EMPLOYMENT TRIBUNALS

Claimant: Mr A Hassan

Respondent: University Hospitals of Morecambe Bay NHS Foundation Trust

Heard at: Manchester (by CVP) **On:** 2-6 October & 16-17 November 2023

Before: Employment Judge Phil Allen
Mr B Rowen
Mr J Murdie

REPRESENTATION:

Claimant: In person
Respondent: Mr A Sugarman, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant did make protected disclosures to the respondent, as alleged.

2. The principal reason for the claimant's dismissal was not that he had made protected disclosures. The claim for automatic unfair dismissal under section 103A of the Employment Rights Act 1996 was not well-founded and is dismissed.

3. The claimant was fairly dismissed for some other substantial reason. The claim for ordinary unfair dismissal was not well-founded and is dismissed.

4. The claimant was not treated less favourably because of his race. His claim for direct race discrimination was not well-founded and is dismissed.

5. The claimant was not treated less favourably because of his religion. His claim for direct discrimination on grounds of religion or belief was not well-founded and is dismissed.

6. The claimant did not prove that he had a disability at the relevant time. The claims for discrimination arising from disability and breach of the duty to make reasonable adjustments were not well-founded and are dismissed.

REASONS

Introduction

1. The claimant worked for the respondent as a consultant ophthalmologist from 4 November 2013. He was dismissed in a letter dated 11 June 2021 (with the last date of employment of 13 June). The claimant claimed that he was automatically unfairly dismissed for having made public interest disclosures or that, in the alternative, he was ordinarily unfairly dismissed. He also alleged that he was discriminated against due to his race and religion. He contended that he had a disability and that he was discriminated against because of something arising from his disability and/or that the respondent breached its duty to make reasonable adjustments. The respondent contended that the claimant was fairly dismissed for some other substantial reason. It denied discrimination and did not admit that the claimant had a disability at the relevant time.

Claims and Issues

2. A preliminary hearing (case management) was conducted in this case, on 17 February 2022. At that hearing the list of issues, as they had been identified at that time, was appended to the case management order.

3. At the start of this hearing the respondent provided a document which it said was the agreed list of issues. The respondent's position was that the issues had been amended following some further particulars from the claimant, after he questioned some of the content of the previous list, and after the respondent's own amended grounds of response. The respondent contended that the list it provided had been agreed by the claimant.

4. At the start of the hearing the claimant did not agree with the list of issues provided by the respondent, as he was concerned that the issues were not set out in the same order as they had been in the list appended to the previous case management order. He emphasised that he had prepared his statement to follow that order. He did not identify any substantive issues with the proposed list. He said that he had not had time to check the list. The claimant was asked to review the list of issues and inform the Tribunal, when it reconvened after reading, whether he disagreed with anything in the list of issues. When the hearing reconvened on the second day, the claimant confirmed that he agreed the list of issues which had been provided by the respondent. That list was accordingly treated by the Tribunal as containing the issues which it needed to determine as agreed by the parties (albeit that the precise order of doing so was not agreed). The list is appended to this Judgment.

5. On the first day of the hearing the Tribunal identified two amendments to the list of issues with which the parties agreed.

6. On the second day of the hearing the respondent's representative confirmed that it had previously been agreed that the protected disclosures set out at issues 4(c) and (d) were accepted as having been protected disclosures. In addition, it was

accepted that part of what was alleged to be the protected disclosure at issue 4(b) was also accepted by the respondent as having been a protected disclosure made by the claimant. The respondent did not, however, accept that the second part of issue 4(b), was a protected disclosure which had been made. As a result, it was confirmed and accepted that the claimant had made protected disclosures as alleged at 4(c) and (d), and the first part of 4(b) in the list of issues. The Tribunal would need to determine whether what was alleged at 4(a), (d), (e) and the second half of 4(b) were protected disclosures which the claimant had made.

7. Prior to the hearing, and as a result of an application made by the respondent, it had been confirmed that this hearing would determine only liability issues and not issues in relation to remedy. Accordingly, in this Judgment the Tribunal has determined the liability issues only. The remedy issues were left to be determined later, only if the claimant succeeded in his claim or parts of it. However, at the start of the hearing it was agreed that the Tribunal would consider and determine the following issues alongside the liability issues, even though they were issues of remedy and recorded in the remedy section of the list of issues: 46 and 47 (ACAS code); 50-51 (contributory fault); and 52-53 (the issue commonly known as *Polkey*).

Procedure

8. The claimant represented himself at the hearing. Mr Sugarman, counsel, represented the respondent.

9. The hearing was conducted entirely by CVP remote video technology with both parties and all witnesses attending remotely by video.

10. The Tribunal was very concerned on the first day of the hearing whether the time listed and available would be sufficient time for the case to be heard in the light of the size of the bundle and the number of witnesses (and the length of the witness statements). The respondent had prepared and provided an agreed timetable. In summary, that provided one day for reading (following initial discussions), one and a half days for cross examination of the claimant and his witness, and one and a half days for cross examination of the respondent's witnesses. The respondent's representative believed that the case could be heard in the time allocated (or at least it would be possible to hear the evidence and submissions). Whilst the claimant had no experience of Tribunal proceedings, he believed that he would be able to cross-examine the respondent's witnesses in the time available because, whilst he expected to have a more significant number of questions for Ms Glass which would take two to three hours, he had fewer questions for the other witnesses and believed the time proposed would be enough. In fact, the claimant's cross-examination took two full days, being longer than the time proposed (the Tribunal having emphasised to the respondent's representative that his cross-examination of the claimant had to be completed by the end of the third day).

11. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 2294 pages. Where a number is referred to in brackets in this Judgment, that is reference to the page number in the bundle. The bundle contained repeat copies of the same documents and some parts of the bundle were not referred to during the hearing. At the start of the hearing the claimant wanted to raise a concern regarding the bundle because he said that the provision of documents had

been continuing until the Friday before the hearing started, some documents had only been provided in their final format on the Thursday before the hearing, and he had only limited time to consider or prepare. He did not make any application as a result, and he did not ask for the hearing to be postponed; both parties' position was that the hearing should proceed. On the first day the Tribunal agreed that it would read the documents referred to in a chronology document prepared by the respondent (which was not agreed by the claimant) and in the claimant's witness statement. The Tribunal read only those documents and the documents to which it was referred during the evidence.

12. The respondent provided a few additional documents in the first two days of the hearing. These included a table providing emergency data and some documents containing medical information about C1, C2 and C3 which had been unredacted with regards to some information which had previously been redacted. The claimant did not object to the Tribunal considering any of those documents and indeed he felt that the Tribunal needed to consider the documents provided.

13. During the third day of hearing, whilst being cross-examined, the claimant was asked about an email which he had sent to Dr Armstrong which had resulted in the response of Dr Armstrong of 17 March 2020. The claimant said that he had only been asked for it the previous week and had not been able to find it in the time available. The Tribunal suggested to the claimant that it would be helpful if he could find the email he had sent and provide it to the Tribunal. That email was never provided as the claimant said that he could not find it, but an additional email of 17 March 2020 from the claimant to Dr Armstrong was provided (albeit an email sent by the claimant in response to Dr Armstrong's email (672) rather than the one sent prior to his response). The respondent did not object to that email being looked at by the Tribunal.

14. Prior to the start of the fourth day of hearing, the respondent provided further documents, being emails which related to the religion of C3. It was not clear why one of the emails had only been provided at that late stage, but the other responded to the claimant's evidence of the previous day. In practice the emails contained evidence from C3, they were not contemporaneous documents. The claimant did not object to the Tribunal seeing the emails, as he confirmed that he believed that the issue had been addressed and resolved the previous day. The Tribunal understood from what the claimant said that in the light of what he had been told, that he did not dispute that C3 was a Muslim, but he argued that it made no difference to his claim as he was an exception which proved the rule.

15. At the start of the fifth day, the respondent provided further documents, being emails provided by Mr Proctor, predominantly containing exchanges with the claimant and relating to job planning meetings. The respondent had identified the existence of the relevant documents at the end of the fourth day when Mr Proctor had been asked. It had disclosed them in accordance with its ongoing duty of disclosure. When the documents were first addressed the claimant confirmed that he was happy for the documents to be read as he had nothing to hide. Immediately prior to lunch on the fifth day the issue of the additional documents was re-visited. The claimant confirmed that he did not wish to return to give evidence under oath so that he could give evidence about the documents. The respondent applied for the documents to be admitted so that they could be referred to in submissions. The

claimant objected and, at that point, said that he had not read them and would not be able to do so over lunch (the claimant had a good reason for not being able to do so during the lunch break). Following the lunch break, the Tribunal heard the respondent's application for the documents to be admitted and the claimant was given the opportunity to say why he objected. The Tribunal adjourned briefly to reach a decision and informed the parties that the decision was that the documents would be admitted. The reasons were provided orally and, in summary were:

a. The most important factor was whether the documents were relevant, and the respondent had explained why the documents were relevant;

b. It was disappointing that the documents had only been provided so late in the day on day five of the hearing when evidence was almost concluded. A reason had been given for late disclosure and why the documents had only been entered so late; and

c. The Tribunal applied the overriding objective of dealing with cases fairly and justly and, so far as practicable, avoiding unnecessary formality and seeking flexibility in proceedings. The Tribunal explained that it can and does on occasion find itself faced with documents disclosed very late and it would often be in accordance with the overriding objective for the documents to be admitted where they are relevant to the issues to be determined.

16. Prior to the hearing, the respondent had made an application under rule 50 requesting anonymity for three comparators named by the claimant and their medical information. The claimant opposed the application for two of the people concerned, but agreed what was proposed for the third (C2). At the start of the hearing, the Tribunal suggested that it would hear the application and consider it at the start of the second day, when the Tribunal had read into the case, and it had a better understanding of the issues. On the second morning, the respondent's counsel made the application. After the application had been made, the claimant confirmed his position and, as a result, a pragmatic resolution was achieved which satisfied what the respondent was seeking and with which the claimant agreed. As a result:

a. The medical documents provided which related to C1, C2 and C3 as included in the bundle and referred to during the hearing, included only references to C1, C2 and C3, and not the names of the individual comparators;

b. The names of the comparators in the list of issues were included only as C1, C2 and C3;

c. The respondent provided an amended version of the claimant's witness statement which removed the names of the comparators and referred to them only as C1, C2 and C3 (in relation to them as comparators and the medical evidence), which was the statement adopted to be provided to the public if a copy was sought (the Tribunal had by that time already read the statement containing the names);

d. During the hearing and the evidence, the three comparators when they were referred to as comparators or in relation to the medical evidence (only) were referred to as C1, C2 and C3 and not by name; and

e. In this decision, where reference is made to the comparators in relation to the medical evidence provided about them, they are named as C1, C2 and C3. None of those referred to gave evidence to the Tribunal.

17. The claimant had provided a very lengthy witness statement which was 279 paragraphs over 92 pages. The Tribunal read that statement during the first day. The Tribunal also read the claimant's disability impact statement (1627). On the second day, the claimant confirmed the truth of that statement and the impact statement under oath, and he was then cross-examined before being asked questions by the Tribunal.

18. The claimant had also provided the Tribunal with the statements of two witnesses who he had intended to call. On the morning of the first day the claimant explained that he was not relying upon one of the statements and it was agreed that statement would be deleted without having been read by the Tribunal. The claimant did rely on the evidence of Mr Mathen, who had worked at the respondent as an ophthalmologist from 1990 to 2021. A statement was provided from him, which the Tribunal read. When he wrote the statement, Mr Mathen had not expected to be in the country for the Tribunal hearing but in fact he was available to attend and give evidence. During the second day, the respondent confirmed that it had no questions for Mr Mathen and therefore the Tribunal confirmed that he did not need to attend the hearing and his evidence was accepted as written without him needing to be heard.

19. The Tribunal was provided with witness statements from each of the following witnesses called by the respondent. Those statements were read on the first day of the hearing. They each attended on the fourth and fifth days of the hearing, were cross-examined, and were asked questions by the Tribunal (where required). The witnesses were:

a. Mrs Linda Glass, the deputy associate director for surgery and, at the relevant time, the service manager or clinical service manager in ophthalmology;

b. Miss Lakshmi Patel, a Trust Associate Specialist in the retina service and from August 2019 the clinical lead in the ophthalmology service;

c. Mr Russell Norman, the associate director of operations for core clinical service;

d. Ms Katy Stretch, the head of people services and a member of the appeal panel in the claimant's internal appeal; and

e. Ms Kanwalpreet Mom, the Chief Pharmacist and controlled drugs accountable officer and a member of the appeal panel in the claimant's internal appeal.

20. For some of the respondent's witnesses, the respondent's counsel asked both questions at the start of their evidence to address a limited number of issues which had arisen either during the hearing or from the claimant's witness statement, and a limited number of questions in re-examination about issues which had arisen during cross-examination and the Tribunal's questions. The claimant objected to this being done, particularly for Mrs Glass' evidence. The Tribunal confirmed that it was the correct procedure. The claimant wished to highlight his objection to a witness answering questions and/or amending their statement at the start of their evidence.

21. At the end of the fourth day, there was a discussion about submissions. At that stage the Tribunal was part way through hearing from the respondent's third witness (Mr Norman). After the possibilities were explained to the claimant, he expressed a preference to have some time to prepare final submissions after he had finished cross-examining the remaining witnesses. In fairness to the parties and particularly taking into account the fact that the claimant was not professionally represented and might need to move from cross-examining to making submissions without time to prepare to do so, the Tribunal confirmed to the parties at the end of the fourth day that submissions would not be heard on day five and that a further day for submissions to be heard would be arranged. In fact, that additional day would have been required in any event because the evidence was only completed late on the fifth day.

22. New dates were listed for days six and seven of the hearing. An order was made for written submissions to be prepared and sent to the other party in advance of the hearing reconvening and each party produced a lengthy and detailed submission document. The parties returned on the morning of the additional sixth day and each made oral submissions in addition to the written submissions provided. It had been agreed that oral submissions would last for no more than one and a half hours for each party and each of the parties used the full amount of time available when they made their oral submissions. The afternoon of day six and day seven gave the panel the time to reach a decision in chambers.

23. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

Facts

24. The Tribunal heard a significant amount of evidence about a number of matters which arose throughout the claimant's employment. We have considered all of the evidence heard but have recorded in this Judgment only the evidence directly relevant to the decision reached. In particular, we have not found it necessary to address in this Judgment the details of many of the historic matters about which the claimant (and others) clearly felt very strongly.

25. The claimant worked for the respondent as a consultant ophthalmologist from 4 November 2013. As part of the claimant's role, he undertook on call duties. For a twenty-four hour period, the claimant would be the consultant on call for the entire geographic region covered by the respondent, including three hospitals.

26. The Tribunal was provided with the claimant's contract of employment (265). That said that the duties of the role were to be set out in a job plan which would be

reviewed annually. Section 5.4, regarding on-call duties, said that the employee may be required to participate in an on-call rota to provide emergency cover. Section 7.5 stated that where emergency work takes place at regular and predictable times, the employee's clinical manager will seek to schedule it as part of the Programmed Activities in the employee's job plan schedule. Section 9.1 of the contract provided that "*Where you are on an on-call rota, the provisions in Schedule 8 of the Terms and Conditions will apply*". Whilst Terms and Conditions was used in the contract as if it was a defined term, it did not appear to actually be defined in the contract, but it would appear that the term was intended to refer to the Terms and Conditions – Consultants (England), that is the collectively agreed national terms and conditions for Consultants (274).

27. The nationally agreed terms and conditions include a section on job plans (280) and disputes about job plans (283) to which reference was made during the hearing. The claimant emphasised the obligation at paragraph 5 on the employer to be responsible for ensuring that a consultant has the facilities, training, development, and support needed to deliver the commitments in the job plan. Paragraph 7 stated that where a consultant is required to participate in an on-call rota, the job plan will set out the frequency of the rota. Mr Norman's evidence was that he believed this provision drew a distinction between the fact of on-call (which was not part of the job planning process) and the frequency of on call (which was). The claimant did not agree with that distinction. Paragraphs 23 and schedule 4 set out a procedure in cases where it was not possible to reach agreement on the job plan, including that the consultant may refer to mediation and, if necessary, appeal. Schedule eight of that agreement also included a section on on-call rotas (290) which would appear to be the section referred to in the claimant's contract (but to which no reference was made during the hearing).

28. The respondent has in place guidance for some other substantial reason ("SOSR") dismissals (1602). That guidance set out a process to be followed in such circumstances. It confirmed that a hearing would be arranged and the required status of the person to sit in the hearing. The procedure did <u>not</u> provide that where the person being dismissed was a clinician, another clinician should be the person making the decision or should be a member of the hearing panel. The procedure provided that the options available to a panel might be (but were not limited to): termination of employment; insufficient evidence; to reschedule the case to be considered under an alternative procedure. The procedure also provided for an appeal hearing to consider the specific grounds of appeal. Appendices to the procedure also set out the process that should be followed at an SOSR hearing and the process that should be followed at an appeal hearing.

29. On 8 April 2014 the claimant and three other consultants (including C3) signed a letter to the Trust about on-call and, in particular, consultants undertaking first on-call duties for ophthalmology (263). On 8 May 2014 the complaint was emailed to another employee at the respondent by one of the other signatories (262). What was said in that email was the following:

> *"Over the past 4 years, the consultant body has undertaken first on-call duties for Ophthalmology, due to a shortage of middle grade doctors.*

This practice has resulted in only one ophthalmologist i.e. on call consultant to be on call for 12 hours from 2030 to 0830 for the whole of South Cumbria and North Lancashire covering a population of nearly 400,000.

Given the fact that, there has no specialist eye nursing staff during these shifts, only one individual i.e. the consultant has provided the Acute Eye Service. This practice without doubt, has been unsafe as noted on several occasions, during this extended pilot programme.

Our concerns in turn have been raised numerous times at the business meetings over the last year, but unfortunately no tangible result has come out of it…

The Ophthalmic consultant body is of the view that the safest option for our patients is to revert to a 2 tier on call arrangements in view of the volume of emergency activities in ophthalmology. This will involve reinstating middle grade on-call cover, setting the casualty clinics during the day and a consultant led weekly casualty review."

30. On 20 November 2014 the claimant emailed Christine Shrimpton (381). The email was headed regarding the meeting that day and responded to an email from Ms Shrimpton to the claimant. Within the text of the email the claimant said the following:

"I have been informed before that there are private patients come on Thursday FFA sessions and they get reviewed in the same day so maybe that is why the general clinic need to run on Thursdays in the macula unit along with the FFA and of course Linda is involved and I believe that she knows that I know, that is why the complaints started and the 'shouting' allegations raised so I must shut my mouth…

I am not accusing any one may be there is legal way to accommodate these patients but it should not affect my clinics and affect our patients who wait for weeks to have FFA appointment, that is why I wanted to raise a concern and it is your role to investigate and I will be so happy to know that I was wrong."

31. On 8 December 2015 the claimant emailed Fiona Bolton and Linda Williams (407). The email was sent regarding the Thursday clinic. What that email said was the following:

"We are now in the med ret injection clinic booking patients who should be seen in 4 wks, we book them in 7 wks which of course is an issue regarding patient safety. I wonder if we can book on Thursday clinic some patients for injections, do you have enough nursing staff to cover the injection room?"

32. It was not in dispute that at some time in or around 2016 there had been a dispute between the claimant and one of his consultant colleagues about the arrangements for additional clinics and what the claimant perceived to be the prioritising of the colleague's patients over his own patients. The Tribunal was shown a large number of documents in which the claimant raised issues in relation to the arrangements of patients, the care of patients, and the prioritisation of specific

patient groups. Examples of such emails included one sent on 19 May 2016 by the claimant (435) in which he addressed the treatment of a specific patient, the booking of the patient's clinics, and the fact that the patient had not had access to her treatment for more than 13 weeks because she had not felt well and had missed one appointment. In that email the claimant said:

> *"This is a major patient safety issue and need to investigate to know how this happened and actions need to be taken to stop it from happening again."*

33. On 9 May 2016 the claimant emailed a number of his colleagues (418) contrasting the capacity issues between two clinics and stated a belief that the solution was for extra clinics to manage the backlog by allocating slots to both services and not one service only. In an email on 21 May 2016 (439) the claimant emailed regarding delays in patients waiting for follow-up assessment in the injection clinic. The claimant contrasted the delays in parts of the service. On 17 June 2016 (446) the claimant sent an email attaching two files and referred to *"the on going events of exclusion and discrimination since last year"* which appeared to relate to similar issues.

34. Ms Lakshmi Patil was employed by the respondent as a Trust Associate Specialist in the retina service. From August 2019 she was appointed as the Clinical Lead for the ophthalmology service. That role involved Ms Patil taking professional and managerial responsibility for medical staff within the ophthalmology department. The claimant did not believe she should have been appointed to the role. Ms Patil and the claimant had worked together since Ms Patil's initial appointment by the respondent in May 2014. The Tribunal was shown an exchange of emails between the claimant and Ms Patil (which was copied to a number of others) in January 2017 (prior to her appointment to the position of clinical lead) in which the claimant, amongst other things, criticised Ms Patil for not addressing her email to him by using "*Dear Mr Hassan*" as he thought she should have done. He also said she was not in a position to ask him about where and when he should arrange for the care of his patients. Ms Patil gave evidence about the way in which that exchange had made her feel. In her witness statement, Ms Patil also described a meeting in September 2018 when the claimant had become angry, raised his voice, and gestured to her to be quiet. It was Ms Patil's evidence, that when she became clinical lead, the claimant would not communicate with her.

35. A formal grievance was raised about the claimant by Ms Bolton and Ms Williams in March 2018, based on alleged behaviours which went back to 2016. The claimant denied the issues about which the complaints were made. The complaints were not directly relevant to the issues which this Tribunal needed to determine. There were attempts to mediate, but mediation ultimately did not take place. The grievance ultimately led to an investigation. An investigation report was produced on 10 September 2020 (781). It was the claimant's evidence that he had not seen the report until these Tribunal proceedings. No formal action was taken as a result. The claimant was critical about the length of time taken it took to inform him (or his trade union representative) of the outcome of the grievance and that the report was not provided. In his evidence, the claimant explained his non-contact with Ms Patil by reference to that investigation. Within the investigation report, Ms Patil was recorded as being someone who had been spoken to about the claimant's conduct. She had not raised the formal grievance herself.

36. An issue arose with the theatres at the RLI site in late 2019 and early 2020. It was a far wider issue, which did have an impact on the ophthalmology service and the availability of theatres for emergency cases at that site. A temporary process was put in place. It was acknowledged that the temporary arrangement was not ideal. The Tribunal was shown an exchange of emails about what should happen with emergency cases until a microscope at the RLI was calibrated. The claimant responded by email on 2 January 2020 (641) and said:

> *"I understand that this is a temporary plan but still the temporary plan should be safe and full filling the basic standards. As we have explained many times; these options are not safe and unfeasible and do not meet the college recommendations.*
>
> *I do not think that putting my patients at potential risk until we find a safe alternative can be considered as good medical practice.*
>
> *Until the Trust provide me with the basic tools to deliver safe and efficient service; I will have no other option but to apologise to take the responsibility of the on call service at RLI."*

37. In January 2020 the claimant was required to travel to see a patient whilst working on call out of hours. He felt that the arrangement was unsafe. The night upon which he worked that on call was the last occasion upon which the claimant worked a night shift on call. He raised the issue and thereafter ceased to work on call.

38. On 15 January 2020 the claimant sent an email to Ms Glass, the Clinical Service Manager for Ophthalmology (at the time). That email was headed "*On Call*" (643). It said the following:

> *"I think I have reached a dangerous level of stress and anxiety caused by the negative response of the trust regarding the longstanding unsolved issues of the on call service. This was clearly reflected on my level of engagement at the audit meeting yesterday, my care to the patients and my relationship with colleagues, besides, my health and family.*
>
> *As a result I am sending for the second time my apology to take any further responsibilities of the on call service with immediate effect and happy to agree other clinical duties instead.*
>
> *I have also arranged a self referral to the occupational health department for assessment and advice."*

39. The Tribunal was provided with an email dated 16 January 2020 which related to advice provided by the BMA to the claimant on that date.

40. The claimant commenced a period of ill health absence from 16 January 2020. There was no dispute that the claimant's GP provided fit notes for the claimant. An example was provided in the bundle (665) from 27 February 2020 in which it was recorded as he may be fit for work taking account of the following advice, which was that the claimant may benefit from amended duties because he was able to fulfil his normal day-to-day role but was unable to participate in the on-

call rota. The condition referred to was stress at work. The period covered by the fit note was 27 February to 25 May 2020. The medical evidence provided to the Tribunal is addressed in more detail below. However, there was no dispute that for a period of six months, the claimant did not undertake any of his duties for the respondent arising from the fact that the claimant said that the medical advice was that he should not undertake on-call duties.

41. The Tribunal was provided with an exchange of emails in February 2020 to discuss support which might have been able to be provided to the claimant. The claimant initially said that he would be able to attend the meeting. On 25 February 2020 the claimant was informed by email that Ms Patil would be attending the meeting in place of Mr Limitsios who was unable to attend. As a result, and in a response sent half an hour later, the claimant said: *"I am sorry but I will not be able to attend this meeting because of previous and on going grievance issues with Dr Patil"* (858).

42. A meeting did take place on 26 February 2020 attended by Ms Glass, Ms Sagar and Dr Herlekar, the Clinical Director for the Surgery and Clinical Care Group. The Tribunal was provided with a letter from Dr Herlekar which was sent following the meeting. The letter concluded (1084) with the following:

> *"Following our meeting, I had a discussion with Linda Glass in relation to what options we have as an interim measure to assist you back to work given you stated that you feel you are ready to return. A suggestion that I would like to propose is that for a period of 6 months, you would work on call with an SAS colleague. They would be the first on call and you would be second. This proposal would allow us time to fully explore the concerns you have raised, initiates the resolution you felt was appropriate and also provides us with the opportunity to understand whether it is a suitable and sustainable long term solution.*
>
> *I would you to consider this interim resolution and contact either myself or Linda Glass with whether you feel this is a viable option to support your return to work. If so we will begin the preparation and have this implemented by the time you are next scheduled on call."*

43. The claimant never accepted the offer made by Dr Herlekar. It was not entirely clear to the Tribunal why the claimant did not do so. In his evidence and submissions before the Tribunal, the claimant made reference to the job planning process and the fact that the offer had not been made within a job plan. He also asserted that the arrangement should be put in place permanently rather than on a six-month basis. The offer made by the respondent was restated in a letter from Linda Glass on 5 May 2020 (1085).

44. On 10 May 2020 Lina Glass sent an email to a large number of consultants, including the claimant (693). The email addressed the on-call service and the fact that it had been reported as being unsafe. The email outlined the fact that the current rota was one in nine. A proposal was made that the rota would be split so that there would be a consultant rota for the RLI site (one in five) and a separate rota for the FGH site (one in four). That approach would mitigate the risk of the person on call needing to cover and attend at different sites. Ms Glass asked for consultants'

thoughts. The claimant responded very shortly after the email had been sent on 10 May and said:

> *"Thank you very much for your efforts but I am sorry, I will not be able to participate in this proposed rota as it doesn't address any of my concerns raised in our meeting on 26/2/20 besides the high frequency of the on calls."*

45. In a further exchange, the claimant proffered the view that the service should be suspended, and, after further emails, the claimant said (691):

> *"I will NOT continue to cover on call unless we have 2 consultants and 2 SAS for 24 hours 7 days a week with immediate effect."*

46. A further meeting took place with the claimant on 21 May 2020, following which Ms Glass sent a letter to the claimant of 26 May 2020 (709). In the letter, Ms Glass explained that she had not removed the claimant from the on-call rota because the Occupational Health report provided did not support this from a medical perspective.

47. On 22 May 2020 the claimant raised a formal grievance by email (705). He said that he was submitting the grievance because he had been stopped by the respondent from ending his sick leave and resuming work as a consultant. He said that he believed that he should not be held as off-sick and stopped from going back to work until the on-call issue was resolved.

48. On 4 June 2020 the respondent was contacted by the CQC regarding issues with the ophthalmology on-call. In response to those concerns being raised, Mr Limitsios, a Consultant Ophthalmologist and at that time the Joint Clinical Lead, undertook a review of the service. The Tribunal was provided with the report that he produced (1094). Within the document, Mr Limitsios went through the Royal College guidance and addressed what was said in each section of it with reference to the emergency services provided by the respondent. From the claimant's evidence, it was clear that he did not agree with parts of the report compiled.

49. In the light of the claimant's issues the respondent undertook what was described as a "fresh eyes review". The outcome was confirmed in a letter from Ms Glass to the claimant on 14 July 2020 (900). The process had involved a review of information undertaken by John Barstow, a People and OD Business Partner. The letter recorded that Mr Barstow had advised that the grievance process had been followed correctly and that there was (in his view) no conclusive evidence to support the claimant's assertion that the on-call rota was unsafe.

50. A meeting was held with the claimant on 22 July 2020, which was recorded as being a sickness absence and fresh eye review meeting. The claimant was supported at the meeting by a BMA representative. The outcome of the meeting was confirmed in a letter of 23 July 2020 (902). The letter confirmed that the claimant had stated that he intended to return to work on Monday 27 July 2020. A phased return to work was offered to the claimant and ultimately accepted by him to take place over a four-week period. In his evidence to the Tribunal, the claimant was highly critical of the Trust and his need to return to work to avoid his pay reducing to half

pay after six months' absence (which he described with reference to slavery). Ms Glass' letter said the following:

> *"We also offered you the opportunity again to have SAS support whilst on call during the evenings for a period of 6 months following your return to work. You declined this offer as you felt that you could not accept this on a temporary basis and without it being written into your job plan. We explained that this would not be written into your job plan as it was a supportive measure to help you whilst undertaking on-call on a temporary basis as a reasonable adjustment.*
>
> *You felt that this is not beneficial to you and you did not feel this was required or worthwhile on a temporary basis. After discussion you agreed that should you change your mind you would let me know by Friday 24th July in the morning so that we have time to start putting any necessary interim arrangements into place."*

51. Following the claimant's return to work in July 2020, the claimant did not undertake out of hours on call as he was required to do. On each occasion when the claimant was due to undertake out of hours on call, he instead was absent from work on what was asserted to be ill health grounds. After a period of needing to arrange cover at short notice, the respondent put in place arrangements for advanced cover in the expectation that the claimant would not attend work and undertake the on-call that he was due to do. The claimant was critical of the respondent for doing so. The Tribunal could not see any genuine grounds for criticism of the respondent for trying to put in place arrangements which ensured patient care was provided on occasions when it was clear and apparent that the claimant was unlikely to do so.

52. In her letter of 23 July Ms Glass also addressed a discussion which had taken place regarding the proposal that Ms Patil would undertake a BAME risk assessment for the claimant (in the context of the Covid pandemic). What Ms Glass' letter recorded was:

> *"you also said that due to an on-going investigation which is not related to your absence from work you did not want Dr Lakshmi Patil to contact you with regards to this. You explained that as Dr Lakshmi Patil is mentioned numerous times in the investigation you did not feel it appropriate for Dr Lakshmi Patil to discuss anything with you until the investigation is complete. Faye Sagar explained that although Dr Lakshmi Patil may have been mentioned in the investigation Dr Lakshmi Patil was the Clinical Lead and therefore for continuity of the service that it would be difficult for the Clinical Lead not to engage or discuss service related topics with yourself. You made it quite clear that you would not engage with Dr Lakshmi Patil and mentioned that you did not vote for Dr Lakshmi Patil to become the Clinical Lead so therefore given the on-going investigation you would not discuss anything with her."*

53. The claimant, in his evidence to the Tribunal, highlighted that nobody voted for the Clinical Lead. He asserted that he would not have said what was recorded.

54. On 23 September 2020 an attendance review meeting took place with the claimant at which he was supported by his BMA representative. A letter was sent following the meeting confirming what had occurred (913). The claimant informed those in attendance that he still felt the on-call was unsafe, he said this caused him stress, and that was the reason why he was taking sick leave when he was scheduled to be on-call. The letter contained a detailed account of the matters which were raised in the meeting. With regard to Ms Patil, the claimant was recorded as stating that he would not engage with someone that had caused trouble for him and that he would not put himself in that situation.

55. A further attendance meeting was held with the claimant on 14 January 2021. The claimant was accompanied by his BMA representative. The meeting was conducted by Ms Pharaoh, the deputy associate director of operations. A letter confirming the outcome of the meeting was sent to the claimant on 18 January 2021 (1159). The letter recorded that the claimant had advised that his periods of absence were associated with his on-call sessions and the stress he said was associated with it. He said that he was following the advice of his GP in reporting absent when he was due to be on-call. The outcome of the meeting was that a first letter of concern was put in place, being the first formal stage of the attendance at work policy. The claimant was informed that in the light of the Occupational Health advice, the respondent would not implement the request for amended duties to exclude on-call.

56. On 7 February 2021 the claimant sent an email to Ms Pharaoh (987) in which he addressed some of the issues she had raised. In that email the claimant said the following:

> *"Regarding Dr Patil, I have mentioned in previous meetings the reasons why I try to avoid any direct communication with her. You I would not go through details again in this email and you can refer to previous meetings minutes.*
>
> *Dr Patil was involved in more than one incidents with other doctors, admins and me related to her communication skills. Unfortunately, the trust was reluctant to take any steps to stop these events from happening again. I protect myself from potential more harassment or abuse by avoiding direct contact with her."*

57. The claimant responded to the letter of 18 January in an email of 17 February 2021 (1162). In that email the claimant said the following:

> *"I am appealing against the outcome of being placed on the formal stage of the Attendance at Work policy. My reason of my appeal that placing me on the policy does not reflect my situation because I am not sick, and I am able to work and I am already at work doing my day to day duties which constitute 90% of my job plan. The on call duties represent only 10% of my job plan so I can do 90% of my job role and I am able to do 100% of my job plan if the trust provided the required support for the remaining 10%. So, the trust is obstructing me from doing my full duties"*

58. The respondent asked an external Ophthalmology Consultant to undertake an external review of the Trust's ophthalmology on-call arrangements. The review was undertaken by Mr Niral Karia, a Consultant Ophthalmologist and the Clinical Director

of Ophthalmology for the Mid and South Essex Hospitals NHS Trust. His report was provided in a letter to Dr Proctor dated 22 February 2021 (1102). His conclusion was that the respondent's ophthalmology emergency eye care provision document had thoroughly addressed the pertinent guidance points for the provision for emergency eye care services from the Royal College of Ophthalmologists. He also addressed the distance of travel and journey times and felt that he did not feel that the patients would come to harm as a result. His report set out in some detail why he had reached his conclusions. The review was not undertaken in person and there was no evidence that Mr Karia had attended at the respondent's sites. The report also expressly placed reliance upon the document prepared by Mr Limitsios.

59. The claimant was critical of the external review. He was particularly critical of references within the review that he believed suggested that Mr Karia had not understood the lack of junior or mid-grade doctors on call. In his submissions, the claimant also challenged why a consultant should take into account a report prepared by another consultant of a different Trust.

60. On 23 April 2021 the claimant's appeal against the first letter of concern (that had been issued regarding his absence) was heard in a meeting conducted by Teams. The hearing was conducted by Ms Park, the Associate Director of Operations, Surgery and Critical Care. A letter dated 30 April 2021 provide the outcome (1288). The appeal panel found no evidence of discrimination in the way in which the attendance at work policy had been applied. The panel concluded that the appeal should not be upheld.

61. The respondent arranged a hearing at which the potential dismissal of the claimant for some other substantial reason would be considered. It was arranged that Mr Russell Norman, the Associate Director of Operations for Core Clinical Service, would conduct the hearing. A management statement of case was produced by Ms Glass on 12 April 2021 (1030) and a copy was provided to the claimant. In the statement of case, it was stated that the claimant's continued non-participation in the on-call rota was unsustainable and his refusal to accept the Trust's assertion about the safety of the on-call rota had led to a breakdown in the working relationship. The statement of case also highlighted that the claimant had expressed a refusal to work with his Clinical Lead, which was said to be without justification or explanation, and had had a detrimental impact upon the ophthalmology service. The statement of case was a lengthy document which set out a detailed chronology of events. The on-call rota was also described in some detail. In her summary, Ms Glass said that she felt as though she had exhausted all avenues in the hope of alleviating the claimant's concerns regarding the safety of the on-call.

62. In advance of the hearing, the claimant also prepared a lengthy statement of case, which was dated 20 July 2020 (1317). The claimant referred to the proposed SAS support and said that he would work through an agreed job plan but the arrangements were temporary and therefore left uncertainty and a lack of clarity. The claimant accepted that the on-call was a part of his contract but contended that the respondent had breached his contract by not providing the required facilities and support. The claimant said that he felt that the respondent had failed to address the safety concerns which he had raised. Within his statement of case, the claimant reproduced a large number of emails and placed his own commentary and observations around them.

63. At the end of his statement of case (1335), the claimant referred to being aware of at least four medical practitioners from a BAME background in the Ophthalmology Department who had either been dismissed or pushed to resign over the last few years. He stated that, surprisingly, three of the four identified as Muslim. He also said that those three had come back to work in the department as locums. This was an allegation which the claimant voiced in the Employment Tribunal hearing. When giving evidence he said did not wish to name the individuals and he gave no evidence about their circumstances. During submissions, at the very end of the hearing, the claimant said that he would now name them but was stopped from doing so as it was too late in the proceedings for the claimant to provide new evidence.

64. The "some other substantial reason" hearing took place on 10 May 2021. Mr Norman chaired the hearing. He was supported by Ms Hadwin, an HR adviser. When asked in evidence, Mr Norman was clear that the decision that he reached was one he reached alone, with Ms Hadwin's support. Ms Glass attended on behalf of management, supported by Ms Sagar who was also an HR representative. The claimant was accompanied by a trade union representative from the BMA. Two notetakers also attended. Lengthy and detailed notes were provided to the Tribunal as part of the bundle (1508). It is not necessary or possible in this Judgment to reproduce everything that was said in the course of that meeting, but there was a lengthy and detailed discussion. The hearing lasted for a considerable period of time. It would appear that the meeting lasted from approximately 10.00am until 3.40pm (with various adjournments). The claimant was clearly given an opportunity to put forward the case that he wished to.

65. During the meeting, the claimant said that he should be deemed as having a disability because of his chronic anxiety caused by what he said was the stressful unsafe work environment in which he was forced to work. The claimant stated that his position throughout had been to request that the respondent either changed the service arrangement and made it safe or he would not be able to undertake his on-call commitment. He referred to the risk to his patients and registration. The claimant referred to the proposal that someone else would undertake the first on-call when he was on call which had been made in March 2020. He said that he had not declined the offer but did not explain how he had accepted it either. He said there had been no genuine attempt to resolve the issue but just postponement of the problem. He said that he had not declined the person on call support but had asked the Trust to implement the support into the claimant's job plan on a permanent basis.

66. Later in the meeting, the claimant was asked questions by other attendees. Ms Sagar was recorded as asking the claimant the following question (1545):

> *"Just touching on the relationship with Lakshmir, we discussed the pathway with patients. Mediation was offered and you declined. In July, I offered this to you again and you declined. More latterly you have still refused to have RTW interviews with her in Linda's absence. How else can we address that?"*

67. In reply, the claimant did not explain (as he did in the hearing) that his position with Ms Patil had been limited to the investigation period and had been as a result of the fact that matters were being investigated. He also did not make any positive proposals for how the two could work together. He simply asked how the matter

could be resolved in a timely manner and in a safe way, when there were unresolved issues? He said that the experiences he had had, had not reassured him that concerns would be resolved. The claimant's BMA representative stated that the claimant had the right to ask not to be managed by someone and she said that he had the right to refuse to meet with his Clinical Lead and that was not an unreasonable request. The BMA representative stated that it was not abnormal for the Clinical Lead not to manage everyone due to interpersonal relationships. In the Tribunal hearing, it was clear that the claimant adopted the position that his BMA representative had put forward in the meeting. In the SOSR hearing, the claimant was again asked what could be done to support his relationship or improve the level of engagement between him and the Clinical Lead, and the claimant replied that he was not a manager and the respondent needed "*a tool in place to deal with it in a timely manner*".

68. At the end of the hearing, the opportunity to summarise the case was given. Mr Norman said that he wished to adjourn the hearing without coming to a conclusion. He said he wished to look at the options and review the evidence presented. He asked the claimant and his BMA representative how they would like to receive the decision and whether they would like to meet again. The claimant's BMA representative said that she would consider it and come back to Mr Norman.

69. Following the adjournment, some limited documentation was provided to Mr Norman at his request. This included details of other consultants who had been removed from the on-call (1291).

70. On 19 May 2021 the claimant's BMA representative emailed the respondent regarding the reconvened meeting (1358). The BMA representative highlighted (correctly) that the SOSR policy required the panel's decision to be given within five days. She highlighted that the respondent had breached its own policy. She concluded that the claimant had advised that he did not wish to attend a reconvened hearing due to the stress that it would undoubtedly cause him. The email made reference to health issues.

71. The claimant also provided a document commenting on the evidence which was recorded as having been sent on 19 May (2235). The document was lengthy and included cut and pasted versions of a number of emails, including the claimant's exchange with his MP.

72. On 8 June 2021, the "some other substantial reason" hearing reconvened. The claimant and his BMA representative did not attend (something which they had confirmed would happen in advance). The claimant had also been given the opportunity to present his case again but had requested the outcome in writing. Notes were provided of the brief hearing (1552). No further points were raised. The notes recorded that at 13:09 the claimant and Ms Hadwin had discussed matters and at 13:22 they had reconvened. The note also recorded that the decision was made to terminate the employment under the policy. It said:

> *"RN not assured Mr Hassan will engage correctly, plenty of evidence against Mr Hassan willingness to engage with safety, Mr Hassan wouldn't engage positively. Notice will be issued in five working days"*

73. The decision made by Mr Norman was set out in a letter dated 11 June 2021 (1421). In evidence before the Tribunal, Mr Norman also corroborated what was said in that letter. The letter highlighted that the management case had said that none of the meetings or suggestions about on-call had been able to satisfactorily address the claimant's belief that the current on-call service was unsafe. Mr Norman noted the concerns and apprehensions that the claimant had with regard to the on-call, but he said he was assured by the Occupational Health advice that there was no medical issue that prevented the claimant from returning to work on the on-call rota. The letter also addressed the breakdown in the relationship between the claimant and the Clinical Lead and said:

> *"The panel were not assured you would engage with the Clinical Lead in the future and consequently this would have a detrimental impact upon the Ophthalmology service and patient safety, given your role and the importance of a functioning relationship with the Clinical Lead…*
>
> *Whilst you continue to request to be removed from the on-call, this is not a viable option as there were no valid reasons to substantiate your request. It is clear from the Occupational Health advice that this is not a medical issue, but an issue about your trust in the organisation.*
>
> *We noted the concerns and apprehensions you have regarding the on-call and the Trust offered a second tier on call for a period of 6 months to try and assist, but you declined the offer."*

74. The decision letter went on to address some points about which clarification had been sought. It was explained that the panel (in practice being Mr Norman) had considered it appropriate to seek clarification on those points before the panel reconvened and the date for the reconvened hearing had been agreed by the claimant's BMA representative. In his letter Mr Norman concluded with the following:

> *"The panel also considered that at the heart of the relationship between employer and employee is the principle of trust and confidence. The panel concluded that there has been an irretrievable breakdown in the working relationship between you and the Trust. Your lack of engagement and refusal to undertake on-call despite the assurances provided by the Trust as to the safety of the on-call (following an internal and external review) demonstrates your lack of trust in the organisation and the panel does not have any confidence in your willingness to perform an important, contracted aspect of your role. This, together with your refusal to engage positively with the Clinical Lead, continues to have a negative impact on the Ophthalmology service and its patients. This supports the panel's belief that there has been a fundamental breach of this bond of trust and confidence.*
>
> *In light of the above, the panel decided that in the interest of the Trust and the Ophthalmology service you should be dismissed on the grounds of 'some other substantial reason' ("SOSR").*"

75. In his submissions, the claimant was particularly critical of the fact that Mr Norman, who made the decision, was not a clinician. He made it very clear in his

submissions that he believed that only clinicians should make decisions of this importance regarding other clinicians.

76. When he was asked about the balance between the factors taken into account in his decision to dismiss (the on-call issue and that regarding Ms Patil), Mr Norman made clear that his decision was not based upon one or the other, but the two in combination. He said that he did not believe that he could identify either one or the other as being the key part of his decision, and indeed he said that the decision was on balance about both factors.

77. On 9 June 2021 the claimant sent an email to Mr Proctor (2319). At the time of emailing, the claimant did not know that he had been dismissed, albeit that the decision had been made. The email was regarding the job plan mediation meeting which had been arranged for that date. In that email the claimant said the following:

> *"I am sorry I will not be able to attend the mediation meeting as I have expressed earlier my concern regarding attending meeting with Dr Patel, the clinical lead, and I was surprised now that she is attending the meeting.*
>
> *I consider this as clear ignorance of my legitimate request and an ignorance of my mental health and well being. I am quite disappointment in the way this trust treats the employee and how their health and safety is not taken into account.*
>
> *I have suggested in my previous correspondences an alternative ways to arrange this meeting but again the trust has ignored my suggestion.*
>
> *Please accept my apology to attend this meeting for the sake of my health and safety."*

78. The Tribunal accepted that this email, in particular, showed that the claimant was refusing to attend meetings which were also attended by Ms Patil and was refusing to engage with her despite the fact that she was his Clinical Lead. Whilst the meeting was arranged to take place after the claimant would have been dismissed and therefore would have had no material impact upon the decisions made for the claimant, the Tribunal accepted the email as a clear indication of the claimant's position towards Ms Patil. As the email was sent well after the relevant investigation had concluded and after the claimant and his BMA representative were aware that was the case, the email also made it clear that the claimant's unwillingness to engage with Ms Patil was not restricted to the period during which the investigation was undertaken and/or was unrelated to matters arising from that investigation during the period when the claimant thought it was still under way.

79. The claimant appealed against the decision made. His appeal was dated 21 June 2021 (1425). A management statement of case was prepared for the appeal hearing (1564). Within that statement of case, Mr Norman set out the basis upon which he had reached his decision and the process that he had followed, in considerably more detail than he had in his decision letter.

80. The appeal hearing started on 19 October 2021. The claimant was accompanied by his BMA representative. The appeal hearing panel consisted of: Mr

Wilkinson, the Director of People and OD; Ms K Mom, the Chief Pharmacist and Controlled Drugs Accountable Officer at the Trust; and Ms K Stretch, the Head of People Services. The hearing was also attended by Ms Hadwin and Mr Norman, as well as a notetaker. The claimant was critical of the fact that some of the documentation which he wished to be considered had not been read in advance of the first day of the appeal hearing. The hearing was adjourned as a result. Notes were provided (1555).

81. The appeal hearing reconvened on Monday 15 November 2021 with the same attendees. Notes were provided (1573). At the reconvened hearing, the staff side presented its case. Questions were asked. Management then presented their statement of case and questions were asked. Staff side was given the opportunity to sum up. In her summing up, the BMA representative stated that there was a way to resolve the issues and that was to remove the claimant from the on-call rota which she asserted was a reasonable adjustment. In the course of the appeal, the claimant's BMA representative clarified that the notes of the previous hearing had recorded her as stating that the claimant did not have to work with the Clinical Lead. The BMA representative said that she had not used those words and that she was informing everyone in the appeal that what was said was incorrect. She did, however, feel it was not uncommon to request someone else be a manager and she felt that that did not lead to an irretrievable breakdown between the claimant and the Trust.

82. The Tribunal heard evidence from both Ms Stretch and Ms Mom about the appeal process and the decision made. The appeal hearing panel did include a clinician, being Ms Mom, from whom the Tribunal heard evidence. It was clear from the claimant's approach to asking questions, that he treated her evidence and answers with a great deal more respect than he did any of the respondent's other witnesses. In submissions, the claimant endeavoured to distance Ms Mom as a decision-maker from her position as a clinician, when he highlighted his criticism of decisions being made without clinician involvement. In answers to questions, Ms Mom did state that she had attended the appeal panel, in particular, as a BAME representative. However, she was still a clinician who was part of the appeal panel. The Tribunal did not understand Ms Mom's evidence to have been that she was in some way distancing herself from being a clinician, when she made her decision as part of the appeal panel.

83. The appeal decision was sent to the claimant on 19 November 2021 (1581). In the appeal decision, the appeal panel set out why they did not uphold the appeal. The appeal panel unanimously concluded that there was a complete absence of trust and confidence, which it said was bilateral. The appeal panel highlighted that a compromise position had been put to the claimant regarding on-call to enable him to return, but the evidence they said showed that the claimant had declined the offer as unviable, without working through the option or giving it a trial. The appeal panel stated that they had concluded that the claimant had no trust in the organisation's ability to follow through on the offer of support. The appeal panel also identified that the claimant had refused to engage with his Clinical Lead when they were undertaking some of their core management responsibilities. The appeal panel also said that it was unclear what a successful resolution would look like for the claimant, other than removing him from his on-call duties permanently and providing him with

an alternative line manager. The panel concluded that those were not viable options for the respondent. The outcome letter said:

> *"In summary, the appeal panel concluded that there was an irretrievable breakdown in relationships, that this was a bilateral loss of trust and confidence, and the decision reached by the original panel was fair, responsible and proportionate."*

84. The claimant entered into ACAS early conciliation on 27 July 2021. It concluded on 3 August 2021. The claimant brought his Employment Tribunal claim on 10 September 2021. The claimant gave no specific evidence which explained why he did not bring a Tribunal claim earlier (in relation to the more historic allegations).

Medical Evidence

85. As the question of the claimant's disability had been in dispute, the claimant had been required to produce a disability impact statement (1627). The claimant confirmed under oath that the content of that statement was true.

86. In practice, the information provided by the claimant in the impact statement was relatively brief. He began the statement by stating that he had had the impairment since September 2016, and he made direct reference to the Occupational Health report dated 21 September 2016. In relation to the effects of the disability, the claimant referred to the following: recurrent depressive episodes; palpitations; interrupted/lack of sleep; morning lethargy; irritable bowels; loss of interest; low self-esteem; restlessness; and lack of concentration. Within the statement, the claimant did not give specific details of when or how each of these impacts occurred, save for referring generally to the symptoms being triggered by issues related to work in the respondent's unit and saying that the respondent failed to resolve the issues for the period of six years between 2014 and 2020. In the light of what was said in the claimant's GP records (see below), the Tribunal did not accept the claimant's assertion that he had suffered with either irritable bowels or palpitations (at least to any material extent), as there was no record of those symptoms in his GP records whatsoever. The other matters to which the claimant referred in his impact statement, were recorded in his GP notes. Had the claimant informed his GP that he was suffering from palpitations and/or irritable bowels, the Tribunal had no doubt that those matters would have been recorded in the GP records.

87. In two places in the disability impact statement the claimant also asserted the following:

> *"The claimant started on antidepressant treatment from May 2017 till present."*

88. From the claimant's GP records, it was recorded that the claimant had been prescribed 28 tablets of citalopram on 19 May 2017 (1617) and that, after his employment had terminated, he was prescribed mirtazapine on 24 June 2021. There was no record in the claimant's GP notes of him being prescribed medication in the period between those two dates. Accordingly, whilst it was correct that the claimant was prescribed antidepressants in May 2017 and had been prescribed

medication after his dismissal (presumably prior to the time the impact statement was written), the Tribunal found that the assertion made in the claimant's disability impact statement was not correct. In the light of the fact that the claimant was clearly a highly intelligent individual and a Consultant with medical expertise, the Tribunal found the statement made to be misleading. The Tribunal also noted that, in a subsequent sentence, the claimant had referred to the fact that he had attended CBT sessions in 2017 and 2021, phrasing that sentence in a way which clearly identified that the CBT had occurred in those two years rather than conveying the suggestion that the claimant had continued to receive (medication or treatment) for the extended period. As a result, the Tribunal found the claimant's evidence, particularly in relation to his medical history, to be unreliable. When considering the medical evidence, the Tribunal focussed on what was clearly recorded in the medical records, in preference to what was asserted within the claimant's own evidence or his disability impact statement.

89. In the claimant's GP records, it was recorded that he had visited his surgery on 19 May 2017 with longstanding stress from work. The comment recorded that he met the depressive diagnostic criteria and anxiety. Something that was notable about the GP records was that the claimant was not recorded as having seen his GP on any other occasion prior to 23 January 2020. In the period between January and August 2020 the claimant had on occasion visited his GP and references were made to sick notes, stress at work, and the claimant's belief that it was an unsafe on-call service. The GP notes recorded that fit notes had been issued, but recorded little or no information of a medical nature which had resulted in the fit notes, other than the claimant's assertions and the record that stress at work had been recorded on those notes. There was reference to further consultations regarding stress at work on 4 October 2020, on 9 January 2021, and 29 March 2021. On 18 May 2021 the claimant was referred to the Community Mental Health Team. The next detailed appointment occurred on 24 June 2021 which was after the claimant's dismissal and therefore outside the period which needed to be considered for the purposes of the issues in the claim. It was clear that the claimant's condition had become more significant following the claimant's dismissal.

90. The Tribunal was also provided with a number of Occupational Health reports prepared by Dr Atkinson on the respondent's behalf. From those reports it was in places difficult to identify when Dr Atkinson was commenting on managerial matters and when he was providing what was clearly Occupational Health advice. The first report was dated 8 May 2015 (396). That report appeared to have related primarily to the claimant's diagnosis of chronic fatigue syndrome. It did refer to a history of conflict within the department which had caused the claimant severe stress. A second report of 21 September 2016 (483) also referred to interpersonal conflict at work. That report said:

> *"He has now started to develop early signs of depression together with other physical symptoms of stress and feels that the situation at work is now adversely affecting his health which appears to be true."*

91. The 2016 report went on to address matters which were stated to be outside the advisor's remit and asked the respondent to look at the possibility of a long-term solution to a conflict about working at particular locations.

92. A detailed report was provided to the respondent on 21 January 2020 (645), shortly after the claimant had commenced his period of ill health absence. That report referred to events in the department and the fact that the claimant wanted to make it clear that those were a significant stressor. The report focussed on management matters rather than providing any detailed health advice, and, where health information was provided, it appeared to have been that provided by the claimant.

93. A further Occupational Health report was provided dated 13 February 2020 (660). That report followed from a consultation on 4 February. The report acknowledged that the matters that were being raised were clearly far outside the remit of any Occupational Health Service. Dr Atkinson observed that the problem was that because matters had been going on for a long time this had markedly increased the claimant's anxiety (and he observed that to some extent the claimant had lost faith in the management systems within the Trust). Dr Atkinson advised that, as things stood, the claimant was currently off sick and did not feel he could participate in what he saw as an unsafe on-call rota even if he was at work. It also recorded that these concerns, from what the claimant told him, were continuing to drive his anxiety. Towards the end of the report the Occupational Health adviser highlighted that the electronic referral forms would not allow him to send the report unless he ticked all of the boxes one way or another and therefore, he would tick them. In answer to the question, *"It is my opinion that the employee has a disability that is likely to be considered to fall within the scope of the Equality Act 2010"* the report recorded *"yes"*.

94. Following that report, the reference to disability was queried by both the claimant and the respondent. In an email of 26 May 2020 (886) Dr Atkinson recorded his response to a question in that respect and said the following:

> *"I have just reviewed the notes for* [the claimant]*, I think you are completely correct in that I have put 'yes' in the drop-down box regarding the likelihood of him being seen as being covered by the disability provisions of the Equality Act 2010 as an error. Normally when I think that this does apply I do also add a justification in the report.*
>
> *I have reviewed both the report, and my contemporaneous notes made over the last few consultations and can see no medical condition which would justify this conclusion.*
>
> *My apologies, the answer to this question should be 'no'."*

95. Further Occupational Health reports were provided on 11 March 2020 (668) and 26 October 2020 (1077). In the first of the reports, Dr Atkinson recorded that he thought the matter had slipped outside the area of occupational medicine. In the 26 October report, Dr Atkinson recorded the following:

> *"The simple answer to your question is there is no medical condition which would prevent him doing on-call which he felt was safe."*

96. The Tribunal was also provided with a letter from the Assessment Practitioner of the Lancashire and South Cumbria NHS Foundation Trust Community Mental

Health Team (1387) dated 20 May 2021. That letter recorded that the claimant did not meet their criteria for assessment and advised that the issue should be taken back to Occupational Health rather than an appointment being made with a psychiatrist.

Comparators

97. The Tribunal was also provided with some medical documentation regarding the comparators identified by the claimant.

98. C1 was a Consultant Ophthalmologist who was not required to undertake on-call. The Tribunal was provided with a report dated 18 September 2012 from a Consultant Occupational Physician (1590). That referred to an issue with the individual's thumb and referred to significant restrictions in his dexterity. It was clear from the report that there were restrictions to be placed upon the matters that he could undertake including surgery and therefore on-call.

99. The Tribunal was also provided with medical records for C2 (1599). C2 was recorded as having menopausal symptoms which were causing her significant sleep difficulty and it said that the combination of this plus trying to do on-call and weekends was understandably causing her a degree of stress that was starting to have an undesirable impact on her. The report supported the individual's request to be removed from on-call and weekends on medical grounds and said that doing so would be likely to very positively improve her performance and her well-being. The report did record that the individual was not likely to fulfil the criteria for disability under the Equality Act 2010.

100. The Tribunal was provided with medical evidence for C3 (1595). That report addressed severe back pain. It detailed adjustments which were required to be made at the individual's place of work. In terms of adjustments, it said that in the light of the need for the individual to rest his neck adequately, it was recommended that he should come off the on-call rota as that would provide an opportunity to rest and would not worsen his symptoms.

101. In the List of Issues, it was also recorded that the claimant also drew a comparison between himself and Messrs Talbot and Limitsios. The Tribunal understood that both of those individuals were Consultants. There was no evidence that either of them had been dismissed. There was also no evidence that either of them had refused to undertake on-call or ceased undertaking on-call.

The Law

Public interest disclosure

102. Section 43A of the Employment Rights Act says:

> "*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*"

103. Section 43B says:

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered"*

104. Section 43C provides that a disclosure to a worker's employer is a qualifying disclosure.

105. The word "*likely*" in section 43B requires more than a possibility or a risk that a person might fail to comply with a legal obligation or that health and safety is endangered, the information had to show that it was probable or more probable than not, that there would be a breach (**Kraus v Penna PLC** [2004] IRLR 260).

106. The necessary components of a qualifying disclosure are:

a. First, there must be a disclosure of information.

b. Secondly, the worker must believe that the disclosure is made in the public interest.

c. Thirdly, if the worker does hold such a belief, it must be reasonably held.

d. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B.

e. Fifthly, if the worker does hold such a belief, it must be reasonably held.

107. The first stage involves a consideration of whether there has been a disclosure of information. The correct approach to the disclosure of information was set out in the decision of the Court of Appeal in **Kilraine v London Borough of Wandsworth [2018] ICR 1850.** In that decision they highlighted that, on occasion, an allegation could be so general and devoid of specific factual content that it would not be a disclosure of information. However, there is not a rigid dichotomy between an allegation and information. In applying the statutory provision, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]". In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in section 43B (1). The respondent's counsel quoted from the Judgment in that case as follows:

> *"In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the Cavendish Munro case did not meet that standard."*

108. It is necessary to consider whether the employee holds the belief that the disclosure tends to show one of the relevant forms of wrongdoing and whether that belief is reasonable. This involves subjective and objective elements. The test of what the claimant believed is a subjective one. Whether or not the employee's belief was reasonably held is an objective test and a matter for the Tribunal to determine. The respondent's counsel referred to **Babula v Waltham Forest College** [2007] ICR 1026 and **Darnton v University of Surrey** [2003] ICR 615. He highlighted that it was not fatal if the claimant's belief turned out to be wrong, but that determining factual accuracy can be an important tool in determining whether a belief was reasonably held.

109. When considering section 43B(1)(b), legal (in legal obligation) is to be given its natural meaning. However, it must be a legal requirement (for which the respondent relied upon **Eiger Securities LLP v Korshunova** [2017] IRLR 115). **Blackbay Ventures Limited v Gahir** [2014] ICR 747 held that the source of the obligation should be capable of verification by things such as reference to statute or regulation, save in obvious cases.

110. In **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731 Underhill LJ held that the same approach, involving both the objective and subjective elements, applies to the requirement that in the reasonable belief of the worker making the disclosure, it is made in the public interest. What is "in the public interest" does not lend itself to absolute rules. Some factors which might be relevant were suggested in that case, being: the number of persons whose interests are engaged; the nature of the interests affected and the extent to which they are affected; the nature of the wrongdoing; and the identity of the alleged wrongdoer.

111. The mental element required imposes a two-stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest; if so (ii) did he have reasonable grounds for so believing? The belief does not have to be the predominant motivation in making it (as motivation is different from belief). The burden of proof is on the claimant.

Unfair dismissal

112. For section 103A of the Employment Rights Act 1996, the question is whether the principal reason for the dismissal is that the claimant made a public interest disclosure.

113. As the respondent's counsel correctly submitted, the law has long since recognised the distinction between a protected act and features separable from it (such as occurred in **Bolton School v Evans** [2006] EWCA Civ 1653). In his submissions the respondent's counsel addressed the cases of **Panayiotou v The Police & Crime Commissioner for Hampshire** [2014] IRLR 500 and **Kong v Gulf International Bank (UK) Ltd** [2022] EWCA Civ 941 and the Tribunal noted what was said in those cases. It is accepted that there is a valid distinction to be drawn between the making of a protected disclosure and the manner of a campaign or the way in which concerns are relayed.

114. It is the decision-makers mental processes that must be examined.

115. For ordinary unfair dismissal, the claim is brought under Part X of the Employment Rights Act 1996. The respondent relied upon the potential fair reason set out at section 98(1)(b) "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".* The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for some other substantial reason. If the respondent fails to persuade the tribunal that it dismissed him for that reason, the dismissal will be unfair.

116. In his submissions, the respondent's representative highlighted the following (amongst other things):

a. A classic type of SOSR dismissal is where the trust and confidence has broken down, which can apply where the employer loses confidence in the employee's willingness or ability to do their contracted work (**Ezsias v North Glamorgan NHS Trust** [2011] IRLR 550);

b. In **McFarlane v Relate Avon Ltd** [2010] ICR 507, where a counsellor was dismissed for objecting to carrying out the full extent of his duties (albeit very different duties and reasons for objection to those in this case), the Employment Appeal Tribunal held that the Tribunal had been entitled to find that the employer had acted fairly and reasonably in treating the employee's failure to commit to doing something the employer regarded as n important aspect of the job as sufficient reason to dismiss; and

c. Where an employee refuses to effectively work with another manager or employee, and that caused an impasse, a fair dismissal on the grounds of SOSR can be effected (**Driskel v Peninsula Business Services Ltd** [2000] IRLR 151).

117. If the respondent does persuade the tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral. It will depend upon all the circumstances in the case.

Direct discrimination

118. The claim relies on section 13 of the Equality Act 2010 which 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."**

119. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include race and religion or belief.

120. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

121. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

122. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he has been treated less favourably than his comparator and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

123. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

124. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

125. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

126. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves.

127. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

128. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race or religion would have been treated reasonably (the respondent's counsel relied upon **Glasgow City Council v Zafar** [1998] 2 All ER 953 and **Khan v Home Office** [2008] EWCA Civ 578 for this point).

129. The way in which the burden of proof should be considered has been explained in many authorities, including: **Barton v Investec Henderson Crosthwaite Securities Limited** [2003] IRLR 332; **Shamoon v Chief Constable of the RUC** [2003] IRLR 285**; Hewage v Grampian Health Board** [2012] ICR 1054**; Igen Limited v Wong** [2005] ICR 931**; Madarassy v Nomura International PLC** [2007] ICR 867**; Royal Mail v Efobi** [2021] UKSC 33.

Disability

130. Section 6 of the Equality Act 2010 provides that:

> **"A person (P) has a disability if:**
>
> **(a) P has a physical or mental impairment, and**
>
> **(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."**

131. Section 212 of the Equality Act 2010 provides that "substantial" means more than minor or trivial.

132. Schedule 1 Part 1 of the Equality Act 2010 includes further provisions regarding determination of disability. Paragraph 2 provides that:

> **"The effect of an impairment is long-term if:**

(a) It has lasted for at least 12 months;

(b) It is likely to last for at least 12 months; or

(c) It is likely to last for the rest of the life of the person affected.

If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur"

133. Schedule 1 Part 1 of the Equality Act 2010 also includes provisions which relate to the effect of medical treatment.

134. The guidance on matters to be taken into account in determining questions relating to the definition of disability, issued by the Secretary of State, confirms that "likely" should be interpreted as meaning that it could well happen. That guidance also addresses: substantial; the effects of behaviour; the meaning of adverse effects on the ability to carry out normal day-to-day activities; and day to day activities.

135. The onus is on the claimant to prove that the relevant condition was a disability at the relevant time.

136. In his submissions, the respondent's representative referred to and relied upon the guidance given in **Goodwin v Patent Office** [1999] ICR 302 and also the Guidance referred to paragraph 134. He emphasised what was said in that guidance about normal day-to-day activities and activities which are highly specialised. He also referred to the cases which confirm that the concept of disability covers an impairment which hinders participation in professional life, but not every activity of professional life is to be regarded as a normal day-to-day activity (**Chacon Navas v Eurest Colectividades SA** [2007] ICR 1 and **Chief Constable of Dumfries and Galloway Constabulary v Adams** [2009] ICR 1034.

137. The respondent also submitted that medical evidence is often required for a claimant to discharge the burden of establishing that he has a disability (even though medical evidence does not determine the issue, that is a questions for the Tribunal). He relied upon **Vicary v British telecommunications plc** [1999] IRLR 680, **Sussex Partnership NHS Foundation Trust v Norris** EAT 0031/12 and (on deduced effects) **C v Gordonstoun Schools Ltd** [2016] CSIH 32.

138. In his submissions, the respondent's counsel addressed the particular difficulties which can arise in cases where mental impairments are relied upon. He quoted from **Royal Bank of Scotland plc v Morris** EAT 0436/10 in which it was said that in cases where the alleged disability took such form, the issues will often be too subtle to allow a Tribunal to make proper findings without expert assistance. He quoted the well-known passage from **J v DLA Piper UK** [2010] ICR 1052 in which Underhill LJ addressed the important distinction which can arise between a mental condition and an adverse reaction to adverse life events. He also placed reliance upon **Herry v Dudley Metropolitan Council** [2017] ICR 610 where an employee was not found to have had a disability where his condition had resulted in an entrenched reaction to circumstances perceived a adverse.

139. Section 6(3) of the Equality Act 2010 provides, in relation to disability, that:

> "**a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability; a reference to persons who share a protected characteristic is a reference to persons who have the same disability**"

Discrimination arising from disability

140. Section 15 of the Equality Act 2010 provides:

> **(1) A person (A) discriminates against a disabled person (B) if —**
>
> **(a) A treats B unfavourably because of something arising in consequence of B's disability, and**
>
> **(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.**
>
> **(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.**

141. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it.

142. In **Sheikholeslami v University of Edinburgh** [2018] IRLR 1090 the Employment Appeal Tribunal held that:

> *"the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the "something" was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."*

143. **Pnaiser v NHS England** [2016] IRLR 170 outlined the correct approach to be taken for such a claim. We will not re-produce that guidance in this Judgment, but we did take it into account.

144. In his submissions, the respondent's counsel said that it was necessary for the respondent to have had the requisite knowledge of the disability at the time it allegedly treated the claimant unfavourably. The respondent should also know of all the matters required to meet the definition of disability.

145. Section 15(1)(b) provides that unfavourable treatment can be justified where it is a proportionate means of achieving a legitimate aim. That requires: identification of the aim; determination of whether it is a legitimate aim; and a decision about whether

the treatment was a proportionate means of achieving that aim. The test is an objective one according to which the Tribunal must make its own assessment.

The duty to make reasonable adjustments

146. Section 20 of the Equality Act 2010 imposes a duty to make reasonable adjustments on an employer. Section 20(3) provides that the duty comprises the requirement that where a provision, criterion or practice of the employer's puts a person with a disability at a substantial disadvantage in relation to a relevant matter in comparison with people who do not have a disability, to take such steps as it is reasonable to have to take to avoid the disadvantage. That requires not only the existence of a disability, but also: identification of a PCP; and knowledge (actual or constructive) on the part of the employer.

147. Section 21 of the Equality Act 2010 provides that a failure to comply with the requirement set out in section 20 is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

148. **Environment Agency v Rowan** [2008] IRLR 20 is authority that the matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant.

149. The requirement can involve treating disabled people more favourably than those who are not disabled.

150. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely.

Time limits/jurisdiction

151. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

152. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme.

153. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable".* The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble [1997] IRLR 336**. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the relevant respondent has cooperated with any request for information; the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. Subsequent case law has said that those are factors which illuminate the task of reaching a decision but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. The best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

154. **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases.

155. For reasonable adjustment cases, the respondent's counsel relied upon **Matuszowicz v Kingston-upon-Hull City Council** [2009] EWCA Civ 22 as authority for the fact that, in claims where there is a deliberate omission, time starts to run from the expiry of the period when the employer might reasonably have been expected to make the adjustment. He also cited **Miller v MOJ** and **Thompson v MOJ** EAT/0003/15 and 0004/15 in which it was held that forensic prejudice for the respondent may be crucially relevant and where there is no forensic prejudice that would not be decisive.

Conclusions – applying the Law to the Facts

156. The Tribunal heard a great deal of evidence about the respondent's on-call arrangements for ophthalmology consultants. The claimant contended that the arrangement was unique to the respondent, and it was only at the respondent that ophthalmology consultants covered three hospitals when on call and were the first person on call rather than having a more junior member of staff also on call. It was clear that the claimant believed that the arrangements which the respondent had in place were not safe and did not comply with the relevant requirements, including those issued by the Royal College of Ophthalmologists. The respondent did not agree.

157. This Tribunal has not needed to decide whether the respondent could or should have adopted other arrangements when such a service was considered from

a managerial, healthcare, or economic perspective. The Tribunal has considered and determined only the issues included in the attached list of issues. To an extent, the on-call arrangements and the consideration of alternatives was relevant to some of the claimant's claims and the issues to be considered. The claimant made protected disclosures about the on-call arrangements and his belief about what he disclosed was relevant to considering those disclosures. The Tribunal needed to decide the fairness of his dismissal and whether the dismissal for some other substantial reasons was within the range of reasonable responses of a reasonable employer. The Tribunal needed to consider the discrimination claims to determine whether the requirement to work on call, as it continued to be applied to the claimant, was discriminatory. However, within this Judgment, the Tribunal has not determined what on call arrangement the respondent should have had for ophthalmology consultants generally, save to the extent it applied to the issues determined. The ultimate decisions about patient safety rest with the Trust, and, where matters were raised with them, the CQC.

158. The Tribunal started by considering each of the alleged protected disclosures relied upon. We considered whether they were protected disclosures and, if so, whether they were the principal reason for the dismissal. That is, we considered each of the alleged disclosures recorded at issues 4(a) to 4(e) separately and applied issues 5 to 7 to each of those alleged disclosures.

Disclosure 4(a)

159. The first alleged disclosure relied upon (issue 4(a)), was an email of 20 November 2014 from the claimant to Mrs Shrimpton (381). We found that the claimant did disclose information within the email, as he explained that he had been informed that private patients had been reviewed at a time when NHS patients should have been.

160. The second question in determining whether something was a protected disclosure, was whether the claimant believed that the information which he disclosed showed either that: a person had failed was failing or was likely to fail to comply with a legal obligation; or that the health and safety of any individual had been, was being, or was likely to be, endangered. The respondent contended that was not the case. We accepted that it was. In the email, the claimant said that what was occurring should not affect his clinics and the patients who waited weeks for an appointment. We accept that the claimant did believe that the delay in patients being seen, which he believed would result from the practice about which he was complaining, would result in potential harm to those patients, as it was self-evident that it might. We accept that he had that belief, and that belief was reasonably held. We would highlight that, in determining whether what was alleged was a protected disclosure, it is not necessary for us to determine whether or not what the claimant alleged was in fact correct (and we have not done so). We needed only to determine whether he believed the health and safety of any individual was likely to be endangered and whether that belief was reasonable. We have accepted that he did and that it was.

161. We have also found that the claimant believed that the information he provided in his email of 20 November 2014 was in the public interest. What he was raising was something which he believed adversely impacted upon a group of

patients. We find that he believed that was in the public interest, and that belief was obviously reasonable.

162. As a result, we found that the email of 20 November 2014 was a protected disclosure. However, we did not find that the principal reason for the claimant's dismissal was the disclosure he made in that email. We accepted Mr Norman's evidence that he was unaware of the email. Mr Norman made the decision to dismiss. The principal reason for his decision was not an email of which he was unaware. In any event, even had he been aware of it, we would not have found that the principal reason for the decision which he made to dismiss the claimant on 8 June 2021 was what the claimant had said in an email which he sent over six years earlier.

Disclosures 4(b)

163. What is recorded at issue 4(b) as being a single disclosure, in fact contained within it two separate potential disclosures, as particularly highlighted by the respondent's representative (because the respondent's position differed between the two).

164. The first disclosure contained in issue 4(b), was concern relating to a backlog of patients. The list of issues recorded that as having been raised between December 2015 and September 2016. What was highlighted to the Tribunal was an email of 8 December 2015 sent from the claimant to Ms Bolton and Ms Williams (407) in which he informed them that a particular patient group who should have been seen within four weeks, was now being booked in seven weeks. He said that was an issue regarding patient safety. The respondent, quite correctly, accepted that the claimant did make a protected disclosure when he did so.

165. The only question which we needed to determine in relation to that disclosure, was whether it was the principal reason for the respondent's decision to dismiss the claimant. The disclosure in the email was made in December 2015 and the last date covered by the alleged period of disclosures was September 2016. It was Mr Norman's evidence that he did not know about the disclosures. He made the decision to dismiss the claimant. We found that the disclosure or disclosures made was/were not the principal reason why Mr Norman dismissed the claimant (or any part of the reason at all).

166. Issue 4(b) also detailed that the claimant relied upon disclosures which he alleged he made that Mr Morgan's patients were being given priority over the claimant's patients in clinic appointments. We would emphasise that in determining whether or not this was a protected disclosure, we were not required to determine whether what the claimant alleged was true or correct. In the claimant's witness statement, he said that he kept repeating to the respondent concerns regarding patient safety, where they were affected by delayed injections. He said that his concern was that extra clinics to tackle the backlog were only booked for patients who were treated by Mr Morgan. In the statement, he explained why the disclosures he made related to patient safety and why he reasonably believed it was in the public interest (with reference to patients). He asserted that the fact that his patient group was denied access to specific clinics, affected the outcome of the treatment which he provided his patients. Within the documents he referred to in his statement were

emails in which the claimant raised these type of concerns on 21 June 2016 (449), concerns about clinic capacity on 21 May 2016 (439), related patient-safety concerns including in his email of 19 May 2016 (435), and he raised concerns about the number of patients booked into a clinic in his email of 9 May 2016 (418). The claimant also referred to an email of 8 September 2016 (477) in which he made proposals about how extra clinics could be utilised (but which did not appear to contain any disclosure of information) (477). It was not entirely clear in which email, or on which occasion, the claimant had raised the specific concern stated in that part of the list of issues. To some extent the legal issues regarding this disclosure (as described in the list of issues and the claimant's witness statement) reflected those already addressed for disclosure 4(a). As a result, when considering this issue, the Tribunal first considered, if it had found that there was a protected disclosure about this issue, what would it have concluded when considering issue 7? As with the other disclosure covered within issue 4(b) and for the same reasons, we did not find that any such disclosure (or disclosures) made was/were the principal reason (or any part of the reason) why Mr Norman dismissed the claimant.

Disclosure 4(c)

167. Disclosure 4(c) was an email of 8 April 2014 sent by the claimant and three other named consultants to Ms Joshi (263). In the email the consultants outlined the on-call service being provided, including that the consultants were undertaking first on-call and were covering a large geographic area and a significant population. It was said that the practice was unsafe. Statements were made about changes said to be required to daytime clinics. The email concluded by stating that the ophthalmic consultant body was of the view that reverting to a two tier on-call arrangement was the safest option. The respondent accepted that this email was a protected disclosure.

168. As a result, the single issue which the Tribunal needed to determine, was whether the principal reason for Mr Norman's decision to dismiss the claimant was the protected disclosure made (issue 7)? Unlike many of the other disclosures, Mr Norman was aware of this email because it was included in the documents provided to him ahead of the some other substantial reason hearing. His evidence was that he did not dismiss the claimant because of this email. The Tribunal noted that there was approximately seven years between the email being sent and the dismissal decision being made. There was also no evidence that the other three consultants had been dismissed or treated adversely for having signed the email. The Tribunal accepted Mr Norman's evidence about the reasons for dismissing the claimant which were (in summary): that the claimant was not working the on-call which he was contractually obliged to do; and the break down in the relationship between the claimant and Dr Patil, the Clinical Lead. The Tribunal accepted the respondent's representative's submission that the claimant not undertaking on-call (which was part of the reason for the dismissal) was entirely different to the fact that the claimant had previously made protected disclosures about the fact that he considered the arrangement unsafe (which was not). The Tribunal did not find that the principal reason for the claimant's dismissal was the email of which he was one of four signatories on 8 April 2014.

Disclosure 4(d)

169. What was relied upon as being disclosure 4(d), was that: between January 2020 and June 2021 the claimant raised the same safety concerns in respect of the on-call arrangement with the, clinical director, business manager, Freedom of Speech Guardian, the BAME Guardian, CQC, his Member of Parliament and NHS England. The claimant believed this evidenced health and safety concerns and a breach of a legal obligation on the part of the respondent. The respondent accepted that the claimant made protected disclosures as asserted.

170. As with disclosure 4(c) that meant the single issue which the Tribunal needed to determine was whether the principal reason for Mr Norman's decision to dismiss the claimant was the protected disclosure or disclosures made (issue 7)? Mr Norman was fully aware that the claimant had raised concerns about the on-call arrangements. The claimant making the disclosures was much closer in time to the decision to dismiss than the previous disclosures relied upon had been. The Tribunal considered the evidence heard from Mr Norman and the documents which recorded the reasons why he had reached his decision, including his witness statement, the decision letter of 11 June 2021 (1421), and the management statement of case for the appeal (1564).

171. The Tribunal found Mr Norman to be a credible witness. He gave evidence methodically and thought about the answers he gave. The Tribunal accepted the evidence which he gave as having been truthful and therefore accepted that the reasons for which he decided to the dismiss the claimant were those set out in his witness statement and the decision letter. As already addressed for disclosure 4(c), those reasons were not that the claimant had made protected disclosures or raised safety concerns about the on-call arrangement in place. Those reasons included the fact that the claimant was not undertaking the on-call. As the respondent's representative correctly submitted, the claimant's refusal to work on-call was clearly a different, separate, issue from the fact of a disclosure of information by the claimant about the on-call system. The Tribunal did not find that the principal reason for the claimant's dismissal was the disclosure (or disclosures) he had made, as alleged.

172. In his submissions, the claimant did assert that Mr Norman had not made the decision and he asserted that the decision was pre-determined and had been at the behest of others within the Trust. The Tribunal did not find that was the case; it accepted that Mr Norman was an independent decision-maker who reached his own decision for the reasons he gave in evidence. The Tribunal did consider (and initially have some concerns about) the speed with which it appeared Mr Norman had reached his decision at the re-convened hearing on 8 June 2021. The note (1552) showed a decision had been reached in the short period between 13.09 and 13.22. However, the Tribunal noted that the hearing had in practice concluded at the end of the first day of hearing on 10 May and that the lengthy part of the hearing had ended with both sides putting forward their cases. The claimant did not attend the second day of hearing. As a result, whilst the limited time taken to make a decision might have in other circumstances supported an argument that the decision was not appropriately made and/or had been pre-determined, in a situation where Mr Norman had had a month to consider the outcome since the first day of hearing, the

Tribunal decided that the limited period of time taken did not evidence that the decision was made for reasons other than those set out in Mr Norman's evidence.

Disclosure 4(e)

173. The disclosure relied upon in issue 4(e), was not a specific disclosure on a specific date, but a number of alleged disclosures in which the claimant said that he raised concerns that he was being discriminated against because of his race or because of his religious belief. In his submissions, the respondent's representative submitted that the claimant's early complaints of discrimination in 2016 concerned alleged differential treatment of different patient groups. At the very end of his oral submissions, the claimant provided the Tribunal with a list of relevant page numbers which he said contained assertions of discrimination. The Tribunal expressly considered each of the page numbers to which the claimant referred. In some of them, the Tribunal could not identify any information about discrimination at all. The Tribunal did note issues in the following:

(1) On 28 June 2016 (462) in an email the claimant referred to *"the discriminative attitude by the managers of the macular unit".*

(2) In a document which was not dated but which appears to have been sent in September 2016 (481) the claimant referred to having to work *"in an unfriendly discriminating excluding hostile working atmosphere".*

(3) On 5 October 2016 (485) in an email the claimant referred to *"the attitude of the macular unit managers which a I perceived as a discriminating and seclusive attitude which affected the patients safety".*

(4) In a letter sent to the claimant on 7 November 2016 which summarised what had been said in a meeting on 28 September 2016 it was recorded (495) that, *"you raised very serious concerns that you were being discriminated against and felt that other staff members were being treated more favourably than you. You felt there was no other non-discriminatory reason for this treatment".*

174. In the first three documents and in the latter meeting, it appeared that the claimant referred to discrimination when making complaints. However, none of the documents referred to provided sufficient detail about what was being alleged for it to be understood. None of them referred to the protected characteristic upon which the claimant was placing reliance, nor did they provide any information which would enable such a protected characteristic to be identified. The nature of the information provided and the assertion made, was so vague and non-specific that the Tribunal found that what was said could not be found to have been a public interest disclosure because the information provided could not be identified, and/or the way in which a legal obligation had not been complied with could not be sufficiently identified from what was said.

175. There was also no evidence available to the Tribunal that the claimant believed that the things that he was disclosing were in the public interest. The allegations appeared (as the respondent's representative submitted) to be about the

claimant's treatment – they did not appear to adduce any evidence that they were in the public interest nor was there any basis for the Tribunal to find that they were.

176. Within issue 4(e) there was also reference to concerns being raised by the claimant in 2017 in a meeting with the Head of the Surgical Division, Clare Alexander. The Tribunal heard no evidence either from the claimant or from anyone else about a disclosure of information being made in that meeting. There was also no evidence of a phone call from the claimant to HR in 2020 in which such a disclosure was made. The reference to the SOSR meetings which led to the claimant's dismissal in June 2021, were too vague for a public interest disclosure to be identified or for the Tribunal to identify relevant parts of the public interest disclosure test from what was asserted. The claimant also referred to disclosures made to the BMA. Anything which the claimant disclosed to the BMA and not the claimant's employer, was not a protected disclosure.

177. In any event, even had the Tribunal found that what was asserted in 4(e) had contained within it a protected disclosure or disclosures, none of the things referred to were the principal reason for which Mr Norman dismissed the claimant (for the reasons already explained in relation to the previous alleged disclosures).

Ordinary unfair dismissal

178. Issue 8 asked whether the respondent had shown that the claimant was dismissed for a potentially fair reason? The reason the respondent relied upon was "some other substantial reason" being the breakdown in trust and confidence and relationships. In his submissions, the respondent's representative also relied in the alternative on misconduct, but the Tribunal has not felt it necessary to consider that reason. The Tribunal did accept that the reason for the claimant's dismissal was "some other substantial reason" as the respondent asserted. The Tribunal found Mr Norman to be a credible witness and it accepted his evidence about why he dismissed the claimant.

179. Mr Norman dismissed the claimant for two reasons: the fact that he could not work the on-call that was part of his contractual duties; and the breakdown in relations with the Clinical Lead, Ms Patil. In his submissions the respondent's representative summarised the case in the following way, and the Tribunal agreed with that summary:

> *"The breakdown in trust and confidence ran both ways, the respondent had lost trust and confidence in the claimant's willingness to perform his contractual duties and to maintain a satisfactory working relationship with his Clinical Lead. The claimant initially seemingly lost confidence in the respondent's ability to provide for him a safe working environment and then, when the respondent offered the claimant what he had sought on a temporary basis, he did not accept the respondent's ability to provide it or to review the arrangement in good faith. The claimant had also lost, if he ever had, the confidence in the Clinical Lead to perform her role."*

180. Issue 9 asked whether the respondent was able to establish that the "some other substantial reason" for dismissal relied upon could justify the dismissal of the claimant, taking into account his role as a Consultant Ophthalmologist. We found

that it could. Whilst the claimant clearly considered that the normal rules of employment did not apply to a clinician and/or decisions about the employment of a clinician should not be made by anyone other than other clinicians, the Tribunal accepted that he was still an employee and still subject to the same requirements as other employees. In this case the claimant was refusing or failing to undertake a fundamental part of his contractual duties, and he was refusing to engage with his line manager and/or to meet with her. The claimant's proposed solutions were not to undertake a fundamental part of his duties and not to be required to report to the same manager. The respondent did not consider those solutions to be acceptable. In those circumstances the dismissal for the "some other substantial reason" relied upon could justify the dismissal.

181. In considering issue 10 the Tribunal was required to apply section 98(4) of the Employment Rights Act 1996 to determine whether the dismissal was reasonable in all the circumstances, to be determined in accordance with equity and the substantial merits of the case. As the respondent's representative highlighted, the decision which the Tribunal was required to reach was whether the dismissal was in the range of reasonable responses that a reasonable employer could reach having determined that the relationship of trust and confidence had broken down. It was not necessary or appropriate for us to decide whether we ourselves would have dismissed the claimant on the same grounds. On that basis, and considering in particular the evidence of Mr Norman about why he made the decision that he did, the Tribunal found that the decision was reasonable in all the circumstances.

182. In the List of Issues at issue 11, specific matters (a)-(k) were identified which the Tribunal were asked to consider. The first of those was the failure to apply reasonable adjustments which has been considered in relation to disability discrimination below.

183. Issue 11(b) was the alleged failure to comply with Occupational Health and GP recommendations. We did not find that the respondent failed to comply with those recommendations. The respondent's Occupational Health adviser did not recommend that the claimant's on-call duties be permanently removed or his line management changed. Whilst the claimant's GP did sign the claimant as unfit to work on-call on occasion, he did not recommend that the claimant had a permanent removal of his on-call duties in circumstances where the respondent had offered the claimant a six-month trial of an arrangement where he was not the first on-call person. The respondent was entitled to rely upon the advice provided by its occupational health advisor. The Tribunal did consider it important that the respondent had offered to put in place an arrangement which appeared to be the one the claimant sought (although the claimant's objections to the on-call arrangement were not always consistent and/or clear), by placing someone else as the first on-call with the claimant as the second on-call person. However, the claimant did not accept that proposal.

184. Issue 11(c) was the alleged failure to seek a risk assessment from the Health and Safety Department. The Tribunal did not consider that this issue assisted the claimant with his claim for unfair dismissal. Whether or not the claimant should be dismissed was carefully considered by Mr Norman and, ultimately, by an appeal panel including a clinician and senior members of the Trust. Matters relating to a risk

assessment would not have altered the core issues which were being considered and the matters which were discussed at some length.

185. Issue 11(d) alleged that a failure to seek a professional neutral view on the on-call service such as from the Royal College of Ophthalmologists rendered the dismissal unfair. We did not find that it did. It was noted that the Trust did undertake some steps to review the service, including obtaining the view of a consultant external to the Trust. The claimant was critical of that review. It also appeared from his submissions that he would have been critical of any review by another consultant undertaken who reached conclusions which differed from his own. The respondent was not obliged to undertake a review by the Royal College for the dismissal to be fair.

186. Similar issues arose from issue 11(e) which related to CQC advice. The CQC raised concerns with the respondent. Mr Limitsios produced a paper. Any further steps involving the CQC and/or the absence of any particular steps involving the CQC, did not affect the fairness of the claimant's dismissal.

187. Issue 11(f) was a summary of the claimant's core case. He alleged that the respondent had not provided the required facilities and support needed to deliver the on-call service, and he alleged that was a breach of the consultants' terms and conditions. The Tribunal did not find that the respondent's dismissal of the claimant for being unwilling to undertake on-call for the period which he did, was a breach of contract. As the Tribunal has already identified, it is not for us to determine the managerial decisions which should have been taken. However, in circumstances where the claimant had not worked on-call from January 2020 until 11 June 2021, had been offered alterations to the on-call arrangements personal to himself to have another person as the first on-call (since March 2020), and had still not undertaken any on-call by the date of his dismissal, the Tribunal considered that the dismissal was fair.

188. Issue 11(g) alleged that dismissal was a harsh decision and it had not been preceded by disciplinary action or warning. As the Tribunal has already confirmed, it was not for this Tribunal to decide whether it would have made the same decision that Mr Norman did. We did find that Mr Norman was entitled to make the decision and that it fell within the range of reasonable responses. It was clear, as the respondent's representative submitted, that any warning would have been futile, as the claimant's position at this Tribunal hearing was that he had been and remained correct in his stance on on-call and in relation to Ms Patil.

189. At the hearings on 10 May and 10 June 2021 and (at least to an extent) at the appeal hearings on 19 October and 15 November 2021, the claimant was given the opportunity to put forward his position and to seek to identify a resolution to his issues with Ms Patil and/or to the fact that he would not perform the on-call. Had the claimant been able to identify a resolution in those hearings, it could have been adopted. The claimant did not do so.

190. Issue 11(h) was the claimant's assertion that the on-call duties were only 10% of his job plan. The Tribunal accepted the respondent's assertion that on-call was important and that the claimant not undertaking on-call would place pressure on other members of the team. It was self-evident that, if employees work on a rota,

allowing one person not to take part in that rota where there is not clear medical advice that they should not, does open up risks and unfairness. We accepted that the on-call work represented an important part of the claimant's contractual duties, even though they did not represent a large proportion of his working time.

191. Issue 11(i) was whether the dismissal decision was taken before exhausting other possible routes. The first letter of concern appeal had already been exhausted and addressed by the time of the "some other substantial reason" hearing. It was also clear from the documents provided, that the claimant was not willing to engage in job plan mediation. We did not think that it was necessarily entirely clearcut as to whether matters around undertaking on-call should have been addressed under the job planning process or the managerial process. However, we accepted the respondent's case that taking away a fundamental part of the claimant's responsibilities was not necessarily something that had to be addressed in the job plan process and was something that was fully considered and addressed and at a senior level by Trust employees and managers. In any event, the claimant was refusing to engage in the job planning (mediation) process. As already identified, the claimant was made fully aware of the seriousness of the position and that dismissal was being considered by Mr Norman, when he was given the opportunity to put forward any proposals that he had to resolve the two issues in a lengthy and detailed meeting at which he was accompanied by a BMA representative.

192. Issue 11(j) was the assertion that the respondent had stated that the claimant had refused to do his on-call duties, but the claimant stated that he had never refused. This was something of a semantic argument. In practice, the claimant had not undertaken the on-call duties from January 2020 until his dismissal in June 2021. Whether it could be accurately described that he had never technically refused, as opposed to not undertaking them, was entirely semantic and made no material difference to the decision reached or its fairness.

193. Issue 11(k) made a valid point which the claimant asserted repeatedly during the Tribunal hearing. The claimant had attended every meeting to which he had been invited, and he therefore had not lacked engagement in that respect. However, the two reasons for the claimant's dismissal were the on-call issues and the claimant's refusal to engage with his Clinical Lead. The claimant's assertions in evidence about the Clinical Lead and his engagement with her, varied during the hearing. They were inconsistencies in what he said, including in the documents seen by the Tribunal. In the section of this Judgment which recorded the facts, we have explained the occasions when it was shown that the claimant had refused to engage with, or attend meetings with, Ms Patil. Some of those occasions were after the investigation upon which the claimant relied had concluded (in which Ms Patil had not been one of those who raised a grievance). We accepted that the claimant had refused to engage with, or meet with, Ms Patil as his Clinical Lead and as part of the reason for dismissal, that was correct.

194. Issue 12 asked whether the procedure adopted by the respondent was fair and reasonable in all the circumstances. The Tribunal found that it was. The claimant had been unwilling or unable to do on-call duties for a long period of time. The respondent had sought to put in place an alternative arrangement on a relatively long-term six-month basis, which it thought accommodated the claimant's concerns. The claimant had declined to accept that arrangement because it had not been

made permanent. The claimant had then proceeded to not attend work on the days when he was due to undertake on-call, requiring the on-call duties to be covered by other employees. The respondent had sought to address the issues between the claimant and Ms Patil, his line manager. The claimant was invited to a final hearing. At a lengthy final hearing, he was given the opportunity to say everything that he wished to. A decision was reached. The claimant was given the opportunity to appeal to a panel consisting of very senior members of the Trust including a clinician. An appeal hearing took place, which the claimant attended with his representative (over two days). The appeal was rejected. We found the process to be fair.

Direct discrimination on grounds of race and/or religion

195. In the List of Issues, it was recorded that the claimant is Middle Eastern/Egyptian and Muslim. Issue 15 recounted the two acts upon which the claimant relied when he alleged direct discrimination.

196. The first alleged direct discrimination was that the claimant was not removed from the on-call register for the Ophthalmology Department from 2016 until 13 June 2021. It was true that the claimant was not removed from doing on-call for that period. The second allegation was that the claimant was dismissed effective from 13 June 2021. It was also correct that the claimant was dismissed.

197. Issue 16 asked whether the claimant had been treated less favourably on the grounds of race or religion. For the non-removal of the claimant from on-call, he compared himself to three comparators: C1; C2; and C3. The claimant was treated differently than C1, C2 and C3. Each of the comparators was allowed not to undertake on-call, whereas the claimant was required to do so. However, for a valid comparison for direct discrimination, an individual's comparators must have been in materially the same circumstances as the claimant. We did not find that any of the comparators were in the same material circumstances. The material difference was that in the cases of each of C1, C2 and C3, the respondent had received a medical recommendation from an occupational health advisor that the individual should not undertake on-call. There was no medical advice from the Occupational Health provider that the claimant should be removed from on-call on the basis of a health recommendation. In that respect, all three of the comparators' circumstances differed materially from the claimant and they were not appropriate comparators. For C1 and C3 the difference was even more notable because in both of their cases the respondent was advised that they had a disability and therefore it followed that what was being recommended was likely to be a reasonable adjustment. The same was not true of C2, as the Occupational Health adviser did not believe that her condition amounted to a disability, but nonetheless there was still a recommendation from an Occupational Health adviser that the adjustment should be made.

198. Even were the Tribunal wrong about the material difference, we would have found that the reason for the difference in treatment was because of the Occupational Health advice provided for each of C1, C2 and C3 (in contrast to the advice provided for the claimant), rather than because of the claimant's race and/or religion.

199. In relation to C3, the claimant's direct religious discrimination claim failed in any event, because his comparator was also a Muslim. The respondent's representative submitted that the race discrimination claim must fail because the comparator was identified as being Iranian or of Iranian origin. The Tribunal did not agree that the race discrimination claim had to fail on that basis, but nonetheless has not found for the claimant for direct discrimination on the grounds of race for the reasons explained.

200. The claimant's other direct discrimination allegation arose from his dismissal. For that allegation, the claimant cited two comparators: Mr Talbot; and Mr Limitsios. It was correct that neither of those comparators were dismissed by the respondent, when the claimant was. However, there was no evidence whatsoever that those individuals were in materially the same circumstances as the claimant. The claimant was dismissed because he had not undertaken on-call for an extended period of time and because his relationship with the Clinical Lead had broken down. There was no evidence that either of his comparators had not undertaken on-call. There was also no evidence about their relationship with the Clinical Lead. Whilst the two individuals might also have raised issues about working on-call, they had not failed to, declined to, or not undertaken, the on-call in contrast to the claimant. The two individuals were in materially different circumstances and the claimant's claim could not succeed as a result.

201. Even if we were wrong about that difference, the reason for the claimant's dismissal was because Mr Norman decided that the relationship of trust and confidence had broken down. We did not find that the reason for the claimant's dismissal was either his race or his religion.

202. We have not set out detailed findings about hypothetical comparators in the claimant's direct discrimination claims, but we also found that a hypothetical comparator in materially the same circumstances as the claimant of a different race or religion would have been treated in the same way as the claimant.

Disability

203. The claimant relied upon the mental impairments of anxiety and/or depression as being disabilities at the relevant time. The relevant time was 2016 until the claimant's dismissal in June 2021. The Tribunal needed to decide whether the claimant's impairments satisfied the test for disability set out in section 6 of the Equality Act 2010. That is, we needed to decide whether the claimant's conditions had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities?

204. The claimant's disability impact statement and the medical records provided have already been addressed above. For the reasons explained, the Tribunal did not accept that the claimant's disability impact statement was accurate. The Tribunal particularly noted the GP records. The contents of the Occupational Health reports were also taken into account. It was clear from the report in September 2016 that, at that time, the claimant had started to develop what were described as "*early signs of depression*" together with other physical symptoms of stress, although what those symptoms were was not described. The GP records also described the claimant as having some symptoms when he visited his GP for a depressive episode on 19 May

2017. What was notably absent from any other medical record was any description of the claimant's condition having a significant impact upon his ability to undertake day-to-day activities at any other (relevant) time. The Tribunal found that the claimant took an initial course of antidepressant medication following his visit to the GP, but did not take medication thereafter until after his employment had terminated (outside the relevant time).

205. In other circumstances, an individual's absence from work and the production of a fit note might be indicative of the fact that their condition had a substantial adverse effect on their ability to carry out normal day-to-day activities, as the fact they could not work for an extended period would be such evidence. In this case, the claimant's absence and/or his inability to undertake on-call, provided no such assistance us. We noted from the claimant's GP records that the occasions when he was certified as absent did not contain any record or evidence that showed that the reasons for the claimant's certified absence also had an impact upon something which could be identified as a normal day-to-day activity. We accepted and agreed with the respondent's representative's submission that undertaking on-call as an Ophthalmological Consultant and the particular stressors of undertaking that over a large geographic area, were not normal day-to-day activities and the claimant's inability to do so, did not indicate or evidence that his condition had an impact upon his normal day-to-day activities.

206. It is for the claimant to prove that he had a disability at the relevant time. Based upon the evidence which we heard, we did not find that the claimant had proved that his anxiety and/or depression had a substantial adverse effect on his ability to carry out normal day-to-day activities which was long-term at the relevant time. The records indicated some limited short-term occasions when the claimant's condition may have been more serious. The claimant did not evidence an extended period over which the condition had had a material impact. His disability impact statement did not provide details from which it could be ascertained that the test for disability had been met. The claimant is a consultant and if his condition had had the impact required on his day-to-day activities, he would have been more than able to have provided the requisite evidence had he been able to do so. We found that he had not proved what is required to meet the test of disability.

207. As the Tribunal has found that the claimant did not have a disability, or at least has not proved that he had a disability at the relevant time, we did not need to go on and determine the question of the respondent's knowledge. Indeed, we did not need to go on and determine any of the other elements of the claimant's disability discrimination claims as they could not succeed in the light of our finding that he has not proved that he had a disability at the relevant time. Nonetheless, we did so, but have recorded our conclusions in briefer terms than we would otherwise have done, if those issues had still been ones that may have determined the claimant's claim.

Discrimination because of something arising from disability

208. The claims outlined at issues 24-27 arose from the decision to dismiss the claimant in June 2021. The claimant asserted that he was dismissed because of something arising in consequence of his disability or disabilities.

209. Issue 25 in the list recorded that the claimant relied upon his inability to carry out on-call work as being the "something arising". We did not find that the claimant was unable to undertake on-call work because of the conditions upon which he relied (even had they been found to be disabilities). The claimant was inconsistent in his assertions about why he could not undertake the on-call. However, on occasion the claimant asserted that it was not because of his health. The Tribunal did not find that the claimant was unable to undertake the on-call because of his health. The claimant was unable or unwilling to undertake the on-call because of his view of the safety of the on-call arrangements in place. In those circumstances we did not find that the dismissal arose because of something arising from the disability. It was also clear that the claimant's issues with Ms Patil did not arise from the "something arising" relied upon, and the two matters were both equally grounds for Mr Norman's decision to dismiss.

210. Had it been necessary to do so, we would also have found that the respondent's dismissal was a proportionate means of achieving a legitimate aim, considering the aim set out at issue 27 and in the light of the very extended period where the claimant had been unwilling or unable to undertake the on-call and the steps the respondent had put in place to provide an alternative doctor as the first on-call during the time when the claimant was required to do so.

The duty to make reasonable adjustments

211. The respondent accepted that it had in place the provision, criterion or practice relied upon, that is that the claimant was required to carry out on-call duties.

212. Issue 29 asked whether the PCP put the claimant at a substantial disadvantage in comparison to persons who did not suffer from anxiety and/or depression, with the substantive disadvantage relied upon being that he could not carry out those duties without becoming ill. For the reasons that we have already explained in relation to other issues, the Tribunal did not find that the PCP did place the claimant at the substantial disadvantage relied upon in comparison with those without his disability. The PCP placed the claimant at a disadvantage in comparison with those who did not think the on-call was unsafe, but the substantial disadvantage was not as a result of the disability.

213. Issue 31 asked whether the respondent had failed to take such steps as were reasonable to avoid the disadvantage? The step cited was that the respondent should have put in place a two tier on-call system, having two doctors on call at the same time. From March 2020 the respondent offered to put exactly that arrangement in place and the claimant declined to accept it. Accordingly, we found that the respondent did make the very adjustment which the claimant contended (at least as recorded in the List of Issues) was the reasonable one for them to make. We did consider that putting it in place for six months was a sensible way of introducing such an arrangement and seeing if it was successful for both parties. In any event, we did not consider that putting it in place permanently was a requirement of a reasonable adjustment, where the proposal was to put the adjustment in place for the relatively long period of six months.

214. Had we found that the respondent breached its duty to make reasonable adjustments, we also would not have found that the claim was brought within the

time required and accordingly we did not have jurisdiction to consider the claim. The last decision about the claimant's on-call was made in March 2020 and the claimant did not bring his claim until September 2021. Whilst the on-call decision had ongoing impact for the claimant, the decision that he had to undertake on-call but would be able to do so with a second doctor as the first on-call, was one made in March 2020. The claim was therefore entered out of time. We would not have found it just an equitable to extend time in those circumstances. As has been highlighted throughout the facts above, the claimant had access to the BMA and received advice from a BMA representative. He is an intelligent individual with access to the same on-line information as others when identifying time limits before the Employment Tribunal. He provided no reason for not entering the claim earlier. Whilst the balance of prejudice might have been one that significantly weighed in the claimant's favour for extending time, nonetheless in the light of the delay and the other factors, we would not have found that it would have been just and equitable to extend time.

Other Issues

215. At the start of the hearing, it was identified that certain of the remedy issues would be determined alongside the other liability issues. In the light of the Tribunal's findings, none of these issues make any material difference to the outcome.

216. Issues 46 and 47 raised the ACAS Code of Practice on Disciplinary and Grievance Procedures, whether it applied and whether the claimant had unreasonably failed to comply with it. As the respondent's representative quite appropriately addressed in his submissions, there appears to be some dispute about whether the Code of Practice applies to a dismissal in "some other substantial reason" circumstances. Nonetheless, even if the Tribunal accepted that the Code had applied, the Tribunal considered that the respondent did in fact comply with the Code. The claimant has not identified any particular way in which the respondent acted outside the Code. The Code does not require that a clinician can only be dismissed by another clinician. We found that the respondent followed a fair process, as has already been explained when addressing issue 12, and therefore we found that the respondent did not unreasonably fail to comply with the ACAS Code (even if it applied, which we do not need to decide).

217. In circumstances where the claimant has not been found to have been unfairly dismissed, it was not possible to decide whether the claimant contributed to his dismissal. Nonetheless, as the claimant was dismissed for refusing to undertake part of his contractual duties and refusing to engage with his line manager, we inevitably would have found that the claimant contributed to his own dismissal (at least to a significant extent) had we needed to do so.

218. In relation to the issue of *Polkey* as set out at issues 52 and 53 (that is whether the claimant would have been dismissed in any event had a fair procedure been followed) that was also not an issue which could be determined where we have found that the dismissal was fair. Nonetheless, in circumstances where the claimant continued to refuse to undertake the on-call, refused to engage with Ms Patil at the time of his dismissal, and has continued to assert at this Tribunal that he was right to do so, the Tribunal would have found that the claimant would have been dismissed in any event and it would appear that it would have been inevitable that a very high reduction would have applied in any event (probably at 100%).

219. The claimant's case as it was pursued both in his evidence and in his submissions was sometimes hard to ascertain. The Tribunal did not find the claimant to be consistent about some of the things that he said. During his oral submissions, the claimant made the submission that the whole system was so corrupt, including the CQC, that he should win his case. It was expressly clarified with the claimant that was what he was submitting, as it had not initially been entirely clear. The Tribunal found absolutely no evidence whatsoever to support that submission.

220. The claimant also referred in his submissions to the Trust having a revenge attitude which was clearly reflected by the process followed. The Tribunal did not find any such attitude. We accepted the evidence of the respondent's witnesses and, in particular, found Mr Norman, Ms Stretch and Ms Mom's evidence to have been credible and genuine about the process followed and the reasons why they reached the decisions that they did.

221. During his submissions, the claimant also raised concerns about the way in which different HR team members supported different parts of the process and the seniority of those involved. We found nothing untoward about those steps and the people who supported the processes. In any event, the important evidence which we heard was from the decision-makers. Whilst it might not have been clear from the documents that Mr Norman alone made the decision to dismiss, the Tribunal accepted his evidence that the decision to dismiss was ultimately his.

222. The Tribunal would add that, in practice, it viewed the circumstances of this case as being very sad. The NHS lost the services of an experienced ophthalmological consultant for a period of six months during his ill health absence, when in practice he was fit enough to undertake most of his duties, if not all of them. It also lost the services of the claimant for the period between his dismissal by the respondent and him obtaining new employment. That was unfortunate. The public, and in particular the patients who the claimant would have been able to treat, will have lost out as a result.

Summary

223. For the reasons explained above, the Tribunal has not found that any of the claimant's complaints succeeded.

Employment Judge Phil Allen

8 December 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
12 December 2023

FOR THE TRIBUNAL OFFICE

Appendix

Agreed list of issues

INTRODUCTION

1. The identifiable claims are:

   (i) A claim of ordinary unfair dismissal pursuant to section 94 Employment Rights Act 1996 ("ERA");

   (ii) A claim of automatic unfair dismissal pursuant to section 103A ERA;

   (iii) A claim of direct discrimination on the grounds of race pursuant to section 13 of the Equality Act 2010 ("EqA");

   (iv) A claim of direct discrimination on the grounds of religion pursuant to section 13 EqA;

   (v) A claim of discrimination arising from disability pursuant to section 15 EqA; and

   (vi) A claim of a failure to make reasonable adjustments pursuant to sections 20 and 21 EqA.

TIME LIMITS

<u>Equality Act 2010 claims</u>

2. Has the Claimant presented claims within the period ending three months from the date of the alleged act, or the last act in a continuing course of conduct?
   a. The Respondent submits that any act or omission about which the Claimant complaints, which occurred before 28 April 2021 are prima facie out of time.

3. If so, would it be just and equitable for the Tribunal to extend time in respect of those acts? In determining this, the Tribunal should consider:
   a. How far out of time, the claim has been presented?
   b. What are the reason/s for the delay?
   c. When the Claimant knew or should have known that she had a potential claim for discrimination?
   d. Whether it was reasonable for him to know or suspect that he had a prospective claim earlier?

e. To what extent the Claimant obtained appropriate professional advice once she knew of the possibility of taking action?
f. How promptly did the Claimant act in bringing his claim once he knew of the possibility of taking action?
g. The extent to which the cogency of the evidence is likely to be affected by the delay?
h. The extent to which the Respondent co-operated with any requests for information?

LIABILITY

Whistleblowing

4. The Claimant relies upon the following alleged disclosures (as set out in the Summary of Preliminary Hearing dated 21 March 2022 and the 'Amendments' document of 14 April 2022):
    a. In November 2014 the claimant wrote to his clinical lead; Christiana Shrimpton, complaining that private patients were wrongly being booked among NHS patients in respect of necessary investigation in particular angiograms. These procedures to private patients should take place at a time that does not impact on normal services for NHS patients. The claimant believed this evidenced health and safety concerns as the NHS patients suffered from delayed access to NHS service and a breach of a legal obligation on the part of the respondent;
    b. Between December 2015 and September 2016 the claimant raised concerns with his clinical leads; Christiana Shrimpton and Gilbert Ozuzu, by email and in person, with his business manager; Lesley Simpson in person, with his clinical director; Amita Joshi by email and with the Royal College of Ophthalmology by telephone call. And later with the Freedom of Speech Guardian by zoom/video and by email and with the BAME (Black Asian Minority Ethnic) Guardian by telephone call. The concerns raised related to a backlog of patients suffering from various conditions (including age related macular degeneration) waiting for necessary timely injections and the fact that the fellow consultant Simon Morgan patients were being

given priority over the claimant patients in additional clinics appointments. This results in claimant patients been harmed and reported formally to the respondent. The claimant believed this evidenced health and safety concerns and a breach of a legal obligation on the part of the respondent;

c. In 2014, four consultants including the claimant sent a letter to clinical director; Amita Joshi, raising concerns about the safety of the on-call rota arrangements of the respondent. Their concerns were ignored by the respondent. The claimant believed this evidenced health and safety concerns and a breach of a legal obligation on the part of the respondent;
d. Between January 2020 and June 2021 the claimant raised the same safety concerns in respect of the on-call arrangement with the, clinical director, business manager, Freedom of Speech Guardian, the BAME Guardian, CQC, his Member of Parliament and NHS England. The claimant believed this evidenced health and safety concerns and a breach of a legal obligation on the part of the respondent; and
e. The claimant raised concerns that he was being discriminated against because of his race or because of his religious belief in 2016 to HR, business manager and BMA. These concerns were raised orally. The same concerns were raised by the claimant in 2017 in a meeting with the head of surgical division; Claire Alexander, and to HR in 2020 through phone call and in the SOSR meetings which led to claimant's dismissal in June 2021. The claimant believed this evidenced a breach of a legal obligation on the part of the respondent.

5. In relation to each of the matters above did the Claimant make a qualifying disclosure in accordance with s.43B ERA? Specifically;
    a. Did he disclose information?
    b. Did he have reasonable belief that the disclosure was information made in the public interest?
    c. Did he reasonably believe that the disclosures tended to show that:
        i. A person had failed, was failing or was likely to fail to comply with any legal obligation and/or
        ii. The health and safety of any individual had been, was being or was likely to be endangered.

6. If the Claimant made a qualifying disclosure, was it made:
    a. To the Claimant's employer?
    b. To a person who was legal responsibility for the matters raised by the Claimant pursuant to s.43C ERA?
    c. To a person prescribed by an order made the Secretary of State made pursuant to section s.43F ERA?

7. Pursuant to s103A Employment Rights Act 1996 was the Claimant dismissed for having made a protected disclosure? In particular was the reason or principal reason for the Claimant's dismissal him having made one or more of the alleged protected disclosures above?

Ordinary Unfair Dismissal

8. Has the Respondent shown that the Claimant was dismissed for a potentially fair reason? The Respondent relies upon the potentially fair reason of some other substantial reason (SOSR) being the breakdown in trust and confidence and relationships.

9. Is the Respondent able to establish that the SOSR reason for dismissal relied upon 'could' justify the dismissal of the Claimant, taking into account his role as Consultant Ophthalmologist?

10. If so, was the decision to dismiss the Claimant for SOSR reasonable in all the circumstances, to be determined in accordance with equity and substantial merits of the case (section 98(4) ERA 1996)?

11. The Claimant relies upon the following allegations in support of his assertion that the dismissal was unfair:

    a. Failing to apply reasonable adjustments;
    b. Failing to comply with OH and GP recommendations;
    c. Failure to seek a risk assessment from the H&S department;
    d. Failing to seek a professional neutral view on the on-call service such as from the Royal Colleague of Ophthalmologists;
    e. Failure to seek CQC advice;

f. Breaching schedule 3 of the Consultant Ts and Cs by not providing the required facilities and support needed to deliver the Claimant's commitments and failing to provide the required facilities as per the RCO guidelines and a clear SOP for the on-call service;
g. The dismissal was a harsh decision not proceeded with disciplinary action or warning;
h. The on call duties only constitute 10% of C's job plan duties so was not proportionate to the rest of his duties;
i. The dismissal decision was taken before exhausting other possible routes such as job plan meeting, 1st letter of concern appeal;
j. In the SOSR statement, the Respondent stated that the Claimant refused to do his on call duties but the Claimant states that he never refused; and
k. In the SOSR statement, the Respondent cited a lack of engagement as a ground for dismissal but the Claimant says he attended every meeting, submitted all the required evidence and statements.

12. Was the procedure adopted by the Respondent fair and reasonable in all the circumstances?

13. If the dismissal was procedurally unfair, would the Claimant have been dismissed in any event had a fair procedure been followed?

Direct Race and/or Religion Discrimination s.13 EqA

14. The Claimant is Middle Eastern/Egyptian and Muslim.

15. Has the Claimant established that the following acts occurred as alleged?

a. The Claimant was not removed from the on-call register of the ophthalmology department of the respondent in particular from 2016 up until the date of his dismissal effective from 13 June 2021.
b. The Claimant was dismissed effective from 13 June 2021.

16. If the treatment occurred as alleged, was it less favourable treatment on the grounds of the Claimant's race and/or religion?

a. The Claimant relies upon the following comparators for alleged act (a) as he stated that they were removed from the on-call rota due to their health and had their job plans adjusted:
    i. C1
    ii. C2
    iii. C3
b. The Claimant relies upon the following comparators for alleged act (b) as he says that they made the same complaints as he did about the safety of the on-call rota but were not dismissed:
    i. Mr Talbot
    ii. Mr Limitsios

17. Are there facts from which, in the absence of any explanation, a finding of discrimination could be made?

18. If so, has the Respondent established an explanation for the treatment, which was nothing whatsoever to do with the Claimant's race?

19. Did the Respondent's treatment amount to a detriment?

<u>Disability</u>

20. The Claimant relies upon the mental impairments of Anxiety and Depression.

21. Did the Claimant's Anxiety and/or Depression have a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities so as to constitute a disability within the meaning of EqA?

    a. The Respondent disputes that the Claimant was disabled at the relevant time.

22. If so, did the Respondent have knowledge, or would it have been reasonable for the Respondent to have had knowledge, of the disability at the relevant time? Namely from 2016 to the date of his dismissal in June 2021 and his unsuccessful appeal in November 2021.

23. If so, from what date did the Respondent have knowledge, or would it have been reasonable for the Respondent to have had knowledge, of the disability relied upon?

Discrimination because of something arising from disability s.15 EqA

24. Was the decision to dismiss the Claimant in June 2021 unfavourable treatment of the Claimant because of "something arising" in consequence of either or both of his disabilities?

25. What was the 'something?' The Claimant relies on his inability to carry out on-call work under the conditions laid down by the then current management of the Respondent. The Claimant states that his alleged disability caused him not to be able to sleep and to suffer from palpitations and anxiety when asked to carry out on-call duties under the conditions laid down by management.

26. If the Tribunal determines that the Claimant's dismissal was unfavourable treatment because of something arising from his disability, can the Respondent show that the dismissal was a proportionate means of achieving a legitimate aim?

27. The Respondent relies upon the legitimate aim to provide an efficient on-call service to protect the health, safety and wellbeing of its service users.

A failure to make reasonable adjustments

28. The Claimant relies upon the Provision, Criterion or Practice ("PCP") of requiring the Claimant to carry out the on-call duties. The Respondent accepts that it had in place this PCP.

29. Did the PCP put the Claimant at a substantial disadvantage in comparison to persons who do not suffer from Anxiety and/or Depression?
    a. The substantial disadvantage relied upon is that he could not carry out those duties without becoming ill.

30. If so, did the Respondent know or could the Respondent reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage in question?

31. If so, did the Respondent fail to take such steps as were reasonable to avoid the disadvantage?
    a. The Claimant suggests that the Respondent should have put in place a two tier on-call system by having two doctors on-call at the same time.

32. Would the adjustments relied on by the Claimant have overcome the alleged disadvantage and was it reasonable to expect the Respondent to make the adjustments in the circumstances?

REMEDY

Reinstatement/Re-engagement

33. Does the Claimant wish to be reinstated to his previous employment?

34. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

35. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

36. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

37. What should the terms of the re-engagement order be?

38. What basic award is payable to the claimant, if any?

Recommendation

39. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant of the discrimination/harassment?

40. What should it recommend?

Financial loss

41. What financial losses has the Claimant suffered?

Injury to feelings

42. What injury to feelings has the discrimination caused the Claimant?

43. How much compensation should be awarded for that?

Personal injury

44. Has discrimination caused the Claimant personal injury?

45. How much compensation should be awarded for that?

ACAS

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

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

48. If so, is it just and equitable to increase or decrease any award payable to the Claimant?

49. By what proportion, up to 25%?

Compensation

50. Did the Claimant contribute to any detrimental treatment or dismissal?

51. If so, should his compensation be reduced?

52. Even if the Claimant's dismissal was procedurally unfair, which is denied, would the Claimant have been dismissed in any event?

53. If so, should his compensation be reduced?

Interest

54. Should interest be awarded?

55. How much?