Neutral Citation Number: [2019] EWHC 1603 (Admin)

Case No: CO/828/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 June 2019

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN
on the application of

IRENE MORRIS	**Claimant**
- and -	
PARLIAMENTARY AND HEALTH SERVICE OMBUDSMAN	**Defendant**
GUY'S AND ST THOMAS' NHS FOUNDATION TRUST	**Interested Party**

- -
- -

Jenni Richards QC (instructed by **Bindmans LLP**) for the **Claimant**
Tim Buley (instructed by the **Bevan Britten LLP**) for the **Defendant**
The **Interested Party** did not appear and was not represented

Hearing dates: 20 & 21 February 2019

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Approved Judgment

Mrs Justice Lang :

1. The Claimant seeks judicial review of the report of the Defendant[1], dated 16 November 2017, into her complaint of maladministration against Guy's and St Thomas' NHS Foundation Trust ("the Trust").

2. The complaint arose from the Claimant's request for the medical records relating to her late daughter, under section 3 of the Access to Health Records Act 1990, after her tragic death at St Thomas' Hospital in 2011, following a diagnosis of bowel cancer.

3. In his report, the Defendant upheld the Claimant's complaint, finding that the Trust's 2014 investigation into Ms Morris' missing records amounted to maladministration. The Defendant recommended that the Trust send to the Claimant a written apology, as well as an acknowledgment of its failings, the lessons learned, and the action taken to avoid any repetitions identified in the report. The Defendant also recommended that the Trust make a payment of £1,000 to the Claimant as an acknowledgment of the impact its failings had upon her, causing her anxiety, frustration and distress.

4. The Defendant decided not to recommend that the Trust should carry out further searches for the medical records, as this would be unlikely to uncover any new records and would be disproportionate given the number of searches which had already been done and the time which had elapsed. The Defendant declined to make a payment in respect of the Claimant's legal costs or recommend that the Trust make a payment in respect of her legal costs.

5. The Claimant submitted that the report was unlawful on the following grounds:

    i) **Ground 1**. The Defendant limited the scope of his investigation and report to the adequacy of the investigation carried out by the Trust in 2014, contrary to his representations to the Claimant, thereby acting in breach of the Claimant's legitimate expectation. The Defendant's assertion that the scope was always limited to the Trust's 2014 investigation was based on erroneous reasoning, and a failure to take into account relevant considerations.

    ii) **Ground 2**. The Defendant's failure to require or request the Trust to carry out further searches and/or to answer the key questions that were recommended by the Defendant's own expert, and agreed to by the Defendant, was unfair and irrational. The Defendant acted in breach of the Claimant's legitimate expectation and failed to take into account relevant considerations.

    iii) **Ground 3**. In refusing to recommend payment of the Claimant's legal costs by the Trust, or in failing to pay them himself, the Defendant acted irrationally, failed to take into account relevant considerations, unlawfully fettered his discretion and misunderstood or misapplied policy and guidance.

[1] Mr Rob Behrens CBE was the Health Service Commissioner at the date of the report in 2017, and so for ease all references are to the male gender, though he was preceded in office by a female, Dame Julie Mellor, who was the Health Service Commissioner from 2012 to 2016.

iv) **Ground 4**. In the final report, the Defendant failed to take into account relevant matters that the Claimant raised in her response to the draft report.

6. The Claimant applied for declaratory relief, a quashing order and mandatory orders for reconsideration and/or reinvestigation.

7. Permission to apply for judicial review on ground 3 was granted by Baker J. on the papers. At an oral renewal hearing, Murray J. granted permission on grounds 1, 2 and 4.

8. After the hearing had concluded, but before I had given judgment, the Claimant applied to adduce further evidence. The evidence broadly fell into four categories: (1) communications between the Defendant and the Trust; (2) Trust records; (3) the Claimant's list of medical records; and (4) solicitors' correspondence. The parties each made submissions on those documents. I have granted the application to admit the documents in evidence, for the sake of completeness, and so that the Claimant may be reassured that nothing has been overlooked. However, this additional material was of marginal relevance, in my view. The Defendant considered that the documents in categories 1 and 2 were not relevant and so did not disclose them. I do not consider that the Defendant breached the duty of candour.

Factual summary

9. In 2005 the Claimant's daughter, Alexis Morris, was diagnosed with bowel cancer. She spent much of the next six years as an inpatient at St Thomas' Hospital because of surgical problems. On 12 June 2011, she died after she contracted a urinary tract infection whilst in St Thomas' Hospital.

10. On 7 July 2011 the Claimant wrote to the Trust to request Alexis's medical records. On 25 October 2011 the Claimant formally complained to Sir Ron Kerr, Chief Executive of the Trust, regarding the Trust's failure to respond to the request. On 16 December 2011 Sir Ron Kerr advised the Claimant that, despite extensive searches, the remaining records, which were approximately 5% of the total retrieved, could not be found.

11. On 8 May 2012 the Claimant made her first complaint to the Defendant, on the grounds that the Trust had failed to supply her daughter's full medical records, some of which appeared to be missing.

12. On 23 August 2012 the Defendant wrote to the Claimant, refusing to investigate the complaint, on the basis that no more records were likely to be found, and there was nothing more it could reasonably do to obtain the records. That decision was upheld following a review on 26 March 2013.

13. On 21 June 2013, the Claimant filed a claim for judicial review against the Defendant, challenging his refusal to investigate her first complaint.

14. In about April 2013, and again in May 2014, the Trust informed the Claimant that more records had been found, in the course of preparing its evidence, in its capacity as the interested party, for the judicial review claim. On 13 June 2014 a meeting was held between the Claimant and the Trust, at which it was agreed that the Trust would

undertake a further investigation into the missing records. On 3 September 2014 the Trust provided the report of its investigation.

15. On 1 October 2014, the Claimant made her second complaint to the Defendant, which is the subject of this claim. On 29 October 2014 the Defendant agreed to investigate it.

16. On 2 December 2014, the High Court dismissed the Claimant's claim for judicial review in respect of the Defendant's refusal to investigate the Claimant's first complaint.

17. On 12 July 2017 the Ombudsman sent a letter to the Claimant enclosing the draft report. On 21 September 2017, Bindmans submitted the Claimant's response. On 16 November 2017 the Defendant sent a covering letter to the Claimant, together with the final report.

18. On 6 December 2017 Bindmans sent a pre-action letter to the Defendant.

19. On 13 December 2017 the Trust sent a letter to the Claimant apologising and enclosing a cheque for £1,000 in accordance with the Defendant's recommendations. On 5 January 2018 Bindmans returned the cheque to the Trust, on behalf of the Claimant.

20. This claim was issued on 23 February 2018.

Legal framework

The Health Service Commissioners Act 1993

21. The Defendant's office of Health Service Commissioner for England was created by section 1(1) of the Health Service Commissioners Act 1993 ("the 1993 Act").

22. The Trust is a "health service body" which may be subject to investigation by virtue of subsections 2(1)(db) and 2(4).

23. Section 3(1) provides:

> "On a complaint duly made to the Commissioner by or on behalf of a person that he has sustained injustice or hardship in consequence of –
>
> a) a failure in service provided by a health service body,
>
> b) a failure of such a body to provide a service which it was a function of the body to provide, or
>
> c) maladministration connected with any other action taken by or on behalf of such a body,
>
> the Commissioner may, subject to the provisions of this Act, investigate the alleged failure or other action."

This was a complaint of maladministration under section 3(1)(c) of the 1993 Act.

24. Section 3(2) provides that in "determining whether to initiate, continue or discontinue an investigation under this Act, the Commissioner shall act in accordance with his own discretion". I accept the Defendant's submission that this encompasses any decision about the scope of an investigation which the Defendant decides to initiate.

25. Under section 9(4), the Commissioner "shall not entertain the complaint if it is made more than a year after the day on which the person aggrieved first had notice of the matters alleged in the complaint, unless he considers it reasonable to do so".

26. Section 11 is headed "Procedure in respect of investigations". Subsections (3) and (4) provide as follows:

> "(3) In other respects, the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case, and in particular—
>
> (a) he may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit, and
>
> (b) he may determine whether any person may be represented, by counsel or solicitor or otherwise, in the investigation.
>
> (4) [The Commissioner] may, if he thinks fit, pay to the person by whom the complaint was made and to any other person who attends or supplies information for the purposes of an investigation—
>
> (a) sums in respect of expenses properly incurred by them, and
>
> (b) allowances by way of compensation for the loss of their time.
>
> Payments [made by [the Commissioner] [...]] under this subsection shall be in accordance with such scales and subject to such conditions as may be determined by the Treasury [...]."

27. By section 14, the Defendant is required to send a report of the results of any investigation into a complaint to those parties listed in subsection (1). If he decides not to conduct an investigation, he must provide his reasons.

Case law

28. The Courts have considered in detail the broad discretionary powers given to the Defendant and other similar ombudsmen, and the extent of the court's supervisory jurisdiction, beginning with *R v Local Commissioner ex p Bradford Council* [1979] 1 QB 287, at 311C per Lord Denning.

29. In *R v Parliamentary Commissioner for Administration, ex p Dyer* [1994] 1 WLR 621, Simon Brown LJ, giving the judgment of the Divisional Court, in respect of materially

identical provisions in the Parliamentary Commissioner Act, rejected the submission that the Commissioner's decisions fell "wholly outside the purview of judicial review" (at 625F) or that the scope of judicial review was not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity (at 625G – 626E). He went on to say, at 626E - G:

> "….despite my rejection of both Mr Richards' submissions on the question of jurisdiction, it does not follow that this court will be readily persuaded to interfere with the exercise of the Commissioner's discretion. Quite the contrary. The intended width of these discretions is made strikingly clear by the legislature: under section 5(5), when determining whether to initiate, continue or discontinue an investigation, the Commissioner shall act in accordance with his own discretion;" under section 7(2), "the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case." Bearing in mind too that the exercise of these particular discretions inevitably involves a high degree of subjective judgment, it follows that it will always be difficult to mount an effective challenge on what may be called the conventional ground of Wednesbury unreasonableness ...
>
> Recognising this, indeed, one may pause to wonder whether in reality the end result is much different from that arrived at by the House of Lords in the two cases referred to, where the decisions in question were held "not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity." True, in the present cases "manifest absurdity" does not have to be shown; but inevitably it will be almost as hard to demonstrate that the Commissioner has exercised one or other of his discretions unreasonably in the public law sense."

30. In *R v Parliamentary Commissioner for Administration ex p Morris and Balchin* [1997] JPL 917, Sedley J. considered the meaning of the terms "maladministration" and "injustice", as used in the legislation. He went on to say, at [17]:

> "In addition, the Commissioner is an investigative officer, not an adjudicative tribunal. As the Divisional Court held in ex parte Dyer (ante), section 5(5) of the 1967 Act gives him a wide area of choice as to the manner in which he investigates. But this discretion, too, will be constrained by the limits set by public law."

31. Sedley J. rejected the irrationality challenge, holding that the relevant test was not whether it was "so bizarre that its author must be regarded as temporarily unhinged" but whether there was an "error of reasoning which robs the decision of logic" (at [27]).

32. Sedley J. also held the Commissioner's investigation was not limited to the strict terms of the issue posed by the complaint" (at [35]), a point which is relevant to the issues in this case.

33. In *R (Mencap) v Parliamentary and Health Service Ombudsman* [2011] EWHC 3351 (Admin), Mitting J. said at [12] that section 11(3) of the 1993 Act confers on the Defendant "the widest possible discretion" and at [13] that "[t]he Ombudsman has…an unfettered discretion whether or not to investigate a complaint of service failure under section 3(1)".

34. In *R (Jeremiah) v Parliamentary and Health Service Ombudsman* [2013] EWHC 1085 (Admin), Collins J. held (at [30]) that:

> "The law, as set out by both the Act and its interpretation in previous decisions, is that the hurdle which has to be surmounted by any claimant seeking to persuade a court that an exercise of discretion by the Ombudsman is unlawful is a very high one indeed. The relevant leading decision is R v Parliamentary Commissioner for Administration ex p Dyer [1994] 1 WLR 621 where Simon Brown LJ, as he then was, giving the judgment of the Divisional Court made it clear that the width of the discretion was, as he put it, made "strikingly clear" by the legislature…. Although I will not go so far as Mitting J appears to have done in R (on the application of Mencap) v The Parliamentary and Health Service Ombudsman [2011] EWHC 3551 in indicating that there is unfettered discretion, nonetheless it is perfectly clear that such fetters as there are exceedingly loosely applied.

35. In the Claimant's first judicial review claim (*R (Morris) v The Health Service Commissioner* [2014] EWHC 4364 (Admin)), Jay J. interpreted Mitting J.'s reference to an "unfettered discretion" in the *Mencap* case as meaning "a very broad discretion, reviewable only on a conventional *Wednesbury* basis, including demonstrating that the decision maker has plainly asked itself the wrong question or has plainly misinterpreted the complaint" (at [35]). If there was any difference of substance between the approach taken by Mitting J. in the *Mencap* case and by Collins J. in *Jeremiah*, Jay J. preferred the reasoning of *Jeremiah*. I agree with Jay J.'s approach.

36. In *R (Newman) v The Parliamentary and Health Service Commissioner* [2017] EWHC 3336 (TCC), Jefford J. accepted the submission that the Commissioner had a broad discretion and that a challenge to the exercise of this discretion on the grounds that it was *Wednesbury* unreasonable (as explained by Sedley J. in *Balchin*) faced a high hurdle.

37. In *R (Miller) v Health Service Commissioner* [2018] EWCA Civ 144, the Court of Appeal upheld a challenge to the procedural fairness of the Commissioner's decision-making process in that case. Ryder LJ, giving the judgment of the Court, said, at [55]:

> "…is important that this court does not import into the informal non-judicial process of administrative and complaints adjudicators like the ombudsman the procedures of courts and tribunals. The adjudication process is an informal resolution of a

> complaint or problem … The procedure is a matter entirely within the gift of the ombudsman provided that her decision making process is lawful, rational and reasonable.".

Legitimate expectation

38. In this claim, the Claimant relies upon legitimate expectation as a ground of review. A legitimate expectation may arise from an express promise given on behalf of a public authority, or impliedly from the existence of a regular practice which the Claimant can reasonably expect to continue.

39. In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2009] 1 AC 453, Lord Hoffmann said, at [60]:

> "The relevant principles of administrative law were not in dispute between the parties and I do not think that this is an occasion on which to re-examine the jurisprudence. It is clear that in a case such as the present, a claim to a legitimate expectation can be based only upon a promise which is "clear, unambiguous and devoid of relevant qualification": see Bingham LJ in *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569. It is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest, particularly in the area of what Laws LJ called "the macro-political field": see *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131." In considering whether the representations relied upon to found the legitimate expectation were "clear, unambiguous and devoid of relevant qualification", the question is how, on a fair reading of the promise, it would have been reasonably understood to those to whom it was made: see *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] QB 1397, per Dyson LJ, at [56]."

40. In *Paponette & Ors v Attorney General of Trinidad and Tobago* [2010] UKPC 32, Lord Dyson summarised the principles to be applied when considering the circumstances in which a public body may be entitled to frustrate a substantive legitimate expectation.

> "34. The more difficult question is whether the government was entitled to frustrate the legitimate expectation that had been created by its representations. In recent years, there has been considerable case law in England and Wales in relation to the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation. Some of it was referred to by Warner JA in her judgment. The leading case is *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213.

Lord Woolf MR, giving the judgment of the Court of Appeal said, at para 57:

> "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

…

36. The critical question in this part of the case is whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise. This raises the further question as to the burden of proof in cases of frustration of a legitimate expectation.

37. The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.

38. If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power. The Board agrees with the observation of Laws LJ in *Nadarajah v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at para 68: "The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances." It is for the authority to prove that its failure or refusal to honour its promises was justified in the public interest. There is no burden on the applicant to prove that the failure or refusal was not justified.

…

42. It follows that, unless an authority provides evidence to explain why it has acted in breach of a representation or promise made to an applicant, it is unlikely to be able to establish any overriding public interest to defeat the applicant's legitimate expectation. Without evidence, the court is unlikely to be willing to draw an inference in favour of the authority. This is no mere technical point. The breach of a representation or promise on which an applicant has relied often, though not necessarily, to his detriment is a serious matter. Fairness, as well as the principle of good administration, demands that it needs to be justified. Often, it is only the authority that knows why it has gone back on its promise. At the very least, the authority will always be better placed than the applicant to give the reasons for its change of position. If it wishes to justify its act by reference to some overriding public interest, it must provide the material on which it relies. In particular, it must give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority. As Schiemann LJ put it in *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237, at para 59, where an authority decides not to give effect to a legitimate expectation, it must "articulate its reasons so that their propriety may be tested by the court".

…

45. There is a further point. In *Bibi*, Schiemann LJ said that an authority is under a duty to consider a legitimate expectation in its decision making process. He said:

> "49. Whereas in *R v North and East Devon Health Authority*, *Ex p Coughlan* [2001] QB 213 it was common ground that the authority had given consideration to the promises it had made, in the present cases, that is not so. The authority in its decision making process has simply not acknowledged that the promises were a relevant consideration in coming to a conclusion as to whether they should be honoured and if not what, if anything, should be done to assuage the disappointed expectations.
>
> …
>
> 51. The law requires that any legitimate expectation be properly taken into account in the decision making process. It has not been in the present case and therefore the authority has acted unlawfully."

> 46. The Board agrees. Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demands that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account."

Ground 1

41. The Claimant submitted that the Defendant, unfairly and in breach of the legitimate expectation created by its statements and assurances, and by its conduct of the investigation, did not adhere to the scope of the investigation that the Defendant had agreed to, with the result that the Defendant failed to investigate fully, and limited his conclusions to the adequacy or otherwise of the Trust's 2014 investigation. The Defendant's report therefore failed to address significant parts of the Claimant's complaint, relating to events prior to the 2014 investigation. This amounted to an error of reasoning on the part of the Defendant, and a failure to take into account relevant considerations.

42. I accept the Defendant's submission that it is clear from the evidence that the Defendant, in the exercise of his discretion, limited the scope of the investigation to the question of whether the Trust's 2014 investigation amounted to maladministration. The Defendant considered events prior to the 2014 investigation because they were an essential part of the background and context to the Trust's 2014 investigation, not because they were within the scope of the formal investigation. Therefore, the Defendant was not required to make separate findings on the pre-2014 events in his report.

43. In order to understand what occurred, it is necessary to consider the history of the Claimant's dealings with the Defendant.

Events up to and including the letter of 16 December 2014

44. On 8 May 2012 the Claimant made her first complaint to the Defendant, on the grounds that the Trust had failed to supply her daughter's full medical records, some of which appeared to be missing.

45. On 23 August 2012 the Defendant wrote to the Claimant, refusing to investigate the complaint, which he summarised as follows:

> "You are unhappy that the Trust has been unable to provide you with a complete set of your daughter's medical records and as a result of your complaint you are seeking to obtain those records."

The letter went on to say that, despite the production of a large number of records, it was unreasonable that the Trust had lost some of them, indicating a failing in its

processes. Nonetheless, the Defendant concluded that the Trust had made reasonable attempts to find the records, no more records were likely to be found, and there was nothing more he could reasonably do to obtain the records.

46. On 30 August 2012 the Claimant requested a review of the refusal. On 26 March 2013 the Defendant upheld the refusal to investigate this complaint.

47. On 21 June 2013, the Claimant filed a claim for judicial review against the Defendant, challenging his refusal to investigate her first complaint. She claimed that the Defendant had interpreted her complaint too narrowly as a complaint about the Trust's failure to provide documents, instead of a wider complaint about the Trust's failures to maintain its records, and its inadequate explanations as to how and why the documents had been mislaid. Permission was granted on 19 March 2014.

48. On 2 December 2014, Mr Justice Jay dismissed the claim, at a substantive hearing, saying:

> "50…returning to the complaint form as completed by the claimant she made clear that her original complaint to the interested party was about its failure to provide documentation for information purposes and she identified in terms those documents which she believed had not been furnished. She told the defendant that she wanted the interested party to comply with its legal obligations by finding and supplying her with copies of the missing information…..At no stage, in my view, did the claimant make it clear that she wanted the defendant to investigate the interested party's excuses or explanations or any underlying systemic failures. In my judgment, putting the matter as high as it could properly be put against the defendant, it may have been open to the defendant to investigate these matters if it wished, but it was not incumbent on the Defendant to do so.
>
> 51. The complaint certainly bears more than one interpretation. My preferred interpretation is that it should be narrowly construed and that paragraphs 6,7 and 8 of the form, read as a whole and in context, properly limit the complaint to the failure to provide documents. Moreover, my preferred interpretation is that there was no subsidiary complaint. But even if I am wrong about that, the interpretation which the defendant clearly placed on this documentation read in its proper context was an interpretation which was reasonable in all the circumstances."

49. The Trust was an interested party in the judicial review claim, and as part of its evidence preparation, the Trust continued its search for missing records. In about April 2013, and again in May 2014, the Trust informed the Claimant that more records had been found.

50. On 13 June 2014 a meeting was held between the Claimant and the Trust, at which it was agreed that the Trust would undertake a further investigation into the missing records. On 3 September 2014 the Trust provided the report of its investigation. In its Introduction, it said that the Trust was very concerned about the weaknesses in Trust processes that this case identified and as a result the Chief Executive asked the Head of

Information Governance "to lead a review of health records management processes in relation to the health records for Alexis Morris, and also more generally". It would then "identify appropriate steps in terms of a wider review of health records management within the Trust", as it was "committed to taking action to remedy weaknesses which it identifies in its current systems and processes".

51. In light of these developments, the Claimant made a second complaint to the Trust on 1 October 2014, before the first judicial review claim had been decided. In the application form, in response to question 6 asking her to "*briefly explain what your complaint is about*", she began by saying:

> "The full background to this matter has been set out in the judicial review proceedings I have brought against the Ombudsman. However, I set out a summary below." *(emphasis added)*

52. I have emphasised the word "background" as that is a fair description of the pages which followed, summarising events from the date of her initial request to the Trust for the records in July 2011 to date. At the end of her account, she stated:

> "…the Trust agreed to undertake a full investigation into the medical records, and to provide any further records that were discovered and/or to explain why any records remained missing.
>
> The Trust provided the results of its investigation on 3 September 2014. In summary the Trust:
>
> - acknowledged that its review had identified "weaknesses in Trust processes" and in particular, that there were record-keeping practices being used at the Hospital of which its own Information Governance department was unaware;
>
> - disclosed further records that had not previously been disclosed;
>
> - confirmed that significant numbers of records remained lost;
>
> - failed even to attempt to explain how it is such records could remain lost;
>
> - failed to explain why the "new" records were able to be located in 2014 but not when I made my original request."

53. Then in response to question 7, asking her "*why are you still unhappy following the response from the organisation*" she replied: "I am unhappy with the results of the Trust's investigation because …" and she then set out her detailed criticisms of the results of the 2014 investigation and the report. This answer clearly related to the 2014 investigation.

54. Question 8 asked her to identify any aspects of her complaint which the organisation had not responded to. She replied, identifying deficiencies in the Trust's response to

her complaint in its 2014 investigation. This answer clearly related to the 2014 investigation.

55. Question 10 asked her "*what outcome do you want us to achieve for you?"*. She replied saying that she wanted "a thorough investigation into the adequacy of the Trust's investigation into the loss of Alexis' medical records"; "a detailed explanation of how Alexis' medical records have been lost"; "a detailed explanation of why newly discovered records were not found during the previous investigation"; "an investigation into both the historic and current record-keeping practices of the Trust to determine their appropriateness and to make recommendations for improvement"; "compensation for costs I have incurred that have been caused by the Trust's serious maladministration"; and "a public apology and public acknowledgment of the Trust's serious maladministration". This clearly related to the 2014 investigation, but also went further back in time, referencing the previous investigation and historic record-keeping practices.

56. However, any doubt as to the intended scope of this complaint was removed by the Claimant's response to Sections 5 and 6 (for greater clarity, the questions on the form have been typed in italics):

> "*Section 5: When things happened*
>
> *The law says that a complaint should be made to us within a year of you becoming aware there is a problem. We can extend this time limit if we think it is reasonable for us to do so*.
>
> *12. When did the events occur:*
>
> June 2011 – September 2014
>
> *13. When were you aware there was a problem and when did you complain?*
>
> See above for a brief chronology.
>
> *14. If you did not complain straight away, please explain why:*
>
> N/A
>
> *15. If the events occurred over a year ago, please explain why you did not complain to us earlier …*
>
> I am asking the Ombudsman to investigate my complaint in light of the most recent investigation undertaken by the Trust. (*emphasis added*)
>
> …..
>
> *Section 6: Legal action*
>
> *The law says that we must consider whether it is reasonable for you to pursue legal action to achieve the outcomes you are*

> *seeking ….We may not be able to look at your complaint if you are already pursuing legal action or are planning to take legal action or if we consider that there is a course of legal action open to you that it is reasonable for you to pursue.*
>
> *17. Are you taking, or planning to take, legal action on your complaint? If YES please give details:*
>
> As explained above, I am currently pursuing legal action against the Ombudsman in respect of her refusal to investigate my original complaint. These proceedings involve the Trust as an interested party. These proceedings do not, however, currently relate to the most recent investigation undertaken by the Trust and should not therefore prevent this complaint being investigated." (*emphasis added*)

57. In my view, it is clear from the Claimant's answers to section 5 that, although the events began as long ago as June 2011, she was only making a formal complaint about the Trust's investigation in 2014, which was within the one year time limit. That was why she did not apply for an extension of time to enable her to pursue a complaint about the earlier events as well.

58. It is also clear from the Claimant's answers to section 6 that she was deliberately limiting her complaint to the Trust's 2014 investigation, because of the bar on investigating matters which were the subject of legal proceedings. The earlier events were under challenge, indirectly, in her first judicial review claim, to which the Trust was a party.

59. The final page of the application was signed by Bindmans, indicating that the responses in this form were given with the benefit of legal advice.

60. There followed some correspondence in which the parties were exploring whether or not the first judicial review claim, which was due to be heard shortly, could be settled, in the light of the new complaint. The negotiating position adopted by Bindmans was that, if the Defendant now agreed to investigate the matters raised by the first complaint, as part of the new complaint, then the first judicial review claim might be settled. The Defendant refused to agree to this course.

61. On 29 October 2014, the Defendant wrote to Bindmans agreeing to investigate the new complaint. The Defendant clearly distinguished between the first complaint and the new complaint. The Defendant made it clear that he stood by his decision not to investigate the first complaint. His view was that, although the new complaint was related to the earlier issues of lost documents, it was a separate complaint about the Trust's 2014 investigation. Thus, it was made abundantly clear that the Defendant would not investigate the first complaint, when investigating the new complaint.

62. In their reply dated 30 October 2014, Bindmans argued that the Defendant's approach was mistaken, as he should have investigated the first complaint in any event, and the second complaint was merely further evidence of the original complaint. Bindmans also clarified that, although the Claimant had not requested obtaining missing documents as an outcome which she sought from the investigation, she did expect that

more records would be located in the course of a further investigation, and she expected to be provided with any such records.

63. Capsticks, the Defendant's solicitors, replied to Bindmans' letter on 30 October 2014 explaining the Defendant's procedure for making a decision on the scope of the investigation, after consulting all parties. The letter explained that "the scope of the Ombudsman's investigation is a matter for the Ombudsman's discretion", and the Claimant did not have the right to dictate that the scope of the investigation be agreed by her, as Bindmans had suggested in its letter of 30 October 2014 to Capsticks.

64. The Defendant's *Interim Casework Policy and Guidance* provided, at the material time, as follows:

> "**Defining the scope**
>
> 13. The investigator should also define and confirm the scope of the investigation….
>
> 14. It is important that all parties to the investigation are aware of the exact scope of the investigation, once it has been agreed. The investigator should therefore, in all cases, prepare a form of words to describe the scope of the investigation which should be shared in writing, with all parties to the complaint."

65. On 7 November 2014, the Defendant wrote to the Claimant setting out the proposed scope of his investigation, and he invited the Claimant's comments. The Trust was written to in similar terms. The letter stated (emphasis added):

> "I am writing to let you know about the scope of the investigation we propose to carry out.
>
> Whilst we have not ruled out investigating any of the matters set out in the complaint form regarding the Trust's 2014 investigation, for ease we have summarised the complaint as follows:
>
> *Mrs Morris complains about the Trust's 2014 investigation into her daughter, Alexis', missing medical records.*
>
> *In summary, Mrs Morris complains that the investigation:*
>
> - *failed to uncover all the missing records;*
> - *failed to explain how documents had gone/or remain missing;*
> - *only identified generic weaknesses in processes, without identifying specific issues which led to documentation going missing;*
> - *and the Trust have failed to offer compensation for the distress caused.*

> *As a result of these failings:*
>
> - *some of Alexis' medical records remain missing;*
>
> - *Mrs Morris has not received an explanation for how this happened;*
>
> - *without knowing how this happened, the Trust have not taken sufficient steps to avoid this happening again; and*
>
> - *the Trust caused distress and inconvenience during an already painful time for Mrs Morris, who has been unable to grieve for her daughter.*
>
> *Mrs Morris is seeking an independent investigation into the adequacy of the Trust's investigation into the loss of Alexis' medical records; compensation for costs incurred (including legal fees) and apologies.*"

66. The Defendant then added:

> "We of course hope that any investigation we carry out into the Trust's handling of their recent investigation resolves Mrs Morris' complaint ultimately. However, I think it is important to say at the outset that, no matter how thorough an investigation we are able to carry out, we may be unable to (for example) pinpoint exactly why or how documents have gone missing." (emphasis added)

67. The passages which I have underlined above repeatedly make it clear that the Defendant intended to conduct an investigation into the Trust's 2014 investigation.

68. Bindmans replied on 12 November 2014 stating:

> "We note that your summary introduces the phrase "the Trust's 2014 investigation". We consider this is unhelpful. The position is that the Trust started investigating Alexis's missing records in 2011. The Trust's investigation did not finish until this year, when the Trust wrote to Mrs Morris telling her that it could do no more. It would be wrong for the Ombudsman to take a blinkered approach to Mrs Morris's complaint by introducing an arbitrary date of 1 January 2014 beyond which she will not look….this imposition of an arbitrary date will render the scope of the investigation wholly inadequate.
>
> As is readily apparent from section 6 of the complaint form, Mrs Morris' complaint concerns all actions and omissions of the Trust in respect of her request for her daughter's medical records

> …leading up to and culminating in the investigation it completed this year."

The author of the letter then made suggested changes to the Defendant's summary of proposed scope which broadened the scope to include matters dating back to September 2011 and removed the references which limited the Defendant's investigation to the Trust's 2014 investigation.

69. In my judgment, Bindmans failed adequately to address those sections of the Claimant's application form which clearly limited the complaint to the Trust's 2014 investigation, in particular section 5 on the one year time limit, and section 6 on legal action. Bindmans disagreed with my view in its response to my draft judgment.

70. On 16 December 2014, the Defendant wrote to the Claimant stating:

> "I have reviewed the detailed comments you have made through your representatives about the proposed wording of the scope of our investigation. I should first explain that the scope is intended as a summary of the complaint we will investigate. It is not intended to detail every issue complained about.
>
> With regard to your concerns about the scope of our investigation being confined to the Trust's 2014 investigation, I can reassure you …that we have not ruled out any consideration of events prior to January 2014, as these form part of the background to the complaint. We will be considering the background to the Trust's 2014 investigation as part of the context to the events complained about." *(emphasis added)*

71. I interpose there to observe that the Defendant was clearly reiterating its intention to treat events prior to the Trust's 2014 investigation as part of the background to the complaint, but not part of the subject-matter of the complaint.

72. The letter continued as follows (without the paragraph numbering which I have added for ease of reference):

> "Following your comments and the comments we have received from the Trust, we have therefore decided on the scope as follows:
>
> *(1) Mrs Morris has had a longstanding correspondence with the Trust about her daughter, Alexis', medical records. Mrs Morris first requested Alexis' records in July 2011, shortly after Alexis' death in June 2011. The records the Trust provided were incomplete and this prompted Mrs Morris to complain to the Trust in October 2011, Following a complaint to PHSO and further correspondence with the Trust, Mrs Morris was supplied with further documents by the Trust in 2013 but these did not comprise all the missing records. In 2014, the Trust carried out a further detailed review of the steps taken to locate Alexis'*

records. The Trust provided Mrs Morris with the results of their investigation in September 2014.

(2) Mrs Morris complains that the Trust's 2014 investigation into Alexis' missing medical records has not resolved her concerns.

(3) In summary, Mrs Morris complains that the Trust:

- *failed to provide all the records requested, with a significant proportion remaining missing, including records which Mrs Morris regards as being of particular importance;*
- *failed to explain or independently verify how such records had gone/remain missing;*
- *only identified generic weaknesses in processes, without identifying specific issues which led to documentation going missing, including in respect of their document destruction policy; and*
- *the Trust failed to offer compensation for the distress caused or to reimburse Mrs Morris for the costs involved*

(4) As a result of these failings:

- *Some of Alexis' medical records remain missing;*
- *Mrs Morris has not received an explanation for how the records could have been lost;*
- *without determining how this happened, the Trust have not taken sufficient steps to avoid this happening again; and*
- *the Trust cause distress and inconvenience during an already painful time for Mrs Morris, who has been unable to grieve for her daughter.*

(5) Mrs Morris is seeking: an independent investigation into the adequacy of the Trust's investigation into the loss of Alexis' medical records; compensation for costs incurred (including legal fees); recommendations for improvement in respect of the Trust's record-management practices; and apologies."

73. I accept Mr Buley's submission that, in the italicised section of this letter, paragraph 1 set out the history leading to the 2014 investigation, and, as the Defendant explained in the preceding paragraph, it was to be taken into account as part of the background and context. It was not the subject-matter of the investigation; in my view, any such interpretation was inconsistent with the rest of this letter and the Defendant's other

letters. In the light of the correspondence from Bindmans, it seems to me likely that the Defendant added this paragraph into the section of the letter, which set out the scope of the investigation so as to reassure the Claimant that the background to the 2014 investigation would be taken into account.

74. The subject-matter of the investigation was shortly summarised in paragraph 2 of the italicised section: "*Mrs Morris complains that the Trust's 2014 investigation into Alexis' missing medical records has not resolved her concerns.*" In my view, the plain meaning of this sentence was that the 2014 investigation had not resolved the Claimant's earlier concerns.

75. On my reading, the third paragraph of the italicised section then set out the ways in which the Claimant complained that the Trust's 2014 investigation was inadequate. It leads on directly from the references to the Trust's 2014 investigation in the preceding two paragraphs. The text was clearly based upon the four bullet points in the Defendant's letter of 7 November 2014, which were expressly said to be a summary of Mrs Morris' complaints about the 2014 investigation.

76. The fifth paragraph of the italicised section concluded by confirming that the Claimant was seeking "an independent investigation into the adequacy of the Trust's investigation". In my view, that was a further reference to the Trust's 2014 investigation.

77. In conclusion, in the letter of 16 December 2014 the Defendant set out the scope of the investigation which he had decided upon, in the exercise of his discretion. It is reasonable to infer that he had regard to the Claimant's representations from the content of the letter, and the changes made to the earlier draft. However, the Defendant's position was unchanged on the central issue. The issue identified as suitable for investigation was whether the Trust was guilty of maladministration in the 2014 investigation. It is clear that the Defendant did not accept Bindmans' proposal that the scope should be broadened so as to include all matters from the date of the Claimant's first request for records in 2011. However, the Defendant appreciated that, since the 2014 investigation was itself concerned with those earlier events, the history prior to 2014 would be relevant to the investigation. The Defendant sought to reassure the Claimant that the earlier events would be taken into account, as part of the background and context.

78. The Defendant did not amend the scope of the investigation at any later date. The procedure set out in the Defendant's *Interim Casework Policy and Guidance* would have required him to notify all parties and circulate the text of any proposed amendment, for comment, and then to issue a revised statement of the scope. There is no evidence that this was ever done.

Events after the letter of 16 December 2014

79. The Claimant submitted that everything that was said and done subsequent to the letter of 16 December 2014 and prior to the appointment of the fourth investigator and the production of the draft report, was consistent with her understanding that the scope of the investigation was not limited to the Trust's 2014 investigation.

80. In my judgment, the evidence did not support the Claimant's submission.

81. The first investigator allocated to the Claimant's complaint was Ms Catherine Orr. On 30 January 2015, the Claimant spoke to her on the telephone. Ms Orr identified two particular elements in the complaint: the first was the adequacy of the 2014 investigation, the second was the Claimant's outstanding concern as to how the records went missing. Ms Orr advised that she might not be able to provide an explanation as to how the records went missing.

82. On 2 April 2015, Ms Orr sent an updating letter to the Claimant stating:

> "I should add that we have not as a result of our discussion made any further amendments to the scope of our investigation; this remains as it was set out in my colleague's…letter to you of 16 December."

83. In May 2015, when Ms Orr went on maternity leave, the second investigator, Mr Gwyn Richards was appointed. On 15 June 2015, Mr Richards spoke to the Claimant and said that his aim was to follow Ms Orr's plan. The Claimant recorded the conversation as follows:

> "IM: Ok when I spoke to Catherine they hadn't agreed a scope of the investigation because she was going to have a meeting with her managers, are you able to tell me what the scope is now, given that you have already started?
>
> GR: When was that? Because as I say I am new to the case so I may have misunderstood this but there is a scope set out in a letter of the 16th December 2014 to you, are you saying that that was supposed to be subject to further refinement?"
>
> IM: Yep."

84. On 15 June 2015, Mr Richards wrote to Mrs Morris that "You mentioned that Catherine Orr had spoken to you about possible changes to the scope of our investigation. I have looked through the papers and have found that Catherine wrote to you (via Bindmans) on 2 April to say that the scope would remain as it was set out in the letter of 16 December 2014". The Claimant did not challenge this.

85. In my view, these exchanges between the Claimant on the one hand, and Ms Orr and Mr Richards on the other, demonstrate that the Defendant's investigators were working within the scope identified in the letter of 16 December 2014, and it was the Claimant who was attempting to persuade them to extend the scope.

86. There were numerous occasions when the Defendant's investigators considered whether and to what extent it was possible to identify the missing records, and what had happened to them. I consider that this was part of a genuine effort on the part of the investigators to address the Claimant's concerns. In my view, this was a legitimate aspect of the investigation into the adequacy of the Trust's 2014 investigation into the missing records, and it did not signify a departure from the scope as set out in the letter of 16 December 2014.

87. Although I have had careful regard to the totality of the evidence, it is not appropriate to set it out fully in this judgment, because of its volume. In order to deal with the issues proportionately, I have set out some of the key evidence below.

88. In October 2015, Mr Richards met with Ms Emily Overton, an expert on NHS data management. She advised him on the approach which the Trust should have adopted in its 2014 investigation, as a matter of good practice i.e. to investigate whether the records sought by the Claimant ever existed, and if so, to find out what happened to them. Mr Richards' note stated:

> "…..my current thinking is to write a brief report describing what should have happened and whether the Trust did this. I expect this will show that the Trust's review was not thorough enough. Broadly, it should be possible to tell from their files whether each specific record Mrs Morris wants exists and, if not: where it should be …..If we uphold the complaint we could recommend that the Trust put that right by explaining the situation for each record.
>
> EO said she thought this approach would work. ……we could not provide a direct answer to the first part of the scope by doing this: we could not say definitely whether the Trust 'failed to provide all the records requested'. For the moment they have not accepted that they failed to provide all records. Instead their position is that they cannot say if the records once existed; they know only that the records do not exist now. Essentially we would be saying that that's not good enough.
>
> I explained that I would pitch this proposal to my manager … The alternative seems to be searching through all 27,000 sheets of records with no guarantee that we'd reach a definitive answer."

89. Mr Richards' reference to the "first part of the scope" was to the first bullet point in paragraph 3 of the italicised section which began with the words "*failed to provide all the records requested* …". It demonstrates that he had the scope of the investigation well in mind.

90. On 12 November 2015, the Claimant had a telephone conversation with Mr Russell Barr, the Defendant's Director of Investigations, who was taking over the management of her complaint. He told her that he had looked at the scope of the investigation that had been set and agreed, and he wanted to discuss with her what she was hoping to achieve from the case. The Claimant explained to him why she considered that the absence of the records had not been satisfactorily explained or tackled by the Trust. Mr Barr said he was going to speak to the records manager concerning the problems with records management, and what had happened to the records in this case. However, he doubted that any further documents would be found after four years. It is apparent from the transcript that the Claimant was expressing her views to Mr Barr, which he listened to sympathetically, but he did not indicate any intention of departing from the scope of the investigation as set in December 2014.

91. Mr Michael Laverick and Mr Keith Burns were two new investigators, working under the supervision of Mr Barr, who took on the Claimant's complaint in November 2013. Mr Laverick was the Claimant's point of contact and he was referred to as the third investigator by the Claimant.

92. In 2016, Mr Steve Harland took over as senior investigator in the Claimant's case, after Mr Barr left the Defendant's employment. The Claimant referred to him as the fourth investigator. On 17 October 2016, he sent an email to the Trust asking for copies of correspondence which it sent to the Claimant in 2013, which had been referred to by the Claimant, but not included in the papers sent by the Trust. I do not agree with the Claimant's submission that the request for documents from 2013 demonstrated that the scope of the investigation was not limited to the Trust's 2014 investigation. The Defendant had agreed that it would take into account evidence which pre-dated the Trust's 2014 investigation, as part of the history and background.

93. In February 2016, Mr Laverick prepared a draft of the Claimant's statement of complaint for her consideration. The proposed changes by Bindmans, which expanded upon the history of her request, were incorporated into her statement by Mr Laverick. I do not agree with the Claimant's submission that, by so doing, Mr Laverick impliedly accepted that the scope of the Defendant's investigation went beyond the Trust's 2014 investigation. The Defendant had made it clear that events prior to the Trust's 2014 investigation were relevant, as part of the background and context to the 2014 investigation.

94. Unlike Mr Richards, Mr Laverick and his co-investigators decided to review the 27,000 documents which had been disclosed by the Trust. He then liaised with the Claimant to identify further questions to pose to the Trust. Mr Laverick noted:

> "All of these enquiries are administrative questions for the trust …. We have gathered enough evidence to prove the concept that there are potential failings in each of these areas and have a case to put to the trust."

95. I do not consider that the different approach taken by Mr Laverick, working under the supervision of Mr Barr, which included consideration of documents which pre-dated the Trust's 2014 investigation, demonstrated that the scope of the Defendant's investigation had widened. Throughout, the purpose of the exercise was to assess whether the Trust met the required standards of good administration when conducting its 2014 investigation, by considering the material available to the Trust, and the steps it took to investigate the missing records.

96. On 31 March 2017, the Claimant and Mr Laverick spoke on the telephone. Mr Laverick's record of that conversation was as follows:

> "I explained that I wanted to make sure that she understood the scope of our enquiry. I referred her to the meeting she had with the Trust in 2014, and that our report would concentrate on what the Trust agreed to do for her at that time. She said she understood. I also mentioned in general terms the letter we sent to the Trust in July 2016, our meeting with the Trust in November 2016, and the Trust's response to questions raised in

> that meeting. She understood that whilst these events formed part of our enquiry, our response would be concentrated on the original agreed scope.
>
> …..
>
> Broadly speaking, IM appears to remain content with our enquiries and has not complained about what we are doing. I believe she understands what is happening and is aware that we are now very unlikely to recover any new documents…"

97. Mr Laverick's note of the conversation indicates that he was well aware of the scope of the investigation throughout, and he made that clear to the Claimant. In the litigation the Claimant said that this note was not consistent with her recollection of the call. However, it appeared authentic and it was the best evidence of the conversation.

98. On 12 July 2017, Mr Harland sent the Claimant a draft of his report. Under the heading "Summary", the Defendant set out a summary of the complaint under investigation in terms which mirrored the December 2014 decision on the scope of the investigation. The provisional decision, in paragraph 7, was to uphold the complaint, holding that the conduct of the 2014 investigation "fell so far below the applicable standard that it amounted to maladministration".

99. The Defendant sought the Claimant's views, amongst other things, on whether she thought the Defendant had not taken the right steps to fairly investigate her complaint.

100. Bindmans responded in a letter dated 21 September 2017. At paragraph 1.3, the Claimant's concerns were said to be that the Defendant had not gone far enough in investigating the Trust, "including by not pursuing lines of enquiry that the Ombudsman identified as necessary at earlier stages of the Investigation, and by presenting exculpatory statements of the Trust … without including the full context …".

101. I agree with Mr Buley's submission that, in the light of the claim of legitimate expectation now advanced by the Claimant, it is striking that Bindmans' letter does not contain any complaint that, by limiting the scope of the investigation to the adequacy of the Trust's 2014 investigation, the Defendant had departed from earlier representations made to the Claimant in breach of her legitimate expectation.

102. The Defendant's letter of 16 November 2017, accompanying the final report, responded to the criticisms made by Bindmans, as follows:

> "…many areas of our casework require us to use our discretion and judgement and will depend on the specific circumstances of the case. In this instance, we agreed (as set out in our letter to Bindmans LLP dated 16 December 2014 and summarised in paragraphs 2 to 6 of the report) to investigate your complaint that the Trust's 2014 investigation into your daughter's missing medical records had not resolved your concerns.
>
> How we approach an investigation is a matter for us to decide, and on this occasion we decided that an proportionate approach

> would be to consider whether the Trust had done what it said it was going to do when its staff met you in June 2014, as we explain in paragraph 70 of the report. Our approach included taking advice from an accredited professional with NHS records management experience about what would have been good practice for a search for missing records in these circumstances and comparing this to what actually happened. But it did not include our own searches for missing records or asking the Trust to conduct further searches for missing records.
>
> That said, we can see that your expectations for our investigation are likely to have been raised by the discussions you had with colleagues, and we apologise for the disappointment this has so obviously caused. At the time our colleagues were trying out different methods of working, and looking back at some of their activities it does appear that in trialling these different methods they may have lost sight of the matters we had agreed to investigate. In the end, we did not adopt these different ways of working and this is why the 'Decision Log' your solicitors mention for example end in July 2016.
>
> Elsewhere, much of the commentary about our report in your solicitors' letter concerns events before your meeting with the Trust's staff in June 2014 and the Trust's subsequent investigation. And therefore it does not relate to the matters we have investigated. On this point, we acknowledge that our report does include some information about events prior to June 2014 (in paragraphs 2,9 to 17, and 60 to 65) but we only added sufficient information about earlier events into our report to put the Trust's 2014 investigation and your complaint into context (as paragraph 59 in the report, for example, explains).
>
> ….."

Conclusion

103. My conclusion, based on the evidence, is that the Defendant did not make the representations as to the scope of its investigation, for which the Claimant contends, whether by its statements or its conduct. Therefore, no legitimate expectation ever came into existence. There was no unfairness. In reaching this conclusion, I have given careful consideration to the Defendant's concession in the letter of 16 November 2017 that the working methods adopted by some of the investigators may have raised the Claimant's expectations. However, it is clear from the evidence that the Defendant limited the scope of the investigation to the question whether the Trust's 2014 investigation amounted to maladministration. The Defendant considered events prior to the 2014 investigation because they were part of the background and context to the Trust's 2014 investigation. Therefore, the Defendant was not required to make separate findings on the pre-2014 events in his report.

104. The Defendant had a broad discretion under section 3(1) of the 1993 Act to decide which complaints to investigate. Bearing in mind the time which had elapsed, the one year time limit, and the reasons why the Defendant had refused to investigate the Claimant's first complaint, I consider that the Defendant's decision to limit the scope of the investigation was a lawful exercise of discretion. It cannot be characterised as perverse, or based on erroneous reasoning. The correspondence shows that the Defendant, when reaching his decision on scope, gave careful consideration to all relevant matters, including the points raised by the Claimant and her solicitor.

105. For these reasons, Ground 1 does not succeed.

Ground 2

106. The Claimant submitted that the Defendant's failure to require or request the Trust to carry out further searches and/or to answer the key questions that were recommended by the Defendant's own expert, and agreed to by the Defendant, was unfair and irrational, and that the Defendant thereby acted in breach of the Claimant's legitimate expectation and failed to take into account relevant considerations.

107. The expert referred to was Ms Emily Overton, an accredited professional with extensive public sector records management experience, including in the NHS.

108. Ms Overton's advice was summarised in Annex D to the report, which stated:

> "Annex D
>
> Records management advice
>
> The Adviser
>
> D1. At the outset, the Adviser acknowledged that the Trust's 2014 review would not have been a statutory one, or one carried out under a prescribed process. So she told us there would be no specific procedures to apply. However, she said that the Trust had taken it upon itself to do a thorough review to identify any outstanding records. She said it was not the Trust's first attempt at searching for records and therefore we would be justified in holding it to a higher standard than we might for a first attempt at searching for records.
>
> D2. The Adviser told us that she had considered what would be good practice for a search for missing records under these circumstances. And she would have expected the Trust to address each specific record that Mrs Morris believed was missing and state:
>
> a. whether it accept that the record ever existed (and, if not, why not);

> b. if it ever existed, where it would expect the record to be now (and, if it has been destroyed, where, why, when and by whom was it destroyed);
>
> c. if it should still exist, what it had done to search for it (who searched, what physical areas and electronic databases were looked in, and when it did that);
>
> d. if the record remains missing despite the search, an explanation of why it thinks the record remains missing (examples, might include older, less robust records management systems, or corrupted electronic files).
>
> Statements of Truth
>
> D3. The Adviser then went on to consider the Statements of Truth from the general managers of the directorates in which Alexis was treated, set out in the report the Trust's solicitors sent to Mrs Morris' solicitors in September 2014 (paragraph 19) and in Annex B of this report."

109. The investigator, Mr Richards, met Ms Overton in October 2015, and made a full attendance note. Mr Richards explained:

> "….I asked EO (Emily Overton) how she would have expected such a review to be carried out. I explained that we need to establish what should have happened so that we can compare that to what actually happened. I noted that we did not apply a 'gold standard': we look for good practice not best practice. However, we did note that, in this case, the Trust had taken it upon itself to do a thorough review to identify any outstanding records. That is, it was not the Trust's first attempt at searching for records, and therefore we are justified in holding it to a higher standard than we might for a first attempt at searching.
>
> We discussed this for some time, and the following summary describes what EO would view as good practice for a search for missing records under these circumstances:
>
> > EO would expect that in this case to address Mrs Morris' issues the Trust should address each specific record that Mrs Morris believes is missing and state:
> >
> > 1. whether they accept that the record ever existed (and, if not, why not);
> > 2. if it ever existed, where they would expect the record to be now (and, if it has been destroyed, where, why, when and by whom);
> > 3. if it should still exist, what they have done to search for it: who searched, what physical areas and electronic databases they looked in, and when they did that;

> 4. if the record remains missing despite the search, an explanation of why they think it remains missing (examples might include older, less robust records management systems, or corrupted electronic files)."

110. It is clear from Annex D, confirmed by Mr Richards' note, that Ms Overton was giving her opinion on the approach which the Trust should have adopted during the 2014 investigation, as a matter of good practice. These were the four questions which the Trust should have asked itself, in accordance with good practice. As Mr Richards explained, the purpose of this was to establish a benchmark against which the Trust's conduct of the investigation could be measured.

111. The Claimant's case on legitimate expectation was that the Defendant represented to her that he would require the Trust to address the four questions identified by Ms Overton, and related matters on record-keeping. In my judgment, that was a mischaracterisation of the evidence. Ms Overton was not telling the Defendant how to conduct his investigation – that was not her role. Whilst the Defendant valued her advice and acted upon it, the manner in which the Defendant conducted the investigation was always a matter for his own discretion and judgment. The Defendant worked collaboratively with the Claimant, and kept her informed as to the different strategies and approaches he was adopting in his investigation. In my view, the Defendant's ongoing dialogue and consultation with the Claimant did not amount to the making of representations which were "clear, unambiguous and devoid of relevant qualification" and thus capable of forming the basis of a legitimate expectation. Despite the Claimant's strong views, the Defendant maintained control of the investigation, in particular, retaining the flexibility to change approach, when in his judgment, circumstances merited it.

112. The Claimant alleged that the Defendant's investigation was unfair, irrational, and failed to take into account relevant considerations. However, in my view, the evidence showed that the Defendant made extensive efforts to investigate the Trust's management of its records, utilising Ms Overton's advice, and working collaboratively with the Claimant. In my judgment, the evidence does not support the Claimant's allegations and criticisms of the Defendant's work, under ground 2.

113. Mr Richards' attendance note of the October 2015 meeting with Ms Overton set out the advice received on records, as follows:

> "We discussed Mrs Morris' views on electronic records. EO stated that the definition in which Mrs Morris' discusses electronic records appears to be talking about audit records. EO discussed that Mrs Morris is talking about records in which you can tell who has been in the record, when, why and what they did whilst in it. The retention period for this record is to keep it until NHS England inform you otherwise; however, this is only if the audit function was switched on in the first place. The audit function slows down a system, especially if the systems are old. Retention periods are based on keeping what you create: if you don't create it then you can't be held to account for it. However, one of the requirements of the Information Governance Toolkit is to have an auditable system.

> EO advised that at no point should the master of any of these records have been destroyed/deleted, as they had not reached a retention period in which they would be ready for review. So if the audit function were available, then you would be able to see every action on Alexis' record.
>
> EO discussed that if the audit function as switched on everything within an EPR could be audited. However, other electronic records such as emails and documents held on individuals drives or shared drives have no audit function to show their appropriate metadata. You are relying on members of staff searching electronic drives appropriately for anything saved locally. If anything was deleted from these drives, they would go to the recycling bin and then on to a backup server which would be typically kept for 6 months. The Trust would likely have to do a full system backup during those 6 months to bring any records deleted back. Therefore, in this case, it is too late. Ideally anything that was created about Alexis should have been placed on the EPR.
>
> EO said that some notes are typically kept elsewhere than the EPR. MDT notes are one example, kept elsewhere because they contain information about several patients. The Trust might have been able to cross-reference and look at all of the MDT notes for each year, searching for Alexis' name, and confirm what they found. The Trust should also be able to interrogate their EPR to see if any of Alexis' records have been deleted."

114. Although Mr Richards said in his attendance note that he did not intend to review all the documents individually (see the quotation in paragraph 88 above), there was a change of strategy when new investigators were appointed. On 7 December 2015, Mr Laverick met the Claimant and his attendance note stated:

> "We discussed what we hoped to achieve, which was to recover any outstanding documents. Should that not be the case then we agreed that the main theme would mirror the suggestions provided by EO as follows:"
>
> [Ms Overtons's four questions were then set out].
>
> "It was suggested that in the greater scheme of things the scope should also seek to determine whether the enquiries by the Trust were appropriate, and if not, what recommendations can be made to ensure a similar occurrence could not occur."

115. By April 2016, Mr Laverick had completed the review of the 27,000 documents disclosed by the Trust. Some of the documents that the Claimant had said were missing were in that disclosure.

116. At a meeting in May 2016 between the Defendant, the Claimant and her solicitor, the categories of potentially missing documents were narrowed, and outstanding issues identified. The attendance note recorded that:

> "All of these enquiries are administrative questions for the trust and having discussed the case with the complainant and assessed the most proportionate approach we can deal with this via correspondence with the trust as opposed to conducting interviews. We have gathered enough evidence to prove the concept that there are potential failings in each of these areas and have a case to put to the trust…."

117. On 6 July 2016, Mr Laverick met with the Claimant to discuss the terms of a draft letter to the Trust containing questions regarding the outstanding gaps. The Defendant's attendance note recorded that:

> "We have agreed that there is no point in bombarding the Trust with dozens of questions, especially where we cannot provide corroborative evidence or give any indication of when an event took place. This will only confuse the issue. The questions agreed are sufficient to prove the concept to the Trust that documents are missing. We seek an explanation from the Trust why they were not identified and disclosed."

118. On 27 July 2016, the Defendant wrote to the Trust asking about each of the potential gaps that had now been identified. The letter expressly asked the Trust to provide each answer by reference to the four questions posed by Ms Overton.

119. The Trust did not reply immediately to the letter and so, on 24 November 2016, the Defendant met with the Trust to discuss it. Mr Harland produced an attendance note of the meeting. The Trust said that it had spent considerable time and effort trying to locate the missing records, and that there were no more records to find. The Defendant pressed the Trust on various points, and the Trust did agree to make further enquiries about specific records. In an email dated 23 January 2017, Mr Laverick told the Claimant that the Defendant had received the Trust's written response in January. The Trust had responded to the questions and included twenty attachments, but oncology files were still missing. The Claimant and Mr Laverick corresponded further about the outstanding documents between 24 and 26 January 2017.

120. On 27 March 2017, the Defendant posed some further questions to the Trust, again with the aim of identifying any missing documents or what had happened to them. The Trust responded with specific information by letter dated 26 April 2017.

121. On 31 March 2017, Mr Laverick spoke to the Claimant on the telephone (see paragraphs 96 and 97 above).

122. On 31 March 2017, the Claimant wrote to her solicitor confirming her understanding that the Defendant was "still hitting a blank wall" with the Trust.

123. On 12 July 2017, the Defendant sent the Claimant a draft of his report, which upheld the complaint of maladministration. The draft report set out a detailed account of the

complaint, the investigation, the advice given by Ms Overton, and the Trust's responses. It made findings in respect of the Trust's failure to follow good practice, as advocated by Ms Overton, in its investigation, stating:

> "108. However, while we recognise that the scale of this search would not have made it easy to undertake we find that the Trust did not complete its investigations and set out its findings in a well-ordered way. It was very difficult for us, and no doubt Mrs Morris, to match up the investigation report and disk containing the newly found records the Trust produced in 2014, with what it had agreed when it met Mrs Morris in June 2014 and her list of missing records ….Crucially, the Trust omitted to address the important questions about each missing record good practice said it should have done (paragraph 74). And it did not keep to the commitments it had given to Mrs Morris when it met her, as our Principles of Good Administration said it should have done (paragraph 80). In the vast majority of instances, it did not offer any explanation for why records Mrs Morris believed were missing could not be found. Furthermore, although the Trust's investigation report claimed to provide a response to all Mrs Morris' issues, we find that some of her key points (paragraphs 86, 87, 88 and 89) remained unanswered or were responded to in an unhelpful way."

124. Bindmans submitted representations on behalf of the Claimant, by letter dated 21 September 2017, stating that the Defendant had not gone far enough in investigating the Trust, and that he had not pursued lines of enquiry which he had identified as necessary at earlier stages of the Investigation.

125. The Defendant's letter of 16 November 2017, which accompanied the final report, responded to Bindmans' representations as follows:

> "How we approach an investigation is a matter for us to decide, and on this occasion we decided that an proportionate approach would be to consider whether the Trust had done what it said it was going to do when its staff met you in June 2014, as we explain in paragraph 70 of the report. Our approach included taking advice from an accredited professional with NHS records management experience about what would have been good practice for a search for missing records in these circumstances and comparing this to what actually happened. But it did not include our own searches for missing records or asking the Trust to conduct further searches for missing records.
>
> That said, we can see that your expectations for our investigation are likely to have been raised by the discussions you had with colleagues, and we apologise for the disappointment this has so obviously caused. At the time our colleagues were trying out different methods of working, and looking back at some of their activities it does appear that in trialling these different methods they may have lost sight of the matters we had agreed to

> investigate. In the end, we did not adopt these different ways of working and this is why the 'Decision Log' your solicitors mention for example end in July 2016."

126. The final report closely followed the draft version, including the conclusions on the failings in the Trust's investigation (paragraph 108 of the draft and final reports).

127. At paragraph 122, the Defendant expressly addressed whether or not he should recommend that the Trust carry out further searches for the medical records, "but we decided that this would be unlikely to uncover any new records and would be disproportionate given the number of searches that have already been done and the time that has elapsed". In my judgment, the Defendant was entitled to reach this conclusion, in the lawful exercise of his wide discretion, particularly in the light of the long history.

128. Subsequently, in the light of the Claimant's allegation of legitimate expectation, the Defendant wrote to the Trust, and met with it on 27 April 2018, in order to obtain the Trust's views. The Trust responded by letter dated 4 May 2018 saying that it had been unable to find any further records, could not therefore confirm whether they had ever existed or not, was being asked to prove a negative, and therefore could not answer the expert's four questions. It did not know what Mrs Morris meant by "audit records" or by "proper interrogation" of the Electronic Patient Record – there were over 50 electronic recording systems in place at the Trust at the relevant time. As to the authors of the statement of truth, four were no longer employed by the Trust and one worked elsewhere, so even at best any interviewing exercise could only be a partial one. In any event, those interviewed would be likely to have limited additional recollection of matters, so long after the events in question. The Trust was not confident that any further searches would reveal any additional documents.

129. The Defendant wrote to Bindmans on 17 May 2018, enclosing the letter from the Trust, setting out its view as follows:

> "We recognise these challenges and have no reason to challenge that response. We recognise that staff have moved, and that those staff who remain may now struggle to remember activity that took place several years ago. We also recognise that there is no agreement between the Trust and your client about the extent to which there are missing records, and this poses its own practical difficulties if we were to consider going back to our advisor on these matters. Your client asserts that about 20% of the records are missing; the Trust assert 5%. We consider it would be an impossible task to identify - as we have stated in our 2017 Report – which records were created and are missing from records that were never created when they should have been.
>
> On that basis, the Ombudsman declines to offer a further investigation that would be capable of meeting your client's claimed legitimate expectations….."

130. As I have found that that no legitimate expectation arose, the Defendant's decision of 17 May 2018 declining to offer a further investigation does not affect the outcome of the claim. Obviously it post-dates the report which is the subject matter of this claim.

131. In my judgment, the Claimant has failed to establish the alleged unlawfulness in the Defendant's approach to the investigation, for the reasons set out above, and so Ground 2 does not succeed.

Ground 3

132. The Claimant submitted that the Defendant's refusal to recommend that the Trust should meet her legal costs was unreasonable and failed to take into account relevant considerations. It was based on a misunderstanding or misapplication of the Defendant's policy and/or an unlawful fettering of the Defendant's discretion. Although the Claimant did not request payment of her legal costs from the Defendant, in her claim for judicial review she challenged the Defendant's failure to consider this option.

Statutory provisions

133. The 1993 Act empowers the Defendant to conduct an investigation (section 3) and to issue a report of the results of the investigation (section 14). Although there is no express statutory power to recommend remedies for maladministration and injustice in his reports, it is common ground that he may lawfully do so.

134. Section 11 of the 1993 Act (see paragraph 26 above) makes provision for the procedure to be followed in respect of investigations. Subsection (4) confers on the Defendant a discretionary power to pay to the complainant, and to "any other person who attends or supplies information for the purposes of an investigation", "sums in respect of expenses properly incurred by them" and "allowances by way of compensation for the loss of their time". The clear meaning of this provision is to reimburse the complainant, witnesses and experts for expenses incurred, and to compensate them for loss of time. A complainant's "expenses" could in principle include legal costs, though I would have expected subsection (3) or (4) to make express reference to the payment of legal costs, if that had been Parliament's intention.

135. There is no express statutory provision for the payment of legal costs by a health service body to a successful complainant.

Defendant's policy and guidance

136. The Defendant's published guidance called 'Principles for Remedy' sets out in the Introduction the Defendant's "views on the Principles that should guide how public bodies provide remedies for injustice or hardship resulting from their maladministration or poor service" and explains that "our underlying principle is to ensure that the public body restores the complainant to the position they would have been in if the maladministration or poor service had not occurred. If that is not possible, the public body should compensate them appropriately".

137. The guidance sets out principles of good practice with regard to remedies, which include "considering all relevant factors when deciding the appropriate remedy, ensuring fairness for the complainant" (principle 1) and "acting fairly and proportionately" (principle 4).

138. Principle 5 provides:

> "Putting things right.
>
> Where maladministration or poor service has led to injustice or hardship, public bodies should try to offer a remedy that returns the complainant to the position they would have been in otherwise. If that is not possible, the remedy should compensate them appropriately…..
>
> There are no automatic or routine remedies for injustice or hardship resulting from maladministration or poor service. Remedies may be financial or non-financial.
>
> An appropriate range of remedies will include:
>
> an apology, explanation, and acknowledgment of responsibility
>
> remedial action …..
>
> financial compensation for direct or indirect financial loss, loss of opportunity, inconvenience, distress ….
>
> …..
>
> Remedies may need to take account of injustice or hardship that results from pursuing the complaint as well as the original dispute. Financial compensation may be appropriate for:
>
> costs that the complainant incurred in pursuing the complaint
>
> any inconvenience, distress or both that resulted from poor complaint handling by the public body
>
> ……"

139. The Defendant's 'Interim Casework Policy and Guidance' (version 8 dated 7/5/14), considers remedies at paragraphs 40 to 49. Paragraph 44 addresses 'Remedy for the individual and those similarly affected' as follows:

> "Our general approach to remedy is that we seek to place people back in the position they would have been in had the maladministration or poor service not occurred. If we make a finding of maladministration then we should consider unremedied injustice (if any) the complainant has suffered. This could include:
>
> - loss through actual costs incurred, for example care fees, private healthcare, loss of benefits, etc;
>
> - other financial loss, for example loss of a financial or physical asset (for example, loss or damage to

possessions), reduction in an asset's value, loss of financial opportunity, etc;

- being denied an opportunity …
- inconvenience and distress as a result of failures in service provision …"

140. Paragraph 45 gives examples of the 'Types of remedy' which may be appropriate, such as apologies, remedial action and financial compensation. Specific considerations in respect of financial remedy are considered in paragraph 48, including the following considerations:

> "• Both the final amount that is paid and the way that amount is calculated should be proportionate to the injustice resulting from the maladministration.
>
> • …..
>
> • Financial compensation may be appropriate, additionally, for injustice or hardship deriving from the pursuit of the complaint (as well as the original dispute). For example, costs in pursuing the complaint or additional inconvenience or distress caused."

141. The Defendant's 'Service Model Policy and Guidance' (version 8.0 date 1/8/2017) reiterates, at paragraphs 7.28 to 7.41, much of the guidance in the Interim Casework Policy and Guidance. Material extracts are as follows:

> "Remedy for the individual and those similarly affected
>
> 7.35 We use the Principles for Remedy to determine our approach to securing remedy. The remedy should be appropriate and proportionate to the injustice sustained. Where an injustice is unremedied, our general approach is that we seek to put people back in the position they would have been in had the maladministration or poor service not occurred **(Policy requirement)**.
>
> 7.36 We should have regard to the outcome the complainant …. is seeking when determining the remedy…..
>
> 7.37 In cases where the injustice cannot be put right, compensation may be appropriate. Most often this is where we recommend payments related to personal impact such as distress, frustration, pain and inconvenience …….
>
> 7.38 The types of remedy that we might seek to obtain will be tailored to the individual circumstances of the case (while taking account of similar cases). Appropriate remedies can include:

- "Apologies, explanations or acknowledging responsibility …..
- Remedial action such as reviewing or changing a decision.
- Revising published material or revising procedures to prevent a recurrence.
- Financial compensation.

7.39 We should remember that it is for us to determine whether a remedy offered or proposed is appropriate.

Specific considerations in respect of financial remedy

7.40 When thinking about making recommendations for financial remedy, we should consider each individual case on its merits. The Typology of injustice contains a searchable database on a range of upheld or partly upheld investigations. This is intended to help caseworkers identify relevant precedent cases when thinking about recommendations for financial redress …..

7.41 Below are some points to think about when looking at questions of financial remedy:

- Both the final amount that is paid and the way that amount is calculated should be proportionate to the injustice resulting from the maladministration.
- …..
- When considering the level of financial redress, we should also consider factors such as the impact on the complainant (were they particularly vulnerable; was ill-health compounded; and injustice aggravated or prolonged?); the length of time taken to resolve the complaint and the trouble that the individual was put to in pursuing the complaint….
- Financial compensation may be appropriate, additionally, for injustice or hardship deriving from the pursuit of the complaint (as well as the original dispute). For example, costs in pursuing the complaint or additional inconvenience or distress caused."

Conclusions

142. Section 11(4)(a) of the 1993 Act provides that the Defendant may, if he thinks fit, pay a complainant sums in respect of expenses properly incurred by them. This power could perhaps extend to the payment of some or all of a complainant's legal costs, though that is not its primary purpose.

143. Although the Defendant has no express statutory power to make an award for the payment of costs by a health body to a complainant, both parties accepted that Defendant has a discretionary power to make a recommendation for the payment of legal costs by a health service body, in appropriate cases, as part of a remedy for maladministration and injustice.

144. The Defendant's policy and guidance documents summarised above envisage payment of financial compensation as a remedy which may be appropriate. Although there is no express provision for legal costs, all the documents state that financial compensation may include costs incurred in pursuing the complaint. In my view, this may include legal costs.

145. Ms Amanda Harrington, who is employed as Operations Manager by the Defendant, explained, at paragraphs 39 to 48 of her witness statement, the Defendant's general approach to reimbursement of legal costs. The general principles set out in the Defendant's policy and guidance are applied, in particular, that financial remedies should be proportionate and appropriate to the injustice suffered. Since the Defendant's investigation process was specifically designed to be accessible to lay persons, and not for the resolution of legal disputes, lawyers will rarely be required, and so legal costs will not usually be reasonably and proportionately incurred.

146. In my judgment, the Defendant was entitled to adopt this approach to legal costs, which was both rational, and consistent with the broad principles set out in the Defendant's guidance and policy.

147. It is noteworthy that the Commissioner for Local Administration, who exercises very similar functions *vis a vis* local government maladministration as the Defendant exercises *vis a vis* central government and health service bodies, states in his published policy document "Guidance on good practice: Remedies" in relation to the award of legal costs (page 3):

> "In some cases remedial action may include reimbursing the complainant (in full or in part) for actual, quantifiable financial loss which has directly resulted from the fault, for example benefits not paid and any avoidable, reasonable expenses. Professional fees may be included but complainants should not need a professional adviser to complain to us and only exceptionally do we recommend reimbursement of legal costs. …."

148. An issue about the Commissioner's approach to legal costs arose in *R (Adams) v Commission for Local Administration* [2012] PTSR 1172. The Commissioner's approach of awarding costs in exceptional circumstances was fully before the court, albeit its legality was not directly in issue. In rejecting the argument made in that case

(which concerned the power to award costs which would otherwise be met by legal aid), Bean J. rejected any analogy with the approach to costs in court cases and specifically observed that:

> "47. … The ombudsman is not even a tribunal, still less a court, but conducts what Mummery LJ in Maxwell's case described as a more user-friendly and affordable procedure whose procedures should not be judicialised."

149. Of course, each case has to be considered on its own particular facts, and the Defendant did so on this occasion. At paragraph 105 of the report, the Defendant explained why he did not accept the Claimant's complaint that the Trust had not paid her legal fees, saying:

> "105. ….people making complaints do not have to instruct a lawyer to pursue a complaint, either with an NHS organisation or with us, and people do not usually do so. For this reason, we would not expect an NHS organisation to compensate a complainant for legal costs they incur making a complaint unless there are exceptional circumstances. We have looked very carefully at the circumstances of this case, but we have decided that they do not warrant us taking a different view. This is because Mrs Morris did not instruct a lawyer to pursue her complaint with the Trust, she instructed a lawyer when she decided to challenge our decision on her earlier complaint by way of judicial review (paragraph 18). And it was as an interested party to these judicial review proceedings that the Trust agreed to meet Mrs Morris in June 2014 and carry out a further investigation. Therefore the legal costs Mrs Morris incurred did not in our opinion flow directly from failings on the part of the Trust."

150. In the Defendant's covering letter of 16 November 2017, he said as follows:

> "**Legal costs**
>
> In their letter your solicitors argue that the circumstances of your case are exceptional and they ask us to reconsider our position with regard to financial redress for your legal costs.
>
> As we explain in paragraph 105 of the report, we thought very carefully about the circumstances of your case. But we saw no evidence that would lead us to conclude that instructing a solicitor was essential and no grounds for recommending that the Trust should meet your legal costs. We have considered your solicitors' latest comments, but there is nothing they have said that would lead us to change our view. NHS advocacy services, as well as our services are free, and people do not have to instruct a lawyer, and usually do not do so, to pursue a complaint. While we recognise that you do not agree, we consider it was your

> choice to appoint a solicitor and to continue to use a solicitor subsequently.
>
> For the same reason, we do not accept your solicitors' argument that we should repay the adverse costs associated with your unsuccessful judicial review and any legal costs that have arisen while we have investigated your complaint."

151. The Defendant had the benefit of detailed submissions by Bindmans on legal costs, in response to the draft report. On the basis of the Defendant's letter of 16 November 2017, I am satisfied that the Defendant took into account those submissions, together with all other relevant factors. In my judgment, his decision to refuse the Claimant's claim for her legal costs was a lawful exercise of his wide discretion, which did not disclose any error of law. The final paragraph of the letter of 16 November 2017 demonstrated that the Defendant did consider whether he should meet the Claimant's legal costs incurred in the investigation.

152. As a recommendation for payment of legal costs by a health body can only be made as part of a wider remedy for maladministration and injustice, it is appropriate to consider the unsuccessful request for legal costs in the context of the remedies which were recommended by the Defendant. In the report, the Defendant set out his findings of maladministration and injustice (at paragraphs 106 to 117), and then made recommendations for remedies (from paragraphs 118 to 125). In recognition of the injustice suffered by the Claimant, the Defendant recommended that the Trust should write to her with an open and honest acknowledgment of the failings identified in the report and an apology for the impact those failings had upon her. Further, the Defendant recommended that the Trust make a payment of £1,000 to the Claimant by way of a tangible acknowledgment of the impact these failings had upon her. The Defendant also recommended that the Trust should set out in writing the lessons it had learnt from the failings identified, to avoid any repetition of the Claimant's experience, and to provide tangible evidence of the the changes to its records management processes. The Trust's letter was to be sent to the Care Quality Commission and to NHS Improvement, as well as the Claimant, so that they could oversee progress.

153. At paragraph 120, the Defendant explained how he had arrived at an appropriate level of payment, by reference to other similar complaints. The recommendation in this case was at a higher level than the comparable complaints because this was the Trust's third attempt at searching for the records, and therefore the Claimant's expectations were high, and the disappointment and distress all the greater.

154. The Trust complied with the Defendant's recommendations, but the Claimant returned its cheque for £1,000.

155. In my judgment, when considered as a whole, the Defendant's recommendations for remedies in the Claimant's case duly applied the relevant policy and guidance, and they were a rational and proportionate exercise of the Defendant's wide discretion.

156. For the reasons set out above, Ground 3 does not succeed.

Ground 4

157. The Claimant submitted that the Defendant failed to take into account and address relevant considerations raised by her solicitors in their response to the draft report. In their letter of 21 September 2017, Bindmans raised specific issues in respect of *inter alia* certain categories of record; record-keeping processes; document destruction; why documents went missing, and how they came to be found subsequently. These were not specifically addressed by the Defendant in the final report.

158. In my judgment, the explanation for the absence of specific responses to Bindmans' letter in the final report was that the Defendant decided it was not necessary to descend to that level of detail when writing the report. The detailed points made by Bindmans extended over some 13 pages. The evidence of the Defendant's investigation showed that the Defendant's investigators had examined the history and the concerns about the medical records in considerable detail, including some 27,000 pages of records. However, the draft and final reports did not make findings about specific records. The reports gave an overall view, drawing the threads of the evidence together, and setting out general findings and conclusions, illustrated by specific examples and incidents. In my view, this approach was a lawful exercise of the Defendant's discretion, particularly since the Defendant had made sufficient findings to conclude that there had been maladministration, and did not consider it was necessary to make further detailed findings.

159. The Claimant has failed to make good the allegation that the Defendant did not have regard to the points made by Bindmans. The Defendant's covering letter to the Claimant, dated 16 November 2017, clearly stated that he had taken into account the points raised by Bindmans in response to the draft report, and in my view, there is no reason to disbelieve him. The letter said:

> "In their letter to us dated 21 September 2017, Bindmans LLP asked us to give further consideration to the points they had raised and we have now done so. We have considered their comments about the draft report very carefully, but we are agreed that we have not been provided with any new evidence that would lead us to substantially alter our report, or its findings and recommendations.
>
> We are not going to address all of the detailed points in your solicitors' letter, but we will try and address some of the key issues.
>
> **How we carried out our investigation**
>
> In their letter, Bindmans LLP say that you generally welcome our findings, but you consider that we have not gone far enough in respect of investigating the Trust, including not pursuing lines of inquiry that we identified earlier in our investigation…Your solicitors go on to set out in their letter further activities they believe we should have carried out and questions about your daughter's records they consider we should have asked the Trust.

> Our casework process is summarised in our Service Model. But many areas of our casework require us to use our discretion and judgement and will depend on the specific circumstances of the case. In this instance, we agreed (as set out in our letter to Bindmans LLP dated 16 December 2014 and summarised in paragraphs 2 to 6 of the report) to investigate your complaint that the Trust's 2014 investigation into your daughter's missing medical records had not resolved your concerns.
>
> How we approach an investigation is a matter for us to decide, and on this occasion we decided that a proportionate approach would be to consider whether the Trust had said what it was going to do when its staff met you in June 2014, as we explain in paragraph 70 of the report. Our approach included taking advice from an accredited professional with NHS records management experience about what would have been good practice for a search for missing records in these circumstances and comparing this to what actually happened. But it did not include our own searches for missing records or asking the Trust to conduct further searches for missing records.
>
> ……
>
> Elsewhere, much of the commentary about our report in your solicitor's letter concerns events before your meeting with the Trust's staff in June 2014 and the Trust's subsequent investigation. And therefore it does not relate to the matters we have investigated. On this point, we acknowledge that our report does include some information about events prior to June 2014 …, but we only added sufficient information about earlier events into our report to put the Trust's 2014 investigation and your complaint into context (as paragraph 59 in the report, for example, explains.
>
> …."

160. The Claimant criticised the distinction drawn by the Defendant between the events prior to 2014, and the Trust's June 2014 investigation into missing records. However, in my view, this was a legitimate distinction for the Defendant to make, when writing the final report.

161. For these reasons, Ground 4 does not succeed.

Final conclusion

162. For the reasons set out above, the claim for judicial review is dismissed.