

Neutral Citation Number: [2026] EAT 37

Case No: EA-2024-000973-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 January 2026

Before :

JUDGE KEITH

Between :

GUY'S AND ST THOMAS' NHS FOUNDATION TRUST

Appellant

- and -

MR NIZAM MAMODE

Respondent

MR JAMES LADDIE KC (instructed by DAC Beachcroft LLP) for the **Appellant**
MR DARSHAN PATEL (instructed by Thompson Solicitors) for the **Respondent**

Hearing date: 13 January 2026

JUDGMENT

SUMMARY

Unfair dismissal

While the Employment Judge directed himself correctly on the law concerning constructive unfair dismissal, he failed to apply the law correctly when analysed whether there had been breaches of contract. His reasons were also, in parts, insufficient. Some of his conclusions were also perverse.

JUDGE KEITH:

1. These written reasons reflect the full oral judgment which was handed down at the end of the hearing. I will refer to the parties as they were before the Employment Tribunal, namely the claimant, (Mr Mamode), and the respondent, (Guy's & St Thomas' NHS Foundation Trust).

Background

2. In a judgment sent to the parties on 19th June 2024, Employment Judge Murdin (the "EJ") upheld the claimant's claim of constructive unfair dismissal. In his judgment, he summarised the largely undisputed background facts at paragraphs [55] to [59].

The EJ's findings

3. I summarise the facts as found by the EJ, as to which there was no dispute between the parties, except where identified. Before his resignation from his employment by the respondent, the claimant had been employed as a consultant transplant surgeon, until the date of the termination of his employment on 24th March 2022. From 1st June 2014 until 12th June 2020, he had also been the clinical lead within the respondent's transplant unit, encompassing both adult and paediatric services. In relation to the latter, he worked at Great Ormond Street Hospital ("GOSH") and also at the Evelina London Children's Hospital ("ECH"). As well as being employed by the respondent, the claimant had what was described as an 'honorary contract' with GOSH.

4. Following a review of GOSH's renal transplant service, the claimant's honorary contract was terminated on 22nd May 2020 with immediate effect, and he was referred to the General Medical Council. GOSH did not consider that its contract with the claimant amounted to a contract of employment, so it did not carry out disciplinary proceedings. As a result of the circumstances resulting in the GOSH termination, the respondent decided to carry out investigation and to exclude the claimant from ECH until the investigation and any subsequent disciplinary process was

concluded. The respondent concluded in its investigation that there was evidence of widespread bullying and intimidation by the claimant of his colleagues.

5. On 12th June 2020, the claimant received a letter from the respondent indicating that he would be restricted from practising at the ECH with immediate effect, initially for a period of 14 days in the first instance, and that he should step down from his role as clinical lead with immediate effect and for the foreseeable future, pending the investigation. The EJ recorded, but did not accept the claimant's claim that he was never been given a reason for these decisions. In the meantime, he continued to work with adult patients as a consultant transplant surgeon. I emphasise, and it is agreed, that there is no question of the claimant's competence in his duties. Rather the disputed issue was whether the claimant had bullied colleagues.

6. The respondent informed the claimant that the investigation process would conclude by 17th July 2020. On 16th July 2020, the investigation report was published, which concluded that there was evidence of the claimant's inappropriate behaviour and therefore restrictions on his practice should continue. The respondent recommended that the matter be considered by a disciplinary panel, but before it convened, on 18th September 2020, the respondent proposed the following outcome by consent: that the claimant accept a first written warning to remain in place for 12 months, without the need for a disciplinary hearing; for the respondent to support some form of mediation and, crucially, (and the subject of disagreement) for a continuing restriction in practice, including that the claimant could not return to work at ECH, or as clinical lead. Whilst the claimant was willing to accept the first written warning, and said that he was willing to engage in mediation, he was not willing to agree to continuing exclusion from paediatric services or to relinquish, or not to be considered in the future, for a clinical lead role.

7. Thereafter, there were continuing practice restrictions, subject to further reviews and rescheduled hearings on various dates between 27th November 2020 and 9th April 2021.

8. The respondent reached a disciplinary decision on 19th April 2021 that the claimant's behaviour had constituted misconduct and recommended mediation. The disciplinary manager, Dr Singh, stated that she could not recommend a specific date for return to paediatric transplant surgery, but that she would expect to see significant progress within the next three months to move to a return. The claimant had been given a first written warning to remain on his file for 12 months.

9. The claimant remained temporarily excluded from ECH pending adequate progress in the mediation.

10. The claimant lodged an appeal against the decision to exclude him from ECH, but the respondent explained to him that his exclusion was not as a result of disciplinary action, but in line with patient protection policies. His clinical lead role had already come to an end. He applied to be reconsidered for it, which the respondent rejected.

11. In June 2021, the claimant took a period of unpaid leave for a month, and thereafter three weeks' annual leave, but, importantly, the claimant had made clear that he would still be available, when absent from work, for any mediation. None was offered.

12. In August 2021, the claimant's union discussed with the respondent how to help the claimant return to work. The claimant continued to be excluded from paediatric work at the ECH, although he was carrying out work for adult patients. He was concerned that his partial exclusion was pending mediation, to which he had agreed, but none had been progressed.

13. From August 2021, the claimant was signed off sick, and remained absent through sickness until January 2022. The EJ found that the respondent made relatively limited contact with the claimant during his period of sickness absence, apart from its overpayment team seeking to recover what it regarded as overpaid salary of more than £17,000.

14. In November 2021, the claimant asked the respondent that his exclusion from paediatric

practice end not later than 1st December 2021. He raised a grievance. He received a letter from the respondent on 16th December 2021, setting out its position, noting that mediation had moved at a slower pace than first anticipated, and that progress of mediation continued to be difficult, given the claimants' sickness absence. At that stage, the respondent also advised that in addition to how mediation could be progressed, additional concerns had been raised in relation to the claimant returning to practice at ECH. He was not told of the nature of those allegations.

15. On 24th December 2021, the claimant emailed the respondent advising them of his resignation. He cited the respondent's conduct in seriously damaging the term of trust and confidence between them, and criticised the respondent for never having provided a formal reason for his exclusion from ECH and for denying him an appeal against his exclusion.

16. A formal grievance meeting took place on 14th March 2022 in which the respondent accepted that it had delayed in identifying and appointing a manager to investigate the claimant's grievance.

17. On 7th June 2022, the respondent sent its decision to the claimant on his grievance, namely that there was a case to answer in respect of delays in dealing with the grievance and how the claimant's continuing exclusion was managed, but there was no case to answer in respect of his complaints about the application of a disciplinary policy, in particular the decision not to allow him to appeal against his continued exclusion from paediatric practice.

The EJ's analysis

18. The EJ went on to identify the legal issues at para [60] of the judgment, namely whether nine breaches, (i) to (ix) had occurred, and were relevant to the implied term of mutual trust and confidence.

19. Allegation (i) was whether the respondent failed to carry out a full and proper investigation into the allegations regarding the claimant's behaviour. Allegation (ii) was the requirement for the

claimant to step down from his role as clinical lead. Allegation (iii) was the respondent restricting the claimant from paediatric practice. Allegation (iv) was the respondent's action on 19th April 2021, to give the claimant a first written warning and excluding him from ECH for an indeterminate period. Allegation (v) was whether, from around 30th April 2021, the respondent had unreasonably denied the claimant the opportunity to appeal the outcome of the disciplinary hearing, namely that he would be excluded from ECH for an indeterminate period. Allegation (vi) was whether the respondent had excluded the claimant from ECH and his paediatric practice for longer than necessary and without adequate explanation. Allegation (vii) was whether the respondent had failed to give the claimant an opportunity to address the additional concerns raised in the respondent's letter of 16th December 2021. Allegation (viii) was whether the respondent had failed to provide the claimant with one-to-one mediation. Allegation (ix) was whether the respondent had failed to adhere to its grievance procedure, including, in particular, by failing to progress the claimant's grievance of 24th November 2021 within a reasonable timeframe.

20. The EJ considered at para [61] whether either individually or cumulatively such actions or inaction amounted to a fundamental breach of the claimant's contract of employment entitling him to resign. Notably, as Mr Laddie KC pointed out, originally the claim had been put on the basis of cumulative incidents and the "last straw" doctrine, but this was a case now put on the individual breaches or a course of conduct. The EJ also considered whether the claimant had waived or affirmed any of the alleged breaches; and whether he had resigned in response to them and thereby was dismissed. Finally, if the claimant had been deemed as dismissed, the EJ considered whether he had been dismissed for a statutory "fair reason", namely an irretrievable breakdown in the relationship, and if so, whether the dismissal was fair for the purposes of **section 98(4) of the Employment Rights Act 1996**.

21. The EJ recited the parties' submissions at paras [72] to [81], and directed himself to the law at paras [82] to [90]. The parties have not suggested that the EJ misdirected himself. Rather, the

respondent contends that the EJ misapplied the law in respect of every individual breach found; and that in addition, the EJ's reasons were either insufficient or were perverse. The EJ's analysis of the series of acts was also flawed.

22. Mr Patel noted that when directing himself on the law, the EJ had referred to the well-known authority of **Malik v BCCI SA (in liquidation)** [1997] ICR 606 in relation to the implied term of mutual trust and confidence, as well as **RDF Media Group Ltd v Clements** [2008] IRLR 207 where, at para [105], the Judge had referred to the test of whether there was a breach, being a "severe one".

23. It is unnecessary for me to recite the remainder of the law except to note, as Mr Patel points out, that at para [90], the EJ had said:

"Applying those principles to the facts, I will deal with each alleged breach in turn."

24. Mr Patel relied on this for his submission that the EJ had applied the law when considering each issue. In contrast, Mr Laddie argued that this was simply a connective paragraph and did not diminish the EJ's errors.

The EJ's analysis on each of the allegations

Allegation (i)

25. At para [91], the EJ analysed allegation (i), that the investigator's manager had failed to put specific allegations to the claimant in the investigation, a complaint that was raised contemporaneously. The EJ described this as "a central feature of any disciplinary process and would amount to a breach of the ACAS Code" (also para [91]), something which Mr Laddie returned in his submissions.

26. The EJ concluded that whilst the claimant was given an option to address this failure in the disciplinary hearing, it did not negate the failure, as there might otherwise have been no need to

progress to a disciplinary hearing. Moreover, as a second aspect, the investigator's selection of interviewees was unbalanced. She had failed to interview several witnesses proposed by the claimant, without explanation, largely limiting her list of interviewees to those who had already been interviewed by GOSH, and which resulted in a partial investigation, albeit later in the process two witnesses specifically identified by the claimant were in fact interviewed for the disciplinary hearing.

27. The EJ concluded, at para [94]:

“94. Whilst the respondent stresses the detailed and lengthy nature of the investigation, which I accept, I agree with the claimant that the above failings have occurred and I find that the above omissions were sufficiently serious to render the investigation flawed. In particular, in reaching this conclusion I rely on the evidence of the claimant both in respect of the allegations not being put, and in relation to the failure to call certain vulnerable witnesses.”

28. At para [95], he continued:

“95. I conclude therefore that the respondent failed to carry out a full and proper investigation into the allegations regarding the claimant's behaviour.”

Allegation (ii)

29. On the respondent's requirement that the claimant step down in his role as clinical lead, the EJ concluded at para [96] that whilst allegations had been raised against him, when he was required to step down, the claimant had not been given any opportunity to answer them and no investigatory or disciplinary process had taken place. The EJ accepted that the alleged behaviours were not compatible with the role of clinical lead, but at the time of the claimant's removal from that role, they remained unproven allegations. The removal, without any acknowledgement of that fact, was inappropriate, and the temporary removal should have been expressly described as a neutral one, instead of it being unclear from the letter of removal. At para [98], the EJ found:

“I conclude therefore that this allegation is proven.”

Allegation (iii)

30. Concerning the claimant's restriction from paediatric practice, the EJ noted that, as with removal of the position of clinical lead, it was not described as a neutral act, and that it was "wrong", (para [101]), to restrict the claimant from practice without any explanation of the decision.

31. Whilst the respondent had explained that one reason for the claimant's suspension was to allow the respondent's investigation to continue unimpeded, without witnesses feeling intimidated or fearful, no evidence had been produced to show that the claimant had ever attempted to, or was likely to interfere with witnesses, and no explanation had been given in the letter of 12th June 2020. Although a second reason had been advanced, namely to ensure the safety and well-being of colleagues, there was nothing in the allegations raised by the GOSH review specific to paediatric practice. The claimant explained, in unchallenged evidence, he had more contact with the paediatric transplant surgeons on the adult side than he would have done with those same surgeons at ECH. Moreover, the EJ concluded, at para [104], that less draconian alternatives were not considered. At para [105], once again the EJ concluded that the claimant had "proven the allegation".

Allegation (iv)

32. Regarding the claimant having been given a written warning and excluded from ECH for an indeterminate period, the EJ noted that first, although the claimant now criticised his warning, he had been prepared to accept it. Second, the disciplinary manager who gave the warning had taken no decision to exclude the claimant from ECH, and on that basis the EJ concluded that the allegation was not proven.

Allegation (v)

33. On whether denying the claimant the opportunity to appeal the outcome of the disciplinary hearing, namely that he would be excluded from ECH for an indefinite period, was a repudiatory

breach, once again the restriction of practice at ECH did not form part of the disciplinary sanction, and therefore allegation (v) “fails” (para [114]).

Allegation (vi)

34. Regarding the exclusion of the claimant from ECH and his paediatric practice for longer than necessary, without adequate explanation, the EJ found in the claimant’s favour. Within the letter of 12th June 2020, no reason had been given for that restriction. It had been explained that the restriction was in accordance with the exclusion and restriction of practice policy and procedure for medical staff. There was reference to a policy rather than the reason for the restriction itself. Whilst it might be said that the investigation was being undertaken and it may have been possible to infer reasons for that restriction from the investigatory context, the letter had made no express reference to it as a specific reason. In contrast, It would have been straightforward to specify this, as the policy so permitted. The second aspect was the length of exclusion, without a clear explanation. The EJ was particularly concerned about the part of the delay from April 2021 to 20 August 2021, given the disciplining manager’s expectation of seeing a significant progress in mediation within the next three months.

35. The EJ concluded that there was no explanation given for the lack of progress made to facilitate the recommended mediation. The respondent also concluded that there was a case to answer in regard to how the continued exclusion was managed.

36. At para [126], the EJ concluded that the respondent had excluded the claimant from ECH and his paediatric practice, without adequate explanation, and for longer than necessary. Once again, the allegation was “proven”.

Allegation (vii)

37. In relation to denying the claimant an opportunity to address the additional concerns raised in

the respondent's letter of 16th December 2021, the EJ concluded, at para [127], that the respondent was obliged to provide details of the allegations, having raised them, instead of simply raising the "spectre" of further allegations. That was exacerbated by the context of prior lengthy investigation and the claimant's ill-health. Whilst the respondent had felt obliged to inform the claimant, it had not yet determined whether to investigate them, and there was no evidence of the investigation occurring in accordance with its disciplinary procedure. Once again, this allegation was "proven".

Allegation (viii)

38. The EJ concluded that the allegation of a failure to provide the claimant with one-to-one mediation was also "proven".

Allegation (ix)

39. Concerning whether the respondent had failed to comply with its grievance procedure and in particular a failure to progress it, once again the EJ found in the claimant's favour. The respondent's policy had stipulated that a manager would acknowledge receipt of a grievance and, crucially, invite a complainant to a meeting to discuss concerns within seven calendar days. This had not occurred, even if the grievance had been acknowledged. The respondent accepted that there had been a breach of the grievance procedure by failing to follow with a meeting swiftly, but stressed in its defence that this had not caused the claimant to resign.

40. Book-ending the initial recital of the law, the EJ continued:

"137. I therefore find that allegations 1, 2, 3, 6, 7, 8 and 9 are proven. As a consequence and for the reasons set out in relation to each individual allegation, I conclude that the respondent conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust."

41. The EJ concluded that the respondent had not acted with reasonable and proper cause. The EJ considered separately whether the breaches individually or cumulatively amounted to a

fundamental breach of contract, and reiterated the authorities of **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978 and **Omilaju v Waltham Forest London Borough Council** [2005] 1 ICR 481, CA. The EJ considered, at para [140], the allegation of raising unidentified additional concerns in the letter of 16th December 2021 at the same time that the respondent had failed to arrange a grievance meeting, and found that the letter doing so was indeed the last straw. It was inappropriate to raise the “spectre” of additional concerns and it was particularly egregious given the context of the lengthy ongoing restriction on the claimants’ practice, his desire to return to ECH and the effect of the process on his health. Once again, and of note, at paras [142] and [143], the EJ stated:

“142 Of the allegations that I have found to be proven, to my mind, each was of sufficient significance to amount individually to a repudiatory breach of contract.

“143 If I am wrong about that, when taken cumulatively, the allegations 1, 2, 3, 6, 7, 8 and 9 that I have found to be proven amount to a fundamental breach of contract of employment which entitled the claimant to resign”.

42. The EJ found that the respondent had not dismissed the claimant for a fair reason, namely an irretrievable breakdown in the relationship between the parties and therefore it did not need to consider generally whether his dismissal was fair or the purposes of **s. 98(4) ERA 1996**.

The respondent’s Notice of Appeal

43. In its Notice of Appeal filed on 31st June 2024, the respondent raised seven grounds. In reciting these grounds I have done so in context of a particular submission raised by Mr Patel, that Mr Laddie’s subsequent written submissions and oral submissions went beyond the grounds, and therefore I did not need to address all of them. I have therefore confined my decision to the grounds and have not addressed any additional points.

Ground (1)

44. The EJ ought to have assessed whether and why each allegation amounted to a repudiatory breach of contract, applying the relevant law in each case, and specifically whether the conduct was

calculated or likely to destroy or seriously damage the relationship of trust and confidence.

45. Mr Laddie accepted that the respondent's appeal would stand or fall on ground (1). It infected all of the EJ's analysis. Grounds (2) to (7) were relevant to the scope of any necessary remaking. If the EJ did not err on ground (1), Mr Laddie accepted that the EJ's decision that the claimant had been constructively unfairly dismissed was unimpeachable.

46. The respondent says that whilst the EJ had directed himself correctly as to the law, he misapplied it. Mr Laddie relied on the well-know authority of **DPP Law Ltd v Greenberg [2021] EWCA Civ 672** and in particular, a passage to which both representatives drew my attention, para [58]:

“...where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where, as in the present case, the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.”

47. Mr Laddie submitted that this is not a ‘carte blanche’ by virtue of the Employment Tribunals being specialist tribunals, for them not to apply the law, particularly where the law is so settled. Instead of this being the case where the EJ can be taken to have applied the law, his words used in the judgment repeatedly indicated that he had not.

48. Mr Laddie relied **Eminence Property Developments v Heaney** [2010] EWCA Civ 1168, for the proposition at para [61], that the test was:

“whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.”

49. This was applied in an employment context by Langstaff P in **Pearce v Receptek** UKEAT/0553/12/LA and the test was a high one. This was consistent with **Woods v WM Car Services (Peterborough) Ltd** [1982] ICR 693. Although the EJ had self-directed himself correctly, the presumption that he had applied it was rebutted by multiple erroneous references to different concepts. The EJ had referred at paras [97] (allegation (ii)); para [119] (allegation (vi)); and paras [127] and [130]) (allegation (vii)); to the respondent's actions being “inappropriate”. Elsewhere, the EJ had analysed the respondent's actions as being “wrong” (paras [100] and [101], allegation (iii)).

50. To find that an allegation was “proven” was unclear and insufficient reasoning. It begged the question of what was “proven”. The inadequacy of the reasons was not remedied by the reference in para [137] that in relation to each allegation, “for the reasons set out,” the respondent had “conducted itself in a manner likely to destroy or seriously damage the relationship of confidence,” or at para [142], that “Of the allegations that I have found to be proven, to my mind, each was of sufficient significance to amount individually to a repudiatory breach of contract.” It was not possible to conclude that when the judgment was read as a whole, the reasons were adequate and the EJ had correctly applied the law. Mr Laddie asked whether the “allegations” “proven” were facts, or facts and analysis (as Mr Patel argued). If the latter, Mr Laddie further submitted that it was unclear what made each breach a repudiatory one. The reference in para [137] to, “as a consequence and for the reasons set out, ” was a gloss, which added little. The recitation of “sufficient significance” in para [142] added nothing, and did not begin to address the EJ's obvious failure, in relation to each of the individual allegations, to consider and explain why there had been a breach of the implied term of

mutual trust and confidence, rather than simply a recitation of the allegation being “proven,” with various phrases such as “inappropriate.”

51. Grounds (2) to (7) were in relation to specific allegations and affected the extent of any required any remaking, if ground (1) were made out.

Ground (2)

52. Ground (2) was that the EJ had erred either in failing to provide sufficient reasons or in reaching a perverse conclusion in considering allegation (i), namely a failure to carry out a full and proper investigation. The EJ's conclusion appeared to derive from two findings of fact. First, was a failure to put specific allegations to the claimant during the disciplinary investigation, and second, an unbalanced choice of witnesses during that investigation. In terms of a failure to put specific allegations, the EJ had erred in law in stating that a failure to put specific allegations amounted to a breach of the ACAS Code of Practice on disciplinary and grievance procedures (para [91]). That was simply incorrect. Whether there was a failure amounted to a breach of ACAS Code would depend on the centrality of the unput allegations, noting para [4] of the ACAS Code.

53. The EJ's error was compounded by the undisputed fact that any allegations that were not included at the investigation stage were ones on which the claimant had been invited to comment before the later disciplinary hearing and which had been considered at that later stage. Mr Laddie drew the analogy of an actual unfair dismissal case (as opposed to this case, which was a constructive dismissal case) where there had been allegations raised at an investigation stage, on which a party had been given an opportunity to comment which had been fully considered in light of those comments at a disciplinary stage. It was inconceivable, in those circumstances, that there would have been a finding of unfair dismissal. How then, in that context, he asked, could it be seen that there would have been a breach of the implied term of mutual trust and confidence in this constructive dismissal case?

54. The EJ's reasoning at para [92] that giving the claimant the opportunity to address this failing in the disciplinary hearing, while mitigating the failing, did not negate it, was perverse.

55. The EJ's second conclusion that the investigator's choice of interviewees was unbalanced was insufficiently explained and was also perverse. To put it in context, the claimant produced 67 character witnesses, many of whom, if not all, could give no relevant evidence as to the claimant's behaviour at ECH or GOSH, (although, as Mr Patel pointed out, this was not true of all of the witnesses).

56. Returning to the grounds as pleaded, the EJ had not sufficiently explained, at para [94], why the decision not to interview the 67 character witnesses made the investigation flawed. No ET properly directing itself could conclude that it was necessary for the respondent to interview people who could only say that they had never seen the claimant engage in inappropriate conduct.

Ground (3)

57. In relation to allegation (ii), and requiring the claimant to step down as clinical lead, this fact had not been disputed. The claimant's case was that he had disputed the basis for that decision, rather than whether it was or was not described or understood to be a neutral act, which the EJ analysed at paras [96] to [98]. The essence of the EJ's reasoning was that the letter requiring him to relinquish his duties did not describe the requirement as a neutral action because the allegations were as yet uninvestigated and/or to be determined, and in doing so, that was inappropriate.

58. This was a breach of natural justice. The EJ's reasons related to the manner of communication and the explanation for it rather than the substance of the decision. The former had had not been part of the claimant's identified case, see para [60](ii) of the list of issues and previously transposed from those identified at an earlier case management hearing. The claimant's pleaded case had acknowledged that he was asked to step down, pending the outcome of the investigation.

59. Further, in the alternative, the EJ's conclusions were perverse because the EJ failed to consider the respondent's letter's reference to its Exclusion and Restriction policy, which in turn made clear that relinquishment of specific duties during a disciplinary process was regarded as a neutral act. The relevant letter had, in addition, stated:

“Given the nature of the allegations about your behaviour, it is inappropriate for you to continue.”

60. Finally, the EJ's finding that there was nothing in the allegations raised by GOSH that was specific to paediatric practice (para [103]) was also perverse. It failed to recognise that GOSH was a children's hospital and, importantly, the only complaints received were in relation to the claimant's paediatric practice.

Ground (4)

61. This was in relation to allegation (iii), namely restricting the claimant from practice, again not described as a neutral act, unexplained and with no evidence of the claimant's interference with witnesses. Once again, the respondent contended that this was a breach of natural justice and/or was perverse. The manner of communication had not been identified as an issue at para [60(iii)]. The respondent had made clear that the reason for restriction was because of allegations of bullying. The criticism of a lack of evidence of interference with witnesses was perverse, as otherwise the respondent would have to adduce evidence of attempted interference before suspending, in the context of allegations of the claimant bullying colleagues, including junior staff.

Grounds (5) and (7)

62. Mr Laddie took these grounds together. Ground (5) related to allegation (vi) that the claimant had been excluded from paediatric practice for longer than necessary and without explanation. The findings were perverse. The respondent had explained that this related to bullying. In relation to suspension being for longer than necessary, this was in the context that there was a particular period about which the EJ had been concerned, namely 20th April 2021 to 10th August 2021, a period of three

and a half months, in which the EJ had failed to consider a relevant factor, namely that the claimant had been on annual leave for a significant part, (even though, as Mr Patel pointed out, the EJ had found the claimant had indicated his willingness to be contacted during that period).

63. In relation to ground (7), this was in relation to allegation (viii) and one-to-one mediation during the same period. That was perverse and failed to take into account a relevant factor, namely the claimant's absence and challenges in arranging a mediation in that period.

Ground (6)

64. This was in relation to allegation (viii), namely that the respondent had failed to give the claimant an opportunity to address additional concerns in its letter of 16th December 2021. This was a particularly critical finding as it was seen as the "last straw". The finding was perverse.

65. The EJ had concluded that it was inappropriate for the respondent to have raised these concerns without giving the claimant the opportunity to respond (paras [127] and [130]). That was based on a fundamental misunderstanding of the evidence, as referred to in the 16th December 2021 letter, and included at para [2] of the supplementary bundle. The evidence was inchoate and the respondent made it clear that it needed to speak to individuals to understand the nature of the further complaints, and that there was nothing at this stage for the claimant to answer. The respondent was merely notifying the claimant that further allegations had come to light. On EJ's analysis, there was no course of action open to the respondent for which it could not be criticised.

The Claimant's case in reply

Ground (1)

66. The EJ had correctly directed himself on the law and made it clear that he would apply those principles, at paras [82] to [89]. It was clear, when fairly read, that an allegation being "proven" was an allegation that fulfilled the legal test on which the EJ had correctly directed himself as to the

implied term, as already outlined. Moreover, in relation to the law on this question, the case of **The Leeds Dental Team Ltd v Mrs D Rose**: UKEAT/0016/13/DM was important. There was no general requirement for an ET to make a specific finding as to the employer's intention in acting in the manner said to amount to a breach of the implied term. In any event, there was no materiality in circumstances where not only the EJ had considered the individual breaches, but the cumulative events and in particular where, on the event said to be the 'last straw' and before that, the delay in reaching the grievance, the EJ had reached a decision on which there had been no challenge in the grounds of appeal (something which Mr Laddie emphasised was not correct, if one were to consider paragraph 7(f) of the Notice of Appeal).

67. I was asked to consider a number of paragraphs already outlined, in particular the recitation of the law which was not only for form's sake, but also the EJ's awareness of the serious actions which needed to constitute a breach of the implied term, and the reiteration of that at the beginning and end of the analysis. What more, Mr Patel asked, was the EJ expected to do?

68. The EJ had unarguably correctly directed himself on the law in respect of cumulative conduct. He had applied the law. The EJ's reasons were sufficiently clear.

Ground (2)

69. The parties knew what allegations had not been put and the respondent did not dispute, at the hearing before the EJ, there had been such omissions at the investigation stage of the disciplinary hearing. The respondent had not tendered the interviewing manager to give witness evidence to the EJ.

70. With regard to the unbalanced choice of interviewees, it was accepted that the list of interviewees was based on those who had been interviewed by GOSH. This has been without explanation by the respondent in terms of witness evidence, even if there were late submissions by way of closing submissions.

Ground (3)

71. The EJ was entitled, when assessing the appropriateness of requiring the claimant to stand down as the clinical lead, the manner of the respondent's communication and whether the action was expressed as being a neutral one, or subject to investigation. Mere reference to a policy did not mean that a step was always neutral, nor could that safely be assumed. The EJ could reasonably consider that the absence of such an express reference, which was of central importance, was relevant to the implied term of mutual trust and confidence.

Ground (4)

72. Moreover, the EJ had not erred in finding that a restriction from practice was unexplained, or that it was not reasonable to rely on a risk of interference with witnesses because of an absence of evidence of the same. The exclusion from ECH reasonably required explanation. The presence of bullying allegations did not provide an explanation for the specific form of restriction implemented, i.e. to restrict the claimant's practice at ECH. Consideration of the absence of evidence on interference with witnesses was permissible where a restriction on practice was an inherently draconian act. It was permissible for the EJ to consider whether there were actual grounds for fearing that the claimant would interfere with witnesses or for the respondent to have considered lesser alternatives than restricting the claimant from his paediatric practice. Moreover, the respondent's purported rationale was undermined, where the claimant had regular contact with the same potential complainants in his adult surgery/practice.

Ground (5)

73. With regard to the absence of an explanation for exclusion from practice for longer than necessary, the EJ had taken into account both that the claimant had been on leave and also what had occurred with regard to mediation. There was only a limited period of holiday taken, during which time the claimant had made it clear that he would still be available for any mediation and only later

received a delayed response.

Ground (6)

74. Concerning an opportunity for the claimant to respond to additional concerns and the letter of 16th December 2021, the EJ had proceeded on the basis that the allegations had crystallised to the extent that they required a response, or that the claimant ought to have been provided with an opportunity to respond, at para [127]. The EJ was entitled to find that the respondent had been obliged to provide details of the allegations and not merely to raise the spectre of further delay. Witnesses had accepted, as long ago as 16th November 2021, that there had been further concerns raised and there was ample basis to find that the respondent did know what the allegations were or had time to ascertain them.

Ground (7)

75. In relation to allegation (viii) that the respondent had failed to provide one-to-one mediation, this was addressed in submissions in relation to ground (5), and the evidence was clear that whilst the claimant had made every effort to engage in mediation, the respondent had failed to take steps adequately to provide the same. Moreover, even if there were errors as asserted in the remaining ground of appeal, they would not have made any difference. Findings that were not subject to the appeal included allegation (ix), namely that the respondent had failed to comply with its own grievance policy, which the EJ had regarded as particularly objectionable.

Discussion and conclusions

76. As the representatives recognised, the crucial element of this appeal was in relation to ground (1) and the EJ's application of the law and his reasons in relation to allegations (i) to (viii). Whilst the respondent takes no issue with the allegations in which it succeeded in resisting the claims, there

is no principled basis on which to distinguish the EJ's application of the law.

77. I accept the caution that any appellate Tribunal, which has not considered all of the evidence should be cautious of not cherry-picking, nor of analysing in forensic detail any wording said to be "unfortunate." I am also acutely conscious of what is sometimes referred to as "island hopping" between particular aspects of evidence (see para [65] of **Volpi & Anor v Volpi** [2022] EWCA Civ 464).

Ground (1)

78. I am satisfied notwithstanding the '**Greenberg**' caution, the EJ erred in law. I accept the respondent's challenge that nothing turns on the EJ's reference at para [90], to the following:

"90. Applying those principles to the facts, I will deal with each alleged breach in turn."

79. This was, as Mr Laddie contended, merely a connective sentence. The EJ's analysis and reasons needed to go beyond just findings of fact, and I further accept that the conclusions referring to the "allegation" as "proven" resulted in confusion, such that the EJ's reasons were not sufficiently clear. To the extent that there was analysis, the repeated references to actions being "inappropriate" or "wrong" rather than the appropriate test on which the EJ had directed himself supported the inference that he had not applied the correct legal test.

80. I accept Mr Laddie's submission that the case of **The Leeds Dental Team Ltd** did not detract from the necessity for the EJ to consider the pleaded case of individual breaches in relation to each of the allegations.

81. Moreover, para [137] begs more questions than it answers, in particular to where the EJ referred to allegations being proven, but then says "as a consequence and for reasons set out" in relation to each individual allegation, followed by a conclusion. If the earlier paragraphs were both findings of fact and the analysis, then the question is what this adds more to the analysis, where it is

so brief. I accept the Mr Ladde's submission that para [142] was, in essence, a mere recitation of the same flawed reasoning.

82. That is the flaw that undermines the EJ's analysis in relation to the allegations made of individual breaches.

83. However, I was conscious, as Mr Patel points out, that the EJ had considered the claims on a cumulative basis at para [143], and had considered the case of **Kaur** at para [144].

84. However, without reciting all of Mr Laddie's submission, I am satisfied of two things. First, and contrary to the claimant's submission, a challenge to the EJ's analysis if cumulative events had been included in the Notice of Appeal. That much is clear from paragraph 7(f), where the grounds state:

“f. In the circumstances, the ET's overarching conclusions, to the effect that the Appellant was guilty of seven individual repudiatory breaches of contract ([¶¶137 and 142]) and that, taken together, the Appellant's conduct as a whole, amounted to a repudiatory breach ¶143] are unsafe. Each of those conclusions derive from the ET's earlier legally erroneous conclusions.”

85. Second, a submission, on the basis of **Kaur**, that because there has been analysis of the “law straw”, the errors in analysis in respect of the earlier conduct are immaterial, is not sustainable. Standing back, the EJ needs to have considered the conduct cumulatively on the correct basis, not on the erroneous basis of, for example, whether it is or is “inappropriate” or “wrong”. I am satisfied that in relation to the allegations, including those where the claimant has succeeded, the analysis is flawed.

86. The EJ erred on the basis of ground (1).

Ground (2)

87. While I am acutely conscious of the high test for perversity, I am also satisfied that the EJ's conclusions were perverse and inadequately reasoned, in relation to his findings at paras [91] to [94]. His reference to putting specific allegations within an investigation as a central feature of a disciplinary process is not answered by Mr Patel's submission that the comment was made only in relation to this case, and could not be read as a general proposition. Generally, as Mr Laddie points out, that is incorrect in relation to the ACAS Code and specifically in relation to this case. The EJ's reasoning ignores the feature of the disciplinary process, which is to consider matters of which a person has been made aware, even if not raised at the investigation stage. It was common ground that the claimant was able to address the additional issues at the disciplinary stage of the process.

88. The EJ did not provide adequate reasons at paras [93] and [94] in relation to the choice of interviewees. The allegation is of a partial investigation. Two points arise here. The first (obvious) point that even if a decision is taken not to interview all character referees, it does not necessarily follow that an investigation is flawed, as alleged. The analysis at para [94] appears to jump to that stage and agrees that because not all of the witnesses have been interviewed, there was a flaw in the investigation. Second, the logic of jumping to that conclusion ignored the fact that two of the witnesses relied on by the claimant but not initially interviewed were interviewed for the subsequent disciplinary hearing.

89. The EJ erred on ground (2).

Ground (3)

90. Concerning allegation (ii), Mr Laddie drew the distinction between the manner and fact of the claimant's suspension. Mr Patel argued that the issue can be fairly read as not only the fact of the suspension, but the manner or the context of it, namely that at the time of suspension there remained unproven allegations, without any acknowledgement that they were to be investigated. The EJ's conclusions, at paras [96] to [98], related to the context and the manner of communication:

“96. At that time, and whilst allegations had been raised against him, he had not yet been given any opportunity to answer them. Furthermore, and notwithstanding the fact that no investigatory and/or disciplinary process had yet taken place, this action by the Respondent was not described as a neutral action.”

91. This is far broader than the issue, as defined, which the respondent was required to defend:

““60(ii) Required the Claimant to step down from his role as Clinical Lead.”

92. I am satisfied there was a breach of natural justice by the EJ in widening the issue. The EJ erred on ground (3).

Ground (4)

93. In relation to the restriction of the claimant's practice not being described as a neutral act, it is said that that is similarly flawed because it is different from the case which the respondent was asked to answer.

94. The EJ's analysis at paras [100] to [105] related to the timing of the restriction, that it was wrong to restrict him without making it clear that such a restriction was neutral, pending determination, without any explanation (para [101]), and the context of no or insufficient evidence or concern that he would interfere with witnesses, with less draconian alternatives not being considered. The issue had been limited in para 60(iii) to “restricting the claimant from practice.” The EJ's analysis criticised the respondent for a case far wider than the case it had been asked to meet.

95. I also accept that the EJ's reasons for criticising the respondent's reliance on the non-interference with the witnesses, as one which required evidence that witnesses would be fearful of giving evidence or were being intimidated, did not explain the EJ's consideration (if at all) of the context that the bullying allegations had been made by more junior members of staff. The fact that there was nothing in the allegations raised by the GOSH review that was specific to paediatric practice

ignored the ECH being a children's hospital.

Grounds (5) and (7)

96. I am not satisfied that the EJ erred on these grounds, (in relation to the period of suspension and delay in mediation) but I am also satisfied, having found that there was an error in relation to ground (1), that it is not safe to preserve any findings. In particular, whilst the respondent has criticised the EJ for failing to consider as a relevant factor the fact that the respondent was absent on leave for the vast majority of the period about which the EJ was concerned, as Mr Patel points out, the EJ was entitled to consider that the claimant had indicated a willingness to engage in any ongoing processes including any mediation, while he was on holiday. Grounds (5) and (7) fail, but the EJ's judgment remains unsafe.

Ground (6)

97. I am satisfied that the EJ erred in law in relation to ground (6), namely the 'last straw' analysis. While the EJ explained at paras [127] to [130] his conclusion that the respondent was obliged to inform the claimant of the details of the allegations, that ignores and fails to engage with the primary evidence, namely the correspondence dated 16th December 2021, in which the respondent had stated:

“we have now made [the claimant's representative] aware that there have been some new, additional concerns that have been raised about the viability of your return to the Evelina London — something you have acknowledged in your letter.... We now need to understand what those concerns are and the relationship between those concerns and your continued restrictions. I appreciate that this will be disappointing for you, but the Trust owes a duty of care to all its staff and it must duly take all concerns that have been raised seriously. We will of course keep you updated in respect of this; at this stage, the concerns are being discussed with the individuals so that the Trust can understand the nature of them. For the avoidance of doubt, no formal complaints have been raised against you and no action is being taken against

you by the Trust.”

98. The EJ did not engage with the respondent's position that it was not aware of the precise nature of the allegations, and needed to speak to those having raised the additional allegations before it spoke to the claimant. In the circumstances, I am satisfied that the EJ's reasons were inadequate. The EJ erred on the basis of ground (6).

How to resolve the claimant's claims and whether to remit to the same EJ

99. Having considered the errors that I have identified, I turn to the well-known authority of **Sinclair Roche & Temperley v Heard & Anor** [2004] IRLR 763, and whether I should remit to the same or a different EJ. Mr Laddie argues the latter, on the basis of there being no preserved findings, and the difficulty in the same EJ deciding the case again where he had reached such a clear conclusion (the so-called 'second bite' risk). Mr Patel points out that the scope of factual dispute is relatively narrow, so that the same EJ can be expected to re-evaluate the evidence with which he is familiar. He also points to the very regrettable delay in hearings being listed before the Employment Tribunal, as late as 2028. I am acutely conscious of the delay that remittal will entail for the claimant.

100. However, I am satisfied that the only appropriate course is to remit matters to a different EJ. This is not to impugn the professionalism or expertise of the EJ. Rather, the EJ has reached a clear view on the ultimate conclusions, based on unclear findings, namely as to what was a finding and what was a part of analysis. The flaws were very significant. Remittal to a different EJ is proportionate, given the substantial flaws and the 'second bite' risk. Therefore, the case will be remitted *de novo* to a judge other than the EJ.