EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4104651/2016

Held at Aberdeen on 26, 27, 28, 29 and 30 August and 2, 3, 5, 6 and 20 September 2019 (with deliberations on 23 September 2019)

Employment Judge: W A Meiklejohn
Tribunal Members: Mr W S Gray
Ms M Williams Edgar

Professor Zygmunt H Krukowski — **Claimant**
Represented by
Mr R Bradley, Advocate

Grampian Health Board — **Respondent**
Represented by
Mr I Truscott, QC

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is as follows –

(i) the claimant's claims of victimisation post-employment and detriment post-employment, having been withdrawn by the claimant, are dismissed;

(ii) the claimant's claim of constructive unfair dismissal succeeds;

(iii) the claimant's claim of automatically unfair dismissal does not succeed and is dismissed;

(iv) the claimant's claim of race discrimination does not succeed and is dismissed;

(v) the claimant's claim of detriment on the ground of having made a protected disclosure does not succeed and is dismissed; and

(vi) the case will be listed for a hearing on remedy.

REASONS

1. This case came before us for a final Hearing on liability only. Mr Bradley appeared for the claimant and Mr Truscott for the respondent. 26 and 27 August 2019 were reading days. The hearing commenced on 28 August 2019. We heard submissions on 20 September 2019. We held a judge and members deliberation day on 23 September 2019.

Preliminary matters

Claimant's amendments to ET1

2. Mr Bradley made an application to amend paragraph 19 of the paper apart to the claimant's ET1 claim form. That paragraph read as follows –

"I am claiming compensation, and where appropriate injury to feelings and recommendations, for claims including:

a) Constructive unfair dismissal

b) Automatically unfair constructive dismissal – whistleblowing

c) Race discrimination

d) Whistleblowing detriments

e) Victimisation post-employment

f) Breach of contract – 3 months' notice pay"

3. The amendments sought were as follows –

   (i) In respect of paragraph 19(a) – add "as specified in the relevant paragraph of the list of issues".

   (ii) In respect of paragraph 19(d) – add "as specified in the relevant paragraph of the list of issues".

   (iii) Paragraph 19(e) – this claim is withdrawn by the claimant.

4. Mr Bradley also advised us, with reference to paragraph 19 (d), that the claimant was no longer pursuing a claim for detriment post-dismissal.

5. Mr Truscott said that the respondent did not object to these amendments and we agreed that they should be allowed.

Respondent's amendments to ET3

6. Mr Truscott made an application to amend the respondent's grounds of resistance and submitted a copy of the grounds of resistance incorporating the amendments sought. Mr Bradley objected to one of the amendments, namely the addition of the following paragraph –

   "12.4 If, which is not admitted, the Claimant made a qualifying protected disclosure, it is denied that the disclosure was made to the appropriate person in terms of Section 43C of the ERA."

7. Section 43C of the Employment Rights Act 1996 ("ERA") provides as follows –

   "**Disclosure to employer or other responsible person**

   (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

   (a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to –

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."

8. Mr Bradley submitted that the proposed amendment to add paragraph 12.4 as quoted above should be refused for the following reasons (in brief summary) -

(i) The application came very late in the day without any explanation for this.

(ii) It was a substantial alteration to the respondent's position.

(iii) Prejudice to the claimant.

9. Mr Truscott submitted that it was a matter of jurisdiction. The Tribunal would hear evidence about the claimant's meeting with Dr A Russell on 27 May 2014. He was an employee of Tayside Health Board, not the respondent. There had to be disclosure to the employer in terms of section 43C ERA.

10. Mr Bradley pointed out that, if this had been raised earlier, enquiry could have been made into Dr Russell's status relative to the respondent.

11. After retiring to consider these submissions we decided to uphold Mr Bradley's objection to the addition of the proposed paragraph 12.4 to the

respondent's grounds of resistance. We reminded ourselves of the guidance given in **Selkent Bus Co Ltd v Moore 1996 ICR 836** that we should consider all the relevant circumstances. These included the nature and timing of the proposed amendment. In deciding whether or not to allow the amendment we required to consider the injustice and hardship to each party (the "balance of prejudice").

12. We decided that the balance of prejudice favoured the claimant. The timing of the application to amend was such that a significant point was being raised very late in the day in a case which had been ongoing since 2016. In short we were saying to the respondent that they should have thought of this earlier.

13. Mr Bradley did not object to the other amendments to the grounds of resistance and we agreed that these should be allowed.

List of issues

14. We were provided with a summary list of issues which required to be amended by the deletion of paragraph 3 –

"Did the claimant make any disclosure to the appropriate person?"

in consequence of our decision on the claimant's objection to the respondent's amendment as detailed above. With this amendment, we understood that the summary list of issues was agreed.

15. The issues were expressed in the following terms –

Protected disclosure

1. In raising concerns about clinical performance and the absence of proper monitoring, recording, reporting and review of patient outcomes with Dr Andrew Russell on or about 27th May 2014, illustrated with material sent to him on or about 30th May 2014, did the claimant make a protected disclosure on 27th May 2014 in that in doing so he had a

reasonable belief that the health and safety of patients of the respondent had been or were likely to be endangered?

2. Did the claimant (himself or by representatives on his behalf) repeat those disclosures in the period between May 2014 and 20th April 2016?

3. [deleted]

4. Did the claimant make any disclosure in bad faith (findings in fact only)?

Claim of unfair dismissal under ERA 1996 section 103A

5. Was the claimant dismissed in terms of section 95(1)(c) of ERA 1996?

6. If so was that dismissal unfair in that the reason for it was that the claimant made the protected disclosure at 1 above?

Claim of Constructive Dismissal

7. Did the respondent do any or all of the following –

   a. trigger a process knowingly intended to remove the claimant from his workplace and make it impossible for him to practice his profession of surgeon?

   b. fail to give proper consideration to and investigation into the claimant's protected disclosures?

   c. Carry out an incomplete and incompetent investigation into the claimant's protected disclosures?

   d. in carrying out that investigation and in handling the claimant's suspension and procedure generally did they fail to follow its *[their?]* own policies including

      i. Framework for Support

ii. Dignity at Work

iii. Voicing Concern Policy

iv. NHS Circulars 1990 PCS (8), PCS (DD) 1994/11 and PCS (DD) 1999/7?

e. in carrying out that investigation, fail to follow the ACAS Code of Practice on Disciplinary and Grievance procedures?

f. deny the claimant access to his research materials?

g. prevent the claimant from undertaking his Continuing Professional Development responsibilities?

h. conduct the investigation and process in an unfair, inconsistent and biased manner?

i. conduct the investigation in a way which was discriminatory on grounds of race?

j. mislead the claimant at review meetings?

k. deny the claimant effective support and opportunity to retain skills during suspension?

l. suspend the claimant from working with no proper basis?

m. fail to adequately review suspension?

n. make scurrilous allegations of misconduct against the claimant for which there was no proper basis?

o. fail or refuse to permit the claimant access to documents necessary for him to answer allegations of misconduct?

p. delay in the provision of a list of allegations of misconduct for an Annex C investigation hearing thus prejudicing the claimant's preparations for it?

q. failure to ever provide a list of specific allegations for claimant to respond to?

r. introduce in April 2016, just before the Annex C hearing, a new and serious and final allegation to the case for Annex C hearing that the claimant made a racial comment in 2014, ie 2 years after the alleged remark was made?

s. continued failure to allow the claimant access to his documents and to materials to support his defence?

8. If so, did the respondent conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the claimant?

9. In particular, was the introduction of this final and serious allegation so late in the day coupled with the delay in the provision of the list of specific allegations of misconduct and continued failure to allow the claimant access to his documents to support his defence the last straws in a series of conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence with the claimant?

10. If the respondent did any or all of the acts listed at 7 above, was that conduct a material breach of contract of employment with the claimant?

11. If so, was the claimant entitled to treat that conduct as a repudiation of the contract so as to entitle him to terminate it with immediate effect?

12. If so, did the claimant resign in response to the repudiation or did he delay too long in resigning thus affirming the contract?

Claim of race discrimination

13. Was the respondent's investigation of the claimant's protected disclosure inadequate?

14. Was the respondent's investigation of the "*Dignity at Work"* allegations against the claimant made by his three surgeon colleagues and its prosecution of related complaints carried out differently to its investigation of the claimant' disclosure?

15. Was that difference less favourable treatment because of the claimant's race?

16. Was the complaint under this head of claim lodged within the legislative time limit?

Claim of detriments

17. If the respondent did any or all of the acts listed at 7 above or as set out in the statement, were they done on the grounds that the claimant had made the protected disclosure at 1 above?

18. Was the complaint under this head of claim lodged within the legislative time limit?

Claim of breach of contract

19. As the claimant was dismissed without his contractual 3 month notice he seeks compensation for wrongful dismissal.

Claims

16. These were as set out in paragraph 2 above with the amendments set out in paragraph 3 above.

Evidence

17. For the claimant we heard evidence from –

(a) the claimant himself

(b) Dr D Fowlie, Consultant Psychiatrist

(c) Dr I Khan, Consultant Nephrologist, Honorary Senior Lecturer and Foundation Programme Director

(d) Prof I Ahmed (whose attendance had been required by a witness order)

18. For the respondent we heard evidence from –

(a) Prof N Fluck, Board Medical Director

(b) Dr M Metcalfe, Deputy Medical Director - Acute

(c) Dr T O'Kelly, Consultant Surgeon and former Associate Medical Director for Surgery

19. With the exception of Prof Ahmed, each of the witnesses gave his evidence in chief by way of witness statement. In the case of Dr Fowlie, we did not consider those parts of his witness statement which were relevant to remedy rather than liability.

20. We had bundles of documents as follows –

(a) a joint bundle to which we refer by page number prefixed by "J"

(b) a second joint bundle, prepared for proceedings involving the claimant before the General Medical Council ("GMC"), to which we refer by page number prefixed by "GMC"

(c) A bundle of documents submitted by the claimant to which we refer by page number prefixed by "C"

21. It is not the function of the Tribunal to record every piece of evidence presented to us and we have not attempted to do so. It is our function to make findings in fact which are relevant to the issues before us and are based on our evaluation of the evidence. These are recorded in the paragraphs that follow.

Findings in fact

The parties

22. The claimant was employed by the respondent as a consultant general surgeon from 1 February 1991 until his employment ended on 20 April 2016. He was awarded a personal chair in clinical surgery by the University of Aberdeen in 1999. He was the Surgeon to the Queen in Scotland between February 2004 and May 2016.

23. The claimant provided a comprehensive and impressive CV with his witness statement. In the words of Dr Khan –

"*In my professional opinion the Claimant is an excellent surgeon, and he is also a meticulous collector of data. His qualifications and expertise are well known and he is internationally renowned for his work."*

Dr Khan also described the claimant as "*a highly competent surgeon*" who delivered "*excellent care to patients*". We considered Dr Khan's assessment of the claimant's skill and reputation to be accurate.

24. The respondent is the NHS Health Board for the region of Grampian. It provides healthcare services to the people of Grampian. These include the services provided at Aberdeen Royal Infirmary ("ARI").

25. The respondent has an executive senior management or leadership team which reports to a supervisory Board comprising some 14 non-executive members and 4 executive members being the Chief Executive, Medical Director, Director of Finance and Director of Nursing, Midwifery and Allied Healthcare Professionals.

26. The expression "leadership team" also applied to those accountable for delivery of specified services or corporate responsibilities. In the period to October 2014 the relevant leadership team was the Acute Sector team which comprised Prof Fluck as Deputy Medical Director (as he then was) and Medical Lead for Acute, the General Manager for Acute and the Lead Nurse for Acute.

27. Prof Fluck succeeded Dr Roelf Dijkhuizen as Medical Director on 6 October 2014.

Cast list

28. In addition to the witnesses listed above a number of other people featured in the evidence presented to us, as follows –

- Mr B Alkari, Consultant General Surgeon (HPB sub-specialism)
- Ms D Annand, Staff Governance Manager
- Mr N Binnie, Consultant Surgeon and former Chairman, Area Medical Committee
- Prof D Bruce, Consultant Surgeon and Clinical Lead for Surgery
- Dr A Cameron, Chair of HIS review team
- Mr R Carey, Chief Executive (2006 – October 2014)
- Dr R Coleman, Associate Medical Director
- Mrs S Coull, Head of HR
- Ms W Craig, Consultant Surgeon

- Prof A Croft, Chief Executive (April 2019 to date) and Director of Nursing (up to April 2019)
- Dr R Dijkhuizen, Medical Director (up to October 2014)
- Dr S Gibson-Smith, Medical Adviser, MDDUS
- Mr M Habib, Consultant General Surgeon (HPB sub-specialism)
- Mr N Hermiston, BMA Representative
- Dr A Keel, Chief Medical Officer for Scotland (2014 – 2015)
- Mr P King, Consultant General Surgeon and Clinical Director for Surgery
- Mr M Koruth, Consultant General Surgeon (retired)
- Mr M Kumar, Consultant Surgeon
- Mr P Lamond, RCS IRM chair
- Ms V Lawson-Brown, CMP investigator
- Ms B Lim, Higher Surgical Trainee
- Mr M Loudon, Consultant General Surgeon
- Ms T McDonald, Assistant HR Manager
- Ms F McKay, Deputy Responsible Officer and Performance Support Officer
- Mr C Middleton, IT Security Officer
- Mr C Morris, Head of Information Governance
- Mr K Park, Chair, General Surgeons Sub-Committee
- Mr W Paxton, GMC liaison adviser
- Dr A Russell, Medical Director of Tayside Health Board
- Mr N Strachan, Divisional General Manager
- Dr P Strachan, Chief Operating Officer
- Mr S Swami, Divisional Clinical Director for Surgery
- Mr D Taylor, Senior IT Manager
- Prof J Webster, Consultant Physician
- Prof S Wigmore, Professor of Transplantation Surgery at the University of Edinburgh
- Mr S Wilkinson, Deputy Associate Medical Director

- Mr M Wright, Interim Chief Executive (October 2014 – June 2015) and Chief Executive (June 2015 – September 2018)

Some of the job titles referred to above are no longer applicable but we understand they were applicable at or during the relevant time (broadly 2014 – 2016).

Acronyms

We use a number of acronyms below and we record their meanings here –

• ETS	British Association of Endocrine and Thyroid Surgeons
• BMA	British Medical Association
• CHI	Community health indicator
• CLO	Central Legal Office
• CMP	CMP Resolutions
• CSC	Consultants Sub-committee
• D@W	Dignity at Work
• DSAR	Data Subject Access Request
• EMAS	Expandable Medical Audit System
• EqA	Equality Act 2010
• FFS	Framework for Support
• GI	Gastrointestinal
• HIS	Health Improvement Scotland
• HPB	Hepato-pancreatico-biliary
• HST	Higher Surgical Trainee
• IRM	Invited Review Mechanism
• ISD	Information Service Division
• M&M/QI	Morbidity and Mortality/Quality Improvement
• MCN	NHS Grampian Managed Cancer Network
• MDDUS	Medical and Dental Defence Union Scotland
• MDT	Multi-disciplinary Team
• NHSG	National Health Service Grampian (the respondent)
• NOSCAN	North of Scotland Cancer Network

- PID Patient identifiable data
- PRG Performance Reference Group
- RCS Royal College of Surgeons (England)
- SBAR Situation, Background, Assessment, Recommendation
- SSI Surgical site infection

Data collection - EMAS

29. As mentioned above, the claimant was described by Dr Khan as a "*meticulous collector of data".* He started collecting clinical data for audit in 1977. He developed EMAS, a computer programme which, according to the claimant, "*simplified accurate data collection by integrating it into routine practice".* It was a tool for measuring surgical outcomes and offered various benefits including the prompt production of a structured discharge letter. EMAS was supported by the respondent and was introduced across surgical specialties in 1990. Prof Fluck acknowledged that EMAS was "*far ahead of its time when initially developed".*

30. EMAS was widely used until Windows XP was introduced within the respondent's organisation in 2004. Thereafter its use declined to the point where it was used only within the claimant's ward (ward 501, formerly numbered ward 31) and two other locations, and ceased around 2015. This coincided with what Prof Fluck described as "*the move towards big data in healthcare*" which can be used and analysed both internally and externally by organisations such as ISD, the national data collection and analysis service which provides statistical services to the NHS in Scotland.

M&M/QI meetings

31. From September 2012 M&M/QI meetings were held on a weekly basis within the general surgery department. The purpose of these was described by Prof Fluck as being "*centred on improvement and learning where clinical teams reflect on patient outcomes and consider how they and the service might improve systems of care in the future"*.

32. At M&M/QI meetings there would be discussion of cases where the patient had died or there had been significant complications. Prof Fluck told us that these meetings were one of the routes by which clinical concerns could be raised, although he also said that these meetings did not normally report to general management – "*usually matters are discussed and subsequently dealt with by the clinical team within the unit who are meeting".*

Datix

33. Datix is an incident reporting system used across the NHS in Scotland. Any member of staff can use Datix to report anything to management. Prof Fluck explained that "*once a Datix is submitted a designated handler deals with it at the appropriate level and some learning should come out of that"*.

34. The claimant referred to Mr Kumar, then a HST, piloting the use of Datix as a clinical tool. A form was developed and circulated in January 2013 (C297). However, according to the claimant, there were deficiencies –

- *"poor compliance with delayed and even non-reporting of even major adverse outcomes including death"*
- *"data entry was not comprehensive and case selection for entry was selective"*
- *"there is no denominator data in Datix to quantify rates of adverse outcomes"*
- "*clinical data entry which is not coded remained primitive and not analysable*"
- "*management assessment and actions on completed Datix entries were ineffective"*

Appointment of HPB consultants

35. Prior to the appointment of Prof Ahmed (then Mr Ahmed, but we will refer to him as Prof Ahmed) and Mr Alkari the department of general surgery had been divided into four units – (i) breast, (ii) colorectal, (iii) upper GI and (iv) HPB with endocrine. Mr Koruth carried out all of the liver resections and the majority of the HPB surgery, supported by the claimant and Mr King.

36. Prior to Mr Koruth's retiral in 2009 two general/HPB posts were advertised and Prof Ahmed and Mr Alkari were appointed.

37. The claimant was initially supportive of his new colleagues and it was clear from Prof Ahmed's evidence to us that, notwithstanding the events which followed, he (Prof Ahmed) was appreciative of that support. However, some differences soon arose –

- The claimant was disappointed that his new colleagues were not seeking to collaborate in complex cases where he had recognised expertise.

- The claimant found that his colleagues were not using EMAS.

- Their approach to patient selection for certain procedures differed from the "*conservative approach"* taken by Mr Koruth and the claimant.

- They stopped bringing images to the long established X-ray conference at 13.00 on Fridays.

Claimant raises concerns

38. The claimant became concerned about aspects of the HPB surgeons' work. In his evidence he referred to –

- The increase in the number of pancreatico-duodectomies, which he described as one of the most complex of abdominal operations in HPB surgery, having high mortality and complication rates.

- The HPB surgeons appearing to take offence at his operating on their patients to manage complications such as large abscesses and bleeding.

- A study of SSI rates in general surgery demonstrating that the SSI rate for the HPB consultants' patients was three times the departmental average.

- The carrying out of what he described as experimental surgery (transvaginal cholecystectomy).

39. In 2011/12 the claimant raised his concerns with Prof Ahmed. He also raised them with Mr King and Mr O'Kelly. He described his concerns as "*HPB surgery outcomes and issues around poor communication, disorganisation, management of surgical complications and data collection"*.

40. When he did so, the claimant was not aware that a national audit of HPB cancer surgery by the Scottish Hepato-Pancreatico-Biliary Network had been collecting data since 2009. Their first report in 2012, covering 2009/10, had confirmed that the HPB team at ARI had performed less well than the national average.

41. Dr Dijkhuizen brought this to Mr O'Kelly's attention in June 2012 and requested a review of all the clinical cases from 2009, 2010 and 2011. Mr O'Kelly asked Mr King to carry out that review.

42. Mr King did so and produced a report – "Clinical report on 30 day Mortality following elective resections of Pancreatic Cancer in Aberdeen Royal Infirmary in 2009, 2010 and 2011" (C2-4 and also J458-460). Mr King's report contained the following as "*Overall comment"* –

"*2 common factors seem to have emerged.*

Firstly is the matter of patient selection – these patients need to be able to withstand complex major surgery and its possible complications.

The second factor is delayed recognition of complications directly related to surgery. In association and directly contributing to the second factor may be the use of Epidural Anaesthesia both during and after surgery."

43. The claimant did not see Mr King's report until 2014. He understood however that it is was shared with Prof Ahmed and Mr Alkari when it was produced in 2012.

44. The claimant had reservations about the accuracy of the national audit and Mr King's review because of the inclusion criteria for the patients reviewed. He exemplified this by referring to the third National HPB Audit report published in April 2014 where, in relation to a patient death at ARI in 2010, it was stated "*This death should not be counted as a death following pancreatic resection"* the impact of which was to show an improvement in the previously reported mortality rate.

Relationship between general surgeons and management

45. A new contract for consultants was introduced in 2004. The claimant's view was that this "*empowered managers in the NHS*". He said –

"*Medical directors, their subordinates and non-clinical managers have the power in the Scottish NHS. Paradoxically clinical governance is the responsibility of the non-medical Chief Executive."*

46. In July 2012 the Supreme Court handed down its judgment in the case of ***Hewage v Grampian Health Board [2012] UKSC 37***. Mrs Hewage's claims of sex and race discrimination had been successful at the Employment Tribunal. The Employment Appeal Tribunal allowed the Board's appeal. The Inner House of the Court of Session allowed Mrs Hewage's appeal and restored the decision of the Employment Tribunal. The Supreme Court refused the Board's further appeal.

47. In the judgments of the Employment Tribunal and the Court of Session there were criticisms of Dr Dijkhuizen. This gave rise to concern amongst

the consultants for a number of reasons including the nature of the criticisms and the fact that Dr Dijkhuizen was the Responsible Officer for approving revalidation of doctors within the respondent with the GMC.

48. Mr Binnie as chair of the CSC wrote to the GMC about this on 12 November 2012 (C5). In December 2012 the GMC responded that the matters raised were for the Cabinet Secretary and the respondent and not for the GMC.

49. A meeting was arranged for 13 March 2013 to be attended by Mr Carey, Mr C Muir as Vice Chair of the Board, Dr A Ingram, the respondent's Director of Workforce and Mrs S Duncan, Employee Director and representatives of the consultants. On 5 March 2013 Mr Binnie emailed Mr Muir (C22) about whether the CSC had referred Dr Dijkhuizen to the GMC; his email included the following paragraph –

"*The main issue which we would like to discuss is the continued disconnection between the management and the consultant body in Grampian and the failure to acknowledge this. There are ongoing initiatives in NHSG which show a lack of management confidence in the commitment and integrity of the consultant staff and these are extremely damaging. We need to move forward and away from the management position where the consultant body is seen as the problem rather than the solution."*

50. Dr Dijkhuizen wrote to Mr Binnie on 7 March 2013 (C24-26) in somewhat strident terms –

"…the Consultant Sub-Committee has presided over an exercise to use the ruling of the Court to undermine my position as the Medical Director and Responsible Officer for NHS Grampian"

"…professional arrogance and petulance…"

"…violated my personal rights…"

"…ignored the governance arrangements within the NHS Grampian organisation…"

"…has been less than straightforward…"

"…my treatment by the CSC constitutes mobbing and harassment…"

"…I reserve the right to ask the organisation to call any of the CSC members responsible to account under the NHS Grampian "Dignity at Work" policy"

51. The claimant did not attend the meeting on 13 March 2013 but was briefed after the meeting by Mr Binnie. According to the claimant's evidence, Mr Binnie described the meeting as *"fraught*" and said that Mr Carey had threatened *"to use every tool in the HR toolbox"* against consultants who challenged the respondent's management. The claimant referred to this "*episode"* as *"the backdrop for everything that followed"*.

Proposal to relocate surgery

52. At a meeting of the General Surgeons Committee in November 2013 Prof Fluck presented a plan to relocate general and vascular surgery within ARI. The consultants' view was that this would have an adverse effect on their ability to provide an adequate elective (as opposed to emergency) service. On 2 December 2013 Mr Park wrote on behalf of the general and vascular surgeons to Councillor B Howatson, then the respondent's chair (J144-146). This letter was copied to Mr A Neil as Cabinet Secretary for Health and Wellbeing and also to a number of MSPs.

53. Prof Fluck told us that, as far as he was concerned, the issues raised in this letter were all addressed and resolved and the respondent managed the move of the departments in a manner which did not affect patient safety. He acknowledged that it would be unusual if all of those involved would agree on all aspects of a change to the working environment.

Managerial issues within general surgery

54. Prof Fluck described the management changes within general surgery in 2013. These involved both Mr King and Mr O'Kelly leaving what he referred to as "*significant management positions*". Prof Fluck said that it was "*important to understand the diminishing influence of the department in the broader management and leadership of the Respondent"*.

55. One element of the new consultant contract introduced in 2004 was annual job planning. The claimant told us, and we accepted, that he complied with this. However, according to Prof Fluck, others did not –

> "*The fact that Job Plans were not then implemented within General Surgery is indicative of the fact that at this time the more senior management of the Respondent were not willing to confront the loose management of the General Surgery department.*"

56. Prof Fluck said that he and Prof Croft (as she now is) were to work as a team to try and sort out managerial issues within the acute sector, and that this exercise took place in early 2014 around the same time as the HIS validation exercise to which we refer below. He said that this "*lifted the lid on a number of issues within the General Surgery department"*. He did not however provide any detail of issues arising from his and Prof Croft's exercise as opposed to those which emerged from the HIS and RCS reports.

Reference to Prof J Forrester

57. In late 2013/early 2014 Mr O'Kelly spoke informally with the claimant. According to the claimant, Mr O'Kelly counselled him not to "*do a John Forrester"*. The claimant did not understand the significance of this at the time but, by 2015, he believed that Prof Forrester had been forced out of his employment by the respondent.

58. Mr O'Kelly's evidence was that he had concerns about the claimant's diminishing reputation within the general surgery department and his increasing isolation from some of his colleagues. He described his conversations with the claimant as "*an attempt to bring the Claimant to his senses and help repair relationships with his colleagues"* and said that the claimant "*had changed his approach less than he needed to"* when speaking to colleagues.

59. By the time of his conversations with the claimant, Mr O'Kelly had resigned from his management role of Group Clinical Director. He was not delivering

a message or warning on behalf of the respondent's senior management. His aim was to give "*good advice to a respected colleague and long-time friend*".

60. Mr O'Kelly had observed with Prof Forrester that, irrespective of reputation or status, not getting along with colleagues would inevitably cause problems and impact on the functioning of a department. Being perceived by colleagues as being a "*problem"* and a "*cause of dysfunction"* was far from ideal. Mr O'Kelly said that Prof Forrester had been perceived to favour certain colleagues and this too had undermined his standing in his own department.

61. As Mr O'Kelly put it –

> "*Rather than my analogy with John Forrester being a warning to suppress patient safety concerns or to warn the Claimant off from challenging senior management, it was simply a plea to him to not end his career marginalised within his department and with his reputation tarnished."*

We accepted Mr O'Kelly's description of and motive for his conversations with the claimant.

HIS reports

62. In March 2014 Mr Loudon as MSN clinical lead met Mr Neil and raised concerns about cancer services within Grampian. In the note of his interview with Ms Lawson-Brown on 15 February 2015 (at GMC834) Mr Loudon is recorded as saying "*services collapsed in autumn 2013".* This led to the HIS Short Validation Review into ARI. The claimant was one of those who spoke to HIS when they visited ARI on 25/26 March 2014.

63. Prof Fluck told us that this review concluded that there were concerns that warranted a more detailed review which the respondent was asked to request. Prof Fluck described the areas of concern as follows –

> "*the relationship between some senior medical staff and the Respondent's senior leadership, the accountability, governance and performance*

management arrangements in acute services, follow-through in translating strategy into operational delivery, and specific concerns about the quality and safety of key specialities (General Surgery, Emergency Medicine and Care of the Elderly)"

64. HIS then carried out a more detailed review, the outcome of which was a report published in December 2014 – "*Aberdeen Royal Infirmary: Short-Life Review of Quality and Safety"* (GMC72-176). The focus of the review was set out at paragraph 4.12 of the report –

- assess the leadership, culture, values and behaviours which support and ensure the quality and safety of care

- identify the areas for improvement, and good practice, in relation to the specific services under review

- advise if any additional support should be made available to NHS Grampian to help strengthen and accelerate their improvement programme, and

- advise on any areas that may require further action, including improvement support

65. While most of the criticism in the HIS report was directed at the respondent's management, there were concerns about the Respondent's general surgery department. We quote from the Executive Summary –

"*We were particularly concerned about the behaviour of a minority of consultants in general surgery…"* (GMC78)

"One of the surgical units is significantly dysfunctional and there are serious allegations about individual consultants which must be resolved….We have recommended that NHS Grampian undertakes an urgent investigation to establish the facts to inform the need for further action" (GMC79)

66. One of the recommendations in the HIS report was that the respondent should ensure that the recommendations made by the RCS following their visit in September 2014 were implemented in full.

Ms Craig's appointment

67. Mr Habib joined the HPB team in ward 501, initially on a locum basis, on 7 October 2013. He was appointed to his substantive post as a consultant surgeon in March 2014.

68. Following interviews in January 2014 Mr Kumar and Ms Craig were appointed as consultants in general surgery, taking up their posts in April 2014. We understood that in appointing Ms Craig, the respondent was filling a post for a general surgeon with an interest in endocrine surgery. There was some evidence, disputed by the claimant, that the requirements for this post were framed in a way that favoured Ms Craig. This related to the person specification requiring a Masters in Public Health, a qualification which Ms Craig held (Prof Ahmed at GMC1088, para 8 and Mr Alkari at GMC1112, para 16).

69. Ms Craig had previously worked in general surgery as a HST in 2009/10. She had what the claimant described as an "*impressive academic CV".* As a HST she had expressed an interest in endocrine surgery which was the claimant's sub-specialty. She was perceived as being the claimant's protégé and potential successor in relation to endocrine surgery.

70. Prof Ahmed and Mr Alkari were unhappy at Ms Craig's appointment although they did not share their concerns with the claimant at the time. According to Prof Ahmed (GMC1088, para 7) there had been complaints from junior doctors about Ms Craig's behaviour when she was a trainee on ward 501.

71. When Ms Craig took up her appointment there were six consultants in ward 501 –

- The claimant — General GI and endocrine
- Mr King — General GI

- Prof Ahmed General & HPB
- Mr Alkari General & HPB
- Ms Craig General & endocrine
- Mr Habib General & HPB

72. Difficulties arose immediately about the provision of office space for Ms Craig. She was to share Prof Ahmed's office and was unhappy about this.

73. There was also difficulty about the emergency receiving rota. The claimant had come off this rota when he reached the age of 60 in 2008. Similarly, Mr King came off the rota in 2014.

74. Ms Craig's first emergency on call was over Easter weekend 18-21 April 2014. She requested the claimant's help to perform a complicated operation on Monday 21 April. The claimant asserted that Prof Ahmed did not attend for handover at 8am on that date and that this contributed to delay in treating the patient who died. Prof Ahmed said that he had no recollection of this, but that handover would not result in a patient's death or a delay in treatment. On balance we preferred the claimant's evidence as he gave a clearer account of this matter.

75. The claimant asked Ms Lim to present the case of the patient who had died on 21 April 2014 at the M&M/QI meeting on 8 May 2014. According to the claimant he had not at that time appreciated that there was antipathy between Ms Lim and Ms Craig. He told us that Ms Lim's presentation "*reflected that antipathy"*. The claimant described the atmosphere in the meeting as "*hostile, bullying and intimidating"* to Ms Craig.

Claimant meets Mr Carey

76. On 8 May 2014 the claimant met with Mr Carey who was at that time the respondent's chief executive. According to the claimant the purpose of the meeting was to express his (the claimant's) concerns about the relationship between management and consultants, patient care and problems in the department. In particular he was concerned about how Ms Craig's appointment had been managed.

77. When the claimant received (on 4 April 2016) the management case for the Annex C hearing scheduled for 25 April 2016, he saw that it was alleged that he had at this meeting with Mr Carey referred to his HPB colleagues as a group of "*hairy arsed Muslims" (*the "*racist remark").*

78. In the version of the respondent's RCS IRM pro forma request sent to the GMC (GMC230) the racist remark was not attributed to any individual but was prefaced by the words "*In a private conversation (jokingly) about surgical colleagues".* In the version actually sent to the RCS, these words were omitted. The claimant asserted the version sent to the GMC had been embellished to support the allegation that he had made the racist remark.

79. The claimant strongly denied making the racist remark. He said that this had been falsely attributed to him almost two years after the conversation in which he was alleged to have spoken these words. It was not a phrase he would use, and certainly not in the presence of a chief executive of a Health Board. He had not been "*confronted"* about it and any proper investigation would have revealed that he had not made the comment. We came to the view that someone had made the racist remark since it would not otherwise have been quoted, without attribution, in the RCS IRM pro forma (J177) but, on the balance of probabilities, it had not been the claimant.

Patient death on 9 May 2014

80. The claimant described this in the following terms, which we found no reason to doubt –

"*…around 18.00 on 8 May 2014 I was approached by P King who was greatly distressed about the deteriorating condition of an HPB patient for whom there was no satisfactory care plan following an abandoned extensive exploratory operation. I was on call and I said I was happy to review the patient. I read her notes and reviewed the scans. I Ahmed arrived and advised he would deal with matters. He telephoned me later that evening and stated the situation was irrecoverable and a Do Not Resuscitate (DNR) notice was in force.*

On attending the ward at 08.00 the following morning 9 May 2014 I was troubled to find that the patient had been subjected to an inappropriate CT scan, which was on display in the resident's office. The CT scan demonstrated an iatrogenic intra-abdominal catastrophe. She arrested on return to the ward and CPR had been attempted. There was no completed DNR notice and the junior staff were unaware of any discussion around CPR. This resulted in an unseemly and undignified death which distressed the junior staff involved….I was upset by this as no thought had been given to the needs of the patient's disabled husband who was denied the opportunity to be at his wife's side.

Later that morning I attended a meeting with P King, I Ahmed, W Craig and Stuart Stephen (Unit Operational Director). This patient's death following the aborted and ill-conceived procedure carried out by M Habib and I Ahmed arose. I Ahmed dissembled to a point where I regret that I lost my temper and shouted. I had been misled over the DNR advice, the care provided, the nature of the surgery carried out and in passing his whereabouts during the week. My only concern was that patients were coming to harm."

81. The claimant told us that this was not his "*proudest day*". He had subsequently apologised to Prof Ahmed. He acknowledged in evidence that, while what he had said was true from a patient perspective, he had "*overstated"* the case at the time.

82. There was conflicting evidence as to whether Prof Ahmed was so shaken by this episode that he felt unable to operate on 9 May 2014. That was Prof Ahmed's evidence whereas the claimant said that Prof Ahmed had not been due to operate that day. The note of Mr Stephen's interview with Ms Lawson-Brown on 21 November 2014 (GMC1118-1122, at page 1121, para 18) supported Prof Ahmed's version and we believed that this was correct.

83. Thereafter there was a meeting between the claimant and Prof Ahmed on 19 May 2014. Prof Ahmed's diary notes referred to this (at GMC489). The claimant acknowledged that his behaviour on 9 May 2014 had been inappropriate. The meeting was, according to Prof Ahmed, "*in general was positive*" and *"cleared my doubts that there was any underlying issue with the HPB team that I was not aware of".*

Claimant meets Dr Russell

84. Dr Russell had been sent to NHSG by the Scottish Government's Chief Medical Officer. According to the CMP Final Investigation report in May 2015 into the complaints made by Prof Ahmed, Mr Alkari and Mr Habib (GMC 400-509, at page 432, based on M Lawson-Brown's interview with Dr Russell on 9 March 2015) there was concern about the relationship between consultants and management, particularly the perceived lack of clinical engagement, and the Scottish Government wanted an objective evaluation and an action plan. Dr Russell was aware of the concerns about general surgery through Mr Loudon and the respondent's Board.

85. Dr Russell met with the claimant on 27 May 2014. The claimant described the concerns he raised with Dr Russell in these terms –

"*…the disappointing performance of the Datix based M&M/QI meetings with poor compliance with agreed standards, consequent absence of objective accurate data collection and poor participation in the process"*

"…poor clinical outcomes amongst my HPB colleagues appeared more frequent than acceptable, these had not been properly investigated and I

was duty bound to raise patient safety and dignity issues in terms of Good Medical Practice…"

86. Dr Russell was alarmed by what the claimant told him and telephoned Prof Fluck. Prof Fluck remembered that he was in his car giving Dr Dijkhuizen a lift home when he spoke with Dr Russell on 27 May 2014. He referred to Dr Russell saying that the claimant had told him there were "*major safety issues within the HPB service".*

87. Dr Russell told Prof Fluck that he had asked the claimant to provide him with evidence of what he was talking about. Dr Russell sent an email to the claimant on 28 May 2014 (J147) asking for the names and CHIs of the patients involved.

88. There was speculation that the claimant had been compiling a dossier about his HPB colleagues but we were satisfied that this was not the case. We accepted the claimant's evidence that, in response to Dr Russell's request, he had spoken with colleagues and senior nurses in general surgery to obtain examples without disclosing why he was seeking this information. He also included some cases of which he was personally aware.

89. The result was a list of 20 cases (J149-150) which the claimant emailed to Dr Russell and which Dr Russell shared with Prof Fluck on 30 May 2014 (J148). Prof Fluck did not recognise this as whistleblowing by the claimant.

M&M/QI meeting on 29 May 2014

90. The case which had been discussed at the M&M/QI meeting on 8 May 2014 (see paragraph 76 above) was, following discussion at a SBAR meeting on 22 May 2014, raised again at the M&M/QI meeting on 29 May 2019. The claimant described this as "*unprecedented".*

91. As above we record the evidence about what happened at the meeting on 29 May 2014 by quoting the claimant –

"*At the M&M/QI meeting on 29 May 2014 the case discussed on 8 May 2014 was re-presented by M Kumar in a manner humiliating to W Craig and compounded the bullying approach at the previous meeting. M Kumar portrayed it as necessary as a result of a failure of learning. He went on to state and repeat that "I know you (Professor) have destroyed people's careers.*

I took great exception to this comment as it was not true and I lost my temper…"

92. Mr Kumar is recorded as giving an account of this exchange in the notes of his interview with Ms Lawson-Brown on 19 November 2014 (GMC1077-1086, pages 1082-1083) in these terms –

"*MK stated to Professor Krukowski that he was being intimidating and that no one wants to stand up to him, as everyone feared he had the potential to destroy their careers."*

According to the interview note Mr Kumar then apologised to the claimant.

93. The claimant's evidence to us was that this had been "*unprofessional behaviour"* on his part and "*embarrassing*" and that he had apologised at the next M&M/QI meeting on 5 June 2014.

Strained relations in ward 501

94. We found evidence of the difficulties in the relationships within ward 501 in the notes of evidence taken by Ms Lawson-Brown in November 2014.

95. Mr Binnie is recorded as saying during his interview on 18 November 2014 (GMC1036-1041, at page 1040) –

"*The disharmony between WC and IA erupted early in 2014 after WC took up post as Consultant Surgeon. This interpersonal disharmony enveloped the unit and spread. This was partly due to ZK being overprotective of his former trainee."*

96. Prof Bruce is recorded as saying during his interview on 19 November 2014 (GMC 1060-1065, at page 1061) –

"*Since WC came, some of ZK's decisions have been out of keeping with his historic behaviour and he has been overly protective of WC, which has had*

an impact on others and appears to have modified ZK's interpretation of several situations."

97. Mr Habib is recorded as saying during his interview on 19 November 2014 (GMC1066-1070, page 1069) –

"*WC is very ambitious and intelligent but also has social issues in addition to other issues; she cannot get along with most people. It is all one way with WC. Her relationship with ZK is perceived to be close but sometimes WC shouts at ZK. ZK manipulates other colleagues to protect WC who can do as she wishes. The on-call swaps are an example when she requests specific days but is not flexible and dictates the terms; if people do not comply they are beaten with a stick."*

We interpreted the last phrase figuratively rather than literally.

98. Prof Ahmed is recorded as saying during his interview on 20 November 2014 (GMC1087-1092, at page 1089) –

"*WC got ZK to come and shout at IA on many occasions. From April 2014, ZK's behaviour changed with WC's arrival; he would shout in from* (sic) *of the secretaries and always side with WC. If anyone says anything to WC, she will go and get ZK to come and shout at other colleagues."*

99. Ms Craig is recorded as saying during her interview on 20 November 2014 (GMC1093-1100, at page 1094) –

"When WC joined 501 it became three HPB consultants versus one. IA, BA, MH and WC were on the on-call rota as ZK and PK do not cover on-call. The HPB consultants did not want ZK and PK involved with their patients' care and the degeneration in relationships is because this view of the HPB consultants has been allowed to continue and dictate how practice was to be; WC was seen as part of the older "Aberdeen" way, with views congruent to those of PK, ZK as to clinical organisation, and so automatically a problem."

100. Prof Fluck's evidence to us touched on this issue –

"*On balance, the senior surgeons in the Respondent's organisation were more opposed to early specialist differentiation and this has been commented on as the Aberdeen Way."*

101. Prof Fluck also made reference to internal concerns relating to the general surgery department. He said that most of the issues "*related to*

behavioural interactions and team working", and that "*most of the specific incidents involved the existing HPB surgeons and either Ms Craig and/or the claimant"* and "*correlated with Ms Craig joining the department*". Prof Fluck also said that there were "*too many individual issues to handle in the normal way*".

102. There had also been some dialogue between the claimant and Prof Ahmed about the HPB consultants' non-participation in the Friday X-ray meetings in the context of their attendance at Friday prayers. The claimant had asked "*For Muslims is prayer more important than patients?"* It seemed to us that this was said more to express the claimant's view that his HPB colleagues should have been attending the X-ray meetings than to infer any racial or religious criticism. The claimant's assertion that he was not racist was endorsed by Dr Khan.

103. In the course of a conversation between the claimant and Prof Ahmed on 22 July 2014 (according to Prof Ahmed's diary notes – J493-494) when Prof Ahmed said that it was difficult to discuss anything with Ms Craig, the claimant stated that Ms Craig felt that the three Muslim Asian consultants were against her for cultural reasons, and she felt that due to cultural reasons they did not want to talk to her directly. This echoed a view expressed by Mr Binnie.

Decision to involve RCS

104. Following receipt of the list of cases compiled by the claimant, Dr Russell advised that the respondent should move swiftly to ensure that the HPB service was safe and should consider an external review. Dr Dijkhuizen asked Mr Swami to carry out a "*very rapid review"* to ascertain if there was an identifiable problem with the HPB surgeons.

105. Mr Swami undertook a "*preliminary case note review"* and concluded on 16 June 2014 that "*there are no major concerns that would necessitate immediate drastic measures"* (J184-185). The claimant was critical of Mr Swami's review but our view was that Mr Swami simply did what he was asked to do.

106. Dr Dijkhuizen decided to use the RCS IRM process. Prof Fluck understood that this decision was made following discussion with Dr Keel and Dr Russell. RCS offer three strands of service which Prof Fluck described as case review, individual review and service review. Dr Dijkhuizen decided to ask RCS to look at both the cases identified by the claimant and behavioural issues within general surgery.

107. On the face of it that was a reasonable decision but we did have some reservations about Dr Dijkhuizen's motivation. We were uncomfortable about the way Dr Dijkhuizen had expressed himself in his letter to Mr Binnie of 7 March 2013 (see paragraph 50 above). We were also uncomfortable about some of the language used by Dr Dijkhuizen according to the notes of his interview with Ms Lawson-Brown on 24 March 2015 (GMC1004-1007) –

- At page 1005 Dr Dijkhuizen referred to the "*troublemakers"* in general surgery (which Prof Fluck understood to include the claimant).

- At page 1007 Dr Dijkhuizen referred to Mr Loudon as "*completely mad".*

108. We were also uncomfortable about the way Dr Dijkhuizen had reported this matter at the PRG meeting on 5 June 2014. Before that meeting were fourteen *"concerns"* relating variously to behaviours, team working and clinical care within general surgery. However, the "*Situation"* and "*Background"* were described by reference only to the concerns reported (by the claimant) to Dr Russell.

109. If Dr Dijkhuizen was seeking PRG advice about referring both (a) the cases raised by the claimant with Dr Russell and (b) the issues of behaviours and team working within general surgery to RCS, we would have expected the note of the meeting to reflect that. It did not do so. The note records (at J169) –

"*Discussion took place around the teamworking/behavioural issues and the best way to deal with this. All individuals would be given the chance to air their views during a confidential interview.*

External mediation such as Edgecumbe Health was suggested and Dr Dijkhuizen said he would have an initial discussion with the Royal College of Surgeons of England to see if they had the expertise to help with this or could recommend another organisation."

110. That gave the impression that the RCS were to be asked about external mediation rather than undertaking a review into behaviours and teamworking.

111. The note (at J168) also records in relation to the cases reported by the claimant to Dr Russell –

"*PRG agreed that these cases were required to be looked at in detail and as a matter of urgency to determine if there was a potential risk to patients. Dependant upon the outcome of this, the organisation could then decide whether external review would be necessary."*

That made it clear, in our view, that Dr Dijkhuizen told the PRG that the case review would be done before a decision was taken to go to external review. That was not what happened.

112. We had a similar concern about the way in which Dr Dijkhuizen was recorded as having reported to the respondent's Board. The minute of the Board meeting (in closed session following an open session on the same date) of 6 June 2014 (at J171) stated as follows –

"*Dr Dijkhuizen reported to the Board recent concerns about general surgery that had been brought to the attention of Dr Andrew Russell, who was supporting the Medical Director during the transitional period prior to Dr Dijkhuizen's retirement. As a result, Dr Dijkhuizen had invited the Royal College of Surgeons of England to investigate. The Chief Executive of NHS Scotland and the Director General of Health and Social Care had been advised."*

113. Prof Fluck accepted that the reference to concerns brought to the attention of Dr Russell was a reference to what the claimant had reported. The absence of any mention of the wider scope of the RCS review might be

an oversight in the minute, but it made us doubt whether Dr Dijkhuizen had disclosed the full extent of the RCS review to the Board.

RCS review request

114. Initiation of the RCS IRM process involved the submission of a pro forma (J173-183) which Dr Dijkhuizen prepared and sent to RCS on 10 June 2014. Dr Dijkhuizen sought input from Prof Fluck and Mr Swami before submitting the form.

115. Dr Dijkhuizen sent a copy of the RCS pro forma to Dr Keel on 16 June 2014 (J186).

116. The claimant's position was that a number of statements contained within the RCS pro forma were incorrect, for example that internal review and audit had been carried out and that steps had been taken to separate the working environment of consultants in conflict (Ms Craig's move to ward 504 not being announced until 8 August 2014). The case note review had not been completed when the RCS pro forma was submitted.

117. In the meantime, Prof Ahmed and Mr Alkari had met with Dr Dijkhuzen on 11 June 2014. Prof Ahmed told us that Mr Dijkhuizen had listened to their concerns; he had told Prof Ahmed about the D@W policy but had not encourage him to make a complaint.

118. On 18 July 2014 the claimant wrote to his colleagues (J190) questioning the appropriateness of the respondent "*escalating the process before sharing these concerns with the group and seeking resolution"*. He urged his colleagues to *"present a united front"*.

119. There was then a dialogue with RCS involving Dr Dijkhuizen and Ms McKay regarding the composition of the review team and the terms of reference. RCS advised that they could not investigate specific individual issues and particularly those around possible discrimination.

120. The terms of reference agreed with RCS on 15 August 2014 were as follows (J204) –

"*Review of the general surgery service at Aberdeen Royal Infirmary, under the Invited Review Mechanism.*

a) To consider concerns about the general surgery service with specific reference to:

- *The standards of team working displayed by the surgeons involved in general surgical care;*
- *The standards of individual behaviours displayed by the surgeons involved in general surgical care;*
- *The ways in which the surgical consultants' team working and individual behaviours may or may not be impacting on the delivery of care;*
- *The quality of patient outcomes achieved by the surgeons with relation to 16, mainly hepato-biliary, cases.*

b) To review the way in which the general surgery service is currently delivered, including:

- *The overall safety of the service;*
- *The quality of the clinical governance systems and processes supporting the service and how these are being used.*

The reviewers will then make recommendations for the consideration of the Chief Executive and Medical Director of the Hospital as to:

- *Whether there is a basis for concern about the general surgery service in light of the findings of the review;*
- *Possible courses of action which may be taken to address any specific areas of concern which have been identified."*

Review visits

121. The HIS review visits took place between 12 August and 9 October 2014. They interviewed some 530 members of staff. Their targeted visit to general surgery took place on 16 September 2014. The claimant told us that he spoke to the HIS interviewers on three occasions.

122. On 16 August 2014 Dr Cameron wrote to Mr Carey (J205-206) confirming that HIS had not found evidence of any patient safety issues that required immediate attention. However, he raised issues of professional conduct and professional competence within the surgery department including –

- Manipulation of the appointment process for consultant staff
- An atmosphere of bullying and intimidation amongst medical staff
- Alterations made to clinical records apparently to frustrate appropriate clinical inquiry into the care of a patient
- Subsequent deletion of clinical records to prevent clinical review of an individual case

123. There followed an exchange of letters between Mr Carey and Dr Cameron (J210-212) with Dr Cameron asking that a bulletin "Aberdeen Royal Infirmary Review" be withdrawn and amended/replaced with the deletion of a sentence which referred to "positive" feedback from Dr Cameron.

124. In preparation for the RCS review, weekly general surgery review information meetings were held between 28 July and 25 August 2014. Minutes were taken – J193-194, J197-199, J202-203, J207-209 and J213-215. The minutes of the meeting of 25 August 2014 included the following –

- *"Concern aside that people aren't aware of individual concerns on individual behaviour around dignity at work. As these concerns have not been raised through a formal dignity at work complaint then individuals have not been informed. It was stated that the management team had decided to undertake a dignity at work investigation based on the informal complaints raised."*

- *"NHSG will investigate in parallel to RCS review. Informal concerns about racial, sexual, and age-related discrimination have been highlighted."*

125. The claimant wrote to Mrs Coull on 26 August 2014 (J216) expressing concern about the "parallel" NHSG review as it seemed contrary to what she had previously told him. He made reference to mediation.

126. The RCS reviewers attended at ARI between 1 and 3 September 2014. They had been provided with 261 documents in advance (shared with the claimant and others via an intranet link). The reviewers spent some 4 hours reviewing the 16 patient records and thereafter conducted interviews with 80 members of staff.

127. A further general surgery review information meeting took place on 8 September 2014 at which Prof Bruce shared initial verbal feedback following the RCS review visit. The minute (J219-220) recorded as follows (after questions about what would happen next and whether individual incidents would be identified) –

"SS advised that there is a process regarding dignity at work where it will be investigated appropriately. It was not thought that the RCS review would identify individuals in the report. It was stated that individuals should not be identified, this had been stated by the college."

128. Mr Lamond wrote to Dr Dijkhuizen on 9 September 2014 (J223-224) to confirm that the review team "*did not immediately identify significant patient safety concerns regarding the hepato-biliary service"* but stating that "*a significant number of the surgeons working within the General Surgery service had exhibited unprofessional, offensive and unacceptable behaviour".*

129. Dr Cameron (HIS) wrote to Mr Carey again on 24 October 2014 (J 233) by which time there had been dialogue between HIS and RCS. His letter included the following paragraph –

"*Healthcare Improvement Scotland (HIS) and the RCSEng heard serious allegations concerning the behaviour, competence and probity of particular Consultant/s within the Department of General Surgery.* ***Due to the nature of these allegations, we strongly recommend that NHS Grampian commissions an urgent investigation to establish the facts of the specific allegations against individuals and to determine whether referral to a regulator is required****. This investigation should be led by an external expert and take account of the findings and recommendations of the HIS and RCSEng reports when available. This should not await the HIS and RCSEng reports, which are concerned with investigating system issues. The responsibility for investigating individual conduct and performance issues, and taking any action that may arise, lies with NHS Grampian."*

RCS report

130. The respondent received the RCS report (GMC1-71) on 10 November 2014. Copies were circulated by Prof Fluck to the claimant and his colleagues on 12 November 2014 (J236-237).

131. The report was critical of the claimant in a number of respects. The indication by Mr Swami at the meeting on 8 September 2014 that individuals would not be identified proved to be incorrect. The claimant described the report as "*a catalogue of anonymous slanders"* and identified criticisms of his behaviour contained in the report –

- *attempting to disrupt the RCS Review*
- *being resistant to change*
- *unsupportive of new colleagues*
- *against sub-specialisation*

- *racist*
- *taking "reprisals" against individuals*
- *being "too powerful"*
- *lying*
- *behaving unethically by "taking over patients"*
- *operating inappropriately, incompetently and "disrespectfully"*
- *showing favouritism*
- *manipulating M&M/QI meetings*

132. Prof Fluck's letter of 12 November 2014 invited recipients to "*record your own reflections on the content of the document and you may do so in writing to Mrs Coull".* The claimant wrote to Mrs Coull on 13 November 2014 (J240) referring to "*errors of fact contained in allegations reported in the document"* and subsequently emailed Mrs Coull on 27 November 2014 (J252) with his (very detailed) draft response to the RCS report (J253-266). Mrs Coull forwarded this by email to Mr Wright (J252). There was no feedback to the claimant.

133. The *"Recommendations"* section of the report included the following paragraphs –

"*Concerns were raised about the professional conduct of some of the General Surgeons working within the hospital. The review team therefore recommends that:*

16. The Health Board reminds all consultant General Surgeons of their responsibility to act in accordance with the standards of professionalism as set out in the GMC's Good Medical Practice and the College's Good Surgical Practice publications.

17. Individuals should seriously reflect on their past behaviours, including the many examples illustrated in this report. They should consider how their behaviour affects their colleagues and influences the delivery of care within the department and improve this.

18. Any future breaches of these professional codes of conduct should be appropriately dealt with by the Trust. Consideration should be given to formal conduct proceedings, which could potentially lead to dismissal."

134. We considered that paragraph 18 of the recommendations in the report was ambiguous. In his evidence Prof Fluck highlighted the last sentence. In our view a more logical reading was that "*formal conduct proceedings"* should be considered if there were *"any future breaches".* It seemed to us that this interpretation sat more comfortably with the terms of paragraphs 16 and 17.

135. Prof Fluck referred to the RCS review concluding that, having reviewed 16 of the cases about which the claimant had raised concerns, it did not consider that the care provided was outside of that which might be expected. The claimant was critical of the time spent reviewing these cases (see paragraph 126 above) as being inadequate for a forensic examination and observed that relevant information was missing from the case summaries in the report (at *"Appendix 2- review of patient notes", GMC66-71).* Our reading of the *"Reviewers' comments"* in Appendix 2 was that there were sufficient issues mentioned to vindicate the claimant having brought these cases to Dr Russell's attention in May 2014.

First CMP investigation – terms of reference

136. RCS had made it clear to the respondent when agreeing their terms of reference that investigations into individual behaviours and allegations of discrimination would have to be carried out by the respondent. In June 2014 a GMC report on trainee experiences raised concerns about general surgery (resulting later in enhanced monitoring by the GMC). These factors led to the Acute Sector senior leadership team, supported by Dr Dijkhuizen and Ms Strachan, deciding to commission a separate investigation.

137. According to Prof Fluck there were *"various discussions regarding possible mediation within the department"* but "*it was felt that there were just too many people and issues involved for mediation to be appropriate".*

138. Accordingly, the respondent commissioned CMP, using Ms Lawson-Brown who was an experienced investigator, *"to conduct a review of the behaviours and relationships within the General Surgery Department".* CMP had been instructed by the respondent in a previous case where "*colleagues had been impressed with the service they had provided".*

139. Terms of reference were agreed by the respondent with CMP (GMC201-207). These are described (at GMC201) as "*draft"* but we understood these were the agreed terms. The *"Objectives of the investigation"* were set out as follows –

"*The Investigator will design and implement a diagnostic Preliminary Investigation into:*

Informal concerns raised by several members of staff within the General Surgery Department

Evaluate allegations and make recommendations regarding the need or viability of further investigation under NHS Grampian procedures (including the Dignity at Work Policy, the Disciplinary Policy), NHS Scotland Policy or national legislation such as the Equality Act 2010

The objective of the Preliminary Investigation is to clarify the nature of the concerns and allegations by gathering evidence from those parties feeling aggrieved; this will include face to face interviews and any supporting documentation.

The Investigator will present a Preliminary Investigation Report which incorporates and evaluates the initial concerns and allegations. She will present her findings, based upon the balance of probability, as to whether in her professional opinion there is a case to answer. Based upon the initial findings, a decision will be made by NHS Grampian managers regarding ongoing investigation."

140. Prof Fluck told us, and we accepted, that the purpose of the CMP preliminary investigation was to "*see whether there was a problem that*

would require more extensive investigation"; there was "*no preconception that this….would focus on the Claimant"* and it was "*certainly not the case that CMP were instructed to investigate the Claimant specifically".*

141. The CMP investigation was due to begin in July 2014. In the event the investigation did not start until October 2014. No formal complaints under the respondent's D@W Policy had been submitted at this time.

Claimant called to meeting

142. Prof Bruce wrote to the claimant on 10 November 2014 (J234) inviting him to a meeting with management – Mr Swami, Ms Annand and Prof Bruce himself – to be held on 13 November 2014. The purpose of the meeting was stated to be –

"…*to outline the management position with regard to behaviours and actions displayed by yourself and the impact this may have on yourself and others"*

The letter advised the claimant of his *"right to be accompanied"* by a trade union or staff side organisation representative. This seemed to us to indicate that this was to be a formal disciplinary meeting but Prof Fluck sought to explain it as a matter of normal HR practice.

143. The claimant replied on 11 November 2014 (J235) that he was happy to attend but not if Mr Swami was allowed to participate, stating that –

"*He is a serial offender in breaching NHS Grampian policies – specifically by being unavailable to attend ARI when the urology consultant on call by operating privately in the Albyn Hospital."*

144. Prof Bruce wrote back to the claimant on 12 November 2014 (J238-239) confirming that Mr Swami would not attend, and telling the claimant that the meeting was being held –

"*….as a supportive mechanism to inform you of how your behaviour and actions has been perceived by individuals. The outcome is aimed to make a positive influence on the department."*

145. The meeting took place on 13 November 2014. Dr Khan attended with the claimant. The claimant prepared a note after the meeting (J241) in which he recorded that –

- *No examples of behaviour or actions were offered by Prof Bruce*
- *Prof Bruce did not identify who had been influential on management in requesting the meeting*
- *He (the claimant) agreed that the current situation in ward 501 was stressful; the reasons for this were not discussed*
- *Prof Bruce acknowledged that there was no impact on the quality of the claimant's clinical work*
- *He (the claimant) was happy to accept the recommendation that he be referred to Occupational Health*

146. In postscripts to his note (J241) the claimant recorded that –

- Having heard nothing from management or Occupational Health by 16 December 2014 he self-referred, arranging an appointment for 16 January 2015
- As at 27 February 2015 he had received no communication consequent to the meeting on 13 November 2014

147. We had difficulty in understanding the nature, timing and purpose of the meeting on 13 November 2014. It coincided with the publishing of the RCS report upon which the claimant had been invited to record his reflections, but had not yet done so. The CMP investigation was ongoing. The HIS report had not been published. Prof Bruce's letter made no reference to any of the respondent's policies. If the claimant's note was accurate, and we had no reason to think otherwise, no "*management*

position" had been outlined. The only discernible outcome was that the claimant was to be referred to Occupational Health, which appears to have been overlooked on the management side.

148. On 17 November 2014 the claimant, in the course of a meeting with his surgical colleagues, made a threat of legal action against those of his colleagues who had made what he alleged were defamatory statements to RCS critical of his behaviour. When asked about this in cross-examination the claimant said "*if things didn't change, they were not going to get better".*

Senior people depart

149. Prior to the publication of the HIS report a number of senior figures within the respondent left their posts –

- Mr Bill Howatson, Chairman — Resigned October 2014
- Dr R Dijkhuizen, Medical Director — Retired October 2014
- Mr R Carey, Chief Executive — Announced retirement October 2014
- Dr P Strachan, Deputy Chief Executive — Early retirement November 2014
- Mrs E Smith, Director of Quality & Nursing — Early retirement November 2014

First CMP investigation – conduct and report

150. Ms Lawson-Brown conducted a series of interviews between 17 and 21 November 2014. Following each interview the notes were typed up and sent to the interviewee by email for amendment and approval. The report was structured around a number of themed sub-sections and relevant evidence from interviewees was summarised within these. It contained an

initial evaluation of the evidence, conclusions on next steps and recommendations.

151. The report recorded the documents sent by the respondent to CMP –

- Terms of Reference for a Preliminary Investigation
- NHSG Dignity at Work Policy dated 2011
- Royal College of Surgeons (RCS) England review report dated November 2014
- Healthcare Improvement Scotland (HIS) Report dated December 2014

152. The report described itself as a *"Preliminary Investigation Report"* for the respondent "*under the NHSG Dignity at Work Policy".* We refer below to the respondent's D@W Policy. It seemed to us that the description of the CMP report as coming under that policy was at best an unfortunate choice of words, and at worst plainly wrong and misleading. For the D@W policy to be engaged there required to be a signed form or letter of complaint containing the complainer's allegation(s) and a respondent to those allegations.

153. The report emphasised that any evaluation of the evidence *"remains tentative"* pending further investigation and that the evaluation as presented was "*currently exploratory hypothesis and speculation".* It identified two "*camps",* one comprising the claimant, Dr King, Dr Park, Dr Loudon and Ms Craig and the other comprising Prof Ahmed, Mr Alkari and Mr Habib (and possibly others).

154. The report recorded the perceptions of Prof Ahmed, Mr Alkari and Mr Habib that there had been elements of harassment, bullying and mobbing which they suspected to be motivated by discrimination against the

protected characteristics of race and faith. It also recorded that they had requested formal investigations under the respondent's Dignity at Work policy and there was attached as an appendix (J362) a matrix detailing who was complaining, about what and against whom.

155. The report's conclusions identified Prof Ahmed, Mr Alkari and Mr Habib (described as "*three consultants"* but their identity is not in doubt*)* as D@W complainers and the claimant, Ms Craig, Dr King, Dr Loudon and Dr Park as the respondents.

156. The claimant was critical of the inclusion in the report of selected extracts from the RCS report, asserting that Ms Lawson-Brown had "*selectively repeated many of the anonymous allegations against me".* The claimant also noted that the interviewees had been nominated by the respondent's HR department, suggesting a bias against the "*mobbing group" (*we deal with the definition of "*mobbing"* below).

157. The report recommended that further investigations under the D@W policy were indicated. The report also recommended as follows –

"*6.3 It is strongly recommended that full consideration is given to neutral exclusion (suspension) from the workplace for those complained about for the duration of the investigation. This is considered to be of necessity in order to protect all concerned."*

158. While we do not doubt that the recommendation to suspend the claimant and his four colleagues was made in good faith, it did not in our view sit comfortably with the statement that the evaluation of the evidence remained "*tentative"* and that the evidence as presented was exploring "*hypothesis and speculation".* It seemed to us that Ms Lawson-Brown, having identified the two *"camps",* was taking the side of the complainers in recommending the suspension of the respondents.

159. That should have led the respondent to question whether it was appropriate that Ms Lawson-Brown should undertake the D@W investigation which followed. We found no evidence that they did so. Prof

Fluck did however consider the recommendation to suspend and decided that suspension *"would not be appropriate at that stage".*

HIS report

160. The Health Improvement Scotland Aberdeen Royal Infirmary: Short Life Review of Safety and Quality report was published on 2 December 2014 (GMC72-176).

161. Perhaps not surprisingly the claimant described the report as cataloguing "*twenty-three failings in senior management in NHS Grampian and ARI"* whereas Prof Fluck focussed on the recommendation that the respondent "*urgently investigate the serious allegations regarding the performance and behaviours of surgeons in the General Surgery department".*

Dignity at Work policy

162. We were provided with a copy of the respondent's D@W Policy (version 5, September 2011) (J1110-1146). We quote from the policy as follows –

- *"In NHS Grampian there is a positive duty upon **ALL** parties to try to resolve a dispute whenever it is reasonable to do so.*

  Therefore, whenever reasonable the use of informal resolution of a Dignity at Work issue will be offered and encouraged as a way forward…."

- "*Sometimes the term 'mobbing' is used to mean the same thing as the word bullying. However, in NHS Grampian 'bullying' is used when the situation involves two people, one of whom is targeted by the other. The term 'mobbing' is used when the situation meets the definition of bullying….but involves a **group** of people who direct the negative/hostile behaviours against a target person or persons."*

- *"….while there is a positive duty upon ALL parties in NHS Grampian to try to resolve a dispute or disagreement whenever it is reasonable to do so, it is also recognised that it may not always be possible to resolve a matter through an informal route."*

- "*The investigators will be independent having no stake or interest in the case….and will be from a different area from the one(s) where the alleged situation has occurred."*

- "*So that it can be investigated, a complaint must be made in writing. This should be done by using the special pro forma….or by letter."*

- *"Only signed witness statements can be used. Those that are not signed must be set aside."*

CMP second investigation – terms of reference

163. Prof Fluck decided, in light of the findings of the CMP preliminary investigation, that the respondent should commission CMP to "*investigate the dignity at work complaints raised by the HPB surgeons".* On 22 December 2014 Mrs Coull wrote to the claimant *(*J364-365) and we quote from her letter –

- "*I write to advise you that three consultant colleagues have raised complaints against you; Mr Irfan Ahmed, Mr Bassam Alkari and Mr Muhammad Habib."*

- *"I will be able to provide more specific details of the complaints once the complainants have been interviewed."*

164. The date of Mrs Coull's letter confirmed that Prof Fluck's decision to commission CMP was taken no later than 22 December 2014. By way of explanation for the fact that there were no formal written complaints at this point, Prof Fluck's evidence was as follows -

"*I do think that the HPB surgeons should have raised formal written complaints in order to access the Dignity at Work process. It does feel a bit clumsy, in terms of the policy, that they did not do so but that the Respondent had to progress the matter as if they had done."*

165. The timing was unfortunate from the claimant's perspective. He received Mrs Coull's letter of 22 December 2014 by email on 24 December 2014 when he was in Australia visiting his daughter. He described this as "*a further blow to which I could not respond".*

166. The terms of reference for the second CMP investigation were dated 12 January 2015 (GMC208-215) by which time the investigation was already under way, interviews having commenced on 6 January 2015. The "*Objectives of the investigation"* were set out as follows –

"*2.1 The Investigator will design and implement a Dignity at Work Investigation into:*

- *Complaints formally raised by several members of staff within the General Surgery Department. The complainants are Irfan Ahmed, Bassam Alkari, Mohammad Habib and Satchi Swami.*

- *Investigate thoroughly and fairly, evaluate the evidence, and make findings and recommendations under the NHS Grampian Dignity at Work Policy, the Disciplinary Policy where appropriate, NHS Scotland Policy and/or national legislation such as the Equality Act 2010.*

- *This investigation is concerned with the behaviour and conduct of those complained about rather than appointment processes, clinical investigations or manipulation of patient notes; however, where reference is made to behaviours in connection with the above, these may be explored further where they impinge on Dignity at Work issues and/or to confirm a wider picture.*

2.2 The investigation process will include clarification of the nature of the allegations by gathering evidence from those parties feeling aggrieved; this will include face to face interviews and any supporting documentation. The investigator will interview those about whom complaints have been made to seek their views, rationale and supporting documents; currently those people complained about (respondents) include Zyg Krukowski, Wendy Craig, Malcolm Loudon, Peter King and Ken Park."

Complaint by Mr Swami

167. Mr Swami wrote to Mrs Coull on 29 December 2014 (J366-367) raising a formal complaint against the claimant. This related to the claimant's reference to Mr Swami as a "*serial offender in breaching NHS Grampian policies – specifically by being unavailable to attend ARI when the urology consultant on call by operating privately in the Albyn Hospital".* (see paragraph 143 above) He also asserted that the claimant had shared this allegation with colleagues because he (Mr Swami) had evidence to

show that those colleagues were under the impression that the claimant had evidence that "*would nail Satchi".*

168. The respondent decided to include Mr Swami's complaint in the D@W investigation which CMP had been commissioned to undertake.

CMP second investigation – conduct and reports

169. On 16 January 2015 Mrs Coull wrote to the claimant (J369-372, also GMC216-220) detailing the complaints raised against him by Prof Ahmed, Mr Alkari and Mr Habib. She also detailed the complaints by Mr Satchi. The details of the complaints by the three HPB surgeons had been provided by Ms Lawson-Brown following her interviews with them on 6 January 2015 (Prof Ahmed), 7 January 2015 (Mr Habib) and 8 January 2015 (Mr Alkari). She had also provided details of Mr Swami's complaints following her interview with him on 7 January 2015.

170. Ms Lawson-Brown distilled the complaints into a series of bullet points for each complainer (J368A-368B) which she emailed to Mrs Coull. These bullet points were then incorporated into Mrs Coull's letter to the claimant. Prof Ahmed had (in the context of giving Ms Lawson-Brown evidence of alleged "*mobbing"* (at GMC769) said "*Patient safety was used as a weapon"* but this did not feature in his list of complaints.

171. The methodology of the second CMP investigation was similar to the first investigation. In addition to the interviews with the complainers referred to above, further interviews were conducted between 27 January and 21 April 2015.

172. The CMP reports were issued in April 2015 (Mr Swami – GMC 510-551) and May 2015 (the HPB surgeons – GMC361-509). Executive summaries were provided – for Prof Ahmed's complaints at GMC254-279, for Mr Alkari's complaints at GMC280-299, for Mr Habib's complaints at GMC300-321 and for Mr Swami's complaints at GMC325-334. We also had copies of the individual witness statements taken by CMP – GMC760-1123.

173. The executive summaries in respect of Prof Ahmed, Mr Alkari and Mr Habib each recorded, at paragraph 1.1, that the complainer had indicated during his preliminary investigation interview in November 2014 that he wished to formalise a D@W complaint against the claimant and continued with the sentence –

"*He subsequently submitted his complaint through the HR department."*

This was misleading. No formal complaints had been submitted by the HPB surgeons prior to their interviews with Ms Lawson-Brown in January 2015 in the manner provided for in the D@W policy – see the fifth bullet point at paragraph 162 above.

174. The witness statements had not been signed by the HPB surgeons when Mrs Coull wrote to the claimant on 16 January 2015. The copies included in the GMC bundle were not signed but we were provided during the hearing with copies signed by Prof Ahmed on 21 January 2015 (J367A-367G) and by Mr Alkari on 28 January 2015 (J367V-367EE). In the case of Mr Habib we were similarly provided with copies of emails dated 3 and 6 February 2015 (J367P-367Q) between Mr Habib and Ms Lawson-Brown in which Mr Habib said (on 6 February 2015) that he was sending the signed copy of his statement to Mrs Coull.

175. The CMP reports issued in April and May 2015 upheld the complaints against the claimant (and others) and recommended that, if the respondent was in agreement with the findings, the next step would be consideration of disciplinary action.

176. Notwithstanding what we have said above in relation to compliance with the respondent's D@W policy, the CMP second investigation was thorough and gathered evidence which supported the Ms Lawson-Brown's conclusions and recommendations. We considered whether we should record any of the detail of the investigation in our findings in fact and came

to the view that it was not necessary to do so unless we had concerns about the methodology, which we did not.

177. The claimant was critical of the fact that the respondent's investigation (ie the investigation which they commissioned CMP to carry out on their behalf) took no account of the patient safety concerns he had raised – he made this point in his letter to Mrs Coull of 23 January 2015 (J373-374). Those concerns were however outwith the scope of the investigation and outwith Ms Lawson-Brown's skill set as an investigator.

Prof Fluck's review

178. According to Prof Fluck, the claimant asked to meet with Prof Croft (as she now is) and Dr McKay to discuss his contention that the review of clinical cases by the RCS had not been appropriately skilled or resourced. This meeting took place towards the end of February or in early March 2015.

179. The claimant then wrote to Dr Khan in his (Dr Khan's) capacity as chair of the Area Medical Committee (J461-462). He made reference to statements by Mr Wright that "*no clinical concerns"* had been raised in the RCS review (which he said he and colleagues had been prepared to let pass *"in the interest of the greater good of the department")* and pointed out that the RCS review had stated that the decision making was *"questionable"* in four cases and that concerns over two colorectal cases were such that these needed to be "*reviewed urgently to ensure patient care had been and continues to be safe".*

180. Dr Khan forwarded the claimant's letter to Mr Wright (J463) and Prof Fluck responded to the claimant by letter dated 13 March 2015 (J464-466). Prof Fluck referred to the RCS recommendation that the respondent should ensure that the 16 patients whose clinical records had been reviewed had received appropriate follow-up care and said that he had been assured by the Clinical Lead for General Surgery that this was the case.

181. Prof Fluck said that he was keen that the remaining 4 cases (of the 20 originally disclosed by the claimant to Dr Russell) should be identified and that he had asked Dr McKay to liaise with the claimant about this. He also referred to having "*tried to collate all of the concerns raised about the NHS Grampian HPB Service and its surgeons together with the findings from internal and external review"* and indicated that this had been completed and was with Dr Keel, Dr Russell and Prof Sir Lewis Ritchie (Chair of the Scottish Medical and Scientific Advisory Committee) for review.

182. This was a reference to Prof Fluck's "*short review of concerns relating to clinical care that were raised between May 2012 and November 2014, subsequent investigations and conclusions"* dated 3 March 2015 (J425-460). This covered the concerns identified by the Scottish National HPB Cancer MSN in June 2012 and the concerns identified by the claimant in May 2014 (and by Dr Loudon in June 2014) through to the RCS report.

183. Following a meeting with the claimant, also attended by Dr McKay and Prof Webster, on or around 27 March 2015 Prof Fluck asked Prof Wigmore to review the remaining 4 cases and Prof Wigmore provided a report dated 8 July 2015 (J567-578). His report did not record any negligent clinical practice but did make a number of recommendations.

GMC becomes involved

184. The HIS and RCS reports were shared with Mr Paxton as GMC liaison adviser. We understood this to be normal practice in the context of regular contact and sharing of information between the respondent and the GMC.

185. The claimant received a letter dated 10 February 2015 from the GMC (C160-162) advising that the GMC had received information about him from

the respondent which they needed to investigate. The enclosures were stated to include the HIS and RCS reports.

186. The respondent's position was that they had not "*referred"* the claimant to the GMC and we found this to be correct. The GMC process involving the claimant had been triggered by the contents of the HIS and RCS reports shared with the GMC – this was confirmed in a letter from the GMC to Prof Fluck dated 21 September 2016 (J1013).

187. The GMC investigation was put on hold while internal NHSG processes were continuing. When the claimant resigned on 20 April 2016, the GMC investigation proceeded. The GMC sent the GMC bundle to the claimant, who prepared a draft response (C167-249) and a separate response relating to the IT investigation (to which we refer below) (C250-259).

188. On 15 September 2016 the GMC wrote to Prof Fluck (J1001-1012) to advise that the GMC had decided "*to close the case with no action".*

Claimant is suspended

189. After some discussion and due consideration of the CMP second investigation report, Prof Fluck decided to suspend the claimant (and Ms Craig – he would also have suspended Dr Loudon but he had by this point left the respondent's employment). He instructed Dr Metcalfe to deal with this.

190. Dr Metcalfe wrote to the claimant on 25 May 2015 (J530) enclosing the executive summaries of the CMP reports into the HPB surgeons' D@W complaints and also a statement on the allegations of mobbing. He had previously written to the claimant on 22 April 2015 with a copy of the executive summary of the CMP investigation into Mr Swami's complaint. He invited the claimant and his BMA representative to a meeting on 29 May 2015 to advise him of the decision on "*next steps".*

191. The claimant, accompanied by Mr Hermiston, met with Dr Metcalfe and Prof Croft on 29 May 2015. Mrs Coull also attended. Dr Metcalfe advised the claimant that he was being suspended on full pay.

192. The claimant prepared a note of this meeting dated 1 June 2015 (J531-532). We found no reason to doubt the accuracy of this. The claimant's note included the following paragraph –

"*The alleged offences were bullying, harassment and mobbing. Prof Krukowski reminded the group that issues around racial, age and sexual discrimination had been raised by S Coull at the preparatory meeting for the RCS Review in August, eight months earlier and these had not been openly addressed. S Coull stated that none of these involved him."*

Dr Metcalfe told us that he did not recall this but we were satisfied that, on the balance of probabilities, this was what Mrs Coull said based on the claimant's almost contemporaneous note.

193. Following the meeting the claimant was escorted from the premises after collecting personal effects from his office. He took his NHS laptop with him.

194. Dr Metcalfe sent two letters to the claimant after the suspension meeting. The first of these dated 1 June 2015 (J533-534) confirmed the suspension. It included the following paragraphs -

"*The investigations conclude with serious allegations of Personal Misconduct, which warrant a disciplinary hearing. We believe that the nature of the alleged offences highlighted in the investigation report i.e. bullying, harassment and mobbing are such that could result in dismissal."*

"Alternatives to suspension were carefully considered, especially the option of secondment to another board. However, at this point in time we do not consider this appropriate, this will be reviewed with you at our next meeting."

195. The second letter dated 2 June 2015 (J535-536) dealt with "*Classification of Misconduct".* The respondent's classification was

"*Personal Misconduct"* and the claimant was invited to appeal this classification if he disagreed.

196. Dr Gibson-Smith of MDDUS wrote to Mrs Coull on 9 June 2015 (J537-539) to appeal the classification. The CLO responded on 11 June 2015 agreeing to reclassify as *"Professional Misconduct".*

Significance of classification

197. If the claimant's alleged misconduct had been classified as "*personal misconduct"* matters would have proceeded under the respondent's Framework for Support (J1045-1109) which incorporated the "*Disciplinary and Dismissal Policy & Procedure for Medical and Dental Employees"* (from J1068). Where the classification was *"professional misconduct"* a different procedure was engaged.

198. This was to be found in NHS Circular No 1990 (PCS) 8 (J1305-1323) entitled "*Disciplinary procedures for hospital medical and dental staff, community medicine staff and doctors in public health medicine".* This was commonly referred to as "*Annex C"* which was the part of the Circular containing the "*Procedure for serious disciplinary cases".*

Annex C procedure

199. This involves the establishment of an investigating panel with a legally qualified chairman. The composition of the remainder of the panel is regulated in Annex C (at paragraph 9 – J1314) in the following terms –

"*In cases involving professional misconduct, membership of the panel other than the chairman should be divided equally between professional and lay persons, unless the allegations relate only to relationships between a practitioner and his professional colleagues when it would be appropriate to have a panel consisting wholly or mainly of professional members apart from the chairman."*

200. Annex C then provides (at paragraph 10 – J1315) as follows –

"*The terms of reference of the panel should include the nature of the incident or complaint. The practitioner should be informed of the setting up of the panel and its terms of reference and he should be given not less than 21 days to prepare his case. He should be provided as soon as possible with copies of any correspondence or written statements made. A list of witnesses should be drawn up with the main points on which they are to give evidence. This task might be undertaken by the legal adviser to the Health Board assisted by the CAMO or CADO as appropriate as early as possible before the hearing the panel should undertake to exchange between the practitioner and the disciplinary authority lists of witnesses and the main points on which they can give evidence unless exceptionally the Chairman of the panel gives authority for the names of witnesses not to be provided in advance of the hearing."*

We think there may be a failure of punctuation within the last sentence.

201. The role of the investigating panel is principally a fact finding one but may they may be asked to make recommendations as to disciplinary action -

- At paragraph 11 – *"The investigating panel should meet in private and seek to establish all the relevant facts of the case."*

- At paragraph 13 – "*The report of the investigating panel should be presented in 2 parts. The first part should set out the panel's findings and all the relevant facts of the case but contain no recommendations as to Action. The second part should contain a view as to whether the practitioner is at fault and should explain the basis on which this finding is reached. At the request of the Health Board the second part of the report may contain recommendations as to disciplinary action. In no circumstances should the investigating panel itself be given disciplinary powers."*

202. At paragraph 12, Annex C provides –

"*The procedure at the hearing and rules regarding the admission of evidence before the investigating panel should be determined by the Chairman who may hold a preliminary meeting with the parties or their representatives for this purpose."*

203. At paragraph 18, Annex C sets out the timetable for the procedure in these terms –

"*The following time limits should apply to each stage of the procedure. The time taken from the decision that there is a prima facie case to the submission of the panel's report to the Health Board should not exceed 32 weeks:*

a. Chairman of the Health Board decides:

that there is a prima facie case and informs the practitioner accordingly.

b. Practitioner comments on the case - *within 4 weeks*

c. After receipt of documents, Health Board

decide to follow the procedure set out

in this Annex - *within 2 weeks*

d. Health Board appoints chairman and

other panel members of investigating

panel and panel meets - *within 13 weeks*

e. Hearing is concluded - *within 1 week*

f. Report is produced and factual part

sent to practitioner and the Health Board - *within 4 weeks*

g. Practitioner and Health Board comment - *within 4 weeks*

h. Full report submitted to Health Board - *within 4 weeks*"

Matters following suspension

204. On 11 June 2015 Dr Metcalfe wrote to the claimant (J541) refusing his request for NHSG IT access and asking for return of any NHS data in the claimant's possession and also any laptop and removable storage. The claimant replied on 13 June 2015 (J545) confirming that he had a laptop NHSG 15265LT ("laptop") which had "*as far as I am aware no identifiable NHS data on it".* He also referred to a memory stick containing "*private and personal correspondence"*. He asserted his right to privacy - a reference to Article 8 of his Convention rights contained in Schedule 1 to The Human Rights Act 1998. He advised that the laptop and memory stick were at his home address.

205. On 12 June 2015 Mr Hermiston wrote to Mr Wright (J542-544) appealing against the claimant's suspension. He made reference to *"a significant field change in the relationships between colleagues in the department"* in "*recent weeks leading up to the suspension"* with the parties involved in the Dignity at Work process "*making conciliatory gestures towards each other".* Mr Wright replied on 16 June 2015 (J546-547) stating that the "*serious concerns of bullying in the workplace"* by the claimant amounted to *"circumstances…sufficiently exceptional to warrant his suspension."*

206. In his evidence to us, Dr Metcalfe disputed what Mr Hermiston had said about *"conciliatory gestures"* but it seemed to us that he was focussing on the claimant's conduct at the suspension review meetings rather than the state of affairs within the general surgery department immediately prior to the claimant's suspension.

207. Dr Metcalfe wrote to the claimant again on 23 June 2015 (J551-553) in response to the claimant's letter of 13 June 2015, (J545) denying the claimant's request for access to his office or computer and insisting on return of the laptop.

208. The claimant maintained his position that his suspension was not "*a proportionate response to the allegations".* He referred to suspension being

governed by the respondent's FFS policy which in turn provided that suspension would be covered by the terms of NHS Circulars Numbers PCS(DD) 1994/11 (J1324-1327), PCS(DD) 1996/6 and PCS(DD) 1999/7 (J1328-1334).

209. The claimant drew attention to various criteria for suspension which reflected the following provisions contained within NHS Circular Number PCS(DD) 1994/11 (J1325-1326) –

- *"…if practitioners are suspended, it should be for the minimum necessary period of time."*
- *"The suspension order should…clearly* [state] *the content of the allegations.."*
- *"The particulars of the allegations should be substantiated within 10 days."*
- *"A review of the position should normally be undertaken at least every 2 weeks…"*
- *"The practitioner concerned should be informed of the outcome of each review."*

The claimant asserted that "*None of this was followed".*

210. The claimant asserted that Dr Metcalfe had acknowledged at the suspension review meeting on 17 November 2015 that suspension was not a "*neutral act"* (J694). Dr Metcalfe's position was that the respondent was not imposing suspension on the claimant as a punishment and said that he had been "*empathising"* with the claimant in respect that not all of the respondent's employees nor the public would fully understand that the respondent considered suspension to be a neutral act.

Suspension review meetings

211. Suspension review meetings were held on 29 June 2015, 3 August 2015, 8 September 2015, 7 October 2015, 17 November 2015, 25 January 2016, 29 February 2016 and 29 March 2016.

212. At the suspension review meeting on 29 June 2015, Mr Wilkinson stood in for Dr Metcalfe. This meeting was part minuted (J558-563). It was clear from the minutes that there were some tensions at this meeting with Prof Croft and Mrs Coull accusing the claimant of being "*intimidating".* Dr Metcalfe also referred to *"hostility"* on the part of the claimant at the fifth (on 17 November 2015) and seventh (on 29 February 2016) review meetings.

213. Following each suspension review meeting apart, it would appear, the last one on 29 March 2016, Mrs Coull wrote to the claimant (J579-580, J595-597, J608-610, J668-670, J698-699, J847-849 and J868-869). Similarly, after each meeting the claimant prepared a note recording what had taken place (J556-557, J585-589, J604-607, J661, J692-697, J836-838, J854-856, and J872-873); the claimant's notes were almost invariably prepared on the date of the relevant meeting and we believed that these notes were a broadly accurate reflection of what had been discussed.

Consideration of alternative employment

214. In Appendix 5 to the respondent's Disciplinary and Dismissal Policy & Procedure (contained within the FFS Policy – J1098-1099) there is provision for the respondent to provide evidence that alternatives to suspension have been "*carefully considered and give reasons for rejecting these".* It is stated that alternatives could include "*Secondment to another Health Board…".*

215. Dr Metcalfe told us that he had liaised with a number of other Scottish Health Boards and had been prepared to approach Health Boards in the North of England to see if the claimant could be redeployed. He said that unfortunately none of the Health Boards he approached was willing to allow the claimant to work at their hospitals, and this was communicated to the claimant during the suspension review meetings.

216. In her letter to the claimant of 17 August 2015 (at J596) Mrs Coull stated –

"*We also discussed the possibility of you working in another Board as an alternative to suspension; we noted that you will consider this further along with your obligations regarding the Royal Household. We will discuss this again at our next meeting."*

217. In her letter to the claimant of 9 September 2015 (at J608) Mrs Coull stated –

"*We discussed the possibility of work/placement with another Board and we are willing to work with you to secure a suitable placement and workload. Dr Metcalfe agreed to progress further with NHS Tayside, to explore the possibility of you seeing patients in Tayside, with an offsite outpatient's clinic."*

218. In her letter to the claimant of 15 October 2015 (at J668) Mrs Coull stated –

"*We updated on our consideration of alternatives to your suspension from duty. Since our last meeting NHS Tayside have advised that they are unable to support a placement for you, due to a number of factors. As NHS Highland have already agreed to assist us with another placement they are unable to help. You advised that you would not be agreeable to a placement within NHS Lothian or NHS Greater Glasgow and Clyde."*

"You reiterated that you believe you could return to work within NHS Grampian under controlled and agreed conditions, you advised that you do not accept that NHS Grampian has considered this option appropriately. We discussed this option further including working in isolation covering a thyroid clinic with day theatre activity. We also discussed the possibility of surgical activity in Dr Grays Hospital, Elgin. Since our meeting we have been able to consider this alternative fully along with other information we have available. Unfortunately, having reviewed this, we are not in a position to facilitate a return to work anywhere in NHS Grampian at this point in time."

219. In her letter to the claimant of 27 November 2015 (at J698) Mrs Coull stated –

"*We noted a correction to our letter of 15 October 2015, you confirmed that you are agreeable to a placement within NHS Lothian or NHS Greater Glasgow and Clyde.*

….we continue to look for an alternative to suspension. At our previous meeting on 7 October we discussed a placement to Dr Gray's Hospital (DGH), however in our letter of 15 October we advised that we were unable to facilitate this. We clarified that whilst this was considered to be a good idea initially, having considered this further and more widely we decided we could not progress as discussed. We understand your disappointment with this decision. We note, however, that you are willing to function in isolation from the complainants and witnesses and are agreeable to having clear boundaries to work within. Taking this into consideration we agree that DGH is a more suitable alternative for you than NHS Lothian or NHS Greater Glasgow and Clyde. We will therefore explore this alternative in order that we can hopefully propose a suitable arrangement there."

220. In her letter to the claimant of 19 February 2016 (at J847) Mrs Coull stated -

"*We discussed looking for alternative work bases for you to maintain your clinical skills. We advised that approaches had been made to Edinburgh and Glasgow. Having discussed with their surgical team, Edinburgh are unable to support as placement for you. We agreed that should a placement within Scotland not be possible that we would look into England, starting with Newcastle. We understand your preference is for a compromise to be sought within NHS Grampian and also why you would believe this to be possible, however the management team must consider all information available and broader views. Our position remains in that we cannot support a placement within NHS Grampian.*

Since our meeting NHS Greater Glasgow and Clyde have advised that they are happy to support a placement. We can discuss this further at our next meeting and your suggestion of Stracathro Hospital as an alternative, this would involve us approaching NHS Tayside again who have previously advised that they are unable to support a placement."

221. In her letter to the claimant of 23 March 2016 (at J869) Mrs Coull stated –

"We….discussed a placement opportunity with NHS Greater Glasgow and Clyde. Unfortunately since our last meeting we have been advised that Glasgow can no longer support a placement with them. We can discuss other areas such as Newcastle at our next meeting….We advised that your suggestion of Stracathro Hospital is not possible as NHS Tayside cannot accommodate a placement. As previously stated we cannot support a working arrangement within Grampian."

222. The contemporaneous notes prepared by the claimant (referred to at paragraph 208 above) did not materially contradict these accounts of the steps taken by the respondent. While the claimant was critical of the respondent for not having sought a placement for him with another Health Board before he was suspended (despite Dr Metcalfe's statement in his letter of 1 June 2015 at J533 that "*Alternatives to suspension were carefully considered*"), we were satisfied that the respondents appeared to have made reasonable efforts to secure such a placement during his period of suspension.

223. The claimant's note of the review meeting of 7 October 2015 recorded Dr Metcalfe using the phrase "*taint of suspension"* in the context of why NHS Tayside did not wish to have the claimant working there. The note also records Dr Metcalfe explaining this by reference to "*difficulties NHS Tayside were also experiencing with suspension and difficulties amongst their own staff".*

Claimant's CPD and research

224. Appendix 5 in NHS Circular Number Pcs (DD) 1994/11 (see paragraph 209 above) also provides that -

"*On suspension NHSG will discuss with the practitioner and his/her representative ongoing CPD requirements and how best these can be accessed and managed. In addition, care and attention will be taken to avoid unnecessary exclusion/isolation of the practitioner concerned. This will include discussion with regard to contact with colleagues."*

225. In his letter to the claimant of 1 June 2015 (at J534) Dr Metcalfe said -

"*We will also support on-going CPD requirements."*

226. In his letter to the claimant of 16 June 2015 (at J547) Mr Wright said –

"*…the Board will ensure that opportunities for Continuing Professional Development are maintained…"*

227. In his letter to Dr Metcalfe of 13 June 2015 (J545) the claimant said –

> "*I note you did not acknowledge my request for access to NHS email and my office was in relation to ongoing CDP projects some of which involve colleagues who will be disadvantaged."*

228. The claimant asserted that apart from approval of funding to attend a course on Surgery in Austere Conditions he was excluded from all of his research, publications and ongoing projects. Dr Metcalfe's position was that he had signed all CPD requests he had received (J848).

229. In his letter to Ms Carr of BTO of 18 February 2016 (J846) the claimant provided a list of "*missed opportunities, invitations and deadlines"* in the period from July 2015 to January 2016 as a result of his restricted access to NHS mail. This echoed the statement the claimant had made in a letter to Dr Gibson-Smith of 14 November 2015 (J691) about "*total exclusion from all professional activity and CPD despite repeated assurances to support me".*

230. While we noted that some of the items listed by the claimant were invitations rather than CPD and/or research, we were satisfied that the claimant had lost the opportunity to participate in a significant number of activities during his period of suspension. The claimant reasonably regarded that loss of opportunity as having a negative effect on his professional reputation.

231. Of particular concern to the claimant was missing the final date for submission of data for the BAETS National Registry annual report. He stated at the suspension review meeting on 25 January 2016 (J837) that "*being non-compliant with incomplete data"* was "*very detrimental to his professional reputation".* There was a dispute as to whether the data had contained a patient's CHI number; the claimant was adamant that it did not.

232. Dr Metcalfe said at the suspension review meeting on 25 January 2016 that completion of the BAETS Registry was "*dependent on restoration*

of [the claimant's] *access to NHS IT and this would not happen while the IT investigation was ongoing".* There was an issue as to whether Dr Metcalfe had contacted the BAETS director of audit – according to the claimant's meeting notes of 25 January 2015 (at J836) Dr Metcalfe had said that this had happened. However, in the claimant's suspension review meeting notes relating to the meeting on 29 February 2016 (J855), when asked what the BAETS director of audit's response had been, both Dr Metcalfe and Mrs Coull stated that they did not know.

Opnote investigation

233. Opnote was computer software which allowed the creation of a written operation note which could be printed out, signed and filed in the written patient record. There was an investigation into two changes made to an opnote on 24 June 2014 together with a command to delete the opnote on 27 June 2014. The opnote related to an operation on 25 April 2014. Ms McKay carried out an investigation (J799-802), in the course of which a number of people were interviewed including the claimant as he had been involved in editing the Datix report about the missing opnote.

234. We did not understand that there was any criticism of the claimant in respect of his involvement. We understood that the significance of this to the claimant was that it was another process in which he had been involved around the time of various other investigations.

Laptop investigation

235. Data security is an important issue in the NHS. Patient data is extremely sensitive. Inappropriate access to or use of patient data is regarded as a serious offence. The respondent had a Policy for the Use of Internet and Email (J1176-1183) and an Information Systems Security Policy (J1184-1304).

236. The claimant was very proficient in IT matters. He had access to many of the respondent's IT systems at "*administrator"* level which was the

highest level of access and allowed the claimant to access and modify those parts of the IT system to which he had access.

237. Following the correspondence referred to at paragraphs 204 and 206 above, the claimant returned the laptop on 26 June 2015. When it was examined by the respondent's IT department, it was found that the claimant had wiped a significant amount of data from the laptop. He had installed a programme called Windows Washer two hours after Dr Metcalfe's letter of 11 June 2015 had been emailed to him. This programme is the electronic equivalent of a paper shredder, ie it permanently deletes files from a computer.

238. The respondent was concerned at the use of this programme, particularly the timing of its use, and the laptop was sent to NHS Protect where specialist IT staff would try to recover data from it. They recovered a number of fragments of files including a folder called "*NHS Gate"* which contained a number of audio recordings. They also found files containing PID and it appeared that some of this was particularly sensitive as it related to members of the Royal Household. The laptop was password protected but not encrypted; it had previously been encrypted but a newer operating system had been installed which removed the encryption. The respondent regarded this as a breach of IT security and initiated an investigation.

239. The claimant's position was that he had installed Windows 7 (to replace Windows XP with which the laptop was supplied) following discussion with Mr Taylor. He had used Windows Washer for many years to remove data relating to the Royal Household. He returned the laptop after securely deleting data which related to protected persons (the Royal Household). He explained that it was not policy at that time to save information on protected persons on the respondent's IT systems because it was not possible to prevent unauthorised access.

240. Dr Metcalfe commissioned a fact-finding investigation under the FFS. The allegations were, in summary, removing security software from an NHSG laptop, storing identifiable PID on an unencrypted device and installing a file shredding application. The claimant was critical of the fact that informal resolution was not pursued. Dr Metcalfe told the claimant in his letter of 14 September 2015 (GMC570-571) that the investigation was being carried out by Mr Strachan and Dr Coleman. According to the investigation report GMC562-758) the investigation was in fact conducted by Dr Coleman, Mr Strachan and Ms McDonald.

241. In the course of the investigation, interviews with the claimant were conducted on 9 November 2015 and 19 February 2016. At the first of these Ms Fletcher deputised for Mr Strachan. The interview notes were GMC572-581/GMC582/594 (9 November 2015) and GMC744-758 (19 February 2016).

242. The investigation panel reached the conclusions that (a) the claimant had installed Windows 7 onto the laptop without express permission to do so, (b) the claimant was aware that his changes to the laptop removed encryption and (C) the claimant knew he had PID and other sensitive data on an unencrypted laptop but believed this was not a security breach. We noted that the report did not disclose whether the panel had spoken with Mr Taylor and so it was not entirely clear how they had reached the "*without express permission"* conclusion.

243. The investigation panel considered that the claimant had breached the respondent's Information Systems Security Policy and the NHS Scotland Mobile Data Protection Standard (2012). They recommended further action under the FFS.

Appointments investigation

244. In his letter to Mr Carey of 16 August 2014 Dr Cameron of HIS had set out a list of allegations that needed to be investigated *"very promptly".*

These included "*Manipulation of the appointment process for consultant staff".* Prof Fluck told Dr Cameron in his letter of 24 November 2014 (J248-251) that the respondent had reviewed all general surgery consultant appointments "*over the last year"* and that the investigation would now move to a second stage as "*some aspects of the job description, shortlisting and interview itself were problematic"* and where "*the role of individuals within those processes will be investigated to establish whether unprofessional behaviour with an aim of influencing the interview outcomes occurred."*

245. The claimant attended a fact-finding investigation meeting on 8 December 2015 conducted by Dr Metcalfe and Ms Annand. This proceeded on the basis of 76 scripted questions (C261-294).

246. At the suspension review meeting held on 29 February 2016 the claimant asked about the investigation. According to the claimant's note of the meeting (at J855) Mrs Coull had to remind Dr Metcalfe that he was involved in writing the report (of the appointments investigation).

247. By the time of his resignation on 20 April 2016 the claimant had not been notified of the outcome of the appointments investigation. He was provided with a copy on 9 April 2017 in response to his SADR in a redacted format which he did not find useful.

Voicing Concerns policy and status of Dr Russell

248. The respondent has a Voicing Concerns policy (J1147-1159). The claimant believed that when he spoke with Dr Russell on 27 May 2014 and subsequently provided the list of cases, he was acting under this policy. He said that the respondent had failed to comply with the policy – they had not informed him within ten days as to "*which course of action"* was being taken, nor had they provided "*further feedback".*

249. Prof Fluck's explanation for this was that the respondent had not recognised that the claimant was *"whistleblowing"* when he (the claimant) spoke with Dr Russell and had therefore not acted on the basis that the Voicing Concerns policy had been engaged. We did not believe, on the balance of probability, that the claimant had the Voicing Concerns policy in mind when he spoke with Dr Russell on 27 May 2014. We did believe, again on the balance of probability, that the claimant was raising concerns about patient safety in good faith and not maliciously and/or in retaliation for how he perceived Ms Craig was being treated. The claimant's concerns about his HPB colleagues were longstanding.

250. Prof Fluck explained that there were a number of methods by which clinical concerns could be raised. These included M&M meetings and Datix (internally) and HIS and GMC (externally).

251. Being relevant to the decision we made on the respondent's application to amend and the objection thereto (see paragraphs 5 to 12 above), we record our findings in relation to Dr Russell's status relative to the respondent. As we did at paragraph 84 above, we refer to the note of Dr Russell's interview with Ms Lawson-Brown on 9 March 2015 as Prof Fluck's evidence was that he did not know Dr Russell's terms of reference.

252. Dr Russell told Ms Lawson-Brown that he had been approached by the Chief Medical Officer, Scottish Government in April 2014 to go to ARI "*to do a diagnostic piece of work on the back of a HIS inspection*". He had agreed to work two days a week at NHSG. He continued "*There had been anxiety about the relationship between consultants and management. ML had been lobbying the Minister and saying ARI was a 'shambles'".* He continued "*Scottish Government were particularly concerned regarding the perceived lack of clinical engagement. Scottish Government needed an objective evaluation and an action plan; this was AR's remit."*

253. This indicated to us that Dr Russell was seconded by NHS Tayside to NHSG to undertake this remit. He did so while remaining an employee of NHS Tayside. He did not become an employee of NHSG.

254. There was nothing to suggest that the claimant's conversation with Dr Russell was confidential in the sense that what was discussed would go no further. On the contrary, it seemed clear to us that the claimant expressed his concerns to Dr Russell in the knowledge that what he said would be reported to the respondent. Dr Russell was not acting as the agent of the respondent when he spoke with the claimant; his investigative remit was not on their behalf. However, in his seconded capacity he was used by the claimant as a conduit to pass information to the respondent's management in a way which was designed to exert pressure on the respondent to take action.

Mediation

255. The claimant was critical of the respondent for not attempting mediation as encouraged in the FFS and in the D@W policy. Dr Khan said that Mr Swami had spoken to him about mediation, and that he (Dr Khan) would have been happy to act as a mediator (although he had no formal training in that capacity); he also indicated that Prof Ahmed was willing to participate in mediation (which Prof Ahmed confirmed in his evidence to us).

256. Prof Fluck's position was that there were too many people involved and a lack of clarity about the seriousness of any potential misconduct for mediation to be appropriate or work. He also said that once the CMP investigations were complete he felt the behaviours identified were so serious that they should be taken to an Annex C panel rather than utilise mediation. We found this last statement difficult to comprehend because the respondent's original decision had been to classify the matter as personal misconduct rather than professional misconduct; personal misconduct would not have led to use of the Annex C procedure.

257. Prof Fluck also said that matters of patient safety could not be mediated. We considered that was a reasonable position for him to take.

Correspondence CLO/bto

258. On 28 July 2015 Mrs Coull wrote to the claimant (J583-584) attaching copies of the full final investigation reports into the complaint by Mr Swami, the complaints by Prof Ahmed, Mr Alkari and Mr Habib and the allegations of mobbing (this last being redacted). She advised the claimant that the "*Chairman has decided there is a prima facie case which could result in serious disciplinary action such as dismissal".* She continued –

"*The complaints made, the investigation evidence the evaluation of the evidence, the conclusions and findings are contained in the attached reports. We now offer you an opportunity to comment on the content and would ask that you do so within 4 weeks of receiving this letter, i.e. by 25th August 2015."*

259. Acting on behalf of the claimant, bto replied to Mrs Coull on 12 August 2015 (J592-593) stating that they were unable to comment on the contents of the reports because the claimant had not yet been advised of the "*specific allegations being taken forward by NHS Grampian"* against him. The letter continued –

"*The final reports you have now issued number over 200 pages and it is unreasonable to ask Professor Krukowski and his advisers to hunt through these reports to work out what the allegations may be which NHS Grampian wish to take forward and for him to provide comments now."*

260. On 24 August 2015 the CLO wrote to bto (J602) stating the respondent's position to be that "*the full Final Investigation Reports contain sufficient specification of the matters being progressed against Professor Krukowski"*. They advised that the respondent was willing to extend the time for responding until 18 September 2015.

261. On 17 September 2015 bto wrote to the CLO (J613-615) disagreeing that sufficient specification of the allegations had been given, arguing that details of the allegations should have been given to the claimant at the time of his suspension and pressing for a list of specific allegations. They also asked for –

- *All witness statements taken as part of the Preliminary Investigation by V Lawson-Brown*
- *Document/report produced as a result of the Preliminary Investigation by V Lawson-Brown*
- *All four letters of complaint leading to the Dignity at Work Investigation*
- *All witness statements collected and/or referred to as part of the Dignity at Work Investigation*
- *All documents referred to in Executive Summaries and Final Reports by all contributors named in or related to "mobbing group"*
- *Copies of all Investigation Reports – unredacted*

262. The CLO wrote to bto on 22 September 2015 (J617) enclosing the unredacted Mobbing Report and the statements taken during the CMP preliminary investigation and the Dignity at Work investigation. They also extended the time limit for providing comments until 9 October 2015.

263. On 6 October 2015 bto wrote to the CLO (J659-660) again requesting a list of detailed allegations. They pointed out that (a) this was what the Annex C panel would require and (b) the respondent had done this in other current cases with which they were dealing.

264. On 7 October 2015 the CLO wrote to bto (J663) agreeing to provide *"further specification of the allegations".* On 9 October 2015 the CLO emailed bto *(*J664) extending the time limit for providing comments until 30 October 2015 and, separately, attaching the list of allegations (J667) which were as follows –

"*Professor ZK behaved in a way which fell below the required standard of professional conduct and competence. He:*

1. *made false, malicious and vindictive allegations against a manager, Satchi Swami, accusing him of serial offending in relation to being unavailable whilst on-call at Aberdeen Royal Infirmary;*

2. *undermined management efforts to address his unacceptable behaviour;*

3. *refused to attend a meeting if Satchi Swami was going to be present;*

4. *used colleagues, including Wendy Craig and Malcolm Loudon, in order to gather material against Satchi Swami in an effort to undermine Satchi Swami or question his probity;*

5. *stored up the information he had gathered about Satchi Swami before choosing when to use it in the form of the false and malicious allegation against Satchi Swami;*

6. *bullied Satchi Swami;*

7. *had an inappropriately close relationship with WC, a professional colleague, to the extent that he behaved inappropriately when choosing to defend her (an example of this occurred at an international conference in May 2014 when ZK jumped up, took the microphone and shouted at a colleague who had asked a question which WC could not answer);*

8. *shared information about, amongst other things, the investigation process with WC and Malcolm Loudon during the course of the investigation into the complaints by SS, IA, BA and MH;*

9. *behaved inappropriately towards IA, BA and MH, work colleagues;*

10. *shouted at them, behaved in a threatening manner towards them, spread malicious rumours about them, made malicious allegations about them, repeatedly criticized them in front of others, made negative comments about their professional performance and repeatedly criticized them and reminded them of perceived mistakes made by them (for example, this includes his behaviour on 8 March 2014 and 9 May 2014;*

11. behaved in a racist manner in towards IA (he called IA, BA and HM muslims and raised the issue of Friday prayers. This occurred on or about 22 July 2014;

12. shouted, was aggressive and behaved inappropriately during a morbidity and mortality meeting on 29 May 2014;

13. bullied IA, BA and MH;

14. harassed IA, BA an MH (He raised issues of cultural difference when discussing these work colleagues. This was done in a manner designed to undermine and threaten them); and

15. deliberately misled people about his role in the reporting of the 16 HPB cases to management.

For the avoidance of doubt the details of all these allegations are contained in the reports that have been intimated to ZK's agents."

265. On 30 October 2015 bto wrote to the CLO (J677-684) criticising the list of allegations as "*completely lacking in specification"* – a statement with which we partially agree as, while there was specification of some of the allegations, others were lacking any specification – and requesting documentation falling within 17 categories.

266. On 12 November 2015 the CLO wrote to bto (J687-688) stating –

"*….the Board's position is that the Final Investigation Reports provide sufficient notice of the allegations at this stage of the proceedings. The additional list of allegations was drafted simply in response to your request for further assistance. It would be wrong to assume that the provision of this further assistance indicates an acceptance that there has been insufficient notice of the allegations."*

We found that the respondent had not at this point provided the claimant with sufficient information about his alleged misconduct to enable him to respond.

267. In their same letter, dealing with bto's request for documentation, the CLO asked for details of the relevance of each of the documents requested. They also advised that the respondent was willing to consider a further extension of time to allow submission of a full response.

268. Following emails from bto to the CLO on 13 and 30 November 2015 (J700) and a letter from the CLO to bto on 8 December 2015 (J701), and notwithstanding that there had been no explanation of the relevance of the documentation requested, the CLO wrote to bto on 18 December 2015 (J702-703) enclosing around 100 pages of further documentation.

269. On 15 January 2016 bto wrote to the CLO (J828-834) responding to some of the allegations contained in the list (J667) and maintaining that (a) the allegations were "*vague and unspecific",* (b) the respondent was not complying with its own Dignity at Work policy, (c) there was no indication as to which of the many documents provided related to which allegation and (d) the Annex C timetable and terms were not being followed. The letter included the following statement –

"*The protracted, delayed and messy process is, in his own words, destroying Professor Krukowski's life, from both a professional and personal perspective."*

270. The CLO replied to bto on 29 January 2016 (J839) advising that the respondent had considered whether to proceed to an Annex C hearing; the respondent considered that a prima facie case existed and that there was a dispute as to the facts –

"*As such a decision has been made to proceed to an Annex C hearing".*

The CLO letter also advised that the respondent intended to conjoin the Annex C hearing for the claimant with that for Ms Craig.

271. On 12 February 2016 the CLO wrote to bto (J845) stating –

"….it remains my client's position that your client has been given sufficient notice of the allegations against him….your client will be provided with the terms of reference of the panel, including the nature of the complaint not less than 21 days prior to the hearing itself."

We did not believe that the claimant had been given *"sufficient notice of the allegations against him"* at this point.

272. The CLO wrote to bto on 25 February 2016 (J850) advising that the Annex C panel would be chaired by Calum McNeill QC, that the lay member would be Ms G Boyd, Head of HR, NHS Highland and that the professional member had still to be identified. The letter also advised that the hearing would take place on 25-29 April and 3-6 May 2016.

273. On 26 February 2016 bto wrote to the CLO (J851-853) stating that the claimant was not available on many of the proposed dates as he was booked to give a lecture in South Africa in respect of which his leave had been approved by the respondent.

274. Prof Fluck explained that finding a date for the Annex C hearing was "*very challenging*" because of the seniority of both the 21 witnesses and the panel. He said that he could understand the claimant's "*desire to attend the conference*" and his "*frustration at the clash"* but that he was very conscious of "*the claimant's criticism of how long the Annex C process was taking"*. It was his decision to refuse the claimant's request for a postponement. He explained that the alternative would have been to delay the hearing until August 2016 and possibly longer.

275. On 4 March 2016 Mrs Coull wrote to the claimant (J859) rescinding the agreement to allow him to take leave during the dates for which the Annex C hearing had been fixed.

Inclusion of IT allegations

276. Also on 4 March 2016 Mrs Coull wrote to the claimant (J860-861) advising that Dr Metcalfe had decided that there was a case against the

claimant following the laptop fact finding investigation, and that the Chairman had decided that the IT allegations were also "*under consideration for inclusion in the forthcoming Annex C panel hearing"*. The IT allegations were set out as follows –

- *That you stored 988 pieces of patient identifiable data on an unencrypted laptop, it being noted that it was you who removed the encryption from said laptop. These actions are alleged to amount to a serious breach of the NHS Scotland Mobile Data Protection Standard and the NHS Grampian Information Systems Security Policy.*

- *That you inappropriately stored and held information in relation to colleagues, including a number of audio files.*

- *That you wiped data from your laptop and removed information from your desktop computer without reasonable explanation.*

- *That you deliberately misled the investigation team in relation to the knowledge you had, and the motives for your storing and removing, of the information in relation to your colleagues.*

277. With this letter the claimant was sent a copy of the IT fact finding investigation report (GMC562-758). He was invited to comment by 1 April 2016. He was told that the respondent was "*content you are being given sufficient time to present your comments on the accuracy of the Investigation Report prior to a decision being taken to proceed to a disciplinary hearing or inquiry panel"*.

278. On 23 March 2016 bto wrote to the CLO (J864-866) protesting on the claimant's behalf about the Annex C hearing date preventing him from speaking at the conference in South Africa and maintaining opposition to the Annex C hearings for the claimant and Ms Craig being conjoined. They argued that the proposed introduction of the IT allegations was another

reason why the claimant's and Ms Craig's Annex C hearings should not be conjoined. They also protested about the lack of specific allegations –

"*We still do not yet, some 5 weeks prior to what will be a significant and complex Annex C Hearing, have terms of reference (list of specific allegations) for Professor Krukowski to allow us to focus our defence, to consider our witnesses and review the thousands of papers which have arrived from NHS Grampian over the last year in order to ensure a fair process for Professor Krukowski. This is not in keeping with NHS Grampian's policies nor the principles of fair notice and natural justice and this is utterly unreasonable given that the primary investigations concluded last year…."*

279. On 30 March 2016 bto wrote to the CLO (J874-875) to remind them that, in terms of Annex C paragraph 10, the claimant was to be given "*not less than 21 days to prepare his case"*, that he should be provided "*as soon as possible with copies of any correspondence or witness statements made"* and that "*A list of witnesses should be drawn up with the main points on which they are to give evidence*". As the Annex C hearing was scheduled to start on 25 April 2016 bto stated that they needed to see the terms of reference, specific allegations etc before 4 April 2016 which, that date being a Monday, meant Friday 1 April 2016 in terms of working days.

280. In their said letter bto also made reference to the claimant's need to have access to his office and to the respondent's IT systems to allow him to gather information to allow him to defend the IT allegations. They also stated –

"*NHS Grampian ought not to await our comments with regard to the IT investigation before providing the necessary paperwork for the Annex C Hearing as the main allegations can be formulated and paperwork issued now."*

281. The claimant's notes, the accuracy of which we found no reason to doubt, record (at J855) that he had been told at the suspension review meeting held on 29 February 2016 that he would be sent the draft IT investigation report "*for checking for factual accuracy".* This did not happen before the report was sent to the claimant on 4 March 2016.

282. Prof Fluck told us that the respondent would usually allow an employee who was the subject of an investigation seven days to comment on the draft report. However, to do so in the case of the IT investigation report would have meant that the IT allegations would not have been able to be considered at the Annex C hearing in April 2016.

283. The claimant was allowed supervised access to a clone of his desktop PC on 31 March 2016, ie one day before the date by which he had been invited to comment on the IT allegations. He prepared a response dated 1 April 2016 (J877-882) which bto sent to Mrs Coull with their letter of the same date (J876, sent by email). We had no evidence to indicate whether, and if so by whom, the claimant's response was considered.

284. Prof Fluck took the decision to ask the Annex C panel to consider the IT allegations. This "*led to there being a short delay in the provision of the Management case to the Claimant".* There did not appear to be any consideration of whether the IT allegations should be classified as personal or professional misconduct (only the latter being appropriate for inclusion in the Annex C process).

Claimant's requests for IT access

285. The claimant made requests for and/or complained about IT access at the suspension review meetings, as recorded in his notes of these meetings, as follows –

- On 29 June 2015 (paragraph 9 at J556)
- On 3 August 2015 (paragraph 6 at J587 and paragraph 8 at J588)
- On 1 September 2015 (paragraphs 7 and 8 at J606)
- On 7 October 2015 (paragraph 8 at J661C)

- On 17 November 2015 (paragraph 3 at J694, relating to CPD)

286. At the suspension review meeting on 25 January 2016 Dr Metcalfe is recorded (at J837) by the claimant as saying that restoration of the claimant's access to NHS IT "*would not happen while the IT investigation was ongoing".* At the suspension review meeting on 25 February 2016 the claimant's note records (at J855) that "*pending the outcome of the ongoing investigation there was no possibility of access to IT systems or email".*

287. Dr Metcalfe was sympathetic to the claimant's requests for IT access but he was overruled by Mr Morris. Dr Metcalfe understood Mr Morris' concern to be that, "*as the claimant was so adept at IT and there were allegations against him of deleting or altering data, the Claimant may misuse any access given to him".* Dr Metcalfe told us that he did not agree with this decision but neither he nor Prof Fluck could overrule it.

288. We understood that the claimant was allowed limited supervised access to the laptop and his NHS email account.

289. When the claimant was allowed access to a clone of his PC and the laptop on 31 March 2016 he was accompanied by Mr Middleton. The claimant told us that at this meeting arrangements were made for a copy of selected email folders to be provided. There appeared to be some confusion about this (whether the claimant was to contact a third party, Ms Powell). On 18 April 2016 the claimant emailed Mr Middleton (J946) stating that he had been unable to open the relevant file.

Relationship between the claimant and Ms Craig

290. Ms Craig returned to the general surgery department following her appointment as a consultant in 2014 with some reputational baggage from her time as a HST (see paragraph 70 above). As described briefly at paragraphs 72-73 above there were difficulties between her and Prof

Ahmed/Mr Alkari from the outset. She looked to the claimant for support which the claimant duly provided.

291. This resulted in a perception that the claimant was over-protective of Ms Craig and took her side against the HPB surgeons. Their evidence to Ms Lawson-Brown was that Ms Craig would get the claimant to take her side against her HPB colleagues and to shout at them. Prof Ahmed's diary entries of 8 April 2014 and 15 April 2014 (at GMC484) recorded the claimant having raised his voice. The claimant was over-zealous in defending Ms Craig; this led to his altercation with Mr Kumar at the M&M/QI meeting on 29 May 2014. This in turn stemmed from what the claimant described as "*hostile, bullying and intimidating"* treatment of Ms Craig at the previous M&M/QI meeting on 8 May 2014.

292. The allegation brought against the claimant that his relationship with Ms Craig was "*inappropriate"* conveyed an element of innuendo to which exception was taken on the claimant's behalf. There was no evidence before us to indicate that the relationship was other than professional. The claimant was asked in cross-examination about payments made from his endowment fund to support activities undertaken by Ms Craig. His evidence was that such payments had required to go through an approval process.

Management case and lead up to Annex C hearing

293. On 4 April 2016 the CLO wrote to bto (J883) advising that the respondent had decided that there was a prima facie case in relation to the IT allegations and that these would be considered at the Annex C hearing due to start on 25 April 2016.

294. Later on the same date the CLO wrote to bto (J884) attaching the Annex C terms of reference (J885-907) which included a list of witnesses. The terms of reference set out the allegations against the claimant in the following terms –

1. *Did ZK's professional conduct fall below an acceptable standard insofar as he had an inappropriate relationship with a professional colleague, WC?*

2. *Did ZK's professional conduct fall below an acceptable standard insofar as he allowed his relationship with WC to influence inappropriately his (and her) dealings with his work colleagues, BA, IA MH and SS?*

3. *Did ZK's professional conduct fall below an acceptable standard insofar as he collected and shared what he perceived to be negative or adverse evidence about those work colleagues?*

4. *Did ZK's professional conduct fall below an acceptable standard insofar as he made malicious and vindictive allegations against those work colleagues?*

5. *Did ZK's professional conduct fall below an acceptable standard insofar as he persistently behaved inappropriately towards those work colleagues, alone and together with others?*

6. *Did ZK's professional conduct fall below an acceptable standard insofar as he made racist remarks about those work colleagues?*

7. *Did ZK's professional conduct fall below an acceptable standard insofar as he undermined management efforts to address his unacceptable behaviour?*

8. *Did ZK's professional conduct fall below an acceptable standard insofar as he used colleagues in order to gather material against SS in an effort to undermine SS and/or to question SS's probity?*

9. *Did ZK's professional conduct fall below an acceptable standard insofar as he made false, malicious and vindictive allegations against SS?*

10. *Did ZK's professional conduct fall below an acceptable standard insofar as he shared information about the investigation process with WC, during the course of the investigation into the complaints by work colleagues?*

11. *Did ZK's professional conduct fall below an acceptable standard insofar as he tried to manipulate the investigation process and fabricated evidence through collusion in an attempt to bolster his position and/or assist WC in bolstering her position?*

12. *Did ZK's professional conduct fall below an acceptable standard insofar as he breached GHB data protection, electronic communication and information security policies?*

13. *Did ZK's professional conduct fall below an acceptable standard insofar as he deliberately failed to be candid in a fact-finding investigation into his alleged breaches of GHB data protection, electronic communication and information security policies?*

295. On 6 April 2016 bto wrote to the CLO (J908-909A) (a) challenging the inclusion of a lay member on the Annex C panel and pressing for two professional members, (b) requesting a paginated inventory of documentation and (c) disputing the inclusion of "*a new allegation which is of the utmost seriousness".* This was the allegation that at his meeting with Mr Carey on 8 May 2014 the claimant had made the racist remark *(*J896).

296. They (bto) also expressed concern about the inclusion of *"yet another new allegation"* relating to the claimant's written assessment of Ms Lim (J903). The CLO replied to bto on 8 April 2016 (J910-911) rejecting the objection to the lay member of the Annex C panel, dealing with the pagination point and standing by the allegations.

297. There were emails from bto to the CLO on 11 and 12 April 2016 about the Annex C hearing bundle inventory and PDFs of all documents upon which management were intending to rely. In a further exchange of emails on 13 April 2016 (J917-919) (a) the CLO queried why the claimant required IT access and bto responded, (b) bto sought witness statements for Prof Fluck, Mr Carey, Ms Lawson-Brown and Mr Middleton and the CLO advised that these witnesses would give evidence at the hearing, speaking to *"the issues as previously advised",* and (c) it was confirmed that the hearing would not now deal with the allegations in relation to Ms Craig (who had resigned).

298. On 14 April 206 bto wrote to Mr McNeill (J928-930) requesting a preliminary hearing "*to discuss growing concerns in relation to preparations"* for the Annex C hearing. In summary these concerns were as follows –

- *No revised terms of reference had been provided following Ms Craig's resignation.*

- *No witness statements had been provided for Ms Craig (now to be called as a management witness), Prof Fluck, Mr Carey, Ms Lawson-Brown and Mr Middleton. Also the witness statements which had been provided were unsigned.*

- *Denial of IT access for the claimant, it being asserted that the respondent's IT systems contained information crucial to preparation of the claimant's defence to the allegations in the terms of reference.*

- *Inclusion of the new allegation (see paragraph 295 above).*

299. On 15 April 2016, having ascertained that Mr McNeill was out of the country, bto wrote to the CLO (J932-934) with a "*preliminary list of information and documentation"* to which the claimant was seeking access.

The information and documentation requested was extensive. By way of explanation bto stated –

"*….the whole purpose of Professor Krukowski requiring access to his IT systems and otherwise was to allow him to review this correspondence, communication and other matters over the period in order that he could then decide what is appropriate and relevant for inclusion within the Professor's bundle of supporting documents and to identify potential witnesses."*

There was also a request for clarification of the allegation of an "*inappropriate relationship"* with Ms Craig.

300. Also on 15 April 2016 the CLO wrote to Mr McNeill (J935-937) stating that the respondent had no objection to a preliminary hearing. They responded to bto's points, again in summary, as follows –

- *The invited findings in fact in the management case made clear which related to the claimant alone or in conjunction with Ms Craig so no confusion should arise.*

- *The respondent had set out the main points to which Ms Craig, Prof Fluck, Mr Carey, Ms Lawson-Brown and Mr Middleton would speak in their oral evidence. There was no requirement to provide witness statements.*

- *The claimant would be allowed access to his emails (in advance of the hearing) and the respondent would provide documentation from specific databases if it was proportionate to do so.*

- *The allegation that the claimant made a potentially racist comment to Mr Carey was noted in the investigation report provided to the claimant in May 2015.*

- *They denied that the normal rules of natural justice had been flouted as alleged by bto.*

301. On 18 April 2016 Mr McNeill sent an email to the respective solicitors at bto and the CLO (J943) proposing a conference call on 21 April 2016, effectively the preliminary hearing requested by bto and agreed by the CLO.

302. On 18 April 2016 the CLO wrote to bto (J944-945) proposing a call on 20 April 2016 between the solicitor at bto acting for the claimant and the advocate instructed by the respondent for the Annex C hearing. In response to the request for clarification of the "*inappropriate relationship"* the CLO said the respondent's position was that this was specified in the Management Case. The letter then responded to the claimant's request for documents, stating that the claimant had been provided with further supervised access to his emails on 18 April 2016, and declined to provide copies of emails, letters and correspondence and minutes of meetings at which the claimant had been discussed on the basis that this was a fishing exercise. There was an indication that some further documents would be provided (subsequently sent by email on 19 April 2016 – J950) and two additional documents were enclosed.

Claimant resigns

303. The claimant wrote to Mr Wright on 20 April 2016 intimating his resignation with immediate effect. He said that the respondent's behaviour represented a "*fundamental and repudiatory breach"* of his contract of employment. In summary, the sequence of events he described and the behaviour about which he complained were described as follows –

- He referred to his meeting with Dr Russell on 27 May 2014 when he had raised "*ongoing clinical concerns over patient outcomes"* and following which he had sent a "*representative but not comprehensive list of clinical examples".*

- He said that he had been advised by a senior clinical manager (a reference to Mr O'Kelly) to suppress these concerns since NHSG

senior managers had the power to remove consultants they perceived as difficult or who challenged the system or who raised matters of patient safety, as he had done.

- His initial protected disclosure had been used by NHSG management to "*trigger*" a process knowingly intended to remove him from the workplace. The respondent had failed to follow their own policies including FFS and D@W and had breached ACAS guidelines and various NHS Scotland Circulars including PCS (DD) 1994/11. He alleged the procedures *"did not meet acceptable standards, contractual provisions or comply with natural justice"*. [The claimant also mentioned the respondent's Grievance, Flexible Working and Job Planning policies but the relevance of these was not entirely clear to us].

- He alleged the process had been carried out in a discriminatory manner, contrasting how the complainers (who, unlike him, were not white and Scottish) had been treated. He had been denied the opportunity to respond. The respondent had not adequately investigated his patient safety concerns.

- The respondent had chosen to portray the exposure of manifest failings in senior management recorded in the HIS report as the fault of a "*small group of consultants"* including himself.

- Ten months after suspension he had been provided with a list of allegations delivered less than 21 days before an Annex C hearing (a breach of procedure and due process) which had been scheduled to preclude previously agreed leave to attend and contribute to a meeting in South Africa, the importance of which to him was "*well known to NHSG".*

- He had "*no confidence in the ongoing process"* or that the respondent had been "*fair, open and supportive".* He referred to *"continued failure"* by the respondent to allow him access to documents he considered relevant to support his defence of the allegations. There had been "*insufficient time to identify possible witnesses"* which meant that he could not have "*a fair investigation hearing".* He stated: "*These continued failures as regards preparations for the forthcoming Annex C hearing is the last straw in my employer NHSG's treatment of me after more than 40 years of exemplary service to the NHS".*

304. In the Paper Apart to his ET1 the claimant referred (at paragraph 13 and 14) to the same matters as detailed at the final two bullet points above.

305. In his witness statement the claimant described his decision to resign, after referring to the allegation that he had made the racist remark, in these terms –

"*After some two years of relentlessly increasing stress related to multiple flawed NHS Grampian investigations and an outstanding GMC investigation this was intolerable. At a meeting with my MDDUS representative and solicitor C Carr I broke down and expressed the view that having embarked on their course there were no depths NNHS Grampian would not plumb and they were out to 'get me out' no matter what.*

I felt I had no option for the sake of my health and wellbeing but to resign. This was a cumulative effect and as a result of my employers' underhand behaviour, failure to follow their own policies, the last minute introduction of a most serious allegation after 2 years of intense scrutiny and investigation when this was not raised once with me, failing to allow me access to material to defend myself, failing to articulate clear and specific allegations to which I could respond and defend myself, their breach of procedure in relation to the most recent IT investigation and the denial of proper access to material to defend myself.

My employers conducted itself [sic] *in a manner calculated or likely to destroy or seriously damage the implied duty of trust and confidence resulting in me being entitled to terminate my employment with immediate effect. I had no option but to resign my employment with immediate effect. I resigned in response to a course of conduct by the NHS Grampian which, taken cumulatively, amounted to a breach of the implied term of trust and*

confidence. The last straws were the introduction of this final allegation….so late in the day coupled with the continued failure to allow me access to my documents to support my defence. I also had insufficient time to prepare for the case given the lack of specific allegations against the volume of papers."

Post resignation matters

306. The claimant submitted a DSAR on 8 July 2016 (J1016-1017). The respondent did not deal with this well, evidently due to staff resource issues. An initial response, not sent until 24 March 2017 (J1022), was incomplete and a final response was not sent until 1 August 2017 (J1040-1042).

307. A meeting between the claimant and Prof Ahmed, at the latter's request, took place on 7 December 2017. Dr Fowlie was in attendance. The claimant's note of the meeting is at C106-110 and we found no reason to doubt its accuracy. It was accepted by Prof Ahmed. Prof Ahmed confirmed that he had requested mediation in 2014 but had been told that D@W was the only route.

308. We include these matters for the sake of completeness; they were not material to the matters we required to decide.

Comments on evidence

309. We found the claimant to be a credible witness. Under cross examination he answered questions directly and did not shy away from a "*yes"* or "*no"* answer even when he was conceding something potentially to his disadvantage. When asked about the meeting with his solicitor at which he had broken down, he became emotional and we took a short adjournment. We believed that recollection of this was genuinely distressing for the claimant and his reaction spoke more eloquently than words could convey how he had felt at that time, immediately before his resignation.

310. It was surprising that the claimant had not mentioned the racist remark in his letter of resignation. His solicitors had protested about this to the CLO on 6 April 2016 (J908-909A) and to Mr McNeill on 14 April 2016 (J928-930) and it is hard to conceive that it was not one of the matters in the claimant's mind when he decided to resign.

311. Prof Fluck was also a credible witness. On a number of occasions he strove to give a more elaborate answer where "*yes"* or "*no"* would have sufficed. Once or twice he seemed less than entirely comfortable defending Dr Dijkhuizen but generally he gave his evidence clearly and cogently.

312. Dr Khan and Mr O'Kelly gave their evidence in a straightforward and credible manner. We had the impression that both were saddened to see the claimant, a former colleague clearly held in high regard, engaged in litigation with the respondent. Dr Khan would happily have become involved in a mediation process. Mr O'Kelly had been worried that things in general surgery were not going to end well for the claimant and had tried to counsel him.

313. The evidence contained within Dr Fowlie's witness statement went mainly to remedy rather than liability so his evidence to us related only to his attendance at the meeting between the claimant and Prof Ahmed on 7 December 2017.

314. Dr Metcalfe also gave his evidence in a straightforward and credible manner. We noted in particular the view he expressed that in their application, the respondent's policies should be followed to the letter. We sensed that he had tried to deal with the claimant fairly during the suspension review meetings which had clearly not been without moments of discord. He was, to his credit, sympathetic with the claimant's desire to have IT access but was unable to provide this to the extent sought by the claimant.

315. While we did not doubt that Prof Ahmed's evidence was given to the best of his ability, he said that his "*defence mechanism"* was to forget and his recollection of events in 2014 was patchy. His contemporaneous diary notes from 2014 were however a useful record of the events he recorded.

Submissions

316. We are grateful to Mr Bradley and Mr Truscott for their detailed and helpful written submissions which were supplemented by oral submissions on 20 September 2019. It would be difficult to do justice to their submissions by way of brief summary and the written submissions are available within the case file. We set out briefly the propositions Mr Bradley made in terms of how we should dispose of the issues, and Mr Truscott's response to these.

Protected disclosure

317. Mr Bradley submitted that the claimant had made a protected disclosure when he spoke with Dr Russell on 27 May 2014. Mr Truscott said that, even if the statutory definition was not met, the respondent had treated the matters raised by the claimant as a protected disclosure; the motive had been revenge for the HPB surgeons' behaviour towards Ms Craig.

Alleged breaches of contract

318. There were 19 alleged breaches – Mr Truscott dealt with some of these together in his submission and so, for ease of reference, we take the same approach:

(a) Trigger a process knowingly intended to remove the claimant from his workplace and make it impossible for him to practice his profession of surgeon

Mr Bradley's position was that the intention of the respondent's conduct towards the claimant was to force his resignation or destroy or seriously damage the relationship of trust and confidence. Mr Truscott argued that the respondent had investigated concerns and this led to further investigations into the conduct of a number of surgeons, including the claimant. It was this conduct, not the making of the allegations, which led to disciplinary against the claimant.

(b) *Fail to give proper consideration to and investigation into the claimant's protected disclosures*

Mr Bradley asserted that there had been no properly detailed assessment of the entire clinical record in relation to the 20 cases reported by the claimant. Mr Truscott's response was that the claimant's disclosures were investigated on a number of occasions, drawn together in Prof Fluck's report in March 2015.

(c) *Carry out an incomplete and incompetent investigation into 'Dignity at Work' allegations against the claimant made by three surgeon colleagues*

We understood Mr Bradley to discount the reference to "*incomplete".* He submitted that the first CMP investigation was incompetent under the D@W policy because the policy does not permit the investigation of informal complaints and requires the complaint to be in writing. Mr Truscott took this allegation to relate to the second CMP investigation which, he argued, was neither incomplete nor incompetent.

(d) *In carrying out that investigation and in handling of the claimant's suspension and procedure generally did they fail to follow its* [their?] *own policies including*

(i) Framework for Support

(ii) Dignity at Work

(iii) Voicing Concerns Policy

(iv) NHS Circulars 1990 PCS (8), PCS (DD) 1994/11 and PCS (DD) 1999/7

(e) In carrying out that investigation, fail to follow the ACAS Code of Practice on Disciplinary and Grievance procedures (2015)

Mr Bradley criticised the failure to detail allegations in advance of the meeting on 13 November 2014, the absence of formal complaints, the failure to try mediation, the failure to detail allegations post-suspension and the length of the period of suspension. Mr Truscott argued that the respondent had applied the D@W procedure as adapted for the circumstances. The essence of the ACAS Code was fairness and the respondent had treated the claimant fairly.

(f) Deny the claimant access to his research materials

(g) Prevent the claimant from undertaking his Continuing Professional Development responsibilities

Mr Bradley referred to the list of opportunities which the claimant had been unable to take up (J846). Mr Truscott invited us to prefer the evidence of Dr Metcalfe that the claimant had not been prevented from undertaking CPD.

(h) Conduct the investigation and process in an unfair, inconsistent and biased manner

(i) *Conduct the investigation in a way which was discriminatory on grounds of race*

Mr Bradley referred to his criticism of the first CMP investigation and to the alleged biased selection of interviewees (and we refer to his assertion of race discrimination below). Mr Truscott's reply was "*These issues appear to provide some specification of the criticisms of the Dignity at Work investigation but not enough specification to answer more fully."*

(j) *Mislead the claimant at review meetings*

(k) *Deny the claimant effective support and opportunity to retain skills during suspension*

Mr Bradley submitted that Mrs Coull had misled the claimant by assuring him that there were no racial allegations against him when the respondent had subsequently alleged that he had made the racist remark. He also argued that the respondent had not taken meaningful steps to allow the claimant to return to limited or alternative duties. Mr Truscott interpreted this as referring to Dr Metcalfe and asserted that Dr Metcalfe had not misled the claimant.

(l) *Suspend the claimant from working with no proper basis*

Mr Bradley argued that the respondent had failed to follow the relevant Circular. Mr Truscott submitted that the suspension was not materially influenced by the claimant's disclosure and was not a material breach of contract.

(m) *Fail to adequately review suspension*

Mr Bradley highlighted the respondent's failure to consider adequately the option of the claimant working elsewhere. Mr Truscott described this as a general criticism made more specific in (*j)* and (*k)* above.

(n) Make scurrilous allegations of misconduct against the claimant for which there was no proper basis

(o) Fail or refuse to permit the claimant access to documents necessary for him to answer allegations of misconduct

(p) Delay in the provision of a list of allegations of misconduct for an Annex C investigation hearing thus prejudicing the claimant's preparations for it

(q) Failure to ever provide a list of specific allegations for claimant to respond to

(r) Introduce in April 2016, just before the Annex C hearing, a new and serious and final allegation to the case for Annex C hearing that the claimant made a racial comment in 2014, ie 2 years after the alleged remark was made

(s) Continued failure to allow the claimant access to his documents and to materials to support his defence

Mr Truscott's position in relation to all of these alleged breaches was that they related to the Annex C procedure and should have been addressed within that procedure, ultimately by the Panel Chair. Mr Bradley made submissions in respect of each separately –

(*n)* The allegation of an inappropriate relationship between the claimant and Ms Craig carried the innuendo that the claimant had been unfaithful to his wife. There was nothing to support that innuendo.

(*o)* Mr Bradley referred to the lack of time given to the claimant to comment on/respond to the IT investigation report.

(*p)* The claimant was not given "*not less than"* 21 days to prepare his case.

(*q)* The Annex C terms of reference did not give fair notice of the allegations which the claimant required to answer.

(r) In addition to repeating the assertion that the claimant had been misled (see paragraph (*j)* above) Mr Bradley submitted that the making of this allegation was contrary to the assurance that the investigation reports provided sufficient notice of the allegations.

(s) Mr Bradley referred to the claimant being provided with the 128 page IT investigation report and being allowed insufficient time to prepare his defence.

Claim of unfair dismissal under section 103A ERA

319. Mr Bradley argued that the claimant had been dismissed in terms of section 95(1)(c) ERA and that the reason for that dismissal was that the claimant had made a protected disclosure. Mr Truscott made no specific submission with reference to this item in the list of issues but did submit that it was doubtful the claimant had a reasonable belief in the disclosures when he met with Dr Russell on 27 May 2014.

Claim of constructive dismissal

320. Mr Bradley reminded us of the terms of section 95)1)(c) ERA and invited us to find that this was engaged. Mr Truscott submitted that the claimant did not resign at any time he perceived there had been a breach of contract or a detriment; when he did resign, there was neither.

Claim of race discrimination

321. Mr Bradley contrasted the respondent's investigation of the claimant's protected disclosures with their investigation of the D@W allegations against the claimant by his HPB colleagues and submitted that this was less favourable treatment because of the claimant's race. We understood Mr Truscott to rely on section 23 EqA in terms of which there must be "*no material difference"* between the circumstances on a comparison of treatment under section 13(1) EqA. He also argued that this claim was time-barred.

Claim of detriments

322. Mr Bradley invited us to accept the claimant's evidence that the respondent had done the acts also alleged to be breaches of contract as part of a process to get him out on the grounds that he had made his protected disclosure and that accordingly these were detriments for the purposes of section 47B ERA. Mr Truscott argued that the detriments claim was time-barred.

Claim of breach of contract (notice pay)

323. It was agreed that this was a remedy issue.

Applicable law

Protected disclosures

324. We quote from the ERA –

"*43A* ***Meaning of protected disclosure***

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

43B ***Disclosures qualifying for protection***

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be concealed."

We set out the text of section 43C ERA at paragraph 7 above.

325. Protection against dismissal is contained in section 103A ERA which provides as follows –

"*An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

326. Protection from detriment is contained within section 47B ERA which provides as follows –

"*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or deliberate failure to act, done –

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer…."

Constructive dismissal

327. Section 95(1)(c) ERA provides as follows –

"*For the purposes of this Part an employee is dismissed by his employer if (and subject to subsection (2) only if) –*

….(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Unfair dismissal

328. Section 94(1) ERA provides as follows –

"*An employee has the right not to be unfairly dismissed by his employer."*

329. Section 98 ERA provides as follows –

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if there is more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

….(c) relates to the conduct of the employee….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Race discrimination

330. Section 13(1) EqA provides as follows –

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

331. Section 23(1) EqA provides as follows –

"*On a comparison of cases for the purposes of sections 13, 14 or 19 there must be no material difference between the circumstances relating to each case."*

332. Section 39(2) EqA provides s follows –

"*An employer (A) must not discriminate against an employee of A's (B) –*

….(c) by dismissing B;

(d) by subjecting B to any other detriment."

Case law

333. Mr Truscott provided a comprehensive review of the relevant case law in his written submission with which Mr Bradley took no issue. We are grateful to Mr Truscott for this and happy to adopt it.

Discussion and disposal

334. We approached our deliberations broadly following the list of issues.

Did the claimant make a protected disclosure?

335. We accepted the claimant's evidence about what he had said to Dr Russell (see paragraph 85 above). We considered that this was the disclosure of "*information*" for the purpose of section 43B ERA. It was more

than just an expression of the claimant's negative opinion about the performance of his HPB colleagues. The list of cases subsequently sent by the claimant to Dr Russell was also "*information"* within the meaning of the section.

336. We considered that the disclosure was in the claimant's reasonable belief "*made in the public interest*". It was in the public interest that there should be "*accurate data collection"* and proper investigation of "*poor clinical outcomes".*

337. We considered that what the claimant told Dr Russell related to patient safety and therefore fell within section 43B(1)(d) ERA.

338. Accordingly we were satisfied that the relevant parts of section 43B(1) were met.

339. Turning to section 43C ERA we gave further consideration to the point raised by Mr Truscott at the start of the hearing about whether there had been a disclosure by the claimant to his employer (notwithstanding that this had not formed part of the list of issues in light of our decision on the application to amend). The claimant had spoken to Dr Russell whose status appeared to us to be that of a part-time secondee to the respondent. In that sense Dr Russell was not wholly external to the respondent's organisation but was at the relevant time fulfilling a role within that organisation. In these circumstances our view was that disclosure by the claimant to Dr Russell did constitute disclosure to the respondent.

340. We noted that it was accepted by Mr Bradley that the claimant had not repeated the disclosures between 27 May 2014 and 20 April 2016 and so we did not require to address this.

341. Our conclusion was that the claimant had made a protected disclosure on 27 May 2014.

Was the claimant constructively dismissed?

342. We approached this by considering each of the 19 alleged breaches of contract by the respondent, ie did the respondent do any or all of the following –

(a) Trigger a process knowingly intended to remove the claimant from his workplace and make it impossible for him to practice his profession of surgeon?

In our view, no. While we found some evidence of antipathy on the part Dr Dijkhuizen towards the claimant, the respondent could not have predicted the outcome of the RCS review nor the first CMP investigation nor the Annex C procedure. The process could not have been "*knowingly intended*" to have the alleged consequences for the claimant.

(b) Fail to give proper consideration to and investigation into the claimant's protected disclosures?

In our view, no. The respondent was entitled to assume that the RCS would deal appropriately with the 16 cases identified to them. The other 4 cases were referred to Prof Wigmore and we did not understand the claimant to be suggesting that this was inappropriate.

(c) Carry out an incomplete and incompetent investigation into "Dignity at Work" allegations against the claimant made by three surgeon colleagues?

In our view, yes. We understood Mr Bradley to withdraw the allegation that the CMP investigation had been "*incomplete*" so we focussed on "*incompetent*". We had a number of concerns. When CMP were instructed to carry out their first investigation, it could not properly be described as a D@W process as there were no formal complaints at that

stage. However, the note of the general surgery review information meeting on 25 August 2014 (at J214) records –

"*It was stated that the management team had decided to undertake a dignity at work investigation based on the informal complaints raised."*

Given the nature of the first CMP investigation, it seemed to us that any evaluation of the evidence had to remain tentative. Ms Lawson-Brown's remit was to evaluate the evidence and *"to present her findings….as to whether in her professional opinion there is a case to answer" (*see paragraph 139 above). She went much too far in her strongly worded recommendations which included the suspension of the claimant and four of his colleagues. In these circumstances no reasonable employer would have instructed the same investigator to undertake the formal D@W investigation. That investigation needed to be impartial in the sense that the investigator had no preconceptions as to innocence or guilt.

(d) In carrying out that investigation and in handling of the Claimant's suspension and procedure generally did they fail to follow its own policies including…

We deal with this by reference to each of the policies which are mentioned.

(i) Framework for Support

In our view, no. While we noted the claimant's criticisms in relation to Framework for Support it seemed to us that there were more material issues in relation to other policies.

(ii) Dignity at Work

In our view, yes. We had two particular areas of concern. The first was the initiation of a D@W investigation, (ie the second

CMP investigation) without there first being a complaint in writing (D&W Policy, Appendix F, paragraph 1 – J1140). The claimant made other criticisms of the process, for example the absence of a note-taker at some interviews and the fact that witness statements were expressed in the third person, but in our view these aspects were less significant.

Our second area of concern related to the letter from Prof Bruce to the claimant of 10 November 2014 (J234) and their meeting on 13 November 2014. The letter advised the claimant that the purpose of the meeting would be –

"….to outline the management position with regard to behaviours and actions displayed by yourself and the impact this may have on yourself and others."

We initially thought this was a disciplinary meeting because the letter advised the claimant of his right to be accompanied, but we accepted Prof Fluck's explanation that the "*right to be accompanied"* wording was used more widely by the respondent in an HR context. That begged the question of what procedure was being invoked by Prof Bruce's letter. The wording we have quoted above has a D&W "*flavour"* to it, but if the letter was intended to be part of a D&W process it was inappropriate as there were no complaints in writing as at 10 November 2014 and no formal D&W investigation had taken place. In these circumstances we found it difficult to understand how there could be a "*management position".*

(iii)Voicing Concerns Policy

In our view, no. While we were satisfied that, judged with the wisdom of hindsight, the claimant had made a protected disclosure, we were not persuaded that he had whistleblowing in mind when he spoke to Dr Russell on 27 May 2014. We also believed that the respondent had not recognised that the claimant might have been whistleblowing so as to engage the Voicing Concerns Policy.

(iv)NHS Circulars (for details see paragraph 318(d) above)

In our view, yes. We identified a number of failures by the respondent to comply with the Circulars. The particulars of the allegations against the claimant were not "*substantiated"* within 10 days of the claimant's suspension. The timetable for the Annex C procedure (see paragraph 203 above) was not adhered to. The claimant was not given the full 21 days to which he was entitled to prepare his case (despite bto pointing out the deadline before it expired). The claimant was not provided with written statements "*as soon as possible".* He was not given a list of witnesses which included the main points on which they were to give evidence. The terms of reference did not provide sufficient details of the *"nature of the incident or complaint".* The allegations should have been framed with enough content and clarity to allow the claimant (and the Annex C panel) to understand them without having to read through the whole of the management case to try and work out what was being alleged; they were not.

(e) In carrying out that investigation, fail to follow the ACAS Code of Practice on Disciplinary and Grievance procedures?

In our view, yes. Mr Bradley referred to paragraphs 4, 8 and 9 of the Code, arguing that the issues were not dealt with promptly (paragraph 4), the period of suspension was not as brief as possible (paragraph 8) and the information provided in advance of the Annex C hearing was not sufficient so as to enable the claimant to prepare to answer the case (paragraph 9). This matter had a complex factual background and the failures to follow paragraphs 4 and 8 were not in our view unreasonable. However, the failure to follow paragraph 9 was unreasonable.

Paragraph 9 of the Code includes, referring to the notification to the employee of the decision that there is a disciplinary case to answer –

"This notification should contain sufficient information about the alleged misconduct….to enable the employee to prepare to answer the case at a disciplinary meeting."

The point we have made in the last sentence of the preceding paragraph relating to NHS Circulars applies equally here.

(f) Deny the claimant access to his research materials?

In our view, yes. However, in light of the IT Security concerns about allowing the claimant access to the respondent's systems we did not consider this to be a material breach of contract by the respondent.

(g) Prevent the claimant from undertaking his Continuing Professional Development responsibilities?

In our view, no. We found that the claimant's lack of IT access impacted on his ability to undertake CPD activity as he was accustomed to do. However, given his high degree of computer literacy, we did not believe that the claimant was wholly prevented from undertaking CPD activity. The matters he referred to in his letter to Ms Carr of 18 February 2016 (J846) were not all of a CPD nature and we believed that the claimant's concern was more related to reputational damage than CPD compliance.

(h) Conduct the investigation and process in an unfair, inconsistent and biased manner?

In our view, yes. We regarded this as effectively the same point as we have already addressed in relation to paragraphs (d)(ii) (D&W) and (d)(iv) (NHS Circulars) above.

We had a difference of opinion on the question of whether the respondent had acted unfairly by withdrawing consent for the claimant's trip to South Africa which clashed with the date of the Annex C hearing. Ms Williams Edgar believed the respondent had behaved unreasonably. The Employment Judge and Mr Gray disagreed and accepted Prof

Fluck's evidence about the difficulty in finding suitable dates for the Annex C hearing.

(i) Conduct the investigation in a way which was discriminatory on grounds of race?

In our view, no. We explain below why we did not consider that there was unlawful race discrimination by the respondent.

(j) Mislead the claimant at review meetings?

In our view, possibly. The claimant's position was that at the preparatory meeting for the RCS review which took place on 25 August 2014 issues around racial, age and sexual discrimination had been raised by Mrs Coull. At the suspension meeting on 29 May 2015 (rather than a suspension review meeting) Mrs Coull had told the claimant that "*none of these involved him".*

The note of the 25 August 2014 meeting included the sentence –

"*Informal concerns about racial, sexual and age related discrimination have been highlighted."*

We speculate that Mrs Coull might have had in mind Ms Craig's concerns about the behaviour of her HPB colleagues rather than the claimant's behaviour when she mentioned discrimination at the meeting on 25 August 2014. This would explain why she told the claimant on 29 May 2015 that the concerns to which she was referring did not involve him. However, given the inclusion in the management case of the allegation that he had made the racist remark, we could understand why the claimant believed he had been misled.

(k) Deny the claimant effective support and opportunity to retain skills during suspension?

In our view, no. We were satisfied that the respondent took reasonable steps to find alternative employment for the claimant during his period of suspension (see paragraph 222 above).

(l) Suspend the claimant from working with no proper basis?

In our view, no. There were serious allegations against the claimant at the time of his suspension. It could not be said that no reasonable employer would have decided to suspend.

(m) Fail to adequately review suspension?

In our view, no. Suspension review meetings were held at regular intervals during the period of the claimant's suspension. The frequency of these meetings did not comply with the relevant NHS Circular (which stated that meetings should be held every two weeks - see paragraph 209 above) but we did not regard this as material.

(n) Make scurrilous allegations of misconduct against the claimant for which there was no proper basis?

In our view, no. The respondent did have evidence of misconduct on the part of the claimant and so the allegations could not be fairly described as "*scurrilous".*

(o) Fail or refuse to permit the claimant access to documents necessary for him to answer allegations of misconduct?

In our view, yes. We recognised that the respondent had a legitimate interest to protect the integrity of its IT systems but it also had a duty to act fairly towards the claimant in terms of affording him access to material relevant to preparation of his answers to the allegations against him. Mr Bradley focussed on the manner in which the respondent afforded the claimant access to a clone of his computer to enable him to comment on and respond to the IT investigation report. Access was given only one day before the end of the 21day period allowed for the

claimant's response to a report which was the product of many months of investigation. That was patently unreasonable and unfair.

(p) Delay in the provision of a list of allegations for an Annex C investigation hearing thus prejudicing the claimant's preparations for it?

In our view, yes. This might have been less of an issue if the list of allegations contained in the management case had been the same as the list provided on 9 October 2015 (J664) but it was not. This was compounded by the addition of the allegation relating to the racist remark.

(q) Failure to ever provide a list of specific allegations for the claimant to respond to?

In our view, yes. In order to give the claimant fair notice of the allegations against him, the respondent should have articulated those allegations with sufficient content and clarity to allow the claimant (and the Annex C panel) to understand them without having to read through the whole of the management case to try and work out what was being alleged. We have already made the same point at paragraph (d)(iv) above.

(r) Introduce in April 2016, just before the Annex C hearing, a new and serious and final allegation to the case for Annex C hearing that the claimant made a racial comment in 2014 ie 2 years after the alleged remark was made?

In our view, yes. The timing of the addition of new allegations relating to the IT investigation could be explained by reference to the timing of that investigation. The same could not be said of the racist remark allegation. It had not been included in the list provided on 9 October 2015. Its inclusion in the management case was contrary to both the letter (as it was not disclosed 21 days before the start of the Annex C hearing) and the spirit of the Annex C procedure.

(s) Continued failure to allow the claimant access to his documents and to materials to support his defence?

In our view, yes. Again, Mr Bradley focussed on the IT allegations and what we have said at paragraph (o) above applies equally to this point. We would also observe that no consideration appears to have been given by the respondent to the classification of the IT allegations, ie whether they were personal or professional misconduct (see paragraph 197 above).

343. We reminded ourselves of the matters we had to consider in deciding whether the claimant had been constructively dismissed, following the decision of the Court of Appeal in ***Western Excavating (E.C.C) Ltd v Sharp [1978] ICR 221***-

- There must be a breach of contract by the employer (either actual or anticipatory).
- That breach must be sufficiently important to justify the employee resigning, or must be the "last straw".
- The employee must leave in response to the breach and not for some other, unconnected reason.
- The employee must not wait too long before resigning in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

344. We considered the terms of the claimant's letter of resignation of 20 April 2016 (J967-969). We have summarised the content of the letter in the seven bullet points at paragraph 304 above. We found the absence of specific reference to the racist remark to be surprising. There was some force in Mr Truscott's criticism of the claimant apparently changing his

position from his letter of resignation to his claim form to his witness statement in terms of what had been the "last straw".

345. We believed that the most reliable and credible expression of the reasons for the claimant's resignation was that set out in his letter of resignation. This was how the claimant had articulated his position at the time of his decision to resign. We regarded the following parts of the claimant's letter of resignation as the most significant –

"*Ten months after suspension I was provided with a list of allegations delivered less than 21 days before an Annex C hearing (another breach of procedure and breach of due process); a hearing scheduled to preclude previously agreed leave to attend and contribute to a meeting in South Africa. The importance of this meeting to me was well known to NHSG.*

I have no confidence in the ongoing process or that NHSG have been "fair, open and supportive". There has been continued failure by NHSG to allow me to access documents I consider relevant to support my defence of the allegations. There has been insufficient time to identify possible witnesses which means that I cannot have a fair investigation hearing. These continued failures as regards preparations for the forthcoming Annex C hearing is the last straw in my employer NHSG's treatment of me after more than 40 years of exemplary service to the NHS.

This behaviour represents a fundamental and repudiatory breach of my contract of employment and as a result I have no option but to resign with immediate effect, and I do not intend to work my notice period. My employer has fundamentally breached the duty of trust and confidence and my position is untenable. As a result of NHSG's actions I have been constructively dismissed…."

346. We compared what the claimant had said in his letter of resignation with our findings in respect of each of the alleged breaches of contract in the list of issues. We discounted those which we had not found to amount to a breach of contract. We identified the following matters which had in our view constituted material breaches of contract by the respondent –

(i) Instructing CMP to carry out the formal D@W investigation when Ms Lawson-Brown had already recommended the suspension of the claimant and four others.

(ii) Initiating the formal D@W investigation without there being a complaint in writing.

(iii) Failing to comply with the NHS Circulars.

(iv) Denying the claimant access to documents necessary for him to answer the allegations of misconduct (particularly with reference to the IT allegations).

(v) Failing to provide a sufficiently detailed list of allegations.

(vi) Introducing the racist remark allegation at the last moment.

347. We considered that the claimant breaking down during a meeting at his solicitor's office shortly before he resigned was indicative of his being under emotional pressure at the time, and that the lack of clarity in the list of allegations had contributed to this. It resonated with his losing trust and confidence in the process in which his employer was engaged. It was consistent with the matters referred to in his resignation letter having a cumulative effect on the claimant. He reached a point where he felt he could not carry on with that process.

348. We believed that the matters which brought the claimant to that point were those which occurred at the end of March and during April 2016. Those are the matters described in sub-paragraphs (iii) to (v) of paragraph 346 above. We found that these were breaches of the respondent's duty of trust and confidence, that the breaches were material, that the claimant resigned in response to these breaches and that he did not wait too long before doing so. The claimant was constructively dismissed by the respondent in terms of section 95(1)(c) ERA.

Was claimant dismissed because he made a protected disclosure?

349. We reminded ourselves that the claimant's dismissal would be automatically unfair in terms of section 103A ERA if the reason (or, if more than one, the principal reason) for the dismissal was that the claimant made a protected disclosure.

350. While the claimant's conversation with Dr Russell was the catalyst for RCS being called in by the respondent, it was Dr Dijkhuizen's decision to include teamworking in general surgery within the RCS terms of reference which led to the criticisms of behaviours within that department, including those of the claimant. Based on Prof Fluck's evidence, which we accepted, there were concerns about general surgery following the initial HIS validation visit to ARI in March 2014.

351. There were also issues within general surgery which predated the claimant's conversation with Dr Russell on 27 May 2014. These included incidents involving the HPB surgeons and Ms Craig and/or the claimant. Prof Fluck referred to *"concerns and conflict about sharing offices, on call rotas, behaviour on ward rounds, behaviour in M&M meetings and specific concerns about public disagreement over patient care".*

352. We considered that there might also have been an element of retaliatory motivation on the part of Dr Dijkhuizen in including teamworking within general surgery in the RCS terms of reference. The terms of his letter to Mr Binnie of [**insert date and document number**] and his witness statement to Ms Lawson-Brown (see paragraph [**insert number**] above) lend support to this view.

353. It seemed to us that the sequence of events which led to the claimant's resignation could be traced back to the events described in paragraphs 350-352. That sequence of events was not triggered by the claimant's conversation with Dr Russell on 27 May 2014 and his protected disclosure to Dr Russell was not the reason for his resignation/constructive dismissal.

354. It followed that the claimant's claim under section 103A ERA could not succeed.

Was the claimant unfairly dismissed?

355. It was clear from the claimant's ET1 and the respondent's ET3 (both as amended) that unfair dismissal under section 94 ERA was an issue in this case – see paragraph 19(a) of the paper apart to the ET1 (J4) and paragraph 13.4 of the respondent's Grounds of Resistance (J14).

356. Mr Truscott's submissions to us proceeded on the basis that the respondent's reason for dismissal was the claimant's conduct. We noted that this was not the reason set out in paragraph 13.4 of the ET3 where the reason was expressed as "*some other substantial reason being the breakdown in relationship between the Claimant and the Respondent*". We did consider whether this meant that the respondent had failed to show a potentially fair reason for dismissal. However, we came to the view that the Grounds of Resistance clearly indicated that there had been a disciplinary process relating to the claimant's alleged misconduct. It was that alleged misconduct which underpinned the alleged breakdown in relationship between the claimant and the respondent.

357. There was ample evidence before us to demonstrate that the reason why the respondent acted as it did in suspending the claimant and embarking on the Annex C process was related to his alleged misconduct. We were satisfied that the respondent had shown that the reason for the claimant's dismissal related to his conduct. This was a potentially fair reason for dismissal in terms of section 98(2)(b) ERA.

358. We then considered whether the respondent had acted reasonably or unreasonably in treating the claimant's alleged misconduct as a sufficient reason for dismissing him. We reminded ourselves that section 98(4) ERA required us to have regard to the circumstances of the dismissal including

the respondent's size and administrative resources, and to determine the question in accordance with equity and the substantial merits of the case.

359. The "*circumstances"* included the following –

- The respondent's decision to instruct CMP to conduct the D@W investigation.

- The terms of the RCS report, in particular the reference in recommendation 18 (at GMC60) to "*future breaches"* of professional codes of conduct.

- The respondent's failure to follow the D&W policy by having signed complaints before instructing an investigation.

- The respondent's failure to comply with the Annex C procedure.

- The respondent's failure to provide the claimant with a sufficiently detailed list of allegations.

- The late inclusion of the racist remark allegation.

- The restrictions on the claimant's IT access.

- The timescale within which the claimant had to respond to the IT allegations.

360. The respondent's failure to provide the claimant with a sufficiently detailed list of allegations was also inconsistent with paragraph 9 of the ACAS Code.

361. In our assessment of whether the respondent had acted reasonably or unreasonably these circumstances weighed against the respondent. The respondent is a large organisation with significant administrative resources.

We agreed with Dr Metcalfe's view that the respondent's policies should be strictly complied with. It was not good enough – and unfair to the claimant - to initiate a D@W investigation without having signed complaints and to fail to provide the management case for the Annex C hearing timeously.

362. We have already expressed the view that no reasonable employer would have instructed CMP to undertake the formal D&W investigation when Ms Lawson-Brown had recommended the suspension of the claimant and four of his colleagues. While the recommendation may have been made in good faith, it tainted Ms Lawson-Brown's impartiality for the purposes of the D&W investigation. She had already taken sides.

363. If the allegation about the racist remark was to form part of the respondent's list of allegations, it should have been included in the list provided on 9 October 2015. It related to something alleged to have been said by the claimant on 8 May 2014. It was not newly discovered information. No reasonable employer would have *"sprung"* this allegation on the claimant at the last moment (indeed beyond the last moment given that the Annex C timescale for providing the management case to the claimant was not complied with).

364. The IT investigation report ran to 128 pages. While we acknowledged the point Mr Truscott made that a significant portion of this was made up of printouts of data and the report itself comprised only some 6 pages, we did not believe any reasonable employer would have given the claimant access to a clone of his computer only one day before the deadline for providing his comments on the report.

365. In these circumstances we decided that the respondent had not acted reasonably in treating the claimant's alleged misconduct as sufficient reason for dismissing him. Accordingly, his dismissal was unfair.

Race discrimination claim

366. The basis of this claim was that the claimant had been treated differently from his HPB colleagues who were of a different race. The difference of treatment related to the way in which the respondent had investigated (a) the claimant's concerns as reported to Dr Russell and (b) the D@W complaints by the HPB surgeons.

367. Our view was that there was a material difference between the circumstances of these cases. The claimant had reported clinical concerns. The HPB surgeons had complained about bullying, harassment and mobbing. In terms of section 23(1) EqA there had to be *"no material difference between the circumstances relating to each case".* Given our finding that there was a material difference the claimant's race discrimination claim could not succeed.

Protected disclosure detriments claim

368. In the same way that we found that the claimant's protected disclosure was not the reason for his dismissal, we found that the respondent's treatment of the claimant (as detailed in paragraph 342 above) was not done on the ground that he had made a protected disclosure. That treatment was part of a course of conduct which, as stated in paragraph 353 above, was not triggered by the claimant's conversation with Dr Russell on 27 May 2014. Accordingly, the detriments claim could not succeed.

Further procedure

369. Our Judgment deals only with liability. The case will now be listed for a hearing on remedy.

Employment Judge: **Alexander Meiklejohn**
Date of Judgment: **30 October 2019**
Date Sent to Parties: **01 November 2019**