Case No: 2359206/2012

EMPLOYMENT TRIBUNALS

Claimant: Dr K J Beatt

Respondent: Croydon Health Services NHS Trust

Heard at: London South Croydon

On: 15-17 July 2019, 28-29 November 2019, 10 January 2020 for closing submissions.
Then 28 and 30 January 2020, 4 February and the 19 February 2020 in chambers.

Before: Employment Judge Sage
Mr W Dixon
Ms B Leverton.

Representation
Claimant: Ms Iyengar of Counsel
Respondent: Mr Cooper QC

RESERVED REMEDYJUDGMENT

The unanimous decision of the Tribunal is:

1. The Respondent is ordered to pay to the Claimant the sum of £25,000 for injury to feelings.
2. The Respondent is ordered to pay to the Claimant the sum of £7,500 for aggravated damages
3. The Respondent is ordered to pay to the Claimant a basic award of £3870
4. The Respondent is ordered to pay to the Claimant a compensatory award of £820,740.25

These sums are not subject to recoupment.

REASONS

Witnesses:

For the Claimant we heard from the Claimant and:
Professor Jaspal Singh Kooner
Dr Piers Clifford
Ms. Marie Leahy
Mr. Edward Rowland
Dr Trevor Greenwood

For the Respondent we heard from:
Dr Oliver Spencer

Findings of fact

The role held by the Claimant at termination.

5. The Claimant had worked at the Respondent NHS Trust from 2005 to September 2012. He was responsible for setting up the Cardiac Interventional Service at the hospital, this service saved money and resulted in significantly improved outcomes for patients. The Claimant worked as a Catheterisation Laboratory (Cath Lab) Lead carrying out treatment that was an alternative to open heart surgery. Although this procedure was a new speciality in 1988 and Dr Greenwood described how the Claimant's interventional treatment was considered to be 'highly controversial' in the 1990's it is now recognised to be a treatment that has a huge impact on survival rates. The Claimant was the person who was at the forefront of this innovation and because of his research he was considered to be the 'go to' person in this field and had an international reputation. What the Tribunal recognise is that the Claimant's contributions over his career were ground-breaking and we do not underestimate the importance of them. He developed one of the first angioplasty programmes in London and was the first to introduce angioplasty at a non-surgical centre, with favourable outcomes for patients. Mr Rowland told the Tribunal that Cardiology is a relatively small speciality (with only about 2000 people in the Country), he described the Claimant as having an impressive reputation and was considered to be a leader in his field.

6. In addition to his role with the Respondent, the Claimant worked one day a week at Kings College Hospital until his contract was terminated in December 2009 by the College, three years prior to the termination of his employment (page 2567A).

7. The Claimant held an honorary contract at the Royal Brompton, where he was able to offer patients from the Respondent hospital specialist treatments that could not be offered on the national health. There was no requirement for the Claimant to take patients with him and he gave live demonstrations and operated with a number of eminent cardiologists. It was noted that when the contract terminated it was not renewed (see Ms Leahy's statement at paragraph 24).

8. Although the Claimant in his statement at paragraph 13 referred to receiving an offer from St George's Hospital (a tertiary centre), there was no evidence in the bundle that a firm offer was made. It was subject to a precondition that the Claimant would bring with him a number of patients from the Respondent

Trust. As the Claimant was unable to do this, he was unable to pursue this opportunity further. Although the Claimant referred to the loss of his work at the tertiary centres in his statement, the Tribunal found as a fact (at paragraph 24 page 24 of our liability decision) that his complaint about how the matter was handled was not an unlawful act, which the Claimant accepted in cross examination. Although the Claimant told the Tribunal that St George's had made it clear they wanted him to work there, there was no evidence that this resulted in an offer of work. The Tribunal therefore conclude that prior to the date of termination, the Claimant's work at Kings had ended and he had no offer of work from St George's. As a result of this the Claimant had no offer from a tertiary centre at the date of termination, he was therefore unable to carry out further research work (as his contract at Kings had ended). At the date of termination, the Claimant no longer occupied a managerial position at the Respondent hospital, this was not due to any act or default of the Respondent.

The evidence in relation to the Claimant's retirement date

9. The Claimant told the Tribunal that he took the decision to draw his pension from 12 October 2012 one month after his dismissal, providing him with an income of £35,200 (£36,000 from 5 April 2017). He told the Tribunal that the decision to draw his pension was not because he had decided to retire. It was firstly because once he had remained without NHS employment for 6 months, he was not able to re-join the scheme and would have to start the new and less advantageous pension scheme. Secondly the Claimant decided that it was likely that the GMC investigation would take months or even years and as he had no income at the time, he decided to take his pension early. He denied it was because he had decided to retire. The Tribunal find as a fact that his evidence is accepted that the decision to draw his pension was not corroborative of an intention to retire, it was on financial grounds due to circumstances he found himself in. As he found himself without a salary and with no job on the horizon it made sense to draw his pension early.

10. The Claimant told the Tribunal that prior to his dismissal he had not thought of retirement and had planned to work "well into [his] 70's". This was due to two factors, firstly because he was driven by his work and secondly, he was not in a secure financial position. He told the Tribunal that he had only accrued 22 years continuous service in the pension scheme and so at retirement date he would receive only about half of the pension that an NHS consultant would receive. Although he considered making additional pension contributions to make up the shortfall, he decided that he would work longer to get the same financial effect. At the time of the remedy hearing the Claimant was aged 68.

11. The Tribunal heard evidence from the Claimant and his witnesses about the average retirement age of those working in similar roles. Although Dr Clifford did not feel that it would be unusual for someone in the Claimant's position to work until the age of 70, he accepted in cross examination that the Claimant would probably not want to do 'on call' or the full angioplasty. He stated that those who worked into their late 60's tended to pursue interests such as research. This was supported by Ms Leahy who said in cross examination that cardiologists work until they feel comfortable and suggested that tended to be between the ages of 65-66, they would then go

on to other positions such as research. Mr Rowland is still working at the age of 68 in the role of Medical Director and Consultant Cardiologist at St Bartholomew's, continuing in his clinical role. Professor Kooner's evidence was that clinicians tend to work after the age of 65 and some into their mid 70's but this was anecdotal evidence. Although Dr Greenwood told the Tribunal that he eventually retired at 70 (and ¾), he accepted in cross examination that it was possible to retire and then return to work on reduced hours. The evidence suggested most would refocus their work into part time clinical work and the rest of the time would be spent on research or managerial responsibilities, which were physically less arduous.

12. Although the Claimant told the Tribunal that it was his intention to work into his 70's, he accepted at paragraph 32 of his statement that he would be unable to "keep up such a punishing workload forever". He stated that it was likely that he would give up on-call work but planned to continue on-call at St George's and 'devote more time to service development and research at Croydon and St George's'. However, we have found as a fact above that this was not possible as no agreement had been reached between the two hospitals. There had been no offer made to the Claimant to take up a position at St George's as the precondition of bringing patients from the Respondent could not be met.

13. There was no evidence of any new research projects being pursued by the Claimant at the time of his dismissal. At paragraphs 33-4 of his statement he referred to the CARDia trial which the Claimant had initiated "some years earlier" which was a world leading programme for revascularisation of patients with type-2 diabetes and coronary artery disease, and he was continuing the long term follow up. This was research at the follow up stage and not a new project. The Claimant made no mention of new projects in the development stage and referred only to previous large-scale research trials and to his speaking and advisory commitments in 2004-5 but no mention of recent work. At the date of dismissal, the Claimant had been unable to secure any work at a tertiary centre and there was no evidence of any current or ongoing research projects. The success of such a plan was also dependent upon this being accepted by the Respondent and by a third party, this was something that the Respondent had refused to do and the Tribunal did not find that this refusal was evidence of an unlawful act. As no agreement had been reached prior to the termination of his employment and there were no ongoing negotiations with any other tertiary centre, the Tribunal conclude that this plan was unlikely to have come to fruition had the Claimant not been unfairly dismissed.

14. The evidence also suggested that the Claimant was unlikely to have maintained what he described as his arduous sessions in the Cath Lab. The Tribunal having considered the witness evidence given by the Claimant's other witnesses and the role the Claimant held at the date of termination, we conclude that he would have retired prior to the age of 70. As he had no new research in the pipeline and no offer of work at tertiary centres, his chances of reducing his hours and going into new research areas were highly unlikely. The Claimant accepted that continuing in clinical practice, carrying out on-call duties and working in the Cath Lab was punishing and could not be sustained indefinitely. On the evidence, the Claimant's role was predominantly focussed on clinical practice, and this was likely to be the type of role that would be available to him on termination of his employment. The

work the Claimant was carrying out had not been limited by any wrongful act of the Respondent, but due to the career choices made by the Claimant, his focus being on clinical work and not on managerial or leadership roles at that time.

15. The Tribunal took into account that he had not developed other avenues of work in research or into more administrative and managerial tasks which would allow him to work reduced hours in the clinical arena. We conclude on the evidence and in the light of the limited options that would be available to the Claimant based on his actual circumstances at the date of termination, that it is more likely than not that he would have retired from his clinical practice by the age of 68.

Mitigation.

16. The evidence before the Tribunal was that in the year following his dismissal (September 2012 -September 2013) (in the appendix C to his statement) he made no applications for jobs. The first application he made was in October 2013. The Claimant told the Tribunal that any job search was bound to be unsuccessful.

17. The Tribunal heard from Professor Kooner who told the Tribunal that if the Claimant had approached him in September 2012 he would have looked favourably on his application and would have encouraged his colleagues to do so. Mr Rowland also confirmed that had the Claimant applied for a role, he would have looked upon his application favourably, as long as it fitted the needs of his department. Although the Claimant did not contact his colleagues in the two years following his dismissal to attempt to secure some work to both mitigate his loss and to prevent him from becoming de-skilled, the Tribunal accept that facing a GMC investigation may be a substantial barrier to any such application. Although the Claimant had an International reputation as a ground breaking cardiologist, this was a person who had been dismissed and was subject to an investigation into his professional conduct, these were not circumstances that would place the Claimant in a favourable position when applying for roles in competition with others within an NHS Trust. There was also added negative impact of the press statement published by the Respondent after the Coroner's inquest, which would have given greater profile to the Claimant's dismissal and the referral to the GMC. The link made in the press release to these facts and the death of the patient would have been damaging to the Claimant's reputation.

18. The Tribunal considered the effect of being the subject of a GMC investigation. The Claimant was unaware that the GMC referral had not been made until over 9 months after his dismissal. The referral when made was timed to coincide with the Coroner's inquest outcome, despite being informed in his dismissal letter that a referral would be made. The Claimant accepted that his job search was not a "concerted effort" due to the live GMC investigation and told the Tribunal that the investigation would have to be disclosed in any job application. The Tribunal accepted the Claimant's evidence that to refer to the GMC investigation was likely to have a negative impact on any application he pursued. The Claimant confirmed that he was aware of his duty to mitigate and when attractive jobs came up, he applied for them.

19. In the period from September 2013 until the 31 March 2014 the Claimant applied for a position as a Consultant in Unscheduled Care Medicine and Emergency services at Heatherwood and Wexham Park Hospital NHS Trust. He told the Tribunal that he attended the hospital and had a useful meeting with Ms Crick on the 25 October 2013 and wanted to meet with Mr Dove but was kept waiting for four hours only to be told that he would not have time to meet him. This the Claimant found to be humiliating (paragraph 96 of his statement). He was not shortlisted for the role.

20. The Claimant asked for feedback as to the reason he had not been shortlisted and the response he received from the Medical Director Mr Dove (page 1280A) was that they did not see anyone prior to shortlisting. The response did not seem to be consistent with the advert which provided contact details for potential candidates to discuss the position which indicated that pre-application discussions were encouraged and facilitated. There was no evidence before the Tribunal to suggest that the failure to be shortlisted was due to any unlawful act committed by the Respondent. Although the response did not appear to answer the Claimant's specific question as to why he was not shortlisted, he took it no further. The Tribunal felt that the Claimant adopted a positive and reasonable approach in his pursuit of this opportunity, this was a role he was qualified to do but despite his international reputation he could not secure an interview, despite being engaged and keen to pursue it.

21. The Claimant also applied for a job in November 2013 at University College London but was not shortlisted.

22. In the year 1 April 2014 to the 31 March 2015 he applied for the role of Interventionalist/Non Interventionalist Consultant Cardiologist at Frimley NHS Trust. In November 2014 he applied for the role of Consultant Cardiologist in Gloucestershire Hospitals NHS Foundation Trust. The Claimant then applied to Oxford University NHS Trust on the 22 February 2015 expressing interest in the role of Locum Consultant in Interventional Cardiology. The Claimant also applied for a role in Surrey and Sussex NHS Trust in February 2015 as a Consultant Cardiologist but was not shortlisted. He was unsuccessful in all applications.

23. The Tribunal's decision was promulgated on the 24 October 2014. Although the Claimant in his statement said that he expected a rapid resolution, the Respondent's decision to appeal showed that the matter was unlikely to be resolved quickly. The Claimant accepted that he knew he was under a duty to mitigate from the date of dismissal, but he still hoped he would be reinstated.

24. After April 2015 the Claimant was seen to adopt a much more concerted approach to his job search after the GMC outcome was delivered on the 2 March 2015 and after the EAT hearing in 2015. This was consistent with the Claimant's evidence that after he had been exonerated by the GMC, he was able to pursue a greater number of roles.

25. The Tribunal noted that although in the two years following his dismissal, only a handful of applications were pursued, we accept the evidence of the Claimant that the GMC investigation would be a barrier to him securing a comparable position. It was noted that despite him reaching out to those

referred to in the adverts to discuss his skills and background, he was unable to secure an interview, even for Locum positions. We conclude that being under the shadow of a GMC investigation had an adverse impact on his ability to mitigate his loss. It was also noted that the Claimant faced a lengthy time awaiting an outcome due to the failure of the Respondent to refer the Claimant to the GMC at the date of dismissal. We found as a fact in our full merits decision that there was no consistent evidence to suggest that a referral had been made by the dismissing or appeals manager at the time their outcomes were sent to the Claimant. We concluded that the timing of the referral to the GMC on the 5 July 2013 was a detriment as it coincided with the publication of a press release issued the day following the coroner's inquest (see paragraphs 407-417 of our full merits finding of fact). The Respondent's delay in referring the matter to the GMC caused the Claimant to suffer a protracted period where he believed he was under investigation and therefore under an obligation to report this to any potential employer.

26. The Tribunal saw that he applied for 15 roles in the period from the 1 April 2015 to the 31 March 2016. He did not secure a position. In the year 1 April 2016 to the 31 March 2017 he applied for 17 jobs. The Tribunal conclude that the job search conducted over these two years amounted to a reasonable search for roles.

27. On the 28 July 2016 Mr Montgomery the Medical Director of the BUPA Cromwell Hospital informed the Claimant that he could no longer practice PCI because he had been unable to maintain a level of practice demanded by the national guidelines (see page 1787). As a result of this decision the Claimant could no longer accept private patients who required coronary intervention however he continued to see private patients at the Cromwell Hospital until at least April 2018 as confirmed in his statement at paragraph 120).

28. In July 2016 the Claimant was not successful in his application for the substantive role at High Wycombe Hospital as a Consultant Cardiologist. Dr Clifford explained that there was a concern voiced by the Trust that he would struggle with the work because he had been out of practice for some time and had become de-skilled. He also confirmed that the Claimant's ongoing legal dispute was raised at the interview and his GMC investigation and the outcome was discussed, reflecting that even though he had been exonerated it was an issue that was of concern to potential employers. He said that it was 'highly unusual' for a Hospital Trust to want to take on a cardiologist that would require months of re-training first. Despite the Claimant being qualified for the role and having the support of his influential friend, he was unable to secure the substantive position.

29. Although the Claimant did not secure the substantive role, he was offered a locum position at High Wycombe Hospital, to assist with the waiting list initiative, which he accepted (page 1698). Dr Clifford's evidence was that he knew that the Claimant "would be willing to take almost any role that he was qualified to do in the area". Dr Clifford's evidence corroborated that the Claimant had expanded his job search to include any role that would get him back to work, even working on short-term locum contracts. This was a role with no status and no career path but would assist him in his attempt to get back into a role and to build up his skills to enable him to perform coronary interventions.

30. Dr Clifford confirmed in cross examination that he had to mentor the Claimant because he had been off work for some time. In his opinion it would take six months of supervised practice to get the Claimant 'back up to speed'. The Claimant confirmed that he accepted this role to help him build up his patient numbers to conform to the requirements of the national guidelines (see above letter from Mr Montgomery). The Claimant commenced work in this role from February to November 2017 working one day a week with the Cardiology Lead and an Interventional Cardiologist, both of whom had previously worked as the Claimant's trainees.

31. The Claimant described the role at High Wycombe as arduous because of the travel involved and he had started having difficulty sleeping due to the journey of the case through the appeal courts (which ended in April 2017 with the Court of Appeal decision). The Claimant was unable to perform sufficient numbers of procedures working on this contract to meet the requirements set in the national guidelines to get back his accreditation to enable him to perform coronary interventions.

32. The Tribunal saw the P60 for the tax year 2017/2018 from Buckingham Hospitals NHS Trust showing gross earnings of £7660.96 (£6128.96 net) (page 478Z (37)), the Tribunal did not see his P60 for his earnings for the first two months of the contract carried out in the previous tax year. The Tribunal conclude that his earnings for the previous tax year were £1751.13 net based on the assumption that he worked one day a week and was paid the same rate as that shown in the P60 for the subsequent year (as referred to in the Respondent's closing submissions at paragraph 77).

33. The Claimant described the legal process as 'unbelievably difficult, stressful and upsetting. He also found it difficult that for the first time in a long and impressive career he faced uncertainty in his financial and professional future.

34. In the year 1 April 2017 to the 31 March 2018 the Claimant applied for only 2 roles. The Claimant told the Tribunal that he would have to be within reasonable travelling distance of London in future as his wife worked in Europe (Geneva and Paris) and he needed to live and work within close reach of a London Airport. The Tribunal noted that he applied for a role Abertawe Bro Moragannwg Health Trust, this did not appear to be within reasonable traveling distance of London and reflected that the Claimant had reasonably widened his search to suitable roles outside of London. At the date of the remedy hearing when the Claimant gave evidence in January 2020, he had been unable to secure a comparable role or a substantive role with similar salary and status. We conclude that the Claimant's job search was reasonable up to the end of March 2018.

35. The Claimant's search for jobs from March 2018 onwards was not reasonable. The appendix attached to his statement showed that 3 roles had been applied for; the role of Consultant Cardiologist in Chelsea and Westminster, in Great Western Hospitals NHS Foundation Trust and one for a role in the Northampton General NHS Trust. There was no evidence that the Claimant had applied for any roles after April 2018 and none were referred to in his statement or in the Appendix to his statement. There was

no evidence to suggest that any applications were presented after April 2018 and no reason was given as to why this was.

36. Although the Tribunal accepted the Claimant's evidence that he found the search for comparable roles to be humiliating and depressing and we accept that the Claimant applied for roles that "before his dismissal he would never have considered" (paragraph 76), that did not excuse the failure to keep trying. As no reason has been given for the lack of evidence to support a continuing and reasonable job search, the Tribunal consider that the Claimant has shown a failure to mitigate from April 2018.

Clinical Excellence Awards Local and National.

37. The Tribunal heard evidence from the Claimant that the NHS operated a merit award system to reward individuals who work "beyond their NHS contract". The system was designed to recognise the benefit of research and development and provide some compensation for consultants who devote their non contractual time and effort to the NHS rather than to private practice. We heard that awards could be made at local and national level and there was no precondition to hold local points before applying for national awards. The local awards went from points 1-9 and national awards starting at bronze, silver, gold and platinum. At the time of his dismissal the Claimant was on a local point 7. Point 9 was equivalent to a Bronze National Award.

38. The Tribunal saw on page 479 the guidance for applying for Clinical Excellence Awards "CEA" awards (in 2008). It was noted that applicants should only include in their application form "*achievements since the last award received, and therefore include the appropriate dates of the relevant achievements*". The more recent guidance published by the CEA in 2014 (at page 933 at paragraph 5.1.6) again stated that when evidencing achievements the application must "..*not include evidence submitted for an earlier award, unless it demonstrates initiatives have been further developed. This may be relaxed for bronze awards. Even then you will have to demonstrate that your current work continues to be excellent*". It was clear that awards were given for achievements that could be demonstrated over and above the contractual obligations and should show achievements since the last award or if it was a bronze application, within the preceding 5 years (page 484, 524 and 933). The Claimant accepted that this requirement was a problem for him because he had not applied for any awards for the first 13 years of his career, when he was engaged in his ground breaking research and development and working on the development of the new angioplasty service.

39. Professor Kooner who was a member of the National Committee on CEA for 10 years, told the Tribunal that the Committee did not interpret literally the 5-year limit and it was hardly ever discussed. It was put to him in cross examination that the Claimant's initiative was in place at the latest by 2011 but he replied that the initiative had not yet rolled out nationally. Professor Kooner's evidence did not seem to be consistent with the evidence the Claimant relied upon in his application dated the 24 January 2009 where he stated that the primary angioplasty service was "…. adopted as the national standard by the DOH". The Tribunal therefore find as a fact that the Claimant's primary angioplasty model had been adopted by the NHS

nationally by 2009, therefore this work was no longer at the developmental or research stage.

40. Although the Claimant and Professor Kooner suggested that awards could be given for a lifetime's contribution, this view was not consistent with the written guidance referred to above. The Tribunal therefore find as a fact that any application had to show significant new achievements since the last award or achievements in the last 5 years for a Bronze. They are awarded for current activities, not for career long achievements.

41. The Claimant's evidence of his previous applications was that he applied for his first award 13 years after he was appointed as a Consultant Cardiologist. He explained that it was not a priority for him to apply for local awards and accepted that the application process "took time which I was happier spending on research and my patients". He also confirmed that he was not familiar with the scoring system. The Tribunal noted that the "emphasis [was] placed on steady progression, being able to add a small additional achievement with each new application, rather than an assessment based on the total of past achievements". The Claimant accepted that he was not driven by money and this was the reason he had not applied for the CEA award at the start of his career. The Claimant in his statement claimed that "had I been driven by money and not my patients welfare, and applied every two years, I believe that in 2003 I could have reasonably expected to receive a Bronze award had I made an application for a National Award". There was evidence to suggest that this was the case, but the Claimant chose not to apply for awards during this period of time despite being in a strong position to do so. The Claimant's failure to apply for any awards before 2003 was not due to any act or default of the Respondent because he did not commence employment with the Respondent until 2005.

42. The Tribunal find as a fact that the Claimant was not focussed on financial rewards and it was not a priority for him to spend his time on the complex applications required in the CEA process. Had the Claimant been motivated by money and incremental increases in his income, he would have pursued awards at regular intervals of his successful career; it was his choice not to do so. However, his failure to apply for awards early in his career when he was focussed on his research and service provision, resulted in him falling behind others in terms of the financial rewards that some of his colleagues enjoyed. This was a choice made by the Claimant at the time and not due to any wrongful act by the Respondent.

43. Prior to the Claimant joining the Respondent, he was in possession of five points, three were awarded for setting up "the most prestigious clinical coronary unit in the country" in 2003, and in 2004 he was awarded a further two points.

44. After the Claimant joined the Respondent, he made a successful application for a point 7 dated the 24 January 2009 (page 490-8), an increase in 2 points. This was the total number of points that the Claimant had achieved at the date of termination.

45. The Tribunal saw that after he had progressed to a point 7, he made an application in 2011 for a Local Level 9 award (see pages 545-553). The Tribunal noted that the evidence he relied upon for domain 2 (developing a

service) dated back to 2006 and 2008 and had been mentioned in his application for his Level 7 award. It was noted that in the description he used on page 551 of his application, he referred to the development of the "Mayday model" which was then "adopted as the national standard by the DOH", showing that the service had already been developed and adopted and was not a new achievement. In domain 3 he showed that he no longer carried out a leadership role. There appeared to be no new achievements under development and there was no new research being carried out.

46. Dr Spencer, who presently works for the Respondent as a Guardian of Safeguarding, gave evidence in relation to Local and National Awards. He was taken to the Claimant's applications in 2009 and 2011 (at pages 490-8 and 545-53 respectively) and he commented that the latter application was very similar to the first. Dr Spencer told the Tribunal that the Claimant would be expected to evidence that he had worked above and beyond his job plan and his previous applications. In his opinion, the Claimant's second application would not have been successful as he could not show that he had worked 'over and above his job plan and above and beyond his previous applications'.

47. The Tribunal also concluded after comparing the application for the Level 7 and Level 9 award, that they appeared to be similar. The only significant addition to the Level 9 application was a reference to "long term follow-up is continuing" and the addition that his landmark trial was published in the Journal of the American College of Cardiology whereas in his previous application he quoted that the manuscript of the study "is in the review process with the Lancet". There appeared to be no new substantive achievements cited in the application for bronze that had not been relied upon in his previous application for a level 7. This was reflected in the scoring applied by the panel who noted (page 536 and 1163) that there was "no change of form since last year".

48. The panel considered the Claimant's application and concluded that he should not receive a further award and that view was consistent with the evidence provided on the form. The Claimant accepted that he made no complaint at the time about the decision not to award him a Level 9 local award and this was not part of his ET claim. The Claimant told the Tribunal that he felt that the process was corrupted, but he did not have any evidence to support this. He complained specifically about the possible input of Mr Hulme who he alleged had scored him down because he was a whistle blower, however he accepted in cross examination that Mr Hulme was a non-scoring member of the panel. Although the Claimant suggested that there was impropriety surrounding the 2011 handling of his application, especially in relation to the contribution of Mr Hulme, this evidence was not before the Tribunal in the liability hearing and the Claimant's assertions in the remedy hearing were not supported by documentary evidence.

49. The Tribunal saw a report produced by Mr Cockayne (Head of Patient Experience) at page 538B-C who was asked to provide an independent view on the scoring mechanisms applied by the panel in 2011. This report was produced after a member of staff had lodged a complaint after their application had been unsuccessful. The Claimant was taken to this in cross examination and he accepted that Mr Cockayne was new to the role and was therefore independent, but he did not accept his findings that the

composition of the panel (of 13 members) was adequate "to control for subjectivity of any individual panel member". Although the Claimant suggested that he was disadvantaged because he was a whistleblower, this allegation was not supported by any consistent evidence, as even if Mr Hulme had been against him (as a non-scoring member), there were 7 members of the panel who had scored the Claimant low (22 or less). There was nothing to suggest that there was bad faith in the way that the Claimant's application was considered by the panel and the Tribunal conclude that he was unsuccessful because his evidence was insufficient to support his application.

50. The Tribunal will now consider the Claimant's applications for national bronze awards made in 2008 and 2010. Professor Kooner told the Tribunal that applying seriously for a national award could take weeks or even months of effort, which is expended to the detriment of time spent on research and clinical work, which would inevitably take a back seat.

51. The Tribunal saw a letter from the Advisory Committee on Clinical excellence Awards "ACCEA" dated the 26 April 2019 (see pages 1193-5). The letter explained the process followed to apply for a National Award. All candidates had to self-nominate and are required to set down evidence in support of their application against five domains which are: (1) developing a NHS Service (2) Delivering a NHS service; (3) leadership; (4) Research and Innovation and finally (5) Teaching and Training. All domains are weighted equally, and each application must be supported by the employer who also provides a weighting in each domain. It was confirmed that the Claimant's applications were assessed by a London South Sub Committee of the ACCEA. The assessors score each candidate independently and an aggregate score is calculated for each applicant. The scoring is subject to quality assurance by the ACCEA Chair and a Medical Director.

52. The Claimant confirmed that when he applied for a bronze award in 2008 and 2010 he did so relying on his achievements over his whole career; this was contrary to the advice given in the above guidance which made it clear that awards were only given for achievements since the last award. When he applied in 2008 there was no national cap on the number of awards given (page 1107) however his application was unsuccessful.

53. However, when he applied in 2010 it was capped at 300 awards nationally and he was again unsuccessful. The Tribunal saw the applications of those who had been successful, and all could show that they had significant current and recent achievements (pages 994-9, 1077-83, 1145-55 and 1173-80). The Claimant could not point to any current achievements, or any new research. All these factors resulted in the Claimant failing to secure a National Bronze Award in 2010. This was a view held by both the local and national panel. It was a fact that by the time he made his 2010 application he was continuing to perform his contractual role but was engaged in no further additional work above and beyond this.

54. The Claimant's application for the award in 2010 was supported by the Trust although the Claimant said that the assessment was supported by "faint praise". The Tribunal saw the trust assessment completed by Mr Hulme on page 1096 of the bundle where he stated that "Dr Beatt has a very strong clinical reputation and delivers excellent care to his patients. He offers

evidence for this in domain 1", the Claimant said that nothing was mentioned about service development. Although this was a much shorter and less effusive statement from the employer than the support provided in the previous application in 2008, it still supportive.

55. The statistics reflected that the success rate of applications for achieving a bronze was low, as in 2011 it stood at 16.57%. The letter from the CEA above confirmed that the number of consultants holding national awards (of all grades) was 2077 against a total number of Consultants in England of 47,823. The letter also provided an opinion that those in the specialty of Cardiology (which was subsumed within the definition of Medicine) had a 0.77% chance of securing a Bronze Award in 2010 based on the numbers of Consultants in post at that time. The Tribunal concluded that even if the Claimant could have shown new developments or achievements, the chances of him securing a Bronze was less than 1% and those in the profession holding the equivalent of a Bronze were few.

56. Although it was the Claimant's evidence that he would have progressed to Bronze from 20 May 2014 and then to Silver in the following year (2015), this has not been corroborated by the evidence before us.

57. The Tribunal saw little evidence to suggest that the Claimant would have been awarded a bronze in 2014. Although he alleged that a fair process was not followed in relation to the bronze award in 2010 this was not supported by any evidence. The evidence was consistent, in that despite the Trust providing a very supportive statement in 2008 he was unsuccessful when there was no cap on the number of awards made. The Tribunal find as a fact that this was because his application relied on past achievements that had been rewarded in previous applications. In 2010 he was again unsuccessful as he was unable to show new achievements within the past 5 years or since his last application. His CARDia research was not new and had been insufficient for him to secure a local bronze in 2011 or nationally. What the Claimant could not show to the national or local panel was recent or current achievements. This remained the case until his dismissal.

58. The Tribunal on the balance of probabilities find as a fact that there was little evidence to suggest at the time of his dismissal that the Claimant would have proceeded to achieve a bronze in 2014 and silver award in 2015, had he not been dismissed. He has failed to show evidence to suggest that he was working on new research or on new achievements that would have resulted in a successful application. Having rejected his evidence that an award could be given for career long achievements and having found as a fact that his application had been rejected on that basis, we conclude that there was no objective evidence to suggest he would have secured a bronze and then a silver award.

Private Practice.

59. The Claimant told the Tribunal that when he was in private practice, all the money he made went into research. When he started working for the Respondent, he said he did 'relatively little private practice' and when Dr Stubbs died, he did none. The Claimant in cross examination accepted that he did not carry out private practice during his hours working for the NHS but he had the opportunity to take up private work if he wished.

60. However, after his dismissal in 2012 the Claimant told the Tribunal that his private practice dwindled and then fell considerably in 2016 because after July in that year he was informed that he could no longer perform interventional procedures (by Mr Montgomery page 1787); this effectively stopped him performing all procedures.

61. The Tribunal saw the report submitted by the Claimant in support of his case and produced by Stanbridge Associates. It appeared on looking at the report that it did not comply with the CPR rules on expert evidence which requires that the witness should be independent "uninfluenced by the pressures of litigation" (CPR 35 paragraph 2.1). Practice direction 2.2 also states that experts should provide "unbiased opinions on matters within their expertise and should not assume the role of advocate". Practice Direction 3.2 provides that a report that is submitted and is relied upon as an Expert's Report must "give details of the expert's qualifications; give details of any literature or other material which has been relied on in making the report; contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based; where there is a range of opinion on the matters dealt with in the report (a) summarise the range of opinions; and (b) give reasons for the expert's own opinion and lastly contain a statement that the expert (a) understands their duty to the court, and has complied with that duty; and (b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instructions of Experts in Civil Claims 2014". The report failed to comply with any of the above requirements.

62. The Tribunal noted that the report referred to statistics, however there was no explanation as to where they were sourced and no information about the report writer's qualifications and experience, which the Tribunal expected to see, as this report had been submitted and relied upon as expert evidence. The report appeared to be anecdotal in nature and did not assist the Tribunal in its fact-finding role. For example, the analysis was said to be based on the 'normal expectations of private practice' (at paragraph 1.8) but gave no indication how the evidence of this expectation was constructed, what was meant by 'normal' and how the data was sourced to contribute to construct this comparative private practice. The writer of the report failed to explain his methodology used to arrive at the figures that appeared in his report. What the Tribunal found surprising was that the report did not provide details of actual earnings or turnover leading up to the date of dismissal and accepted that they had no figures of "what level of private practice he had at the time" but produced a figure that he then reduced by 30% (para 4.6) on the basis of individual consultant evidence and "anecdotal verbal evidence". We were also at a disadvantage because Mr Stanbridge was unable due to ill health to attend any of the hearing dates, he could therefore not be cross examined or asked to explain the methodology that he adopted. The Claimant also confirmed in cross examination that he did not rely 'entirely' on the report. The Tribunal conclude therefore that very little weight should be given to the report.

63. It became apparent during cross examination of the Claimant that some of the relevant data was missing from the bundle as the tax returns had not been disclosed and relevant correspondence had not been provided. This

was provided after the hearing and it was before the Tribunal for use in the chambers hearings.

64. The Claimant also referred to the sum of £100,000 owed to him from various embassies and the fact that he made a 'big effort' to recover the monies due to him (as he told the Tribunal they are slow in paying). He told the Tribunal he made an effort to recover the unpaid monies in 2014 but the Tribunal had no evidence to show when the work was carried out and when it was invoiced. The Tribunal looked to see if any assistance could be gained from the Stanbridge report as to when this work was carried out and if it had been invoiced. In paragraph 3.5-6 of the report it stated that the figure of £100,000 had not been included in the accounts and the result of this was that since 2014-5 it was suggested that "probably £20,000 should be added for fees invoiced to Embassies" per annum. The report again suggested that the £100,000 had not been included on the accounts at paragraph 4.10. It may be the case therefore that the turnover figures had been understated.

65. In the Claimant's statement there was little evidence to suggest that his private practice fell after his dismissal in 2012. The question for the Tribunal is whether the Claimant suffered any actual loss in his private income because of his unfair dismissal or because of the post termination detriments. The Tribunal, using the figures provided by Stanbridge Associates reflect that his turnover in the two years following his dismissal increased (please see Stanbridge report para 4.10).

66. The Tribunal accept that the proper approach to adopt to determine whether the Claimant had suffered a loss after dismissal was to use a more conventional approach (rather than that suggested in the Stanbridge report) by taking an average of the previous three years turnover prior to dismissal. We accept the Respondent's submissions that this was the proper approach to adopt and we decided that this resulted in the more accurate representation of the financial state of his private practice. The average turnover of the Claimant's business prior to dismissal was £60,400. In the year following his dismissal it was £62,400 and in 2014 it was £71,440. There was no evidence to show that in the two years following dismissal the Claimant suffered any loss of earnings in his private practice, in fact his turnover went up and these figures did not appear to have included the embassy work.

67. Although the turnover went down in 2015 to £46524, there was no consistent evidence to show that this was as a result of the unfair dismissal or the post termination detriments. The Tribunal noted that there had been a number of fluctuations in the Claimant's private practice over the years. This evidence was consistent with the Claimant's evidence that his focus was not on developing private income streams but on the patients and research. The turnover of his private practice fell to below this level at times when he was employed by the Respondent, there being no evidence to suggest that this was due to any unlawful act of the Respondent.

68. The fall in income in 2016, four years after his dismissal, coincided with the decision made by Mr Montgomery that the Claimant could no longer perform interventional services. The evidence provided by Ms Leahy was that the

Claimant "wasn't in it for the money" and was not interested in private practice, he was only interested in the parties in front of him. That evidence is entirely consistent with the Claimant's focus being predominantly on research and on his contribution to the NHS. At times the Claimant did not focus on his private practice work and that was a matter of choice. However, there was no evidence to suggest that the dismissal adversely impacted the turnover or income of his private practice; it increased after his dismissal until three years later when it fell. The Tribunal also noted that Dr Clifford confirmed that the Claimant continued in private practice but understood that his work was dwindling. Dr Clifford confirmed that he had received referrals from the Claimant as he was no longer allowed to perform procedures himself, this corroborated that the Claimant continued to see private patients in 2018 and into 2019.

Injury to Feelings.

69. The Claimant told the Tribunal that his suspension and his subsequent dismissal had a devastating effect on his career and his wellbeing (paragraph 16). Ms Leahy told the Tribunal that this case has dominated both their lives for 8 years. She stated that during suspension the Claimant became socially isolated from his colleagues. She stated that his medical career was in tatters and he became depressed and 'completely demotivated when he saw the newspaper reports and then discovered he was being investigated by the GMC in 2013. The Claimant told the Tribunal how he found the GMC investigation and the search for work to be unbelievably difficult, stressful and upsetting. He also described suffering from insomnia for the first time in his life.

70. In our decision made after the full merits hearing the Tribunal found as a fact that the Respondent had indicated in the dismissal letter dated the 14 September 2012 (paragraph 374 at page 163 of the bundle) that a report would be made to the GMC. The Respondent indicated to the Tribunal that a letter was sent to the GMC on the 16 October 2012. The Tribunal had some doubt as to the veracity of the Respondent's evidence on whether a report had been sent to the GMC in October 2012.

71. We refer to the Court of Appeal's decision at paragraph 107 at pages 239-240 where they agreed that "the seriousness of the detriment may well depend on whether the first letter was ever sent: if it was then it could be argued that the second letter did not add much to the damage already done". The Tribunal made it clear in our decision that there was no criticism of the Respondent for making a referral to the GMC but if they had failed to do so at the date of dismissal (or the outcome of appeal) it called into question whether the Respondent felt that the matter was so serious as to amount to a genuine concern. There was no dispute that the second letter was sent, and it was the timing of the letter that caused the Tribunal to conclude that there was a causal connection between the coroner's inquest, the press release and the GMC referral, as they had both been written by the same person.

72. The Respondent was aware of the Court of Appeal's decision and the need for the Tribunal to consider this point and to reach a conclusion on whether the letter was sent in October. If it was, the detriment would be significantly reduced as they would only be repeating an action that had been taken and

was consistent with the letter of dismissal. The Respondent could have provided further evidence to show that the letter had been sent at the time of the Claimant's dismissal or could have called additional witness evidence to this effect, however they have not done so. In the absence of any evidence to the contrary the Tribunal conclude that the letter was not sent to the GMC in September or October 2012.

73. We further conclude that the letter to the GMC was sent the day after the coroner's inquest. This added to the significant damage caused to the Claimant. The delay in escalating the matter to the GMC left the Claimant facing a further significant delay in getting his career back on track. It resulted in the Claimant facing an additional period having to report to potential employers that he was under investigation; this resulted in a significant impediment to his job search.

74. The GMC referral was mentioned in the press release issued after the coroner's inquest. The timing and wording of the press release also gave publicity to the Claimant's dismissal the previous year, even though the Respondent confirmed that his dismissal and the events covered by the inquest were 'entirely unrelated'. This adversely impacted the Claimant's ability to secure a comparable role. The Tribunal concluded that the timing and contents of the press release was more than a mere coincidence (page 175-8 of the bundle and paragraphs 406-413 of the decision on the liability decision).

75. We also refer to the Court of Appeal's decision at paragraph 110 (page 240 of the bundle) where they concluded that the press release would have created a false and misleading impression to the public. They stated that "What is likely to have been damaging to [the Claimant] is not so much the Trust's use of this particular phrase as the public statement that "following a disciplinary procedure" he had "left the Trust" - a rather mealy mouthed formulation which would however clearly be understood (correctly) to mean that he had been dismissed -- and also that he had been "referred to the GMC for further investigation". Even if those statements were literally true, it is not clear why they needed to be made in a press release about the outcome of the inquest (still less if the Trust believed that the [Claimant's] departure was indeed for unrelated reasons".

76. The Tribunal conclude that the reference to the GMC referral and the termination of his employment in the press release was conduct that was high handed and malicious and damaged the Claimant's reputation. It was the timing and the wide publicity given to the false impression that made this conduct high handed and malicious and was highly damaging to the Claimant's personal and professional reputation. The Tribunal accept that the press release would have left the Claimant's reputation "in tatters" (as described by Ms Leahy). We also heard specific reference to the effect that this wider publication of the dismissal and the GMC referral had on potential employers. Dr Clifford confirmed that in 2016, some three years after the press release, the Claimant was still subject to scrutiny by prospective employers about the circumstances that led up to his dismissal and the following GMC investigation and this had cast a shadow over his career.

The Law

Section 49 Remedies

(1) Where an [employment Tribunal] finds a complaint [under section 48(1), (1ZA), (1A) or (1B)] well-founded, the Tribunal—

(a) shall make a declaration to that effect, and
(b) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.

[(1A) Where an employment Tribunal finds a complaint under section 48(1AA) well-founded, the Tribunal—

(a) shall make a declaration to that effect, and
(b) may make an award of compensation to be paid by the temporary work agency or (as the case may be) the hirer to the complainant in respect of the act or failure to act to which the complaint relates.]

(2) [Subject to [subsections (5A) and (6)]] The amount of the compensation awarded shall be such as the Tribunal considers just and equitable in all the circumstances having regard to—

(a) the infringement to which the complaint relates, and
(b) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.

(3) The loss shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and
(b) loss of any benefit which he might reasonably be expected to have had but for that act or failure to act.

(4) In ascertaining the loss the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

Section 123 Compensatory award

(1) Subject to the provisions of this section and sections 124[, 124A and 126], the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

> (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
> (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in subsection (1) shall be taken to include in respect of any loss of—

> (a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy (whether in pursuance of Part XI or otherwise), or
> (b) any expectation of such a payment,

only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) In ascertaining the loss referred to in subsection (1) the Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

The submissions

77. The Tribunal were grateful to the parties for their helpful written and oral submissions. We have referred to the case law in our decision and to the outline legal arguments in both the findings of fact and conclusions. However, we do not intend to recite the entirety of those detailed submissions in this decision but failing to do so is not an indication that they have not been considered.

Decision

The unanimous decision of the Tribunal is as follows;

Is this a case where career long losses should be awarded?

78. The Tribunal must first decide whether this is a case where career long losses should be awarded. We have been taken by the Respondent to the case of *Wardle v Credit Agricole Corporate and Investment Bank [2011] EWCA Civ 545* and particularly to paragraphs 50-53 on pages 1306-7. In that extract, the Tribunal is reminded that it will be a rare case where the Tribunal will award career long losses. This is dependent on whether the evidence supports this approach. We are reminded that the correct approach to adopt is to decide not when the Tribunal is sure that the Claimant will find an equivalent job but to assess that the employee is likely to get a job by a specific date and that exercise will encompass the possibility that he may be lucky to find a job earlier. The Tribunal will also have to assess what the Claimant would have earned had he not been treated unlawfully compared to what he is earning now. The Tribunal should then consider reductions to

take into account the vicissitudes of life, including the possibility that he may retire early.

79. The Tribunal was also taken to the case of *Qu v Landis and Gyr Limited UKEAT/0016/19/RN* where it was again stated that it would be rare for a Tribunal to award career long losses. The usual approach is to assess losses up to a point where the individual is likely to get another job. This assessment, we were reminded, was not a question of fact but rather a range of possibilities.

80. The Tribunal noted that it is permissible to award career long losses where it is likely that the Claimant's earnings would have remained lower than they would have done but for the dismissal. We have been referred to the case of *Abbey National plc v Chaggar [2010] ICR 397* at paragraph 76 (page 450) where it stated that to decide what will happen in respect of a future career, the assessment is to be made on the degree of chance not on the balance of probabilities. In the case before us we do not have to rely on conjecture or to look at a significant period into the future to try and predict what would have happened. At the date of the remedy hearing the Claimant was aged 68 and the evidence suggested that this was towards the end of a career for someone in the role of Consultant Cardiologist.

81. The evidence before the Tribunal was consistent that the role the Claimant occupied at the date of termination was physically demanding and he was likely to consider retirement at some time into his late 60's. Although the Tribunal heard that the Claimant wished to change the focus of his work away from physically demanding clinical interventions to research, administrative or managerial roles, this was not an option he could avail himself at the date of termination as we have found as a fact above.

82. At the date of termination, the Claimant had no managerial responsibilities and had no arrangement to take work to a tertiary centre which made the prospect of future research work unlikely. There was no evidence to suggest that the loss of his managerial status or the failure to secure agreements with a tertiary centre was due to any unlawful act of the Respondent. It was also noted that the honorary contract with the Brompton had not been renewed. The Tribunal conclude it was highly unlikely that the Claimant would have been successful in securing a research position, had he not been unfairly dismissed.

83. The Tribunal then considered the degree of chance that the Claimant would have worked until the age of 70 and we conclude that this was highly unlikely taking into account the role he held with the Respondent at the date of dismissal and the physically demanding nature of that role. The Tribunal considered the vicissitudes of life and the Claimant's evidence that the Cath Lab role was punishing. All the Claimant's witnesses appeared to agree that it was usual for someone in his position to reduce their hours or to replace clinical work with other less physically arduous tasks. The Tribunal conclude that the Claimant was unlikely to continue in the clinical role past the age of 68. If the Claimant were to secure a comparable role to that held with the Respondent, earning a comparable salary, we conclude that it is likely that he would have retired at the age of 68. The Tribunal did not conclude that this was a case where career long losses should be awarded.

The decision on mitigation.

84. The Tribunal have also found as a fact that in the two years following dismissal the Claimant applied for only a few jobs. The Tribunal accepted the evidence of the Claimant that being under investigation by the GMC would adversely impact his job search. We did not conclude that the low applications pursued in the first two years suggested a failure to mitigate or an unreasonable search for work. We considered the case of *Cooper Contracting v Lindsay [2016] EAT ICR* where the Tribunal were reminded that the burden of proving a failure to mitigate is on the wrongdoer and what must be shown is that the Claimant acted unreasonably. The Tribunal also considered the case of *Fyfe v Scientific Furnishings Ltd [1989] ICR 648 EAT* which stated that when approaching the issue of reasonableness it is important to look at the surrounding circumstances and in the case of *Wilding v BT [2002] ICR 1079 CA* which stated that it was important to take into account the state of mind of the Claimant. The Tribunal accepted that a GMC investigation made the search for work more difficult. It was not a factor that could be ignored or in some way brushed over. It was important for the Claimant to be honest and upfront about the investigation. One other important factor that we took into account was the Respondent's decision to publish details of his dismissal and the GMC referral in the press release in 2013. The Tribunal saw that for the two years following dismissal even when the Claimant applied for a role, he was unable to secure an interview. This we concluded corroborated the Claimant's evidence that NHS Trusts were unlikely to consider those under investigation. The Tribunal took into consideration that it was not only the steps that the Claimant had taken to mitigate but also the steps that it was reasonable for him to take in all the circumstances. We consider that the Claimant took all reasonable steps to mitigate in the two years after dismissal, which would have included assisting in the GMC investigation to clear his name, as well as approaching potential employers.

85. The Claimant's evidence was consistent that after the GMC had exonerated him in March 2015 his search for suitable roles increased. He applied for 11 positions in 2015 but was unsuccessful in securing a role. The Tribunal accept that the Claimant would have needed time to reach out to his many contacts in the profession to secure a position. The Claimant had by 2016 found himself deskilled by the time he spent under suspension and then in the period after his dismissal. We heard evidence from Dr Clifford that it would be 'highly unusual' for a hospital to want to take on a person who had become deskilled. This was a major barrier to the Claimant being able to secure a position that was comparable in salary and status to the role he held prior to dismissal. The Claimant was able to secure a role that gave him an opportunity to re skill but was unable to carry out a sufficient number of procedures to be able to regain his ability to practice.

86. The Claimant had been unable to secure a position despite applying for a significant number of roles from the date of termination to the end of March 2018 as we have found as a fact above. We considered that the Claimant had taken all reasonable steps to mitigate, taking into account the particular circumstances of the case, including the delayed referral to the GMC and the impact that this had on his job search up until 2015. We also considered

the adverse impact the further publicity of the press release had on his attempts to find work during this time.

87. By the time the GMC investigation had concluded, he had become deskilled and unable, even with help from his professional colleagues, to be considered for a comparable position. We have found as a fact above that the Claimant did not apply for any roles after April 2018. At that date he had reached the age of 66 (shortly before his 67th birthday on the 5 June) and we have found as a fact above at paragraph 15 that a person carrying out the role he held at the date of termination would have continued working until the age of 68 based partly on the Claimant's evidence when he described the role as 'punishing'. The evidence before us was consistent that the Claimant was likely to continue in a comparable role until the age of 68.

88. The Tribunal conclude that the Claimant's failure to submit any applications after April 2018 amounted to a failure to take reasonable steps to mitigate his loss. There was no evidence that after that date the Claimant took any steps to mitigate, we conclude therefore that his losses should be capped at March 2018 to reflect this. Although we concluded above at paragraph 84 that the Claimant would have retired at the age of 68 had he secured a comparable role, having seen no evidence to suggest mitigation, we conclude that the Claimant's award should be capped at the earlier date.

89. We award to the Claimant his losses up until **31 March 2018** which is the sum of **£464905.17.**

Local and National Awards.

90. The Tribunal have found as a fact that the Claimant was not motivated by money and he was slow to apply for local and national awards. He was successful in his first three applications for local awards but when he later applied for bronze he was rejected twice. We were told that to be successful for national awards, considerable time and effort must be spent on the form to show evidence of excellence. From the little evidence we had, it appeared that the Claimant was unable to show evidence that he had a real and substantial, rather than a speculative chance of getting a further award and we refer to our findings of fact above. We had to consider the likelihood that he would secure an award and we conclude on the evidence the chance of him securing a Bronze award was speculative and did not amount to a real or substantial chance (taking into account the case of *Allied Maples Group Limited v Simmons and Simmons [1995] 1 WLR CA*) at paragraph D-E on page1614). We award no uplift to reflect the speculative chance of securing a Bronze and Silver award.

Injury to Feelings

91. The Respondent in their submissions contend that the Tribunal is unable to make an award for injury to feelings in a case of whistle blowing. The Respondent referred to the case of *Dunnachie v Kingston Upon Hull City Council [2004] ICR HL* at paragraph 16-29 which stated that the Tribunal had no power to make an award for injury to feelings in respect of awards for unfair dismissal. Dunnachie made the point that 'loss' referred to in section 123(1) of the Employment Rights Act 1996 was a reference to pecuniary loss

only. It could not include a right to award a payment for injury to feelings which arose out of dismissal and this also included the manner of dismissal.

92. The Respondent has suggested that the Dunnachie ruling calls into question whether the cases of *Brassington v Cauldron Wholesale Ltd [1978] ICR 405 and Cleveland Ambulance NHS Trust v Blane [1997] ICR 851* can still be regarded as good law. The cases of Brassington and Blane dealt with the meaning of the words "infringement to which the complaint relates" which is the wording also used in the Trade Union Labour Relations (Consolidation) Act 1992 in relation to payments for trade union detriment. The wording in the section that applied in the aforementioned cases is similar to Section 49(2) Employment Rights Act 1996 which also refers to the "infringement to which the complaint relates". HHJ Clark said in the case of Blane that these words granted the power to a Tribunal to award compensation over and above pure pecuniary losses.

93. The Tribunal have been referred by the Claimant's counsel to the case of *Virgo Fidelis Senior School v Boyle [2004] ICR EAT* which referred to the decision of Dunnachie at paragraph 34, where it confirmed that it was impermissible to award compensation for non-economic losses in unfair dismissal cases under Section 123, but went on to conclude that in a case of detriment falling within Section 47B of the Employment Rights Act it was akin to "a form of discrimination". It was concluded that the remedies section provided for under Section 49(2) was a wider ambit giving the ability to recover compensation over and above pecuniary loss, and can include a payment in respect of injury to feelings for detriment suffered, as distinct to dismissal which is limited to pecuniary losses only. It was not contended in the case of *Commissioner of the Metropolis v Shaw [2012] ICR* that the case of Virgo Fidelis was wrongly decided.

94. The Tribunal also considered the case of *Timis v Ospov [2019] ICR* paragraph 27 which proceeded on the assumption that the case of Virgo Fidelis was correctly decided.

95. The Tribunal has also been referred to the case of *Royal Mail Group v Jhuti [2019] UKSC 55* which referred to the different remedies available under section 103 and Section 48(3) and confirmed that compensation for detriment can include an award for injury to feelings.

96. The Respondent also made reference to the obiter comments made by Singh LJ in the case of *Santos Gomes v Higher Level Care Limited [2018] ICR 1571 CA* (paragraphs 61-66) where it was stated that the word 'infringement' is not naturally language that is concerned with compensation at all'. This case considered whether the cases of Brassington and Blane were correctly decided following the case of Dunnachie, but Singh LJ concluded that the matter would not be decided in the case before him for a number of reasons, firstly because the two cases had been around for some time and had a long pedigree and secondly the House of Lords had an opportunity to say that they were wrong in the case of Dunnachie but did not expressly do so. In the Santos Gomes case it was concluded that the Tribunal did not have power to award injury to feelings in a claim under the Working Time Regulations in connection with rest breaks because it was felt

that the natural remedy for a claim was not a payment for injury to feelings but a payment of compensation calculated for the time of the rest break calculated by using the rate of pay. It was concluded that the wrong in this case was more akin to a claim for breach of contract and not apt for a payment for injury to feelings. This case can therefore also be distinguished on the facts. The Tribunal did not conclude that this called into question the Tribunal's power to award the Claimant a payment for injury to feelings in respect of detriment .

97. Taking all of the above case law into account that has been referred to the Tribunal, we conclude that although the matter has been subject to much legal debate over the years, the case law is clear and confirms that the Tribunal is entitled to award to the Claimant a payment for injury to feelings.

98. The Tribunal then considered the appropriate sum to award to the Claimant. We conclude that in this case he should be awarded the sum of **£25,000** and we considered that there were three acts complained of which were found to be detriments. The injury suffered by the Claimant was serious and caused him considerable distress and harm. The acts caused damage to the Claimant's professional and personal reputation and his career. The Tribunal felt that this sum was appropriate in all the circumstances of the case.

99. We considered whether the Claimant should be awarded a sum in respect of aggravated damages. The Tribunal was taken to the case of *Commissioner of the Metropolis v Shaw [2012] ICR 464 EAT* by the Respondent and specifically to paragraph 15 on page 472. It confirmed that aggravated damages are not punitive but compensatory in nature. There are three heads where an award can be made and they are in respect of the manner in which the Respondent has committed the tort, the motive for it and the Respondent's conduct subsequent to the tort but in relation to it. In other words, any of the aforementioned circumstances can affect the award because they aggravate the distress caused by the wrongful act. It was further emphasised in the case of Shaw (paragraph 21) that aggravated damages are an aspect of injury to feelings. The Tribunal are invited to make a significant additional award to the Claimant for aggravated damages of £25,000. This appeared to be excessive considering the sum that has already been awarded to the Claimant for injury to feelings.

100. The Tribunal in making an award are entitled to take into account the manner in which the wrong is committed; was it for example done in an exceptionally upsetting way or was it in a malicious, high handed, insulting or oppressive nature. It is said that when considering an award under this head a Tribunal can consider the subsequent conduct of the Respondent; for example, did they rub salt into the wounds.

101. We have found as a fact in our decision that there were aggravating factors in the manner in which the tort was committed. We found as a fact that there was no evidence to suggest that the referral to the GMC had been made at the date of dismissal (even though it was referred to in the dismissal letter). We found that there was a causal connection between the coroner's inquest outcome and the date of the letter of referral to the GMC. The press release making reference to the Claimant's dismissal and the GMC referral was a further aggravating factor; there was no need to refer to the Claimant's dismissal and this was what we saw as rubbing salt into the wounds. We

found as a fact that the referral to the GMC was not made until after the coroner's inquest and we conclude that the timing of the referral added to the damage done as we found as a fact that the referral was written by the same person who wrote the press release. We conclude that this added to the seriousness of the detriment and was a significant aggravating factor. We have concluded above that the reference in the press statement to the Claimant having left the Trust following a disciplinary procedure was a further aggravating factor as it was unclear why this was relevant. It was the further publication of the dismissal to the wider public that was then reported in the press which caused further distress and damage to the Claimant's professional and personal reputation, especially taking into account that according to the Respondent, the Claimant's dismissal was for a reason unrelated to the issues considered at the inquest. These factors led us to conclude that a further award of **£7500** is to be added in respect of these aggravating factors.

102. The Claimant has asked that the award be uplifted in accordance with the ACAS code of practice in relation to the handling of the appeal. Having looked at the various paragraphs we have been referred to in our full merits hearing decision, we conclude that our finding only refers to an inadequate and unfair process. The Tribunal did not conclude that the handling of the disciplinary process was a breach of the statutory code. The Tribunal also did not consider that the failure to deal with the Claimant's grievance prior to dismissal was a breach of the ACAS Code, the wording in the code only suggests that a disciplinary procedure 'may' be suspended to allow for a grievance to be heard. Although this was not done, this did not result in a breach of the disciplinary procedure. There will be no uplift in the compensation awarded.

103. The Claimant also asked for compensation for delayed receipt and referred to the case of *Melia v Magna Kansei Ltd [2015] EWCA Civ 1547,* stating that due to the number of years that have passed since the Claimant's dismissal and the magnitude of the loss of earnings, it would be appropriate to award a sum to represent a loss of interest. We first note that Tribunals do not have power to award loss of interest in unfair dismissal cases. In the case of Melia it was confirmed that where a Claimant suffers loss and is seeking to recover compensation that is just and equitable, it is appropriate to compensate for delayed payment. The case at paragraph 41 stated that a Tribunal is to assess the compensatory award in such amount as it considers it to be just and equitable in the consequences of the dismissal. It stated that where compensation is made for future losses that are subject to a deduction for accelerated receipt, the Tribunal should also make an award for delayed receipt.

104. Although this ruling was focussed primarily on the importance of treating payments for accelerated and decelerated receipt equitably, it did not state that the power to make an award for decelerated receipt was contingent upon an award for accelerated receipt. Although the Respondent has stated that this was a case that dealt with the consistent treatment of past and future losses; as we are not awarding future losses the case of Melia does not apply. However, the case did not say that as a matter of principle, losses for delayed receipt could only be awarded if there were future losses that were discounted. The Tribunal has been unable to find an authority that states that, as a matter of principle awards for decelerated receipt can only be made

where there is an award of accelerated receipt. We therefore conclude that it is just and equitable in this case to award a sum for decelerated receipt. We conclude that as the Claimant has sustained losses over a lengthy period, it is just and equitable to increase the award to reflect delayed receipt, to compensate the Claimant for the loss of use of money he should have received earlier. We are satisfied that an award shall be made for delayed receipt by increasing the compensatory award by 2.5%.

The total financial award

The Basic Award		**£3870.00**
Compensatory Award		
We have decided to award to the Claimant his losses from the date of termination to the 31 March 2018 which is		**£464905.17**
Less earnings in 2016	**£6128.96**	
	£1751.13	
		£7880.09
		£457,025.08
Add loss of statutory rights		£300.00
		£457,325.08
Uplift of 2.5% for decelerated receipt		£11,433.13
Total		**£468,758.21**

105. This figure was then grossed up using the formula set out in the Respondent's submissions at paragraph 107-8 which is as follows:
Y is the grossed-up sum which is arrived at using the following formula = 468,758.21/ 0.55 + £38,148.48/11 - £35,015.45.

106. We conclude that using this formula the grossed-up figure for compensation is £**870,740.25.**

Employment Judge **Sage**

Date: 21 February 2020