake surgery unless a second consultant was present. In March 2007, she had made a complaint that Theatre staff had subsequently made her working life unbearable. In June 2007, a consultant observing an operation, raised a complaint that Dr Gentry had altered a patient consent form retrospectively, after the operation. These matters were the subject of a disciplinary investigation which ultimately led to her dismissal for gross misconduct in April 2008. She had appealed her dismissal and that Trust refused to allow her to be represented at the Appeal Hearing by a Solicitor. At the Employment Tribunal, she was found to have been unfairly dismissed because the Appeal Panel had not allowed legal representation at the Appeal Hearing.

174. In his conclusions, (page 1975) Dr Quinn noted the following:

174.1. In respect of a number of cases, the events were unfortunate, the sort of complications that sadly occur from time to time.

174.2. A number of concerning themes do though emerge, that is,

> "… a lack of self-awareness and reflection, poor working relationships with others, poor clinical decision making, clinical

> decision making too heavily influenced by the desire to please the patient rather than acting in the best interest of the patient and baby. Whereas there is some evidence of reflection in some of these cases, in a number of these cases CG simply refuses to acknowledge that she could have caused any injury".

174.3. On Case 1 he wrote,

> "… it is difficult to comment whether CG's actions resulted in the adverse outcome for this baby; however it is of concern that the account given by CG differs significantly from that given by the Anaesthetist Staff at the time".

174.4. On Case 3:

> "…the confidence with which CG claims that there was no bladder injury at the time of the surgery is not shared by the Urologist who reviewed this case".

174.5. That Case 6:

> "…does demonstrate poor decision making by CG resulting in the iatrogenic prematurity of this baby".

174.6. That:

> "The clinical decision making in Case 7 [LP] is very difficult to understand or defend."

174.7. That Dr Gentry relied on the excuse of oversight for the non-disclosure of incidents and complaints in her appraisals and that she said she was unfamiliar with the process.

174.8. In respect of the midwives' complaint:

> "The account of CG's alleged intimidating behaviour towards three members of staff on 7 February 2018 is very concerning. It does appear to reflect the experiences of other midwives and doctors within the Trust. When challenged, CG does appear to behave in an aggressive and intimidating way."

174.9. He commented that,

> "CG has made complaints and serious allegations about a number of her colleagues and has been very critical of both her consultant colleagues and the midwives within the department… The toxic working environment is a risk of patient safety."

174.10. Then he wrote,

> "Finally, a number of claims made by CG appear to be false. These include the assertion that her professional competence and behaviour has never been questioned before, when the events surrounding her leaving her previous trust are matters of public record. CG claimed that she had only ever made formal complaints about one of her colleagues, when this was clearly not the case.
>
> Overall, CG has demonstrated poor decision making on a number of occasions, a lack of self-reflection and failure to adequately and honestly engage with the appraisals process; she has allowed important working relationships within the department to become toxic and there are instances in the review of incidents where this has led to patient harm. CG has admitted to making retrospective amendments in the notes without proper documentation of time, date and retrospective nature, and has admitted to taking photographs of babies involved in adverse incidents on her mobile phone. Several of the claims made by CG in her statements have been found to be false".

175. A Panel was constituted for a Disciplinary Hearing and would consist of:-

175.1. Ms Brown, at that time Deputy Chief Executive;

175.2. Dr Douglas Salvesen, Consultant Obstetrician – external;

175.3. Dr Ajitha Jayaratnam, Consultant with the Respondent (discipline unknown);

175.4. Dr Susan Catnatch, Consultant Gastroenterologist with the Respondent; and

175.5. Ms Laura Bevan, ex Deputy Director of HR with the Respondent (at the time employed externally).

176. On 30 May 2019, the Respondents received an anonymous letter of complaint about Dr van der Watt which is reproduced at page 1984. This letter referred to Dr van der Watt as a racist. It was suggested there was a Trust wide problem, 90% of staff disciplined being from ethnic minority background. It was alleged that Dr van der Watt had planted people in different hospital departments to propagate his racist agenda. The Respondent conducted an investigation into the complaint, in respect of which a review was carried out by the HR Department of all NHPS cases in the previous two years, noting the outcomes and ethnicity of the people subject to the process. The split in ethnicity was reported to have been found to be broadly proportionate. Mr de Gama's report and the statistical evidence relied upon begins at page 2015.

177. On 21 June 2019, Dr Gentry objected to Mr Salvesen appearing on the Capability Hearing Panel on the basis that he was a friend of Dr Coker.

She also asked for a BAME Member from outside the region to be appointed to the Panel.

178. The Hearing was originally scheduled for 21 June 2019. Dr Gentry requested a postponement in an email dated 11 June 2019. She said the Hearing Pack had not been sent to her until 23 May 2019, she was travelling to Nigeria and she had not had access to the papers remotely and therefore had not had a chance to prepare. The request for a postponement was refused. Caroline Lankshear wrote to Dr Gentry, Head of Employee Relations, she pointed out that Dr Gentry had been aware that the Pack would be sent to her during May and yet she had chosen to travel in any event. She pointed out that Dr Gentry had received Dr Quinn's full Report with Appendices in November 2018 and a further copy had been sent in May 2019 to make it easier for her by removing the unnecessary Appendices that related to cases that were no longer being considered at the hearing. Notwithstanding the refusal of the postponement request by Dr Gentry, the first scheduled hearing was postponed due to Dr Quinn having a family bereavement. In the letter confirming that to Dr Gentry, Ms Lankshear confirmed that Dr Salvesen will not be removed from the panel, he was said to be an acquaintance of Dr Coker, he did not work for the Trust and there was not reason for him not to be on the panel.

179. The second scheduling of the Capability Hearing was for it to commence on 17 September 2019. This was subsequently postponed because it coincided with a hearing before the GMC Dr Gentry was due to attend. The Respondents say that she could have sought a postponement of the GMC hearing, but chose not to do so.

180. The Capability Hearing was then scheduled for a third time, to take place on 9 December 2019. Dr Coker said about this that her representative had agreed with the Respondents the hearing date of 3 February 2020, but the Respondent subsequently changed that to 9 December 2019 and then had refused to postpone on 9 December 2019 because of her representative's unavailability. We note an email from Dr Gentry's BMA representative dated 5 December 2019 starting at page 2097. It recites the Respondent had suggested in November 2019 that Dr Gentry find a different representative and Dr Gentry had responded that she had tried many different people and that no one was able to undertake representation within a month. Her representative protested that Dr Gentry would not have access to support and representation in regards to the clinical aspects of her Capability Hearing and would thereby be seriously disadvantaged. He emphasised that her career was at stake. Subsequently, on 6 December 2019, Dr Gentry's GP certified her as not fit to attend the hearing, (page 597). The third scheduled Hearing was therefore postponed and re-scheduled for 6 and 7 February 2020.

181. In notifying her of this new date in a letter dated 17 December 2019, Ms Brown set out the history of postponements and noted that the BMA had

told the Respondent that the first date a Clinical Representative would be able to attend is 3 February 2020, though only for the morning and not until after 10.30am. Ms Brown noted that it was seven months since the Respondent had tried to set up a hearing, which had been postponed twice already. It was noted that Dr Gentry had failed to provide the Respondent with details of who her Clinical Representative was, so they could not liaise with that person directly. Dr Gentry was advised that the re-scheduled hearing would be for 6 and 7 February 2020. Ms Brown explained that it had considered listing for 3 February 2020, but that was not possible due to the clinical commitments of members of the Panel. On the topic of Dr Salvesen, Ms Brown gave some more information. She said that Dr Salvesen had trained with Dr Coker in 1998, they did not socialise with each other and although they had occasion to liaise with each other, this was not particularly frequent. Ms Brown also said that she would be arranging for Dr Gentry to have an appointment with the Respondent's Occupational Health Physician.

182. We accept that Dr Salveson was not a friend of Dr Coker, their only relationship was professional arsing out of the occasional need discussion with each other.

183. The Capability Hearing commenced on 6 February 2020 and proceeded in Dr Gentry's absence. The Occupational Health Report that had been procured by the Respondent, (page 598) concluded,

> "In my opinion, she is able to instruct a representative, understand the issues involved and follow the procedures. However, she will need to have a representative present.
> …
>
> On balance I suggest offering two or three dates in the near future, to which she and her representative can commit.
>
> …
>
> I suggest a review in two months if she is not back to work by then."

184. Dr Gentry's GP had also provided a letter of support, this time not expressly stating that she was not fit to attend the hearing, but simply putting forward a request that the hearing be postponed until she was stronger. She was certified as unfit for work due to stress. Dr Gentry's request for postponement was refused. The reasons for that are set out in an email to her of 31 January 2020 which begins at page 2149. The reasons given in summary were:

184.1. This was the fourth scheduling of the hearing and Dr Gentry had requested a postponement on each occasion;

184.2. She had been informed previously that this hearing would proceed in her absence unless there were wholly exceptional circumstances;

184.3. It was now nine months since the trust had first sought to set up the hearing;

184.4. Concluding the process was likely to be beneficial to her in terms of her health;

184.5. A further postponement would involve significant delay, there was no indication Dr Gentry's health would improve in the meantime and that they may well find themselves in the same situation at the next re-convened hearing in at least two months' time; and

184.6. It was noted the Occupational Health report had said that she was fit to attend the hearing with a representative.

185. The Capability Panel therefore proceeded on 6 February 2020 and heard the Management case in Dr Gentry's absence. They then made preliminary findings, which are set out in a document at page 2168. The preliminary findings were sent to Dr Gentry on 7 February 2020. She was invited to make her comments. Some additional points were made in support of the decision to proceed, including at point 13, that the decision was in accordance with the Trust's Maintaining High Professional Standards Policy:

> "The Trust retains the right, after a reasonable period (not normally less than 30 working days), to proceed with the hearing in the Practitioner's absence: the Trust will always act reasonably in doing so".

186. The Respondent also sent to Dr Gentry a recording of the hearing.

187. Dr Gentry was informed that a sub-set of the Panel comprising Dr Salvesen, Laura Bevan and Ms Brown would re-convene to hear from Dr Gentry.

188. Dr Gentry provided a detailed response to the preliminary findings, to be found at page 2198. It runs to 151 pages.

189. In the meantime, the Coroner's inquest into the death of LP's baby was held on 18 and 19 February 2020.

190. Dr Gentry had been asked by the Coroner to provide a statement. Dr Gentry complains about the lack of support in this from the Respondent. The Respondent's position is explained in a statement from the Disciplinary Panel provided by the Respondent's Head of Legal, Ms

McSkeane as follows. The Respondent had written to Dr Gentry in September 2019 asking for her statement for the Inquest. On 28 October 2019, Dr Gentry replied saying that she would provide her own statement to the Coroner. Ms McSkeane says the Respondent's Legal Department received a copy of Dr Gentry's statement from the Coroner on 29 January 2020 and they found that it conflicted with the statements they had provided. She says that on the day before the Inquest, Dr Gentry rang the Legal Department and asked them to provide her with Legal Representation. It was explained to her that they would not be able to do so as there was a conflict situation. Dr Gentry attended the Inquest the next day with her own Legal Representation.

191. We note from this report from the Legal Department that it is suggested Dr Gentry was sent the up to date Root Cause Analysis Report in November 2018. According to Dr Gentry's witness statement, she received it on 17 January 2020.

192. The author of the first Root Cause Analysis Report, Ms Vikram, was sent along to the Coroner's Inquest on behalf of the Respondent to speak to the Report. She had not been involved in the amendment. She had not been aware of the amendment. She confirmed as such to the Coroner, (see the transcript at page 2478).

193. Relevant to this case is the Coroner's analysis of the evidence on the events of 26 September 2017. Dr Gentry's evidence was that when she saw LP, she was keen to go home. The Registrar had already offered LP a caesarean section but she did not want one. Dr Gentry said LP was advised not to leave the hospital as a caesarean section could be performed and that LP had turned it down because she wanted to go home. She was therefore advised to go home and come back, but that it was made clear if she did leave, it was against advise. There is a form to complete to confirm the patient was going home against advice but on this occasion, there was no form available.

194. LP's evidence was, (she was a nurse employed by the Respondent) that she had been hoping for a natural birth but was open to medical intervention if necessary. She referred to her Birthing Preferences document that indicated a preference for natural birth, but expressed an appreciation that developments might change things. She said that on 26 September 2017 she spoke to the Registrar, (a Dr Rigby) and expressed a wish for a caesarean section. She said Dr Rigby returned later with Dr Gentry, who told her there was no clinical need for a caesarean section and that the plan was for her to go home and return to be seen again. She says she was not offered a caesarean section and that she did not turn a caesarean section down. She said she was not desperate to leave the hospital, but she was desperate to have her baby.

195. The Coroner explained that in this situation, he has to make a finding. He said that both were clear in their oral evidence. Midwife Ms Russel had no

recollection of a caesarean section being offered or of one being refused, or of LP being discharged against advice. Ms Russel did not recall any great desire for LP to go home. Dr Rigby's recollection had not been particularly clear. The Coroner commented that ordinarily in a situation like this, one might look to the medical notes, but in this instance, there were no notes on the file, nor was there the usual form outlining discharge against advice.

196. The Coroner described evidence from Dr Gentry, about she and LP embracing and exchanging numbers, as sounding quite strange.

197. The Coroner noted that some text messages been produced by LP were consistent with the accounts given by Ms Russel and Dr Rigby. He noted that there were no text messages suggesting a desire to get out of hospital, or In-Patients, or any aversion to a caesarean section. There was a text message that referred to a plan to do a caesarean section the same day, which needed to be discussed with the Team and then a text message after the meeting with Dr Gentry in which LP wrote:

> *"They have said there is no clinical indication for one, and actually I am glad the decision has been taken out of my hands"*

The Coroner observed this fits the account given by LP, the midwife and registrar, that LP was open to the idea of a caesarean section and would take advice. He referred to a text message from LP's husband to someone else,

> *"They have decided to send 'LP' home"*

There was no indication of any desperation to leave, of having been offered and refused a caesarean section, or of her being discharged against medical advice.

198. The Coroner's conclusion is that all of the evidence seems to go against Dr Gentry's account. He decided to accept the evidence of LP. She was discharged on 26 September 2017 without being given the option of a caesarean section, there was a plan put to her which she accepted on the medical advice and that therefore, 26 September 2017 represented a missed opportunity for a caesarean section to have been carried out. Had it been, it was likely that the baby would have survived. The Coroner's verdict was that the baby died as a result of avoidable natural causes.

199. The Coroner recorded matters of concern, (page 2521). Neither of those matters of concern relate to Dr Gentry, they relate to resources and procedures at the Respondent.

200. The day after the conclusion of the Inquest, on 20 February 2020, Dr van der Watt wrote to the GMC to report the outcome. He wrote:

> "Ms Gentry submitted, under oath, a contradictory statement to the report the trust submitted, following a formal "Serious Incident" investigation. Her account of the management was also disputed by [LP] and the Coroner formally disregarded her evidence, and raised serious concerns about the statement she had submitted, and the verbal statements made by her at the Inquest (under oath)."

201. The Coroner suggested that the apparent deliberate misrepresentation was something which ought to be reported to the GMC and Dr van der Watt wrote that in his professional opinion, Dr Gentry should be suspended from the Medical Register.

202. On 6 March 2020, the Capability Hearing resumed to hear Dr Gentry's response to the management case. The Full Panel did not convene. Ms Brown wrote in her letter of 7 February 2020, in her penultimate paragraph, that the reconvened hearing would be before a, *"sub-set of the panel"* consisting of Dr Salvesen, Ms Bevan and herself. Her explanation as to why that is the case is given. Dr Gentry says that she wrote objecting the fact that the full panel was not reconvening, but she did not refer us to any correspondence in the Bundle to that effect. The explanation offered by Ms Brown in her witness statement, (paragraph 27) says that it would not have been possible to convene the full panel due to it consisting of *"numerous senior clinicians"* some of whom did not work for the Respondent for some months. They were keen to avoid further delay on a matter that had already been postponed on three occasions. Ms Brown's evidence is that Dr Gentry accepted this offer. That evidence was not challenged.

203. On 6 March 2020, the reduced Panel heard from Dr Gentry and her Clinical Representative in relation to the five clinical capability cases and in relation to the allegations concerning the failure to comply with appraisal obligations. The hearing lasted from 1.15pm to 6pm. There was insufficient time to hear from Dr Gentry in relation to the breakdown in trust and confidence allegations. The matter was therefore adjourned to 3 April 2020.

204. In the meantime, the Covid crisis arose and on 3 April 2020, Dr Salvesen was unable to join because of last minute urgent Covid related clinical commitments. Ms Brown decided to continue as the matters remaining to be discussed were non-clinical, which she felt she and Ms Bevan would be able to deal with. She was influenced in this by the prevailing situation with Covid, which meant that it would be unpredictable as to when the meeting could be reconvened with Dr Salvesen. Ms Brown's evidence was that there would have been a minimum of three months delay.

205. Following the final resumed Capability Hearing before Ms Brown and Ms Bevan, Dr Gentry submitted her written submissions on 7 April 2020.

206. The full Disciplinary Panel convened on 12 May 2020 for its deliberations and a note was prepared summarising the four hearings and their conclusions in a document which starts at page 2562. The conclusions are replicated in a letter to Dr Gentry dated 27 May 2020, in which she is informed that she is dismissed on notice. The letter of dismissal is at page 2640. A summary of the Panel's conclusions is as follows:

206.1. In relation to Case 1, Patient SA – the allegation was not upheld.

206.2. In relation to Case 3, Patient NG, (failure to spot a bladder injury) – the Panel upheld the allegation that Dr Gentry had failed to carry out appropriate checks to confirm whether there was a bladder injury and furthermore, had failed to acknowledge that there was a bladder injury.

206.3. The Panel did not uphold the second allegation in relation to Patient NG, that Dr Gentry failed to adequately deal with the complications which arose, finding that these had not been matters for her.

206.4. In relation to Case 6, Patient AI – the Panel upheld the allegation in relation to the early delivery of a baby. The Panel found that Dr Gentry's decision making in not making a referral to the Fetal Medicine Clinic, was inadequate.

206.5. In relation to Case 7, Patient SA – the Panel upheld the allegation and found that the care provided by Dr Gentry had been unsafe and outside recognised accepted practice and that Dr Gentry had failed to reflect adequately on the case.

206.6. In relation to Case 13, Patient LP – the Panel wrote,

> "CG's clinical decision making in this case was sub-optimal. CG failed to take sufficient steps to take care of the patient and her baby. She did not take steps to persuade LP to stay on the Ward or monitor her / the baby appropriately. She did not discuss appropriate options with the patient and / or the midwives. She did not reflect adequately on the case or acknowledge the respects in which it could have been handled better. In summary, CG failed to appropriately discuss the risks and benefits of the options following failed induction of labour with LP and effectively discharged her without taking due care and attention to the well-being of the mother and baby.
>
> The Panel is very concerned that the evidence provided by CG cannot be considered an honest account of the events on the day. Although this is not a specific allegation that the Panel was asked to consider, it is a very serious matter of probity and I return to this below."

206.7. In relation to probity and the allegation that Dr Gentry had failed to provide sufficient support to a Junior Registrar when he administered drugs for an abortion, the allegation was not upheld.

206.8. In relation to the probity allegation concerning appraisal obligations, the Panel found that Dr Gentry had failed to comply with her appraisal obligations to disclose incidents and complaints in her 2015 / 16 and 2016 / 17 appraisals and therefore upheld the allegation.

206.9. The Panel did not uphold the allegations of an irretrievable breakdown in trust and confidence between Dr Gentry and her colleagues.

206.10. In terms of sanction, in relation to the allegations in respect of clinical competency, the Panel expressed concern that the cases presented evidence of a pattern of fundamentally poor clinical decision making, a lack of adherence to establish good practice and poor record keeping over a relatively short period of time. The Panel felt that Dr Gentry had not demonstrated openness to learning and reflective practice in respect of those cases. The Panel found that she had fallen substantially short of the standards expected of a senior experienced clinician and that she represented a real and substantial risk to the safety of patients. It was not felt any further period of supervised practice or retraining was a viable or appropriate option, particularly taking into account Dr Gentry's demonstrated lack of insight / reflection. Therefore and not withstanding Dr Gentry's period of service, the Panel had decided that she should be dismissed by reason of these allegations on notice.

206.11. In relation to probity, the Panel felt that Dr Gentry had failed to demonstrate any real understanding of the importance of appraisals as a mechanism for reflective practice and continued improvement. Dr Gentry was also thought to have demonstrated an unwillingness or inability to take responsibility for her actions. The Panel felt that on their own, the probity allegations upheld would have warranted a First Written Warning.

206.12. The Panel went on to say this,

> "However, the panel considers that it is important to note that, had the evidence presented to the Coroner's in respect of the death of [LP's baby] been available to management's side prior to the submission of the management case, then a further probity allegation was likely to have been added to the management case in relation to your account of your discussion with patient LP. The Panel believes that you have presented untruthfully misleading evidence in respect of this case both to the Coroner and to the Panel. The Panel notes

> that, had this been considered as an allegation in its own right, then an outcome of dismissal for gross misconduct was likely to have been appropriate on the grounds of probity."

207. Ms Gentry issued her first ET1 claim on 8 June 2020, claiming unfair dismissal an detriment for whistle blowing.

208. On 25 June 2020, Dr Gentry appealed against her dismissal, page 2653. She set out 18 grounds of appeal. She provided a statement, page 2683.

209. Mr Redmond, from a Department of Health pool of Chair Persons with legal training, was appointed to chair the appeal hearing. He does not and did not work for the Respondent, he has no connections with the Respondent. He is a Chairman of the Central Arbitration Committee. The appeal hearing was scheduled for 6 and 7 January 2021. Mr Redmond contracted Covid just before and so by agreement with all, the appeal hearing was postponed to 19 April 2021. We heard evidence from Mr Redmond.

210. Also on the Appeal Panel with Mr Redmond, were a non-executive Director of the Respondents, Ms Edwards and a clinician with expertise in Obstetrics and Gynaecology, Mr Nieto of the Norfolk and Norwich Hospital. Dr Gentry attended the appeal hearing on 19 April 2021 accompanied by counsel appearing on her behalf, Mr Butler. The hearing was by way of review and notes of the hearing are at page 2804. At the appeal hearing, Mr Butler limited Dr Gentry's grounds of appeal to three key points. Mr Redmond's evidence, (paragraphs 15 and 16) is that these three points replaced Mr Gentry's 18 points. She appeared to seek to resile from that in her evidence, (that is not something that Dr Morgan pursued). For the avoidance of doubt, the unchallenged minutes of the appeal meeting, Mr Butler is noted as saying as follows:

> *"… Narrow down the points that we wish to address, we are all aware of the principles and framework. It Case 3 on finding of fact that's one of the points we are going to maintain, the bladder injury case, there is also case 13 and preliminary I appreciate that some of that is factual but there is the issue of the inquest and how one attaches weight to that and I think it is an important point where the partner* [that presumably should be Coroner] *is expressing an opinion, as they are not like you and sit there and make findings of fact like a judge in an inquest they look into conclusions and they are just expressing a view, it's an opinion based approach with the Coroner rather than a specific finding. Preliminary issue you and your colleagues would have picked up the sanction is really the thrust… "*

211. The Management Case was presented by Counsel Ms Criddle. She sought absolute clarity:

> *"With that in mind can I just be clear because I have a document that states Dr Gentry's grounds of appeal and there are 17 grounds of appeal, so just*

that I understand so out of those 17 grounds of appeal are replaced by the three grounds of appeal you have just outlined?"

212. To which Mr Butler is recorded as responding,

"Yes please, I apologise."

213. It is noteworthy that on appeal, no argument was pursued suggesting that the hearing process had been unfair.

214. The outcome of the appeal was communicated to Dr Gentry by letter dated 28 April 2021, page 2858.

215. At page 2865, we see within the Appeal Outcome letter, recording of an answer Dr Gentry had given to a question from Ms Criddle in relation to the allegation in the original Grounds of Appeal that the whole outcome of the Disciplinary was pre-determined and the Trust had already decided to dismiss her. Dr Gentry is noted as having responded that she had been too emotional and that she was not now saying that.

216. We note the following from the conclusions of the Appeal Outcome:

216.1. In relation to Case 3, Patient NG – the letter reads:

> "As the expert on the panel, Mr Nieto found conflicting statements from yourself. He was particularly concerned that did not write it down in the operation notes. When asked why you would check for bladder injuries if in over one thousand cases you've never caused an injury, there was no response. There is no record except for your statement that the bladder integrity was checked. In view of the adhesions there was a high risk of damage and should have checked using methylene blue. You still doesn't seem to accept that you caused the damage to the bladder and that there were things you should have done at the time of the surgery to mitigate them."

The finding of the Capability Panel was therefore upheld.

216.2. In relation to Case 6, Patient AI – the Appeal Panel found Dr Gentry's decision in not making a referral to Fetal Medicine Clinic was inadequate and the Capability Panel's findings upheld.

216.3. In relation to Case 7, Patient SA – the Appeal Panel upheld the Capability Panel finding that the care provided was unsafe and outside recognised accepted practice and that Dr Gentry had failed to adequately reflect.

216.4. In relation to Case 13, Patient LP – the Appeal Panel wrote:

> "Mr Nieto found conflicting statements from yourself. There was no record of the discussion about this patient going home because it would appear the piece of paper you wrote on has never been found. When asked if you said to the patient that she would go home against medical advice, you did ask the patient to sign the specific consent, you said it was more like a chat. To Mr Nieto, that meant that the patient was not told she would be going home against medical advice. All other statements, those from patient, midwife and registrar, appear to contradict your statement. The Coroner at the inquest rejected your statements as unreliable. The text messages from the patient to partner which suggest that the patient was expecting a C Section and was not against the idea. In summary, all the evidence seen would appear to go against your recollection of events and the piece of paper in which you say you wrote down the discussion has never been found."

The Appeal Panel upheld the Capability Panel's decision.

216.5. The Appeal Panel upheld the Capability Panel's findings in relation to the appraisal allegations.

216.6. On sanction, the Appeal Panel wrote:

> "The Appeal Panel also noted that, although your representative stated at the commencement of the hearing, that your statement consisting of 67 pages did not now represent your appeal, in your comments to the panel you said you stood by *"the majority"* of the contents. The Appeal Panel had reviewed your statement when considering all the documents supplied to the hearing. The Appeal Panel did not consider that the MHPS procedure had not been followed properly throughout the investigation and capability hearing as alleged. The Panel considered that there had been a genuine and concerted effort to organise a fair and comprehensive investigation and with expert external professional advice in the investigation and the hearing.
>
> The Panel also considered that every effort had been made to arrange the capability hearing and the appeal hearing at times that were convenient to you as well as the Panel Representatives.
>
> … The Appeal Panel did not consider on the basis of the evidence and the submissions as well as your statements at the hearing and during questioning that you had demonstrated insight or acceptance of the clinical failings identified. The Panel also considered that proper consideration had been given to the possibility of local performance assessment prior to convening a capability hearing, and that such an outcome was not feasible in the circumstances…

> The Appeal Panel considered that the sanction of dismissal was reasonable and appropriate, and that a fair / thorough investigation and process was followed."

217. The second claim to the Employment Tribunal claiming race discrimination was issued on 23 September 2020.

Conclusions

Protected Disclosures and Protected Acts

Issue 12.1, 12.2 and 12.3

218. On 17 January 2017 Dr Gentry told Dr van der Watt that she believed him to be a racist, that he deliberately targeted black and brown doctors with disciplinary action and that under his leadership, more ethnic minority, black and brown doctors had been subjected to disciplinary action.

219. Was that disclosure of information? The information being conveyed is that she believed Dr van der Watt to be a racist, that he had in her opinion, targeted and had in fact disciplined, more doctors of ethnic minority than white doctors. That contains a degree of specificity; that there is a statistical difference, a disproportionality, in the the number of white doctors as opposed to ethnic minority doctors who have been subjected to disciplinary action. Dr Gentry reasonably believed that making such disclosures is in the public interest, particularly when that somebody is the Medical Director of an NHS Hospital. Her motive is not relevant.

220. The statements are also protected acts. They are allegations that are connected with the Equality Act 2010, allegations that Dr van der Watt's conduct was contrary to a duty not to discriminate on the grounds of race, of contravention of that Act.

Issue 12.4

221. There is no dispute that on or about 4 or 5 May 2017, Dr Gentry said to Dr Barlow that Dr Coker's behaviour had endangered the health of a patient by the prolongation of an operation and the resultant exposure of that patient to unnecessary risk. Dr Gentry believed that it would be in the public interest to raise concerns that a colleague might be behaving in the way alleged, and rightly so. It therefore amounted to a protected disclosure.

The Alleged Detriments

222. The same alleged detriments are relied upon as either inflicted upon Dr Gentry because of her protected disclosures, (whistle blowing), because her protected act, (telling Dr van der Watt that she believed him to be racist towards her and thus victimisation) direct discrimination, (because

she is black Nigerian or in respect of those detriments alleged to have been inflicted by Dr Coker, because she is Yoruba) or racial related harassment. In each instance we have considered whether there are facts from which we could properly conclude that the alleged detriment amounted to prohibited conduct either as a whistle blowing detriment, as victimisation, direct discrimination or harassment. Where there are, we go on to consider whether the Respondent has satisfied us the reason for the detriment was not the protected disclosures nor the protected acts, whether Dr Gentry's race played any part in the reasons for the conduct complained of, (having regard to whether a hypothetical comparator would have been treated differently) or that it related to race and could be said to amount to racial harassment.

Detriment: 13.1: agitation and threatening recourse to lawyers

223. Dr van der Watt did become very agitated and threatened Dr Gentry with recourse to lawyers. Was his reason for that the protected act or disclosure, that she had accused him of being racist? We pause to consider whether his reaction might have been the manner in which she made that accusation. That was not his case, he did not suggest as such in his witness statement nor in cross examination. We find that Dr van der Watt threatened Dr Gentry with legal action because she had accused him of being racist. It is an inappropriate response from any manager, let alone a senior manager, to make such an accusation. It is surprising there was such a response given that Dr van der Watt had on a number of occasions received Equality and Diversity training from the First Respondent in accordance with its training cycle. To be threatened with legal action is a detriment. It is intimidating. It is likely to deter or discourage a person from raising allegations of discrimination. We find that it was a detriment inflicted upon Dr Gentry because of her allegation that he was being racist, which is both a protected disclosure and a protected act.

224. We considered whether Dr van der Watt's response amounted to direct race discrimination. That Dr Gentry had made the accusation and Dr van der Watt responded in the way that he did, are facts, without more, from which we could conclude had Dr Gentry been white, he would not have responded in the same way. However, we are satisfied on hearing the evidence of Dr van der Watt that his anger is because as a white South African he is very sensitive to being accused of racism and prejudice. We find that he would have reacted in the same way if anybody had made such an accusation, whether they be of any other ethnicity, including white British.

225. For similar reasons, we find that Dr van der Watt's reaction was not harassment. It was not related to Dr Gentry's race, it was related to the allegation, not the race of the person making the allegation.

226. Pausing for a moment from our analysis of each alleged detriment in turn, we make the observation that having made a finding Dr van der Watt responded to the accusation in this way that amounted to whistle blowing detriment and victimisation, is a factor to keep in our minds when considering in each instance a detriment is upheld, whether there are facts from which we could properly conclude without explanation that the detriment concerned amounted to a whistle blowing detriment, victimisation, harassment or direct discrimination. As are the facts that his response was apparently overheard by the Director of Human Resources, who was making notes, that no action was taken to address Dr Gentry's allegation, that no attempt was made to treat it as a grievance and to investigate and indeed, that no written note of that meeting was ever produced by the Respondent.

Detriment 13.2: the Second Respondent's decision to Review the Claimant's Appraisals

227. Dr van der Watt did not decide to review the Claimant's appraisals until February 2018. At that time, there were complaints from the midwives about Dr Gentry seeking to access notes, a year later. This exchange with Dr Gentry a year earlier was not Dr van der Watt's motive in February 2018 to review her appraisals. Whilst the burden of proof is shifted to the Respondents in this regard, Dr van der Watt has satisfied us that his motive was concerns about Dr Gentry that were before him in February 2018, not the protected acts or disclosures, not race could not be described as related to race and therefore not harassment.

228. It is Dr Barlow who instigated a review of Dr Gentry's appraisals in May 2017. The allegation is not that *his* actions in relation to the appraisals amounted to a detriment. That there were genuine concerns about Dr Gentry's appraisals is corroborated by the unconnected investigation and concerns expressed by Dr Quist-Therson as set out in their letter of 2 May 2017 at page 782.

Detriment 13.3: subjecting the Claimant to a Disciplinary Investigation in June 2017

229. Dr Barlow instigated this investigation because of reports he had received from Dr Coker about Dr Gentry and it was appropriate for him to do so. He similarly instigated an investigation into Dr Coker, because of Dr Gentry's protected disclosure, and rightly so. Dr Barlow satisfied us that genuine concerns were the reasons for instigating the investigation and discrimination played no part in his decision making. His decision was not related to race, nor because of Dr Gentry's disclosure to him in relation to Dr Coker, but because of Dr Coker's disclosure to him about Dr Gentry.

Detriment 13.4: Third Respondent's threat about December 2017, "to deal with" *the Claimant*

230. We found that this conversation did not happen.

Detriments 13.5 and 13.6: Complaints of the two matrons to Dr Coker in or around December 2017 and the alleged instigation of those complaints by Dr Coker in relation to Patient ED

231. There are insufficient facts to suggest without explanation, that the matron's were motivated in any way by race, or that their actions were related to race, or because of the protected acts/disclosures. Even if there were, we have seen from Dr Quinn's Report at page 1705 that ordinarily, after three pulls with forceps one would expect to resort to caesarean section and from the report, we can see that the midwives had good reason to be concerned that Dr Gentry had resorted to seven pulls. This was one of the matters that the independent external expert in the field thought was something that should be considered for disciplinary action, although he also recognised there was a genuine dilemma, see pages 1753 / 4. We accepted the evidence of Dr Coker that she had no involvement in this at all. She did not instigate the midwives drawing this to the attention of Dr van der Watt. Although we noted that Mr Alfolaemi suggested to Mr Quinn there was an element of vindictiveness, see page 1254, that was in the context of the general observation that midwives do not like consultants. An unfortunate state of affairs if true, that does not mean the midwives in particular reporting Dr Gentry because of her raised protected acts or protected disclosures.

Detriment 13.7: Dr van der Watt's decision in or around December 2017 to organise a Serious Incident Review and / or failure to arrange a Preliminary Investigation before arranging such a Review

232. Although there are facts sufficient to shift the burden of proof to the Respondent in respect of Dr van der Watt's actions, we found that there is no policy that suggests he should have arranged a Preliminary Investigation. We were satisfied that there were genuine concerns that required investigation. We find that those concerns were the reason for the Serious Incident Review and not because of Dr Gentry's race, not because of her protected acts, nor protected disclosures nor related to race.

Detriment 13.8: the fabrication by two midwives in early 2018 of an allegation that Dr Gentry was so aggressive towards them that they felt intimidated

233. We did not find Dr Gentry's evidence credible. The three statements were consistent with each other. Midwife Turner's Statement is corroborated by what she said to Dr Quinn, page 191. It is the reports of midwives Turner and Fake to which Dr Gentry objects. Their accounts are corroborated to a degree by the statement from Danielle Boyd. From our observations of Dr Gentry, what they write about her seems to us credible. There is no evidence that what they have written was fabricated. We have not heard evidence from the midwives, but we find that there are no facts from which

we could properly conclude without more, that they fabricated allegations motivated by race, the protected acts, the protected disclosures or that it could be regarded related to race.

Detriment 13.9: the allegations by the two midwives referred to above were instigated by Dr Coker

234. We found Dr Coker a credible witness. In this instance, we find that she genuinely took steps to remove herself from dealings with or in relation to Dr Gentry. There is no evidence that she instigated these complaints from the midwives and we accept her evidence that she did not.

Detriment 13.10: the assertion by Dr van der Watt that three rather than two midwives had made the above mentioned allegation

235. Firstly, we make the observation that there were three statements, although two by way of complaint about Dr Gentry's behaviour. By reference to Dr Gentry's own note of this meeting at page 1122, she herself records Dr van der Watt as first of all saying that there were complaints from two midwives and very shortly afterwards, referring to three separate complaints. Even if that is an accurate record of what Dr van der Watt said, it is obviously a slip of the tongue. It is not a detriment. We do not consider the previously mentioned facts relating to Dr van der Watt as sufficient to properly conclude, absent explanation, that he was motivated by the protected acts, the protected disclosures or Dr Gentry's race. Nor could that slip of the tongue be regarded as an act of harassment, it is not related to race.

Detriment 13.11: the decision to cause an external investigator to review Dr Gentry's practice and the communication by Dr van der Watt of that decision to Dr Gentry upon her return to work after her sister's funeral, on 6 February 2018

236. A Review of Dr Gentry's practice is obviously a detriment. However, we find that such a review was appropriate, given the concerns raised as summarised for example in the letter from the National Clinical Assessment Service dated 13 February 2018, reciting what Dr van der Watt had spoken to them about, page 1121. Whilst the above mentioned facts may be sufficient to enable us to conclude properly, without explanation, that the Review of Dr Gentry's practice instigated by Dr van der Watt could be motivated by her race or her protected acts or disclosures, or could be viewed as an act of harassment. We find that there were genuine causes for concern.

237. To appoint an independent external investigator is not a detriment. If there was any truth in Dr Gentry's assertions about her difficulties in her relationships with Dr Coker and Dr van der Watt, the appointment of an independent investigator is to her benefit, not her detriment. It is appropriate from the First Respondent's point of view to ensure a fair and objective review is undertaken. The proposal there be an independent

investigator is endorsed by the NCAS and the policy at page 248, paragraph 6.8, provides for an independent investigation. Even if one could regard the appointment of an independent external investigator as a detriment and even if the above mentioned facts were sufficient to shift the burden of proof, we are satisfied that the motive for appointing an independent investigator was not in any way the protected acts, the protected disclosures or Dr Gentry's race. Nor could it properly be regarded as related to race.

238. There is no evidence that Dr van der Watt knew Dr Gentry had just come back from her sister's funeral on 6 February 2018. Dr Gentry came out with an explanation as to why she said he did for the first time in cross examination, which we found not credible. We find that Dr van der Watt did not know Dr Gentry was returning from her sister's funeral when he spoke to her on 6 February 2018.

Detriment 13.12.1: Dr Coker giving Dr van der Watt false information

239. It is not clear what is being referred to here. Paragraph 21 of the Particulars of Claim, cross referred to in the List of Issues, says no more than this. Dr Gentry does not deal with the allegation in her witness statement. We find that Dr Coker did not give Dr van der Watt false information.

Detriment 13.12.2: the choosing by Dr Coker of witnesses

240. We find that Dr Coker did not choose the witnesses.

Detriment 13.12.3: the coaching of witnesses against Dr Gentry

241. We find that nobody coached the witnesses, there is no evidence of anyone coaching anybody.

Detriment 13.12.4: interference by Dr van der Watt with the process, and / or the procuring by Dr van der Watt of the replacement of Dr Wood as the Case Manager by Dr Borkett-Jones, the latter being a close associate of Dr van der Watt

242. We note that the focus of submissions in this regard, as in the wording of the issue itself, is in the replacement of Dr Wood with Dr Borkett-Jones rather than Dr van der Watt overriding Dr Wood's decision to allow Dr Gentry to return to work from her exclusion.

243. Dr van der Watt stood down as Case Manager, but he remained as the Respondent's Medical Director.

244. It is not clear to us how it is said that Dr van der Watt was interfering with the process, he was not. If it were argued that Dr van der Watt overruling

Dr Wood in the decision to allow Dr Gentry back to work, there were genuine concerns voiced to him by Dr Gentry's clinician colleagues.

245. We find that Dr Borkett-Jones was not a close associate of Dr van der Watt. He was the most senior doctor within the Respondent organisation, with 10 years previous experience as Medical Director and he came from a different department.

246. The allegations are not upheld.

Detriment 13.12.5: the failure to interview witnesses proposed by the Claimant

247. In submissions, Dr Morgan focused on the Respondent's failure to interview Dr Rigby and Midwife Russel. They were two people involved in the care of patient LP. They are not in Dr Gentry's list of people that she asked Dr Quinn to interview, set out at page 2985. The allegation is that he did not interview those who she proposed, she did not propose Dr Rigby and Midwife Russel.

248. Dr Quinn interviewed 33 people, (page 1947). As recorded in our Findings of Fact, there was a reasonable decision not to interview Dr Nanduri. The suggestion that Dr Quinn should have interviewed Dr Rigby and Midwife Russel was not raised until the hearing and sadly, Dr Quinn did not have an opportunity to comment. From reading the very thorough report, we are satisfied the investigation and report was a genuine attempt to be thorough and that the decision making was not tainted by the protected act, the protected disclosure, race discrimination, or that it could be regarded as related to race. We are satisfied that Dr Quinn was not influenced in who he interviewed, there was no input, overt or covert, from Dr van der Watt, Dr Coker or anybody else in the Respondent's management.

249. We agree that it would perhaps have been helpful for Dr Rigby and Midwife Russel to have been interviewed at the time in relation to the care of LP, but it was not proposed by Dr Gentry that they should be.

Detriment 13.12.6: changing the scope of the investigation, including by changing the terms of reference and extending the period of review

250. The decision to increase the terms of reference was that of Dr Wood, see page 1303. There is no evidence that Dr van der Watt or Dr Coker had anything to do with it. Dr Wood is the person who later said Dr Gentry ought to be allowed to return back to work from her exclusion. The increase relates to two further cases that had come to light, including that of LP. It would have been remarkable if that had not been added to the terms of reference. We accept on the evidence that Dr van der Watt and Dr Coker had nothing to do with this, whilst we did not hear evidence from Dr Wood, on the evidence before us there is nothing to suggest her reason for doing so was in any way anything to do with the protected acts, the

protected disclosures, Dr Gentry's race nor could it have been regarded as an act of race related harassment.

251. As for extending the period of review, the various copies of the terms of reference documents all appeared to refer to a period of review of five years. Dr Quinn in his witness statement at paragraph 12 seems to acknowledge that the original intention was a two year period of review, that because of the number of concerns being raised and after taking advice from the Practitioner Performance Advice Service, (PPAS) which had replaced the NCAS, he and a Chief Nurse, Ms Carter, decided to extend the period of review to five years. Dr van der Watt says the same at his paragraph 26. We find that the intended initial review period was two years, which was extended to five years but in terms of the terms of reference, they were always for five years. Whilst the above mentioned facts mean that we might properly conclude, without more that Dr van der Watt's decision to increase the period of review was because of the protected acts, Dr Gentry's race or an act of harassment, we are satisfied that the period of review was extended for genuine reasons, (concerns about Dr Gentry's practice) and was not motivated by the protected acts or the protected disclosures, race played no part in the decision to extend the period of Review.

Detriment 13.12.7: the rejection of Dr Gentry's objection of inclusion on the Disciplinary Panel of the external specialist Dr Salvesen on the basis of his relationship with Dr Coker

252. We have found that Dr Salvesen was not a friend of Dr Coker, nor in any kind of relationship with her other than the occasional need for a professional discussion.

253. The above mentioned facts are not sufficient on this allegation to put us in the position where we could conclude, absent explanation, that Ms Brown's rejecting Dr Gentry's objection to Mr Salvesen was motivated by the protected act, the protected disclosure or her race. In any event, we accept her evidence that rejecting Dr Gentry's objection had nothing to do with the protected acts, the protected disclosures, Dr Gentry's race and was not influenced in any way overtly or covertly by either Dr Coker or Dr van der Watt and her decision could not have been regarded as an act of harassment.

Detriment 13.12.8: on 6 February 2020 the Disciplinary Hearing proceeded to hear the First Respondent's Management Case against Dr Gentry without her being present

254. Ms Brown was the decision maker. We accept her evidence that Dr van der Watt and Dr Coker had no input or influence, covert or overt, in any of the decisions that she or the Disciplinary Panel made. The above mentioned facts are not a sufficient basis upon which we could properly conclude, without more, the decision of Ms Brown and the Panel were in

any way influenced by the protected acts, the protected disclosures or Dr Gentry's race. We accept that she knew about the protected acts from Dr van der Watt and she knew about the disclosure in relation to Dr Coker, but that is not sufficient to shift the burden of proof. The decision was not related to race and did not amount to race related harassment.

255. In any event, in regard to the fact that Dr Quinn's final report was published on 21 May 2019, eight nearly nine months earlier and that there had already been three postponements, the nightmare of trying to co-ordinate the diaries of so many busy professional practitioners, having regard to the rationale set out by Ms Brown at page 2193, (discussed further below) we find that these are the reasons for the Panel proceeding and not any of the proscribed grounds.

Detriment 13.12.9: conducting subsequent hearings without the Claimant being present

256. In fact, Dr Gentry did attend the subsequent hearings, except on the final occasion when the Panel convened to deliberate, at which neither party would have been expected to attend.

257. The List of Issues was amended in this respect at the instigation of Dr Gentry through Dr Morgan and the word, *"Claimant"* replaced by *"Panel"*. The complaint becomes a complaint that on each subsequent occasion Dr Gentry did attend, not all Members of the Panel were present. It is a matter discussed further below, but we accept that the reason for an incomplete Panel attending on subsequent occasions were the availability of panel members due to clinical commitments and the Covid outbreak. The protected acts, the protected disclosures and Dr Gentry's race played no part. The decisions could not properly be regarded as harassment.

Detriment 13.13: holding a meeting in June 2018 with the parents of the child who had died without consulting Dr Gentry or other medical staff who had been present at the material time and informing or giving the impression to the parents that Dr Gentry had missed an opportunity to save the child's life

Detriment 13.14: giving an account to those parents which was different from that set out in the original Root Cause Analysis Investigation Report concerning the death (including in particular in regard to Dr Coker's involvement in the same)

Detriment 13.15: revising that Report so as to make it critical of the Claimant, when the original version of the Report had not been critical of the Claimant

258. Dr Morgan in closing submissions deals with the alleged detriments (13.13, 13.14, 13.15) in relation to LP collectively. In short, he says that the decision makers were Dr Coker and Dr van der Watt or others acting as their unwitting tool. He cites the case of Royal Mail Group Limited v Jhuti [2020] IRLR 129. That case has the potential to assist Dr Gentry in the context of detriment for making protected disclosures, not in relation to

the discrimination complaints. The Respondents were dealing with upset parents following the death of their baby. It is a distressing subject matter for all. There is no obvious reason why Dr Gentry would be invited to be present with the parents in June 2018. The meeting does not appear to have been attended by anybody involved in the care of LP at the time. The attendees were people in managerial positions, taking responsibility on behalf of the Respondent. That is appropriate.

259. The minute of the meeting is at page 1390, from which it is not obvious why one might think that LP and her family were given the impression that Dr Gentry had missed an opportunity to save the child's life. The minutes record that LP had become aware that Dr Gentry was suspended and under investigation and complains that the Respondent was not open with her about that. It is not surprising that LP had become aware of Dr Gentry's situation because she was a nurse working at the same hospital.

260. However, the amended report subsequently produced, page 1641, includes as we have noted in the Findings of Fact, a statement that the investigation had identified that if the Obstetric Team (that is Dr Gentry and others) had followed policy, offered and actioned LP's request for caesarean section, then the baby would have been delivered on 26 September 2017 and the baby's death therefore avoided. It does appear that Dr Gentry, (and others on the Obstetric Team) were not consulted. That is not good. The authors of the report are Midwives Declan Symington and Danielle Boyd, and Consultant Obstetrician Ms Vikram. Whilst approval of the report is recited in the heading, by Divisional Director Dr Barlow and Medical Director Dr van der Watt, they were not involved in the preparation and authorship of the report.

261. Dr Gentry is entitled to feel aggrieved that the final report as presented to the Coroner, contained this variation in respect of which she had not been consulted.

262. However, there is no evidence that this was at the instigation, covertly or overtly, of Dr van der Watt or Dr Coker or that the decision makers were influenced by those two individuals; we find that they were not. There is no evidence from which we could properly conclude that the changes to the report were because of the protected acts or the protected disclosures, or because of Dr Gentry's race and it could not properly be described as an act of harassment.

Detriment 13.16: giving that revised Report to the Inquest in February 2020 without explanation for the revisions

263. That indeed appears to be what happened. It was a source of embarrassment to the Respondents and in particular to Ms Vikram, who was sent along to the inquest to give evidence about the report without her realising the changes that had been made. That is an instance of administrative incompetence which is surprising, given the circumstances,

one would have thought great care would have been taken. However, for the same reasons, we find there are no facts from which we could properly conclude without more, that this was because of the protected acts, the protected disclosures or Dr Gentry's race. Nor could it be described as an act of harassment.

Detriment 13.17: failing to provide legal advice or assistance to Dr Gentry in respect of the Inquest

264. On the facts, Dr Gentry asked for the assistance very late and the trust's Solicitors would clearly have been in a position of conflict of interest, given that she had provided the Coroner with a witness statement that contradicted the position taken by the Respondent in its report. It was therefore appropriate for the Respondent to tell Dr Gentry that she would have to arrange her own representation if she felt that she needed representation and in fact, Dr Gentry was able to attend the inquest the next day with legal representation. There is no evidence from which we could properly conclude that the decision making of the Legal Department in this regard is because of the protected acts, the protected disclosures, or Dr Gentry's race. Nor that the act could be described as harassment. In any event, we accept the explanation as set out above.

Detriment 13.18: failing to take any action against any other person involved in the care of the child in question

265. Dr Gentry does not say who she thinks other action should have been taken against. We are unable to discern who it is that action might have been taken against and if there was such a person, we undoubtedly would have been taken to evidence about that. This allegation is not upheld.

Conclusion on Whistle Blowing detriment and discrimination

266. The one allegation upheld on the facts, is that Dr van der Watt became agitated and threatened recourse to lawyers in response to Dr Gentry's protected acts and disclosures in the meeting on 13 January 2017. She did not issue proceeding claiming whistle blowing detriment and dismissal until 8 June 2020, 3 years and 5 months later. She did not issue proceedings claiming race discrimination until 23 September 2020, 3 years and 8 month's later. The claims are substantially out of time. There was no series of similar acts, no continuing act, to bring the claims in time. It was reasonably practicable for the whistleblowing claim to have been brought in time; there was no impediment to Dr Gentry taking advice and bringing this claim during her employment. It is not just and equitable to extend time in relation to the discrimination claim, given the lack of impediment and the very substantial delay. We accept that this particular aspect to the claim has merit, (although any award of compensation would have been modest) but the time limit is there for a reason and should be adhered to and the sheer length of delay is too long.

267. The whistleblowing detriment and race discrimination claims therefore fail.

Automatic Unfair Dismissal - within the meaning of s.103A ERA 1996

268. Dr Gentry says that she was dismissed because of her protected disclosures, in other words that she was dismissed because in January 2017 she had told Dr van der Watt that she believed him to be a racist and in May 2017 made an allegation to Dr Barlow with regard to the behaviour of Dr Coker. The Respondent says the reason for dismissal was Dr Gentry's capability. In accordance with the case of Kuzel, in these circumstances it is for Dr Gentry to provide some evidence that the reason for dismissal was the disclosures and if she is able to do that, we look to the Respondent to satisfy us that the real reason was Dr Gentry's capability.

269. Potentially, the facts which might suggest the reason for dismissal was whistle blowing might be as follows:-

269.1. Drs van der Watt and Barlow were involved in the disciplinary process, albeit to a limited degree. Dr van der Watt was certainly involved in setting up the initial investigation, the appointment of the Case Manager and the replacement of Dr Wood with Dr Borkett-Jones in that capacity. Dr Barlow was involved in dealing with LP.

269.2. Ms Brown was aware of the disclosures.

270. That seems to be about the extent of it. It is noteworthy that Dr Morgan does not appear to attempt to spell out for us why he says whistle blowing was the reason for dismissal.

271. We do not consider the foregoing as sufficient, but we proceed on the basis that it is and we note the following:-

271.1. There were concerns about Dr Gentry's capability before the disclosures.

271.2. The incidents giving rise to concerns about Dr Gentry's capability were independently and thoroughly investigated without interference overtly or covertly by anybody who might have had a motive to do so because of the disclosures, in particular Dr van der Watt, Dr Barlow and Dr Coker.

271.3. The independent investigator, Dr Quinn, dropped allegations that in his assessment were mere bad luck or part and parcel of daily medical practice in Obstetrics, as did Ms Brown and the Disciplinary Panel.

271.4. One needs to remember the context, this is not about somebody involved in the manufacturing of a product or running a business efficiently, it is about the health and lives of people and babies. The importance of high standards of competence could not be greater.

271.5. The Disciplinary Panel's conclusions in respect of sanction, where they refer to a pattern of fundamentally poor decision making, lack of adherence to good practice guidelines, poor record keeping over a relatively short period of time and Dr Gentry not demonstrating an openness to learning and reflective practice, all ring true and are consistent with the evidence before the Disciplinary Panel.

272. Our conclusion is that the reason for dismissal was Dr Gentry's capability and her protected disclosures played no part whatsoever in the decision to dismiss. He claim of automatic unfair dismissal for having made protected disclosures fails.

Ordinary Unfair Dismissal – contrary to s.98 ERA 1996

273. As we have just noted, the reason for dismissal was capability. There was a potentially fair second reason for dismissal, conduct. This is in respect of what the Respondent described as probity. However, the Disciplinary Panel's conclusions in that regard were that its findings in relation to Dr Gentry's failings with regard to her appraisals warranted a First Written Warning only.

274. The question therefore arises, whether the decision to dismiss lay within the range of reasonable responses.

275. There is no doubt in our minds that the Disciplinary and Appeal Panels believed that there were unacceptable failings in Dr Gentry's capabilities. Whether those beliefs were based upon reasonable grounds and after conducting a reasonable investigation gives rise to questions about the fairness of the process which is the understandable thrust of Dr Morgan's submissions.

276. In the first place, it is important to repeat that there was a thorough investigation, in that Dr Quinn's investigation was very thorough, carried out even handedly and objectively. There are of course significant subjective elements, because it is subjective clinical judgement which was being investigated. Dr Quinn was an independent expert in the field, well placed to make that subjective judgement, as was Dr Salvesen on the Disciplinary Panel and Dr Nieto on the Appeal Panel.

277. Dr Gentry argues that it was unfair for the Disciplinary Panel to proceed to hear the Management Case in her absence on 6 February 2020. Their reasons for doing so are clearly spelt out in Ms Brown's email of

7 February 2020 which begins at page 2193. Of particular significance to us in forming our view is:

277.1. The 6 February 2020 was the fourth occasion on which commencement of the Disciplinary Hearing had been scheduled. Two of the three earlier postponements were because of the Respondent, not Dr Gentry and they had refused her first two requests for postponement, but all the same, this was the fourth occasion on which the hearing was scheduled to start.

277.2. Two years had elapsed since the investigation into Dr Gentry began and one year since the investigation report had been published. Justice delayed is justice denied, from both sides' perspective. With the passage of time, memories fade. As time passes there is an ongoing cost to the Respondent and a gap in its resource.

277.3. An Occupational Health Report was obtained for the purpose of deciding whether or not to proceed and the advice was in the first place,

> *"She is able to instruct a representative, understand the issues involved and follow the procedures. However, she will need to have her representative present."*

In other words, she is fit to attend if she has a representative present. We are not ignoring the fact that the fourth point of advice was the suggestion that two or three dates in the near future should be offered to which her representative could commit.

277.4. It is up to Dr Gentry to arrange representation and after such a passage of time and three earlier adjournments, the obligation on her to do so and so avoid further delay in the process, is the greater.

277.5. It is extraordinary that Dr Gentry had not revealed to the Respondent who her Clinical Representative was, which made it impossible for the Respondent to speak to them directly and try to arrange mutually convenient dates.

277.6. There would be significant further delay because of the inevitable problems in co-ordinating the diaries of busy professionals, some from other organisations.

277.7. It is in fact, contrary to Dr Gentry's assertions, within the Respondent's Policy that it is permitted to proceed, section 9.1 at page 251, (previously quoted):

> "The Trust retains the right, after a reasonable period (not normally less than 30 working days), to proceed with the Hearing in the Practitioner's absence: the Trust will always act reasonably in deciding to do so."

278. Given these very particular facts, our conclusion is that it is within the range of reasonable responses of a reasonable employer to have proceeded with the Capability Hearing on 6 February 2020 in the absence of Dr Gentry.

279. Dr Gentry objects that it was unfair of the Respondent to send to her its Preliminary Findings and invite her to respond. One can see how at first blush, that may appear so. However, in the context of the Respondent having made a reasonable decision to proceed in her absence, to then set out for her its preliminary findings on what it has heard from the Respondent helps her and is not unfair. It enables her to focus on precisely what it is that concerns the Disciplinary Panel rather than trying to assess what the Panel might be most concerned about during the course of a hearing. Alternatives might either have been for the Panel simply to have gone on and drawn its conclusions, or to have sent her a recording of the hearing and invited her to respond. Sending Dr Gentry preliminary findings so that she could focus her response is in our judgement, within the range of decisions a reasonable employer might make in these particular circumstances.

280. It was argued that Ms Brown should not have been involved in the Disciplinary Panel because she was close to Dr van der Watt. It did not escape our notice that she consistently referred to Dr van der Watt as, *"Mike"* throughout her evidence. We are satisfied, however, that she was not, *"close"* to him; their offices happened to be on the same corridor and they inevitably interacted as work colleagues would, but not to the extent that would disqualify her from chairing the Panel, hearing the allegations against Dr Gentry and doing so in a fair and objective fashion, as we find that she did. Dr van der Watt was not involved in the disciplinary process once the investigation was underway and did not overtly or covertly influence Ms Brown in any way.

281. It is without doubt a significant concern, rightly pursued by Dr Morgan, that a reduced Panel consisting of Ms Brown, Dr Salvesen, (the external Clinician) and Ms Bevan from HR heard Ms Gentry on 6 March 2020, with two Members of the Panel missing. Then again on 3 April 2020, only Ms Brown and Ms Bevan hearing from Dr Gentry, (Dr Salvesen having been caught up in the Covid outbreak and unable to attend).

282. The Full Panel convened to decide the outcome on 12 May 2020.

283. Members of the Panel absent on 6 March 2020 and 3 April 2020 were the Respondents own two Clinicians. Dr Gentry lost the opportunity to persuade them they should not find that she was lacking in capability, but

on the other hand, the independent clinician might, it could be argued, be more open to such persuasion when they heard from her on 6 March 2020. Of course what was said then, was conveyed to the absent clinicians at the Full Panel meeting on 12 May 2020.

284. Only non-clinical matters were discussed on 3 April 2020, which is not to say there is no need to involve clinicians in a discussion about non-clinical matters, but it is relevant to note clinical matters were not discussed on 3 April 2020.

285. We were concerned that the Disciplinary Panel may have drawn on the Coroner's Inquest without giving Dr Gentry the opportunity to comment. The Coroner's Report was dated 26 February 2020, but the analysis of evidence and the conclusions were given orally on 19 February 2020 at the end of the Inquest. We know from the Disciplinary Outcome Report at page 2563, paragraph 5, that the Panel obtained from the Respondent Legal Department, key witness statements and a summary of key evidence from the Inquest, which was also passed on to Dr Gentry before the hearing on 6 March 2020. She therefore had an opportunity to comment. We note in passing that the Coroner in reaching his conclusions, had the benefit of hearing evidence from Dr Rigby and Midwife Russel.

286. It is significant that on Appeal, Dr Gentry was represented by Counsel and as we have seen, the Appeal was advanced on very narrow grounds, the facts in the bladder injury case, what weight should be attached to the outcome of the Coroner's Inquest in relation to LP's baby and the sanction applied. With the benefit of expert Legal Representation, it was not argued that the process followed by the Disciplinary Panel was unfair and that the decision to dismiss should be set aside on the basis of any failings in the process followed.

287. We are not comfortable with endorsing a disciplinary process that involves hearings at which not all members of the decision making panel are present and that those present vary from one hearing to the next. In the vast majority of cases, that would not be fair. On the particular facts of this case; the delays, the difficulties in co-ordinating diaries, the onset of Covid, the differentiation between hearing evidence about clinical matters and non-clinical matters, the absence of any complaint on appeal where the employee has the benefit of legal representation, we conclude these various decisions that might ordinarily render a process unfair, are within the range of reasonable responses of the reasonable employer on these particular facts.

288. Had we decided differently, we would have found that even if a different more conventional process had been followed, including one further adjournment to accommodate Dr Gentry's Clinical Representative, all members of the Panel attending all hearings, we are satisfied, given the clinicians certainty as to the unsatisfactory nature of Dr Gentry's practice,

there is a one hundred per cent chance that she would have been dismissed anyway.

289. It is also likely that further delay would have resulted in Dr Gentry facing a further charge, one of dishonesty in relation to the events with patient LP and in the evidence that she gave to the Coroner. That would very likely have led to her dismissal.

290. Any hearing as to Remedy on the conduct of Dr Gentry and the evidence which she gave to the Coroner would have been likely to have resulted in a finding that it would not be just and equitable to make any award of compensation, pursuant to the case of Devis v Atkins.

291. For these reasons, the Claimant's claim of unfair dismissal pursuant to section 98 of the ERA fails.

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Employment Judge M Warren

Date: 27 October 2023

Sent to the parties on: 1 November 2023

For the Tribunal Office.