Appeal No. UKEAT/0336/19/DA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 26 January 2021

Before

HIS HONOUR JUDGE JAMES TAYLER

MS G MILLS CBE
MRS M V McARTHUR BA FCIPD

BMI HEALTHCARE LTD — APPELLANT

MR M SHOUKREY — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAMES LADDIE (One of Her Majesty's Counsel) Instructed by: DAC Beachcroft LLP The Walbrook Building 25 Walbrook London EC4N 8AF
For the Respondent	MS DEBBIE GRENNAN (of Counsel) Instructed by: Porter Dodson LLP 53 High West St Dorchester Dorset DT1 1UX

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES

The Claimant is a consultant who succeeded in some of his protected disclosure detriment claims against the Respondent who operate a hospital where he carried out private practice as a "worker". The Claimant resigned his practising privileges with the Respondent. The Tribunal determining remedy, erred in law because in finding that the Claimant would suffer very substantial career long loss of private practice earnings the Tribunal (1) failed to determine the Respondent's argument that the Claimant's loss was not caused by the protected disclosure detriments found against it (2) made inconsistent findings as to whether there was a risk that the hospital operated by the Respondent would close in the future (3) in effect decided it was certain that the Claimant would have taken over the lucrative practice of another surgeon when he retired, failing to take account of a relevant factor, that he might not, and (4) decided that the Claimant's future private practice earnings were limited to just over a third of what he could have earned with the Respondent because it was not "realistic" to expect him to relocate which was perverse on the basis of the limit findings of fact and analysis of the Tribunal.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against a remedy Judgment of the Employment Tribunal sitting in Southampton; Employment Judge Housego, members P Bompas and CL Date. The remedy hearing took place on 23 and 24 May 2019. The Judgment and Reasons were sent to the parties on 28 May 2019.

2. The parties are referred to as the Claimant and Respondent as they were before the Employment Tribunal.

3. The liability hearing took place on 6, 7, 10 – 14 October 2016; with deliberation on 3, 4 and 11 November 2016. The liability Judgment and Reasons were sent to the parties on 20 December 2016. The panel was chaired by Employment Judge Kolanko who had retired by the time of the remedy hearing. The members were the same. The Claimant alleged that he had suffered detriments done on the ground that he had made protected disclosures. He succeeded in respect of some, but not all of the claimed detriments.

Outline Facts

4. The following outline facts are taken from the liability Judgment. The Claimant is a Consultant Gynaecologist and Obstetrician. The Claimant commenced employment with Dorset County Hospital NHS Trust (the Trust) in Dorchester on 1 June 2011. The Claimant was born on 24 October 1973, so was 37 when he joined the Trust. The Claimant had moved to the UK from

Egypt in 2002, after which he had moved around the country, gradually obtaining more senior posts, before moving to work at the Dorset County Hospital as a Consultant.

5. Mr Iftikhar was the Clinical Director of the Claimant's department, and his line manager.

6. The Respondent operates private hospitals including the Winterbourne Hospital in Dorchester. The Claimant was granted practising privileges at the Winterbourne Hospital on 11 December 2012. The Claimant was not an employee of the Respondent, but was a worker for the purposes of the **Employment Rights Act 1996** (ERA). Mr Iftikhar also had practising privileges at the Winterbourne Hospital.

7. On 9 and 16 February 2015, The Claimant performed operations at the Winterbourne Hospital. Concerns were raised about the Claimant after the operations.

8. On 18 February 2015 the Claimant complained about Mr Iftikhar who had operated on one of the Claimant's private patients, without informing the Claimant beforehand, in September 2014. The Claimant complained about Mr Iftikhar's clinical practice. The Employment Tribunal held that this was a protected disclosure. Subsequent investigation did not uphold the Claimant's complaint against Mr Iftikhar.

9. On 26 February 2015, The Respondent suspended the Claimant's practising privileges pending investigation of the operation he had performed on 16 February 2015. The Tribunal concluded that the "only clinical information came from Mr Quick, the Consultant Anaesthetist, who stated … *"there was nothing specific that he did on Monday that I could say was dangerous or incompetent."* The Tribunal found that Mrs Starling, Executive Director of the Winterbourne

Hospital, "was unable to explain as to why she did not adopt her invariable practice in cases such as this of ascertaining the views of specialists in the claimant's field before reaching any conclusion, or indeed speak to the assisting Surgeon". The Tribunal concluded that the suspension was a detriment done on the ground that the Claimant had made his first protected disclosure. It was described as detriment 31(a) *"Suspending the claimant"*.

10. The procedure the Claimant had conducted on 16 February 2015 was investigated by Professor Downes, who exonerated the Claimant in a report that was sent to the Claimant on 15 May 2015. The Respondent still had concerns about other aspects of the Claimant's practice. The Claimant was invited to a meeting by Mrs Starling, "to discuss the outcome of the investigation and discuss any concerns that you may have".

11. The meeting was held on 25 June 2015. The Tribunal was highly critical about how the meeting was conducted, there being little focus on the report of Professor Downes exonerating the Claimant in respect of the operation he had conducted on 16 February 2015, the Claimant being prevented from raising the subject of his complaint against Mr Iftikhar, and the Respondent concluding that the Claimant had failed to inform them about two further incidents that had occurred at the Dorset County Hospital, although, it transpired, the incidents had not yet been raised with the Claimant by the Trust. The Respondent continued the suspension of the Claimant's practising privileges. The Tribunal found that the Claimant had suffered a detriment done on the ground that he had made his first protected disclosure. This was described as detriment 31(b) *"Continuing that suspension despite the favourable conclusion of Professor Ellis Downes' investigation report"*. The Tribunal also found a further linked detriments, 31(d), *"Failing to provide the claimant with valid reasons for his suspension and its continuation"* and 31(e) *"Ignoring the claimant's legitimate concerns over his treatment and treating the claimant*

with disdain since making his protected disclosure". The Tribunal considered the last of those detriments predominantly related to the Claimant's treatment at the meeting on 25 June 2015.

12. On 26 June 2015, solicitors instructed by the Claimant wrote to the Respondent complaining that the Respondent's management had failed to address legitimate clinical concerns, thereby placing patient safety at risk, and contending that there was a disparity between the Respondent's treatment of Mr Iftikhar, in comparison with the Claimant. The Tribunal found that this was a protected disclosure.

13. On 26 June 2015, Mrs Starling wrote to the Trust about the issues the Claimant had raised about Mr Iftikhar asking "whether the Trust had any concerns about Mr Iftikhar's practice". The Tribunal considered that this was too little, too late. The Tribunal held that the Respondent subjected the Claimant to detriment done on the ground that he had made a protected disclosure by failing to properly apply its whistleblowing policy in respect of his complaint against Mr Iftikhar. This was described as detriment 31(c) *"Failing to adhere to its own policies"*. The Tribunal limited their finding to breaches of the whistleblowing policy.

14. The Tribunal dismissed a number of detriments from this period, because they did not add to the other detriments or lacked clarity (detriments 31(f), 31(g), 31(h) and 31(i)).

15. On 16 July 2015, the Claimant submitted his complaint to the Employment Tribunal.

16. On 20 July 2015, the Respondent wrote to the Claimant stating that his practising privileges were suspended. Reference was made to a number of historical issues and the two

A further incident at Dorset County Hospital that the Respondent had been aware of when they met with the Claimant on 25 June 2015.

B 17. On 24 July 2015, the Claimant complained to the CQC about Mr Iftikhar and the alleged failure of the Respondent to address or investigate the Claimant's initial disclosure and clinical concerns. The Tribunal accepted that this was a protected disclosure.

C 18. On 28 July 2015, restrictions were placed on the Claimant's practice at Dorset County Hospital because of the two further incidents mentioned above. He was temporarily released from operating duties but his other duties remained unchanged.

D 19. On 11 August 2015, a report was produced by Peter Harris, the Respondent's regional director, which concluded that the Claimant had not been treated less favourably than Mr Iftikhar in respect of clinical concerns.

E 20. On 30 September 2015, the Trust informed the Claimant that, following a review of his practice, a reference to the National Clinical Assessment Service "NCAS" had been recommended.

F 21. On 30 October 2015, the Claimant's appeal against the withdrawal of his practising privileges at the Winterbourne Hospital was upheld; but the practising privileges were immediately suspended again because of the ongoing investigation by the Trust. The Tribunal considered that the appeal did not deal with the Claimants concerns about the disparity in treatment between himself and Mr Iftikhar, and upheld protected disclosure detriment 31(k) "*Failing to investigate the claimant's concerns adequately or at all, in respect of the matters*

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raised by him on 26 June 2015 and thereafter, whether as part of his appeal against the withdrawal of practising privileges or otherwise." This was the last of the alleged detriments that was upheld by the Tribunal. The Claimant contends it was an ongoing detriment that continued up to, and was instrumental in, the Claimant's eventual decision to resign his practising privileges.

22. The Trust referred the Claimant to NCAS on 4 March 2016. The Claimant was to be supervised when undertaking gynaecological operations, but was otherwise permitted to work at Dorset County Hospital without restriction. The Respondent told the Claimant in April 2016 that they could not replicate such arrangements at the Winterbourne Hospital.

23. On 17 May 2016 the Trust lifted all restrictions on the Claimant's practice despite the ongoing NCAS process. The Respondent wished to consider the NCAS documentation before deciding whether to reinstate the Claimant's practising privileges. The Respondent received the NCAS documentation in early summer 2016. Before the Respondent reached a decision about whether to reinstate the Claimant's practising privileges, the Trust placed the Claimant on new restrictions because of an incident on 20 July 2016. The Trust informed the Respondent of this decision on 28 July 2016.

24. In June 2016 the Claimant received the report written by Mr Harris. The Claimant sought an independent review. In the appeal the Respondent has focused its causation argument on the contention that it was their refusal to commission such an independent review that resulted in the Claimant resigning his practising privileges.

25. The Claimant raised as detriment 31(j) "*Suspending his practising privileges after their reinstatement on appeal, particularly in the period from 6 April 2016 – 7 September 2016*". The Tribunal rejected this detriment, noting that in the NHS the Claimant would be part of a team, whereas working with practising privileges for the Respondent he would be work independently. The Tribunal concluded that the suspension of practising privileges "would happen to anyone in similar clinical circumstances, irrespective of having made any protected disclosures." The Tribunal rejected detriment 31(j); and also detriments 31(l) and 31(m), as repetitions of 31(j). The Tribunal also rejected the Claimant's alleged detriment 31(h) that the Respondent had been "*Colluding with DCH and encouraging further investigations against the claimant as a means of justifying the respondent's actions*".

26. The Claimant resigned his practising privileges with the Respondent by letter dated 7 September 2016. The Claimant's case was that he resigned in response to the unlawful detriments that he had been subjected to by the Respondent because he had made protected disclosures, whereas the Respondent claimed that he resigned for other reasons which were not unlawful protected disclosure detriments.

The Remedy Hearing

27. The remedy hearing took place on 23 and 24 May 2019. The Remedy hearing was substantially delayed, pending the determination of a claim that the Claimant had brought against the Trust, which was eventually compromised. Things had moved on considerably since the Claimant had resigned his practising privileges at the Winterbourne Hospital. Mr Iftikhar had been dismissed by the Trust because of a breakdown in inter-team relationships. The Claimant had been promoted to a level above that Mr Iftikhar had held and his income from the Trust had

increased to well in excess of £114,000 (the Claimant did not provide the precise figure to the Tribunal). The Tribunal concluded that "Any suggestion that the Claimant is in some way "damaged goods" with some sort of reputational damage or someone under some sort of cloud or that he would be regarded with suspicion on the "no smoke without fire" principle by referring GPs is wholly unfair." The Claimant had put the past behind him, his career was going from strength to strength and the outlook was very bright, the only shadow being the lack of private practice because the Claimant no longer had practising privileges at the Winterbourne Hospital; where Mr Iftikhar continued to have a significant private practice, while moving towards retirement.

28. The Judgment and Reasons were sent to the parties on 28 May 2019. The Respondent was ordered to pay the Claimant £920,202; made up of injury to feelings of £30,000, aggravated damages of £10,000 and loss of earnings from private practice of £880,302 (a considerable majority of which was future loss). The losses ran from the date that the Claimant resigned his practising privileges at the Winterbourne Hospital on 7 September 2016, when he was 42. Core to the calculation was an assessment that the Claimant would, but for the unlawful acts of the Respondent, have taken over the private practice of Mr Iftikhar at the Winterbourne Hospital, with steadily increasing annual private practice earnings reaching £100,000 (in addition to his NHS salary) after 10 years, and remaining at that level until retirement at age 65; whereas now he would only be able to reach annual earnings of £35,000 from private practice because of the limited other local opportunities; it being "unrealistic" for him to relocate to gain greater opportunities for private practice.

The Appeal

29. The Respondent appealed on 19 July 2019. There is no appeal in respect of the awards for injury to feelings, aggravated damages or loss of private practice earnings in 2015. There are four grounds of appeal:

29.1 *Failure to Consider Appellant's Arguments re Causation of Loss*; the Respondent contends that the Tribunal failed to consider and determine its argument that the Claimant resigned practising privileges for reasons other than the detriments that the Tribunal held were unlawful

29.2 *Error of Law in failing to remember/apply its own factual findings on discount*; the Respondent contends that the Tribunal concluded that there was a 5% chance that the Winterbourne Hospital would close in the future, but failed to apply the discount in its calculations

29.3 *Inadequacy of Reasons/Error of Law/Perversity in determining what C would have earned in future and for how long he would have done so;* the Respondent contends that the Respondent took an excessively rosy view of the Claimant's prospects absent the Respondent's unlawful action; in particularly assuming that he would have been certain to take over Mr Iftikhar's private practice at the Winterbourne Hospital. The Respondent was granted permission to amend this ground to contend that the Tribunal should have adopted a loss of a chance approach

29.4 *Inadequacy of reasons/Error of law/ Perversity in addressing mitigation;* the Respondent contends that the Tribunal took an excessively pessimistic view of the Claimant's ability to mitigate his loss, particularly by concluding that "it is not realistic to require the Claimant to relocate"

30. By an Order with seal date 19 December 2019 Soole J permitted grounds 1 and 2 to proceed. He concluded that grounds 3 and 4 of the appeal were not reasonably arguable.

31. At a hearing pursuant to rule 3(10) **EAT Rules 1996** HHJ Stacey permitted grounds 3 and 4 to proceed.

The Law

32. There was little dispute between the parties as to the approach to be adopted by the Employment Tribunal in assessing the financial losses of the Claimant.

33. Section 49 ERA provides:

> **"49 Remedies**
>
> **(1) Where an employment tribunal finds a complaint under section 48 … (1A) … well-founded, the tribunal—**
>
> **(*a*) shall make a declaration to that effect, and**
>
> **(*b*) may make an award of compensation to be paid by the employer to the complainant in respect of the act or failure to act to which the complaint relates.**
>
> **...**
>
> **(2) … the amount of the compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to—**
>
> **(*a*) the infringement to which the complaint relates, and**
>
> **(*b*) any loss which is attributable to the act, or failure to act, which infringed the complainant's right.**

> **(3) The loss shall be taken to include—**
>
> > **(*a*) any expenses reasonably incurred by the complainant in consequence of the act, or failure to act, to which the complaint relates, and**
> >
> > **(*b*) <u>loss of any benefit</u> which he might reasonably be expected to have had <u>but for</u> that act or failure to act.**
>
> **(4) In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland."**
>
> **[<u>emphasis added</u>]**

34. The ERA requires an assessment of the loss that is "attributable" to the unlawful act, and for the award to be of a sum that the tribunal "considers just and equitable". The provision does not put the assessment of loss at large. In considering what loss is attributable to a detriment, the approach is as it would be at common law, involving a determination of whether the detriment caused the loss: the starting point being "but for" causation, but subject to the possibility that there is some intervening event that wholly breaks the chain of causation or that the loss is too remote from the detriment. Once the tribunal has assessed what loss is attributable to the detriment, it can still consider overall justice and equity in determining the award. Singh LJ put the matter this way in **<u>Wilsons Solicitors LLP v. Roberts</u>** [2018] ICR 1092 at 1102 para. 59:

> **"In my respectful opinion, Simler J confused two different concepts in para 26 of her judgment. First, there is the question of what "attributable to" means. The second - but different - question is what is the overall function of the tribunal when it considers an award of compensation under section 49? Simler J was right to observe that the answer to the second question is that the tribunal has a discretion to determine what is just and equitable in all the circumstances. But that does not answer the first question. One of the things that the tribunal is required by the legislation to have regard to is what loss is attributable to the act, or failure to act, complained of. That raises the first question, the meaning of "attributable to". In my view, that phrase does import the common law concept of "but for" causation."**

35. It is possible that an intervening event might be established that breaks the chain of causation. In that case the loss comes to an end entirely. However, the chain of causation might not be broken, but there may be events other than the unlawful detriments that contributed to the loss, and could be the principal reason for the loss. In the context of constructive dismissal, in

which it is only necessary that a breach of the employment contract is an effective cause of the resignation for an employee to establish dismissal, Langstaff (P) noted in **Wright v North Ayrshire Council** [2014] IRLR 4, at para. 32:

> **"As to compensation we should note that where there are a variety of reasons for a resignation but only one of them is a response to repudiatory conduct the compensation to which a successful claimant will be entitled will necessarily be limited to the extent that the response is not the principal reason. A tribunal may wish to evaluate whether in any event the claimant would have left employment and adjust an award accordingly. This does not affect the principle to be applied in deciding breach: it is merely to recognise that the facts have a considerable part to play in determining appropriate compensation."**

36. Similarly, even if the chain of causation from the protected disclosure detriments that the Tribunal found proven, to the financial loss resulting from the Claimant's resignation of his practising privileges, was not broken by any intervening event, compensation might have been reduced if the Tribunal considered that, absent the unlawful detriments, the Claimant would, or might, have resigned his practising privileges because of other concerns; so that it was just and equitable to extinguish compensation, or to reduce compensation to reflect the chance that the Claimant would have resigned because of the matters that did not involve any unlawful conduct on the part of the Respondent.

37. Assessing future loss is difficult. It involves assessing what would have happened but for the unlawful conduct and what will now happen. Mr Laddie adopted Burton J's naming of these scenarios in **Kingston-upon-Hull City Council v. Dunnachie (No.3)** [2004] ICR 227 as "old job facts" and "new job facts". As the different scenarios may not involve a change of job, we prefer to refer to the "what would have been" and the "what will be" scenarios.

38. Schedules of loss commonly are pleaded on the basis that it would have been the best of times, but now it will be the worst; a claimant would have had a brilliant career, but now will have none. Sometimes that is the case, particularly if the actions of a respondent have destroyed

A the claimant's health. But it is rare for lifetime loss to be awarded, particularly if a claimant is healthy and performing well at work at the time of the assessment. A claimant who was likely to have a brilliant career will generally be strongly placed to mitigate loss.

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39. Assessing the "what would have been" and the "what will be" scenarios, necessarily involves an assessment of likelihoods, things may turn out better than expected, or may turn out worse. Rising stars may suddenly fall, and slow starters may go on to excel. One can only be sure C that the future is not certain.

40. These are not new points. In **Mallet v McMonagle** [1970] AC 166, Lord Morris of Borth-D y-Gest stated at 173F:

> **"In cases such as that now being considered it is inevitable that in assessing damages there must be elements of estimate and to some extent of conjecture. All the chances and the changes of the future must be assessed. They must be weighed not only with sympathy but with fairness for the interests of all concerned and at all times with a sense of proportion."**

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41. It is necessary to consider not only the possible upside, but also the potential downsides. Lord Pearce held at 174D:

> **"Any assessment must contain elements of reasonable prophecy and arithmetic. In assessing the proper figure, the jury have to take into account both the** F **possibilities for good and for bad, striking a fair balance as they see it, on such evidence of the future probabilities as is given to them. To assume for certainty all the most advantageous possibilities and take no account of the disadvantageous is not to strike a fair balance."**

42. Just as it was for the jury in the High Court 50 years ago, so it is for the industrial jury G today; there must be a balance between the advantageous and disadvantageous possibilities.

43. Generally, in assessing loss of future earnings, this balancing exercise is carried out by H assessing a date on which the claimant will obtain work with equivalent remuneration, from which date the loss ceases: **Wardle v Credit Agricole Corporate and Investment Bank** [2011]

ICR 1290. This is not, in reality, a determination on balance of probabilities that the claimant will obtain such a job on the date the tribunal fixes, but is an assessment of just compensation, taking into account the chances that such a job might be found sooner, or later. In **Griffin v Plymouth Hospital NHS Trust** [2015] ICR 347 Underhill LJ held at para. 9:

> "**At the risk of spelling out the obvious, that is not a finding that it was more probable than not that the Claimant would find a job after precisely one year. Rather, it is an estimate, made on the assumption that the Claimant continued to make reasonable efforts to mitigate her loss, of the mid-point of probabilities"**

44. An award made under ERA is compensatory, not penal: **Morgans v Alpha Plus Security Ltd** [2005] ICR 525.

45. The need to assess the possibilities, ranging from good to bad fortune, and to avoid penal awards, means that it is rare for loss lasting a whole career to be awarded. Before making such an award, an employment tribunal should consider the matter with great care.

46. A claimant cannot limit attempts at reasonable mitigation relying on the receipt of compensation from the Respondent. In **Wilding *v* British Telecommunications plc** [2002] ICR 1079 it was put this way at para. 37:

> **It was the duty of Mr Wilding to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from BT as his former employer**

47. The onus is on a respondent to establish that a claimant has acted unreasonably in failing to mitigate loss in the past. In looking to the future, the assessment of earnings in the "what will be" scenario is made on the assumption that the Claimant will take reasonable steps to mitigate loss: see **Dunnachie (No.3)** at para.28(ii).

48. It is also important to step back and take an overview of compensation. In **Ministry of Defence v Cannock** [1994] ICR 918 Morison J stated at 950H that:

> **"We suggest that tribunals do not simply make calculations under various different heads, and then add them up and award the total sum. A sense of due proportion involves looking at the individual components of any award and then looking at the total to make sure that the total award seems a sensible and just reflection of the chances which have been assessed."**

The Grounds of Appeal

Ground1; Failure to Consider Appellant's Arguments re Causation of Loss

49. The Respondent argued that the Claimant had resigned his practising privileges with the Respondent for reasons other than the unlawful protected disclosure detriments he had been subjected to by the Respondent. Counsel for the Respondent, Mr Adkin, put it in this way in his skeleton argument at paras. 8, 16 and 17:

> **"8. By the time of the Claimant's resignation of practising privileges in September 2016, his suspension was linked to suspension and ongoing investigation in the NHS trust, not the six detriments found by the Tribunal. The Respondent's principal position is that "but for" causation in respect of losses from September 2016 [is] not made out.**
>
> **16. The Respondent does not accept on a "but for" causation basis that losses contended for extend beyond 2016. The further investigation at DCH in 2016, the NCAS referral and the complaint to the GMC are plainly supervening events that break the chain of causation. These are not 'routine'. These suggest matters reasonably to be understood by R as representing a concern about C's safety regarding patients.**
>
> **17. Before the Tribunal can find any ongoing period of loss it must make a finding, consistent with its findings on liability, about if and when on the balance of probabilities, absent the detriments R would have lifted the suspension."**

50. The Tribunal appreciated that this was the argument being advanced by the Respondent. At paragraph 3, the Tribunal noted that the Respondent "argues for a short period only, based on an asserted lack of causation for long term loss". At para. 8, the Tribunal considered the Respondent's argument in more detail:

> **"b. Any loss should be confined to events in 2015, and in particular the period February 2015 to June 2015. There was no causative link between any of the**

> **losses claimed after that date: they are in reality based on the heads of claim that did not succeed.**
>
> **f. On the merits, the matters that lead to any loss post date the matters found by the Tribunal to be public interest disclosure detriments.**
>
> **g. If he relies on things that happened before he resigned his practising privileges he has, by analogy with constructive dismissal, waited too long before doing so, from June 2015 to September 2016."**

51. The Claimant's response to the argument was recorded at para. 9f:

> **There is no lack of causation, as the matters found to be detriment clearly extend to the present.**
>
> > **"(e) ignoring the Claimant's legitimate concerns over his treatment and treated him with disdain since the making of his protected disclosures" and**
> >
> > **(k) failing to investigate the Claimant's concerns, adequately or at all, in respect of the matters raised by him on 26 June 2015 and, whether as part of his appeal against the withdrawal of practising privileges or otherwise thereafter."**

52. Having set out the argument the Tribunal made no determination of the issue. Ms Grennan for the Claimant accepts that it is not expressly dealt with in the Judgment, but contends at para. 25 of her skeleton argument:

> **"It is implicit from the judgment that the causal link between the detrimental treatment and the resignation from practising privileges, and as a result, the ongoing loss of earnings, had been found. That causal link was clearly apparent and the tribunal was entitled to reach, and properly reached, the conclusions it did."**

53. This was a key argument of the Respondent as it could result in a break in the chain of causation that would prevent the Claimant claiming the losses that post-dated his resignation of practising privileges on 7 September 2016; and so exclude the substantial majority of the losses he was claiming. Determination of this issues required careful assessment of the reason, or reasons, for the Claimant's decision to resign his practising privileges, to determine what losses could properly be said to be attributable to the protected disclosure detriments that had been made out.

54. In **Anya v University of Oxford** [2001] ICR 847 Sedley LJ held that:

> **"The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."**

55. Unfortunately, this Tribunal did fail in the basic task of determining the question before it in respect of the causation of the Claimant's loss. It is not possible to conclude that the determination is implicit in what the Tribunal wrote . It did not consider this important issue at all. That was an error of law. The matter must be remitted for consideration of whether there were matters, other than the unlawful public disclosure detriments, that led the Claimant to resign that either broke the chain of causation, or should result in compensation ending at the date of resignation on the basis that he would have resigned at that time in any event; or should result in a percentage reduction in compensation to reflect a chance that he would have resigned practising privileges at the same stage for reasons unrelated to the unlawful detriments that he had suffered.

56. We heard considerable argument about the correspondence leading up to the Claimant resigning his practising privileges; the Respondent focusing on the Claimant's unfulfilled demand for an independent inquiry, and the Claimant contending that there was ongoing unlawful detriment in failing to address his concerns about the difference in treatment between himself and Mr Iftikhar. We will not rehearse the competing arguments and do not express any opinion, save that there was a significant factual issue to be decided about the reason, or reasons, for the Claimant's resignation of his practising privileges. That is a matter for determination on remission, not by us.

Ground 2; Error of Law in failing to remember/apply its own factual findings on discount;

57. At paragraph 31n the Tribunal considered the possibility that the Winterbourne Hospital might close in the future, and held that:

> **"It is not a sound basis for assessing loss to assume that the Winterbourne will continue as it is for the next 20 years or more: there has to be the risk that it will not. There is probably a higher risk that the Winterbourne will close, as Mr Hudson spoke of a substantial reduction in the number of hospitals run by the Respondent. However two of the likely reasons for the Respondent ceasing at Winterbourne are that they sell it to another provider or that a competitor has opened up. In the first case the Claimant might be able to work for the company that took over (though perhaps not if Teresa Starling was tupe'd over). In the second example the Claimant could go and work for the competitor. The Tribunal put that risk at 5%, and reduce compensation accordingly, as any loss would then be for a supervening reason."**

58. At paragraph 52 the Tribunal decided the opposite:

> **"We have not made any reduction for the possibility that the Winterbourne may be closed by the Respondent, because it might be taken over by another operator, or may have closed because of the opening of a competitor, for whom the Claimant might work."**

59. In its calculation the Employment Tribunal did not make a deduction for the chance that the Winterbourne Hospital would close. The Respondent contends that the Tribunal failed to remember or apply its finding of fact when it came to make its calculations; resulting in the Respondent overcompensating the Claimant by £43,698. The Claimant accepts that there is an inconsistency, but contends that the issue should be remitted to the Tribunal to correct on the papers by explaining whether it determined that there was, or was not, a deduction to be made in respect of the risk of the Winterbourne Hospital closing; and, if so, to apply the deduction to its calculation.

60. We do not consider that it can be said, on a realistic reading of the judgment overall, that the Tribunal concluded that a 5% reduction should be made, but merely failed to make the deduction when it came to carry out the calculations. The two determinations are wholly

inconsistent. This is an error of law. It requires that the matter be remitted for this issue to be determined anew.

Ground 3; Inadequacy of Reasons/Error of Law/Perversity in determining what C would have earned in future and for how long he would have done so;

61. It should be noted that the Tribunal did not accept all of the Claimant's arguments about the "what would have been" scenario:

61.1 the Tribunal rejected the claim for loss of pension – based on the contention that he would have opted into the NHS scheme but for the Respondent's unlawful actions

61.2 the Tribunal concluded that it would have taken the Claimant 10 years to reach optimum earnings from private practice where as he contended he would be able to do so in 5 years

62. The Tribunal recorded the Claimant's case as to his optimum earnings from private practice: "He puts his annual loss at around £100,000." That was the sum that the Tribunal found the Claimant would have reached 10 years after he resigned from his practising privileges. The Tribunal considered the Claimant was very strongly placed because he had an unusual specialism in keyhole surgery that is popular with patients and had connections with local GPs from whom he might expect referrals.

63. In preparation for the remedy hearing, the Claimant had difficulties in obtaining disclosure from the Respondent of the private practice earnings of other consultants. The Tribunal

was critical of the Respondent. However, the difficulty was resolved at the hearing. The Tribunal recorded at para. 15:

> **"On day 2 of this hearing he produced a revised schedule (195C) the formulation of which the Respondent agreed. Over a 4 year period it showed Consultant A earning between £81,000 and £104,000 a year, Consultant C earning between £20,000 and £32,000 and Consultant E earning between nothing in the first year, then £11,000, £8,000 and £22,000 in the next years. One of the Claimant's colleagues had volunteered her private earnings in the last 4 years as £1,500, £17,000, £19,000 and £41,000. (All these figures are rounded.)"**

64. This showed a range of private practice earnings, with Mr Iftikhar (Consultant A) earning by far and away the largest amount. The Tribunal concluded that the Claimant would have earned the same as him because he would have stepped into his shoes. The Tribunal noted that Mr Iftikhar was in his mid-60s and concluded that he was likely to retire soon. This led to the conclusion at paragraph 31(m):

> **"The Tribunal considers that there would have been the opportunity to step into Consultant A's shoes sooner rather than later (so increasing his potential earnings)."**

65. The Tribunal further found at paragraph 33 that:

> **"Consultant A is likely to retire fully in the next few years, and the Claimant was likely over the next few years to achieve earnings of £100,000 a year. The starting point is the figure of £15,000 in 2015. Others earn between £20,000 to £25,000 a year. Over the 5 years from 2015 to 2020 the Claimant would have increased his private income from £15,000 to £50,000 a year, and after the retirement of Consultant A to £100,000. Consultant A's fee income is now declining, so that would be a steady progression from £50,000 and £100,000, over the 5 years from 2020 - 2025."**

66. The Tribunal's increasingly fixed view as to the future reached its apotheosis in paragraph 39, where it held that:

> **"In short, and with some adjustments, we consider that the submission of Counsel for the Claimant has a simplicity and directness that is simply irrefutable. It is that Consultant A is in his mid 60's. While he is earning a little less now (perhaps by reason of ceasing NHS work) he is still earning towards £100,000 a year. When he retires, as he is likely to do soon, there will be a gap for the Claimant to fill. He is eminently suited to do so with his laparoscopy skills and connection to local GPs and there is every reason to think that he would step into Consultant A's shoes and be very successful in a private practice in the well off area of Dorset around Dorchester, where there may be a defined catchment area but also no competition."**

67. In reality the Tribunal determined not that there was a possibility that the Claimant would take over Mr Iftikhar's highly lucrative private practice, but that it was a certainty. The Tribunal considered the Claimant's arguments to this effect to be "simply irrefutable". The reasoning appears to develop from this being a likelihood to a certainty, as was reflected in the compensation that was awarded. On a proper reading of the judgement the Tribunal was not determining that the Claimant might do better than Mr Iftikhar, or might do worse, so that his earnings represented a mid-point of the possibilities, but that he would definitely have stepped into his shoes. In so doing the Employment Tribunal failed to take account of a material factor – that there had to be at least some chance that he would not have done so. Failing to take account of this important factor was an error of law. The Respondent canvassed a range of reasons why the "what would have been" scenario might not have been as rosy as the Claimant contended. We will not rehearse those points here as they are matters for careful consideration and factual determination on remission to the Employment Tribunal, not us.

68. The Claimant contended that he would have worked until 70. The Respondent led evidence that most surgeons retire at about 60. The Tribunal made findings about matters that would incline the Claimant to retire rather later than the average; he has young children (aged 2 and 4 at the time of the remedy hearing) and has not opted into the NHS pension scheme. In addition the Tribunal noted that Mr Iftikhar has continued to have a successful private practice into his mid-60s. The Tribunal was entitled to fix the Claimant's likely retirement age at 65. We detect no error in the decision of the Tribunal in this regard.

Ground 4 Inadequacy of Reasons/Error of Law/Perversity in determining what C would have earned in future and for how long he would have done so;

69. The tribunal concluded that there were limited opportunities for the Claimant to find alternative private practise while working for the Trust and living in Dorchester. The Tribunal rejected his contention that it would be impossible for him to have any private practise earnings, concluding that the local opportunities, excluding the Respondent, would provide annual private practice earnings rising to £35,000. This would leave the Claimant with an annual ongoing loss, from 10 years after he resigned his practising privileges, to retirement at age 65, of £65,000. While it is correct, as the Claimant contends, that the Respondent based its cross-examination and submissions before the Tribunal on the contention that the Claimant could earn equivalent sums locally to those that he could have earned working for the Respondent at the Winterbourne Hospital, without needing to relocate, the Tribunal itself, perhaps appreciating its assessment would lead to very substantial ongoing loss, considered the possibility that the Claimant might have moved in order to increase his earnings from private practise, and questioned the Claimant about the possibility. There is nothing in the reasoning of the Tribunal that suggests that should the Claimant be able to move he would not be able to obtain equivalent private practise earnings to those that he would have attained with the Respondent. This meant that the issue of relocation was fundamental to the very large award of future loss of private practice earnings. The only reasoning of the Tribunal dealing with the question of relocation was at paragraph 40, where the Tribunal stated:

> **"We accept the submission that it is not realistic to require the Claimant to relocate. Consultants relocate around the country to progress to consultant status and then tend to stay put. Mrs Reynolds' evidence was confirmatory of this, and that it was the consultant status that opened the door to lucrative private practice."**

70. This reasoning is excessively brief, and, we regret to say, illogical. It may well be that medical practitioners tend to relocate around the country to progress to consultant status and then tend to stay put once consultant status has opened the door to lucrative private practice. However, in the Claimant's case that door was, on the Tribunal's findings, closed. What the Tribunal had to consider was whether it was reasonable to expect the Claimant relocate in order to replace those private earnings. It is not reasonable for the Claimant to stay put because those private earnings will be compensated for by the Respondent. Absent the fact that the Claimant was going to be compensated by the Respondent, could it realistically be suggested that had he been told that if he relocated he would gain private practice income in excess of £800,000, he would not have considered doing so?

71. Although the Claimant put forward reasons why it would be difficult for him to move (recorded by the Tribunal in the section on remedy sought and contentions); he has young children (aged 2 and 4 at the time of the remedy hearing) and he lived in a catchment area for oversubscribed schools, his wife's mother, who has dementia, is coming to live with them and the Claimant did not enjoy his experience of living in a village; the Tribunal made no findings of fact about these matters. They do not immediately appear to be particularly compelling points, as the Claimant's children are not at an age that generally precludes relocation; strongly performing primary schools exist in many places in the UK, there does not appear to be a reason why his wife's mother cannot come to live with them even if they move, and village life is not the only alternative to living in Dorchester. However, it may be that more detailed consideration of the evidence will show that there are compelling reasons why the Claimant cannot move. That will be a matter for remission.

72. The brevity of the reasoning; and the fact that such reasoning as there is does not logically lead to a conclusion that the Claimant cannot relocate, results in our determination that the Tribunal's decision on this vital point was perverse on the basis of its very limited findings of fact and analysis. This matter required much more detailed consideration because hundreds of thousands of pounds turned on it. No reasonable tribunal, properly directed to the law, could have concluded that the fact that most consultants stay put means that there was no question of considering the private practice earnings that the Claimant might be able to obtain should he move. The Tribunal dismissed the possibility out of hand, whereas it needed careful consideration. That will be for remission.

73. The Tribunal stated at paragraph 60:

> **"Overall, we consider the award we have made is not overgenerous to the Claimant so as to be unfair to the Respondent, nor unfair to him by the making of unrealistic expectations."**

74. We do not consider that the tribunal really did step back and consider the picture overall. If they had, it is hard to see how they would not have questioned the determination that a fully fit consultant whose career was going from strength to strength, had fully recovered from the wrongs he had been done by the Trust and the Respondent, and in the words of the Tribunal had "a particular skill that will appeal to patients and GPs, and is not widely available" would suffer a loss of private practice earnings of over £800,000, and could never recover his position before retirement.

Disposal

75. We consider that the matters should be remitted to be determined by a differently constituted employment tribunal because, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763:

75.1 The most significant matters will have to be determined anew. The high value of the claim makes hearing by a new panel proportionate

75.2 The errors of law were fundamental; in particular, the Tribunal failed completely to determine the issue of causation; made wholly inconsistent findings on whether there should be a discount for the possibility that the Winterbourne Hospital might close in the future, and made significant errors in assessing the "what would have been" and "what will be" scenarios that could have a very substantial effect on the level of compensation to be awarded

75.3 The Tribunal stated that it had stood back and looked at the overall figure and found nothing to suggest any over or under compensation. This gives the Respondent's a legitimate concern that the Tribunal might not be able to avoid taking a second bite at the cherry

75.4 We have no reason to doubt the Tribunal's professionalism but, unfortunately, it did not give this decision the detailed consideration that it required. The remitted issues need to be considered by a fresh set of eyes

75.5 Unusually, the composition of the panel had changed between the liability and remedy hearings because of the retirement of the Employment Judge. Usually, we would be reluctant for remedy to be remitted to a tribunal other than that which determined liability. In this case that concern does not apply to the same degree as the Employment Judge cannot be the same as at the liability hearing.

Although the members could be the same, we consider it is better for a new panel to address these issues unencumbered by the criticisms of the manner in which remedy was determined previously

76. The awards of injury to feelings and aggravated damages were not challenged so will remain as they are. The determination of the Claimants retirement age at 65 was upheld so will not require redetermination. There is no dispute about the Tribunal's finding in respect of the Claimant's loss of private practice earnings for 2015.

77. The employment tribunal on remission will need to determine, in particular:

77.1 Causation; what loss was attributable to the protected disclosure detriments found against the Respondent, including whether there was a break in the chain of causation, or whether any ongoing loss should end at the date of resignation, or be reduced, because the Claimant would, or might, have resigned his practising privileges absent the unlawful actions of the Respondent

77.2 Should a discount be applied to take account of the fact that the Winterbourne Hospital may close; and, if so how much.

77.3 In the "what would have been" scenario, what would have been the Claimant's likely private practice earnings

77.4 In the "what will be" scenario what will be the Claimant's likely private practice earnings, including should a date be assessed, as the balance of possibilities point at which the loss should cease

78. It may well be helpful to convene a Preliminary Hearing for Case Management to determine a list of issues for the remedy hearing, and to make Orders to prepare for the hearing.

79. The parties should also consider whether they can reach a compromise to maximise the amount of available money to be paid to compensate the Claimant for his losses, rather than being eaten up in legal fees, freeing the Claimant to concentrate on his now successful career.