EMPLOYMENT TRIBUNALS

Claimant: Dr B Oshin

Respondent: Public Health England

Heard at: Exeter **On:** 3, 4, 5, 6 & 7 October 2016
1 November 2016 (in chambers)

Before: Employment Judge Housego
Mrs S Long
Mr J Martin

Representation
Claimant: In Person
Respondent: Mrs S Fraser-Butlin of Counsel

RESERVED JUDGMENT

1. The Claimant was constructively unfairly dismissed by the Respondent.

2. There is no reduction for contribution,

3. The Respondent discriminated against the Claimant in the grounds of his race, contrary to S13 of the Equality Act 2010.

4. The Respondent victimised the Claimant contrary to S27 of the Equality Act 2010

5. The claim under S13 of the Employment Rights Act is dismissed

6. The claim is to be relisted for a remedy hearing.

REASONS

The Claimant, a Consultant in the field of public health medicine formerly employment by Public Health England, makes the following claims against his former employer. The issues were identified at a preliminary hearing in April

2016. They were set out in a case management order made after that hearing as follows.

> ***"1. Introduction***
>
> *The Claimant who was employed from 07 December 2009 - 31 July 2015, complains of the following:*
>
> *1.1 direct race discrimination*
> *1.2 victimisation*
> *1.3 constructive unfair dismissal, and*
> *1.4 unlawful deduction from wages.*
>
> ***2. Jurisdiction***
>
> *2.1 Are the claims relating to the MPS investigation and grievance in time?*
>
> *2.2 The Respondent submits that any claims predating the claim form by three months or more are out of time and should be struck out. The Respondent submits that there is no continuing act and no reason to extend time.*
>
> ***3. Direct race discrimination***
>
> *3.1 Did the Respondent treat the Claimant less favourably than it treats or would treat others? The Claimant alleges that the less favourable treatment includes:*
>
> *3.1.1 The MPS investigation process;*
>
> *3.1.2 Being stereotyped as an "angry black man", focusing on the Claimant's accent questioning the Claimant's capability and recommending behavioural coaching;*
>
> *3.1.3 The Claimant's alleged constructive dismissal;*
>
> *3.1.4 One alleged unlawful deduction from wages in July 2015;*
>
> *3.1.5 Failing to conduct the grievance appeal in a timely manner, allowing a member of its own staff to lead the grievance appeal and failing to conduct a face-to-face appeal hearing; and*
>
> *3.1.6 Failing to give proper consideration to the Claimant's allegations of discrimination in the report of 17 August 2015.*
>
> ***4. Victimisation***
>
> *4.1 Did the Claimant do a protected act in issuing an Employment Tribunal claim and/or raising allegations of race discrimination?*
>
> *4.2 Did the Respondent subject the Claimant to a detriment as a result of this protected act? The alleged detriment is that during 01 - 31 July 2015 the Respondent decided not to provide necessary information to*

the GMC and/or omitted to deal properly with the Claimant's GMC revalidation without reasonable cause.

4.3 If so, was this on the grounds of the Claimant's race?

5. Constructive unfair dismissal

5.1 Did the Claimant resign? The Claimant freely elected to leave under the respondent's voluntary exit scheme. [note – this was the text of the case management order and not a finding of fact in that hearing: it set out the Respondent's case in that regard.]

5.2 If so, was there a repudiation through breach by the respondent which was sufficiently serious to justify the Claimant's resignation? The Claimant states that the only reason he left was because his line manager suggested it.

5.3 If so, did the Claimant accept the breach and resign in response to it?

5.4 Alternatively, did the Claimant delay too long in accepting the breach or waive the breach?

5.5 Was the dismissal fair and reasonable according to the equity and substantial merits of the case?

5.6 Would the Claimant had been dismissed in any event and/or was there any contributory fault?

6. Unlawful deduction from wages

6.1 Were wages or any payment properly due to the Claimant in July 2015? If so what were these?

6.2 Did the Respondent make any deductions from the Claimant's wages in July?

6.3 If so, was this deduction authorised by statute and/or the Claimant's contract and/or with the Claimant's consent?

6.4 Are there any sums outstanding or owed to the Claimant by the respondent?"

The Law

1. The Claimant claims that he was constructively unfairly dismissed. The burden of proof is upon him, to the civil standard. He needs to show that there was a fundamental breach of contract by the employer, that he resigned in consequence of it, in good time, and without affirming the contract. The last matter leading to the resignation need not itself be a breach of contract (*cf* Omilaju v LB Waltham Forest [2004] UKEAT 0941 03 3101 – the perception of the employee is relevant as to whether the 'last straw' in a constructive dismissal case has to involve at least some blameworthy or unreasonable conduct by the employer) The conclusion in Malik v Bank of Credit [1997] UKHL 23 is also

helpful *"…the implied mutual obligation of trust and confidence applies only where there is "no reasonable and proper cause" for the employer's conduct, and then only if the conduct is calculated to destroy or seriously damage the relationship of trust and confidence."*

2. Provided there is the necessary causative link those constructively unfairly dismissed do not have to resign immediately, but may take some time to formulate their plans for the future. The Statutory provisions applicable are the well known Part X of the Employment Rights Act 1996, and in particular sections 95(1)(c) and S98, containing the statutory definitions of constructive and unfair dismissal.

3. The Claimant claims direct race discrimination. The statutory provisons are in Sections 6, 9,and 13, and for victimisation S27, Part 5 of the Equality Act and for matters relating to the time limits relating to discrimination Section 123 of the Equality Act 2010. The decision is long enough without setting out all the relevant statutory provisions in the judgment. The Claimant must have suffered a detriment, by reason of his race or nationality. The treatment of which he complains must in no sense whatsoever be tainted by race discrimination. Race discrimination can be subconscious, as opposed to being directly motivated by discriminatory intention. If the evidence shows reason why the treatment could be discriminatory, the burden of proof shifts to the Respondent to show that it is not. (Igen v Wong [2005] ICR 91 (Court of Appeal)).

4. The application of the burden of proof is critical. We bear in mind the guidance in Madarassy v Nomura International Plc [2007] EWCA Civ 33 at paragraph 12:

> *"I do not underestimate the significance of the burden of proof in discrimination cases. There is probably no other area of the civil law in which the burden of proof plays a larger part than in discrimination cases. Arguments on the burden of proof surface in almost every case. The factual content of the cases does not simply involve testing the credibility of witnesses on contested issues of fact. Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact-finding body is clear and certain. The guidance in Igen v. Wong meets these criteria. It does not need to be amended to make it work better."*

5. At paragraph 55 onwards of Madarassay sets out the legal position:

> *"55. In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment in Igen v. Wong.*
>
> > *28. The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the complainant "could*

have committed" such act.

29. The relevant act is, in a race discrimination case …., that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example, in relation to employment in the circumstances specified in section 4 of the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities.[The court then proceeded to criticise the Employment Appeal Tribunal for not adopting this construction and in regarding "a possibility" of discrimination by the complainant as sufficient to shift the burden of proof to the respondent.]

56. The Court in Igen v. Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

57. "Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.

59. Mr Allen submitted that the tribunal had applied the wrong law. It had cited and applied the law as laid down in the Great Britain-China Centre case, instead of the amended law contained in section 63A(2) as

construed in Igen v. Wong. He added that, if this court rejects his criticisms of paragraph 175, it will be holding that the burden of proof has not been reversed, that section 63A(2) does not give effect to the Directive and that no material change in the law has been made.

60. I do not accept these submissions. The amendments changed the law. They did so by stating the circumstances in which the burden of proof moves from the complainant to the respondent. If and when this happens, the tribunal has to decide whether or not the respondent has proved that he has not committed an unlawful act of discrimination. If the tribunal accepts the respondent's evidence of a non-discriminatory reason for his treatment of the complainant as an adequate explanation, the respondent will have discharged the burden of proof. If the respondent does not discharge the burden of proof, the complainant "shall" succeed. This was not the law as laid down in Great Britain-China Centre and Zafar and applied by the tribunals before 12 October 2001, according to which the tribunals "may", not "must", infer unlawful discrimination from the absence of an adequate explanation for discriminatory treatment."

6. The Claimant claims victimisation. He claims to have suffered a detriment subsequent to lodging his Employment Tribunal claim, by reason of lodging that claim. The claim was issued on 31 July 2015, and only actions after the intention to bring the claim are relevant. The Claimant lodged a grievance on 26 January 2015 [374-377] and that is the date for the start of any claim for victimisation for raising a grievance. The same Igen v Wong principles as to burden of proof apply to this head of claim.

7. The Claimant claims unlawful deductions from wages. This requires a contractual entitlement to money, not paid by the employer, without good reason, outstanding at the ending of the Claimant's employment, contrary to Section 13 of the Employment Rights Act 1996. The Respondent takes a time point about earlier claims said to be deductions. The burden of proof for this claim is on the Claimant. There is no concept of a shifting burden of proof for this head of claim, and it is not asserted to be a matter of race discrimination.

8. In relation to covert recordings we have considered Vaughan v London Borough of Lewisham [2013] UKEAT 0534/12/SM.

Summary

9. The Claimant was born and educated in Nigeria. He specialised in public health medicine, and joined the Respondent in 2009. In early 2015 a complaint of bullying was made against the Claimant by a subordinate, arising from a telephone call made by the Claimant on 05 December 2013. The Respondent wanted it dealt with informally. The Claimant wanted to clear his name and asked for an investigation. The Respondent did not use its bullying policy but an MPS investigation which recommended a disciplinary hearing. [An MPS investigation is the formal process used to discipline doctors, countrywide.] At a review of that recommendation the decision maker decided there was no need for a disciplinary hearing, but made a compulsory requirement of the Claimant that he attend behavioural coaching. Some adverse comments were made about the Claimant in that final report. The Claimant felt these, and the recommendation, were totally unfounded, and tantamount to an adverse finding against him. He felt that they

were based on matters where he had been proved not to be at fault. He raised a grievance about the way matters were dealt with, including of race discrimination. He signed up for an exit package offered to some employees of the Respondent and says he was encouraged to do so, so that the Respondent wanted him gone. His grievance was dismissed, and an appeal was dealt with on the papers, but not until after he had left. The Respondent decided to close the office in St Austell where he was based. Shortly before leaving his employment with Respondent the Claimant wrote to his MP about it having told the Respondent that he intended to do so, they replying that he should not do so. The MP wrote to the Chief Executive of the Respondent, which then withdrew its revalidation of the Claimant a few days before he left them. Some years beforehand he had been asked to work in Exeter at least one day a week, and had done so for two years, asking for some adjustment to work or pay, but none had been forthcoming. He ceased to travel to Exeter, and did that work remotely for a further 2 years, resuming only shortly before leaving. He claims pay for the time spent travelling to Exeter. The race discrimination claim is based on the Claimant being a black African, with a hypothetical white male comparator. The claim at 4.3 originated with a protected act, that is the lodging a grievance claiming race discrimination.

Dramatis personae

10. The primary actors in this matter from whom the Tribunal heard evidence are:

Dr Babafemi Oshin: the Claimant: a consultant doctor based in St Austell. Documents of the Respondent frequently refer to him as "FO", as his first name is abbreviated to *"Femi".*

Dr Sarah Harrison: line manager of the Claimant.

Dr Peter Sheridan: a doctor based in London, retired from PHE and who undertook investigations for the Respondent on an ad hoc basis, and who undertook an investigation into the Claimant, submitting that report to Prof Kessel.

Prof Anthony Kessel: based in London and manages the global health programme: dealt with the conclusion of the investigation and made the recommendation for behavioural coaching.

Alexander Sienkiewicz: Director of Corporate affairs of the Respondent, based in London, above Prof Kessel in the structure of the Respondent

Prof Yvonne Doyle: Regional Director for London, who dealt with the Claimant's grievance appeal on the papers after he had left the Respondent

Others in the narrative are:

Duncan Selbie: Chief Executive of the Respondent

Dr T Wyatt: in the role as external independent person in the MPS scheme

Debra Lapthorne: the Director of the Exeter office (which had responsibility for the St Austell office)

Isobel Oliver: previous Regional Director of the Exeter Office

Rupert Goodman: deputy Human Resources Director, assisting Dr Sheridan

Tony Vickers-Byrne: Director of Human Resources, assisting Prof Kessel

Hilary Morris: a complainant, based in the Exeter office

Lesley-Anne Williams: initially said to be a complainant, based at the Exeter office

Penelope Edwards: a complainant based at the Exeter office

(the three above worked in the Exeter ARC on 05 December 2013 reporting to the Claimant on that day. Ms Morris usually worked elsewhere.)

Dr Mark Kealy: colleague of the Claimant, and formerly his direct line manager.

Jackie Sowerbutts: locum consultant involved in the terms of reference and revalidation process

The documentation

The Claimant's contract of employment [72 et seq]

11. This provided for him to be based in St Austell as his principal place of work. He would generally be expected to undertake his Programmed Activities at the principal place of work. Exceptions would include travelling between worksites and attending official meetings away from the workplace. He could be required to work at any site within the Respondent, including new sites. As a Consultant his workload was set out in "Programmed Activities" each of half a day, and so 10 a week, set out in a Job Plan.

12. Clause 11.4 stated that the Claimant was free, without prior consent, to publish books articles, et cetera, and to deliver any lecture or speak, whether on matters arising out of his NHS service, or not. Clause 19 expressly stated that the provisions in Schedule 12 of the Terms and Conditions would apply. Those provisions related to public interest disclosure. The respondent, Public Health England, is an agency and a quasi civil service organisation, but within the NHS. Its employees are bound by the Civil Service obligations as to confidentiality, but there is plainly a tension between that, and the work of doctors involved in public health, and this schedule enabled doctors to make public interest disclosures which might be a breach of terms and conditions for other employees who were purely civil servants.

13. Schedule 3 of the Terms and Conditions referred to travelling time being part of a Job Plan. Clause 23 of the Terms and Conditions provided for the

resolution of disputes over Job Plans, which should be discussed at annual or interim reviews. There was provision for mediation or appeal (mechanism in Schedule 4).

14. At paragraphs 10 and 11 of Schedule 5 to the Terms and Conditions is provision for travelling time. Paragraph 10 said that where consultants are expected to spend time on more than one site during the course of the day, travelling time to and from their main base to other sites will be included as travel time. Paragraph 11 referred to "excess travel" which is time spent travelling between home and a working site other than the consultant's main place of work, after deducting the time normally spent travelling between home and that main place of work. Employers and consultants might need to agree arrangements for dealing with more complex working days.

15. The provisions relating to public interest disclosure are in Schedule 12 [additional documents in tab 4 at 25]. This provided at paragraph 9 that *"Should a consultant have cause for genuine concern about an issue (including one that would normally be subject to the above paragraph) and believe that disclosure would be in the public interest, he or she should have a right to speak out and be afforded statutory protection and should follow local procedures for disclosure of information in the public interest."* The paragraph above imposes an obligation of confidentiality in respect of the confidential business of the organisation.

<u>The Voluntary Exit Scheme</u> [89 et seq]

16. This scheme was to allow people to leave the organisation. Two sets of criteria had to be fulfilled, business criteria and individual criteria. The business criteria were that the post, or a comparable one, could be redesigned to obviate the compulsory redundancy of another, that the Department was confident that it could manage its work commitment without the individual's skills and experience, and there was sufficient resource at the relevant grade levels for the future, and that there was a value for money test met, and a clear rationale for sustainable cost savings. The individual criteria were that people must not already have given notice of intention to resign, or secured employment with others, or been notified of a date for termination for any reason, and must have at least six months service. The sums involved were large; the Claimant received some £77,000, gross.

<u>The Maintaining Professional Standards ("MPS") policy</u> [102 et seq]

17. The title of this policy is *"Maintaining professional standards: including conduct, capability, ill-health and appeals policies and procedures"*. It is a policy which can lead to the dismissal of doctors. It sets out a detailed process.

18. Paragraph 1 says that *"all serious concerns"* must be registered with the Chief Executive. Concerns are to be raised with a line manager, and through the appropriate managing line to the Chief Executive or Medical Director. Common sense needed to be applied as to whether such concerns were of sufficient substance they needed to be reported. If in doubt the line manager should err on the side of caution and report.

19. Paragraph 2 requires that the Chief Executive must appoint a Case Manager, and paragraph 3 [106] that the Chief Executive appoint (this is

delegated to the Director of Human Resources) an external independent person to oversee the process and ensure that momentum is maintained. In the case of the Claimant the Case Manager was Prof Kessel [witness statement paragraph 5]. The Tribunal was given no evidence of the appointment of an external independent person, but Dr T Wyatt held that position. Prof Kessel stated that he was supported by Mr Vickers-Byne throughout [Prof Kessel witness statement paragraph 5]. It was his responsibility to appoint an independent person, and the *"external independent person"* also appears in the grievance appeal panel process.

20. The Case Manager is to make an initial assessment (paragraph 6, page 107) to establish the nature and seriousness of the concern, and the likelihood that the conclusion or whether it would be necessary to appoint a case investigator to carry out a full investigation. This might include short interviews with key witnesses, and the Case Manager should seek guidance from the Human Resources Director, in this case Tony Vickers-Byrne, (indicating that this is a different function to that of the external independent person). Unless the Case Manager decides that the practitioner should be "excluded" immediately, or where the initial evidence clearly exonerated the practitioner the Case Manager should set out his views on how the matter should be taken forward in a brief report "the initial assessment report".

21. Paragraph 8.1 refers to counselling. It states *"Minor shortcomings shall* (i.e. this is mandatory) *initially be dealt with informally. The practitioner's line manager will be responsible for discussing the shortcomings with a view to identifying the causes and offering help to the practitioner to rectify them. Such counselling will not in itself represent part of the disciplinary procedure."*

22. Paragraph 8.4 is headed *"Action in the event of a pattern of behaviour"*. It states "If a particular pattern of inappropriate behaviour has been identified managers are referred to appendix J and appendix K of this policy for further guidance. The Tribunal was not shown those appendices.

23. Paragraph 7 sets out what the Case Manager may recommend. Paragraph 7.1 refers to an informal approach – if the Case Manager considers an informal approach should be taken to address the problem" he must indicate the nature of the approach, where possible in agreement with the practitioner. This could include NCAS undertaking a formal clinical performance assessment when the practitioner, PHE and NCAS agree this could be helpful in identifying the underlying cause of the problem and any possible remedial steps." There is no provision for compulsion in dealing with an informal approach other than the phrase "*…where possible in agreement with the practitioner concerned…*" this is all at this stage before an investigation, and on the basis of the initial assessment.

24. Paragraph 9 is headed *"Action in the event that serious shortcomings are identified"*. A Case Investigator (in this case Dr Sheridan) is to be appointed. In this case Prof Kessel at no point considered the matter was serious, because he was proposing to investigate the issues informally [his witness statement paragraph 6]. Terms of reference for investigation are determined by the Case Manager in consultation with the Director of Human Resources. The person being investigated is not entitled to have input into the terms of reference. The practitioner is entitled to be informed [paragraph 9.3 (page 109)] and expressly

has the right to see any relevant documentation relating to the investigation including all written statements prior to submission of his final statement.

25. Paragraph 10 states that the Case Investigator should complete the investigation within 4 weeks of appointment and submit the report to the Case Manager within a further 5 working days. If this is not possible he should, as soon as this is realised, notify in writing both the Case Manager and the practitioner explaining the reasons why and providing a revised timetable.

26. Paragraph 11.2 gives the practitioner the right to comment on the factual parts of the reporting capability cases. The practitioner has 10 working days in which to comment on the report. Dr Sheridan sent the report to the Claimant on 27 October 2014 (251 and 253). The Claimant requested further time to comment on the report and was allowed this, providing extensive comments on 25 November 2014 (pages 250 and 339 - 368). Dr Sheridan sent his report, unaltered, together with the Claimant's comments, to Prof Kessel on 15 January 2015 (254).

27. Part 5 of the MPS procedure relates to Capability Procedures [113]. Among the matters covered are *"inability to communicate effectively".* In the event of overlap between issues of conduct and capability both matters are heard under the Capability Procedure.

28. Paragraph 3 of Part 5 of the MPS procedure covers *"Pre-Capability Hearing Process"* [114]. This provides that the Case Manager, on receipt of the Case Investigator's report, shall decide on the action needed to be taken, shall consult with the NCAS and within 10 working days notify the practitioner in writing as to how the issue is to be dealt with. If the decision is to apply the Capability Process, the options available to the Case Manager are: no action, retraining or counselling, referral to NCAS to deal with by an assessment panel, or referral to a Capability Panel for a hearing. Prof Kessel made a decision under this procedure for retraining or counselling.

29. There is an appeal procedure at paragraph 7 of the MPS policy [117]. This relates to decisions of a capability panel. There is no provision for appeal from a decision under a decision made pre capability hearing (as the decision of Prof Kessel was in this case).

<u>The Equality and Diversity in the Workplace: Guidance</u> [131 et seq]

30. This is a 5 page policy covering what would be expected in such a policy in an NHS environment.

<u>The Grievance Policy and Procedure</u> [140 et seq]

31. At 1.5(g) "There is no provision for grievances to be dealt with once PHE employment has *ended. However, if an ex-employee raises a concern, PHE will investigate and take appropriate action."*

32. 8.2 Paragraph 5 of the procedure sets out the Formal Procedure. the employee must put the complaint in writing. At 5.5 a "stage 1" manager is assigned to deal with the grievance and where appropriate will investigate prior to a hearing, including in detail, with support from human resources. A pre hearing

investigation is not necessary if a more timely resolution could be achieved without an investigation in advance of the hearing. The hearing may be the opportunity to gather information from the complainant to be investigated afterwards.

33. If the complainant is dissatisfied with the outcome he or she may appeal (paragraph 14 [page153]). The appeal is a full oral hearing with witnesses (paragraph 14.5 [page 153]). The schedule of those to take hearings is at Appendix HR010B [page 155]. For the Claimant, Formal Stage 1 was to be a manager at least 2 levels removed, and for an appeal a panel of 3, consisting of an external independent member, a member of the National Executive and a Staff Side/Trades Union Representative.

The Bullying and Harassment Policy and Guidance [163]

34. It is stated that *"this policy will apply"* to apply to a variety of staff including employees in agreed PHE ring fenced clinical roles, into which category the Claimant fell.

35. At paragraph 1.4 *"The Human Resources Directorate will…(c) ensure that allegations of bullying and harassment that are made are taken forward thoroughly and in line with the Grievance Procedure"*. The Claimant points out that the word *"will"* is mandatory, and requires such matters to be dealt with as grievances by the person complaining.

36. There are definitions at paragraph 1.6 to include *"(a) conduct which is intimidating"* and *"(d) shouting at an individual to get things done"*.

37. At paragraph 10.1 [174] *"Where HR has received a written formal complaint and decided that a formal investigation is required, they will appoint an independent investigator as set out in the Grievance Procedure"*.

Revalidation Procedure document [176(a) et seq]

38. At 2.4.1 [176(i)] *"You should have regard for information generated by local processes that provides robust information for your recommendation judgment. These processes may include… disciplinary or other human resources processes. To make an informed recommendation, you may need to consider the outcome of an ongoing or recently concluded process. In this instance you should consult the GMC's criteria for recommendations to defer (see section 4)."*

39. At 3.2.3 *"When you should not make a recommendation to revalidate. You should not make a recommendation to revalidate if the following circumstances apply: you wish to consider the outputs of an ongoing or recently concluded local process."*

40. 10.3 Recommendations to defer – section 4 [176(m)]. If there is deferral 4.2.2 sets out that the following criteria apply: *"You will not be in a position to consider the outcome of that local process by the date on which the revalidation recommendation is due, you expect that the outcome of that local process will enable you to make an informed recommendation about the doctors revalidation, and where appropriate, you are confident that any concerns about the doctor's*

fitness to practice do not meet the threshold for referral to GMC's fitness to practice procedures.".

Main documents specific to the procedure applied to the Claimant

Terms of reference [212]

41. These are:

- Letter 12 February 2014 Dr Steve Boyle to Tony Vickers-Byrne: *"I am writing to confirm a phone conversation on 12 February…"* (There is then reference to the events of 05 December 2013) *"You told me that there has been earlier discussion with the practitioner about his wider working practices"* and *"The incident will be investigated following the guidance in part 1 of the MHPS and your local procedures. [The Claimant] should be urged to seek his own independent advice from a defence organisation or professional association. When the investigation report is available, if there is a case to answer there is guidance on the next steps in part one paragraph 17."*

- The terms of reference were sent by Tony Vickers-Byrne to the Claimant on 28 March 2014. This stated that the matters to be investigated were the following: –

  "1. The circumstances around the incident at the Exeter ARC on 5 December 2013 when allegations of bullying were made against Dr Oshin by three members of staff.

  2. A review of Dr Oshin's decisions on 5 December in light of the agreed operational process in place for consultant cover in the centre.

  3. Whether these allegations, if substantiated, are a single incident or indicative of an underlying behavioural problem.

  4. The overall working practices of Dr Oshin, to ensure that they meet the expectations of Public Health England as set out in relevant policies e.g. homeworking, time off in lieu, attendance at the ARC when on duty."

- There was confusion in the mind of Dr Sheridan who used the wrong version of the terms of reference, to which we return.

- Letter 24 February 2014 [204], Prof Kessel to the Claimant commencing *"I am writing to raise with you some serious concerns, which have brought to my attention by Prof Deborah Lapthorne."* The concerns were enumerated:

  "the telephone conversations and subsequent upset caused to a number of junior staff working in the Exeter ARC on 05 December 2013

a review of whether the current arrangements in place for consultant cover at the ARC are safe

a review of your working practices and whether they comply with operational requirements as set out in the relevant PHE documents"

• Emails 07 May 2014 and 03 June 2014 Claimant to Tony Vickers-Byrne asking for a statement as to exactly what allegations were made [226] and [229].

• Response from Prof Kessel 04 June 2014 [232/3]

• Email Claimant to Mr Vickers-Byrne of 07 May 2014 asking for a written statement of exactly what allegations were made against him.

• Emails Claimant to Dr T Wyatt starting on 12 May 2014 expressing concern that the procedure was not fair or transparent and that there seemed to be a hidden agenda [225] and in reply to the Claimant stating that he would not be involved in commenting on the terms of reference (Dr Wyatt being the independent adviser) as this was outside his remit, and Claimant to Prof Kessel 28 July 2014 [237 & 242] asking to whom such a point should be addressed.

• An email dated 26 November 2014 from Dr Sheridan (investigator) to Mr Goodman (deputy HR director) stating that *"the nature of our evidence may be difficult in a formal disciplinary process for reasons FO points out"*.

• A 30 page critique of the draft report prepared by the Claimant [330 et seq] prior to its submission to Prof Kessel, and appended to that report by Dr Sheridan, who read it but made no alteration to his report by reason of it.

• The case investigation report [page 255 et seq] dated 13 January 2015 prepared by Dr Sheridan stated that it is a case investigation report *"into allegations of poor performance and capability"* in respect of the Claimant. This concluded that *"The incident on 05 December 2013 caused significant distress to 2 nurses who had telephone conversations with [the Claimant]. This behaviour was similar to that documented from an incident in December 2010. Another example was reported of an angry interaction with a human resources manager in 2012. Similar behaviours were observed of his adversarial style with his managers, the organisation and, indeed, this case investigation. These behaviours have a potentially significant adverse effect on his capability as a consultant in communicable disease control."* and *"…it is easy to see how it [the centre] might become unsafe if these behaviours were not addressed. We recommend that [the Claimant] attend the ARC on his duty days. This would comply with PHE standards for acute response centres and ensure improved interaction between the consultant and the team he is leading. We recommend that these performance concerns about [the Claimant] be*

explored within NCAS with a view to undertaking a behavioural assessment and developing a remediation plan to address his capability to be a consultant in communicable disease control." There is further analysis of this report later in this decision.

- Email Dr Sheridan to Rupert Goodman 26 November 2014 [250] following 30 pages of detailed observations of the Claimant on the draft report [339-347], which email stated, with reference to that response: *"This is very rich data which confirms my main conclusion. Minded to include this in its entirety as appendix to final report. I am happy to change the date he became consultant from 2010 to 2009. I maintain the way forward is capability and NCAS advice initially. The nature of our evidence may be difficult in a formal disciplinary process for reasons FO points out."*

- The case investigation report dated 13 January 2014 [255-331] headed *"Case Investigation Report into allegations of poor performance and capability by (Claimant)"*.

- Voluntary Exit generic email from Deputy Chief Executive 16 January 2015 [371], and expression of interest by Claimant of 26 January 2015 [372].

- Grievance by Claimant dated 26 January 2015 [374-377] that he was being targeted by senior people in the organisation.

- Email exchange 04 March 2014 between Prof Kessel and the Claimant following their meeting on 03 March 2014, couched in civil terms, where they respectfully disagree with one another and in which the Claimant refers to discussing his view that prejudice has had a role in his treatment.

- Email Louise Hewitt of human resources dated 22 May 2015 stating that information about proposed closures was privileged and external discussions such as to an MP *"… may be deemed a breach of the Civil Service Code"* [431], and a further email of 29 May 2015 (in response to an enquiry from the Claimant as to exactly which part of the Code was deemed to be breached) containing with a link to the entire Code [433], but not referring to any particular part of it.

- Email of 02 July 2015 Andrew Cooper (Deputy Director Organisational Development) to 4 people including Tony Vickers-Byrne and Rupert Goodman, suggesting a counselling note about non compliance with management advice.

- Letter said by Prof Kessel to have been sent to the Claimant on 14 July 2015 seeking clarification as to the disclosure to the MP [452] but not in fact sent as emails between Prof Kessel and Duncan Selbie on 16 July 2015 established [Tab 4:125-128]

- Email from Mr Selbie to Prof Kessel of 15 July 2015 *"My sense in writing this letter we provide the doctor with a green light to go public. We stand likely to be accused of suppression and the MP can take issue with our pursuing the doctor for speaking to an elected representative on the floor of the House. We would be toast."* [Tab 4:126] and reply of the same day *"It is tricky but what about the following as an alternative: – we put this letter on file but agree we will endeavour to find out the information by phone instead – a telephone call is arranged for early next week with the doctor during which the issues in the letter are explored. Perhaps Paul could do this if he is content as I am unsure over recuperation and Imogen is away – an internal file note is made of the phone discussion [redacted] what do you think?"* And a subsequent reply from Mr Selbie on 16 July *"I have thought further on this and do not want any action to be taken with this doctor about contacting his MP on a matter to do with office accommodation."*

- Email 21 July 2015, Jackie Sowerbutts to Antonio Americano (of the revalidation authority) stating that Prof Kessel had decided to withdraw the *"very recent recommendation"* positively to revalidate the Claimant [458(a)] because of *"the allegation that he may have passed information to an MP against the specific request not to do so by PHE"*.

- Letter from pa to Alex Sienkiewicz to Claimant 22 July 2015 asking him to attend a meeting near Salisbury to discuss the outcome report prepared by Mr Sienkiewicz after investigating the grievance [459], and the report dated 22 July 2015 pursuant to a hearing of 21 April 2015 [464-471, with note of hearing at 472 et seq. This upheld the grievance about the lack of attention to the travel St Austell to Exeter, apologised that an asserted second incident was included in the investigation, accepting that it should not have been included in that investigation, and it was acknowledged that an apology [538, dated 22 January 2013] was sent by Dr Isobel Oliver to the Claimant about the other matter which was separate from that of 05 December 2013 and which featured in the investigation. Nevertheless the outcome was said not to be affected by these matters and the decision was said to be proportionate and reasonable.

- The Claimant's appeal against that outcome dated 24 July 2015 [517 - 518].

- Letter Dr Doyle to Claimant 28 September 2015 dismissing the appeal against the outcome of the grievance, that appeal taken by her alone on reviewing the papers.

- Letter Prof Kessel to BMA 21 October 2015 explaining his stance on the revalidation matter [574-575].

42. Further documents of note are:

- tab 4:16 redacted email from Isobel Oliver of 01 August 2012 asking if the fraud policy could be used if the Claimant taking time off for travel

- email Prof Lapthorne to colleagues of 14 July 2014 announcing the departure of one of the Claimants colleagues (director of the ARC) at the end of July 2014 [tab4:K]

- terms of reference: [212] [258] & [279] Dr Sheridan used the terms of reference at 279, from the first draft.

These were:

> *"1. The circumstances around the incident at the Exeter ARC on 05 December 2013 when allegations of bullying were made against Dr Oshin by three members of staff.*
>
> *2. Whether these allegations if substantiated are a single incident or indicative of an underlying behavioural problem that may need support.*
>
> *3. The allegation by Dr Oshin that the arrangements for cover at the ARC are unsafe.*
>
> *4. The overall working practices of Dr Oshin to ensure that they meet the expectations of Public Health England as set out in relevant policies e.g. homeworking, time off in lieu, attendance at the ARC when on duty."*

Prof Kessel had set terms of reference [212/213] on 28 March 2014 under Part 2 of the PHE's policy on Maintaining Professional Standards for Medical and Dental Practitioners, and they were:

> *"1. The circumstances around the incident at the Exeter ARC on 05 December 2013 when allegations of bullying were made against Dr Oshin by three members of staff.*
>
> *2. A review of Dr Oshin's decisions on 05 December in light of [the] agreed operational process in place for consultant cover in the Centre.*
>
> *3. Whether these allegations, if substantiated, are a single incident or indicative of an underlying behavioural problem.*
>
> *4 The overall working practices of Dr Oshin, to ensure that they meet the expectations of Public Health England as set out in relevant policies e.g. homeworking, time off in lieu, attendance when at the AOC when on duty."*

These differ. Dr Sheridan used the draft terms of reference, not the ones set by Prof Kessel (of which the Claimant was unaware at the time). Dr Sheridan refused to alter them when the Claimant asked, pointing out in relation to point 3 that he had never made an allegation that the working practices at the ARC were unsafe. Dr Kessel did not notice the use of the wrong terms of reference.

- The notes of interviews of colleagues, such as of Hilary Morris [299], where the notes commence *"PS welcomed HM to the meeting. PS explained that the meeting was being held in response to a grievance and advised that this was a formal investigation* ***under the PHP grievance procedure****, stage I…"* [our emphasis]. Prof Kessel had asked for the MPS procedure to be used, and the report starting at 255 is headed *"Case investigation report into allegations of poor performance and capability by [the Claimant]"*.

- page 13/85 of the report of Dr Sheridan, where it is stated *"Dr Kealy had observed a tendency of Dr Oshin to maintain a hierarchy in his agreed statement: "PS asked if MK was aware of hierarchical ways of working amongst his consultants. MK confirmed that it varied on the individual and that FO had on occasion got on his high horse and felt the need to remind the staff that he was the doctor. MK added that team working could be improved if FO was present in the office on his days so that he would not be emotionally disconnected from the team in Exeter."* This was the text prepared by Dr Sheridan for Dr Kealy, and send to Dr Kealy for approval. Dr Kealy had replied attaching a corrected and altered draft statement. He had removed the passage about *"getting on his high horse"*. Dr Sheridan did not use the approved version of the statement, but used his own draft unamended. This was even though the Claimant had looked at Dr Kealy's approved version of the statement, and told Dr Sheridan in his 30 pages critique of the report at 12/30 [350] that the *"high horse"* comment was not in that statement. The report was not altered and sent as drafted with the critique attached. Prof Kessel did not notice the point either.

The Evidence

43. The Tribunal had extensive documentation provided, which was augmented at the start of almost every session of the hearing. It heard oral evidence from the Claimant, and for the Respondent from Dr Peter Sheridan (a retired PHE employee who was retained on a daily remunerated basis to prepare reports), Professor Anthony Kessel (Director of Public Health Strategy and (for revalidation purposes) Responsible Officer of PHE), Dr Sarah Harrison (Claimant's line manager from May 2014 [witness statement paragraph 1]), Alexander Sienkiewicz, Director of Corporate Affairs (and line manager to Professor Kessel), and from Professor Yvonne Doyle, the Respondent's Regional Director for London.

Submissions

44. The Tribunal received detailed submissions from Counsel, who spoke to a skeleton argument, for the Respondent and orally from the Claimant. We have considered those submissions carefully, and the case law supplied by Counsel, set out in that argument. Copies of the case reports were supplied to us.

45. The skeleton argument of the Respondent was of 20 pages and any summary of it will be wanting. The Tribunal agreed with the submissions about travel time, and they find their way into that part of this decision.

46. Counsel submitted that the Claimant had not met the requirements of the classic tests in Western Excavating Ltd v Sharp [1978] IRLR 27. The test of repudiatory breach was objective, not subjective – Buckland v Bournemouth Higher Education Corporation [2010] IRLR 445. There had been no repudiatory breaches of contract.

47. For the question of race discrimination the issue was what was the reason for the treatment of the Claimant. He had to establish that they were due to his race and that his comparator would not have been so treated. The proper approach was set out in LB of Islington v Ladele [2009] ICR 387 upheld by the Court of Appeal [2009] EWCA Civ 1357. The need to set out the factors leading to a finding or not of discrimination was stressed.

48. The evidence of the Claimant was analysed. He now attributed a discriminatory motive to some matters where previously he had not. His own BMA representative had described the withdrawal of the revalidation as disproportionate only. The credibility of the Claimant was undermined by his evidence on the travel claim which was far in excess of what he had admitted in cross examination – a few days only. There was doubt about his credibility in the covert recording of the meeting with Professor Kessel, which had been disclosed only shortly before the hearing.

49. The use of the MPS procedure was absolutely standard. There was no evidence that a greater proportion of BAME staff were subject to such procedures (the Tribunal agreed, and has not set out findings other than in brief in this regard).

50. That the Claimant said that bullying was not a communication issue showed a lack of insight, and this was a recurrent theme lying behind much of the Claimant's case.

51. It was the Claimant who did not want an informal resolution: it was not, then for him to complain when there was a formal resolution. It was right that he should not dictate the process or its scope.

52. It was accepted that the case investigation process was not of adequate standard. Dr Sheridan had been candid in his errors and careless slips. He accepted that he had overlooked the changes to the terms of reference [279 and 258, and 212], and the changes made to Dr Kealy's notes [295 and S28]. However the Claimant said this was deliberate and co ordinated. It was not a claim of unconscious bias but of conscious deliberate discrimination. He said Dr Sheridan had twisted the facts, and this was simply not so – he may not have done a good job, but that was not a synonym for being discriminatory. His evidence was scattergun and unfocussed. He did not always appear to be following the questions. But he was careless not discriminatory.

53. The investigation report was received on 13 January 2015 and so anything before 01 March 2015 was out of time.

54. It was not enough that the outcome of the process was unfair (though it was denied that it was). It would have to be discriminatory. It was clear from the interviews with those affected that the Claimant had upset them on 05 December

2013. It was entirely rational and evidence based to say that the Claimant had caused significant distress to two nurses.

55. Prof Kessel had taken on board the Claimant's observations, as he had said that some elements of the investigation had not been as strong as the Claimant may have wished them to be, but that it was clear that the communication style of the Claimant had aggrieved some of his colleagues, and that was the reason (and the only reason) why he had recommended coaching.

56. The historic issues should not have been included, but the core incident was still a significant one. It would, all in the Respondent agreed, have been the same outcome with only the 05 December 2013 matter in view.

57. The meeting of 03 March 2015 had been described by both as cordial. He did not complain at the time about this in the way he now did. There was no evidence of racial stereotyping. On the contrary Prof Kessel hoped the coaching would help the Claimant in his career. There were 3 other white consultants who had been offered coaching.

58. Voluntary Exit was something the Claimant had asked for as a way of resolving his unhappiness at working with the organisation, and perhaps as means of achieving his wish to reverse the 80/20 caseload/research workload. The valedictory email to Dr Harrison belied the case now put.

59. In short, the Claimant was unhappy at the Respondent, wanted a change in career focus, he was able to leave with a very large amount of money and those were the reasons, and the only reasons, why he left.

60. The grievance procedure had been followed: there was in fact no right of appeal once someone left. The Claimant was not, in truth, complaining about race discrimination in the handling of the grievance procedure but about the outcome. This was not related to race. It should be noted that the grievance outcome had been largely in favour of the Claimant.

61. The revalidation issue was based on hr advice about the intention of the Claimant to involve his MP. The "pulling" of the recommendation was after Imogen Stephens of hr asked the GMC what should be done on receipt of new information.

62. The Claimant did not provide a skeleton argument. He spoke for a considerable time, carefully analysing the evidence and setting out the facts as he saw them, and inviting the Tribunal to draw conclusions favourable to his claim. The Tribunal's record of proceedings contains a full note of what he said, but it is not set out here.

63. In summary, the process had started on 24 February 2014 and it was 07 October 2016. He was fighting this as a matter of principle. Those in the organisation were highly intelligent and too clever to make it easy to for him to show discrimination. A careful examination of detail and then an overview was required. He had taken 3 key things from the meeting of 03 March 2015. First he had clearly expressed that the investigator (Dr Sheridan) had discriminated against him – Prof Kessel's answer was to ask why he was angry against the world. He had never seen that as a connection – it was just the investigation he

was not happy about, and he made that clear. Secondly Prof Kessel might be in his 50's. He was 46, and a consultant doctor, and it was patronising in the extreme to talk to him by comparison to what he would say to one of his children. Thirdly, they had repeatedly said that they were only investigating as he had asked them to do so. That did not account for the manner and extent of the investigation. They set out to prove that he was indeed an "angry black man", and this clouded the judgment of those involved.

64. The Tribunal should not be swayed by the submission that this was all incompetence. All those involved were highly educated people on salaries of over £100,000 a year. It was not conceivable that this was all done incompetently. The extent of the failures in the report had become very clear and the Respondent had nowhere to go but to claim incompetence.

65. The Claimant's line manager had made clear that it was obvious that he was unhappy with the organisation so why did he not opt for VE? This was disheartening as he wanted to stay and had not contemplated leaving. He had not until then realised that there was a wish to see him depart, which to him plainly this was. He had only put in for it by reason of the way he had been treated.

66. The MPS policy was not appropriate. The bullying policy had as an integral part feedback to those complaining. The MPS policy did not.

67. Neither of the two asserted previous matters should have been considered. Whose but a prejudiced mind would allow such matters to form a "pattern" of behaviour? The fabrication of Dr Kealy's "high horse" evidence was an example of this. Then Prof Kessel relied on this report for his outcome.

68. Prof Kessel's support was the hr director for the whole organisation. He had been shouting from the rooftops about how unfair it all was, but they continued, though the faults were simple and obvious. The conclusion was inevitably that it was race discrimination.

69. The Claimant then spoke of his career history and pride at working for the Respondent.

70. The organisation was short staffed and the VE had been a pretext to get rid of him. There was no other similar employer in England, so he had been pushed out of the entire country – he was passionate about public health work and always had been: he was not looking to change career, and so had to go to Scotland.

71. The issue with the revalidation was clearly an act of victimisation.

72. The Claimant also made submissions about travel time which the Tribunal did not accept, for the reasons that appear in the findings below.

Credibility of witnesses

73. As can be seen from the findings and observations on facts, the Tribunal found the Claimant a credible witness for the reasons set out. It found the evidence of Prof Kessel and of Dr Sheridan unreliable, again for the reasons set

out above. Prof Doyle was entirely credible, but had a preconceived view of her desired outcome at the inception of her involvement which continued to its conclusion. The Claimant does not criticise Dr Kealy or Dr Harrison and the Tribunal did not hear evidence from them. Their actions seem to be exactly as they appear from the documentation. There are factual matters concerning others in the narrative, about which the Tribunal had concerns, but they as they did not give evidence the Tribunal goes no further as to credibility. The Respondent failed to deal adequately or at all with the Claimant's clearly expressed position that Dr Oliver was influential in his treatment, to his detriment.

The Tribunal's findings of fact

74. We have undertaken a credibility assessment of all the evidence. We have scrutinised that evidence. In doing so, we have used the tools of internal credibility, external credibility, plausibility, coherence, consistency, and then stood back and judged the matter in the round.

75. In setting out our findings of fact (which we made first in our Chambers discussion) we have also included some commentary upon them which was the result of our consideration of those findings of fact. To set out the facts without comment and then to set out our observations upon them would make this decision harder to read, as may be apparent from the section on the documentation where the comment on the documentation separately from the description of the documentation.

76. While it would have been of assistance to the Tribunal to have heard from Mr Vickers-Byrne, Mr Goodman, and from Dr Isobel Oliver and Debra Lapthorne, who were all prime movers in the procedure and history, it is for the Respondent to call such evidence as it wishes. In the circumstance where the burden of proof shifts to the Respondent the Tribunal has to make its decision on the basis of the evidence of the Claimant and such evidence as the Respondent choses to place before it. The Tribunal has kept firmly in mind the natural justice requirement not to criticise those not giving evidence since they will not have been able to give their own accounts.

77. The Claimant was trained in Nigeria. He is of African ethnicity (more precision is unnecessary) black and of Nigerian nationality. In Nigeria he was an expert in public health medicine, involved in matters such as dealing with outbreaks of highly infectious tropical diseases. When dealing with such an outbreak he met people from the Respondent. He was very impressed by the Respondent and it became his ambition to work for them, an ambition he realised when joining the Respondent.

78. The Respondent was based in St Austell. There came a time [30 September 2011 - C witness statement paragraph 5] when he was asked to work a day a week or more in the Exeter office. He did so. He requested that there be some adjustment to his pay or work, as this is at very least 90 minutes each way, and often more. On 24 March 2013 he said by email to Dr Kealy [206(e)] that he would leave home at 08:30 and arrive at 10:00 and leave at 3:30. Dr Kealy replied on 25 March 2013 stating that this was not acceptable. The Claimant raised this with Dr Oliver, and an email dated 09 April 2013 from Tariq Salih, interim HR manager, [206(c)] makes it clear that the matter had been considered *"with HR advice at the highest level"*. No alteration was made, the Claimant gave

up, and by email to Dr Kealy of 16 September 2013 [196] said that as nothing had been done about his request either for more pay or for time off, he would cease to attend at Exeter and deal with the work remotely, from his base in St Austell. Dr Kealy replied the same day, to apologise for all the trouble that the issue had caused and saying that he looked forward to meeting up in St Austell. This method of working continued satisfactorily and without objection from anyone in the Respondent, and without anyone indicating that there was any issue with the work being done. The Claimant's witness statement dealt with this in detail and the facts he there set out on this point are not disputed by the Respondent. It was with Dr Isobel Oliver, then Regional Director, that he was communicating about this issue. It was her view that such travel was within the job specification of the Claimant. There was no payment for, or time off in lieu of, the travel undertaken by the Claimant before he ceased to travel to Exeter.

79. In December 2010 there was an incident involving a nurse. She complained that the Claimant had shouted at her. There was an investigation. Dr Kealy accompanied the Claimant to an investigation meeting. The Claimant said that it was the nurse who had got angry with him, not the other way round, and for no good reason. Dr Kealy said that the same thing had happened to him - the nurse got cross with him for no good reason and then complained about him. The investigator spoke to the nurse in question, who said that when she got stressed this was something she had done. The Claimant thought that the matter was then dropped. However the investigator prepared a report, which was not shown to the Claimant and of which he was unaware, which said that while there was no fault to be found, there had been communication difficulties to which both had contributed. The Claimant dealt with this in his 30 page deconstruction of Dr Sheridan's report, Dr Sheridan made reference to this in his report [266], stating in that report that *"there were clear similarities between the incidents".*

80. The Claimant found out about the report on the 2010 matter on 28 March 2014 when a copy of it was sent to him by email. It is at 28/85 of Dr Sheridan's report [281]. It refers to Dr Kealy saying that he had been on the receiving end of similar treatment, and named someone else who had the same experience. The copy of that report in Dr Sheridan's report is partial and does not include its conclusions. It is headed *"Confidential".* Plainly it was placed on the Claimant's hr file. It recorded that he had contacted hr about the matter because the outburst from the nurse in question caused him concerns.

81. On 02 October 2012 the Claimant received an email from Dr Oliver to which he took exception, because it had been circulated to others, and he felt this inappropriate, and undermining, as it was critical of him. He raised this and by email of 29 January 2013 Dr Oliver wrote an email of apology to him.

82. Both these matters found their way into Dr Sheridan's report and were the basis for his findings, which were, on the bullying allegation [272]: *"The allegation of bullying was not an isolated event and the incident investigated in 2010 is remarkably similar. Both had their roots in a challenge to Dr Oshin in the course of him allocating and prioritising work. This seems to be part of a wider behavioural problem with Dr Oshin escalating problems to other people rather than seeking and negotiating solutions. This presents problems in functioning as a consultant in leading the ARC team. This formal investigation was considered unnecessary but was undertaken because Dr Oshin was unwilling to accept arbitration."*

83. On 05 December 2013 the consultant who would have been present in the Exeter ARC, Dr Mark Kealy, was in Bristol attending a conference. The other experienced practitioner, Peter Smith, was attending the same conference. Mr Smith asked Hilary Morris to come down and support the ARC as there would be no experienced staff [Hilary Morris investigation meeting 299]. The other people present in the ARC that day were two relatively inexperienced nurses, Penelope Edwards and Lesley-Anne Williams. Hilary Morris was late in arriving at the ARC and the other two did not know she was to attend. There was a routine telephone conference call made by the Claimant to the Exeter ARC at about 09:30, before she arrived.

84. Ms Edwards was asked to undertake the lab importing duties (processing returns from laboratories).The data was not due to arrive until midmorning. The Claimant asked her to undertake two new cases in addition, as she would have nothing to do until that data arrived. These were one follow up telephone call to a nursing home about a novovirus outbreak and another brief follow up task. She told him she felt uncomfortable with this, saying it might deflect her from her primary task that day.

85. Ms Williams was asked to deal with a chronic hepatitis case, and had replied that she had no experience of this work. She had a BSc in public health and the task given to her was a reasonable one, according to Dr Sheridan [report 9/85, at 262]. The Claimant said that both were trained and ought to be competent to undertake that work.

86. When Ms Morris arrived, she phoned the Claimant back, and there was a discussion where the Claimant voiced the view that the nurses were signed off to undertake the jobs he had allocated, it was his responsibility to allocate the roles, and not for her to question that, that the rationale was that there was nothing for Ms Edwards to do until the lab data arrived, and it was sensible for her to do the task he had allocated to her. Ms Morris said that Ms Williams had soon grasped what was needed on the hepatitis case. The Claimant then rang Ms Edwards back, and Ms Edwards found that call upsetting.

87. It is these three people who are referred to in the terms of reference. The report refers to three people in 1.2.1 *"Following allegations of bullying from three nurses…"* [258]. The conclusions of the report refer to Hilary Morris and to Penelope Edwards, but not to Lesley-Anne Williams, hence two nurses not three at the end of the report. Ms Edwards and Ms Williams were administrative staff permanently based in the Exeter ARC, responsible to Dr Mark Kealy, who was also based there and who was the Claimant's line report. Dr Isobel Oliver was the overall head of the region.

88. The matter was not considered serious enough for there to be any form of investigation, but the Claimant said that he wanted his name cleared.

89. The initial report, from a telephone conversation held by Mr Vickers-Byrne with Steve Boyle of National Clinical Assessment Service is recorded in a letter from him to Mr Vickers-Byrne of 12 February 2014 [197]. It stated that Mr Vickers-Byrne had explained that the Claimant was responsible for an Acute Response Centre and was late in arriving, and was not present at the site. He was alleged to have been aggressive and spoken inappropriately in a telephone

call in a bullying manner. He was also challenging the requirement to be physically present at the site. Mr Vickers-Byrne had told Mr Boyle that there had been *"…earlier discussion with the practitioner about his wider working practices"*.

90. There are three factual errors in this relaying of information by Mr Vickers-Byrne to Mr Boyle. The Claimant was not late in arriving. He was never intended to arrive at the ARC. Ms Morris was late in arriving, though that was not relevant to the Claimant. The Claimant was not challenging the requirement to be physically present at the site. He had not been present there since the email of 16 September 2013, and that had been accepted by Dr Kealy. It is unclear what the *"earlier discussion about wider working practices"* might involve, but plainly was intended to widen matters, and was based on matters raised by Mr Vickers-Byrne that were unconnected to the events of 05 December 2013, and not brought up by anyone else involved in those events, but by others.

91. Prof Lapthorne organised, or was highly instrumental in organising, the investigation - emails of mid February 2014 show her stating who the witnesses were, and that she should be one of them [199 et seq]. Terms of reference were formulated by Jackie Sowerbutts and sent to Prof Lapthorne by Jackie Sowerbutts for approval.

92. Prof Kessel then wrote to the Claimant on 24 February 2014. This letter stated that *"serious concerns"* had been brought to his attention by Prof Lapthorne. Her report to him referred to previous similar allegations against the Claimant [his witness statement paragraph 4]. The letter of referral [285] is dated 16 January 2014. Prof Lapthorne stated that she had discussed matters with Dr Isobel Oliver, previous regional director of the Health Protection Agency (absorbed into PHE). It reported on previous allegations and concerns [note, not findings]. It set out that she was reporting hearsay which would need to be checked. It said:

> *"1. An allegation of bullying by Dr Oshin of a health protection practitioner in 2010 was investigated informally by Dr Deirdre Lewis. She concluded that the problems were related to a lack of empathy and understanding of each other's position and the use of emails and telephone calls instead of face-to-face discussions rather than bullying per se.*
>
> *2. A second informal investigation into Dr Oshin's behaviour was led by Dr Ruth Gellatlie in January 2013 when concern had been expressed about Dr O's approach to not following due process concerning an innovations project and also taking significant time off in lieu which was considered inappropriate by Dr Oliver, the individual's line manager Dr Mark Kealy, HR and Dr Paul Gosford. Dr Gellatlie recommended that a follow-up meeting take place between Dr Oshin, his line manager, Dr Kealy, and HR to resolve any outstanding matters relating to travel, based on the advice from senior management and that Dr Oshin should follow standard line management arrangements in relation to discussions about new areas of work."*

93. It then said there was an allegation that the ARC was unsafe on the day. This appears to be the genesis of that part of the terms of reference, but the

referral does not say who made that allegation, or why the ARC was thought to be unsafe by whoever it was thought this was the case.

94. Dr Sheridan's report did not (as he admitted in his evidence) deal with the fact that Prof Lapthorne's report of these 2 matters was hearsay by checking matters out properly. Instead they find their way to his conclusions. The Claimant pointed this out in his 30 page critique at page 6 of its 30 pages [344]. Dr Sheridan read this critique, but in his oral evidence to the Tribunal it was clear that he regarded it as too difficult to rewrite the whole report so instead amended nothing and added the 30 pages to the report as an addendum. So Prof Kessel was told in the very first letter that this was hearsay, and the Claimant said so as well, and that the report did not attempt adequately to verify the hearsay, and Prof Kessel did not then examine the report to see whether that point had been addressed.

95. The 30 page critique from the Claimant also pointed out that the second allegation was relayed by Dr Isabel Oliver. It was she about whom the Claimant had complained in 2010, as a result of which she wrote him a letter of apology, for inappropriately widely circulating an email critical of him. He pointed out that she might well have her own agenda for recycling allegation 2 (that having occurred earlier in 2013). That point was not taken further, and it is a valid concern.

96. The letter setting out Professor Kessel's concerns expressed them to be three - the 05 December 2013 matter, a review of whether the current practices in place for consultant cover at the ARC were safe, and a review of the working practices of the Claimant and whether they complied with operational requirements as set out in relevant PHE documents. There was no reference to previous matters.

97. The Tribunal found the Claimant's objections to this letter to be sound. The matter of 05 December 2013 had not been considered serious enough for any action until the Claimant asked for the allegation to be investigated further, yet it was now elevated into a serious concern. A review of the ARC in general might or might not be needed, but if it was it had no place in an MPS investigation into the Claimant as one of the people working there. Dr Kealy had approved the remote working: Prof Lapthorne as director knew of it throughout, but she was heavily engaged in this MPS investigation into the Claimant. A generic review of all the working practices of the Claimant is not in response to the complaint made, and the annual appraisals of the Claimant showed him to be entirely within the expected parameters of performance in all aspects, with no criticism contained in those appraisals, and some points of commendation. The December 2013 360 degree appraisal, (confusingly carrying a date 10 February 2015 at the bottom of its pages) at page 8 carried a comment from a direct report *"On a few occasions Dr Oshin has to deal with a few difficult members of the public who had irrational complaints over the phone. I observed his communication with them directly and I was impressed at the way he handled these situations. He always showed compassion and incredible patience. This is something I aspire to in my own work."* His manager said that she/he was aware there had been occasions when there had been difficulties with relations with colleagues but had no personal experience of this. The compliment was not mentioned in the report, and nor was the hearsay investigated.

98. The investigation was under the MPS policy. The Claimant had asked for the investigation. He had asked for an investigation under the bullying policy. The witnesses for the Respondent said that the MPS policy was always used for all investigations into doctors and this was a jealously regarded privilege as it had safeguards for doctors. Dr Sheridan conducted interviews under the bullying policy, or said he did. This was through lack of thought by Dr Sheridan as to what processes he was to follow.

99. Paragraph 1.3 of the grievance policy states *"PHE recognises that issues relating to bullying and harassment are particularly sensitive. These issues would therefore be handled by the PHE bullying and harassment policy."* and the Bullying and Harassment Policy specifically applies to *"Employees in agreed PHE ring fenced clinical roles"* (paragraph 1.6, point 3)[163]. In the contract of employment condition 16 [76] set out that the grievance procedures applicable were those of the Health Protection Agency, and so now those of the Respondent.

100. On 06 October 2016 Mr Sienkiewicz obtained clarification from someone in NCAS (NCAS describes itself thus - *The National Clinical Assessment Service - has been an operating division of the NHS Litigation Authority (NHS LA) since 2013. NCAS contributes to patient safety by helping to resolve concerns about the professional practice of doctors, dentists and pharmacists. We provide expert advice and support, clinical assessment and training to the NHS and other healthcare partners.)."* This email [Tab 4:130] stated: *"NCAS would normally advise that concerns about the performance of medical practitioners should follow the guidance of MHPS incorporated into local policies and procedures although that does not preclude the use of other non-disciplinary approaches such as remediation, mediation et cetera also being used."*

101. Accordingly it was open to the Respondent to use the bullying and harassment policy as the Claimant had requested, and all the policies of the Respondent say that it should be done that way. The convention said to exist, that all matters to do with doctors are dealt with under the MPS policy is not evidenced in writing anywhere, and conflicts with all of the policies shown to us. The Claimant did not accept the use of the MPS policy, but his objections were not dealt with adequately or at all. The Tribunal finds the use of the MPS policy in these circumstances a relevant fact in support of the claims of the Claimant.

102. However, Prof Kessel knew of the Claimant's objections to the terms of reference, which are entirely logical, and refused to change them. It was his decision [his witness statement paragraph 11]. The Tribunal views this decision in the light of subsequent events relevant to his credibility, as appears later in this judgment.

103. In March 2014 Dr Sheridan was asked to investigate under the MPS policy. Dr Goodman was to be his HR support, and Dr Wyatt was appointed to ensure that the investigation was undertaken promptly [Dr Sheridan's witness statement paragraph 4].

104. The Tribunal observes that in this role, Dr Wyatt is conspicuous by his absence. The only time he was involved was when the Claimant asked him to resolve the difficulty with the terms of reference: he said it was not within his

remit. The timescale of the investigation was lamentably slow, and there was no evidence of any oversight by Dr Wyatt of it.

105. As his attempts to get the investigation to be of only 05 December and under the bullying policy had been refused, the Claimant wished to obtain clarity of exactly what allegations he was to face. On 07 May 2014 he emailed Tony Vickers-Byrne, copying in Prof Kessel and others. In a clear and professional email [228/230] the Claimant set out his requests. While he wanted witness statements from those said to be accusing him, his primary request (and they are the only underlined words in the text of that email) are *"Again, my request is not for witness statement but written statements of the allegations from the two other colleagues. As there are three allegations of bullying, I don't see the rationale for sharing only one of the three written statements of the allegations before the start of the investigation and not the other two; this raises a question around transparency".* This was an indubitably reasonable request.

106. The response was an email from Prof Kessel [228], on 13 May 2014. It said *"I have checked with Debra Lapthorne and Rupert Goodman. There was only one witness statement taken at the time which sets out the allegations about the incident at the ARCA on 5th December. Your line manager was approached by the individuals concerned at the time, and any support by others for this statement/allegation would be in the scope of the investigation."* This does not deal with the request, unless it be that the allegation was as in the terms of reference: which are not precise enough to enable rebuttal.

107. Further, and as the Claimant said, part of the point of a bullying policy is to obtain resolution of difficulty. The Claimant wanted to know exactly who alleged what against him. If appropriate he would want to apologise for offence caused. This is a very apposite point. Ms Edwards was said to have become upset only after the conversation with him. At the end of his call with her it was not apparent to him that she was upset. The colleague with the Claimant in the office where he made the call was not aware of anything amiss with it: his view was - let me know exactly what is alleged so that I can deal with it. That did not happen.

Dr Sheridan

108. The oral evidence of Dr Sheridan was remarkable. Counsel for the Respondent, in her closing argument refers to his candid admission of various errors and careless slips in the process and report, including overlooking the changes to terms of reference. His oral evidence is described in Counsel's closing submissions as *"scattergun and unfocussed"*.

109. Dr Sheridan:

- Used the wrong terms of reference, the draft ones, not the amended final ones

- interviewed people stating that it was under the grievance procedure, when it was the MPS policy he was told to use

- declined to tell the Claimant exactly what allegations were being investigated despite express request so to do

- took an inordinately long period to carry out his investigation and prepare his report

- included 2 previous matters as central when they were not

- concluded that they were a course of conduct, when since the Claimant was not found to be at fault in earlier matters they could not be

- selected partial quotations from documents about those matters, leaving out the parts favourable to the Claimant

- misquoted Dr Kealy by inserting his own phrase *"gets on his high horse"* when it had never been used by Dr Kealy

- when Dr Kealy responded by returning the amended version to it that phrase simply assumed that the returned version was the same as the one sent to him without reading it (the excuse that the alterations were not in track changing format does not excuse the making of the assumption)

- ignored the Claimant's carefully argued 30 page dissection of the report, making no changes to it at all (although the whole point of the PHE policy requiring that the report be sent in draft to the Claimant is that if should be revised if good reason was shown (and it was)) but simply added that critique as an annex to his report

- made findings of fact rather than set out the results of investigation for the decision maker to make findings of fact

- asked about the Claimant in oral evidence Dr Sheridan stated that the Claimant's attitude was wanting, and that further evidence of that was in the oral evidence of the Claimant to the Tribunal. Asked by the Tribunal why he thought so, Dr Sheridan said that the fact that the Claimant would not accept what had been said in the report, and had raised a grievance was testament to the confrontational attitude of the Claimant, and that bore out his (Dr Sheridan's) view of the lack of interpersonal skills of the Claimant. The Tribunal observed that the grievance decision of Mr Sinkiewicz had upheld the grievance and had apologised to the Claimant: could he help as to how raising a grievance that was upheld could be evidence of any want of character in the person raising the grievance? My note of the exchange is as follows, *q* being the Claimant, *a* being Dr Sheridan and *j* being the Judge:

> *q paragraph 5 - it was a bullying investigation that I asked for*
> *a yes I understand that but not till met you in August*
> *q I challenged the terms of reference*
> *a yes*
> *q but not understand what I challenged*
> *a did not appreciate fully - now do*
> *q you drew a conclusion that it was abnormal behaviour*

a described as pattern and said strong - was it so may wish to challenge that - still there and heard some of that this week - comment on grievance procedure - could have predicted that would happen
j but didn't grievance find for him
a yes
j so why do you complain about his attitude in lodging a grievance when he was right - that it is a pattern of behaviour - when Mr Sienkiewicz upheld the grievance?
a because I am irrational - can't argue with the logic of that [and leaned back and threw his arms in the air]

110. So Dr Sheridan knew there was an objection to the terms of reference but not what it was and did not seek to find out. He drew conclusions that were not based on the evidence that was before him (but used evidence selectively to support the conclusion that was inevitable given his mindset), put words in the mouth of one witness (Dr Kealy) that were inaccurate, and even when presented with an external view (Mr Sienkiewicz' grievance decision) found that the raising of the grievance supported his conclusions. This is an exemplar of confirmation bias.

111. The report is headed *"Case investigation report into allegations of poor performance and capability by [the Claimant]"*. There was no allegation of poor performance - this was a conduct issue. The explanations offered by the witnesses and on their behalf in submissions are not convincing. This was said to be a communication issue, and therefore, it was said, performance related. The meaning of the Claimant in his communication with the Exeter ARC on 05 December 2013 was at all times clear: it was the manner of delivery of information and instruction that was said to be inappropriate: the meaning was never in doubt. It is a misnomer to call this lack of capability in communication.

112. The conclusions of the report are set out in four headings on page 23 of the 85 page report [276].

113. The first relates to the circumstances around 05 December 2013 when allegations of bullying were made against the Claimant by three members of staff. The investigation report stated that the Claimant had an altercation with Hilary Morris and left her believing that he was taking out a grievance against her. It stated that he upset Penny Edwards and made her cry. These are set out as findings of fact, whereas the role of the investigation report is to supply evidence upon which others - in this case Professor Kessel - make those findings of fact.

114. The second matter was *"Whether those allegations if substantiated are a single incident or indicative of an underlying behavioural problem that may need support."* Dr Sheridan stated *"There is a strong pattern of abnormal behaviour with Dr Oshin prone to reach a position of conflict which he makes no attempt to resolve but escalates for other people to deal with. The conclusion for bullying and harassment is based on the incident of 5 December 2014* (sic)*, and the December 2010 incident which was set out in a report"*. It was stated that *"the associated behavioural problem has an impact on Dr Oshin's capability to practice as a consultant in communicable disease control. I recommend that an action plan be agreed which will address Dr Oshin's capability and that appropriate remediation is provided…"*

115. This section is replete with unfairness. The phrase *"a strong pattern of abnormal behaviour"* is not justifiable. The assertion that Dr Oshin is *"prone to reach a position of conflict with others"* is not evidence based. The criticism that he makes no attempt to resolve conflicts is without any basis apparent to the Tribunal. That the Claimant escalates is apparently a response to the Claimant asking that the allegations of the 3 - or 2 - against him be investigated. If the reasons are other than this Dr Sheridan has not made them clear.

116. Penny Edwards was asked if it was any difference in working with the different consultants. She said [307] that she *"had found them fairly consistent"*, and that they were all *"good at turning cases into learning and sharing open discussion"*. Specifically asked if Dr Oshin was different to the others she was reported as saying that *"the communication was different as FO was not in the office, that he would always answer her questions but that the relationship was different as she does not work directly with him like the others (sic)"*. On the day in question she is reported as saying that she had not heard any earlier conversation and then *"PE advised that shortly after that FO called PE and he had sounded pretty angry was speaking loudly which came across as aggressive"*. It does not come across from the interviews that there is any systemic difficulty between the Claimant and those with whom he worked in Exeter, or elsewhere.

117. The third section is *"The allegation by Dr Oshin that the arrangements for cover at the ARC are unsafe"*. The Claimant had made no such assertion. The conclusion is *"We were satisfied that the arrangements for the ARC were safe on 5 December 2014"*. It was said that there was a risk of poor communication within the team when there was routine remote access.

118. The use of the word *"we"* causes concern as to who was making or influencing the conclusions in the report. There was HR support for Dr Sheridan, but the report was supposed to be his alone.

119. The fourth section is: *"The overall working practices of Dr Oshin to ensure they meet the expectations of Public Health England as set out in relevant policies…"* The conclusion was *"PHE standards and all involved agree that duty ARC consultant (sic) should normally be present in Exeter with the main duty team"*. All involved did not, in Dr Sheridan's conclusion, include the Claimant.

120. The recommendations were that the investigation had highlighted *"serious concerns"* and what were described as *"Dr Oshin's behavioural issues"* should be addressed by a remediation plan, and that he should attend at the ARC in Exeter when on duty.

Subsequent to Dr Sheridan's report

121. The report reached Prof Kessel. The trigger for the report was 05 December 2013. The request for a report was not long after that. The report is dated 13 January 2015. The draft report was sent to the Claimant on 27 October 2014 [339 refers] and he returned it with his observations on 25 November 2014. There was no explanation for the gap between 25 November 2014 and 13 January 2015.

122. The Claimant had at all times been co operative. The draft was 9 months after the report was commissioned (in January 2014 by Prof Lapthorne) - the timescales for such investigations is supposed to be very much shorter (and this was in reality a simple case of finding out what happened in a few short telephone conversations on the same day). This was an inordinately long period of time. The justifications put forward were various but not convincing. Dr Sheridan is not in practice. There should have been no constraints on his speed of work. Those interviewed were all employees of the Respondent, and it would not have been difficult for them all to be interviewed in a short time frame. Even given the bureaucracy involved in a public authority investigation scheme this was far too long.

123. Prof Kessel's witness statement [paragraph 13] said that the report *"identified that safety could be at risk if the behaviours were left unchecked".* This appears to be Prof Kessel's assessment for that conclusion is not in Dr Sheridan's report. Is this about the assertive manner of Dr Oshin's communication with colleagues? Presumably so, as not attending at Exeter is a *"behaviour"* that is checked simply by requiring him to attend there, and the word *"behaviour"* would not sit naturally with attendance as it does with dealing with allegations of bullying. How this put safety at risk was not explained to us - safety of the public? Of staff? The Tribunal finds it to be neither, but an ex post facto attempt to justify actions.

124. The initial letter from Prof Lapthorne had referred to the 2 previous matters as evidence of a pattern, but that they were hearsay, and needed to be checked. The Claimant had said the same in his 30 page critique, so that this was not a point that had escaped Prof Kessel's memory. Dr Sheridan had not properly verified this. When he read the report neither did Prof Kessel. The point came up in his evidence, and in answer to questions from the Tribunal asking him to clarify his answers to the questions of the Claimant, Prof Kessel said that he appreciated that Prof Lapthorne had said that it was hearsay and needed to be checked. He could not recall whether or not he had checked it. He thought he would have made telephone calls to ask. He agreed that he had a file on the matter, but that it contained no notes of any such calls. Given that this is an organisation dealing with public health where meticulous record keeping is a basic requirement of the ethos of the organisation, the Tribunal had no difficulty in concluding that Prof Kessel did not check up on the hearsay.

125. There was an extended passage of questioning by the Claimant of Prof Kessel which laid bare the uncritical acceptance by Prof Kessel of the 2 allegedly previous matters, even though the Claimant had set out his position with clarity in his 30 page critique, and in the hearing it was clear that he was correct in his assessment of it. In answer to those questions from the Claimant, Prof Kessel accepted that it had not been correct to rely on the 2013 matter involving Dr Isobel Oliver, included in Dr Sheridan's report at page 35/85 [288].

126. The whole basis of the criticism of the Claimant by everyone (other than Penny Edwards and Hilary Morris) is that there was a systemic problem with the way the Claimant communicated with others. A course of conduct cannot be one incident. The previous matters were therefore of importance. It appeared to the Tribunal that none of the witnesses of the Respondent, save Mr Sienkiewicz, felt able to concede the point that the investigation was rendered unfair by this (very

simple) point. Even he said in his oral evidence to the Tribunal that he felt the outcome was a fair one.

127. Prof Kessel accepted the conclusions of the report as written. He came to this conclusion without meeting the Claimant. Of course by reason of the way the report was written, Dr Sheridan had set out matters as fact. Prof Kessel was the Case Manager for the investigation. Dr Sheridan was a bank Case Investigator, reporting to the Case Manager, whose role it was to decide if there should be a disciplinary hearing - which would be the place for findings of fact to be made.

128. If the Case Investigator was going to decide that the Claimant's behaviour was unacceptable (which was the reason for the decision to send him on a course) then he ought to have allowed the Claimant the opportunity to speak to him personally before so concluding, or at the very least when the Claimant demurred at the suggested solution, rather than imposing it.

129. Prof Kessel decided that he would send the Claimant on a course about better communication. Prof Kessel said that this showed he took account of the 30 page critique: a contention undermined by the fact that it was Dr Sheridan's conclusion (referred to above).

Meeting 03 March 2015 Prof Kessel and Claimant

130. Prof Kessel called the Claimant to a meeting, in London, on 03 March 2015 to tell him of his decision not to take disciplinary action, but that this was a *"favourable"* outcome and was *"supportive"* [witness statement paragraph 14]. Nevertheless he also decided that there were *"serious issues with the Claimant's behaviour"* [witness statement paragraph 13]. The Claimant travelled from St Austell to London to attend this meeting with Prof Kessel, which was not a discussion, but for Prof Kessel to tell the Claimant what he had decided upon as the outcome. He was not minded to alter that decision at any time.

131. Prof Kessel portrayed this as a benefit to the Claimant, as such courses are expensive and are not easy to get funding for, and might be of great benefit to the Claimant in his future career, and that he, Prof Kessel, hoped that the Claimant would become a centre director one day [witness statement paragraphs 14 and 15].

132. This evidence is contradicted by Prof Kessel's own witness statement where he stated that the refusal of the Claimant to undergo the course was a further example of his adversarial approach and behaviour, and a refusal to address the issues [witness statement paragraph 16]. This was to dismiss the concerns of the Claimant that the whole report was unfair and unfounded. The Tribunal's conclusions about this are below.

133. Prof Kessel stated in his witness statement [paragraph 26] that he believed that the Claimant could have been disciplined for refusing to go on the course, which was a reasonable management instruction. He iterated that view shortly before the Claimant left, in an internal email of 29 May 2015 [426], though he never mentioned anything of the sort to the Claimant while the Claimant was an employee of the Respondent.

134. The Claimant's view was that to go on the course was to accept the highly critical terms of the report, which he did not, and that as there was no sanction and no finding of misconduct he could not appeal, so that he had no where to go, procedurally. The Tribunal sees the force of the Claimant's point of view.

135. Prof Kessel's witness statement stated at paragraph 24 that there were complaints from *"numerous"* individuals, but (after one had been removed) there were two - Hilary Morris and Penny Edwards, on one day, 05 December 2013. This must be a reference to the two previous matters, but these were not relevant as the subsequent grievance made clear. Prof Kessel's witness statement is (obviously) subsequent to the grievance decision of Mr Sinkiewicz, but notwithstanding the apology to the Claimant within that grievance outcome letter, the use of the word *"numerous"* appears not to take account of that outcome letter even at the date of this hearing.

136. Prof Kessel could not explain why it was that he was critical of the Claimant for working remotely (in relation to the Exeter Centre), but not of Dr Kealy, who authorised it. There is a mosaic of small facts that lead us to our conclusions and this is one of them.

137. The Claimant secretly recorded the meeting of 03 March 2015, and the transcript was made available to the Tribunal. The Respondent objected to this as improper. Tribunals seldom refuse to take cognisance of such recordings, and it was only the formal discussion that was recorded. The Tribunal found it helpful to have the text clearly set out, and it meant there was no dispute about what was said. It is not, in the finding of the Tribunal, a matter affecting adversely the credibility of the Claimant that he recorded the meeting, nor that he should be somewhat reticent about the existence of the recording.

138. The Claimant found the meeting unhelpful. He found it patronising. Having heard evidence from both, it is clear that both are highly intelligent people, and there was a form of intellectual chess played in this meeting. The Claimant set out that the only reason he could think of to explain why he was treated thus was his race or ethnicity. Prof Kessel urged him not to go down that road. It was plain that from understated evidence of his own cultural background Prof Kessel has a deep personal understanding of where race discrimination can end up. That does not make him immune from such an allegation. There was a cordial exchange of emails [402] subsequent to the meeting in which each made clear that they had expressed their points of view but neither had altered his own. Prof Kessel denied that there was anything patronising about their meeting, and that he was entirely genuine about his confidence in the Claimant and his intention that the course would be of assistance in the development of the Claimant and of use in career progression. For the reasons that are set out below, and viewed in its entirety, we do not accept the contentions of Prof Kessel about this meeting. This was not an invitation or offer but a remedial requirement for retraining following a finding of improper behaviour, and the witness statement which stated that he could have been disciplined for failing to attend clearly establishes that.

139. The Claimant wrote a detailed and courteous email to Prof Kessel on 22 April 2015 [423]. It needs to be read in full, but in summary it set out many of the failings we have identified in the procedure and conclusions. It asked whether Prof Kessel was going to do anything about the failures of Dr Sheridan. He asked what parts of Dr Sheridan's report Prof Kessel had relied upon. He asked what

kind of course was suggested? Was it communication, as discussed at their meeting? Or was it behavioural coaching as set out in a letter from Prof Kessel to the Claimant on 24 March 2015? If the latter which behaviours was he to be coached in? What behaviours did the Professor think he needed to modify? The reply was on 23 April 2015 [422]. It did not address the questions about Dr Sheridan's report but said this was an opportunity which could be of great personal benefit to the Claimant and one that was expensive and sadly not open to all.

140. The Claimant replied on 07 May 2015, to say that it was plain that Prof Kessel was relying on the deeply unsatisfactory report of Dr Sheridan, but would not say what parts of it he relied upon, and that he was not told what part of communication or behaviour was considered needed improvement. He concluded:

> *"Finally, I am going to have to disagree with your view that standing up against prejudice is not a productive use of anyone's time, especially following our lengthy discussion of the issue at the 3rd March meeting – clearly we did not reconcile our differing experiences of it, but I might continue to hope, in time, you will change your view."*

Observations on documentation

141. The Tribunal considered carefully the documentation set out above. The Tribunal's observations specific to that documentation are as follows:

> The document on maintaining professional standards: the Tribunal found difficulty with the *"external independent person"* in this case. The natural meaning of the word *"external"* is that such a person cannot be an employee of PHE. It is unclear to the Tribunal how Dr Wyatt was selected or how it is that he is independent. He may be outside PHE, and the Tribunal assumes this to be the case. If not it adds to the concerns of the Tribunal about the way the process was handled.
>
> In Prof Kessel's role of Case Manager, it does not appear that a report was prepared by him as required (Prof Kessel witness statement paragraph 6) because the Claimant did not wish matters to be investigated informally, and wanted a formal investigation. Paragraph 6 of the policy at page 107 contains that requirement.
>
> Paragraph 8.1 referred to counselling. This is mandatory when there are minor shortcomings found. It requires first a finding that there are minor shortcomings. Such counselling is expressed not to be disciplinary. In this case coaching was *"offered"* but it was said to be a disciplinary matter not to accept. To offer coaching requires there to have been a finding of a shortcoming, even if only a minor one. The account given of the process indicates some muddled thinking. There should have been a discussion before a conclusion, and a finding, of a shortcoming, with the offer of coaching. There is in the policy no suggestion that it will be a disciplinary matter not to take up the offer. There is real force in the Claimant's objection that he was to be compelled to undergo some form of corrective instruction, so meaning that there was something to be corrected, without there being an opportunity to address this with Prof Kessel before he came

to his conclusion. Paragraph 7 indicates that there should be agreement as to coaching where possible, which means there should be an attempt to get agreement, which was not the case here: Prof Kessel told the Claimant what was to happen to him when they met having predetermined the outcome.

In the timing of the Claimant's case, the timescales in the policy were far exceeded. In this case Prof Kessel provided Dr Sheridan with terms of reference on 26 March 2014. [Dr Sheridan's witness statement paragraph 6] and his investigation report [page 255 et seq] is dated 13 January 2015. This is 10 months rather than 4 or 5 weeks, although it was prepared and sent to the Claimant for comment on 27 October 2014, after 7 months. No explanation or revised timetable was ever provided by Dr Sheridan either to Prof Kessel or to the Claimant.

The provisions allowing input from the Claimant were not followed. He provided a forensic dissection of Dr Sheridan's report. Dr Sheridan made no changes at all, but simply annexed the response of the Claimant. The whole point of the draft report being sent to the Claimant is so that it may be changed on receipt of his observations.

The Tribunal considered the appeal procedure at paragraph 7 of the MPS policy, and concluded that decisions of a capability panel are not disciplinary decisions, per se. The instruction to undergo coaching would be a management instruction, but as it was one that resulted from a complaint and investigation and was imposed to remedy a perceived defect would cast a disciplinary shadow. But this was not a capability panel.

The way the terms of reference was dealt with by the respondent was not satisfactory.

The terms of reference were sent by Tony Vickers-Byrne to the Claimant on 28 March 2014. This stated that the matters to be investigated, as set out above.

There was confusion in the mind of Dr Sheridan who used the wrong version of the terms of reference, to which we return.

Letter 24 February 2014 [204], Prof Kessel to the Claimant commencing *"I am writing to raise with you some serious concerns, which have brought to my attention by Prof Deborah Lapthorne."* The concerns were enumerated, as above. The Claimant correctly objected then, and now, that the second and third matters do not arise in any way from the first matter, which was the only one that he had asked to be investigated, and that there was no evidence of, and no reason to investigate any question of, *"a pattern of underlying behavioural problem"*.

The letter does not refer to an external independent overseer. The letter does not explain why the matters are now considered *"serious concerns"* when it had been the intention to deal with the matter informally on the basis that they were *not* serious concerns.

The case investigation report [page 255 et seq] dated 13 January 2015 prepared by Dr Sheridan stated that it is a case investigation report *"into allegations of poor performance and capability"* in respect of the Claimant, whereas it was supposed to be about alleged bullying. The terms of reference in their introduction refer to *"a number of concerns"* when in truth there were not. The terms say he raised an allegation of unsafeness, which he did not. The lateness of interviews is a matter of great concern to the Tribunal and for which there was no, or no adequate, explanation. There was a failure – or refusal - to provide the allegations. First there were 3 complainants then 2, with the final report not including Ms Williams as complainant, although the report leaves it to the reader to try to work out who is no longer a complainant, which can only be done by reading all the source material in the annexes.

The text of the email from Dr Sheridan to Rupert Goodman (of hr) of 26 November 2014 [250] following 30 pages of detailed observations of the Claimant on the draft report [339-347] is set out above. The Tribunal noted that this means that Dr Sheridan thought that there was no basis for disciplinary action on the basis of the evidence he had gathered, and so did not think that a disciplinary process was appropriate. Having so concluded he did not amend his report, the conclusions of which were unfounded (as this email shows that he appreciated) and decided to call it capability, and that there needed to be a remediation plan, to remedy matters he accepted in his oral evidence were not sustainable concerns.

The case investigation report dated 13 January 2014 [255-331] was headed *"Case Investigation Report into allegations of poor performance and capability by (Claimant)"*. The Claimant points out that he asked for an investigation into 1 allegation of bullying made against him, and made no such allegations and none had been made against him. It was a one off allegation of bullying that he asked to be investigated. While the Respondent is entirely right to say it wanted to look at whether this was a pattern (it is not for the Claimant to dictate the remit of a bullying investigation), having done so it was clear that there was no such pattern, yet the respondent (in the persons of Dr Sheridan and Prof Kessel and Professor Doyle) persisted in treating it as such.

Voluntary Exit ("VE")

142. Dr Harrison worked with the Claimant as his line manager from May 2014. It is clear that each has a personal and professional respect for the other. She knew, at the time, of the 05 December 2013 incident and that there was an investigation, though not what it was.

143. On 20 January 2015 the Claimant met Dr Harrison for a one to one meeting, including about the now proposed closure of the St Austell office where they both worked. She thought he was not intending to stay at the Respondent. This was not so. The Claimant had a wish to move to a more research orientated role - 80% of his time was his aim - but his passion has long been in public health medicine. As the Respondent is the only place in England where he can do such work (the Respondent is *"Public Heath England"* and there is no other body doing such work in England) he very much wanted to stay with the Respondent and seek a more research orientated role within it.

144. At about this time, there was a voluntary exit scheme for the Respondent [89 et seq]. It was made public in January 2015 [Dr Harrison's witness statement paragraph 7]. It provided substantial sums for those leaving if the employee could be spared, and if there was an economic case for the payment.

145. At their meeting on 20 January 2015 Dr Harrison asked if the Claimant wanted to go for the voluntary severance package. It was Prof Lapthorne who had mentioned this possibility to Dr Harrison. It is not suggested that Dr Harrison was other than a well intentioned messenger. Her view was that it was a great pity that the Claimant was so unhappy at work, and that if he really felt he did not want to stay further here was an opportunity to leave with a substantial payoff. The Claimant feels it significant that it was Prof Lapthorne who suggested this to Dr Harrison, and this is another small factual part of the mosaic that informs our conclusion. The emails about this are dated 26 January 2015 [372] - they make clear the matter had been discussed by Prof Lapthorne with Dr Harrison, that the Claimant was thinking of raising a grievance before the suggestion was made, and that it could be arranged that the grievance would be concluded before he left, with no date presently in mind.

146. The Claimant wanted to explore this, as while he did not wish to leave he could see no way that he was going to be able to stay. Paradoxically the reason he thought this was the very fact that the suggestion was made to him.

147. He left under this scheme on 31 July 2015 with a payment of over £77,000. The Tribunal was invited to consider that the very size of this payment cast doubt on the Claimant's claims. Examination of the facts dispels such an impression. The Claimant is a highly qualified person, whose annual salary comfortably exceeded £100,000. As a proportion of annual income it is not insignificant, but there were other highly negative factors for the Claimant in leaving. He is a career expert in public health. He had no wish to change that career (save to try to find a more research based role within the Respondent). There was no other employer with whom he could get such a job in England. He had no job anywhere else, and the scope for getting one was not large. The Claimant refused to leave before the hearing of his grievance by Mr Sienkiewicz.

148. On the other hand, the south west of England was very short of consultants. One had been off sick and another also left at the end of July 2014 after a long absence from work [additional material in tab 4 at K]. The office in St Austell was to be closed but that would not reduce the need for public health work in the south west. An economic case was made for the Claimant to go, but this must, in the circumstances of the organisation not have been easy to do [it is at 393]. It refers to his ongoing salary saving and asserts that *"it will allow for redesign and realise recurrent savings."* The case put up [392] said:

> *"This member of staff transferred into PHE and has struggled to adapt to working in the new organisation. This is impacting on their ability to carry out their responsibilities to the standard expected of them. VE offers an opportunity to re-evaluate this post of offer it to someone at risk who can be redeployed. Following VE the Centre will consider the utility of the post in a wide ranging assessment of form following function. … likely to provide an overall saving to the organisation. We have not yet done HPP*

redesign yet but would target a non- medical consultant if the worse case like for like replacement is required…"

149. It is plain that this was put forward (at the suggestion of Prof Lapthorne) in order to get the Claimant to leave. The whole basis of the case for savings was speculative.

150. The assertion of the Claimant was that it was plain to him that he had no future in PHE, and as he was going anyway he might as well go with the money than without, is entirely credible. That the Claimant was primarily concerned with principle and not money is evidenced by a contemporaneous document from the Respondent - an internal email of 29 May 2014 [428] from Louise Hewitt to various recipients, which is dealt with below regarding the revalidation issue. We so find.

Grievance

151. On 26 January 2015 the Claimant raised a grievance of race discrimination [374 et seq]. It set out a discrimination claim. It cited Dr Isobel Oliver's 2013 matter, the travel time issue, and the way the investigation into the 05 December matter and its outcome had been handled. On 04 March 2015 Camilla Bellamy, deputy director of HR told the Claimant that Mr Sinkiewicz would handle the grievance and that a meeting date had been set for 21 or 22 April 2015 [Tab 4 at GG]. The Claimant replied asking for 21st, and they met on that date.

152. The nine page investigation report [464 et seq] is dated 22 July 2015. (The Claimant was due to, and did, leave on 31 July 2015). Mr Sienkiewicz had met the Claimant on 21 April 2015 to go through matters. There is no adequate explanation for the delay of 3 months before the nine page report was produced.

153. Mr Sienkiewicz asked the Claimant to go to a meeting on 24 July 2014 at Porton Down in Wiltshire to discuss the report. Understandably the Claimant saw no point in travelling all that way from St Austell when he thought nothing would be altered. The report was eventually issued with appendices on 17 August 2014 [Tab 4 121]. In a passage of questioning by the Claimant of Mr Sienkiewicz. Mr Sienkiewicz agreed that (possibly with the exception of the correction of the odd typo) the report issued was exactly as the document sent to the Claimant on 22 July 2014. He regarded it as a missed opportunity, as it was possible that he might have changed the report. The Tribunal thinks this highly unlikely. While the report did accede to two of the Claimant's points (the 2013 matter and sympathy over terms of reference), the timing of the report indicates strongly that the organisation was 'running down the clock" on the Claimant.

154. At point 3.6 of the report [467] the 2010 matter is set out, and the report (of which the Claimant did not know until Dr Sheridan's report revealed excerpts from it to him) said to be accurate. Document 457 contains the extract reproduced by Mr Sienkiewicz. To give Dr Sheridan some credit, he did put the entirety of the report as an annex to his report [282] (and it was there for Prof Kessel to read), even if Dr Sheridan did not accurately summarise it in the report itself. Mr Sinkiewicz did not put in the body of his report the most important part of the 2010 report - that this was par for the course for this nurse -

> *"The interview with FO was interrupted whilst I spoke alone to MK, to ascertain whether such an outburst from RC has happened before, as claimed by FO. MK confirmed that he himself been accused of bullying RC when he had a conversation with her during the swine flu containment phase. She had approached MK to suggest ways that the response could be handled better but MK replied on a number of occasions during the conversation but it was out of his hands and he could do nothing about it. MK also said that GT had similarly been accused by RC of bullying it had been extremely upset by it. There was also an occasion when she had upset one of the administration staff in call because of her manner."*

This section of the grievance investigation report is not sustainable, for that reason.

155. However Mr Sienkiewicz at point 3.7 of his report [467] accepted without reservation that it had been Dr Isobel Oliver who had been in the wrong, and that she had apologised to the Claimant, and that the 2013 matter could not form part of any course of action for which the Claimant could be criticised.

156. At 3.9 of the report [468] Mr Sienkiewicz sympathised with the Claimant in his frustration as to the impossibility of doing anything about terms of reference, but suggested only that the Claimant (due to leave in a week) might discuss lessons for the organisation arising from this difficulty with Tony Vickers-Byrne. The Claimant did not take up this offer.

157. The Claimant wanted to appeal the findings of the report. On 24 July 2014 he lodged a formal grievance appeal. He had filed this claim with the Employment Tribunal on 01 July 2014. Prof Yvonne Doyle gave it short shrift. She declined an oral hearing and dealt with it on the papers. It was a modified procedure. This is not a procedure contained within the policies of the Respondent. As set out above, paragraph 14 [153] of the grievance procedure provides for a full appeal, with three person panel, made up in accordance with a policy, stated in the policy to be HR027B, but the table is headed as with the procedure rules as HR010DB. It is page 13/27 of the policy [155]. It requires a staff side person and an independent person, as well as a person from within the organisation. The Tribunal entirely understands why the Respondent did not want either of the other two to sit with Prof Doyle. They might have come to the conclusions at which we have arrived. There is nothing in the procedure to indicate that the right to appeal is in any way truncated by the termination of employment of the person appealing.

158. Prof Doyle thought a full panel would have decided the same [witness statement paragraph 12]. Her opinion was set out in paragraph 13 of her witness statement:

> *"It came out strongly from factual information in the papers that the Claimant's behaviour was viewed by many as autocratic, disrespectful and rude. On reading the reaction of the Claimant to this information, the Claimant failed to take responsibility for this and acted in a defensive manner. This behaviour does not comply with our values and behaviour statement which clearly set out that PHE does not tolerate rudeness or lack of consideration towards colleagues. Although the grievance was not upheld, I feel that the report and process went over and above what was*

> *required and was very reasonable. The report acknowledged several areas where things could have been done differently (such as the inclusion in the MPS investigation of the historical issues with Dr Isabel Oliver relating to a project grant). I agreed and felt that these findings were reasonable (sic) but they had not caused any disadvantage to the Claimant and an apology was provided for this."*

159. It will be apparent from the preceding paragraphs of this judgment that the Tribunal does not share most of those conclusions.

160. Nor did Prof Doyle consider it necessary to speak to the Claimant before reaching her conclusions … *"because his position was so clear from the documents"*. There was no evidence to support the appeal so she dismissed it [paragraph 14]. This does not seem to comply with the spirit of fairness enunciated in the policies that were not being followed.

Victimisation Claim

161. We next consider the facts relevant to the victimisation claim. For the reasons we set out, they impact on the entirety of the discrimination claim.

162. It is necessary for doctors to be *"revalidated"* every five years in order to be able to continue to practice. This is done by the employer of the doctor. By chance, the Claimant's revalidation was due as he was to leave the employment of the Respondent. For the Claimant ordinarily this would be a matter of routine.

163. On 09 June 2015 Dr Imogen Stephens wrote to the Claimant [436] to tell him that his validation date was 10 September 2015, and that they had heard from the GMC. The email stated that *"your portfolio has been reviewed and found to be satisfactory"* and that a revalidation recommendation would be made on his behalf before he left on 31 July 2015.

164. It was processed and a recommendation made for revalidation on 30 June 2014 [Tab 4 123 refers]. Prof Kessel was the "Responsible Officer" and so it was he that submitted it, by email. The administrator at the Respondent, Matthew Skinner emailed the Claimant on 30 June 2015 at 16:15 [448] to tell him that it had been submitted. It was acknowledged by the General Medical Council on 01 July 2015 by email at 08:39 [446].

165. Later but also on 01 July 2015 Prof Kessel then told the GMC that the revalidation recommendation *"had been made incorrectly"*, and the GMC was requested to withdraw the recommendation, which it did [Tab 4 at LL from the GMC confirms]

166. It is now necessary to look at the reason why this was done. The Respondent proposed to close its office in St Austell. There had been internal communication about this from January 2014. The Claimant felt very strongly that it was impossible properly to conduct the public health function for the whole south west peninsular from Exeter.

167. The matter was put out for external consultation. The Claimant wanted support from his local MP for the issue - it was a matter of public health, and the Respondent is a public body.

168. On 15 May 2015 [431] the Claimant wrote to Louise Hewitt, of HR, copying in his line manager, Dr Sarah Harrison, saying that he wished to write to his MP about the matter. He asked her to clarify whether there were any restrictions upon him, as a PHE employee, raising and discussing this planned office closure with his elective representatives in Cornwall.

169. On 22 May 2015 [431] an email reply arrived stating:

> *"The information you have been given is for the purposes of meaningful consultation with affected staff and as such is only available to you as a member of PHE staff and not as a constituent of the local area. Whilst it is acceptable to approach MPs about information in the public domain, at present this information is privileged and therefore external discussions may be deemed a breach of the Civil Service code. Therefore we advise you not to approach your MP to raise this issue."*

170. On 29 May 2015 the Claimant wrote [431] to Jenny Harries, copying in Dr Sarah Harrison and Prof Lapthorne telling them that he was not convinced of the rationale of the advice and had made an appointment to see his local MP. He set out that he thought that the closure was driven primarily by the Estates Department, which was, in his view, dictating clinical service parameters for budgetary reasons.

171. On 29 May 2015 Ms Hewitt replied very shortly [433] *"No problem Femi"* and attached a link to the whole PHE Code, which included the Civil Service Code, with no indication as to which part he was said to be in breach if he went to his MP. The Claimant courteously pointed out that he was not going to be able to work this out, and said that he somewhat doubted that he would be able to get a clear answer from PHE to his question.

172. There was then a flurry of emails. Louise Hewitt suggested in emails to various people, including Prof Kessel, that the voluntary exit payment could be impacted if the Claimant was in breach of contract. It also recorded that the Claimant would only accept voluntary exit if his grievance was resolved. This confirms the Claimant's evidence that he was primarily concerned with principles and not the money [427].

173. On 26 June 2015 the MP for St Austell and Newquay wrote to Duncan Selbie [439]. He said he was disappointed at the closure, and that there had been no impact assessment carried out. He said it would impact on the whole of Cornwall and offered to meet and discuss. A letter from the MP did not record the date he met the Claimant other than to state that it was earlier in June 2015.

174. Duncan Selbie replied to the MP on 07 July 2015 [Tab 4 at KK] saying that the quality of service provided would not change so that there was no need for an impact assessment.

175. On 07 July 2015 Professor Kessel wrote to the Claimant [451]. He stated that later in the day when the revalidation recommendation had been made:

> "…*we became aware of an alleged action you are taken with your local MP, which appear to have contravened advice from PHE's HR team about*

compliance with the Civil Service Code. In view of this, I felt obliged to immediately withdraw this recommendation until all the facts around this situation were understood. I will be writing to you separately to seek further information on this."

176. Prof Kessel prepared a later dated 14 July 2015 [452]. The delay of a week is not explained. This letter stated: –

"I understand that you mentioned you might raise this issue with your MP. I understand that you then received advice by email from Ms Louise Hewitt, your HR business partner that this was an internal PHE issue and should not be discussed outside the organisation, and the reason for this advice was such disclosure might contravene the Civil Service Code (the Code). The Code provides that: "you must not misuse your official position, by example by using information acquired in the course of your official duties, to further your private interests or those of others.""

177. The copy provided for us is a photocopy of an original complete with signature. In his cross examination of Prof Kessel the Claimant stated that he had never received this letter. Prof Kessel said he did not post his letters personally, but he was sure it had gone to the Claimant. The Claimant was repeatedly challenged by Counsel for the Respondent as to whether he was saying that the letter had never been sent. No, said the Claimant, if the Professor tells me he sent it, I accept that, but I say that I never received it. He asked Prof Kessel why he, Prof Kessel, had not followed up this letter to ask for that information, he well knowing how important it was for him to be revalidated before he left the Respondent.

178. Prof Kessel did not dispute the importance to the Claimant of being revalidated before he left, but said that the Claimant was always very good at responding to letters, and it was not his responsibility to chase the Claimant for a reply to this letter.

179. Mr Sienkiewicz was in the Tribunal room during Prof Kessel's evidence. The following morning Counsel for the Respondent asked if further documents could be admitted. They are emails held by Mr Sienkiewicz, between Professor Kessel and Mr Selbie about this letter. They are in Tab 4, at 127 - 125.

The first is dated 15 July 2014, the day after the letter said to have been sent by Professor Kessel, and is from him to Mr Selbie.

"Dear Duncan

As you know, this case (of the doctor and the MP letter) is far from straightforward. He has a back–story of an investigation (no disciplinary panel, though has rejected management recommendations about behavioural coaching), a grievance against PHE for a variety of matters (not upheld, has appealed) and is leaving the organisation at the end of July on VE. Then, the letter from the MP came to you, at which point I pulled back a recommendation on revalidation that had been made to the GMC – they were content to put matters on hold. His revalidation date is not for another 6 - 8 weeks and we are under no requirement to revalidate

him (responsibility would transfer when he left to his new employer, FPH or elsewhere).

I understand there was significant discussion on this last week when I was in China and Imogen Stevens (deputy RO) was asked not to send a certain letter out. I believe an investigation into the MP matter is not underlined indicated. However,… The GMC have very much advised that I write to him in connection with what has happened with his revalidation. I have already told him his revalidation has been put on hold, but the attached letter asks him for his side of the story around the MP letter – in relation to his revalidation (and not in relation to an investigation). (Redacted) there is a risk of course that, on his departure, he raises this issue with the media. This risk exists whether we send this latest letter or not, it may be raised by this letter. I am of the view that the letter needs to go out, but welcome your thoughts on the attached (redacted)."

The letter of 14 July 2014 was attached. Plainly it had not been sent to the Claimant. Mr Selbie replied at 20:32 the same day:

"My sense in writing this letter we provide the doctor with a green light to go public. We stand likely to be accused of suppression and the MP can take issue with our pursuing are Dr for speaking to an elected representative on the floor of the house. We would be toast. Is there an alternative."

On 15 July 2015 at 21:09 Professor Kessel replied:

"It is tricky but what about the following as an alternative:

– we put this letter on file but agree we will endeavour to find out the information by phone instead
– a telephone call is arranged for early next week with the Dr during which the issues in the letter are explored. Perhaps Paul could do this if he is content as I am unsure over recuperation and Imogen is away [Professor Kessel was having an operation on his shoulder the following day]

– an internal file note is made of the phone discussion

What do you think?"

On 16 July 2015 at 06:27 Mr Selbie emailed Professor Kessel:

"For your return, I have thought further on this and do not want any action to be taken with this doctor about contacting his MP on the matter to do with office accommodation. I appreciate he seems to have done so against instruction and that this reflects poor attitude and judgment but against the petty nature of it and the likely costs of us doing so it is not worth pursuing."

16 July 2015 at 08:15 Prof Kessel wrote to Mr Selbie:

"Duncan – I too have reflected overnight and concur with you that we should not send the letter. I am struggling to think how it would make any

material difference and (redacted). The GMC are already aware of this anyway (through our routine regular meetings), and we can simply make a file note/log and pass on anything new after he has left. We have already pulled back on his revalidation, quite rightly, and that will be his issue after he has left."

Mr Selbie replied briefly on the same day, at 08:29 *"Thank you Anthony."*

180. This sequence of emails directly contradicts the oral evidence of Prof Kessel given to us. While he was being cross examined, Counsel for the Respondent (then ignorant of these emails) pressed the Claimant hard about whether he was asserting that the letter of 14 July 2015 had not been sent. He said several times that he was not saying that - if the Professor said it had been sent that was good enough for him. Prof Kessel heard all those exchanges. He stated that the letter had been sent on the date it bore, though the mechanics of it getting into the post were not known to him. It would have been the only letter or communication not emailed to the Claimant. He said that it was not his job to chase the Claimant to reply.

181. While noting the dates of the emails are 15 months before the hearing, given the exchanges of emails are with the CEO of the Respondent, at times that show it was important to them (early morning and late at night) and that Prof Kessel had a lot of dealings with the Claimant and that this immediately before Prof Kessel was having an operation, and that there was a long passage in his cross examination where Counsel for the Respondent repeatedly asked the Claimant whether he was saying that the letter had not been sent, it is inconceivable that Prof Kessel had forgotten them. The Tribunal reluctantly concluded that Prof Kessel had deliberately not been truthful in his evidence to it. This fatally undermines his credibility as a witness.

182. When these emails were produced (and Mr Sienkiewicz is to be commended for producing them, as is Mr Selbie who had been contacted by Mr Sienkiewicz and approved his action in so doing), I observed that it was open to Counsel to seek to recall Prof Kessel if she wished, though that application might or might not be granted, if made. I said that I would give her time to consider her position on that question. At the end of the day I enquired if there was to be an application to recall Prof Kessel, and Counsel said that there was not to be such an application.

183. More generally the Tribunal noted the evidence of Mr Sienkiewicz that the matter of the closure of the St Austell office had gone out to wider consultation before the Claimant wrote to his MP, so that it was not correct to say that this was an internal matter.

184. The contract of employment contains a reference to appendix 12, which is incorporated in it by that reference. It was accepted that appendix 12 is a public interest disclosure policy. (It was not within the documentation provided for the Tribunal as there was no public interest disclosure claim made by the Claimant.) The meeting with the MP would fall clearly within the public interest provisions of the Employment Act 1996. The disclosure was made in good faith, without prospect of gain, to an MP, with the aim of getting the MP to exert pressure on the CEO of the Respondent, the matter having previously been raised by the Claimant at a senior level in the organisation.

185. It was said to be misconduct to breach the Code. But the emails from the Respondent to the Claimant say to contact the MP *"might"* be a breach. No part of the Code was cited, despite request from the Claimant. Sending the entire Code without saying which part was said to be breached shows the weakness of the contention.

186. The Claimant was accused of not following HR instruction, and that this was misconduct. That is not the same as breach of the Code. The instruction from HR was wrong. It cannot be misconduct to do something when the instruction not to do it was incorrect. Even the instruction itself was not to go to the MP as it might be a breach of the Code, not that it was such a breach.

187. The Respondent accepted that the policies of the Respondent specifically exempt doctors from matters of confidentiality where public safety is involved (for the obvious reason that public safety is their raison d'etre), and the Tribunal finds that public interest was the sole motivation of the Claimant. His actions were entirely within the policies of the Respondent and the law on public interest disclosure. He had no personal benefit in prospect from his action.

188. The Tribunal did not accept that the withdrawal of the revalidation was as advised by the GMC. The GMC simply responded to what the Respondent told it. That explanation does not sit with the email exchange between Duncan Selbie and Professor Kessel. Paragraph 174 of this decision records Prof Kessel's own words saying that this was his decision, not one on advice from the GMC *("I felt obliged to immediately withdraw this recommendation"*).

189. From 08 July 2015 the Claimant worked in the Exeter ARC, rather than remotely. There was dispute about how many days it was that he travelled there to do so: we have found this part of the claim does not succeed and so the correct number is not relevant. Counsel for the Respondent stressed the differing number of days that the Claimant had claimed at various times as casting doubt on his credibility generally. The Tribunal did not accept that the credibility of the Claimant was damaged in this way. Overall the Claimant's evidence was marked by candour, and by its fairness of approach. He was a careful courteous and fair witness and advocate.

190. After leaving the Respondent the Claimant was able (after an interval) to join a similar organisation in Scotland. This was not in prospect when he left the employ of the Respondent.

191. The Tribunal considered the evidence and assertion of the Claimant that those of a BAME background were more likely than white colleagues to face an MPS investigation, but the evidence did not bear this out. The sample size was too small to be reliable.

Assessment of the effect of these facts on the claims

192. The synopsis of our view on the evidence is as follows:

193. Dr Isobel Oliver had no reason to be positive about the Claimant. We have not heard from her, and therefore do not think it appropriate to make any adverse finding about her motivation.

194. Prof Lapthorne similarly did not give evidence to the Tribunal and for the same reason the Tribunal does not feel it appropriate to make any adverse finding about her actions or motivation, though again there was no reason for her to be positive about the Claimant. She proposed the voluntary exit package for the Claimant.

195. Dr Sheridan was at best incompetent. The Tribunal's view is that he went into the matter with a preconceived view, which he reinforced as he went along. The criticisms of his approach, his work and the time it took have been set out above.

196. Prof Kessel was disingenuous in his evidence. The decision to withdraw the revalidation recommendation cannot be seen as other than vindictive. Dr Selbie specifically said that he wanted nothing done about the MP letter: the phrase in Professor Kessel's email *"that will be his issue after he has left"* speaks volumes.

197. The grievance outcome was described by Prof Kessel to Mr Selbie as not upheld, when it contained two matters where it was upheld.

198. The organisation deliberately dealt with matters so as to extend them until the Claimant would depart on 31 July 2015.

199. The appeal was not one that was likely to find in favour of the Claimant. Prof Doyle's evidence to us clearly demonstrated that she had made her mind up at the very start. There was no willingness to evaluate the contentions and propositions put forward by the Claimant. There is not the excuse or reason that he was either hard to follow or intemperate. He was the reverse of those things.

Conclusions

200. Our conclusions and findings on the questions necessary for us to answer are these.

201. The actions of the Respondent set out above amounted to a fundamental breach of contract. The suggestion of voluntary exit was not itself a breach of contract, but indicative of the wish of some of those in the Respondent to be rid of him.

202. The handling of the investigation was on its own such a breach. The Tribunal did not accept the submission that the outcome would have been the same if the matter had been handled entirely properly with reference only to 05 December 2013. This was a point, but not the only point. It was the unfairness of the process at least as much as (if not more than) the outcome that was the basis of the Claimant's case.

203. The test is whether the actions of the Respondent were calculated or likely to undermine mutual trust and confidence. The way the investigation was handled amply justifies the conclusion that it was likely so to do. This relates to the imposition of the MPS scheme and not the bullying policy, the multiple errors over the terms of reference, and the inability of the Claimant to have any oversight of what was imposed, the inadequacy of the investigation handled by

Dr Sheridan, the failure properly to check what was expressly stated to be hearsay, the repeated assertion that there was a course of conduct when proper examination of the evidence shows there was not, the imposition of a non appealable direction for coaching by reason of a non existent course of behaviour, the approach taken by Prof Kessel to the Claimant's concerns over race discrimination against him. The approach of Prof Doyle is not part of that continuum, but is an example of the approach of the institution as a whole to the Claimant.

204. Did he resign in consequence of this? Indubitably. The Tribunal accepted the evidence of both the Claimant, and the Respondent, in this regard: it will be recalled that contemporaneous internal emails of the Respondent made it clear that he was stating that he would not wish to leave until his grievance was concluded The obtaining of the role of consultant with the Respondent was the attainment of his life's ambition. He had no job to go to. (He was fortunate enough to have worked with Scottish doctors, in Scotland, before joining the Respondent's predecessor, and they thought highly of him so that after a short interval after leaving the Respondent he was able to join a Scottish public health team. He did not leave in order to join them. He was leaving with no plan or job expectation. He left only because of the way he was treated by the Respondent.

205. Did he resign in good time? There is no fixed date for a resignation. He was shocked by the suggestion that he might opt for voluntary exit, as the entire point of asking for an investigation was to make sure that he could stay with the Respondent. He was not committed to voluntary exit until late in the day. The time frame for the voluntary exit was in the hands of the Respondent. It would not be realistic to expect someone leaving by reason of constructive dismiss to leave before getting the payment available though the voluntary exit package. That is not dissimilar to someone seeking out a new job before resigning.

206. Did he affirm the contract, for example by utilising the grievance procedure and appeal? No. His motivation was that he felt strongly that he was the victim of race discrimination, and he wanted that explored and investigated. It would be contrary to public policy to label such actions as affirmation of the contract, and would undermine the anti discrimination provisions of the Equality Act 2010.

207. What was the motivation of those dealing with the Claimant as set out in this decision? Was it in no sense whatsoever motivated by considerations of the race of the Claimant? The Tribunal looked first to see whether there was evidence which could lead to the conclusion that there was a discriminatory motivation, conscious or unconscious for the actions and inactions that have been set out above. The Tribunal is aware that there have been a number of health service cases where there has been serious incompetence in the handling of the careers of senior people. There is the possibility of such incompetence being the sole reason for these matters. However the first question is whether the burden shifts to the Respondent to show that it was not racially discriminatory.

208. When reviewing (as the Tribunal did for a day in Chambers) the evidence in this case, there can be no doubt that the burden of proof must shift to the Respondent and an explanation is called for as to why it is not race discrimination.

209. There is then the question of victimisation. The facts set out do not need repeating. The public interest disclosure of the Claimant was the avowed reason why the revalidation was withdrawn. The Employment Tribunal claim was filed on 01 June 2015, the day the revalidation was withdrawn, and the day the ACAS early conciliation certificate was issued to the Claimant. It is not denied that those in the Respondent making decisions about the Claimant knew that he intended to bring a claim in this Tribunal - that is not the defence offered. The defence is that the withdrawal of the revalidation recommendation was because the Claimant was thought to have acted badly in the matter of the MP. The Claimant had very clearly raised a grievance of discrimination (and referred to it as set out above). The Tribunal finds that both the intention to lodge the Tribunal claim and the raising of the grievance about discrimination were motivating factors in the decision to withdraw the revalidation recommendation. The action evidences both the race and the victimisation claims.

210. The Tribunal does not accept that this could have been a genuine belief. There was irritation at his actions which were potentially difficult for the Respondent, and they tried to warn him off on spurious grounds, exemplified by the sending of the entire PHE and Civil Service Code when he asked what part of the Code he was supposed to be breaking. The letter from Prof Kessel later picked out a section of it, relating to private interests. There were none. It was public interest that motivated the Claimant, and it could have been no other - by the time he made the appointment to see his MP he was signed up for voluntary exit. He had nothing to gain personally at all. Nor could this be aimed at any individual in the Respondent. His concern was solely that the economic drivers in the estates department were calling the shots over the clinical needs of the service, so that public health was at risk. He may be right or wrong on that point, but it is most certainly not a private interest.

211. The co incidence in time between the revalidation and its withdrawal and the issue of the proceedings is instructive. The Early Conciliation notification was received by Acas on 01 June 2015, and the certificate issued on 01 July 2015. There is also a proximity in time with the withdrawal and the appreciation by Prof Kessel that the Claimant had been to his MP.

212. On the balance of probabilities the Tribunal finds that the withdrawal of the revalidation was victimisation by reason of the issue of proceedings in this Tribunal.

213. The issue of victimisation, and the letter of 14 July 2015, are relevant to the discrimination claim as it severely impacts on the credibility of the evidence of the Respondent, which has the task of rebutting the presumption of discrimination.

214. The Tribunal did not find the Claimant's assertion that he was perceived as a stereotypical "angry black man" persuasive. He is not someone who is likely to be perceived as angry. There was the allegation that this was how he behaved on 05 December 2013, but that cannot have been how the witnesses from whom we heard regarded him when his interactions with them were so courteous. Nor did we think his assertion of accent relevant. The English of the Claimant is to a very high standard indeed. The occasional trace of an accent in someone whose mother tongue is not English is barely discernible.

215. The Tribunal noted the indignant assertions of the witnesses that the colour of the Claimant had nothing to do with what they did or did not do, and it may very well be that they all so think.

216. The difficulty for the Respondent came when the Tribunal assessed unconscious discrimination. The actions of so many people in the Respondent make this highly likely, and of course the requirement is a lower one - *"in no sense whatsoever"*. This goes back to an email dated 01 August 2012 from Dr Isobel Oliver wondering whether the fraud policy could be used if the Claimant had taken time off in lieu by reason of going to Exeter. The evidence of the Claimant is to be preferred to that of Prof Kessel wherever they are in conflict, his credibility having been diminished by the evidence concerning the letter of 14 July 2015. Dr Sheridan is between the Scylla and Charybdis of utter incompetence and subconscious discrimination.

217. Even Mr Sienkiewicz suffers from the difficulty of the length of time it took for his grievance decision letter: what we have described as *"running down the clock"*. While his decision accepted one point and sympathised with another, there was the 2010 matter not properly resolved by him. The note made of the discussion between the investigator and Dr Kealy (who had left the Respondent before the material times) - meant this was very clearly not a tenable assertion against the Claimant. Nor did anyone consider the simple fact that this was the only issue in several years of the Claimant working with the teams in St Austell or Cornwall. There is the vindictiveness (there is no other word to describe it) of withdrawing the revalidation, which was known would create a great difficulty for the Claimant. It was his good fortune that his good reputation with colleagues with whom he had worked in the past enabled him both to get a new job (in Lanarkshire which could not be much further from St Austell) and through his new employer obtain revalidation. While we have found this to be victimisation, it is also capable of forming part of the discrimination claim - it does not have to be one or the other. Prof Doyle's perfunctory appeal is all part of the picture.

218. The effect of these conclusions meant that when the Tribunal came to consider the burden of proof it was immediately apparent that the burden of proof shifted to the Respondent. The Claimant did not limit his claim to one of intentional conscious discrimination.

219. The conclusion is irresistible. Considering carefully, and at length, what we have described as a mosaic of fact, and the evidence leading to those findings of fact: it is the unanimous conclusion and finding of this Tribunal that the reason for the treatment of the Claimant was unconscious race discrimination. This conclusion should not be considered to reflect on Dr Sarah Harrison, or on Dr Mark Kealy in any way adverse to them. The Tribunal does not pick out individuals for specific mention. This was a case of *"group think"* or as set out more starkly in other cases, institutional discrimination, with some more and some less involved. The burden of proof shifted to the Respondent, to the civil standard. Scrutiny of the evidence and the facts found meant that the Respondent was unable to meet the burden of proof that now lay upon it. As the Respondent did not discharge that burden of proof the Claimant therefore succeeds. The Tribunal finds that had the Claimant been a white man of equivalent status he would not have been so treated.

220. We had considered the claim for deduction from wages first and shortly. The claim is for deduction from wages. There was no deduction. There was an absence of extra pay, but there was no contractual entitlement to extra pay. In any event the claims for the period before the Claimant stopped attending at Exeter are out of time, not forming a series with any more recent alleged deduction. There was additional time spent travelling, which does not equate to an entitlement to money. The way this was handled was not satisfactory. It is a background fact, but the Tribunal does not consider it to be relevant to the other claims of the Claimant.

221. To return to the issues set out at the head of this decision (which the Panel had in the forefront of its mind throughout its deliberations (and in paper form also):

1. The first three claims succeed, the fourth is dismissed.

2.1 Are the claims relating to the MPS investigation and grievance in time? Yes. This was a course of action from 05 December 2013 through to the decision in Prof Doyle's appeal being sent to the Claimant. To use an analogy, while there were different strands, the whole is one continuous piece of rope.

2.2 Was there a continuing act? Should anything predating the claim form by more than 3 months be struck out? Yes, and no. There was a continuum involving the Claimant, the genesis being 05 December 2013. It would in any event be just and equitable in the circumstances of this case to permit the race claims to proceed even if they were out of time. The Tribunal also noted that much of the length of time of these events was caused by the Respondent.

3.1 Did the Respondent treat the Claimant less favourably than it treats others? (Meaning those who are white.) The Tribunal took a hypothetical white comparator in all other respects being as the Claimant. Yes, as above. The MPS investigation was one such factor, as was the constructive dismissal, the handling of the grievance appeal as set out in 3.1.5 and in failing to investigate the complaint of discrimination. The Tribunal did not find two of the matters in 3.1.2 made out (the *"angry black man"* stereotype and accent). The other matters - questioning his capability and recommending behavioural coaching - were less favourable treatment (the coaching was said to be both, or alternatively, communication and behavioural).

3.2 Was this by reason of the Claimant's race (Black African)? Yes for the reasons given above.

3.3 Who is the comparator? A hypothetical white British man otherwise similar to the Claimant.

3.4 Is compensation due for injury to feelings and if so at what level? Yes, and to be decided at a remedy hearing.

4.1 Did the Claimant do a protected act in issuing an Employment Tribunal claim and/or raising allegations of race discrimination? Yes in both cases.

4.2 Did the Respondent submit the Claimant to a detriment as a result (withdrawal of revalidation without reasonable cause)? Yes.

4.3 Was this on the grounds of race? Yes (and for other reasons)

5.1 Did the Claimant resign? The Claimant freely elected to leave under the Respondents' voluntary exit scheme. Yes, and here the Tribunal does not find that the Claimant *"freely elected"* to leave. He felt he had no option but to leave, and that the voluntary exit was indicative of a wish to remove him, which he had not appreciated until that point.

5.2 There was a repudiatory breach serious enough to justify resignation. Any repudiatory breach is serious enough to justify resignation. It was not that the only reason he left was that his line manager suggested it. His line manager Dr Sarah Harrison was a messenger for Prof Lapthorne, the Centre Director, and he expressed an interest as he feared he had no future with the Respondent, a conclusion which each subsequent event bore out and reinforced.

5.3 Did the Claimant accept the breach and resign in consequence of it? Yes, for reasons given above.

5.4 Did he delay too long or waive the breach? No, to both alternatives, for reasons given above.

5.5 Was the dismissal fair and reasonable according to equity and the substantial merits of the case? In the light of the above findings, no.

5.6 Would the Claimant had been dismissed in any event and/or was there any contributory fault? The only reference to the Claimant being dismissed in any event is in paragraph 26 of Professor Kessel's witness statement. As tendered to us it stated *"I believe that the claimant could have been dismissed in any event due to his failure to follow a reasonable management request to participate in the behavioural coaching."* At the commencement of his evidence, when asked if he wished to alter correct or amend any part of his witness statement, Professor Kessel asked that the word *"dismissed"* be replaced by the word *"disciplined"*. Accordingly the Respondent did not, at the hearing, seek to say that the Claimant could have been dismissed. In the facts we have found there is no contributory fault by the Claimant.

6.1 Were wages or any other payment properly due to the Claimant in July 2015? If so, what were these? For the reasons given above there was no payment due to the Claimant.

6.2 Did the respondent make any deductions from the Claimant's wages in July 2015? No.

6.3 If so was this deduction authorised by statute, the Claimant's contract or with Claimant's consent? This is not applicable.

6.4 Are there any sums outstanding or owed to the claimant by the respondent? No.

222. Accordingly the Tribunal's decision is that:

1. The Claimant was constructively unfairly dismissed by the Respondent

2. There was no contributory conduct by the Claimant

3. The Respondent victimised the Claimant for raising a claim of race discrimination and in respect of an Employment Tribunal claim

4. The Claimant was subject to direct race discrimination by the Respondent

5. The claim under S13 of the Employment Rights Act 1996 in respect of a deduction from wages is dismissed

6. The case will be relisted for a remedy hearing.

Employment Judge Housego

Date 16 January 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

17 January 2017

FOR EMPLOYMENT TRIBUNALS