EMPLOYMENT TRIBUNALS

Claimant: Mr D Nasralla

Respondent: HCA International Ltd t/a HCA Healthcare UK

Heard at: Central London Employment Tribunal
On: 10, 11, 12, 13 and 14 June 2024

Before: Employment Judge Keogh

Representation
Claimant: Mr D Welch (Counsel)
Respondent: Mr H Dhorajiwala (Counsel)

JUDGMENT

1. The claimant's claim for constructive unfair dismissal succeeds.

2. In relation to remedy, the claimant's basic award is reduced by 50% as a result of the claimant's contributory fault. The claimant's compensatory award is reduced by 50% as a result of the claimant's contributory fault and is limited to a three month period, being the time at which he would have resigned in any event had a fair process been followed.

REASONS

The Claim

1. The claimant, a consultant HPB, General and Liver Transplant Surgeon, brings a claim of constructive unfair dismissal against his former employer, a provider of private healthcare. In brief summary, the claimant complains about a restriction of his duties, which he considered to be a suspension without good reason, and a subsequent disciplinary process at the end of which he was given a final written warning and a number of recommendations were made imposing conditions on him. He also takes issue with the way in which the respondent communicated with private health care insurers. He contends that these matters amounted to

fundamental breaches of the implied term of trust and confidence, entitling him to resign.

The Issues

2. The issues were set out in the case management order of Employment Judge Grubb dated 7 February 2024. At the outset of this hearing the parties were asked to confirm that no amendments were required. Mr Welch indicated that there was an issue missing, namely failure to follow the grievance procedure. This took the respondent by surprise, this being a substantial additional point. I considered paragraph 17 of the case management order which gave the parties a period in which to write to the Tribunal if the list of issues was wrong or incomplete, otherwise it would be treated as final unless the Tribunal decided otherwise. I determined that if the claimant wanted to amend the List of Issues at this stage an application would have to be made. No application was forthcoming.

3. At the beginning of the hearing the parties requested that the Tribunal deal with liability only. Given the number of witnesses to hear from and the length of the documentation I agreed this was proportionate. However, it was later discussed and agreed that if there was a finding of unfair dismissal it would also be convenient at this stage to consider the questions set out at paragraphs 2.6.4 to 2.6.10 of the List of Issues in relation to remedy, namely *Polkey*, contributory fault and uplifts and/or decreases for breaches of the ACAS Code of Practice.

4. The List of Issues was therefore as follows, using the numbering in Employment Judge Grubb's summary:

1.1 Was the Claimant dismissed?

1.1.1 Did the Respondent do the following things:

1.1.1.1 Suspended the Claimant without good reason on 27/04/23

1.1.1.2 Failed to follow a fair disciplinary procedure, in that the Respondent:

1.1.1.2.1 Failed to provide adequate reasons to the Claimant for suspending him on 27/04/23.

1.1.1.2.2 Failed to provide sufficient clarification or reasons following the Claimant's requests on 28/04/23, 12/05/23 and 23/05/23.

1.1.1.2.3 Failed to appropriately address the concerns raised by the Claimant about the disciplinary process in his email to Dr Bracknell, dated 15/6/23.

1.1.1.2.4 Gave the Claimant one day's notice of the disciplinary hearing held on 10/07/2023, which he says was insufficient time to prepare.

1.1.1.2.5 Informed the Claimant that if he were unable to attend the disciplinary meeting on 10/07/23 it would be held in his absence.

1.1.1.3 Informed his private insurance provider to remove recognition, preventing the Claimant from being able to practice privately.

1.1.1.4 Issue a final written warning valid for 12 months, which was too harsh under the circumstances.

1.1.1.5 Require the Claimant to:

1.1.1.5.1 have monthly meetings with the CEO and Sean Preston for an unspecified period;

1.1.1.5.2 be allocated a mentor; and/or

1.1.1.5.3 be allocated a supervisor to oversee the Claimant's practice.

1.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

1.1.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

1.1.2.2 whether it had reasonable and proper cause for doing so.

1.1.3 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

1.1.4 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?

1.3 Was it a potentially fair reason?

1.4 Did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

Remedy:

2.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.6.5 If so, should the Claimant's compensation be reduced? By how much?

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

2.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

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

2.6.9 If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

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

…

2.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

5. In relation to breach of the ACAS Code of Practice, the respondent relied on the claimant's failure to appeal the disciplinary outcome. Mr Welch for the claimant was given time after his submissions to produce a list of the respondent's alleged breaches.

6. No application was ultimately made to amend the List of Issues. My attention was drawn to **Scicluna v Zippy Stitch Limited & Ors** [2018] EWCA Civ 1320, where the Court of Appeal gave guidance that where parties have agreed a list of issues, the matters to be determined in the substantive hearing and on any appeal were properly limited to those agreed issues, particularly where professional advocates were instructed; and **Mervyn v BW Controls Ltd** [2020] ICR 1364 in which it was observed that it is good practice at the start of a hearing, with either or both parties unrepresented (which was not in fact the case here) to consider whether any list of issues previously drawn up properly reflects the significant issues in dispute.

7. As there were no applications to amend the List of Issues drawn up by Employment Judge Grubb, I have limited my deliberations to the matters contained on that list.

The Hearing

8. I received a bundle of documents and witness statements from the claimant and his former secretary Mrs Jane Wilson, and Mrs Maxine Estop Green (CEO of Princess Grace Hospital where the claimant worked), Professor Matthew Wilson (Interim Chief Operating Officer), Dr Kathryn Oakland (Chief Medical Information Officer) and Mr Neil Buckley (Vice President of the Physician Services Group) for the respondent. I heard oral evidence from all witnesses. I received written submissions from the respondent, heard oral submissions from both parties, and subsequently received a typed copy of the claimant's oral submissions. I considered all the written and oral evidence and the documentary evidence in the bundle to which I was referred and the submissions made. If I do not mention a particular fact or dispute in this judgment, it does not mean I have not taken it into account, only that it is not material to my conclusions. All my findings of fact are made on the balance of probabilities.

9. Prior to the hearing both parties had made applications for unless orders in respect of disclosure and the claimant had made an application for a witness summons in respect of Dr Cliff Bucknall, Chief Medical Officer. At the outset of the hearing the respondent indicated that it was not pursuing its application in respect of disclosure. The claimant sought disclosure of various emails and a policy document as set out in the claimant's witness statement, and sought an unless order in respect of a report from Dr Windsor. The respondent agreed to prepare a supplementary bundle in relation to the emails and policy, however after some initial confusion confirmed that Dr Windsor had no knowledge of such a report. A supplemental bundle was produced in due course for the remaining documents. After discussion, the claimant confirmed he would not pursue the application for a witness summons.

10. The parties also helpfully produced an agreed cast list and chronology. I did not treat the chronology as evidence or agreed fact and drew my own conclusions from the primary evidence before me.

11. No reasonable adjustments were required for the parties or witnesses.

Findings of fact

12. The claimant was employed by the respondent as a consultant Hepato-Pancreato-Biliary and General Surgeon from 19 July 2021. His contract of employment provided for a basic salary, together with additional remuneration in the form of a 'Compensation Plan'. This was expressed in clause 2.5 of the contract to be subject to amendment, variation or withdrawal at any time.

13. In respect of hours of work, the contract provided:

    "4.1 Your hours of work will normally be 8 hours per week … between Monday and Saturday.

4.2 As a senior employee you will be required to work such additional hours as may be necessary for the proper performance of your duties without extra remuneration…"

14. The claimant also worked 12 PAs (the equivalent of 48 hours per week) undertaking complex surgeries at the Royal Free Hospital.

15. The respondent is a private healthcare provider. It was not in dispute that there are differences between surgical practice for this type of provider and an NHS practice, notably in the levels of support available. For example, in the NHS the consultant has a team of nurses and junior doctors available, whereas these layers of additional support are not available at a private healthcare provider. A model often used by private healthcare providers, including the respondent, is to afford 'practising privileges' to consultants. The claimant however was employed.

16. The evidence in this case centres around two of the claimant's patients, referred to throughout the hearing as 'Patient A' and 'Patient B'.

17. In summary, the claimant spent several months from September 2022 to December 2022 working up Patient A for major surgery for a hilar cholangiocarcinoma. It is not in dispute that without surgery his life expectancy was a few weeks. On 30 September 2022 there was what the claimant describes as a 'brief interaction' when Patient A was an inpatient for a different procedure. I accept the claimant's evidence that he saw Patient A on the ward. He introduced himself and wished Patient A well for his procedure. The claimant did not make a record of this interaction in Patient A's notes. The claimant undertook three video consultations with Patient A subsequently, but did not at any point prior to the day of surgery conduct any physical examination of Patient A. Patient A sadly passed away on 4 January 2023.

18. On 17 January 2023 a physician wrote to senior managers of the respondent outlining a number of patient safety concerns they had in relation to 9 patients. This led the respondent to commission a clinical review of all 9 cases. One of those cases was Patient A. No formal HR process was used to conduct this review. It was carried out by Dr Michael Fertleman, who reported on 20 February 2023. In relation to Patient A, it was noted that as this involved a patient who had died and was subject to a Coroner's investigation, he would not comment further. The claimant was not made aware of this report.

19. In his report Dr Fertleman was critical of the clinician who had initially raised concerns, due to breaches of confidentiality. I accept Mrs Estop Green's evidence that the reason no disciplinary action was subsequently taken against that clinician was because they had blown the whistle in respect of the patients concerned, so it was not considered appropriate to discipline them.

20. Patient A's case was referred to the Coroner's Office for review, and on 2 February 2023 confirmation was received that the Coroner's Office had no concerns in relation to Patient A's care.

21. A Learning From Death (*"LFD"*) review was conducted into Patient A on 20 February 2023. It is noted in this review that Patient A was turned down for surgery by a different MDT and had a complex past history. It was concluded that the surgery was successful. The assessment of the function of the residual liver was ultimately not correct but this would not have been apparent pre-operatively. The respondent's MDT had considered surgery to be viable. There was a concern in relation to the lack of endocrine input, which was left for further discussion. I accept Mrs Estop Green's evidence that although she did not know about this at the time, there were a number of questions she would have asked for more information about had she been aware, and it would not have made a difference to subsequent events.

22. Patient A was discussed at the respondent's Morbidity and Mortality (*"M&M"*) meeting on 9 March 2023 and no concerns were raised with regards to the claimant's practice in relation to Patient A. However, I accept Mrs Estop Green's evidence that there were still a number of questions that she had following this meeting, and that the Head of Governance, Professor Haddad, had, having not attended the meeting but listened to a recording subsequently. The respondent's Chief Medical Officer, Dr Bucknall, and Medical Director, Professor Sina Dorudi, also had questions. Some of the matters raised in the complaint of 17 January 2023 had not been resolved.

23. As a result of these unresolved concerns, Dr Bucknall instructed that a desktop review should be carried out. Terms of Reference were prepared by Ms Judi Ingram, Divisional Vice President of Quality, and sent to Dr Philip Harrison. These stated:

    "This review is commissioned to assess the appropriateness, standards and decision making in relation to the clinical management of the care of a patient (A), who had been diagnosed with cholangiocarcinoma. The patient was under the care of Mr David Nasralla at The Princess Grace Hospital, HCA Healthcare Limited.

    The scope of the review is the following:

    1. Review of clinical management of Patient A who underwent surgery on 20th December 2022.

    2. Review of Patient A :

    a. Clinical review and assessment if the management of Patient was appropriate and in
    particular:
    i. if surgery was indicated;
    ii. the appropriateness of surgery and the impact of the patient's past medical history of myeloma and crohns disease

iii. if pre, intra, and post-operative management was optimally managed and if indicated specialist reviews obtained
iv. was a pre-operative referral to an endocrinologist indicated for advice on the management of the patient's hypopituitarism, and if surgery should have been delayed until this was available.

Proposed Scope of Investigation

A. Patient A only
B. …

The reviewer is asked to review these and to provide a report setting out the outcome of the review, as well as an assessment of the appropriateness and expected practice against relevant professional standards and best practice. The report needs to provide sufficient information to support decision making on the next steps required.

The Reviewer is not asked to make any recommendations as to any next steps."

24. I accept Mrs Estop Green's evidence that this type of review was standard where there were unanswered questions, and that the requirement for an assessment of the appropriateness and expected practice against relevant professional standards and best practice was a standard inclusion in reviews of this type.

25. Dr Harrison completed his report on 30 March 2023. He headed his report, "Report of investigation into concerns raised in relation to Mr David Nasralla'. No evidence was adduced from Dr Harrison as to why he entitled his report in this way. Mrs Estop Green considered it to be a mistake, as the Terms of Reference required a review. Although the claimant was the lead consultant there were a number of other clinicians involved in Patient A's care. There is no evidence that Dr Harrison was asked to do anything other than conduct the review set out in the Terms of Reference. Given the content of the report, I find it likely that Dr Harrison labelled his report in this way because he had, on conducting the review requested, found matters that concerned him in relation to the claimant. The Terms of Reference do not support a suggestion that this was a formal investigation conducted under the remit of the respondent's disciplinary policy. For example, an investigation requires prior identification of allegations to be investigated, which was not the case here.

26. This report was provided to Dr Bucknall and Ms Ingram by email dated 6 April 2023. The email stated:

"Please find attached my completed review of case [A]*. As you will read there are a number of significant failings that either contributed to this patient's death or could have resulted in serious harm.*

I am happy to discuss my conclusions with you if needed. I am sure that you will share this with Mr Nasralla in order to get his comments/reflection. I

assume you will send a version with my details redacted as I would not wish to start a North-South London HPB divide."

27. No evidence was given as to the reasons Dr Harrison wanted his details redacted, however it is apparent from the email that he assumed the report would be shared with Mr Nasralla.

28. The report was not however shared with the claimant, but it is not in dispute that it was the source of subsequent allegations against him. I accept Mrs Estop Green's evidence that in fact it was normal for such reviews to be done without informing the consultant.

29. I accept Mrs Estop Green's evidence that Dr Bucknall told her he was going to discuss the findings of the report in more detail with the case manager. Other enquiries were also going on in the background at this time in relation to the MDT discussion which had taken place on 6 December 2022.

30. On 12 April 2023 the claimant performed surgery on Patient B. Patient B sadly passed away on 17 April 2023. Matters therefore moved on and Dr Harrison's report was not shared.

31. On 20 April 2023 the Coroner's Office confirmed that there were no concerns in relation to Patient B's care. However, I accept Mrs Estop Green's evidence that in light of the proximity to Patient A's death, this was a matter for concern.

32. A decision was therefore taken on around 25 April 2023 to place a temporary restriction on the claimant's practice while a review into both deaths was undertaken. That decision was taken by Dr Bucknall, and it is not challenged that he discussed this with Professor Wilson on that date, as Mrs Estop Green was due to be away.

33. I accept the evidence of Mrs Estop Green that it was not uncommon practice at the respondent where patient deaths were being investigated for steps to be taken to protect patients, and that consultants were usually cooperative about this. Mrs Estop Green referred to the respondent's policy, 'Corporate responding to concerns regarding a practitioner's practice policy', which discusses convening a local Decision Making Group to discuss concerns regarding a consultant's practice and makes provision for interim restriction of practice or interim suspension while an initial risk assessment is carried out but without having had the opportunity fully to investigate concerns. The claimant rightly pointed out that this policy relates only to consultants with 'practising privileges', rather than employed consultants, for whom there is no similar policy. However, I accept Mrs Estop Green's evidence that although the policy is not related to employees the general principles were still applied by the respondent to employees.

34. Mrs Estop Green's witness statement confirms that rather than the desktop exercise that had gone before, it was decided there was a need to review the claimant's decision making in respect of both Patient A and Patient B. I

accept her evidence in cross examination that at this point a closer examination of the matter was started by Dr Bucknall and his team. I also accept Professor Wilson's evidence that when he spoke to Dr Bucknall, Dr Bucknall indicated that he had instructed an independent review and that the claimant would be allowed to contribute when appropriate. That is what was intended at that time, and accords with what Professor Wilson says in his email to the claimant on 4 May 2023 (discussed below).

35. On 26 April 2023 the claimant was invited to a meeting by Professor Wilson for 27 April 2023, and informed him that it was regarding a clinical issue that required discussion. After a further email asking for more specific information, the claimant telephoned Professor Wilson and was told the matter would be discussed in more detail the following day.

36. A meeting was then held on 27 April 2023 between the claimant, Professor Dorudi and Professor Wilson. In his witness statement, the claimant contends that at this meeting he was informed that following the recent patient death and, as a consequence of the findings from the 'secret investigation' conducted by Mr Bucknall, he was to be suspended pending a further investigation. In cross examination the claimant said that the meeting mainly consisted of Mr Dorudi apologising, that Dr Bucknall had got the wrong end of the stick and was bothered about MDTs, he had told Dr Bucknall there was nothing to worry about but Dr Bucknall would not listen. What was said in cross examination accords with the unchallenged evidence in his witness statement that after the M&M he was informed by Professor Dorudi that Dr Bucknall had spoken to him about the case. Professor Dorudi told him that Dr Bucknall had misunderstood the documentation from the MDT about Patient A, and had sought a separate investigation from a liver specialist.

37. Professor Wilson's unchallenged account of this meeting is slightly different. He says that Professor Dorudi informed the claimant that the two patient deaths were under review and that a temporary surgical restriction was going to be placed on him. It was agreed that while the patient reviews were ongoing, the claimant would not perform further surgery at the respondent and would also temporarily be removed from the PGH's on call rota. The claimant agreed in cross examination that he was told the restriction on his practice was not disciplinary in nature, but was to enable a review of the patient deaths for the purpose of patient safety.

38. On balance, because of the concessions made by the claimant in cross examination, I prefer Professor Wilson's account of this meeting to that set out in the claimant's witness statement. The claimant was told there would be temporary restrictions on his practice (not a suspension) for reviews into the deaths of Patient A and B to be undertaken for the purpose of patient safety. Professor Dorudi was apologetic about this.

39. Following the meeting on 27 April 2023 a letter was sent to the claimant on the same date which confirmed the temporary restriction on duties and that the respondent was reviewing both patient deaths. It was again reiterated

that the restriction was not disciplinary action, and that no decision had been made in that regard.

40. The claimant then emailed Professor Dorudi and Professor Wilson on 28 April 2023 stating that he had reflected on the discussion and would like to clarify a few things:

"- I had not been given any prior warnings that concerns had been raised about my clinical practice at the Princess Grace Hospital

- I have not been informed of any specific concerns about my clinical or surgical practice that have been raised by any members of the PGH staff with whom I work. In particular, I do not believe that any concerns about my practice have been raised by administrative staff, theatre staff, specialist nurses, ward nurses, anaesthetists, ICU doctors, ICU nurses, other surgeons or any physicians with whom I have worked. Is this correct?

- I was informed that an independent review of the case of had been performed. This was done outside of the M&M and outside of any governance process. Is this correct?

- I was not offered the opportunity to contribute to the independent report on [A]*'s case, I have not been offered the opportunity to review the report and have not seen the findings.*

- I have the impression that the current review of the two cases in question is being performed in a somewhat informal nature. In particular it does not seem to fall within the formal remit of any M&M or Clinical Governance Process. Is this correct? If not, please could you advise me under which part of employee practice review does this investigation fall.

- What is the scope of this investigation? In particular:

a. Is it based only on these 2 cases or on my wider practice?
b. Is it purely a review of the notes or involve speaking to other healthcare professionals?
c. Who is conducting the investigation?
d. To whom does the investigation report?
e. Do I have the opportunity to contribute to the investigation?
f. Do I have the right to see the investigation results prior to their publication?

- What are my rights of appeal against this process?

- It is not clear from your letter as to whether this Investigation can result in any disciplinary action. Please can you clarify what are the potential outcomes?

Of note, I strongly refute the assertion in your letter that my practice poses a risk to patient safety. My morbidity and mortality rates for major surgery

across my practice are low and certainly fall below internationally defined benchmarks for HPB surgery.

I would be grateful if these points could be incorporated into the case notes for this investigation and would appreciate your timely response to my questions."

41. He also emailed Dr Bucknall, stating:

"I completely understand why their deaths would cause eyebrows to be raised but would very much appreciate the opportunity to discuss these cases directly with you; something which has not previously been possible. This will allow me to understand your specific concerns but also ensure that I can put across my perspective, particularly regarding the communication and decision-making processes."

42. Professor Wilson acknowledged the claimant's email and said he would need time to consider before responding. However, Mrs Estop Green subsequently informed Professor Wilson she would take over the process, so he did not respond further.

43. The claimant sent a further email to Professor Dorudi and Professor Wilson on 4 May 2023, seeking an update on the status of 'the investigation' and a response to his email of 28 April 2023. Professor Wilson replied:

"The current status as I understand it is that Dr Cliff Bucknell, HCA's Chief Medical Officer, has instructed an independent review and that you will be formally invited to contribute imminently. I am sorry not to be able to offer more detail than that."

44. On 12 May 2023 the claimant emailed Mrs Estop Green and Dr Bucknall as follows:

"It has now been over 2 weeks since my surgical practising privileges at the Princess Grace Hospital were suspended and I was informed that an investigation was being conducted into my practice. To date, I am yet to receive any meaningful information regarding the basis for the investigation, the nature of the investigation and the anticipated timescale. It is my understanding that the investigation is being conducted outside of the hospital governance framework, apparently on the whim of a single individual. As a result I have already suffered demonstrable financial losses, reputational damage with clear implications for my future earnings.

Regrettably, I have been left with no choice other than to seek legal advice from a solicitor specialising in employment law. The lack of any attempt to adhere to due process represents a breach of UK employment law. This does not only apply to the manner in which the present investigation is being conducted but, even more so, to the previous investigation which I understand is serving as part of the basis for my current suspension.

With regards to the previous investigation related to the death of [Patient A], this appears to have been conducted in a secretive fashion. No attempt was made to inform me of the intention to instruct the investigation to be

performed, I was not informed that it had been completed, was not provided with a copy of the results and was not offered the opportunity to contribute to, or respond to, its findings. This represents a clear breach of due process with regards to UK employment law.

Regarding the present investigation, despite sending several emails in the past 2 weeks, I have not received any meaningful information or clarification for the various points I raised. In particular:

- The terms of reference of the present investigation have not been defined

o I have not been informed of the nature of the allegations against me

o I have not been informed which aspect of my practise is under investigation

o I have not been informed who is conducting the investigation

o I have not been informed to whom the investigation will report

o I have not been informed of a timescale for the investigation

Needless to say, this represents a beach of HCA's own regulations with regards to processes of governance and the manner in which disciplinary processes are conducted as well falling short of standards as defined by UK employment law. Perhaps more importantly, it is just unprofessional, disrespectful and discourteous to treat an employee in this way.

I would like to give HCA-UK the opportunity to rectify this situation before taking further legal action. Therefore, I request that you take the following steps before 5pm on Monday 15th May 2023 to address the situation:

- Schedule a fair and impartial hearing to address the allegations against me, in accordance with UK employment law.

- Provide me with full compensation for any losses I have incurred as a result of the breach of my employment rights.

If HCA-UK fails to take these steps within the specified timeframe, I will have no choice but to pursue legal action to seek redress for the breach of my employment rights."

45. Dr Bucknall responded on 15 May 2023, apologising for the delay as he had been away. He stated:

"Background

Your work at Princess Grace Hospital and HCA UK is under an employment contract rather than 'practising privileges'. At the meeting with Professors Wilson and Dorudi on 27 April 2023, it was agreed you would not perform any further surgery and would be temporarily taken off the Hospital's on-call rota whilst a review of two patient deaths was undertaken. It was confirmed this was not disciplinary action and that your pay would be unaffected by this temporary decision. For ease, I attach a copy of the letter sent to you after that meeting.

Review

It was explained to you at the meeting that the pause was to allow us to review two recent patient deaths. You wrote emphasising your wish to be involved in the reviews (which I'm grateful for) and I am aware you have sent Langa Dube a mortality report you have prepared in relation to the second patient's death. The next meeting of the Morbidity & Mortality Committee at Princess Grace Hospital is scheduled for June and I know you've contacted both Langa and Mr Al Windsor to ask if that might be brought forward. Given also the number of Consultants involved in this patient's care, as is apparent from your report, we are looking at that review being undertaken at one of our other hospitals and I am speaking to the relevant people on that, currently.

Next Steps

I believe Ms Estop Green, is looking to schedule a meeting with you for later this week and will leave her assistant to liaise with you on a convenient time for this, separately."

46. Before this email was sent, Mrs Estop Green and Dr Bucknall had a conversation (as discussed in Mrs Estop Green's witness statement) in which Dr Bucknall emphasised his concerns arising out of the preliminary reports they had received. His view on reflection was that a further desktop review would not suffice and an independent investigation would need to be carried out. They discussed whether this should be under the disciplinary procedure and whether the claimant would need to be suspended. Mrs Estop Green was already intending to schedule a meeting with the claimant later that week, and it was decided she would take advice in the meantime.

47. The claimant sent a further email on 17 May 2023 to Dr Bucknall and Mrs Estop Green:

"If this Investigation is not part of a Disciplinary process, I assume that it is being conducted under the auspices of Clinical Governance. I am yet to be provided with information about which part of the governance framework is overseeing this Investigation and the defined process related to this. I understand from the Princess Grace Hospital Governance Lead, Langa Dube, that she is not involved in the investigation.

I note that your email makes no reference to the Investigation that was performed into the death of that was conducted outside of the M&M or Governance Process. Please could you confirm if that report is part of the basis for my present suspension? And again, please could I request a copy of that report?

Regarding my meeting with Ms Estop Green, it is unclear what role she is playing in this Investigation. Please could this be clarified in advance of my meeting with her? Please could I request that minutes are kept of that meeting and that I am provided with a copy of those minutes to review prior to their approval?

I am being subject to an Investigatory process, the precise nature of which is yet to be defined. If this is incorrect, please could you provide me with a

copy of the terms of this Investigative process. This is a requirement of the Acas Code of Practice on disciplinary and grievance procedures and a requirement of UK employment law.

I note that the timescale of this investigation remains undefined. This continues to have a measurable impact on my income. Yes, I continue to receive my basic HCA salary of £50000 per annum. As is defined in my contract of employment, when my personally invoiced income exceeds this salary, I receive that additional income minus a percentage. This top-up is applied on a quarterly basis and, over the past 18 months, I have consistently exceeded this income threshold. Already this month I have had to arrange for another surgeon to perform a distal pancreatectomy on one of my patients, have had to turn down requests to perform joint cases for patients with HPB malignancy, and have had to defer or cancel other lower complexity procedures. The income lost thus far is close to £5000. Please could you advise how HCA intends to remunerate me for these measurable and demonstrable financial losses?"

48. A further email was sent by Dr Bucknall on 17 May 2023, stating:

"Further to our previous correspondence, I have identified Professor William Drake, Consultant Endocrinologist, to undertake a review of patient 's care – specifically, to assess the appropriateness, standards and decision making in
relation to the endocrine clinical management of the care of the patient. I would emphasise that this is not a review of your practice, but a review of that patient's care at Princess Grace Hospital. Professor Drake is aware that you were the patient's Consultant and he has confirmed there would be no conflict of interest in him performing that review. Please let me know by return if you are aware of anything that would (or might) create a conflict as regards Professor Drake undertaking that review.

…

I note you've sent a further email today and will respond on that separately, once I've had an opportunity to review."

49. The claimant replied on 18 May 2023 confirming he was not aware of any conflict.

50. On 23 May 2023 the claimant emailed Dr Bucknall and Mrs Estop Green stating:

"It is now approaching 4 weeks since my arbitrary suspension from the Princess Grace Hospital. At my meeting with Profs Dorudi and Wilson I was advised that the investigation was likely to be concluded quickly and I should not need to cancel my operating list on 31/5/23. I have got 2 patients scheduled for that date who are well known to me, been extensively worked up and have rescheduled life events around their planned surgery date. It is not appropriate to cancel them and considered poor GMC practice to unnecessarily pass them to other clinicians who are not familiar with their case.

I have still not received any meaningful information about the nature of the investigations into my practice and not received any substantial responses to my previous emails. This lack of communication or professionalism is appalling and certainly not acceptable from a large healthcare organisation. My last email from Dr Bucknall even suggested that the investigation into 's death was not concerned with my practice, but only with the endocrine aspects of his management. The basis for my suspension remains unclear and I would request to proceed with my planned operating list scheduled for 31/5/23. Please can you urgently confirm this is acceptable.

As I have stated previously, my frequently audited practice across the NHS and PGH over the past 2 years shows that I have significantly lower morbidity and mortality rates than internationally defined benchmarks for HPB surgery. I have no record of any allegations against any aspect of my clinical practice in the NHS or at Princess Grace Hospital since my appointment as a consultant in 2019. I have continued to operate at the Royal Free Hospital throughout this period of suspension at PGH and have performed 3 liver transplants, 2 whipples procedures and 2 liver resections in this time, as well as other benign cases. None of these patients have suffered any morbidity to date, despite the magnitude of these operations. It is frankly outrageous that my present suspension is permitted to continue in an open-ended fashion without any adherence from HCA-UK to any of the norms or standards with regards
to due process as defined by UK Employment Law.

If this situation is not resolved by the end of my discussion tomorrow with Ms Estop Green, I will be proceeding with legal action and seeking remuneration for lost income.

Your urgent attention, response and resolution would be appreciated."

51. As discussed above, I accept Mrs Estop Green's evidence in her witness statement and in cross examination that in the background to this, reviews had been underway into the claimant's care of Patient A by Dr Bucknall and his clinical governance team, which gave rise to some concerns. I also accept her evidence that there would not necessarily be anything recorded on paper by Dr Bucknall and his team who were conducting those reviews. The claimant was however aware that reviews were being undertaken, because he had been told this in the meeting on 27 April 2023.

52. As a result, a decision was ultimately taken by Mrs Estop Green to commence a disciplinary investigation into the claimant's conduct as regards Patient A, and that, having considered alternatives, a full suspension was required.

53. The claimant was invited to a meeting with Mrs Estop Green on 24 May 2023. At that meeting he was formally suspended and informed that an investigation would be conducted by Dr Kathryn Oakland. As the M&M for Patient B had not yet take place, it may be necessary to add further issues. (In fact no issues were ever added in relation to Patient B.) During this meeting the claimant reiterated to Mrs Estop Green that he had not had

responses to his emails of 12, 17 and 23 May. Mrs Estop Green confirmed that she would respond in the next few days.

54. The claimant was provided with a letter confirming his suspension on the basis of patient safety and setting out five allegations against him relating to the care of Patient A ("the Original Allegations"). The letter confirmed that if the claimant had any queries about the suspension or the investigation, he should contact Mrs Estop Green.

55. Around 2 hours after the meeting the claimant's secretary, Mrs Jane Wilson, received a telephone call from her line manager. I accept Mrs Wilson's evidence that she had applied to change her hours from full time to part time, and around two weeks previously it had been agreed that she would work 50% and only work for the claimant, having previously assisted a number of consultants. In the call on 24 May 2023 she was told that her line manager had had a call with Mrs Estop Green, who had informed her she was no longer permitted to continue working for the claimant and would need to be redeployed elsewhere. This was because the claimant's practice was too busy for a part time secretary. Mrs Estop Green denies having such a conversation with the line manager. Given the limit of the issues in this matter I have not found it necessary to resolve whether she gave that instruction or not, but I do accept that is what Mrs Wilson was told. Mrs Wilson eventually resigned.

56. Mrs Estop Green emailed the claimant on 26 May 2023 to respond to his previous correspondence. The responses were as follows:

"Email of 12 May

Your email of 12 May expressed concern over the lack of detail about the "investigation [that] was being conducted into [your] practice" and requested that HCA schedule a fair and impartial hearing to address the allegations against you and provide you with full compensation for any losses you had incurred as a result of the alleged breach of your employment rights.

I consider that Dr Bucknall's email of 15 May addressed the points you raised and attach a further copy for reference. The specific issues of concern for which you have since been suspended were set out in the suspension letter sent to you on 24 May 2023.

Your email suggested you were being subject to an investigatory process and that you were "suspended". Whilst it is correct that some temporary changes to your work at the hospital had been agreed at the meeting of 27 April, I consider it inaccurate to describe that as a 'suspension'. It is also incorrect that you were being subject to an investigatory process. As had been explained to you at the meeting of 27 April and in Dr Bucknall's email of 12 May, we were reviewing two recent patient deaths, not investigating your practice. The ACAS Code of Practice were not applicable.

Your email also referenced the quarterly 'top-up' element of your salary, referring financial losses. As you note, this is paid on a quarterly basis (with

the last payment being made in April and the next one is due in July). There has been no financial loss to you at this time.

Email of 23 May

This email was sent the day before our meeting repeating questions about the nature of the investigations into your practice. As I have already set out above, there has been no investigation into your practice and instead – as we have advised, consistently – there have been reviews into two recent patient deaths. The first patient death has, as you know, already been considered at a meeting of the Princess Grace Hospital Morbidity & Mortality Committee but as you will have seen from Dr Bucknall's email of 17 May, a further review is taking place (Dr Bucknall's email refers to a review of the endocrine clinical management of the patient). Dr Bucknall's email of 15 May (copy attached for ease) noted the Morbidity & Mortality Committee review of the second patient's death would take place at another of HCA UK's hospitals and further details will be provided when this is confirmed.

I note what you have said in your email about your practice across the NHS and also at Princess Grace and would re [sic] *the points above about your incorrect reference to the position at that date being a "suspension".*

Meeting of 24 May

At our meeting on 24 May, I explained to you that an investigation would now take place into five allegations which had been made about your practice and that you were suspended, pending that investigation (which would be undertaken in accordance with our Disciplinary Policy). At the meeting, we advised that Ms Kathryn Oakland would be the Investigating Officer, supported by Ms Stephanie Grainger, a senior HR colleague. It will be Ms Oakland's decision how to conduct the investigation into those allegations.

I said at our meeting that I would send a soft copy of the letter I handed to you as well as a copy of the Disciplinary Policy, both of which are attached to this email. I would also take this opportunity to remind you of the support which can be accessed through our Occupational Health team or Employee Assistance Programme; either Darren (who I have copied into this email) or I, can provide further details if helpful."

57. The claimant was not satisfied with this response and, having spoken with a solicitor, on 31 May 2023 he emailed Mrs Estop Green and Dr Bucknall, copying in HR:

"Thank you for your email dated 26/05/2023. I have now had the opportunity to review this with a solicitor specialising in employment law.

I note that your email suggests that the initial process conducted between 27/4/2023 and 24/5/2023 was not an 'investigation'. This appears to be an attempt to, in retrospect, redefine the nature of the events over the preceding 4 weeks. I now understand the strange content of Dr Bucknall's email dated 15th May, which seemed incongruous relative to the events and actions that had preceded it. It also leads to the inevitable question of: if this

process was not an investigation into my practice, then why was I suspended whilst the process was on-going? Such semantic gymnastics are almost laughable when the facts of the matter clearly show them to be untrue.

Similarly, your assertion that for the duration of time from 27/4/2023 to 24/5/2023 I was not 'suspended' but rather under 'temporary changes to my work' is also absurd. I am a surgeon and, integral to this job, is the need to operate. Preventing me from being able to operate prevents me from being able to perform the duties that are integral to my job. This is demonstrated by me having to cancel cases, reallocate them to other surgeons or restrict the referrals that I received during that time. It is not possible to work as a surgeon without operating. As such it is very clear in law that this period of 'temporary changes to my work' constituted a period of suspension.

It is the clear assertion from my solicitor that these processes should have been conducted under the ACAS Code of Practice, which they were not.

Furthermore, as is clearly detailed under the ACAS Code of Practice, before allegations are levelled against an employee, that employee should have the opportunity to respond to, and put across, their perspective with regards to the allegations. It is now approximately 5 weeks since my initial suspension and I have still not been offered the opportunity to contribute in any meaningful way to the investigation.

I also note from your email that you have failed to acknowledge or respond to several of the points raised in my previous correspondence.

In particular: with regards to the previous investigation related to the death of [Patient A]*, which was conducted in a secretive fashion. I was clearly informed by Sina Dorudi and Mathew Wilson that this investigation was part of the events contributing to the decision to suspend me from 27/4/2023. As you know, no attempt was made to inform me of the intention to instruct that investigation to be performed, I was not informed that it had been completed, was not provided with a copy of the results and was not offered the opportunity to contribute to, or respond to, its findings. This represents a clear breach of due process with regards to UK employment law. Please could I be provided with a copy of that investigation by 5pm this Friday 2nd June 2023.*

As you may be aware, last Friday 26th May 2023 I met with my Responsible Officer at the Royal Free Hospital, Dr Jane Hawden, together with Prof Joerg Pollok (Clinical Lead in HPB and Liver Transplant Surgery, Royal Free Hospital) and Dr Doug Thorburn (Divisional Clinical Director for Liver and Digestive Health, Royal Free Hospital). Please can you confirm that you have received their correspondence stating that there are no concerns with regards to my practice at the Royal Free Hospital. In particular, my participation across all MDT with which I am involved at the Royal Free Hospital is unblemished. They have further urged HCA to ensure that those conducting the present investigation declare any conflicts of interest, and that the investigation is conducted in a transparent and unbiased fashion?

Following on from this please could you urgently clarify the following:
• who is conducting the investigation

• to whom the investigation will report
• what is the timescale for the investigation, including when will I be invited to contribute to it.
Please could these points be clearly clarified by 5pm this Friday 2nd June 2023.
As you are aware, last Friday 26th May 2023, Dr Sean Preston made much appreciated attempts to act as an intermediary
between Dr Bucknall and myself. The feedback from this interaction was that Dr Bucknall had requested access to the
notes of [Patient A]*. This seems a somewhat perverse request given that all of the notes are in HCA's possession*

Please could you clarify what this refers to?

I continue to suffer substantial financial losses arising from HCA's actions. Please can you clarify the process in place to ensure that I am appropriately remunerated for present losses, reputational damage, and the impact on my future earnings.

I trust that you will take this matter seriously and take the necessary steps to address the situation. If you have any questions or concerns, please do not hesitate to contact me."

58. On 2 June 2023 the respondent wrote to various private insurance providers informing them of the claimant's suspension. All the letters were of the same nature:

"We need to inform you that we have suspended one of our Consultants, whilst an investigation takes place, in accordance with our Disciplinary Policy.
Might you share this with the appropriate colleague/department please?

[The claimant's details are given]

The concerns are conduct related, entailing his judgement and decision making related to the management of a patient's care, who subsequently died.
Our investigation is currently underway and we will of course update you following the disciplinary hearing."

59. Also on 2 June 2023 the Claimant sent two emails to Mrs Estop Green and Mrs Wilson's line manager regarding what he perceived to be the removal of his secretarial support, having been told by Mrs Wilson of the conversation she had on 24 May 2023. Mrs Wilson's line manager replied and Mrs Estop Green also replied responding to each query raised. She also confirmed that she did not advise Mrs Wilson's line manager to change the claimant's secretarial support, and that the timing was coincidental.

60. On 7 June 2023 the claimant wrote again to Dr Estop Green, Dr Bucknall and HR about this issue.

61. On the same date he emailed Dr Oakland, requesting clarification on a number of points around the investigation process, including asking where the allegations had originated from. He noted that he had limited access to the respondent's portal and requested the respondent's guidelines for processes related to the HPB MDT or cancer MDTs in general, guidelines for booking patients for surgery, and any email correspondence between Mrs Wilson and the HPB MDT coordinator.

62. Dr Oakland accepted in evidence that she did not provide the email correspondence. In her reply to the claimant's email on 12 June 2023 she indicated that there would be discussions at the investigation meeting as to what documentation might be required, and that is what in fact happened. She did however provide an MDT policy document for cancer generally, there being no HPB specific policy at that time. The claimant's further reply sought only the specific policy.

63. On 13 June 2023 Mrs Estop Green wrote a lengthy letter to the claimant responding to his correspondence of 31 May and 7 June 2023. She confirmed that the claimant should not correspond with anyone other than herself and Dr Oakland.

64. She noted that there appeared to be some confusion over how the matter had evolved, and confirmed the position to be as follows:

"• As you are aware following concerns relating to the death of two patients in your care, you were asked to restrict your duties with us so as not to undertake surgery. The death of the second patient has not yet undergone a Morbidity and Mortality Review. The death of the first has, but elements of the patient's care are being further reviewed. Such reviews are not a disciplinary investigation. You agreed to a Temporary Restriction of Duties (which covered surgery and participation in the on-call rota) and this was confirmed to you in a letter of 27 April 2023 by Professor Mathew Wilson. As a senior practitioner in both the NHS and in private healthcare, you will know that this is standard practice in a situation where patient deaths are being clinically reviewed. You will also know that this restriction did not equate to a disciplinary process but was simply a precautionary step to protect patient safety while the clinical reviews of two patient deaths were undertaken. If you were not aware, this was explained to you in the letter of 27 April.

• During the course of the further review into one of these patients, concerns arose about the way in which you had conducted yourself. These concerns were of a serious nature and had implications for the safety of your practice. You were therefore suspended by me at our meeting on 24 May 2023. During this meeting I explained the issues that had arisen and these were set out in a suspension letter sent to you that same day. We have since initiated a disciplinary investigation that, as you know, is being undertaken by Dr Kathryn Oakland and Stephanie Grainger.

Regardless of whether you agree with the reasons why your practice was restricted and then subsequently suspended, this is what occurred and there has been complete transparency with you about this. The M&M

Review into patient was not a disciplinary investigation and to the extent we consider it is relevant to your practice or to the current investigation, it will be shared with you but otherwise you do not have any right to a copy of it."

65. The letter went on to deal with a number of other subjects, including contact with the Royal Free Hospital, arrangements for the investigation, and instructions in relation to the claimant's availability during working hours (believing incorrectly at that time that the claimant's hours were fixed), the claimant's pay during suspension (namely that, as a matter of discretion, the claimant would be paid what he would ordinarily have earned under the compensation plan), and the situation regarding secretarial support.

66. An investigation meeting was held on 14 June 2023. During the course of the meeting, Dr Oakland asked the claimant when he had first examined Patient A. He confirmed, *"When he came in for portal vein embolisation on 1st October."* There was then a discussion whether this had been recorded in the patient notes. It was confirmed the claimant next saw the patient on the day of his operation. At the end of the meeting the claimant requested a copy of the previous investigation, raising concerns about the transparency of the process.

67. The following day the claimant emailed Dr Bucknall, Mrs Estop Green and HR in response to Mrs Estop Green's email of 13 June 2023. He asserted that the suggestion that prohibiting a surgeon from operating or doing surgical on calls does not constitute a suspension was 'demonstrably false'. He requested a copy of the previous investigation report by 23 June 2023 or a grievance would be raised. He went on to respond to the other areas of discussion in Mrs Estop Green's letter.

68. On the same day he emailed Dr Oakland and her HR support Ms Grainger, to provide a proposed witness list, and after a back and forth emailed again attaching documents he wished to refer Dr Oakland to via a Dropbox link. He confirmed a discussion had in the meeting regarding grievances he intended to raise, first in relation to the 'secret investigation' and secondly regarding the withdrawal of secretarial support.

69. On 20 June 2023 the claimant provided his formal written response to each of the allegations to Dr Oakland.

70. On 30 June 2023 Mrs Estop Green responded to the claimant's email of 15 June 2023, stating, *"I am deeply concerned by the tone of your email which I consider unacceptable."* She asserted that the claimant had ignored her reasonable management instructions regarding only contacting her, that there was no basis for his assertion that her letter of 13 June 2023 was 'demonstrably false, and dealing with other matters raised in the claimant's correspondence. The letter went on to address the grievances the claimant had intimated to Dr Oakland that he intended to bring:

"Turning to the investigation, I understand that you have sought to raise two grievances with the investigators. This is not their role and so I have considered how to deal with these.

One grievance appears to be raised on behalf of your former secretary. If my understanding is correct, I can confirm that you may not raise a grievance on behalf of another employee. That would have been for her to do when she was an employee. If that is not correct and the grievance relates to you, this will need clarification but can be addressed once the current disciplinary process has been completed.

The other grievance appears to concern the genesis of the current disciplinary process. Any matters directly relevant to the concerns raised about you should be raised with the investigators who can then consider whether any steps need to be taken in respect of these matters. To the extent this issue is not relevant to the concerns raised about you, it will be considered after the completion of the current disciplinary process."

71. She then discussed the issue of when the claimant had seen Patient A:

"Also on the investigation, I understand that a concern has arisen about when you saw patient A. I have therefore expanded the current concerns being investigated to ask Dr Oakland to consider the following additional issue:

• *That in relation to patient* [A] *there is no adequate record of you seeing the patient before the day of major surgery and that this failure to keep appropriate records is reflective of a reckless or deliberately wilful approach to inadequate patient record keeping.*

As you are aware, my original letter suspending you envisaged the potential for additional concerns to arise (this is not unusual in the context of an investigation) and I have decided in this case, it would be better for Dr Oakland to look into this as part of her investigation rather than commencing a separate process."

72. The claimant replied on the same day, stating that he had serious concerns with regards Mrs Estop Green's impartiality, including a complaint that she had pre-emptively attempted to dissuade him from bringing a grievance. He urged her to recuse herself from the disciplinary process.

73. Following this the respondent decided that Mr Neil Buckley should take over conduct of the investigation from Mrs Estop Green.

74. On 2 July 2023 the claimant emailed Ms Grainger in relation to the minutes of the investigation meeting, complaining that these did not accurately reflect the concerns he had raised, particularly as regards the withdrawal of secretarial support and the secret investigation. Ms Grainger replied on 5 July saying she did not understand the relevance of the secret investigation to the disciplinary allegations.

75. On 4 July 2023 the claimant replied to Dr Oakland in relation to the additional allegation, having taken legal advice. In summary, he asserted that the interaction with Patient A had occurred on 30 September 2022 (not 1 October) and it was a brief interaction in which he introduced himself and

wished him well with the procedure. He confirmed that he did not record the interaction in the patient notes, which he said were missing.

76. Dr Oakland produced her investigation report on 5 July 2023. She found that three of the five original allegations were substantiated (one of these only in part), and found the new allegation to be substantiated.

77. On 6 July 2023 (a Thursday) at just before 11pm Mr Buckley sent the claimant 4 emails, attaching Dr Oakland's report and around 100 pages of documentation. He invited the claimant to a meeting at 9am on 10 July 2023 (the following Monday). The invite letter set out the four allegations found to have been substantiated by Dr Oakland, and added a further two allegations relating to the manner in which the claimant had corresponded with Mrs Estop Green and an alleged disregard of management instructions.

78. The letter concluded as follows:

"I would therefore like to invite you to attend a disciplinary hearing which I will chair to discuss the concerns identified by the investigation I have set out above and also in relation to your exchanges with Ms Estop Green so I can hear your side of this. I understand from an email you sent Ms Estop Green on 3 July that you are unavailable on 11 and 12 July and that you have booked annual leave on 29 July 2023 to 13 August 2023. I have therefore arranged this meeting to take place at 9am on Monday 10 July 2023 at 2 Cavendish Square, London W1G 0PU. I am keen to meet as quickly as possible to resolve these matters.

I would encourage you to attend this meeting and you may be accompanied by an HCA colleague or trade union representative. If you are unable to attend this meeting for any reason, I am happy to consider any written submissions you wish to make provided they reach me before the meeting. Please note that given your non-availability on 11 and 12 July and difficulties with my subsequent availability, this time and date will not be moved and if you are not able to attend, the hearing will go ahead in your absence (hence why I have said I will consider written submissions from you if you are not able to attend).

As I have said I very much hope that you will attend the hearing and it is in your interests to do so. I am obliged to warn you that the hearing could result in no sanction or any informal or formal sanction available under the HCA Disciplinary Policy up to and including dismissal on grounds of gross misconduct if that is considered appropriate. If I issue any sanction (whether formal or informal) against you, you will have the right to appeal that decision."

79. On 7 July 2023 at 11.27am the claimant emailed Mr Buckley and HR noting that there were important omissions from the investigation report, and he would inform of any further considerations he wished to be taken into account in the meeting on Monday as he identified them.

80. At 12.53pm he emailed Dr Oakland, providing 'investigation feedback'.

81. On Saturday 8 July 2023 at 22.26pm he sent a further email to Mr Buckley raising further concerns regarding the disciplinary process. This included further detail in relation to the examination of Patient A. In relation to the timing of the disciplinary hearing, he stated as follows:

"1. It cannot be understated the degree of short notice that has been provided for this meeting. I received four emails from Mr Leach between 22:50 and 23:04 on 06/7/2023, containing over 50MB of documents for me to review. I was provided with one working day in which to review all of the content prior to the meeting scheduled for 9am on Monday. Considering the seriousness of the allegations that are levelled against me, and the potential sanctions, this is clearly not a reasonable timescale in which to prepare for such a meeting. ACAS guidelines make it clear that employers should provide employees with reasonable advance warning of these meetings in order that they may attend adequately prepared.
2. Following on from this point, this short notice has also made it impossible to arrange adequate representation to accompany me to this meeting. This again reflects the fact that there was not reasonable advanced warning provided for this meeting.
3. The lack of reasonable advanced warning does not provide sufficient time to review all of the documentation with which I have been provided, nor sufficient time to prepare a comprehensive response.
I am sure there are other areas of this report and the extensive additional documents that were supplied which are also worthy of comment or clarification. Unfortunately having only 1 working day to prepare for this meeting makes comprehensive preparation almost impossible.
See you on Monday."

82. The disciplinary hearing took place at 9am on 10 July 2023 as planned. At the outset of the hearing, the minutes record the claimant saying:

"Raised concerns about the notice period given in advance of the meeting. Advised that he had only been given 1 working days' notice to review the materials provided for the meeting and to arrange a trade union representative to accompany him to the meeting. Does not feel that this is a reasonable notice period given the seriousness of the meeting."

83. In cross examination it was put to Mr Buckley that the claimant had said there was no time for him to get a representative. He suggested that he recalled the claimant saying this, and Mr Leach, HR, asked if he still wanted to proceed, and he did. However, when asked where this was in the minutes Mr Buckley conceded that the minutes did not support that. The minutes in fact only record *'Acknowledged DN's concerns'*.

84. I find that, given his repeated protestations, if the claimant had been given an opportunity to postpone the hearing and ensure that he was fully prepared and represented (if he so chose), he would have taken it. He was not given this opportunity.

85. In relation to the additional allegation on record keeping, which at this point was allegation 5, the minutes note the following discussion after recitation of the allegation:

DN	*I have admitted that I did not document this visit with the patient however, I have also mentioned that this is because the patient notes were not available for me to complete the documentation.*
NB	*May I go back to a comment you made earlier? Is it your understanding that the hospital will access Medbase to pull your clinic notes over?*
DN	*Yes, I would assume so. Medbase is not my system it is an HCA system that I was advised to use.*
NB	*At RFH do you use Epic?*
DN	*No, we use EPR*
NB	*Is this an integrated system?*
DN	*Yes*

86. There was no specific discussion as to any alleged failure to examine the patient at all prior to surgery.

87. The outcome of the disciplinary hearing was provided by letter dated 18 July 2023. The only allegation which was upheld was allegation 4 (which is the allegation previously referred to in the disciplinary hearing as allegation 5).

88. The section dealing with this allegation recites the allegation again and notes that Dr Oakland had found that there was no record of the claimant seeing Patient A in person before the day of major surgery and that overall, his record keeping in relation to Patient A was poor.

89. It then details what the claimant had said about this:

"Your views on this were:

• You had seen Patient A virtually and this was standard practice post-pandemic;
• You had seen Patient A when he had been admitted for treatment of an embolisation on 30 September 2022 with another doctor. There is a variance in the accounts you have given about this interaction. At the disciplinary meeting and the investigation meeting you said that you had carried out an examination of the patient but had failed to make a note of this. However, the account of this examination in an email you sent to Dr Oakland and Ms Grainger on 4 July is at variance to this. In that email, you explain that after having had the opportunity to review the allegation with a solicitor specialising in employment law you were able to confirm that you were able to make a thorough examination of the patient through your virtual appointments, and in addition, on 30 September, you had been "passing through PGH for other purposes" when you saw Patient A and had a discussion with him because you considered it was courteous to say "hello". You expressly state that your "interaction" with Patient A was "brief and did not have any meaningful impact on his care". I note that email makes no reference to you examining the patient on 30 September.

• The omission of the discussion on 30 September 2023 was not unusual: you felt that Patient A's record contained other omissions including the omission from the PGH MDT notes that the NHS Hepatologist for Patient A had stated there was no need for a further CT Chest scan as there had been a recent one undertaken by the NHS.
• You have other patients where your record keeping is immaculate. By contrast it is widely recognised that clinicians often fail to document patient interactions due to lack of patient notes (you have made reference to the PGH Mortality & Morbidity meeting on 29 June 2023 where the Chair mentioned this for example).
• The pre-operative assessment (POA) process should assess the fitness of Patient A for surgery and you relied upon the POA nurses to do this. The anaesthetist had also seen the patient and cleared him for surgery."

90. The section then concludes:

"Given the very serious nature of this surgery and the state of health of Patient A, I agree with Dr Oakland that it is inconceivable anyone would not have thought it necessary to review the patient in person prior to the day of surgery. Seeing a patient in person allows for a much better clinical assessment of them. While a virtual assessment may be fine for fairly standard procedures with relatively healthy patients, this was certainly not surgery that fell into that camp.

I am concerned by the discrepancy between the accounts you have given verbally for seeing the patient on 30 September and the considered view you expressed after taking legal advice which suggests no examination of Patient A was undertaken by you. Whatever the truth of this, it is clear that you did not document seeing the patient then. You also told me during the disciplinary meeting that the performance status of these types of patients wax and wane, so the relevant assessment of a patient is the one close to the time of surgery.

After our meeting I checked that I have a complete and accurate copy of the patient record, which confirmed that I did. From these notes, it is clear there is no record of you seeing the patient pre-operatively. I do not consider you can rely exclusively on others to have carried out the pre-operative assessments and made the necessary determination around fitness for surgery. Your professional duties as the treating doctor and (if nothing else) the HCA Pre-Admission Assessment of Elective Surgery Patients Policy should have made it clear to you that it is your ultimate responsibility to assess and ensure your
patient was fit for surgery.

For the reasons above I uphold this allegation."

91. Mr Buckley went on to consider the appropriate sanction. He listed various mitigating and aggravating features, and concluded that there was serious misconduct and that there should be a final written warning for 12 months:

"I now look at the appropriate sanction that should be applied. Within that context I take into account the following mitigating factors:

• My view is that MDT data management (particularly minute taking and sign off) is not sufficiently robust and need to be considered more holistically.
• Other doctors may also have failed to meet standards of record keeping that we might consider appropriate and therefore there is a general need to reset.
• My view is that the discussions at the Christmas Party are likely to have been general discussions between colleagues centred around the logistics of care over the Christmas holiday rather than the clinical detail of the patient.
• I do think the misunderstanding around the accessibility of Meddbase is significant but one for which you are not at fault as the technical issues could have been made clearer to you and you should not be penalised for such technical issues when otherwise it would be reasonable to assume all systems speak to each other.
• You demonstrated to me at our meeting that you had reflected on your practice and taken on board the importance of accurate record keeping.

I have also taken account of the following aggravating features:

• There is no real dispute that you did not see Patient A before the day of surgery and there is no record of you having done so. On your own account, if you did see the patient in September, that would have been irrelevant to assessing whether he was fit for surgery in December.
• I reman disturbed by the inconsistencies in your account over whether or not you examined Patient A in September – on one interpretation of this, you may well have sought to mislead us on the nature of your September visit although I make no firm conclusion on this either way.
• Relying on the ITU and pre-assessment teams does not relieve you of your duty to ensure you are personally satisfied that the patient is fit for surgery and I would ask you to take this on board in particular. For this complexity of surgery there is no doubt you should have seen the patient earlier than the day of surgery to ensure you were satisfied to proceed.

Overall, my view is that disciplinary allegation 4 constitutes serious misconduct. I have considered if this is so serious as to justify dismissal but my view is that, subject to your compliance with the conditions set out at 4 and 5 below, the mitigating factors identified above mean you should receive a final written warning that will remain on your file for 12 months."

92. He then made the following recommendations:

"1. HCA should develop an induction programme for consultants who are new to employment within a private setting so they are aware of systems and expected standards.
2. HCA should implement an annual audit of employed consultants' record keeping (over and above those audits already undertaken). Anyone falling below acceptable standards should be addressed on an individual basis.
3. There should be a review of decisions to undertake complex cases immediately before major holidays at PGH.
4. In relation to you specifically, there are clearly concerns raised about your practice which I consider, for the reasons explained above, have some foundation. You also highlighted administrative and operational aspects of

independent practice where, as a Consultant new to the independent sector you had to rely on your medical secretary for guidance. It is a condition of the final written warning that you agree to meet monthly with Ms Estop Green and Sean Preston to review your practice and conduct at work until such time as they are happy to conclude they are satisfied.
5. It is also a condition of your warning that a mentor is appointed to support you (I would suggest Al Windsor but Ms Estop Green can pick this up with you) and a supervisor within PGH to assist you in adapting to working in the independent sector."

93. The claimant was given the right to appeal.

94. On 24 July 2023 however the claimant resigned with immediate effect. His covering email stated that he considered the process to which he had been subject over the previous three months to represent a repudiatory breach of contract and he considered himself to be constructively dismissed.

95. In his letter of resignation he objected to the findings made in relation to the one allegation proven. He acknowledged he had not seen Patient A prior to surgery however he had assessed him over three video consultations. There was a single misdemeanour in respect of the patient notes and no pattern of behaviour. He asserted that to conclude that this misdemeanour achieves the threshold of Serious Misconduct was excessive. He further asserted that the sanctions imposed were disproportionate, punitive and designed to humiliate, particularly as regards being overseen by Mrs Estop Green with whom he considered there to have been a complete breakdown of trust.

96. He then expanded on the basis for his resignation, citing the following matters:

    (i) The secret investigation, which was the primary basis for his 'suspension' on 27 April 2023, which he considered to be against UK employment law and a breach of the ACAS Code of Practice, and which led to five baseless allegations which had not been upheld;

    (ii) The original allegations were without merit and almost all were a consequence of systematic failings within the HPB MDT process of which the respondent should have been aware;

    (iii) The investigatory process, which was fundamentally flawed and lacked credibility;

    (iv) Disregard for due process, including breach of the ACAS guidelines. This included lack of proper notice for the hearing;

    (v) An allegation that Mrs Estop Green was conflicted;

    (vi) The impact on his private practice;

    (vii) Financial impact;

(viii) Impact on health

97. On 8 August 2023 Mr Buckley responded to acknowledge the claimant's resignation, asserting that it demonstrated a lack of insight and suggesting it was likely that the claimant would have been unsuccessful in passing the conditions of his final written warning and would likely have been dismissed at some point in the foreseeable future in any event.

The Law

98. Section 94(1) of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer. Under section 95, for these purposes a dismissal by the employer includes a situation where the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct, in other words a constructive dismissal.

99. Section 98 provides:

> *"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
> *…*
> *(b) relates to the conduct of the employee,*
> *…*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends 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."*

100. It is for the employer to show a potentially fair reason for dismissal. The burden of proof in respect of the consideration of reasonableness is neutral.

101. There will be a constructive dismissal in circumstances where: there is a fundamental breach of contract by the employer; the employee accepts the breach; and the employer's breach causes the employee to resign (**Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221).

102. Every contract of employment contains an implied term of mutual trust and confidence. Where the alleged breach is of that implied term, the test is an objective one, namely that an employer (or employee) would not *"without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (**Malik v Bank of Credit and Commerce International SA (In Liquidation)** [1998] AC 20 (HL)).

103. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 guidance was given in relation to a the 'last straw':

> *"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
> *(2) Has he or she affirmed the contract since that act?*
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
> *(4) If not, was it nevertheless a part (applying the approach explained in* **Omilaju** *[2005] ICR 481) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)*
> *(5) Did the employee resign in response (or partly in response) to that breach?"*

104. When assessing the question of fundamental breach, the Tribunal must not apply a test of reasonableness. It is not a legal requirement for fundamental breaches to be assessed by the range of reasonable responses test, as opposed to one of objectivity (**Bournemouth University Higher Education Corporation v Buckland** [2010] ICR 908).

105. If a constructive dismissal is found, the Tribunal must go on to determine whether the dismissal was unfair, on the basis of an objective 'band of reasonable responses test. The key principles are summarised in **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17 as follows:

> *"(1) the starting point should always be the words of* [S.98(4)] *themselves;*
> *(2) in applying the section* [a] *tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;*

(3) in judging the reasonableness of the employer's conduct [a] *tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

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

Conclusions

Dismissal

106. The claimant relies on a number of matters as set out in paragraph 1.1.1 of the List of Issues in support of his contention that he was constructively dismissed. I have considered each in turn.

Suspended the Claimant without good reason on 27/04/23
Failed to provide adequate reasons to the Claimant for suspending him on 27/04/23

107. I find the respondent did not breach the implied term of trust and confidence in relation to the temporary restriction of his duties on 27 April 2023. There was a good reason for the restriction, namely that various reviews had been undertaken by that point into the death of Patient A, and Dr Harrison's review had identified a number of concerns in relation to the care provided by the claimant which required further examination. Given the proximity of the death of patient B, it was entirely reasonable for the respondent to want to look into these matters more closely and to take steps in the meantime to ensure patient safety was protected. I have accepted the respondent's evidence that this was standard practice where such reviews were undertaken.

108. I do not accept the claimant's submission that the temporary restriction was the same thing as a formal suspension under the disciplinary policy. He was not prevented from undertaking all work and confirmed in answer to my questions that he did a small amount of ongoing work for existing patients and a short outpatient clinic. While the effect of the temporary restriction may have been to drastically curtail the work he was able to do, that did not change its character under the respondent's procedures.

109. As regards the 'secret investigation', I find that this was a desktop review, not a formal investigation. It was a paper exercise. Dr Harrison was not charged to look at specific allegations against the claimant. He was charged to undertake a review in relation to Patient A, and the claimant agreed that was what the terms of reference required. In so far as Dr Harrison's report was headed 'Report of investigation…" I have found that

Dr Harrison labelled his report in this way because he had, on conducting the review requested, found matters that concerned him in relation to the claimant. It is noted that the words 'investigation' and 'review' are used interchangeably both in correspondence (see for example the claimant's own email on 28 April 2023 which states, *"I was informed that an independent review of the case of [Patient A] had been performed."*) and in the respondent's witness statements, however this was not a formal investigation conducted under the respondent's disciplinary policy.

110. Further, it was not a secret. The claimant was told about it by Professor Dorudi on 27 April 2023 (and possibly before this, as indicated by the claimant in the disciplinary hearing, where he described Mr Dorudi advising him prior to 27 April 2023 that Dr Bucknall had misunderstood the M&M outcomes and had another HCA liver consultant review the case). The claimant's real complaint appears to be that he was not asked to input into the report, and was not provided with a copy. I accept the respondent's evidence that it would not be usual to share such reviews with clinicians concerned. If nothing arose from such a review, as would be hoped, there would be no reason to trouble the consultant. If something did arise, as it did here, further steps would then be taken, which is precisely what happened.

111. I therefore find that the claimant was given sufficient information why he was temporarily restricted. He was told this was for reviews to be undertaken into the deaths, and that this was necessary to ensure patient safety. He may not have agreed with that need, however that did not mean that the respondent was in breach of contract.

Failed to provide sufficient clarification or reasons following the Claimant's requests on 28/04/23, 12/05/23 and 23/05/23

112. On 28 April 2023 the claimant raised the following queries:

(i) He had not been informed of specific concerns and requested confirmation that no concerns had been raised by administrative staff, theatre staff, specialist nurses, ward nurses, anaesthetists, ICU doctors, ICU nurses, other surgeons or any physicians with whom he had worked;
(ii) Confirmation that there had been an independent review of Patient A;
(iii) Which governance process the current reviews fell under;
(iv) The scope of the investigation;
(v) His rights of appeal;
(vi) Whether the investigation could result in any disciplinary outcome.

113. His query in relation to whether concerns had been raised was not in the end responded to.

114. In relation to his request for confirmation that there had been an independent review of Patient A, the claimant had already been told that

there had been such a review by Professor Dorudi the previous day. It is not clear what further confirmation was required.

115. It was not confirmed which governance processes the current reviews fell under. The respondent now says, and I have accepted, that there was no particular process being followed, but that this was standard practice. The claimant was not told this however.

116. In relation to his queries about the investigation, there was no investigation at this stage. It had been made clear to the claimant on 27 April 2023 that what was happening was a further review and that the restriction from duties did not constitute disciplinary action.

117. On 12 May 2023 he repeated his request for clarification of the basis of the investigation, the nature of the investigation and the anticipated timescale. As before, at this point there was no investigation, and the claimant had clearly been told that what was happening was a review.

118. On 23 May 2023 he repeated his complaint that he had not been given adequate information about the nature of the investigations.

119. In response to this correspondence, the claimant received the following from the respondent:

(i) An email of 4 May from Professor Wilson informing the claimant that Dr Bucknall had commissioned an independent review to which he would be asked to contribute imminently. I find that this reflected what Professor Wilson knew at the time, and was a correct summary of the position at that time. The claimant had already been informed on 27 April 2023 that such a review was going to be conducted.

(ii) Dr Bucknall's email of 15 May 2023, which reiterated the nature of the temporary restriction, confirmed that it was not disciplinary action, and that there was to be a review and indicating that a meeting was due to be scheduled that week. At that point consideration was being given as to whether there should be a formal disciplinary investigation. As a meeting was imminent and a decision needed to be taken this was a reasonable response.

(iii) Dr Bucknall's email of 17 May 2023 which focussed on the separate endocrinology review by Professor Drake;

(iv) The meeting of 24 May 2023 and letter of 24 May 2023. It was only at this point that a formal investigation commenced. The claimant was given details of the allegations against him and the investigator, and was told clearly that this was to be an investigation under the respondent's disciplinary policy.

120. In the circumstances there were two points not properly responded to, namely confirmation that there had been no complaints, and which

governance processes the review fell under. Both of these were superceded by the commencement of a formal investigation. They are relatively minor points and not in themselves serious enough to constitute a fundamental breach of contract.

121. In any event, there is no reference to the failure to respond to these points in the resignation letter. I find that the claimant did not have this in mind when he resigned.

Failed to appropriately address the concerns raised by the Claimant about the disciplinary process in his email to Dr Bucknall, dated 15/6/23

122. A comprehensive response to the claimant's letter of 15 June 2023 was provided on 30 June 2023 by Mrs Estop Green. The claimant may not have agreed with the response, however the way in which the correspondence was addressed did not amount to a breach of contract.

Gave the Claimant one day's notice of the disciplinary hearing held on 10/07/2023, which he says was insufficient time to prepare.

Informed the Claimant that if he were unable to attend the disciplinary meeting on 10/07/23 it would be held in his absence

123. I find that the notice given to the claimant for the disciplinary hearing on 10 July 2023 was inadequate to enable him properly to prepare, given his other work commitments. The respondent was aware that the claimant's primary employment was elsewhere and failed to take this into account. The meeting was not scheduled for the days the claimant had been requested to keep available for the respondent. While the policy provided for 48 hours' notice, this ought not to have been a rigidly applied deadline. Moreover the invitation letter was clear that if the claimant did not attend the hearing would take place in his absence. The claimant raised his concerns about lack of time to prepare over the weekend and at the hearing itself. His concerns were acknowledged but not acted upon. It ought to have been obvious that he was saying he had not had time to prepare sufficiently and had not had time to secure trade union representation or a colleague to attend with him.

124. This was an unreasonable approach for Mr Buckley to take given the potentially serious consequences for the claimant's employment and I find that, viewed objectively, this amounted to a breach of the implied term of trust and confidence. As discussed below, this was also a breach of the ACAS Code of Practice on disciplinary procedures.

Informed his private insurance provider to remove recognition, preventing the Claimant from being able to practice privately

125. This simply did not happen. The respondent informed insurers of the suspension, which the claimant accepted was a requirement for the respondent and something which the claimant would have to have done himself if the respondent had not. In cross examination it transpired that the claimant's real complaint was that the respondent had not taken steps

required by the insurers to have the claimant returned to their lists. However that was something which would have taken place after the date of resignation and cannot have caused the resignation. Nor is it the issue the Tribunal was asked to determine.

Issue a final written warning valid for 12 months, which was too harsh under the circumstances.

Require the Claimant to have monthly meetings with the CEO and Sean Preston for an unspecified period; be allocated a mentor; and/or be allocated a supervisor to oversee the Claimant's practice.

126. I find that there was a fundamental breach of the implied term of trust and confidence in relation to the sanctions imposed on the claimant.

127. Looking at this matter in hindsight, the sanctions would have been appropriate had the claimant faced a formal allegation in relation to failing physically to examine Patient A prior to surgery. I accept Mr Buckley's evidence in his witness statement as to how he viewed the seriousness of failing to carry out a physical examination. I also take into account the detailed evidence of Dr Oakland given in cross examination as to the reason why a physical assessment prior to surgery is necessary, rejecting the claimant's position now that video consultations were sufficient.

128. However I reject the respondent's submission that the allegation actually put at the time of the disciplinary hearing can be read in that way. An objective reading suggests it relates purely to record keeping. The sanctions imposed were entirely disproportionate for the single accepted omission in relation to record keeping on 30 September 2023.

129. The decision was not made on that basis, but on the basis that the claimant had not physically examined Patient A. That was not an allegation put to him and nor was it something he was asked about in the disciplinary meeting.

130. This is likely to have been compounded by the lack of sufficient notice given for the hearing. With proper preparation the claimant may have been more alert to the possibility he could be criticised in this way.

131. This level of procedural unfairness was sufficiently serious to amount to a fundamental breach of the implied term.

132. In the circumstances, the respondent did fundamentally breach the claimant's contract of employment and the claimant was entitled to resign.

133. I have considered whether the other matters not found to be fundamental breaches in themselves could have contributed to a fundamental breach overall, and find that they do not add to the two matters found proven.

Did the Claimant resign in response to the breach?

134. I find the claimant did resign in relation to the matters I have found to amount to fundamental breaches of contract. The claimant specifically references in his resignation letter the failure to provide him with sufficient notice fo the disciplinary hearing, and the opportunity to be accompanies. He goes on to complain about the invitation letter stating that if he did not attend the meeting would be conducted in his absence. The claimant also squarely addresses in his resignation letter the conclusion reached in relation to Allegation 4 and his view that the sanctions imposed were punitive and disproportionate relative to the allegation made. He described the outcome of the Disciplinary Hearing as the last straw. I find that he had these matters in mind when he decided to resign.

Did the Claimant affirm the contract before resigning?

135. The claimant resigned promptly and did not affirm his contract.

If the Claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract; Was it a potentially fair reason?

136. I have considered carefully the reason for the breach. The respondent has not given any adequate explanation why the disciplinary hearing could not have been postponed to allow for proper preparation, why the claimant was told it would not be moved at all in the first place, or why the matters for which sanctions were imposed were not properly put to him such that the sanctions did not align with the allegations.

137. In the circumstances the reason for the constructive dismissal was not a potentially fair reason.

Did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

138. As there was no potentially fair reason for dismissal I find that the dismissal was unfair. In any event, given the respondent's size and administrative resources it ought to have been possible to ensure, given the seriousness of the matter, that properly considered allegations were put to him, and that the disciplinary hearing was arranged for a suitable time allowing the claimant to attend, to prepare properly, and to arrange for someone to accompany him.

139. In the circumstances the claimant's claim of unfair dismissal succeeds.

Remedy issues

Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the Claimant's compensation be reduced? By how much?

140. I do consider that had a fair process been adopted, namely giving the claimant sufficient time to prepare and formally putting to him the matter which led to sanctions being imposed, the result would have been the same. As discussed above, it is likely that Dr Buckley would still have reached the conclusion that there was serious misconduct in relation to the lack of physical examination of Patient A if the claimant had given the explanation he now gives that he considered video consultations to be sufficient, and that such a finding would likely have been upheld had the claimant had the claimant decided to appeal. I find that the key reason for the claimant resigning was what he considered to be humiliating sanctions in relation to that finding. I find it is likely therefore that he would have resigned in any event had a fair process been followed.

141. In the circumstances, allowing for additional time for such processes and an appeal to take place, I consider it is likely the claimant would have resigned in any event within three months, and it would be just and equitable to limit compensatory damages accordingly.

Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the Respondent or the Claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

142. The ACAS Code of Practice did apply in this case to the disciplinary process adopted by the respondent.

143. The claimant unreasonably failed to appeal against the finding of dismissal, where consideration could have been given to both his substantive concerns about the sanctions imposed and his concerns about the fairness of the process.

144. The claimant in turn alleges that the respondent has breached the ACAS Code in the following respects:

(i) Paragraph 2 – "Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear…"

In relation to paragraph 2, the claimant contends that there was a lack of documentary evidence provided to the claimant and that the respondent had consistently said in correspondence it didn't know who Dr Fertleman was. Those points, even if correct, do not go to the fairness and transparency of the rules by which the process is conducted, which is what this paragraph addresses. The claimant was told, when the formal investigation commenced, what the process was.

(ii) Paragraph 4, bullet point 2 - Employers and employees should act consistently.

In relation to this point the claimant complains that the clinician found to have breached GMC guidelines in relation to confidentiality was not disciplined, nor the endocrinologist. I am satisfied as to the respondent's explanations why that situation was treated differently.

(iii) Paragraph 4, bullets point 3 and 4 - Employers should carry out any necessary investigations, to establish the facts of the case; Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

The claimant suggests in relation to these points that the respondent's witnesses were not aware of certain documents until the hearing (ie Dr Harrison's report). That does not suggest that the investigation into the actual allegations was insufficient. However, I do find that there was a breach of bullet point 4 in that the matter found proven was not put to the claimant in the form of a clear allegation and he was not given an opportunity to present his case in response.

(iv) Paragraph 4, bullet point 5 - Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

I do find that the very short notice for the hearing effectively deprived the claimant of the opportunity to be accompanied. His complaint about this at the hearing itself was ignored.

(v) Paragraphs 5 and 8 - It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case; In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

The claimant complains that there was a period of 5 weeks between his 'suspension' on 27 April 2023 where nothing happened and no investigation took place. I have found however that the claimant was not suspended on this date, and no investigation had started. There were however reviews being conducted.

(vi) Paragraph 9 - If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting…

The claimant's complaint here is that he was not told about or provided with the 'secret investigation' (ie Dr Harrison's report). I have already found that the claimant was told about the review conducted by Dr Harrison. In so far as he was not given a copy, that did not impact on his ability to understand and respond to the

allegations put to him. He was able successfully to defend all the allegations arising from Dr Harrison's report.

(vii) Paragraph 11 - The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

As I have already found, the claimant was not given adequate time to prepare for the disciplinary hearing. The claimant also alleges that there were delays in providing the terms of the investigation subsequent to the 'initial investigation'. This is dealt with at (v) above and I reject this.

(viii) Paragraph 12 - … The employee should be allowed to set out their case and answer any allegations that have been made…

As above, I find that the matter found proven was not put to the claimant in the form of a clear allegation and he was not given an opportunity to present his case in response.

(ix) Paragraph 21 - A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale)…

The claimant complains in relation to this paragraph that while a timescale was given as to the final written warning, none was given in relation to the proposed supervisory meetings. I find that it is not a breach of this provision not to give precise timescales for recommendations made to support an employee to improve following a final written warning.

(x) Paragraph 32 and 33 - If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance; Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

The claimant alleges that Mrs Estop Green pre-emptively dismissed his grievances and closed them down. I reject this assertion. Mrs Estop Green was told roughly the nature of the grievances as indicated by the claimant and in her email of 30 June 2023 states in effect that if she was incorrect in her assumptions about the grievance relating to the claimant's secretary then it could be dealt with, and that if there were matters to do with the disciplinary process which could not be dealt with by the investigators, then they could be dealt with afterwards. She did not shut the grievances down at all. In any event the claimant did not in the end submit a formal grievance to be considered.

(xi) Paragraph 46 - Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily

suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently.

This does not apply as the claimant did not in fact raise a grievance.

145. I find therefore that both parties breached the ACAS Code, the claimant by failing to appeal, and the respondent in the ways set out above. Given the breaches on both sides, and I particular that an appeal process may have cured any procedural breaches, I do not consider it just and equitable to increase or decrease any award made.

If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion? Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

146. I do consider that the reason for the sanctions applied, which was the key reason for the claimant's resignation, was the claimant's failure physically to examine Patient A. I accept the respondent's evidence that this was a significant failing on the part of the claimant. As discussed, had a fair process been followed it is likely he would still have been sanctioned for this and would have resigned as a result. In the circumstances I find it is just and equitable to reduce any compensatory award payable by 50%.

147. I am also satisfied that there should be a corresponding reduction to the claimant's basic award of 50%.

148. The remaining issues in relation to remedy will be considered at the listed remedy hearing.

Employment Judge Keogh

Date 2 July 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

9 July 2024

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FOR THE TRIBUNAL OFFICE