EMPLOYMENT TRIBUNALS

Claimant: Mr N Matar

Respondents: Imperial College Healthcare NHS Trust (1)

Mr P Ziprin (2)

Heard at: London Central

On: 19, 20, 21, 22, 23, 26, 27 & 28 October and 16 December 2020

In chambers: 17 December 2020, 10 February 2021 and 10 March 2021

Before: Employment Judge Khan
Ms C I Ihnatowicz
Ms E Flanagan

Representation
Claimant: Mr D Panesar QC, Counsel
Respondent: Mr S Keen, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

(1) The unfair dismissal complaint succeeds.
(2) The breach of contract complaint succeeds.
(3) The direct age discrimination complaints against the first and second respondents succeed in part: issues (n), (t), (x), (y), (aa) and (ee) to (jj).
(4) All other complaints fail and are dismissed.

REASONS

1. By an ET1 presented on 4 October 2018, the claimant brought complaints of unfair constructive dismissal, direct age discrimination and age-related harassment, and breach of contract. The claim was amended on 8 February 2019 to include a victimisation complaint. The respondents resist these complaints.

Preliminary matters determined at this hearing

The claimant's application to amend the claim

2. The claimant made a written application to amend the claim on day five of this hearing, following the respondents' disclosure of new and relevant material on day four, to add 13 allegations of direct age discrimination and a further allegation of victimisation. We gave our decision orally and have set out our written reasons below under rule 62(3) as requested by the claimant (with reference to the allegations as enumerated in the claimant's written application).

3. We allowed amendments 18 (i), (ii)(a), (v), (vi), (xii) and (xiii) because we were satisfied that these were new allegations which arose from the respondents' late disclosure. We concluded that allegations (i) and (ii)(a) were materially distinct from the broader allegations which Mr Panesar, for the claimant, had already put to the second respondent in cross-examination. We did not agree that 18 (v) was caught by allegations (v) and (y) in the extant list of issues ("LOI") nor that 18 (vi) was caught by paragraph 3.12.2 of the claimant's particulars of claim, as Mr Keen contended, for the respondents.

4. The amendments we refused:

   (1) 18 (ii)(b), (iii) and (viii): We found, taking account of his witness statement dated 20 January 2020, and paragraph 117 in particular, the claimant was already aware that Mr Hakky had been supported in making an application to join the specialist register (and thereby to maintain his locum consultant contract) whereas he had not been so supported. We did not therefore find that it was in the interests of justice to allow this amendment.
   (2) 18 (iv): We found that this allegation was not caught by paragraph 3.12.4 of the amended particulars of claim, as Mr Keen contended for, but was caught by paragraph 3.14.3 of the same document and allegation (s) LOI. This was the same complaint i.e. that the respondents had failed to consider the claimant for the alternative role of Associate Specialist. Although Mr El Masry was cited in allegation (s) the claimant also relies on Mr Hakky as a named comparator. We were satisfied that this caused no prejudice to the claimant.
   (3) 18 (vii): We found that the underlying facts for this allegation were already known to the claimant. We did not therefore find that it was in the interests of justice to allow this amendment.
   (4) 18 (ix) and (x): We found that these were broadly the same allegations as 18 (vi) and (xiii), respectively, which we allowed and it was neither prejudicial to the claimant to refuse nor proportionate to allow them.
   (5) 18 (xi): We found that this allegation was caught by allegation (v) LOI. The claimant was aware of the factual basis for this allegation prior to the respondents' late disclosure and it was not in the interests of justice to allow this amendment.
   (6) 19: Although we found that this was a new allegation it was a speculative complaint stemming from the respondent's late disclosure and had little reasonable prospect of success in our summary assessment. We were also mindful that granting this application would jeopardise the trial timetable and the ability to hear all of the evidence at this hearing. This was the third trial window for which it had taken over a year to be listed

and it was likely that a fourth would not be listed for another year. We found that it was not therefore in the interests of justice to allow this amendment in such circumstances.

5. Following this amendment to the claim the respondents were given leave to amend the response and an addendum to the grounds of resistance was served on the tribunal on 25 October 2020.

The claimant's application to adduce evidence

6. The claimant applied to add documents into evidence at the start of day seven of this hearing, these documents having been disclosed by the respondent in response to the claimant's voluntary request. The respondent objected. We gave our decision orally and have set out our written reasons below under rule 62(3) as requested by the claimant. The new documents were in three tranches:

   (1) Documents relating to Mr Hakky: We found that these were relevant to the treatment of the claimant's named comparator and probative. We allowed these documents to be admitted.
   (2) Documents relating to the contracts of Dr Gonzalo and Dr Thompson: We found that these documents were not relevant to the issues in dispute given the respondents' concession that both doctors were employed on the same Locum Consultant contract as the claimant.
   (3) Other documents relating to Dr Thompson: Nor did we find that these documents were relevant to the issues in dispute. They related to events which post-dated the impugned conduct and to another doctor who was not a named comparator and to decisions made by none of the relevant decision-makers.

The claimant's application for specific disclosure

7. Following this application, the claimant applied for specific disclosure against the respondent's objection which we refused save that we ordered the respondents: (1) to clarify whether Dr Anton was appointed into the role of Associate Specialist and if so to disclose any relevant documents; and (2) to disclose any correspondence between the Division and MDO on 12 February 2020.

The issues

8. We were required to determine the following issues on liability, the same having been agreed between the parties in advance before being revised to incorporate the amended claim and clarified with the parties during the hearing:

Factual issues

8.1 The claimant relies on the following allegations which are denied by the respondents:

   a. On 17 January 2017 the claimant was informed that his services would be no longer be required as the second respondent was appointing two new junior consultants and the second respondent

made it clear that the claimant would be replaced by two junior consultants by June 2017 at the latest.

b. The first and second respondents failed to consider the claimant's request to extend his Locum Consultant contract through to his retirement age in May 2019.
c. From or around 7 July 2017 the second respondent cancelled the claimant's theatre list, sought allegations against the claimant that would substantiate a restriction from practising for a significant period of time.
d. On 10 July 2017 the claimant was informed of allegations (datix 1) and placed on immediate restriction from clinical practice until 24 July 2017.
e. On 11 July 2017 the second respondent personally completed a formal complaint against the claimant in relation to an incident which had taken place more than a year earlier (datix 2) which had been discussed in 2016 and deemed not to be a serious incident.
f. On or around 24 July 2017 the second respondent requested that a colleague complete a further datix against the claimant (datix 3) again relating to an incident which had taken place in June 2017 but which had not resulted in a formal complaint / datix at the time it had occurred.
g. On 25 July 2017 the restriction on the claimant's practice was extended for four weeks to 22 August 2017.
h. During August 2017, Mr Justin Vale searched through patient deaths on the first respondent's database actively seeking allegations to bring against the claimant. Unable to find any, he commented that his search "did not get off to a good start". Mr Vale then instructed the investigator, Professor Vassilios Papalois, that if he found serious issues in his investigation then a wider piece of work could be done.
i. On 22 August 2017 the restriction on the claimant's practice was extended for four weeks to 20 September 2017.
j. On 19 and 20 September 2017 the second respondent and Julie Eaton exchanged emails about the allegations they were investigating against the claimant from which it is clear that they were struggling to build a disciplinary case against him, but unreasonably continued, nevertheless.
k. On 20 September 2017 the restriction on the claimant's practice was extended for four weeks to 19 October 2017.
l. On 3 October 2017, Mr Vale raised a new disciplinary allegation (datix 4) against the claimant relating to an incident on 20 August 2016 about which the datix was inexplicably only raised on 20 September 2017, more than a year after the event. The case had already been discussed at the time and concluded to be a non-serious incident.
m. The conclusion of the investigation into the initial allegation (datix 1) asserted on 10 July 2017 was unreasonably delayed.
n. On 3 October 2017 the restriction on the claimant's practice was extended for an undefined period and was not thereafter properly kept under review in breach of Maintaining High Professional Standards in the Modern NHS.
o. On or around 10 October 2017 the first and second respondents ignored the concerns of Mr Chris Aylwin in continuing with datix 4

given that at the time of the incident it had been investigated and no allegations sustained.

p. On or around 26 October 2017 Ms Eaton and Mr Vale discussed the possibility of making the claimant redundant but concluded that it was too expensive, evidencing a predetermined intention to dismiss the claimant on some ground.

q. On or around 13 December 2017 Ms Eaton deliberately ignored the claimant's request for a break from the disciplinary investigation in emailing him a copy of the disciplinary report whilst he was on holiday, thereby negating the health benefits of his holiday.

r. On 22 December 2017 for the first time Mr Vale informed the claimant that he could not (in any event) continue with his position as Locum Consultant because he was not on the GMC Specialist Register and that other locums had to become speciality doctors, a position which was considerably below that of Consultant.

s. At the same time, Mr Vale and / or both respondents did not consider treating the claimant in the same way as Mr Nabil El Masry who was instead of a Locum Consultant an Associate Specialist.

t. Notwithstanding the disciplinary investigation had not found any serious clinical allegations against the claimant and that Mr Vale was prepared to treat the communication issues as learning points i.e. a disciplinary was not necessary, the restriction on the claimant's practice continued without limit.

u. On 18 January 2018 Mr Vale deliberately continued and / or revived the disciplinary matter and again raised the issue of the claimant not being able to continue as a Locum Consultant, and would need to take a pay cut of £35,000 to transfer to the role of Speciality Doctor inciting further stress and anxiety in the claimant.

v. On 1 March 2018 the first respondent gave three months' written notice to terminate the claimant's Locum Consultant contract and offered him a junior Speciality Doctor role, and failed to exercise discretion as to when this notice could be served in light of the claimant's age and failed to consider suitable alternative roles.

w. On 8 March 2018 the claimant was invited to a disciplinary hearing where dismissal was a potential option. The allegations which Mr Vale had been prepared to drop in December 2017 were now artificially inflated. The disciplinary hearing was listed initially for 8 May 2018 and then postponed to 29 May 2018 – three days before his notice in any event would have expired. This caused significant increased stress and anxiety for the claimant.

x. The respondents failed to review the claimant's restriction on practice which continued without limit. Further, they deliberately ignored advice from Ms Eaton that there were insufficient grounds to continue the restriction on the claimant's practice and continued the restriction.

y. The respondents obstructed the claimant's return to work to the position of Locum Consultant and failed to conduct his annual appraisal.

z. The first respondent wrote to the claimant on 11 May 2018 to inform him that the outcome of the disciplinary would not include the possibility of dismissal but retained the possibility of a final written warning.

aa. On 23 May 2018 the claimant concluded that his position was no longer tenable and resigned with immediate effect.

bb. Between June and October 2018 the respondents ordered an investigation into the claimant's pension and instructed NHS Pensions to reduce the claimant's pensionable annual salary to £107,772 and to refund all pension payments that he had made on any earnings above that amount.

cc. The respondents failed to assist the claimant in receiving a fair NHS pension and / or deliberately failed to confirm to NHS Pensions the requisite information to ensure he received his due pension entitlement.

dd. The conduct of the respondents was unduly influenced by the claimant's age (he was 59 at the date of his dismissal) and has caused the claimant significant stress and anxiety. At times the respondents' conduct was malicious.

ee. [new allegation (i)] The respondents failed to warn the claimant between May and December 2017 that they were proposing to terminate his Locum Consultant contract by reason of his not being on the Specialist Register (as per Mr Hakky).

ff. [new allegation (ii)(a)] The respondents failed to proffer or provide support from May 2017 to the time of his resignation in the form of encouragement to apply to the Specialist Register (as per Mr Hakky on 11 October 2017).

gg. [new allegation (v)] The respondents failed to inform the claimant that he would after the termination of his Locum Consultant post "remain from the point of view [of the respondents] and your colleagues, as a Consultant colleague with the same role and responsibilities" (as was done with Mr Hakky on 11 October 2017).

hh. [new allegation (vi)] The respondents failed to reassure the claimant that they would on termination of his Locum Consultant contract "try and make sure that financially you are not worse off" (as the second respondent did with Mr Hakky on 11 October 2017).

ii. [new allegation (xii)] Failing to inform the claimant that he would be permitted or to permit him to complete an application for the Specialist Register whilst retaining his Consultant rate of pay (as was done with Mr Hakky at least up to 2020).

jj. [new allegation (xiii)] The respondents changed the claimant's role to have him working in other consultants' clinics and failed (as was done with Mr Hakky) to preserve the nature of his role (as indicated by the second respondent's email dated 15 February 2018).

<u>Jurisdiction</u>

8.2 In respect of any acts which are out of time:

a. Do any or all of those matters form part of a course of conduct by the respondents (or any of them) extending over a period of time?
b. If not, is it just and equitable to extend time?

<u>Unfair constructive dismissal</u>

8.3 Did the first respondent commit a fundamental breach of the implied term of mutual trust and confidence? The claimant relies on (a) to (aa).

8.4 The claimant relies on a composite final straw: the continuation of the disciplinary process notwithstanding that he was told that it could be dealt with informally; the termination of his Locum Consultant contract; the failure to facilitate a return to adequate work i.e. as a Locum Consultant.

8.5 If the claimant was dismissed, what was the reason or principal reason for dismissal and is it a potentially fair reason under sections 98(1)(b) & (2) ERA? The first respondent relies on alternative SOSRs: clinical concerns, including those in relation to communication, in relation to the claimant's practice (if the dismissal arose out of the disciplinary process); or because of regulatory concerns (if the dismissal arose because the claimant could not return to the Locum Consultant post).

Direct discrimination because of age (section 13 EQA)

8.6 The claimant relies on (a) to (cc) and (ee) to (jj).

8.7 Did the respondents (or either of them) act as alleged?

8.8 If so, did the respondents (or either of them) treat the claimant less favourably than they treated or would have treated an actual / hypothetical comparator? The claimant relies on Mr Sherif Hakky and / or a hypothetical comparator who was in a lower age group than the claimant and / or was in a lower age group than the claimant and who was engaged by the first respondent as a Locum Consultant but not required to accept the role of junior Speciality Doctor in 2017/18.

8.9 If so, did it do so because of the claimant's age?

Harassment related to age (section 26 EQA)

8.10 The claimant relies (in the alternative) on (a) to (z).

8.11 Did the respondents (or either of them) act as alleged?

8.12 If so, was this related to the claimant's age?

8.13 If so, did the conduct have the purpose or effect (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Victimisation (section 27 EQA)

8.14 It is accepted that the claimant did the following protected acts:

a. On 23 May 2018 the claimant sent his letter of resignation to Mr Vale in which he confirmed his belief that he had not been offered a genuine suitable alternative role because the respondents no longer wanted someone of his age working in a Consultant position.

b. On 6 June 2018 the claimant's representatives wrote to Mr Vale to confirm that the claimant was entitled to bring claims against the first respondent for unfair constructive dismissal and age discrimination.
c. On 4 October 2018 the claimant submitted his claim against the respondents which included a complaint of age discrimination.

8.15 If so, did the respondents subject the claimant to a detriment because the claimant had done so? The claimant relies on (bb) and (cc).

Wrongful dismissal

8.16 Was the claimant dismissed in breach of his contract?

8.17 If so, to what notice pay was the claimant entitled?

The evidence

9. We heard evidence from the claimant.

10. For the first and second respondents, we heard from: Mr Paul Ziprin, the second respondent, Consultant Colorectal Surgeon and Head of Speciality for Surgery; Julie Eaton, formerly an HR Consultant; Mr Justin Vale, Consultant Urologist and formerly Associate Medical Director for Patient Safety and Quality; Professor Vassilios Papalois, Consultant in Renal and Pancreas Transplant Surgery; Anne Hall, General Manager for the Trauma Directorate and formerly Operational Manager for the General Vascular Directorate; Andreas Cheers, Pensions Manager.

11. There was a bundle exceeding 1100 pages. We admitted into evidence additional documents disclosed by the respondents which related to Mr Hakky and to Mr Frith and which in the main were contained in two tranches. We read the pages to which we were referred. References below to [25], [25S] and [25SS] are to the primary bundle and to the first and second tranches of documents, respectively.

12. We also considered written and oral closing submissions from both parties.

The facts

13. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

14. The first respondent is an NHS trust providing acute and specialist healthcare. It consists of five London hospitals including St Mary's Hospital in Paddington and Charing Cross Hospital in Hammersmith.

15. The second respondent, Mr Paul Ziprin, is the Head of Speciality for Surgery in addition to being a Consultant Colorectal Surgeon and was the claimant's line manager from 2014. He, like the claimant, was based in the General and Vascular Directorate which was part of the Surgery, Cancer and Cardiovascular Division.

16. The claimant was employed by the first respondent for seven years from 10

January 2011 until 23 May 2018. He was based at St Mary's Hospital. At the date of termination he had accrued 24 years' service in the NHS and was 59 years of age. Under the terms of his occupational pension scheme the claimant was able (and intended) to retire at 60, in May 2019.

17. The claimant was initially employed as a Senior Clinical Fellow for six months. He was employed as a salaried Locum Consultant from 7 April 2014 until his employment ended four years later. We find that in the intervening period i.e. between July 2011 and April 2014 the claimant was employed as a Locum Consultant on an as and when basis. There was no written contract for this work. Although the claimant's Electronic Staff Record ("ESR") for the period January 2012 to April 2014 referred to the designation "Specialist Registrar – As and When" we also note from other documents we were taken to, that the first respondent also referred to the claimant: as having been employed as a Locum Consultant for five years, in July 2017 [198]; as being employed as a "Specialist Registrar – As & When Locum", in September 2017 [1S]; as having been employed "as a locum consultant since April 2014 and previous to that on a locum sessional basis", in May 2018 [424]; as having been employed both as a Locum Consultant and "ad-hoc locum specialist registrar", in March 2019 [597]. We accept the claimant's evidence that he began working as a Locum Consultant in July 2011 on ad hoc basis initially to cover the on-call rota, he had an ID card bearing the title 'Consultant Surgeon', had his own clinic and theatre, and his work remained unchanged when he moved onto a salaried Locum Consultant contract on 7 April 2014 when he continued to provide cover on the on-call rota and Outpatient clinics, and Elective and Emergency theatre lists in a Consultant capacity. This is consistent with the second respondent's evidence that the claimant was employed as a Locum Consultant Surgeon when he joined the first respondent in 2012. The claimant was paid variously on an hourly or sessional basis for this work between July 2011 and April 2014. Over this period he worked more than 72 hours per week on average and earned approximately £238,000 per annum. On-call work accounted for half of this time and more than 50% of his income. As the second respondent said in oral evidence, the claimant was covering lots of gaps in the rota. The claimant agreed to move onto a salaried contract in April 2017 in order to regularise his pay when he was paid an annual salary and an on-call supplement. This resulted in a substantial reduction to his salary which was now in the region of £120,000 per annum. We shall return to this issue in relation to the claimant's pension below.

<u>The requirement to be on the Specialist Register</u>

18. It is a statutory requirement under the NHS Appointment of Consultants Regulations 1996 ("the 1996 Regs") for a doctor employed in a Consultant post for more than 12 months to be on the Specialist Register ("the Register") kept by the General Medical Council ("GMC").

19. The claimant was not on the Register. He applied twice unsuccessfully to join it, in 2010 and in 2011. In refusing his first application, the GMC recommended that he move to a teaching unit. This was one of the reasons which led the claimant apply to work for the first respondent. The claimant made his second application to join the Register some six months into his employment with the first respondent, in June or July 2011, with the second respondent's support. On this occasion, the GMC concluded that his application was premature and

the claimant needed to demonstrate more evidence of his clinical performance through appraisals and revalidation.

20. The claimant made no further attempt to apply to join the Register and nor did the respondents raise this issue with him at any time prior to December 2017. This meant that by continuing to employ the claimant as a locum for more than 12 months the first respondent was contravening the 1996 Regs. This regulatory issue in so far as it related to the claimant was not identified by the first respondent until July 2017 and the second respondent was made aware of this issue later that year. We find that this status quo suited the claimant as he was able to do the same work with the same autonomy and pay, and broadly the same status as a substantively employed consultant. He knew from experience that the application process was time-consuming. The claimant also knew that Mr Hakky had been, like him, employed as a Locum Consultant for several years. The claimant's oral evidence, which we accept, was that he had come to understand that specialist registration was not a prerequisite to work as a Consultant.

The 'Consultant of the Week' model

21. In November 2015 the second respondent introduced a new way of working within the Division at the St Mary's site only. Each week a designated Consultant covered emergency (on-call) inpatients and admissions, and supervised surgery, Monday to Thursday, from 0730 to 1930. Christos Tsironis who, like the claimant, was employed initially as a clinical fellow, acted up into the role of Locum Consultant to manage the emergency work and became the designated Consultant every alternate week from this date. The other consultant surgeons, including the claimant and the second respondent, covered the other weeks on the rota. The second respondent said that in practice this meant one in every ten weeks. This left more time to cover the elective specialist work.

22. The claimant remained on the on-call rotas for both Out of Hours (i.e. Monday to Thursday, from 1930 to 0730), and weekends (i.e. Friday 1930 to Monday 0730) in addition to covering one in ten of the weeks when Mr Tsironis was not on duty and additional weekdays when other colleagues were on leave. He also continued to provide cover for the elective lists.

23. By late 2016 the respondents concluded that a single Consultant covering the emergency work every other week was onerous. Additional funding was secured to appoint two substantive consultant surgeons in Emergency and General Surgery who would alternate to cover 50% of the rota across the year. Anne Hall, Operations Manager for the General and Vascular Directorate, made the business case for these posts which she had presented to senior managers for approval.

The meeting between the claimant, the second respondent and Ms Hall on 17 January 2017 (issue (a))

24. The claimant met with the second respondent and Ms Hall on 17 January 2017 to discuss these new posts. The second respondent's evidence was that the introduction of these roles did not affect the claimant's employment because they were paid out of additional funding. He said he wanted to meet with the

claimant to discuss these new roles and way of working to reassure him as he anticipated that the claimant would feel threatened by this change. We find this to be an unconvincing explanation. We find it more likely that the second respondent convened this meeting for the very reason that the new appointments impacted on the claimant's work. In the absence of any evidence to the contrary we find that the claimant was the only Locum Consultant with whom the second respondent and Ms Hall met in relation to this issue. We also find that Ms Hall was in attendance at the second respondent's request. Although he said that they decided together to convene this meeting, we prefer Ms Hall's evidence that it was the second respondent's idea that she accompanied him to this meeting. As someone who was not in the claimant's line of management there would have been no other reason for her to attend a meeting between the claimant and his line manager. We also accepted the oral evidence of Ms Hall, whom the second respondent described as the architect of these new roles, that the intention was that the claimant's locum post needed to be substantiated and would not be retained once the new posts were filled. Her view was that the first respondent could not employ all three roles. If the claimant was not appointed into one of these new roles then his locum role would end. This was why the second respondent wanted to meet with the claimant together with Ms Hall. Her attendance would have been unnecessary if the second respondent's intention had been merely to reassure the claimant.

25. Although neither manager told the claimant expressly that he was being replaced, this is what he understood when the second respondent explained that the new roles would together cover 50% of the (weekday) emergency work, currently being undertaken by Mr Tsironis. With this emergency work taking up one out every four weeks, each of the two new post-holders would be available to take on substantially more of the on-call and elective work at other times. The claimant's understanding was entirely consistent with Ms Hall's evidence. When the second respondent told him that his aim was that these appointments would be in place by June 2017 the claimant concluded that this was when his employment would cease. We find that he responded in a way which was consistent with this realisation: he pleaded with the second respondent and Ms Hall to remain in post until his 60th birthday (in May 2019) to avoid a shortfall in his pension. As Julie Eaton, HR Consultant, said when she gave evidence, the claimant had commonly shared his intention to retire when he reached 60. The claimant explained that as there would only be one additional surgeon there remained a demand to fill the two extra all-day theatre lists every weekend which had been established to enable the first respondent to meet its waiting list target. Ms Hall agreed to look into this. The claimant left this meeting feeling hopeful that he would be accommodated and able to continue working as a Locum Consultant. There was no further discussion about the claimant's ongoing employment until the regulatory issue was discussed with him in December 2017, some 11 months later.

26. In his oral evidence, the claimant agreed that the second respondent did not tell him that he was being replaced by "younger" consultants. We do not find that the second respondent stated this otherwise by implication. The claimant did not apply for one of these new posts. He says this was because it was already made known, at a meeting in early December 2016, that two doctors had been earmarked for these roles: Mr Tsironis and Daniel Frith. His evidence was that this was discussed following a Morbidity and Mortality Meeting ("MMM") that month. When he asked about Mr Frith he was told that he was a

"younger pleasant guy". The claimant said that the second respondent and Barry Paraskeva, former Clinical Director, were both present. The second respondent denied this. We find that whilst it is likely that Mr Tsironis was a presumptive appointee because he had been undertaking his role for more than a year, Mr Frith was not. We were taken to two emails which were sent to the second respondent on 4 January 2017 [1171] in which one colleague recommended Mr Frith for consideration for one of the new posts and a second colleague agreed that he would be "worth a look". The second respondent did not reveal these communications nor did the respondents disclose them until day four of this hearing. However, we do not infer from these emails or from the respondents' initial failure to disclose them that a decision had already been made to appoint Mr Frith into one of the roles. We find that it is clear from these emails demonstrate that a selection decision had not been made by this date and Mr Frith was not known to the second respondent.

27. The second respondent drafted the job description and job advert for these posts and was one of four clinicians on the panel who shortlisted and selected the applicants. He was therefore only one of four decision-makers. Mr Tsironis and Mr Frith were two of four shortlisted applicants for these two posts. They were both appointed following their interviews in June 2017. Mr Tsironis took up his appointment in the same month. Mr Frith started in November 2017. They were both in their thirties. We do not find that they were appointed because they were younger than the claimant. Mr Tsironis was already doing this work (for reasons which we were not taken to in evidence nor invited to find were related to his age) and he and Mr Frith applied whereas the claimant did not. Although we have found that there was an intention to substantiate the claimant's locum post he remained in his role and was not therefore replaced by either of these new consultants.

Datix and Serious Incident ("SI") investigations

28. A datix is a clinical incident reporting tool which enables an NHS body to review, learn and apply best practice. This document can be completed by anyone involved in the care of a patient or who has observed this care in order to report a clinical incident i.e. any unplanned or unexpected event. When completing a datix one of the following categories of harm must be selected: none, low, moderate or serious. Where any harm has been reported the clinical incident is treated as an adverse event. If the level of reported harm is either 'moderate' or 'serious' then an SI investigation is required. Once completed, SI investigation reports are sent by the first respondent to the CCG for review.

29. All datices are automatically forwarded to the first respondent's Medical Management Team ("MMT") and reviewed each week. When deemed necessary, the MMT appoints an SI investigator. In 2017 the MMT was made up of Dr Julian Redhead, Medical Director and Responsible Officer, Dr Katie Urch, Divisional Director Surgery, Cancer and Cardiovascular, and Trust Lead Cancer, and Justin Vale, Associate Medical Director for Patient Safety and Quality, and Deputy Responsible Officer. The second respondent did not sit on the MMT although like other heads of division he would meet with the MMT to discuss issues relevant to his division when necessary.

Complaint – patient BK

30. On 16 May 2017, a patient, BK, on whom the claimant had performed a laparoscopic cholecystectomy (i.e. gall bladder removal) 11 months earlier, in June 2016, wrote a letter of complaint [156]. The procedure had resulted in a small bowel injury. The complaint, in so far as it related to the claimant, was that he had caused this injury and his communication had been poor. The claimant provided a response to be relayed via the first respondent to the complainant. We accept that when the second respondent reviewed this response he found the claimant's explanation for the cause of the injury (i.e. that the patient had coughed) was implausible and demonstrated poor reflection.

SI Investigation – patient FW

31. Patient FW had sustained traumatic and ultimately fatal injuries in a road traffic accident in August 2016. The claimant had been one of five or more consultants involved in the care of this patient. He was the on-call surgeon. An SI investigation had been completed initially in December 2016. It was reviewed by the CCG SI panel who found it to be incomplete and decided to re-investigate. The claimant was interviewed by Mr Chris Aylwin, Vascular and Trauma Consultant, and Mr Shehan Hettiaratchy, Lead Surgeon and Major Trauma Director, on 6 June 2017.

32. Two cases in which the claimant performed emergency surgery during the last weekend of June 2017 precipitated further concern in relation to his clinical practice. Both patients (GF and JM) were emergency re-admissions having previously been under the care of Mr James Kinross, Consultant Colorectal Surgeon.

33. We accept the second respondent's evidence that Mr Kinross came to him to report his concerns about GF and JM, and was upset. Of further concern to the second respondent was that two junior colleagues, Ms Jasmine Winter-Beatty, Specialist Registrar, and Mr Haris Markakis, Clinical Fellow, approached him independently of each other to report their concerns about the claimant's decision-making, his conduct during surgery, his communication and lack of support over the same weekend. They reported that they had to go back and see the patients again on the ward round and that the Critical Care Nurse was also concerned. In his oral evidence, which we accept, the second respondent felt that this lack of support to clinical juniors was "unique" and rang alarm bells. This is consistent with evidence provided by both junior doctors to a subsequent investigation in relation to patient GF. As is the claimant's subsequent description of Ms Winter-Beatty as "unstable" in the context of their interactions that weekend. We find that the second respondent was genuinely concerned about the claimant's decision-making and communication, and, in relation to patient GF, directed Mr Kinross to complete a datix because of the complaints he had brought to his attention.

Datix 1 – patient GF

34. The claimant performed an emergency laparotomy on patient GF on 25 June 2017 when he was the emergency on-call surgeon. This patient had had a mechanical bowel obstruction for five days. A CT scan and clinical pathology

report revealed that there were ischaemic changes to the bowel, acute peritonitis, adhesions and early abscess formation [651]. The claimant decided that surgical intervention could not be delayed. Following this surgery the patient was subsequently admitted to ICU.

35. Mr Kinross who had performed elective surgery on this patient two weeks earlier raised concerns about the claimant's actions which he felt may have caused the patient to be admitted to ICU. The second respondent therefore advised him to complete a datix. He completed a datix the next day, on 26 June 2017 [626]. He concluded that the laparotomy which the claimant had performed was an unnecessary and inappropriate procedure which had caused two iatrogenic perforations of the small bowel. He was also critical of the claimant's failure to consult with him. Mr Kinross concluded "This is a complex patient…and there was a complete failure of communication and clinical decision making during his readmission that lead to patient harm." He designated the impact to the patient as "moderate harm".

36. Because of Mr Kinross's complaints, the second respondent reviewed GF's patient records and found that they lacked any notes documenting the claimant's clinical findings or rationale for his intervention nor any consultation with the patient's family.

37. In his oral evidence, the second respondent agreed that the pathology report supported the claimant's clinical decision-making because it showed that there was a risk of bowel perforation if surgery was not performed. He did not review this report prior to his meeting with Dr Urch on 4 July 2017. We do not find that this oversight was deliberate nor that it demonstrates any bias against the claimant. The second respondent also agreed that it was a common practice not to discuss a patient with their treating consultant in the case of an emergency re-admission. We find that based on Mr Kinross's datix and his own review of the patient records, the second respondent was genuinely concerned about the claimant's practice.

Patient JM

38. The claimant performed surgery on patient JM on 23 June 2017 following which the patient's condition deteriorated and the patient died from multiple organ failure three days later. Mr Kinross was once again concerned about the claimant's clinical decision-making and communication and felt that there had been a delay in recognising this patient's condition which might have led to death.

The decision to investigate the claimant and restrict him to non-clinical duties (issues (c) & (d))

The meeting between the second respondent and Dr Urch on 4 July 2017

39. The second respondent met with Dr Urch on 4 July 2017 when they initiated a process that resulted in the claimant's restriction to non-clinical duties. Ms Eaton was also in attendance and took a note of their discussion [163]. They discussed patients GF, JM, BK and FW.

40. In relation to BK, the second respondent, as we have already noted, found that

the claimant's reflection was poor and his explanation for the injury to this patient implausible. In her note of this meeting, Ms Eaton recorded the comment "hogwash". We accept the respondents' evidence that this was not a word which the second respondent used but was one which Dr Urch used to paraphrase his view and which Ms Eaton recorded. The second respondent concluded that it was necessary to complete a datix because the procedure had resulted in harm to the patient. We accept his evidence that one was required. As the claimant's line manager and Head of Speciality it fell to the second respondent to complete this datix.

41. Ms Eaton's note also recorded the following comment: "Set ball rolling with 4 complaints and SI investigation". We find that this reflected the fact there were now four live issues in relation to the claimant's practice: the BK complaint; Mr Kinross's complaints in relation to his patients GF and JM (which included datix 1); and the SI investigation in relation to FW. We do not infer from this note or otherwise from his conduct that the second respondent was now looking for reasons to remove the claimant. There was now a concurrence of issues which in the genuine belief of the second respondent and Dr Urch warranted the claimant's restriction pending investigation. The second respondent was also exercised by the issues which had been raised by Ms Winter-Beatty and Mr Markakis which overlapped with the concerns raised by Mr Kinross in relation to patients GF and JM.

The MMT meeting on 7 July 2017

42. Whilst the second respondent and Dr Urch took the steps to initiate the restriction of the claimant's practice it was necessary for this decision to be sanctioned by the MMT before it could be implemented. Three days after the meeting on 4 July 2017, a decision was taken at the weekly MMT to investigate the GF, BK and JM cases, to conduct an informal review of the claimant's cases and to restrict him to non-clinical duties. The second respondent attended a pre-meeting to discuss the cases involving the claimant. No record of this meeting was taken or if one was it was neither retained nor disclosed.

43. During this pre-meeting, the second respondent and Dr Urch suggested that because of the concurrence of these incidents within a relatively short timeframe the MMT should sanction a wider review of the claimant's caseload to ascertain whether there were common themes or concerns relating to the claimant's clinical competence. Mr Vale and Dr Redhead disagreed. As Mr Vale said in oral evidence, this would look like a case was being built. He and Dr Redhead agreed that in the first instance any investigation would be limited to the four cases under discussion and if this demonstrated that there was a wider problem then consideration would be given to whether a full formal review was necessary. In the meantime, they also agreed that Mr Vale would conduct an informal review of the claimant's cases. We accept Mr Vale's evidence that his focus and motivation was to safeguard patient safety.

44. When the MMT convened it considered whether to investigate these cases under the SI procedure or formally under Maintaining High Professional Standards in the Modern NHS ("MHPS"). The purpose of an SI investigation is to establish the root cause of incidents related to patient care and key learning points in order to reduce the likelihood of future harm to patients. The purpose of an MHPS investigation is to establish the facts relating to allegations raised

about the conduct or performance of a medical practitioner which then enable the case manager to decide whether formal action is necessary under the disciplinary or capability procedure. Therefore, whereas an SI investigation is potentially wider-ranging and has the aim of establishing lessons to be learned, one conducted under the MHPS is focussed on the conduct or performance of a doctor and can presage formal disciplinary or capability action. As Ms Eaton noted in an email dated 25 October 2017 "disciplinary allegations normally arise out of an SI which tends to take a more objective overview rather than setting out to prove or disprove an hypothesis" [266]. An SI investigation can recommend an MHPS investigation in relation to the conduct or performance of a doctor. It is permissible to conduct investigations concurrently under these separate procedures.

45. The MMT decided that:

    a. GF would be investigated under both SI and MHPS procedures. The second investigation was deemed to be appropriate because there was a concern (raised by Mr Kinross) that the claimant's decision making may have caused harm to the patient.
    b. BK and JM would be investigated as SIs only as the MMT felt that these cases did not raise any immediate serious concerns in relation to the claimant's conduct or performance.
    c. They would await the outcome of the extant SI investigation in relation to FW.

46. As Deputy Responsible Officer, Mr Vale was responsible for case managing the MHPS investigation and overseeing the SI investigations. We accept his unchallenged evidence that he did not at this stage make any assessment of these allegations. All that was required at this stage was for the MMT to assess whether the nature of the concerns raised warranted further investigation and if so, under which procedure. Mr Vale and Dr Redhead agreed that these investigations were necessary. They also agreed that the claimant would be restricted to non-clinical duties pending the MHPS fact-finding investigation.

47. We find that the decisions to investigate the claimant were driven by the second respondent with the support of Dr Urch. It is clear from the note of the meeting on 4 July 2017 that Dr Urch had already decided that this action was necessary. We do not find that the second respondent was actively looking for cases but acted out of genuine concern. As Head of Speciality, the second respondent was deemed to have raised credible concerns about which the MMT was required to act. We accept Mr Vale's evidence that the decisions to conduct an investigation under MHPS and to restrict the claimant were taken because of the allegation that the claimant's decision-making had led to patient harm and formal action was warranted to safeguard patient safety. This was a very serious step to take but one they felt was warranted by the concerns raised by Mr Kinross which the MMT agreed required investigation under the MHPS. These processes were under the purview of the MMT and Mr Vale's oversight in particular, and it is fanciful to suggest that the second respondent was orchestrating an investigation the conduct of which was outside his control and for which there was no predetermined outcome.

48. It was agreed that the claimant would be restricted to non-clinical duties with immediate effect. As the claimant's line manager, it fell to the second

respondent to convey this decision to him and also to look into what other work was available.

49. Although there had been two adverse consequences in relation to patients GF and JM and also a complaint in relation to JM, Mr Kinross was not placed on restriction nor investigated. We do not find that Mr Kinross was in a comparable position to the claimant, as is contended for. We find that the reason for this difference in treatment was that there was now a confluence of potential issues in relation to the claimant's clinical decision-making and his communication arising from these four cases which the second respondent and Dr Urch agreed should be raised with MMT and which these senior managers agreed warranted investigation and restriction. We do not therefore find that the decisions to cancel the claimant's theatre lists from this date nor to restrict him to non-clinical duties were because of or related to the claimant's age.

Handling Concerns about Doctors' and Dentists' Conduct, Performance and Health ("the Policy and Procedure for Handling Concerns")

50. MHPS is incorporated within the first respondent's Policy and Procedure for Handling Concerns, Part Two of which sets out the rules governing the restriction of practice and exclusion from work of a relevant practitioner. An overview of the process to be followed once a decision has been taken to restrict or exclude is provided by flowchart 2 and includes the following steps:

    a. Notification to the National Clinical Assessment Service ("NCAS") (now Practitioner Performance Advice).
    b. Arrangements made for: supervised practice; restriction to certain types of clinical duty; restriction to administrative work, research / audit, teaching or other educational duties; or investigation of specific health problems.
    c. If relevant, immediate exclusion for a maximum of two weeks on full pay.
    d. Discussion between the Medical Director and NCAS to confirm that exclusion or restriction is appropriate.
    e. If relevant, the temporary exclusion ends followed by a two-week "cooling-off period" before the practitioner returns to work; alternatively, a decision is made to formally exclude on the basis that the case manager has considered there is a case to answer.
    f. If there is a formal exclusion: a third review should be conducted within 12 weeks (with a report to the Chief Executive outlining the reasons for the continued exclusion instead of restricted practice and the ongoing exclusion reported to the Trust Development Authority ("TDA") – by this date, part of NHS Improvement – and a final review within 24 weeks (with a report from the Chief Executive to the TDA); the investigation should be completed within six months when the exclusion ends and is formally lifted; the exclusion can be extended in exceptional circumstances, for example, where there are criminal proceedings or there are serious conduct / capability issues and a complex investigation is under way.

51. The focus of Part Two is on exclusion. There are only three paragraphs which provide specific guidance on restriction: paragraph 10.1.1 which provides that where there are serious concerns about a practitioner's conduct, performance or health, consideration will be given to whether it is necessary to place temporary restrictions on their practice; paragraph 10.6.1 which enumerates a non-exhaustive list of the alternatives to exclusion (see (b) above); and

paragraph 10.5.6 which provides that an exclusion should be lifted if the allegations are without foundation or the investigation can proceed with the practitioner working normally or with restrictions.

52. Mr Vale who was responsible for overseeing the claimant's restriction was assisted by Ms Eaton in applying these provisions to the claimant. Their oral evidence was that the principles applicable to exclusion also applied to restriction. The notable provisions in relation to exclusion are:

    a. Paragraph 10.1.2 which provides that exclusion is a precautionary and interim measure taken whilst action to resolve a problem is being considered; and will be on full pay.
    b. Paragraph 10.1.3 which provides that exclusion is potentially justified when the following objectives cannot be met by other means: (i) to protect the interests of patients, the Trust, or other staff: (ii) where there are significant concerns about conduct or capability, pending investigation; (iii) to assist in the investigative process when the practitioner's presence is likely to impede the process; (iv) when a serious criminal charge has been brought; (v) to provide a cooling-off period.
    c. Paragraph 10.2.2 which provides that the process must involve *inter alia*: (i) active review of the exclusion; (ii) thereafter exclusion for periods of no more than four weeks; (iii) a right to request to return to work if a regular review has not been conducted; and (iv) a return to work programme in the absence of a referral to the disciplinary or capability processes.

    Ms Eaton's oral evidence was also that the types of restriction enumerated in paragraph 10.6.1 were considered; the claimant was restricted because this was deemed necessary to protect the interests of patients (in accordance with paragraph 10.1.3); and she and Mr Vale used the same review periods which applied to exclusion. Consideration of restricted duties was delegated, as was appropriate, to the second respondent. Other than coding work, which was offered to the claimant in October 2017, and which the second respondent agreed was not appropriate for him in the circumstances, no other non-clinical work was identified or offered to the claimant and it is likely that none was available. As Mr Vale conceded in oral evidence this restriction meant that the claimant was unable to work. The effect of the claimant's restriction to non-clinical duties was therefore tantamount to an exclusion from work but without the stricter oversight applicable to formal exclusion.

53. A consequence of restriction was that any pending appraisal and revalidation was deferred. In his oral evidence, Mr Vale explained that an appraisal would usually be completed within a short timeframe of a return to practice. Restriction also precluded an application for specialist registration which required the first respondent's support and without which support an application was unlikely to succeed, as the second respondent and Mr Vale agreed in their oral evidence.

54. Notably, the policy statement at paragraph 4 of the Policy and Procedure for Handling Concerns provides that:

> "Appropriate action will be taken to provide a swift and effective resolution of concerns about performance or conduct. Every consideration will be given to informal resolution of concerns where possible."

The restriction of the claimant from clinical practice on 10 July 2017

55. The decision to restrict the claimant to non-clinical duties with immediate effect meant that his lists on 8 and 10 July 2017 were cancelled. The claimant had been on leave and returning to the UK on 7 July 2017. He received a text message confirming that he had been taken off these lists and a second one from the second respondent inviting him to a meeting on 10 July 2017. He called the second respondent who told him that this was because of the SI raised in relation to patient GF.

56. When the claimant met the second respondent on 10 July 2017 he was told that he was being placed on restricted duties with immediate effect pending the investigation into patient GF. The claimant wanted to explain his actions. He was unhappy that Mr Kinross had completed the datix in relation to GF because he had not been present. Having explained himself, the claimant felt reassured. The second respondent told him that the investigator would be able to verify his account and the restriction would last only a few weeks.

57. The claimant's restriction to non-clinical duties was confirmed in writing by Dr Redhead on the same date [173]. Dr Redhead confirmed that the "event" on 25 June 2017 had been treated as an SI and he enumerated several allegations which related to GF and to Mr Kinross' datix: the claimant had failed to consider alternatives to surgery; he had caused two perforations in the small bowel which led to ITU admission; he had failed to communicate effectively in relation to this complex patient and had not consulted with Mr Kinross; and overall, he had demonstrated "ineffective clinical decision making that led to clinical harm". Dr Redhead also confirmed that an investigation would be conducted under the Policy and Procedure for Handling Concerns (i.e. MHPS) by Professor Vassilios Papalois, Consultant in Renal and Pancreas Transplant Surgery. There was a four-week target for completing this investigation. The case manager was Mr Vale. This letter made no reference to the BK, JM or FW cases which were not being investigated under MHPS. Dr Redhead confirmed that the restriction on the claimant's practice would be for an initial two-week period and would be maintained for the minimum period necessary. As will be seen, this restriction remained in place for nine months.

58. The claimant's unchallenged evidence, which we accepted, was that this was the only action taken against him under MHPS or an equivalent procedure in 24 years in the NHS.

<u>Datix 2 – patient BK (issue (e))</u>

59. Following the meeting on 4 July 2017, the second respondent completed a datix on 11 July 2017 in relation to patient BK [956]. The second respondent reported that this incident had resulted in "Harm" and an actual impact of "Moderate harm". He noted that this incident had been identified following the patient complaint. As we have found, the second respondent had a genuine belief that the claimant's explanation for the injury to this patient, made more recently in response to the complaint, was implausible and he felt that a datix was necessary to report this clinical incident. We do not therefore find that this was because or of related to the claimant's age.

Datix 3 – patient JM (issue (f))

60. The decision to complete a datix in relation to patient JM was made at an MMM on 13 July 2017 [685] when Mr Kinross presented this as a mortality case for discussion and contended that this patient could have been saved. This decision was taken by the group of consultants at this meeting which included the claimant who agreed that a datix should be completed. We were not invited nor we find that Mr Kinross made the case for this datix for reasons which were related to the claimant's age. Nor do not find that he was put up to this by the second respondent: Mr Kinross was clearly concerned that about the claimant's clinical decision-making. We find that the second respondent asked Mr Kinross to complete this datix because he had been the treating consultant and had raised credible concerns in relation to this patient's care. We do not therefore find that this was because of or related to the claimant's age.

61. In the resulting datix, dated 24 June 2017, Mr Kinross concluded for the second time that the claimant had harmed a patient in his care [189]. He reported that there had been a "Failure to Rescue…Failure to recognise deteriorating patient" and the result was "Harm" and actual impact "Extreme death".

62. Both datices in relation to BK and JM were treated as SIs and referred to the MMT.

63. The second respondent agreed in evidence that his relationship with the claimant became difficult around the time that these clinical incidents were being raised and investigated. He said that this was not surprising because the claimant was in a difficult position.

64. Professor Papalois commenced his investigations in relation to patient GF on 25 July 2017. He conducted an investigatory meeting with the claimant two days later.

First renewal of restriction on 25 July 2017 (issues (g) & (h))

65. Mr Vale wrote to the claimant on 25 July 2017 to confirm that his restriction would remain in place for another four weeks [192]. He gave no consideration to any alternatives because the basis for the claimant's initial restriction remained applicable and the MHPS investigation was still under way. We do not therefore find that this decision was made because of or that it related to the claimant's age. We also find that it was reasonable in the circumstances.

66. In relation to his informal review of the claimant's cases, Mr Vale emailed Dr Redhead and Shona Maxwell, Chief of Staff in the Medical Director's Office ("MDO"), on 10 August 2017 that this "did not get off to a good start" [214]. We accept his evidence that this comment concerned the inaccuracy of consultant attributions in the CRAB system which meant that he had been unable to conduct a full informal review of the claimant's cases. From the cases he had been able to review he did not see any cause for concern: the claimant was not an outlier and his O/E (i.e. Observed to Expected) ratios were within the confidence limit. There is no evidence to suggest that Mr Vale was actively seeking allegations to bring against the claimant as is alleged. When Ms Maxwell replied to query whether further investigation was required, Mr Vale advised against this. He noted that a wider investigation could be conducted if

warranted by the findings of Professor Papalois' investigation. We find that this was even-handed and proportionate.

The discovery of the regulatory issue in relation to the claimant

67. Following the claimant's restriction, Ms Eaton discovered that the claimant's ongoing employment as a Locum Consultant was in breach of the 1996 Regs. She emailed Veronica Grant, Medical Personnel Projects Manager, on 21 July 2017 [198] noting that the claimant had been in post for five years in contravention of these regulations. She asked to see his contractual documents. She referred to a previous review she had conducted which had not identified the claimant and suggested a fresh review. Ms Grant noted that the claimant had been employed as an 'As and When' Locum and appointed as a Locum Consultant from April 2014 [197]. Ms Eaton then emailed Ms Grant, Dr Redhead and Mr Vale in relation to the regulatory issue. Dr Redhead was evidently exercised by this issue because he wrote [196]:

> "I am very concerned about this doctor…if he is not on the specialist register then he cannot return to his position following the exclusion. I suspect we may need to terminate his locum contract – although there may be financial repercussions from doing so."

He suggested a meeting to agree on the legal position and the clinical, and financial repercussions for the first respondent. We infer from this that Dr Redhead had not made any conclusions about the claimant's fitness to practise, however, he was now cognisant of a regulatory impediment which it was felt precluded the claimant's return to his post and which was entirely unconnected with the clinical concerns under investigation. As will be seen, the claimant was not put on notice of this regulatory issue for another five months.

The other locum consultants employed by the first respondent in contravention of the Regs

68. Concerned that others may have been missed, Ms Eaton conducted another trawl of the first respondent's records. She found nine other locum consultants who had been employed for more than 12 months and were not on the Register. This data was tabulated by the first respondent for the purposes of these proceedings and updated during the final hearing [1078]:

Name (age at 1 August 2017)	Date of appointment as Locum Consultant	On the Register (October 2020)	Status (October 2020)
Mr Hakky (38)	05.03.12	N (application pending)	Remains in post
Dr Thompson (53)	23.04.12	N	Remains in post
Mr Kareem (44)	01.07.14	Y (29.10.18)	Remains in post
Dr Shoukry (43)	12.06.15	N/A	Left 31.12.17
Dr Mahjoob (37)	22.06.15	N/A	Left 01.03.18
Dr Malbon (45)	12.10.15	Y (13.03.18)	Appointed substantively 22.05.18

Dr Gonzalo (39)	01.03.16	Y (04.03.20)	Appointed substantively 01.04.20
Mrs Akshikar (42)	14.03.16	Y (21.05.18)	Remains in post
Dr Nassar (36)	01.09.16	N	Regraded to Speciality Doctor 01.10.17

69. Ms Eaton wrote to divisional directors, including Dr Urch, and Mr Vale and Dr Redhead on 17 August 2017 [216] about these locums, whose ongoing employment, like the claimant's, contravened the 1996 Regs. She suggested an urgent review and the issues which this should focus on, including:

    a. Whether the first respondent could support the locum with a CESR (i.e. Certificate of Eligibility for Specialist Registration) application (this was equivalent to a Certificate of Completion of Training ("CCT") which is awarded by the GMC and confers eligibility for entry onto the Register).
    b. The age of the locum and, if near retirement age, to consider early retirement in the interests of the efficiency of the service.
    c. Length of NHS service
    d. Redundancy costs.

    These were sensible areas of enquiry some of which would enable the first respondent to survey the potential financial repercussions which Dr Redhead had queried in relation to the claimant.

    <u>The extension of the claimant's restriction on 22 August and 20 September 2017 (issues (i) & (k))</u>

70. Mr Vale wrote to the claimant on 22 August 2017 [221] to confirm that the restriction to non-clinical duties would be extended by a further four weeks to 20 September 2017. He explained that the reason for this was that the investigation had been delayed and he expected it to be completed by this date. However, Mr Vale extended this restriction by another four weeks to 19 October 2017 [224] when he confirmed that Professor Papalois had now completed his investigation and the report would be disclosed in early October 2017. Although both of these letters stated that Mr Vale had considered alternatives including supervised practice, we find that this was not actively considered. As Mr Vale agreed in oral evidence, he did not consider alternatives because the reasons for the claimant's restriction (i.e. patient safety) remained applicable and by the date that he extended this restriction on 20 September 2017 additional allegations had arisen in relation to patient FW. We do not therefore find that this decision was made because of or that it related to the claimant's age. We also find that it was reasonable in the circumstances.

    <u>The decision to widen the scope of the MHPS investigation (issues (j), (l) & (o))</u>

71. In early September 2017, Mr Vale received the final SI investigation report in relation to patient FW which recommended that the claimant's decision-making should be investigated under MHPS [724]. The allegation was that the claimant had failed to review this patient with radiological evidence of a perforated abdominal viscus and had delayed potentially life-saving surgery. Mr Vale reviewed this report and agreed that this allegation which related to the

claimant's clinical decision-making warranted investigation under MHPS. We accept that this was his genuinely held view. The MMT had agreed on 7 July 2017 that a decision on FW was contingent on the outcome of the SI investigation. We do not therefore find that this was because or related to the claimant's age.

72. The datix which had originally been completed in September 2016 was updated following the final SI report into FW [750]. It had not therefore been raised for the first time in September 2017 (as is contended).

73. Mr Vale liaised with Ms Eaton. They agreed that the best approach was to widen the current MHPS investigation to include the FW allegations instead of setting up a second and separate investigation which was liable to result in further delay. Mr Vale also queried whether the claimant had been made aware that in addition to the GF investigations, SI investigations were proceeding in relation to JM and BK. We were taken to an email exchange between them on 19 and 20 September 2017. We do not find that this exchange evinces an attempt to build a disciplinary case against the claimant. We find that Ms Eaton misunderstood this query to be about investigating these issues under MHPS. She confirmed that she had notified the claimant on 19 September 2017 about the SI investigations into patients JM and BK. Mr Vale replied that he was satisfied with the current process. This exchange was about ensuring that these parallel investigations were being dealt with under the correct procedures. The second respondent was not involved in this dialogue.

74. The claimant was notified about the decision to expand the ambit of the MHPS investigation on 3 October 2017 when Ms Eaton forwarded a copy of the SI final report in relation to patient FW and related documents together with a letter from Mr Vale of the same date. In this letter, Mr Vale confirmed that he had instructed Professor Papalois to widen his investigation to include the following allegations which related to FW:

    a. The claimant did not clinically review a sick major trauma patient with radiological evidence of a perforated abdominal viscus.
    b. He had delayed potentially life-saving surgery unnecessarily.

75. In his oral evidence, which we accept, the claimant said that this second allegation was "mind-blowing" as it could mean manslaughter and was potentially career-ending. He now felt that the respondents were looking for reasons to extend his restriction indefinitely and even to dismiss him. The claimant had now been made aware of all four cases under investigation.

76. When Mr Alwyn and Mr Hettiaratchy were invited to meet with Professor Papalois in relation to patient FW both surgeons queried why this was necessary. Mr Alwyn, who had completed the SI investigation replied on 10 October 2017 [238] that they had interviewed the claimant and were content with the explanation he had given and also his reflection. Professor Papalois did not ignore these concerns. He responded to explain that this decision was based on the conclusions of the final SI report. We accept his evidence that Mr Alwyn accepted this explanation. The second respondent was not copied into this correspondence nor was there any evidence of his involvement in relation to this issue.

The indefinite extension of the claimant's restriction (issues (n))

77. In his letter dated 3 October 2017 Mr Vale [229] also confirmed that the claimant's current restriction would remain in place "for the present time". However, unlike his previous letters he gave no end date in breach of MHPS which stipulated a maximum extension of four weeks. This did not refer to the previous four-week extension which was due to end on 19 October 2019. This restriction was not thereafter reviewed. We find that whilst the decision to renew this restriction was reasonable because the ambit of the MHPS investigation had been widened, the open-ended nature of this extension and the failure to review it was not only in breach of MHPS but contributed to the claimant's loss of trust and confidence in the first respondent.

The investigation reports in relation to patient GF (issue (m))

78. Professor Papalois emailed Dr Redhead and Mr Vale on 10 October 2017 [243] to provide an update on his investigations. He explained that his investigations into GF which began on 25 July 2017 and had been delayed because of summer holidays had been concluded although he was waiting for confirmation that the content of two of the statements obtained were agreed. The SI and MHPS investigations would be complete by the end of the month. The investigations in relation to JM, BK and FW had been initiated on 19 September 2017 and his aim was to interview colleagues over the next fortnight and to arrange dates with those individuals who were no longer employed by the first respondent. Professor Papalois also noted that the claimant had cancelled their interview which was scheduled later that week pending advice from the MDU. He also signalled that based on his investigations to date a wider review of the claimant's surgical practice was not warranted and the decision to restrict the claimant was "very reasonable and proportionate".

79. Professor Papalois forwarded his MHPS investigation report in relation to GF to Dr Redhead and Mr Vale on 17 October 2017 [255] and his SI investigation report in relation to the same patient six days later [263] when he confirmed that his SI investigation in relation to JM would be completed later that week, he was waiting on a statement in relation to BK from a doctor who was now based in Edinburgh; in relation to the MHPS investigation relating to FW he was waiting for the claimant to confirm an interview date based on the availability of his MDU representative.

80. In his MHPS investigation report for patient GF, Professor Papalois concluded that there were issues in relation to the claimant's communication but not his clinical decision-making in the following terms [622-624]:

    a. The decision to proceed with surgery was within the claimant's remit and responsibility as the on-call Consultant surgeon.
    b. The claimant had not considered alternative options and had he consulted with Mr Kinross or other experienced colleagues, would have been more aware of the advantages of conservative treatment for this patient. The allegation that he had failed to consider alternative options was therefore partially upheld.
    c. This was a difficult surgical procedure for which iatrogenic injuries were not unexpected, however, once the challenges of this procedure became evident it would have been best practice for the claimant to have consulted

with experienced colleagues. The allegation that the claimant had caused these iatrogenic injuries leading to ITU admission was partially upheld.

d. The claimant had failed to communicate appropriately with Mr Kinross, other experienced colleagues and his communication with the family before and after surgery was "sub-optimal".
e. The claimant had acted in good faith with the aim of serving the best interests of the patient. The allegation that he had not demonstrated effective decision-making which had led to harm was not therefore upheld.

81. We do not find that the investigation in relation to GF was delayed unreasonably because we accept the reasons for the delay which Professor Papalois explained in his email dated 10 October 2017. His report was comprehensive. He interviewed five clinicians. In addition to his investigatory activities, he was a full-time clinician and academic.

82. As the case manager, it was necessary for Mr Vale to review this report and make findings. He endorsed the findings made. The claimant was not provided with these findings until December 2017 when the investigation in relation to FW had been completed and reviewed. Although we find that this was the reason for this two-month delay (and we do not therefore find that it was because or related to the claimant's age), there was no reason why Mr Vale could not have provided the claimant in the interim with an overview of these findings or some other form of reassurance that his capability and clinical decision-making had not been found to be deficient. We find that this delay, of which the claimant became aware in December 2017, when he received the investigation report, contributed to his loss of trust and confidence in the first respondent.

Exploration of redundancy (issue (p))

83. On 26 October 2017 Ms Eaton contacted Andreas Cheers, Pensions Manager, [272] to request a quote for a redundancy payment or early retirement in the interests of the efficiency of the service, in relation to the claimant. Mr Cheers confirmed that the claimant would be entitled to a redundancy payment which exceeded £200,000. He was unable to provide a quote for the alternative mechanism of early retirement although he provided an estimate for voluntary early retirement which was not the same. Ms Eaton forwarded these figures to Mr Vale and Steve Russell, HR Business Partner, Division of Surgery, Cancer and Cardiovascular, when she concluded that retirement was too expensive and an ex gratia payment to make up the claimant's pension to normal retirement age was the best option.

84. We do not find that this evidenced a predetermined intention to dismiss the claimant but was an exploration of options if it became necessary to terminate his employment because of the regulatory issue, as Dr Redhead had instructed. However, the first respondent provided no evidence to show, in the absence of which we do not find, that these steps were also taken in relation to the other locums identified including the claimant's named comparator, Mr Sherif Mohamed Hakky, who was based in the same division as the claimant and who at 38 was 20 years younger; something which Ms Eaton had, in August 2017, suggested as part a wider review. As will be seen, by the date of Ms Eaton's enquiry in late October 2017, the first respondent had decided that it was necessary to move these locums into a more junior role. Notably, in his

oral evidence, Mr Vale said that the second respondent told him some time prior to December 2017 of the claimant's intention to retire. He said he was aware of the claimant's age, it was felt that it would be difficult for the claimant to revert to a more junior role and this was why the first respondent was looking into the option of early retirement and the cost of uplifting the claimant's pension. Mr Vale explained (to the tribunal) that this was all done with good intentions, however, we find that these considerations were premised on assumptions relating to the claimant's age which he, Ms Eaton and the second respondent held by this date i.e. late October 2017 and which they did not apply to Mr Hakky.

The treatment of Mr Hakky (issues (ee), (ff), (gg), (hh) & (ii))

85. Whilst the claimant remained on restriction, the respondents remained focused on the regulatory issue in so far as it related to the other locums whose ongoing employment contravened the 1996 Regs.

86. On 15 September 2017, Mr Russell emailed the clinical directors within the Division [1S] with a list of the locum consultants in post for more than 12 months and highlighted three locums, including the claimant who was listed as a "Specialist Registrar – As & When Locum" and Mr Hakky. Four days later, Dr Urch emailed the second respondent and Mr Vale [14S] when she set out the following steps to be taken in relation to these locums:

    a. A face to face meeting to be informed that they would not be able to continue to work as an independent Consultant.
    b. Arrangement for supervised practice.
    c. To establish whether the doctor wished to be supported in gaining CCST via the CESR route.
    d. A change of job title to Clinical Fellow or Associate Fellow / Specialist with pay protection if applicable.

87. The second respondent replied [13S] on the same date, 19 September 2017, to confirm that he had "mentioned" this issue to Mr Hakky whom he hoped would apply for CCT and he queried the supervision arrangements that would need to be set up. He also asked whether consultation with the claimant should wait until after the investigation had been completed noting that he was not currently doing any clinical work. Mr Vale responded that the guidance was clear and whilst an Associate Specialist could remain on the rota, a "long stop" supervisor was required to be available to take responsibility for their work. He "agreed" that consultation with the claimant should wait until the investigation was completed. This had been suggested by the second respondent on the basis that it was unnecessary to arrange for supervision for the claimant because he was currently restricted from clinical duties.

88. Ms Eaton, who was not copied in to this exchange, emailed Mr Russell on 22 September 2017 [6S] when she queried whether "there is any chance" that Mr Hakky would get onto the Register and if not she advised that he would need to be converted to a Speciality Doctor. The first respondent was therefore considering retaining Mr Hakky in post if it was likely that he would join the Register. Although Ms Eaton's medical colleagues referred to the post of Associate Specialist in correspondence that we were taken to, we accept the first respondent's evidence that this was a closed grade to new entrants so that

the post of Speciality Doctor was the correct grade into which it was intended that affected locum consultants would be moved. Ms Eaton also noted that although the claimant was under "review", by which we find she meant investigation, his employment status would need to be dealt with. She did not enquire about the likelihood of the claimant moving onto the Register. The claimant's future options were not therefore being framed in the same way as Mr Hakky's.

89. Ms Eaton then wrote to the second respondent, Mr Vale, Dr Urch and Mr Russell on 11 October 2017 [15S] to query whether a decision had been made about Mr Hakky. She also referred to a decision to delay consulting with the claimant about his contract until there was an investigation outcome although she noted "we could inform him at any time". The second respondent replied that Mr Hakky would be applying for CESR and would need to swap onto an Associate Specialist contract. He said that he had discussed this with Mr Hakky on a couple of occasions. Mr Vale confirmed that this was required as "There was no flexibility on this and it needs to happen immediately."

90. In a subsequent email in the same chain of correspondence sent on the same date, Ms Eaton counselled the need for a consistent approach "so there is no discrimination" [21S]. She proposed a formal meeting with the claimant to update him and to offer him a new contract on revised terms. This did not happen and Mr Vale's decision to delay this consultation until the MHPS investigation was concluded subsisted.

91. Mr Hakky was not treated in the same way as the claimant. Having already discussed this regulatory issue with him the previous month, the second respondent emailed Mr Hakky on 11 October 2017 to tell him that he would need to be moved onto an Associate Specialist contract [17S] when he offered support and reassurance in the following terms:

> "You will remain, from my point of view and your colleagues, as a consultant colleague with the same role and responsibilities I am happy to support you as I have said before in your application to the specialist registry and hopefully back into a substantive consultant contract I will also try and make sure that financially you are not worse off either…Julie Eaton has already made enquiries into a CESR application for you (i.e. application to the specialist register)…"

92. In oral evidence, the second respondent said that in the month leading up to this email he had discussions with Mr Vale that in the event that Mr Hakky moved into a junior role he could act up as a Consultant on rotas and have his own clinics if other colleagues were available for support and he had a nominal supervisor. He also discussed this with other consultants to get their support. In relation to applying to join the Register, the second respondent agreed that the first respondent's support was an important factor. From the contemporaneous documents we were taken to, we find that the respondents were in no doubt about the interest and willingness of Mr Hakky to make such an application and he was left in doubt as to their willingness to support him with this process.

93. When Ms Grant emailed [20S] for an update on Mr Hakky, on 30 November 2017, the second respondent explained that he had spoken to and emailed Mr

Hakky who was waiting to hear from HR. He wrote "I would like to be involved so he has support and is not at a disadvantage with this". He was invested and actively supporting Mr Hakky.

94. Dr Urch emailed Mr Russell on 1 December 2017 [18S] to query whether all the locums, save for the claimant, who were not on the Register had now been moved onto new contracts. Mr Russell contacted the second respondent for assurance that Mr Hakky was no longer working at Consultant grade. He then emailed Dr Urch later that day to note that he was waiting on this confirmation. In relation to two other locum consultants, he confirmed that one, Mrs Akshikar, was no longer working as a Consultant and had been given three months' notice before moving onto the grade of Speciality Doctor and a second, Dr Mahjoob, had been taken off the rota and her employment would terminate in early March 2018.

95. The second respondent emailed Mr Russell a week later, on 8 December 2017, [24S] to confirm that he had told Mr Hakky that "clinically little will change as he will still work independently in theatre, clinics and on the consultant on call rota but he will need a consultant supervisor". The second respondent explained that the on-call Consultant would supervise Mr Hakky's on-calls and there would be plenty of consultants around during the day, an arrangement that Mr Vale "was very happy with".

96. Noting that nothing had changed since December 2017, Ms Grant emailed the second respondent on 15 February 2018 [28S] to confirm that Mr Hakky would be given formal notice and would transfer to a Speciality Doctor contract on 1 June 2018. She advised that the second respondent would need to decide on a new job description for Mr Hakky, so that he was being treated the same way as the claimant. The second respondent replied:

> "With regards to his duties, he is going to continue with what he is doing now as discussed and agreed with my colleagues and Justin Vale. With regards to Mr Matar – I am drawing up a new timetable as his role will change and he will be in clinics with other consultants".

We conclude from this that whilst the first respondent intended to transfer Mr Hakky to a Speciality Doctor contract in June 2018, he was being supported in the meantime, with Mr Vale's agreement, to retain the same job duties with the same autonomy and status by having his own clinics with a "long stop" Consultant, whereas the claimant would be required to work directly alongside another Consultant so that he would not have the same autonomy or status. As will be seen, for the claimant, this meant being required to work under a new job plan and duties more consonant with the role of a Speciality Doctor than Consultant.

97. In related correspondence, on 17 February 2018 [28S], the second respondent also confirmed that he had spoken with Mr Hakky on several occasions and "We have discussed how we will support him and also through the CESR process." The respondents were therefore actively supporting Mr Hakky in getting onto to the Register.

98. As will be seen, by early June 2018, it was agreed that Mr Hakky would retain his Locum Consultant contract pending specialist registration. He applied to

join the Register in 2019 on a date which was unclear to us. This application was rejected and resubmitted (via an appeal) by January 2020. In the following month, Barbara Britner, Head of Employee Relations, reminded Dr Urch [P41S] that the Medical Director "was very clear that this arrangement could not continue and should cease immediately". However, she noted that a decision had been made to retain Mr Hakky on his Locum Consultant contract pending the outcome of his appeal. In later correspondence, Mr Russell confirmed that this contract had been extended to the end of July 2020. As the table above shows (see paragraph 68), Mr Hakky remains employed as a Locum Consultant (as does Mrs Akshikar) and has continued to work in a Consultant capacity throughout this intervening period.

99. None of this correspondence (cited above within paragraphs 86 – 98 and also below at paragraphs 123 & 139) was disclosed by the respondents until day four of this hearing. This was an inexplicable failure to disclose documents which were self-evidently and centrally relevant to this claim, which involved senior and experienced HR professionals, in addition to the second respondent and Mr Vale, and which illustrate the more favourable treatment of Mr Hakky in which the second respondent took an active part in encouraging, supporting and advocating for him, and both respondents supported him to remain in post notwithstanding the regulatory issue; and specifically:

    a. He was consulted with in relation to the regulatory issue from September 2017.
    b. He was told that he would continue to be seen by his colleagues as a Consultant with the same role and responsibilities.
    c. He was told that steps would be taken to mitigate the reduction to his pay.
    d. He was supported in retaining the same duties before it was agreed that his Locum Contract would be extended.
    e. He was encouraged and supported to make an application to join the Register.
    f. He was retained in the same role and on the same pay pending his specialist registration more than three years after this regulatory issue had been identified.

    <u>Disclosure of the investigation reports to the claimant on 13 December 2017 (issue (q))</u>

100. Following an investigatory interview with the claimant in relation to patient FW on 17 November 2017 when he was accompanied by Lee Gledhill, a barrister and medical / professional defence organisation representative, Professor Papalois completed and submitted his outstanding reports to Mr Vale in early December 2017.

101. In his MHPS investigation report dealing with patient FW, Professor Papalois once again concluded that there were issues which related to the claimant's communication but not his clinical decision-making in the following terms:

    a. The claimant had acted in the best interests of the patient and followed the relevant protocol, however, given the severity and complexity of the injuries it would have been best practice for him to have reviewed the patient himself and establish a plan in collaboration with the Trauma Team Leader and other relevant specialities. The allegation that he had not clinically reviewed

this patient was therefore partially upheld.

b. The claimant had not delayed potentially life-saving surgery. He had a clear and sound plan. An earlier laparotomy would not have resulted in a different outcome. However, the claimant could have communicated in a clearer and well documented way.

102. In relation to patients JM and BK, Professor Papalois concluded that the claimant's treatment was appropriate. However, in relation to JM he noted that the claimant had relied upon Ms Beatty-Winter to communicate with Mr Kinross and he recommended that consultants communicated directly. He also found that there were some lapses in documentation.

103. Mr Vale endorsed these findings which he found related to the claimant's communication and not his clinical performance. It was now clear to him that the claimant had not caused harm to any patients. We therefore find that from this date it was patent that the basis for the claimant's restriction i.e. to protect the interests of patients no longer applied. It was therefore incumbent on Mr Vale to lift this restriction once he had discussed these findings with the claimant.

104. Mr Vale agreed in oral evidence that none of his findings warranted the claimant's dismissal. He anticipated that the claimant would accept these findings which would enable him to resolve this process informally and without further delay (as required by the Policy and Procedure for Handling Concerns). He said that only in the worst case scenario would a warning be necessary. Given the nature of the investigation findings and Mr Vale's view that the investigation process could be resolved informally, we find it likely that he would have envisaged a sanction no higher than a first written warning, in the event that it was necessary to proceed with a disciplinary process. A meeting was arranged to take place on 22 December 2017. When Mr Gledhill sought clarification of the purpose of this meeting, on the claimant's behalf, Ms Eaton confirmed that it would be an informal meeting to discuss the investigation findings and also about the requirement for locum consultants to be on the Register.

105. The claimant spoke to Ms Eaton on 7 December 2017 when she reassured him that there were no adverse findings in relation to his clinical skills but communication issues had been identified. The claimant requested a week's leave from 12 December. As a result of this discussion, Ms Eaton understood that notwithstanding his leave request the claimant wanted to receive the reports without further delay. This is what she told Mr Vale in a contemporaneous email [311]; and she also conveyed her intention to send these reports to the claimant to Mr Gledhill on 11 December 2017 whom she understood was acting on the claimant's instructions, when he thanked her and did not tell her that the claimant wanted to wait for these reports until his leave ended. We do not therefore find that Ms Eaton ignored a request for the claimant to have a break from the disciplinary investigation but acted on what she understood to be the claimant's wishes. Ms Eaton sent these reports to the claimant two days' later, on 13 December 2017 [316], when she confirmed that he had 10 working days from the end of his week's leave to provide any comments. This deadline expired on 8 January 2018.

Informal meeting on 22 December 2017 (issues (r), (s), (t), (ee) & (ii))

106. The claimant met with Mr Vale and Ms Eaton on 22 December 2017. Mr Vale emphasised that this was an informal meeting and the issues were communication and not the claimant's capability or technical ability. He wanted to hear the claimant's reflections. He also referred to the regulatory issue. He said that in terms of "future plans" the claimant should not have been reappointed for as long as he had because he was not on the Register.

107. We were taken to Ms Eaton's note of this meeting [317] and to a letter dated 5 January 2018 [319] which she drafted based on this note and was signed by Mr Vale (and which for reasons that were neither patent nor disclosed was headed "without prejudice").

108. Mr Vale summarised his findings in relation to patient GF which were that the claimant should have communicated with the family and Mr Kinross. The claimant agreed. Mr Vale also confirmed that the claimant's decision to operate was reasonable despite Mr Kinross's views to the contrary. In relation to patient FW, Mr Vale explained that when the decision was taken to investigate the assumption had been that the claimant had delayed treatment, however, having reviewed the investigation reports, he concluded "there is not a lot there at the end of the day". Mr Vale also confirmed that no issues had been identified in relation to BK and JM. The claimant was critical of Ms Winter-Beatty which Mr Vale declined to discuss. He concluded overall that the claimant's communication skills, especially in relation to GF, had not been what he expected of a "modern surgeon". We do not find that this comment related to the claimant's age nor his length of service in the NHS but to the standards of communication Mr Vale expected all surgeons to demonstrate in the "modern NHS". We find that the claimant was told that if he accepted these findings no formal action would be taken. The corollary of this was that if he challenged these findings it was likely that a formal disciplinary process would follow. The claimant understood that he was not therefore required to provide any feedback.

109. Turning to the regulatory issue, Mr Vale told the claimant that he could not remain in his post because he was not on the Register, he would be moved to the role of Speciality Doctor and the second respondent would draft a revised job plan. The claimant understood that this was a more junior supervised role and therefore without the same autonomy. This was not acceptable to him. The claimant referred to his intention to retire at 60 in 2019. He recounted his experience at the previous Trust where he had worked. He also referred to the "lengthy PMETB process" which related to a previous application he had made to join the Register. He said that he wanted to be treated in the same way as Mr Nabil el Masry, an Associate Specialist, who worked independently, was on the on-call rota and who was not on the Register. As we have found, this was a closed grade and it was not therefore an option that was available to the first respondent. Mr Vale agreed to discuss the job plan and the lifting of his restriction with the second respondent. Whilst the claimant now knew that he could not remain in the same role he understood that the respondents would explore a means of retaining him in an equivalent capacity. We find that this is consistent with the following excerpt in the 5 January 2018 letter:

> "We discussed the options for a revised job plan…I will discuss this situation…with [the second respondent]…I am hopeful that we will come to a reasonable conclusion that will enable you to fulfil your long terms plans."

110. We find that the claimant was neither invited nor refused to make an application for specialist registration. We give weight to the absence of any reference to this in Ms Eaton's contemporaneous note of this meeting, the letter she subsequently drafted or any other related correspondence. We have found that by this date Mr Vale and Ms Eaton were cognisant of the claimant's intention to retire. We find that when the claimant conveyed his intention to remain working in an autonomous capacity until his 60th birthday by means which did not involve him applying to join the Register they assumed that the claimant was neither interested nor willing in proceeding with such an application. This is consistent with the fact that Ms Eaton had enquired about the likelihood of Mr Hakky applying to join the Register but not the claimant and with the first respondent's investigation of the costs of terminating the claimant employment's through redundancy or early retirement. In their oral evidence, Ms Eaton agreed that the claimant was not invited to apply to the Register and Mr Vale agreed that the claimant was not given any encouragement to apply. They did not therefore explore this with him at this meeting and failed to establish whether the claimant wished to be supported with a CESR application, which was one of the steps Dr Urch had told colleagues it was necessary to take in relation to the locum consultants. Nor had the claimant been treated the same way as Mr Hakky and given the same reassurances and encouragement from the second respondent. Having been restricted for over five months, he had, unlike Mr Hakky, been told that he was required to return to an amended and supervised role. The consequence of all of this was that the claimant did not actively consider making an application to join the Register.

111. The decision which we find was taken by Mr Vale to delay consultation about this regulatory issue until the MHPS investigation had been completed meant the claimant did not learn about this issue until late December 2017. Not only was this more than three months later than Mr Hakky it meant that the claimant had lost the opportunity to use the previous five months to gather evidence to support an application to join the Register once his restriction had ended. Noting that Ms Eaton advised her colleagues on 11 October 2017 that the claimant could have been informed at "any time" we do not find that the fact of his restriction put him in materially different circumstances from Mr Hakky in relation to being consulted about this regulatory issue.

112. In a letter dated 5 January 2018 [319], Mr Vale confirmed that the claimant could not be retained as a Locum Consultant because he was not on the Register nor had he taken the steps necessary to join it. This was written in definitive terms in which no reference was made to either the prospect of any steps being made or to a refusal by the claimant to take any. Mr Vale explained that it was necessary for doctors in the same position as the claimant to change to speciality doctors save for "a few" other colleagues who were in the same position whose inclusion in the Register was imminent. Although the claimant was otherwise being treated differently in comparison with Mr Hakky, we find that it was envisaged that both doctors would be required to move to the Speciality Doctor role because of the regulatory issue because neither was close to gaining entry to the Register.

113. Mr Vale advised "we must now find a solution to the current situation which will now of course include a review of the current restriction on your practice." He did not invite the claimant to agree with the summary of their recent meeting which this letter recorded. He told him that he would be in contact once he had discussed the outcomes of the investigations with the second respondent. In the meantime, his restriction remained in place.

The meeting between Mr Vale, Ms Eaton and the second respondent on 9 January 2018

114. When Mr Vale and Ms Eaton met with the second respondent on 9 January 2018 to feedback on Professor Papalois' investigations, the second respondent was tasked with drafting a revised job plan for the claimant to enable him to return to work in the role of Speciality Doctor. In his oral evidence, Mr Vale said that he could not permit the claimant to return to his Locum Consultant duties. We do not therefore find that the second respondent was confused about this (as is contended). The consequence of this was that the claimant's restriction remained in force pending his intended return in an amended role. We find that this was the reason for the continuation of his restriction from January 2018. We have found that the same approach was not being taken with Mr Hakky. As the second respondent said in oral evidence, a new job plan was not needed for Mr Hakky because it had been decided that he could continue in the same role.

115. In a related email sent to the second respondent on the same date [321], Ms Eaton noted that having checked that the claimant's 60th birthday was in May 2019 "there is no question of him retaining a locum consultant post for this period, even if he does decide to retire at this time". She wrote that it was made clear to the claimant that he would not be able to continue in post "for more than a limited period". The first respondent accordingly gave limited consideration to extending the claimant's contract unconditionally but concluded that his retirement date was too distant. We infer from this that had the claimant's intended retirement date been temporally more proximate the first respondent would have contemplated maintaining his role for longer. This decision was not therefore because of or related to the claimant's age.

116. Ms Eaton made no reference in this email to lifting the claimant's restriction. We find that no active consideration was given to this because the focus was now on revising the claimant's job plan before he could return to work. Ms Eaton highlighted that the second respondent would need to draft a Speciality Doctor job description for the claimant and a meeting would be arranged with the claimant and his representative to discuss options.

Continuation of the disciplinary process (issue (u))

117. The claimant did not therefore return to work on 9 January 2018. In oral evidence, Mr Vale said that he had expected the claimant to provide written feedback on the investigation reports and his failure to do was "exceptional". However, as we have found, as a result of the meeting on 22 December 2017 and the letter dated 5 January 2018, the claimant understood that by providing no feedback he would be deemed to have accepted the investigation findings and would be able to return to work when this deadline expired.

118. On 10 January 2018 the claimant had been restricted from non-clinical duties and in effect excluded from work for six months which was the maximum duration for a formal exclusion under the MHPS Procedure save for exceptional circumstances which did not apply to the claimant's case. In his oral evidence, Mr Vale agreed that this restriction which remained in place until 20 April 2018 should have ended sooner; it was serious, carried stigma and therefore caused reputational damage to a doctor; it carried the risk of de-skilling; and the longer the period of restriction the greater the impact these adverse consequences were likely to have. We find that this ongoing and open-ended restriction from this date had the effect of damaging the claimant's trust and confidence in the first respondent.

119. Mr Vale wrote to the claimant again on 18 January 2018 [322] to invite him to provide any feedback within another 10 working days i.e. by 2 February 2018. He confirmed that in the absence of any feedback the claimant would be deemed to have no amendments to make. Mr Vale also confirmed that the claimant could not be retained in his current post because he was not on the Register and he would be offered a new role as a Speciality Doctor on a salary of £70,718 with notice. We find that this was because of the regulatory issue which applied equally to Mr Hakky. The claimant's expectation or hope that a mutually acceptable solution would be found had not therefore materialised.

120. The claimant replied on 1 February 2018 [325] in which he confirmed that he "strongly disagree[d]" with the "false allegations". This response confounded Mr Vale who had been satisfied by the claimant's acceptance of the investigation findings and his reflection when they had met on 22 December 2018. We accept Mr Vale's evidence that his genuine view was that the claimant lacked insight and it was appropriate to proceed with a formal disciplinary process because it was necessary for these findings to be considered and tested by a panel. We find that this was a reasonable step to take because the claimant had not agreed with these findings nor accepted that he was at fault.

121. Ms Eaton wrote to the second respondent, Mr Russell and Ms Grant [329] to confirm that the disciplinary process was continuing because the claimant had not accepted any fault. Noting that the claimant had been restricted for some time she advised that he should now be brought back in a "relevant capacity" and would need a period of readjustment. By this, we find that Ms Eaton was referring to the revised job plan which the second respondent had been told to draft for the claimant when they had met together with Mr Vale on 9 January 2018.

122. Notably, in an email dated 14 February 2018, relating to notice arrangements for Mr Hakky, Ms Grant [30S] referred to a comment made by Ms Eaton that he might be leaving soon. Ms Hall responded to clarify that Mr Hakky "is not leaving us soon, I think she has mixed him up with NM [the claimant]". We find that this reveals the different way in which the respective career trajectories of the claimant and Mr Hakky were being viewed.

Notice of termination (issue (v))

123. Ms Grant wrote to the claimant on 1 March 2018 [336] giving him three months' notice that he would be transferred to the role of Speciality Doctor on 1 June 2018. Although Mr Hakky received the same letter on the same date [37S], the

second respondent emailed Ms Grant within two hours [39S] to report, in an intervention demonstrating his ongoing and active involvement, that Mr Hakky had obtained advice from the BMA who asserted that his pay could not be reduced. Notwithstanding the second respondent's support, we find that the first respondent's intention at this date remained that both the claimant and Mr Hakky would be required to transfer into these alternative posts because of the regulatory issue and the requirement for specialist registration.

124. Following his receipt of this termination letter, the claimant contacted Andreas Cheers, Pensions Manager, when he told him that he was planning to retire at the end of June 2018 and requested a pensions estimate.

Invite to disciplinary hearing (issue (w))

125. A week later, on 8 March 2018, the claimant was invited to a disciplinary hearing in relation to three allegations relating to patient GF [342]. This hearing was scheduled two months later on 8 May 2018. The claimant was warned that the outcome could be dismissal. Although we accept the first respondent's evidence that this was standard wording for such letters (so that we do not find that the reason for this was because of or related to the claimant's age), given Mr Vale's evidence that none of his findings warranted dismissal we find that the inclusion of this threatened sanction and the failure to remove this threat for two months, until 10 May 2019, damaged the claimant's trust and confidence in the first respondent.

126. Although we accept Mr Vale's evidence that this hearing had to be moved from 8 to 29 May 2018 because of the availability of the external panel member, no explanation was given for the two-month delay in scheduling the initial hearing dated on 8 May 2018 which we find was not compliant with the requirement for "swift and effective resolution" under the Policy and Procedure for Handling Concerns particularly when the claimant had been on restriction for almost 8 months. We find that this two-month delay in the absence of any explanation had the effect of damaging the claimant's trust and confidence in his employer.

The continuation of the claimant's restriction and exclusion from his Consultant duties (issues (x), (y) & (jj))

127. Gail Tatsis, Senior Employment Advisor, BMA wrote to Mr Vale on 29 March 2018 [348] to outline concerns about the claimant's ongoing restriction and related MHPS breaches. She also highlighted the effect of this extended restriction on the claimant's reputation as well as his ability to maintain his professional practice. When Mr Vale forwarded this correspondence to Ms Eaton she replied [351] that there was "no justification to keep him restricted on non-clinical duties pending the hearing" and also that the claimant was able to undertake his clinical duties as a Locum Consultant until his change of contract took effect (as was the case with Mr Hakky). However, contrary to this advice, Mr Vale responded to Ms Tatsis on 4 April 2018 [370] to confirm that the claimant's restriction would be extended for a further and final two weeks to enable arrangements for the claimant's return to a supervised role to be agreed.

128. By this date the claimant was beginning to view this ongoing state of affairs as untenable. In a letter to Ms Tatsis written in relation to Mr Vale's response, he

wrote [374]:

> "It is over 9 months now since my restriction and 4 months since the conclusion of the investigation that could only comment on communication and still the trust is searching for a suitable supervised registrar job is clearly constructive dismissal and any meeting would be a mere cover up the reality and trust intention [sic]."

129. Noting that his restriction was due to end on 20 April 2018, Ms Eaton emailed the claimant on 17 April 2018 [377] to request that he contacted the second respondent about returning to work with a suitable job plan. The second respondent drafted a revised job description for the claimant which he sent to Ms Grant. The date when this was drafted by the second respondent was not clear to us, however, it was now more than three months since he had been charged by Mr Vale and Ms Eaton to devise a new job plan for the claimant. We find that the second respondent, cognisant of the claimant's opposition to moving to a role which involved the loss of autonomy and status, was himself reluctant to broach this issue with the claimant. We also find that the open-ended nature of the claimant's restriction permitted this ongoing delay. These factors combined to prolong the claimant's restriction until the BMA's intervention.

130. The second respondent's reluctance to engage with the claimant and take the necessary steps to facilitate his return to work contrasted starkly with the steps he took to support Mr Hakky. The second respondent had to be instructed by HR to contact the claimant to facilitate his return without further delay. Ms Eaton emailed him on 17 April 2018 [376] to query whether the claimant had returned to work and instructed "If not this needs to happen as his restriction cannot be justified any longer". She told him that the claimant could be allocated the duties of a Speciality Doctor even if he had not responded to this offer. When the second respondent replied that he had not heard from the claimant, Mr Russell, who had been copied in to this email correspondence, emphasised that it was necessary for the second respondent to tell the claimant that his restriction had ended and was required to report for work, and to meet with him and give him his new job plan.

131. The claimant emailed the second respondent as instructed, on 20 April 2018, to confirm that he was ready to resume work on 23 April until the end of May. When the second respondent queried whether he had received his new job plan the claimant replied that he had; it was an insult, and unacceptable, because it ignored his experience as a Locum Consultant for the last 20 years. When the second respondent referred this to HR, Ms Eaton told him that the claimant could return to his Consultant duties until his contract expired and she alluded to a potential solution. The second respondent failed to relay this to the claimant who understood that he was still required to return to work under the revised job plan. The claimant submitted a formal grievance to complain about this on 23 April 2018 to Ms Eaton [385]. However, when Ms Eaton replied the next day to confirm that he would return to work on his existing contract for the remainder of his notice period she told the claimant that he was required to attend work without delay "to undertake the duties as set out" by the second respondent. The claimant therefore understood the requirement to perform the duties under the new job plan remained applicable to him and he did not return to work.

132. In the meantime, the claimant contacted the second respondent on 26 April 2018 [390] to request that his annual appraisal which was now overdue was completed. He noted that he had been unable to complete this whilst on restriction and there was now a risk that the GMC escalation procedure would be triggered unless his appraisal was completed within the next few weeks.

133. Ms Eaton emailed the claimant on the same date [390] to reiterate that it was necessary for him to return to work. She told the claimant that his contract could not be retained for an indefinite period without him being on the Register. She suggested a meeting with Ms Tatsis. The claimant responded that he had contacted the second respondent, as advised, to agree on a suitable job plan, he was not asking to continue in his existing role for an indefinite period and nor was he wishing to resign from his substantive role. He noted that his greatest priorities were completing his overdue appraisal and clearing up the misunderstanding which had led to disciplinary proceedings with the threat of dismissal. Ms Eaton responded [389] to ask the claimant to confirm that he had returned to work to the interim duties which the second respondent had identified. We find that this implied the supervised duties under the revised job plan. Ms Eaton also referred to a without prejudice meeting to find a mutually acceptable solution "to the current problems".

134. The second respondent confirmed that the claimant would be allocated three clinics a week, however, when the claimant reviewed the rotas none of the clinics were under his name. The second respondent's evidence was that he would confirm a start date for these clinics once they had met and agreed on a date, however, as the contemporaneous email correspondence shows [405] the second respondent did not arrange a meeting with the claimant. The claimant attended Charing Cross Hospital on 8 May 2018 but there was no work for him there. They agreed to meet two days later, on 10 May 2018, when the claimant referred to his outstanding appraisal and the disciplinary process. The second respondent confirmed that the claimant would be required to work under a job plan which included some supervised practice as part of his reintroduction and could then be developed into the Speciality Doctor role. This was unacceptable to the claimant. We accept his oral evidence that the second respondent told him that he did not have the capacity to offer any him any autonomy and this would be in breach of the 1996 Regs.

135. When the second respondent sent a summary of this discussion to Ms Eaton [415], which was copied to the claimant, he queried how the claimant could complete his appraisal whilst there was an outstanding disciplinary process. He failed to take any steps to support the claimant with this process. He also confirmed that he would not book any patients for the claimant because he had not agreed to work in another Consultant's clinic. We find that the ongoing failure to facilitate the claimant's return to his substantive duties and to support him with his appraisal which he had been unable to complete during his extended restriction had the effect of damaging his trust and confidence in the first respondent. We also find that the respondents had therefore failed to preserve his role in the same way as was done with Mr Hakky.

136. The claimant submitted a second formal grievance 9 May 2018 to Ms Eaton [407] to complain about the decision to proceed with the disciplinary process, the threat of dismissal, the delay in scheduling a disciplinary hearing and the extension of his restriction to 20 April 2018. By this date, Professor Tim

Orchard, Director of the Division of Medicine & Emergency Care, was Interim Medical Director. He replied to the claimant on 11 May 2018 [419] to confirm that he was keen to resolve this matter informally, he explained that he required the claimant's assurance that he had reflected adequately, taken on board the adverse findings from the MHPS investigation and would amend his practice accordingly, and he invited the claimant to reconsider his written feedback of 1 February 2018. Professor Orchard confirmed that he would arrange a meeting with the claimant and his representative before "re-considering the need for formal disciplinary action".

137. The claimant responded on 15 May 2018 [442] in which he accepted responsibility, apologised, explained his actions and demonstrated reflection in relation to investigation findings. This letter crossed with one sent by Mr Vale on the same date [439] in which he confirmed the arrangements for the disciplinary hearing on 29 May 2018. The threat of dismissal had been removed and replaced with disciplinary action up to a final written warning. Although we find that this was done with the objective of ensuring that the panel had a range of sanctions to apply excluding dismissal (and was not therefore because of or related to the claimant's age), we also find that the threat of a final written warning which contradicted Professor Orchard's express intention to resolve this issue informally had the effect of damaging the claimant's trust and confidence in the first respondent. We also find that the failure to withdraw this letter and threat of disciplinary action once the claimant's letter had been received damaged his trust and confidence.

New contract

138. The claimant was sent a new contract for the role of Speciality Doctor by Ms Grant on 23 May 2018 [446]. The start date for this post was 1 June 2018.

139. At around the same time, Mr Hakky and the first respondent agreed that he would continue in his Locum Consultant post pending his application to the Register. Ms Grant wrote to him on 6 June 2018 to confirm that his Locum Consultant contract had been extended "as per instructions received from the Medical Director's Office" [7SS]. The next day, Ms Eaton confirmed the approach that was being taken in relation to Mr Hakky:

> "The intention is for Mr Hakky to actively pursue his CESR, which he is doing with assistance of Dr Ruth Brown. Further extensions of contract will be necessary for him to achieve this (he will be submitting all the documentation to the GMC at the end of November)…"

The second respondent replied "Thanks very much[.] That is much better…" and enquired about the process for appointing Mr Hakky to a substantive post in due course.

Resignation (issue (aa))

140. The claimant wrote to Mr Vale on the same date to resign with immediate effect [461]. He complained that he had lost all trust and confidence in the first respondent as a result of a series of breaches culminating in the refusal to allow him to return to his substantive duties since 23 April 2018. These included his

protracted restriction, the investigations and related disciplinary process, and the refusal to support him with an annual appraisal. In relation to the notice of termination and offer of the Speciality Doctor role, the claimant complained that there had been a failure to offer him a suitable alternative role which he asserted was because the first and / or second respondent "no longer wants someone of my working age working in a consultant position". The respondents accept that this allegation constitutes a protected act under the EQA.

141. Ms Eaton wrote to the claimant the next day [470] to confirm that in light of his letter dated 15 May 2018, Professor Orchard was minded to deal with the disciplinary issue formally and she invited him to reconsider his resignation pending a meeting with Professor Orchard the following week. The claimant was not prepared to reconsider. In his oral evidence, which we accept, he explained that as a result of his extended restriction, the threat of disciplinary action and his fear about the regulatory consequences of not having completed his appraisal he had lost confidence that the first respondent would enable him to work again or that it was safe for him to return.

142. Notably, on the same date, Mr Russell wrote to Dr Urch [466] to confirm that it was possible for the MDO to permit the claimant to retain his title as Locum Consultant without being on the Register. We find that this was an arrangement which was being explored exceptionally by the first respondent as a means of resolving the claimant's employment dispute and we do not infer from this that the first respondent had a practice of retaining doctors in a Consultant capacity who were neither on the Register nor likely to join the Register (including those who, like Mr Hakky, were in the process of making a CESR application). Referring back to the table at paragraph 68, it is notable that, excluding Mr Hakky, four out of the five locum consultants who have retained Consultant status have joined the Register.

143. On 6 June 2018 the claimant's solicitors wrote to Mr Vale when they alluded to a prospective age discrimination claim. The claim was presented on 4 October 2018. The respondents agree that these both constitute protected acts.

<u>The claimant's pension arrangements (issues (bb) and (cc))</u>

144. As we have noted above, in April 2014 the claimant agreed to regularise his locum work and take up appointment as a salaried Locum Consultant. This meant a dramatic reduction in his pay from approximately £238,000 to £120,000 (inclusive of a non-pensionable on-call supplement). From April 2014 he moved from being paid either by the hour or session to receiving a fixed salary. We have found that prior to April 2014 the claimant was working more than 72 hours each week on average.

145. To be treated as pensionable pay in their entirety these earnings needed to be based on a whole-time equivalent ("WTE") and therefore exclusive of overtime. For a Consultant this meant 10 Professional Activities ("PAs") each week. Any earnings generated from additional work would be treated as overtime and would not count as pensionable earnings.

146. At around the same time that he moved onto a salaried contract, the claimant liaised with Mr Cheers in relation to obtaining protection for his higher rate of pay. This protection is available where a member of the NHS Pension Scheme

suffers a reduction in their pensionable salary through no fault of their own. Mr Cheers agreed to support the claimant in making this application. We find that he treated the entirety of the claimant's earnings as his WTE salary on the basis of the claimant's representations in the absence of any contractual or other documents confirming the actual hours worked by the claimant. Mr Cheers queried the claimant's pay with the Payroll Department who did not have any record of these hours. He also queried this with the claimant who asserted that his pay was based on work which was equivalent to 10 PAs and was therefore pensionable in full.

147. An application submitted in June 2014 to preserve the claimant's higher rate of pay which was based on annual pensionable pay of £289,295.00 was approved by NHS Pensions ("NHSP") [521]. Pension contributions were made with reference to these earnings. This figure was set out in a pension statement dated 19 March 2018, which the claimant had requested, confirming a projected pension annuity of £51,047.54 based on a notional retirement date of 31 March 2018 [531]. NHSP wrote to the claimant in the same month [532] to confirm that the correct protected pensionable pay was £238,040.50. The previous figure was too high because it had been calculated using earnings attributable to previous years. A revised pension statement confirmed a projected annuity of £49,166.80 [536].

148. Mr Cheers processed the claimant's application for retirement on 29 June 2018 [543a] together with confirmation of the claimant's salary for each of the previous three years, as he was required to do. These were: £105,946.89 for year 1 (period 30 June 2015 – 29 June 2016); £106,985.02 for year 2; and £107,772.00 for year 3.

149. Lisa Greene, a Pensions Team Member at NHSP, emailed Mr Cheers on 12 July 2018 [561] to query the claimant's protected pay figure. We accept Mr Cheers' evidence that this was unsolicited by him or anyone else at the first respondent. We also accept that his evidence that he was not cognisant of the claimant's protected acts. Ms Greene requested contractual information in relation to the claimant's pay for this protected period. Mr Cheers referred this query to Ms Eaton on 17 July 2018 when he noted that prior to his transfer onto a salaried contract, the claimant "was deemed Specialist Registrar but on a Q grade (Non Whitley Basis)". Ms Eaton replied to explain that it was likely that the claimant did not have a locum contract but worked on an as and when basis and was paid on a sessional basis, having been a Clinical Fellow on a Senior Registrar level [560]. This was an accurate summary.

150. Ms Greene contacted Mr Cheers again in October 2018 [559] to confirm that the Technical Compliance Team had concluded that the protected pay figure of £238,040.50 was "excessive" and whilst it was not disputed that the claimant had earned this amount it could not agree that the entire sum was pensionable. The starting point was the Consultant pay scales. The whole time salary for a Consultant at the relevant time was £105.690.80. She asked Mr Cheers to confirm the claimant's pay scale. The claimant maintained that his entire earnings should be treated as pensionable.

151. When Mr Cheers updated Ms Eaton, and Ms Hall, he queried whether the claimant had been classed as WTE or whether he had been working additional hours. In a subsequent email he queried whether there were any records to

show the number of sessions the claimant worked in the relevant period so that his pensionable pay could be calculated on the basis of 521 sessions per year. Another Pensions Manager, Debbie Martin, confirmed that the ESR identified only the sums paid and not the hours or sessions worked [556]. Mr Cheers then set out the three options available to the first respondent [554]:

a. Refund all pension contributions deducted in excess of 10 PAs per week (this would require a breakdown of the claimant's hours / sessions and pay).
b. Refund all pension contributions for salary exceeding £105,690.
c. Accept that the claimant worked equivalent to a full-time consultant in the relevant period and treat his entire earnings as pensionable.

When Mr Cheers wrote to update the claimant [562] he confirmed that as far as NHSP were concerned either (a) or (b) were applicable. Mr Cheers explained that the claimant would, in the meantime, receive a pension based on a pensionable salary of £107,772 (i.e. his salary in his final year). This was an interim measure which NHSP would adjust if necessary. He also explained that this dispute had been referred to more senior colleagues in HR and the medical management team. This included Ms Eaton and Ms Grant.

152. In an email on 17 October 2018, Ms Eaton [544] suggested that the second respondent or his predecessor, Mr Paraskeva, were well-placed to comment on the claimant's working arrangements. Her email was copied to neither and there is no evidence that this suggestion was followed up immediately. The second respondent could not recall whether he was asked to comment. We find that whilst the second respondent had worked in the same area of clinical speciality as the claimant since 2012 he did not have any direct knowledge of the working arrangements that the claimant and first respondent had agreed in 2011 and he would not have known the number of hours or sessions the claimant was working each week.

153. NHSP wrote to the claimant on 1 November 2018 to confirm that he would receive a pension annuity of £20,763.65 from 30 June 2018, based on the pensionable pay for his final year. This meant that the pension contributions which the claimant had made with reference to the higher rate of protected pay would need to be refunded to him. We do not find that the respondents ordered an investigation into the claimant's pension as this was initiated by NHSP. Nor do we find that they instructed that the claimant's pensionable salary be reduced and for any consequential contribution overpayments repaid to him because this decision was made by the pension scheme's Technical Compliance Team which deemed the pensionable pay claimed by the claimant to be excessive and there were no contractual or other documents which substantiated that this pay was equivalent to 10 PAs.

154. Following a complaint from the claimant's BMA representative, a meeting was set up by Dr Urch and Ms Britner. We accept Mr Cheers' evidence that the purpose of this meeting was to establish the claimant's hours of work. He advised his colleagues that if the claimant could prove that his entire earnings were equivalent to WTE then the first respondent would have to honour the higher rate of protection in full.

155. On 14 March 2018 Joanne Harrison, a Compliance Advisor at NHSP, emailed Ms Britner for an update [598]. Stating that the figure of £238,000 "seems

excessive" she assumed that it included payments which exceeded 10 PAs per week and requested a copy of the claimant's contract for the date when his pay had been protected in 2014 detailing his duties and pay. Ms Harrison confirmed that without a contract NHSP the interim pension award would continue to apply. Ms Britner replied later that month to explain that there was no contract. In a related email, she forwarded screenshots of the claimant's ESR for the period January 2012 to April 2014 which identified him as a "Specialist Registrar – As and When". She confirmed that the claimant was employed both as a Locum Consultant and "ad-hoc locum specialist registrar". When Ms Harrison queried this apparent contradiction, Ms Britner clarified that based on the ESR the claimant had been employed as a Specialist Registrar. Ms Harrison also requested confirmation of the claimant's pay scale or the WTE salary for "someone with similar skills, knowledge and experience" [596]. In internal correspondence, Ms Grant told Ms Britner that she would provide a response based on the ESR [593]. A decision was therefore taken to benchmark the claimant's WTE salary against the pay of an equivalent Specialist Registrar. Ms Britner emailed Ms Harrison on 26 April 2019 [598d] to confirm that the correct pensionable salary for the period in question was £72,924. As a result, the claimant's earnings which exceeded this figure would not be treated as pensionable and he received a reimbursement of pension contributions of around £40,000. Mr Cheers was tasked with calculating amended pay and contribution figures [598a].

156. We do not find that the second respondent was involved in this decision. Although we have found that the claimant was employed at the material time as a Locum Consultant (working in excess of 72 hours per week), we find that the first respondent relied on the claimant's ESR because of the requirement stipulated by NHSP for contractual documents in relation to the putative protected period. The ESR recorded that the claimant was employed as an As and When Specialist Registrar and there were no documents which detailed his duties and working hours. We do not therefore find that this was because of the claimant's age or protected acts.

Relevant legal principles

Constructive dismissal

157. For there to have been a constructive dismissal the following three conditions must be met:

    (1) There must be a fundamental breach on the part of the employer.
    (2) The employee must not, by the time of the resignation, have conducted himself in such a way as to have relinquished the right to rely on the breach. This is known as affirmation.
    (3) The fundamental breach must be a contributing cause of the resignation though it need not be the principal cause.

158. The implied terms of a contract of employment include the implied term of mutual trust and confidence i.e. that a party not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and the other party to the contract (see Malik v BCCI [1997] IRLR 462). This breach can be the result of a single act / omission or of cumulative conduct which culminates

in a last straw. A last straw need not amount to blameworthy or unreasonable conduct but it must contribute in some meaningful way to the overall breach.

159. Whether there has been a fundamental breach is an objective test. Accordingly, there will be no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held.

160. If there has been a constructive dismissal, there may still be a dispute over whether the dismissal was fair and a tribunal must go on to consider whether the respondent had a potentially fair reason for this dismissal and if so, whether the dismissal was fair under section 98(4) ERA.

Direct discrimination

161. Section 13(1) EQA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

162. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause". The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (see O'Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor [1997] ICR 33).

163. In relation to the protected characteristic of age, an employer will escape liability for any less favourable treatment if it can show that the relevant treatment was a proportionate means of achieving a legitimate aim (13(2) EQA).

Victimisation

164. Section 27(1) EQA provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes B has done, or may do a protected act.

165. Section 27(2) EQA enumerates the four types of protected act as follows:

(a) bringing proceedings under the Act (i.e. EQA)
(b) giving evidence or information in connection with proceedings under this Act
(c) doing any other thing for the purposes or in connection with this Act
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

166. A protected act for the purposes of section 27(2)(c) EQA can be said to be done "if it is done by reference to the race relations legislation in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act" (see Aziz v Trinity Street Taxis Limited [1988] IRLR 204).

167. As to causation, the tribunal must apply the same test to that which applies to direct discrimination i.e. whether the protected act is an effective or substantial cause of the employer's detrimental actions.

Detriment

168. Section 39(2)(d) EQA provides that an employer (A) must not discriminate against an employee of A's (B) by subjecting him to "any other detriment".

169. A complainant seeking to establish detriment is not required to show that she has suffered a physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC [2003] IRLR 285).

170. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

171. Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841).

Dismissal

172. The same concept of constructive dismissal applicable to an unfair dismissal complaint is found in sections 39(2)(c) and 39(7)(b) EQA.

173. Where a tribunal has found that there has been a constructive dismissal it must go onto consider whether the conduct that amounted to a fundamental breach was materially influenced by any discriminatory conduct (see Williams v The Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19).

Harassment

174. Section 26(4) EQA provides that:

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

175. In deciding whether the conduct "related to" a protected characteristic consideration must be given to the mental processes of the putative harasser (see GMB v Henderson [2016] IRLR 340).

176. In Pemberton v Inwood [2018] IRLR 542, Underhill LJ reformulated his own guidance in Richmond Pharmacology v Dhaliwal [2009] IRLR 336, as follows:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

177. The claimant's subjective perception of the offence must therefore be objectively reasonable.

Burden of proof

178. Section 136 EQA provides that if there are facts from the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

179. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must first establish a prima facie case. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination (see Madarassy v Nomura International plc [2007] ICR 867).

180. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16). Accordingly, the burden of proof provisions have no role to play where a tribunal is in a position to make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870).

181. In exercising its discretion to draw inferences a tribunal must do so on the basis of proper findings of fact (see Anya v University of Oxford [2001] IRLR 377).

182. In a victimisation complaint, as essential element of the prima facie case is that the claimant must show that the putative discriminator knew about the protected act on which the complaint is based or believed that a protected act was done by the claimant (see Bowler).

183. A tribunal cannot find both direct discrimination under section 13 EQA and harassment under section 26 EQA in respect of the same treatment. This is because section 212(1) EQA provides that:

> 'detriment' does not, subject to subsection (5) include conduct which amounts to harassment

Jurisdiction

Extension of time limits to facilitate early conciliation

184. In calculating the limitation periods under section 123 EQA the dates of any relevant early conciliation process must be considered. Where a claimant has complied with the requirement to contact ACAS prior to instituting proceedings, the time limit is extended in accordance with section 140B EQA as follows:

    (1) Where Day A is the date on which the complainant notified ACAS and Day B is the date when the complainant received an early conciliation certificate, the period between the day after Day A and Day B is not to be counted when working out the relevant time limit (section 140B(3)).
    (2) If the time limit would otherwise have expired during the period beginning with Day A and ending one month after Day B, the time limit instead expires at the end of that period i.e. one month after Day B (section 140B(4)).
    (3) For the purposes of 140B(4) EQA, the time limit is the one which has been modified by sections 140B(3) EQA.

    The ERA contains parallel provisions.

Conduct extending over a period

185. Section 123 EQA provides that:

> (1)…Proceedings on a complaint within section 120 may not be brought after the end of –
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section –
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does not inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

186. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and amounted to an act of discrimination extending over a period.

187. In considering whether an act of discrimination is to be treated as extending over a period the focus of inquiry must not be on whether this is something which can be characterised as a policy, rule, scheme, regime or practice but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated

less favourably (see Hendricks v Metropolitan Police Commissioner [2003] IRLR 96).

188. An ongoing situation or continuing state of affairs is to be contrasted with a succession of unconnected or isolated specific acts and equally with an isolated act that has continuing consequences.

189. A tribunal must focus on the substance of the alleged incidents when assessing whether they form a continuous act. Factors which are likely to be relevant, although not determinative, include whether the same or different individuals were involved in the alleged incidents over the period in question and whether there is a break of several months or more between the specified allegations.

Just and equitable extension

190. It is for the claimant to satisfy that it is just and equitable to extend the time limit. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather than the rule (see Robertson v Bexley Community Centre [2003] IRLR 434).

191. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT said that in considering this discretion a court should consider the prejudice which each party would suffer as the result of refusing or granting an extension and have regard to all the circumstances of the case, including:

(1) the length of and reasons for the delay
(2) the extent to which the cogency of the evidence is likely to be affected by the delay
(3) the extent to which the party sued has cooperated with any requests for information
(4) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action
(5) the steps taken by the plaintiff to obtain appropriate professional advice once he or he knew of the possibility of taking action.

192. In applying the just and equitable formula, the Court of Appeal held in Southwark London Borough v Afolabi [2003] IRLR 220 that while these factors will frequently serve as a useful checklist, there is no legal requirement for a tribunal to go through such a list in every case, "provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion". This was approved by the Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 when it noted that:

> "factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

Conclusions

The issues that fail on the facts

193. We have found that issues (a), (j), (o), (p), (q) and (bb) fail on the facts.

The unfair dismissal complaint

188. We find that the claimant was constructively dismissed.

(1) Issues (b) and (v): We have found that the first respondent gave limited consideration in January 2018 to the claimant's request to extend his contract and took this no further because of the amount of time left until the claimant's intended retirement age. We find that this also applies to the claimant's notice period.
(2) Issues (c), (d), (g), (i) and (k): We have found that the second respondent cancelled the claimant's lists from 8 July 2017 and escalated his concerns to Dr Urch at a meeting four days earlier which initiated the claimant's restriction because there was a concurrence of potential issues which had arisen in relation to his practice. We have found that these were genuinely held concerns. We have not found that the second respondent sought out allegations against the claimant to support an extended restriction. The decision to restrict the claimant was made by the MMT to safeguard patient safety and this was extended by Mr Vale on reasonable grounds pending the outcome of the Professor Papalois' MHPS investigation.
(3) Issue (e): We have found that the second respondent had reasonable grounds for completing a datix in relation to patient BK because he had a genuine belief that the claimant's explanation for the injury to this patient was implausible.
(4) Issue (f): We have found that it was agreed at the MMM on 13 July 2017 that Mr Kinross would complete a datix in relation to patient JM because of his genuine belief that this patient's life could have been saved.
(5) Issue (h): We have not found that Mr Vale actively sought allegations against the claimant. We have found that his instruction to Professor Papalois to conduct a wider investigation if this was warranted by his primary findings was reasonable.
(6) Issue (l): We have found that Mr Vale widened the MHPS investigation to include patient FW because of the recommendations of the final SI investigation report which he accepted.
(7) Issue (m): Although we have found that the conclusion of the MHPS investigation in relation to patient GF was not unreasonably delayed we have also found that the failure to convey the findings of this investigation (pending the outcome of the FW investigation) to the claimant in some form was unreasonable and contributed to the claimant's loss of trust and confidence in the first respondent when he learnt of this two-month delay in December 2017.
(8) Issues (n), (t) and (x): Although we have found that there were reasonable grounds for extending the claimant's restriction on 3 October 2017 because of the decision to expand the MHPS investigation, we have found that the first respondent acted without reasonable and proper cause when it extended this restriction for an undefined period (pending the outcome of this investigation and Mr

Vale's expectation that this process could be resolved informally) and when it maintained this restriction from January until April 2018 because of the requirement for the claimant to return to amended duties under a new job plan. We have found that this damaged the claimant's trust and confidence in the first respondent.

(9) Issues (r), (u) and (v): We have found that the claimant was told he could not remain in his locum role without being on the Register and needed to move to the role of Speciality Doctor role, and he was given notice to this effect, because of the regulatory issue.

(10) Issues (s) and (v): We have found that the first respondent did not consider redeploying the claimant into the role of Associate Specialist because this was a closed grade; the claimant did not identify nor do we find that there any other suitable alternative roles into which he could have been redeployed.

(11) Issues (u), (w) and (z): We have not found that Mr Vale deliberately continued or revived the disciplinary process but had reasonable cause to proceed having sought the claimant's written feedback in relation to the MHPS investigation findings and having received the claimant's feedback dated 1 February 2018 in which he disagreed with these findings and denied being at fault. We have concluded that the initial two-month delay in convening a disciplinary hearing without explanation, the threat of the sanction of dismissal, the failure to remove this threat for two months, the threat of a sanction up to a final written warning and the failure to withdraw the threat of disciplinary action following the claimant's letter dated 15 May 2019 contributed to his loss of trust and confidence in the first respondent.

(12) Issue (y): We have found that the first and second respondents obstructed the claimant's return to his contracted duties and failed to conduct his appraisal without reasonable and proper cause. This contributed to his loss of trust and confidence.

189. We find that taken together, the conduct we have found above at issues (m), (n), (t), (w), (x), (y) and (z) had the effect of breaching the implied term of mutual trust and confidence. This conduct had a profoundly damaging effect on the claimant's trust and confidence in his employer, in particular: his restriction which was tantamount to exclusion was extended by almost four months (having subsisted for five months) having been left open-ended and without review; he was threatened with disciplinary action including a final written warning, and dismissal in relation to the findings of an MHPS investigation which Mr Vale intended to resolve informally and which we have found, he felt warranted at most a first formal written warning; he was obstructed from returning to his substantive duties and instead told that he was required to return to a different and more junior role which involved the loss of his autonomy and status as a Consultant. For the reasons set out above (see paragraph 118, in particular) we also find that the open-ended continuation of the claimant's restriction from January until 20 April 2018 without review was sufficiently serious to have breached the implied term of mutual trust and confidence on its own.

190. For completeness, we do not find that the claimant affirmed his contract. He remained excluded from his workplace and his duties until his resignation, having submitted two formal grievances to complain about his treatment.

191. We find that the claimant relied on this repudiatory conduct when he resigned with immediate effect on 23 May 2018 and in response to the final straw which related to the ongoing disciplinary process and the obstruction of his return to his substantive duties as a Locum Consultant.

192. We find that the respondent has not established that it had a potentially fair reason for this dismissal. Neither of the alternative reasons relied on by the first respondent were the sole or main reason for the claimant's dismissal.

193. We therefore find that the first respondent unfairly dismissed the claimant.

The breach of contract complaint

194. For the reasons we have already given, we find that the claimant was dismissed in breach of the implied term and mutual trust and confidence.

The discrimination complaints

<u>The issues that fail</u>

195. We have found that the respondents have provided cogent non-discriminatory reasons in relation to the conduct set out at:

(1) Issues (b) and (v).
(2) Issues (c), (d), (g), (i) and (k).
(3) Issues (e), (f), (h), (l) and (m).
(4) Issues (n), (t) and (x) up to the end of December 2017.
(5) Issues (r), (u) and (v).
(6) Issues (s) and (v).
(7) Issues (u), (w) and (z) save for the two-month delay in convening a disciplinary hearing (w).
(8) Issue (cc).

196. In respect of that part of issue (w) which relates to the two-month delay in convening a disciplinary hearing we do not find that the claimant has established a prima facie case that this treatment / conduct could have been because of or related to his age. We do not find that there was any coordination between Mr Vale or the second respondent to delay this hearing. Nor do we find that a younger doctor in materially the same circumstances would have been treated any differently nor that the age-related assumptions which Mr Vale and Ms Eaton had about the claimant played any significant or effective part in this delay.

<u>The issues that succeed</u>

197. We find that issues (n), (t) and (x) i.e. from January 2018, (y), and (ee) to (jj) i.e. from October 2017 amount to less favourable treatment of the claimant because of his age. We find that the claimant has established a prima facie case and the respondents have failed to show that this treatment was in no sense whatsoever because of his age, due to the following:

(1) The more favourable treatment of Mr Hakky (see paragraph 99, in particular) who other than his age was in materially the same

circumstances as the claimant.

(2) The extent and duration of this treatment.

(3) The lack of a cogent explanation for this disparate treatment.

(4) The first respondent's exploration of the costs of terminating the claimant's employment because of age-related assumptions shared by the second respondent, Mr Vale and Ms Eaton in relation to the claimant's intention to retire and his reluctance to accept a more junior role.

(5) The failure of the first respondent to enquire about the likelihood of the claimant applying to join the Register and to invite or encourage him to make a CESR application.

(6) The second respondent's delay in drafting the revised job plan and reluctance to meet with the claimant to facilitate his return to work.

(7) The failure to disclose timeously documents which were self-evidently and centrally relevant to this claim, from which we draw an adverse inference.

198. We find that the discriminatory conduct at issues (n), (t) and (x) from January 2018 and issue (y) was a material part of the repudiatory conduct which the claimant relied on when he resigned (aa) and we therefore find that this dismissal amounts to a discriminatory dismissal.

199. For completeness, in relation to issue (dd) which was a broad assertion, rather than a specific allegation, of discriminatory conduct, we have found that the respondents' conduct was unduly influenced the claimant's age and that this contributed materially to the conduct which repudiated the claimant's contract, however, we do not find that this conduct was malicious because we have not found that there was an intention to cause harm to the claimant even if that was the effect of this conduct.

Jurisdiction

200. Issues (n), (t), (x) and (y) being part of the same course of repudiatory conduct which culminated in the claimant's resignation (aa) were brought within the relevant time limit. This is because taking account of the early conciliation dates of 17 July 2018 (Day A) and 31 August 2018 (Day B), the relevant time limit in respect of this dismissal on 23 May 2018 expired on 6 October 2018.

194. Issues (ee) to (jj) were added to the claim by way of an amendment on day five of this hearing following the respondents' late disclosure on day four. We find justice is served by extending the time limit under section 123 EQA. This is because the delay was caused by the respondents' inexplicable failure to disclose this material any earlier, this application was made expeditiously, the cogency of the evidence was not impaired by this delay because these new allegations were predicated on contemporaneous documents involving several of the respondents' witnesses, including the second respondent, and we find that the balance of prejudice warrants this extension in these circumstances.

Remedy

191. A preliminary hearing will be held to make any necessary case management orders and to list a remedy hearing.

Costs

192. The parties' respective applications for costs will be determined at the same time that remedy is determined.

Employment Judge Khan

Dated 06.05.21

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

07/05/2021.

FOR EMPLOYMENT TRIBUNALS