EMPLOYMENT TRIBUNALS

Claimant: Miss E M Griffiths

Respondent: Liverpool Heart and Chest Hospital NHS Foundation Trust

HELD AT: Liverpool **ON:** 6-19 September inclusive, and in chambers on 27 September and 1 October 2013

BEFORE: Employment Judge Franey
Ms H D Price
Mr P Gates OBE

REPRESENTATION:

Claimant: Mr S Healy of Counsel
Respondent: Mr P Gilroy QC of Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of direct sex discrimination fails and is dismissed.

2. The complaint of harassment related to sex fails and is dismissed.

By a majority (Mr P Gates OBE dissenting) the judgment of the Tribunal is that:

3. The complaint of unlawful victimisation fails and is dismissed.

4. The complaint of unfair dismissal fails and is dismissed.

REASONS

1. These are the Reasons for the Reserved Judgment set out above.

Claim and Response Forms

2. By a Claim Form presented on 27 June 2012 the claimant complained of unfair dismissal, sex discrimination and breach of contract in relation to a series of events which culminated in her dismissal from her post as a Consultant Cardiothoracic Surgeon on 28 March 2012. The Claim Form made reference to matters going right back to before she was first appointed to her role in 1992 and made reference to earlier Employment Tribunal proceedings which she had issued in 2003. Her complaints included direct sex discrimination, victimisation and harassment as well as unfair dismissal and breach of contract in relation to her latest period.

3. The Response Form lodged on 17 September 2012 resisted the claim, arguing in part that some of it was out of time, and denied any unlawful treatment.

4. Subsequently case management measures were undertaken to clarify the precise claims. On 10 January 2013 the claimant confirmed that she was not seeking any remedy for matters which were raised in her earlier Tribunal claims, and a "Scott" Schedule was served in February 2013 which identified nine discrete matters for which a remedy was sought.

5. On 6 March 2013 the claimant presented a second Claim Form which complained of victimisation in the form of information given to the National Clinical Assessment Service (see below) suggesting that the claimant had sought to interfere with the investigation into alleged misconduct on her part. The claimant had only learned that such information had been disclosed after her dismissal. The Response Form lodged on 2 April 2013 resisted this claim on its merits but suggested that it was insufficiently particularised. By letter of 8 July 2013 Further Particulars were provided and the Response amended in a letter of 27 August 2013.

6. In the meantime on 17 June 2013 the claimant withdrew some aspects of her complaints and her claim for breach of contract. It was ordered by Employment Judge Ross that the hearing would deal with liability only.

Issues

7. The Tribunal had the benefit of the claimant's Scott Schedule, which was supplemented during the hearing by clarification of how the claim was put in relation to each witness called by the respondent. In addition the parties had agreed a List of Issues. These documents appeared in the hearing bundle between pages 1 – 12 inclusive. The numbering of the List of Issues did not match that of the Scott Schedule. For the purpose of these Reasons we will adopt the numbering of the Scott Schedule but subdivide events by reference to letters where the List of Issues

did so. What follows, therefore, is a composite formulation of the issues drawn from the Scott Schedule, the clarification of that Schedule, and the List of Issues.

Discrimination/harassment/victimisation claims

8. The allegations were all put as direct sex discrimination, harassment related to sex and unlawful victimisation, save where the contrary is indicated. In relation to the victimisation claims, the respondent accepted that the Employment Tribunal complaints presented in 2003 and 2004 amounted to "protected acts", as did the allegation of sexual harassment made by the claimant on 29 September 2010.

9. The allegations for which the claimant sought a remedy under the Equality Act 2010 were as follows:

1a. That the respondent encouraged complaints of bullying by junior members of surgical staff against the claimant in March – July 2008. This allegation was levelled at Dr Russell and Dr Page.

1b. That the respondent treated the claimant less favourably than two male colleagues, Mr Niraj Mediratta and Mr John Chalmers, were treated in that complaints made against those comparators were not pursued beyond a general e-mail to all consultants, but in contrast the claimant was required to undergo informal discussions with the Medical Director which were (according to the List of Issues) equivalent to disciplinary action and a verbal warning.

2. That allegations of bullying were made by Mr Upadhyay about the claimant following an incident which allegedly occurred on 29 May 2009 and as a result of which the claimant was aggressively confronted by Mr Upadhyay on 1 June 2009. This allegation was levelled at Mr Upadhyay. It was not pursued as victimisation.

3a. That the respondent pursued disciplinary proceedings resulting in the issue of a written warning to the claimant as a result of Mr Upadhyay's allegations. This allegation was levelled at Dr Russell, Dr Page and Dr Perry.

3b. That the respondent rejected the claimant's appeal against the decision to issue her with a first written warning. This allegation was made against Mr Cummins. [Although it appeared in the Scott Schedule as an allegation of all three types, the clarification of the Scott Schedule did not pursue the victimisation strand].

4a. That there had been a breach of the duty of confidentiality during the appeal process in that members of the disciplinary panel divulged details of the case, meaning that individuals within the Trust were openly discussing the details of the claimant's appeal. This allegation was levelled against Dr Perry.

4b. That the respondent failed properly to deal with the claimant's grievance concerning that breach of confidentiality, failed to deal with it within a reasonable time and failed to uphold the grievance. This allegation was levelled at Susan Westbury and at Dr Page.

5. That Mr Upadhyay made a second complaint of bullying against the claimant on 24 September 2010. This allegation was levelled at Mr Upadhyay.

6a. That the respondent failed to investigate the second complaint from Mr Upadhyay adequately or at all prior to making a decision as to whether to pursue disciplinary action against the claimant. This allegation was made against Anne McEvoy.

6b. That the respondent pursued disciplinary action against the claimant arising out of the second complaint by Mr Upadhyay and decided to issue the claimant with a final written warning. This allegation was made against Dr Russell and against Ms Richards (formerly Holmes) who chaired the disciplinary panel.

7. That the respondent failed to consider and properly to determine the claimant's grievance regarding sexual harassment by Mr Upadhyay lodged on 29 September 2010. This allegation was levelled at Ms McEvoy and Dr Russell.

8a. That the respondent decided to subject the claimant to disciplinary proceedings arising out of the "Kryptonite incident" on 25 July 2011. This allegation was levelled at Dr Russell and Dr Page.

8b. That the respondent decided to dismiss the claimant on 28 March 2012. This allegation was levelled at Mr Jain who chaired the disciplinary panel. (There was no allegation against the appeal panel chaired by Mr Appleton itself but it was said that it had failed to correct the discriminatory decision at the dismissal stage.)

9. That the respondent reported to the National Clinical Assessment Service that the claimant interfered with an ongoing investigation in that she had written to the Chief Executive Officer of Sorin (in relation to the Kryptonite incident) and that she had, via her BMA representative, suggested mediation between herself and Mr Upadhyay. This allegation was levelled at Dr Page and Ms McEvoy. It was put as victimisation only.

Unfair Dismissal

10. The decision to dismiss the claimant was also said to be an unfair dismissal. Even if the respondent could establish that the reason or principal reason related to the claimant's conduct (as opposed to any reason which constituted unlawful sex

discrimination, sexual harassment or victimisation), the claimant contended that the dismissal was unfair on ordinary principles under Section 98(4) of the Employment Rights Act 1996.

Time Limits

11. In so far as any of the discrimination matters for which the claimant sought a remedy occurred prior to 28 March 2012 (or 7 December 2012 for allegation 9), the Tribunal would only have jurisdiction to hear them if they formed part of an act extending over a period ending less than three months before the presentation of the relevant claim, or if in the alternative it was just and equitable to allow the claim to proceed.

Witness Evidence

10. The Tribunal had a reading day in Chambers during which the witness statements and relevant documents were read before the oral evidence commenced on the second day of the hearing.

11. It was agreed between the parties that the respondent's case would be heard first. The Tribunal heard oral evidence from the following witnesses on behalf of the respondent: Raj Jain the Chief Executive, Dr Glen Russell the Medical Director, Geoffrey Appleton a non-Executive Director of the respondent who sat on the panel which heard the claimant's appeal against dismissal, Aaron Cummins the Director of Finance at the relevant time who chaired the panel hearing the appeal against the first written warning, Hazel Richards (née Holmes) who was Director of Nursing at the relevant time and who chaired the disciplinary panel which imposed the final written warning in June 2011, Dr Raphael Perry, who chaired the panel which gave the claimant a first written warning, Richard Warwick who had been one of the junior doctors in 2008 when the first allegations of bullying by the claimant were made, Anne McEvoy who had been the Associate Director of Human Resources at the relevant time, and Dr Richard Page who was the Clinical Lead for Thoracic and Upper GI Surgery.

12. On the fourth day of the hearing (the third day of oral evidence) the respondent made an application to call a witness whose statement had not previously been disclosed, Mark Field. He was another junior doctor in 2008 although subsequently had been appointed as a Consultant with the respondent. An unsigned witness statement was provided which related to the 2008 allegations. Having heard submissions from both parties the Tribunal decided it would not be in accordance with the overriding objective to allow the evidence to be admitted late. No clear reason was given as to why it had not been disclosed promptly when witness statements had been exchanged in August 2013, but in any event the Tribunal considered that the specific issue Mr Field sought to address was of limited relevance, being a point of detail (as to how frequently trainees worked with the claimant) as to which other witnesses could give evidence. It was also our view that the draft witness statement did seek to go beyond addressing the point made by the claimant in paragraph 23 of her witness statement, which was the point which the respondent asserted Mr Field would be called to address. Finally, we had a concern

about the effect of allowing a further witness to be introduced would have on the progress of the case within the allotted time.

13. As far as the claimant was concerned she gave evidence but did not call any other witnesses.

Documentary evidence

14. The Tribunal had an agreed Bundle of Documents which filled three lever arch files and which exceeded 1,100 pages. We were not referred to every page in those bundles and only read those pages to which we were referred by the witness statements, by the agreed reading list or by the witnesses in the course of the oral evidence. A number of documents were added by consent to the Bundle during the hearing and given appropriate page numbers. Any reference to page numbers in these Reasons is reference to that Bundle.

Relevant legal principles

15. A summary of the relevant legal principles is annexed to these Reasons. Annex A contains the principles applying to the discrimination and victimisation claims; Annex B those applying to the unfair dismissal claim.

Relevant findings of fact

16. The Tribunal had a considerable weight of evidence about the course of events between 2008 and 2012 before it, but these Reasons contain only those findings of fact necessary to enable the parties to understand why they have won and lost. This section contains an overview of the course of events. Any disputes of primary fact which were particularly significant will be addressed in the discussion and conclusions section.

The Respondent

17. The respondent is an NHS Foundation Trust and its staff include Consultant Cardiothoracic Surgeons, Cardiologists and Clinicians of other disciplines, support staff and managerial staff. It has a dedicated Human Resources ("HR") function. At the relevant time the Trust Board was chaired by Neil Large, and the Chief Executive was Raj Jain, who reported to that Board. He also sat on the executive team together with the Director of Nursing, Hazel Richards (née Holmes) and the Medical Director, Dr Glenn Russell. As Medical Director Dr Russell was the senior manager of the doctors employed by the Trust, including the Cardiothoracic Surgeons.

18. The clinicians were organised in two divisions, surgery and medicine. Each of those divisions was headed by a person reporting to the Medical Director. The title varied at different times (and in the past there had been a post of Deputy Medical Director) but from about 2006 the role was termed Associate Medical Director. There was also a clinical lead role in each division.

19. Dr Glenn Russell was a Consultant Anaesthetist who held the position of Deputy Medical Director from 1995 to 1998, and again from 2004 until 2006. In 2006

he was appointed to the role of Medical Director. The claimant was also a candidate for that role but was unsuccessful

20. Dr Richard Page was a Consultant Thoracic Surgeon who was Associate Medical Director (Surgery) from 2006 until 2010, and then Clinical Lead for Thoracic and Upper GI Surgery. His counterpart as Associate Medical Director/Clinical Lead for Cardiology, Chest Medicine and Radiology was Dr Raphael Perry, a Consultant Cardiologist, who held that role from 2007 to 2012.

21. The Medical Director and the two Associate Medical Directors had a role in dealing with management issues.

Respondent's Policies

22. A number of policies featured in this case. The respondent had a Dignity at Work Policy which appeared at pages 979 – 990. The introductory policy statement recognised the right of everyone to work in an environment free from harassment and bullying. This was sometimes called a "zero tolerance" approach to bullying. A definition of bullying appeared at page 983 as follows:

> **"Bullying is the intimidation or belittling of someone through the misuse of power or position that leaves the recipient feeling hurt, upset, vulnerable, isolated or helpless."**

23. The Disciplinary Policy appeared in 2010 and 2011 versions at page 934 and page 953 respectively. The latter was current at the time of the claimant's dismissal. It contained a passage on suspension (which was also termed "exclusion"). The clause provided that it may be necessary in certain circumstances of a serious nature to suspend an employee from duty. An example of situations where that would be appropriate was if...

> **"...it is likely that the investigation process could be impeded if they remain in work."**

24. As to suspension once the investigation had concluded the following appeared on page 959:

> **"If there is no case to answer, the individual will return to normal duties as soon as is practicable. If there is a case to answer a disciplinary hearing will be convened and the individual will remain suspended until the outcome of this process."**

25. The range of disciplinary sanctions appeared on page 962 and ranged from a verbal warning for very minor acts of misconduct through a first written and final written warning up to dismissal. On page 962 the Policy said that:

> **"Dismissal is the ultimate and final sanction which may be imposed. It would be appropriate in cases of gross misconduct, and where a previous final written warning has failed to secure the required improvement in conduct or performance. In considering dismissal, the panel must ensure that all other available courses of action have been considered and discounted."**

26. The respondent also had a Grievance Policy and Procedure which appeared at page 973 onwards.

27. In addition to its own policies, the Trust also had regard to certain external policies. These included a document called "Maintaining High Professional Standards in the Modern NHS" ("MHPS") which was issued by the Department of Health and which the respondent adopted in February 2007. That document set out a framework for the handling of concerns about doctors in the NHS, including issues in relation to conduct and disciplinary matters. MHPS referred in paragraph 8 on page 891 to the importance of those taking the decisions about the management of such matters involving the National Clinical Assessment Service ("NCAS"), which was part of the NHS National Patient Safety Agency. The NCAS would provide immediate telephone advice which would be confirmed in writing.

28. MHPS addressed the question of exclusion from work on pages 895 – 904. It emphasised that exclusion from work should be reserved only for the most exceptional circumstances and in paragraph 6 on page 896 the following appeared:

> **"The purpose of exclusion is:**
>
> - **to protect the interests of patients or other staff; and/or**
> - **to assist the investigative process when there is a clear risk that the practitioner's presence would impede the gathering of evidence.**
>
> **It is imperative that exclusion from work is not misused or seen as the only course of action that could be taken. The degree of action must depend on the nature and seriousness of the concerns and on the need to protect patients, the practitioner concerned and/or their colleagues."**

29. MHPS went on to provide a number of ways to manage risks other than exclusion, including supervision of normal clinical duties, restricting duties and restricting the practitioner to non-clinical work completely. In paragraph 10 on page 897 MHPS emphasised that a case should be discussed fully with the Chief Executive, the Medical Director and the Director of HR as well as NCAS prior to the decision to exclude a practitioner.

The Claimant

30. The claimant was employed by the respondent from 1 April 1993. Her appointment was as a Consultant in Cardiothoracic Surgery. She was the first female surgeon appointed by the respondent and she remained the only female Cardiothoracic Surgeon employed by the respondent for the whole of her employment. During her employment with the respondent the claimant secured a number of external appointments which evidenced her high professional standing, including being appointed Director of Cardiothoracic Surgical Studies by the University of Liverpool Medical School, serving on an external reference group established by the Department of Health to develop the National Service Framework for Coronary Heart Disease published in 2000, and two terms as a member of the Council of the Royal College of Surgeons of Edinburgh. She also worked as a national and international examiner and ambassador for the College of Surgeons.

2003/4 ET Claims

31. In 2003/2004 the claimant brought two Employment Tribunal claims of sex discrimination against the respondent under case numbers 2101562/2003 and 2100039/2004. The respondent resisted the claims and they were resolved by a Compromise Agreement dated 20 August 2004. Although a number of these matters were mentioned in the claimant's first Claim Form in these proceedings, the parties had agreed a Statement of Facts in respect of those matters which appeared at pages 15a-15c and had agreed that the Tribunal was not required to find any facts about those matters. That agreed Statement of Facts identified seven distinct allegations of sex discrimination brought by the claimant, and recorded that the respondent's case had consistently been that there was no merit in those allegations. It is not necessary to rehearse those allegations here but it is appropriate to record that a number of the witnesses in this case had been at the Trust at the time of the earlier claims. They included Dr Page, Dr Perry, and Anne McEvoy, who had been Acting Director of Human Resources between 2001 and November 2003. She left the Trust whilst that earlier claim was in its early stages. Dr Russell had been at the Trust at the time, but he was admitted to hospital with a serious illness in August 2003 and it was more than a year before he was fully back up to speed. In cross-examination he said that he had been concentrating on his own health and was not fully engaged in what was happening. That said, other respondent witnesses acknowledged that the ET claims which the claimant brought were a matter of importance which was discussed at the Trust at the relevant time.

32. It was also apparent that at around the same time the claimant referred the entire consultant body of the Trust to the General Medical Council ("GMC"). The referral was made on a collective basis and included the claimant herself as well as all the other consultants. The GMC looked into this, as did the Department of Health Fraud Unit, but no formal action was taken against anyone. We were not given details but we understood that the referral related to earnings from private practice.

2008 Bullying Allegation

33. Against that background we can turn to the events which were the focus of our consideration in these proceedings. As a Trust with responsibility for training doctors the respondent was inspected every six months by the Liverpool Deanery. One such visit occurred on 6 March 2008. After the visit the Deanery visitors gave feedback to the Trust verbally in advance of their formal report. No date was provided for the feedback meeting but Dr Page was present, as was the then College Tutor, Dr Susan Gilby. In November 2009, more than eighteen months later, Dr Gilby provided a brief statement [page 236] in which she said this:

> **"In my capacity as College Tutor, I was present at the feedback meeting following the Deanery visit to the Trust. The Deanery expressed their concern regarding the behaviour of three surgical consultants. These consultants were named and in subsequent weeks a complaint by the trainees was discussed amongst medical management and the consultants responsible for training."**

34. In contrast Dr Page who was also present at the meeting told us in evidence that the Deanery had said there was a problem with bullying amongst the surgeons but neither the number of the consultants concerned nor any names were mentioned.

35. We heard live evidence from Dr Page. We did not hear from Dr Gilby. We concluded that the Deanery had not identified the names of the consultants who were said to be guilty of bullying. Firstly, the note from Dr Gilby at page 236 was not entirely unambiguous. It had been completed in late 2009, approximately 18 months later. It could be read as indicating that the consultants were named during the discussion amongst medical management in the weeks that followed. That would have been consistent with what other witnesses told us about "coffee room chitchat". We did not have the opportunity of hearing evidence from Dr Gilby in person to explore this. Secondly, and more importantly, the Deanery report itself which followed the feedback meeting [page 110c – 110h] did not name the doctors. It included this on page 110c:

> **"The surgical trainee whom we saw reported on behalf of his non-trainee colleagues that a small minority of cardiothoracic surgeons, three consultants in particular, whom neither he nor those directly affected are willing to name for fear of retribution, do not treat junior colleagues working with them in an educationally or personally appropriate manner. When the word bullying was used by a [Deanery] visitor this was readily accepted."**

36. It seemed to us unlikely that if the Deanery report made clear that the trainees did not wish to name the consultants that those names would have been passed on in the feedback meeting. We therefore concluded that no names had been mentioned at this stage.

37. The respondent had to act on the Deanery concerns and Dr Russell as Medical Director and Dr Page as Assistant Medical Director met a group of surgical trainees, Clinical Fellows and staff grades on 31 March 2008. A note of that meeting appeared at page 111. That note was also approved in the days after the meeting by Dr Page (page 112), Dr Field (page 114) and Dr Oo (page 115). We ourselves heard evidence from three witnesses present at that meeting (Dr Russell, Dr Page and Mr Warwick), and all three of them confirmed that the note was accurate. We found it to be so.

38. The note recorded that Dr Russell opened the meeting by providing a definition of bullying as follows:

> **"Bullying was a nasty form of behaviour, either verbal or physical, that was repeated and resulted in the juniors feeling stressed, inadequate and unhappy in their work. This had to be differentiated from the occasional stress-related outburst from senior surgeons."**

39. The note then recorded that the juniors had met previously to discuss the issues initially raised at the Deanery visit and that on reflection only the claimant's behaviour fulfilled the true meaning of bullying. The note recorded that the trainees felt a general e-mail from the Medical Director would alert other surgeons to borderline behaviour that was unacceptable, and that there should be regular consultation between the group and the Medical Director.

40. The second half of the note read as follows:

> **"All levels of trainee spoke freely and at length. In summary with regards to Ms Griffiths:**

> **Her behaviour was consistently unpleasant, making working with her in theatre an ordeal that they would all avoid if at all possible. It was difficult to assist her, but much worse if the junior had to endure it whilst the primary operator. Most of the intimidation was verbal but with occasional hand slapping. Her behaviour in this respect is entirely repetitive and predictable "we know it's going to be a bad day whenever we are scheduled to be in theatre with her". SHOs have a degree of choice in their attendance at the operating theatre. None of them would choose to work with Ms Griffiths if they could avoid it, and they were aware of the problem prior to arriving at CTC.**
>
> **Of note is that the behaviour is confined to the operating theatre. None of the juniors had any real problem with her outwith the environment, or when looking after her patients.**
>
> **Dr Russell stated that it was the responsibility of the Trust to deal with this. The first approach would be informal conversation with Miss Griffiths. Dr Page thought it was likely that she may wish to respond formally. In this situation, the Juniors would need to sign a group complaint and they were happy to do this. Dr Russell will keep them informed of progress by three monthly review, and thanked them for raising an issue that clearly had significant impact on their experience as a trainee at CTC."**

41. The first step agreed at the meeting was for an e-mail to go to all consultants. That e-mail was sent by Dr Russell on 1 April 2008 at page 113. The claimant was amongst the recipients. It made clear that "protracted criticism and undermining of the confidence of junior staff will not be tolerated by the Trust." The e-mail asked all the recipients to take time to reflect on their behaviour with juniors and other staff. It said that Dr Russell would be meeting with the juniors on a regular basis to review the situation.

42. Dr Russell updated the Dean by letter of 7 May 2008 at page 116. He said that he had e-mailed all surgeons, but then had also arranged to meet informally the surgeon whom the trainees felt was a particular problem, particularly in the operating theatre.

43. That meeting between Dr Russell and the claimant took place the same day. Dr Russell kept a diary note at page 118. He was accompanied by Dr Page. The views of the trainees were outlined. The diary note recorded the claimant responding by saying that the behaviour was not as bad as portrayed and that she was a hard taskmaster. She also said that she felt she was always given the most junior trainees and that she was under additional pressure to get good clinical results **"because of the past issues"**. His note recorded this (referring to the claimant as "EMG"):

> **"EMG accepted that there might be a problem but often was not aware she was behaving this way. She would try to change but would in all honesty find it difficult."**

44. The note ended by recording that the matter would be kept under review with the trainees.

45. A follow-up meeting with the trainees occurred on 30 June 2008. Dr Russell's diary note appeared at page 119. In his evidence Mr Warwick recalled that the meeting took place because of an incident between the claimant and another trainee, Mr Bashir. He had been allocated to work with the claimant between April

and the end of June 2008. Under cross-examination Dr Page confirmed that at the meeting the incident between the claimant and Mr Bashir was fresh in everyone's minds. When interviewed about this on 6 July 2009 by Cath Barton (see below), Dr Page said that Mr Bashir came to see him and said that he (Mr Bashir) had walked out of theatre because of insults received from the claimant. The claimant, however, had told Dr Page that she had asked Mr Bashir to leave. We concluded that although this incident predated the second meeting on 30 June 2008 it was not the cause of it: the meeting was the review promised by Dr Russell. In any event, Dr Russell's note recorded that the trainees said there had been no significant change in theatre behaviour, that the previously discussed issues were still prevalent, and that after discussion the trainees felt reluctantly that they wished to be excused from working with the claimant until the behaviour changed. The note ended with this:

> **"[Dr Russell] suggested that they write to him with specific allegations. The Trust would then proceed with further discussions with EMG in the hope of a solution that benefited all parties."**

46. The letter which followed was said to come from all sixteen Cardiothoracic Surgical Registrars, and had been signed by fifteen of them [pages 120 – 122]. It included the following:

> **"As you are aware, we have previously raised this issue with Dr Page, Mr Oo and yourself and highlighted a particular problem with Elaine Griffiths. Our main complaint centres around the verbal abuse, which is often personal and derogatory, and on occasions extends to smacking of hands with instruments, during cases. These verbal attacks often take the form of name-calling over a prolonged period making them psychologically difficult to manage. This is not simply an occasional outburst in the stress of the moment but rather persistent behaviour experienced throughout almost all theatre days ... Although not all junior doctors have assisted her in theatre, and not all have experienced problems, her allocated Registrar bears the burden of this treatment. This treatment of juniors by her has been a feature of her theatre for many years. As a group we do not believe this is an acceptable work environment for any of our colleagues. ... As you will be aware since we last met her allocated Registrar has had to be removed from her service because of these very issues and we feel it is unfair to simply replace Registrars depending on their ability to cope in this environment. It is for this reason that we collectively would like to be excused from attending her theatre."**

47. The signatories to that letter included Mr Ghotkar, Mr Upadhyay, Mr Field, Mr Warwick and Mr Bashir.

48. The letter bore at the top a date of 6 July 2008 but it was not received by Mr Russell until late August. No reason for this delay was identified although it may have been due to the need to get all fifteen signatures during the holiday period. On 10 September 2008 Dr Russell wrote to the claimant at page 123 saying that he was extremely concerned and disappointed to receive the letter from all of the current Registrars, and inviting her to meet him informally. He enclosed a copy of the MHPS Policy setting out the procedure to be used should the issue not be resolved informally.

49. That meeting took place on 7 October 2008. A note appeared at pages 125 – 127. The content of the letter from the trainees was read to the claimant. It was agreed that she could have a copy. The claimant responded by saying that a

number of people who had signed the letter have never worked with her, and that she felt she was being discriminated against by being allocated very inexperienced or failing juniors. Dr Russell reiterated that he did not want to take this down the formal disciplinary conduct pathway, although he pointed out that he had in the past observed a junior crying following working with the claimant. He proposed that the claimant might accept she needed some help and would work with the Occupational Psychologists to work through the issues. The note recorded her saying that the way in which the senior and more experienced juniors were allocated to consultants showed that it was a **"boys' club"**. The claimant also made the point that as the only female cardiac surgeon she had had to behave more forcefully to succeed. The meeting concluded with agreement that the claimant would work with external Occupational Psychologists, and that the claimant would receive the support of a Trust grade doctor in the interim period rather than inexperienced juniors.

50. As a consequence for the months that followed the claimant was supported first by Mr Ghotkar between October 2008 and March 2009, and then from 1 April 2009 by Mr Upadhyay.

51. Dr Russell e-mailed the representatives of the trainees on 24 October 2008 at page 128 confirming that the individual concerned was to receive appropriate support in changing the behaviour that caused the concern of the trainees, and that it was hoped this would resolve matters.

52. The claimant subsequently received coaching from an external consultant with monthly sessions between February and May 2009. During this period two other issues arose which the Trust had to address in relation to male consultants.

Doctor A

53. In March 2009 the spokesman for the trainees in Cardiology, Dr Mudawi, met Dr Russell to discuss an allegation of bullying against a single male consultant, Dr A. It appeared to be an allegation of protracted bullying rather than a single one-off, and the allegation was made by a female trainee. Dr Russell wrote to Dr Mudawi on 10 March 2009 at page 130 and indicated that the way to resolve the issue satisfactorily was for the trainee to make a formal allegation under the bullying policy, but that Dr Mudawi should discuss this approach with the trainee in question. Dr Mudawi did not come back to Dr Russell, and Dr Russell sent a reminder e-mail on 17 April at page 154 which indicated that he had written to Dr Mudawi twice but with no response. His e-mail said that he needed to know whether the individual wanted to take it further or not. The response from Dr Mudawi of 20 April 2009 at page 153 was that the trainee had decided that she did not want to take it further by way of full investigation but would have a quiet word with the consultant involved. The matter went no further.

Mr Poulis

54. In the documents disclosed in the hearing bundle the identity of the complainant and the alleged bully were redacted, but for reasons which will become clear the identity of them is of relevance. On 23 March 2009 at page 131 Dr Poulis was invited to a disciplinary hearing on 2 April 2009 to answer an allegation that he

had acted in an aggressive and intimidating way towards Dr Gilby, had refused to leave the room when asked to do so, and had used foul language when she sought to discuss the incident afterwards. The disciplinary panel was chaired by Dr Page. The notes appeared at pages 133 – 150. Mr Poulis resisted the allegations and said that they were false. He denied having behaved as Dr Gilby alleged. The conclusion of Dr Page's panel was set out in a letter at page 151 which gave Mr Poulis a first written warning on the basis that he had:

"acted in a manner that caused Dr Gilby to feel frightened, intimidated and upset."

55. Mr Poulis appealed against this finding, and his appeal panel was chaired by Dr Perry. It sat on 18 September 2009. The outcome appeared in a letter dated 22 September 2009 at pages 204 – 205. The panel reduced the punishment to a verbal warning. The letter referred to Mr Poulis' previous conduct and mitigation presented on the day.

Mr Upadhyay's First Complaint 1 June 2009

56. On 28 May 2009 the claimant had her fourth and final coaching session with the Occupational Psychologist. The note kept by the coach appeared at page 242. It was in positive terms. It recorded that the claimant was looking forward to working with a new trainee and supporting him in achieving his ambitions. It said she was practising to soften the words she used to convey better her intention to be supportive. However, on the following day (29 May 2009) there was an incident between the claimant and Mr Upadhyay. He had been working with her since 1 April. He subsequently alleged [page 174] that she had started to shout at him asking why he was standing around instead of prepping the patient in the anaesthesia room.

57. On 1 June 2009, Mr Upadhyay went to speak to the claimant at the end of the working day. According to the claimant when interviewed on 30 June 2009 [page 177], he told her he felt humiliated, the claimant apologised for the fact he felt like that and they had a discussion. Her recollection was that it was agreed that he would tell her next time he felt uncomfortable so that she could identify the exact nature of her behaviour and understand what was causing him distress. In the ten days or so that followed he did not raise anything of that kind.

58. Mr Upadhyay's account on 29 June 2009 at page 174 was not significantly different. He said that he told the claimant that if she had a problem with him she should speak to him personally and not in front of other people, and that the claimant said she did not speak to him in that way but that if she did then she did not realise that she was doing it. He suggested that she was friendly and jokey with the others but spoke to him as though he was not a human being. She said she spoke the same to everyone.

59. Both Mr Upadhyay and the claimant had a sense that this discussion had cleared the air a little, even if only for a very short period. Mr Upadhyay told Dr Page the next day (2 June) that his list the following day had been less stressful because the claimant's behaviour had improved.

60. The allegation that Mr Upadhyay had behaved in an aggressive way was not made when the claimant was interviewed by Cath Barton on 30 June 2009 [pages 177 – 180]. It was first made in November 2009 in the claimant's response to Mr Upadhyay's allegations against her (page 215-216). There she said that Mr Upadhyay had behaved aggressively when he followed her into her office. She said that she was acutely aware that she was alone on the administration floor and trapped in her office. She felt vulnerable and took every opportunity to defuse the situation and calm him down.

61. On the evening of 1 June Mr Upadhyay sent an e-mail at page 158 to Dr Russell. It was copied to Dr Page and Mr Fabri. The e mail came after the discussion with the claimant. When interviewed on 18 August 2009 (page 176) Mr Upadhyay told Cath Barton that he sent the e mail because he had doubts over whether the claimant would change and he wanted to inform "higher authorities". That e mail said:

> **"I am working with Miss Griffiths for the last few weeks. It is the most distressing period in my >20 years cardiothoracic surgical career. I am getting exposed to verbal abuse and humiliation all the time. I am using all my efforts to control my temper. My stress level has gone very high. I request you to look into this matter before any unpleasant situation arises."**

62. Mr Fabri saw that e-mail immediately because a few minutes later he e-mailed Dr Russell and Dr Page at page 159 to say that this was unbelievable, that Mr Upadhyay was a hard-working, skilful and nice guy and one of the more senior people, and that this allegation was **"history repeating itself"**. He recorded that Mr Ghotkar had also had a hard time (when he supported the claimant up to March 2009) but preferred to put up with it and did not want to escalate it further.

63. Dr Russell was away on leave at the time and on 2 June Dr Page interviewed Dr Upadhyay. He wrote to Dr Russell on 3 June to confirm that discussion [page 160]. His letter recorded Mr Upadhyay as alleging that there had been **"consistent inappropriate behaviour on the part of Miss Griffiths including verbal abuse, humiliation and personal stress"**. His sleep was affected and his wife had noticed that he was much more irritable than usual. According to Dr Page:

> **"Although the problem is at its worst in the operating theatre he says that his whole relationship with her as a Registrar is unpleasant and he finds it difficult to relate to her in a professional manner over all aspects of patients' care."**

64. Mr Jain and Ms McEvoy were made aware of this matter.

65. The claimant was unaware that this complaint had been made. She continued to work as normal until she went on leave on 12 June. During this period on 8 June an issue arose where a female patient made a complaint about Mr Upadhyay. It was recorded in a document known as a "PALS" reporting form. That document appeared at pages 230 – 233. A colleague called Vicky Cleary had been to see the patient who was genuinely upset about how Mr Upadhyay had treated her. The matter was resolved because Vicky Cleary contacted the claimant, the claimant saw the patient on the ward and arranged matters so that Mr Upadhyay was not

going to have any dealings with that patient again. Effectively the claimant had intervened to stop a complaint about Mr Upadhyay going any further.

66. Once she was made aware of the complaint by Mr Upadhyay against the claimant Ms McEvoy contacted NCAS [pages 161 – 163]. The claimant was notified of the complaint by letter of 17 June 2009 at page 164. A formal investigation was to be undertaken. The General Manager for Medicine, Cath Barton was appointed to investigate.

67. Ms Barton carried out a number of interviews between 29 June and 18 August 2009. She interviewed Mr Upadhyay, Mr Ghotkar, Dr Page and Dr Russell. Dr Russell had been in theatre as the anaesthetist on 29 May 2009 but he was not asked whether he had witnessed anything, and nor did he volunteer any information. Ms Barton interviewed the claimant on 30 June 2009. The claimant denied any inappropriate treatment of Mr Upadhyay. In addition Ms Barton interviewed the Theatre Nurse, Mary Abraham, and Theatre Assistant, Elaine Lock, on two occasions. They said that the claimant did not treat Mr Upadhyay any differently from how she treated the others. Their opinion was that she was no different to any of the other surgeons. The Perfusionist, Mr Nisar, however, said in an interview on 18 August 2009 that the claimant was more abrasive than other surgeons and that he recalled an incident when theatre felt **"really awkward"** because of the way the claimant was behaving towards Mr Upadhyay. Mr Marshall, a Surgical Practitioner, also confirmed [page 184] that the claimant would **"have a crack at most people"**, including him, and that her interaction with Mr Upadhyay was different. He remembered a particularly bad case when he and Mr Nisar had discussed how Mr Upadhyay had been treated. Neither Mr Nisar nor Mr Marshall could give Ms Barton any specific dates of such behaviour.

68. The notes of all these interviews were appended to Ms Barton's report dated 28 August 2009 at pages 168 – 173. After reviewing the results of her interviews she concluded that there were no witnesses who corroborated either version of events relating to 29 May 2009. However, in relation to what she described as the second allegation (**"constant verbal abuse and humiliation"**), she said that the witnesses Mr Ghotkar, Mr Marshall and Mr Nisar had stated that they had experienced or witnessed the claimant displaying what they believed to be unacceptable behaviour in theatre. It then fell to Ms McEvoy to decide whether disciplinary proceedings should be pursued.

Claimant's Complaint about Mr Upadhyay 1 September 2009

69. Before that decision was taken the claimant raised a complaint about Mr Upadhyay with Mr Fabri by e-mail of 1 September 2009 at page 198. It concerned the position of two patients and the claimant summarised her e-mail by saying:

> **"Significant events have occurred in which Mr Upadhyay has failed to communicate and which I consider threatened the safety of my patients and constitute unprofessional behaviour. I wish to make a formal complaint and request that you take the matter further."**

70. Her e-mail went on to suggest that there had been numerous episodes of sub-optimal management of her patients by Mr Upadhyay in the last few weeks without any attempt at communicating with her, but the focus of her e-mail was in relation to two particular patients. Mr Fabri as Clinical Lead for Cardiac Surgery acknowledged the e-mail on 3 September and said that he would look into it. He asked the claimant for more information on 11 September [page 202], and on 9 October he responded to the complaint at page 206. In summary, Mr Fabri concluded that there had been inadequate communication with the claimant regarding a change to the clinical condition of the patients, but that Mr Upadhyay was not to blame. The failure had occurred before he came on duty. His letter said:

> **"I would agree therefore that in both these cases there appears to be very poor communication with you regarding significant changes in the clinical condition of the patients. However, in neither of these cases can I identify mismanagement of a patient and therefore see no reason to escalate this further in relation to patient safety."**

He intended to address the communication issue by making sure all juniors were aware of the responsibility to inform the consultant immediately of changing clinical scenarios.

71. The claimant was not satisfied with this response and on 3 November 2009 at page 209 she sent a detailed e-mail setting out further information about each of the two patients in question. Her e-mail made clear that she believed there was an issue of patient safety caused by Mr Upadhyay's unprofessional behaviour. Her e-mail ended with the following:

> **"I don't believe a general letter to all the junior staff is an adequate response and must request that you give Mr Upadhyay a written warning. If you feel unable to take this course of action I will have to take this matter up via a critical incident review regarding dereliction of duty resulting in actual patient harm. I will confirm this e-mail correspondence with a hard copy."**

72. The claimant did not receive any response to this. After her disciplinary hearing had concluded and her appeal had been lodged (see below) she e-mailed Mr Fabri on 30 December 2009 at page 259, and he replied the following day noting her disagreement with his conclusion and saying that he was in no position to issue an independent written warning to Mr Upadhyay. It would require a further investigation and he suggested the claimant would need to pursue it through the appropriate route as indicated in her letter. The claimant did escalate this to Dr Russell in early January 2010 but it went no further.

Disciplinary Warning November 2009

73. In the meantime Ms McEvoy had decided in the light of Ms Barton's investigation report that the claimant should face a discipline hearing. That was confirmed in a letter of 7 September 2009 at page 201. Dr Perry was appointed to chair the disciplinary panel. The date was set for 20 November 2009.

74. On 11 November 2009 Dr Gilby (who had left the Trust by this stage) spoke to another colleague Mr Scawn. The claimant had asked Dr Gilby to prepare a statement for her to use at the Disciplinary Hearing. Mr Scawn was interviewed

about this in March 2010 (see below). He recalled an informal chat with Dr Gilby over coffee when they met at an external meeting. Dr Gilby mentioned that she had been contacted by the claimant out of the blue and asked to support her. As will become clear, Mr Scawn subsequently spoke to Mr Poulis about this discussion.

75. The statement which Dr Gilby provided to the claimant appeared at page 236 dated 15 November 2009. It said that the claimant had never bullied or harassed a trainee although she had seen the claimant be exacting and stern and become frustrated when a trainee repeatedly failed to grasp basic cardiac surgical skills. Dr Gilby expressed the view that shortly before she left the claimant did go too far in expressing her frustrations with a trainee at the operating table, which prompted Dr Gilby to speak to the claimant about tempering her response. Her note dealt with the 2008 allegation (see above) and suggested that there had been difficulty persuading the trainees to put their complaint in writing. She ended by saying that she had witnessed bullying and harassment at the respondent but not by the claimant. (We inferred that this was a reference to her allegation against Mr Poulis for which he eventually received a verbal warning).

76. The claimant also obtained a supporting statement from a male Consultant Anaesthetist, Dr Thomas, at page 234 – 235. His statement said that the claimant could be of necessity assertive which could appear brusque or terse to people who did not know her well. He said that he had never seen any bullying or unfair harassment or verbal assault. His evidence was that the claimant treated all members of the theatre team in the same way.

77. The claimant prepared her response to Mr Upadhyay's allegations in a document at pages 212 – 223 which included a number of appendices. She made clear that she had had to be a strong female with high personal standards to succeed in her field, and that in all walks of life some men had difficulty working with a female superior. She speculated on page 213 whether the trainees had been pressured to complain about her in 2008, and she suggested on page 214 that trainees who had difficulties were sometimes inclined to blame their trainers. She said:

> **"There may be a negative reaction to my behaviour by those who are not culturally comfortable with strong women."**

78. On page 215 she analysed the number of occasions on which Mr Upadhyay assisted her between 1 April and 10 June 2009. It was fourteen cases in total, but only seven operations prior to 29 May 2009. She suggested that he had shown poor performance during this time.

79. For the first time on page 215 – 216 the claimant said that Mr Upadhyay had behaved aggressively on 1 June when he followed her into her office.

80. The claimant's submission went on to mention the PALS incident dealt with by Vicky Cleary on 8 June, and her complaint about Mr Upadhyay in September 2009 which Mr Fabri had not properly investigated. In her response to the statement from Dr Russell she said she had been warned by the coach and by Dr Gilby that the Trust was actively canvassing the juniors for complaints against her. She made

clear that she had learned that the other two male surgeons identified in 2008 had not gone through any disciplinary investigation and suggested that this was a clear case of sexual discrimination. The thrust of her defence was that she was being disciplined for the same behaviour as male consultants and that was because as a female she was not **"one of the boys"**.

81. The disciplinary hearing took place before the panel chaired by Dr Perry on 20 November 2009. The notes kept by the Trust appeared at pages 244 – 250. Alternative notes prepared by the claimant's BMA representative appeared at page 250a – 250h. Mr Upadhyay gave evidence to that hearing and was questioned by the claimant's BMA representative on her behalf. Both sets of notes recorded the BMA representative putting to Mr Upadhyay that some people had issues working with senior staff who were female. His response was recorded in different terms. The Trust note at page 246 recorded this:

> **"I am a married man and I listen to my wife. I know how to behave in front of females."**

82. The BMA note at page 250c recorded this:

> **"I have a wife and know how to treat women".**

83. At the conclusion of the hearing the panel decided that the appropriate sanction was a first written warning. In summarising its decision Mr Perry said (according to the BMA note at page 250g):

> **"While there was no evidence presented of intent on your part to bully or harass Mr Upadhyay, we had no doubt that your actions had caused Mr Upadhyay to feel humiliated and suffer what he considered to be verbal abuse over a sustained period. Furthermore, we found it disappointing that this has happened while the Trust has invested in, and you have accepted, ongoing support in managing inappropriate behaviours."**

84. This decision was confirmed in a letter dated 24 November 2009 at pages 251 – 252. The warning was to remain active on file for twelve months.

85. The reference to support in managing inappropriate behaviours was a reference to the coaching following the 2008 allegations. The claimant was concerned that this matter had been relied upon. When interviewed by Cath Barton on 30 June 2009 Mr Fabri had mentioned the 2008 issue [page 192]. According to page 250a, Mr Perry responded to a request for disclosure of documents about that issue by saying that those reports did not form part of the hearing and would not be considered. The hearing was based solely upon Mr Upadhyay's concerns. However, the 2008 matter had been taken into account in the decision as to the appropriate sanction.

Appeal against First Written Warning

86. The claimant's appeal was lodged on 1 December 2009 at page 253 and the appeal hearing was set for 22 January 2010.

87. In the meantime it was necessary to arrange for the claimant to have first assistant cover. Dr Russell asked whether the surgical care practitioners could provide that. This resulted in an e-mail from the Lead Surgical Care Practitioner, Celia Ireland, of 23 December 2009 at page 257. There she recorded a reluctant agreement to continue to provide that service, and the e-mail included the following:

> **"We feel any long-term or permanent arrangement would have a negative effect on the staff within our department, causing undue levels of personnel stress, and also impacting on our ability to meet the demands in other theatres. Taking on the role of First Assistant for our department is a service that has developed in the last few years, and although we are keen to carry on providing this service it is both tiring and stressful particularly when assisting Miss Griffith's theatre."**

88. On 8 January 2010 the claimant had a conversation in passing with Mr Poulis. He told her that Mr Scawn had spoken to him about Mr Scawn's discussion with Dr Gilby. Mr Poulis said the gist of what Mr Scawn was saying was that Dr Gilby's statement would not help the claimant and in fact would **"shoot her in the foot"**. The claimant believed that this information could only have come from a member of the disciplinary panel which sat on 20 November 2009 because only that panel had been privy to what was in Dr Gilby's statement. Accordingly on 13 January 2010 [page 303] her BMA representative raised a grievance about breach of confidentiality in the following terms:

> **"On behalf of Miss Griffiths, I am contacting you to raise a concern at what appears to be a breach of confidentiality following the disciplinary hearing held on 20 November [2009]. Miss Griffiths has unfortunately been approached by colleagues within the Trust who have referred to confidential information considered by the disciplinary panel. This information was only available to those people involved in the disciplinary process and therefore, I must request that an investigation is undertaken as to how knowledge of confidential information was made available to third parties."**

89. Although the grievance was contained in an e-mail sent to Anne McEvoy, it had not been acknowledged, let alone progressed, by the time of the hearing on 5 February 2010 of the claimant's appeal against the first written warning. For that appeal a management statement of case was prepared at page 267, and the claimant's appeal case appeared at pages 264 – 274. As part of that statement of case she suggested that the Trust had failed to collect evidence about her behaviour in a theatre from witnesses with whom she regularly worked, that the Trust had been selective in the extracts from the witness which it considered, that it had ignored factual inaccuracies on the part of Mr Upadhyay which showed that he was not a reliable witness, that it had ignored his indisputable discrimination towards women, and had ignored its own data which showed that he had only worked for the claimant for a short period of time which could not have given rise to a **"sustained period"** of bullying. She raised a concern that the outcome of the disciplinary hearing had been predetermined. Those points were developed in detail in the pages which followed. As to Mr Upadhyay's allegedly discriminatory approach, on page 273 the claimant's statement of case asserted that in the disciplinary hearing he had responded to her BMA representative (who was female) in an aggressive manner, and had raised his voice when responding to questions from Cath Barton too, that he had referred to the claimant as "she" in a disrespectful fashion, and that his response about his wife (see above) was inappropriate for any discussion about female work colleagues.

90. The appeal against the first written warning was heard by a panel chaired by the Director of Finance, Mr Cummins. Dr Perry presented the management side. The claimant was accompanied by her BMA representative. There was a detailed discussion. The notes ran between pages 277 and 285. At the conclusion of the hearing, after an adjournment lasting some thirty minutes or so, the panel decided to reject the appeal. The first written warning would stand and would expire on 19 November 2010. This was confirmed in a letter of the same date at page 286 – 287.

Grievance: Breach of Confidentiality

91. During the appeal hearing there was mention of the grievance about breach of confidentiality and on 9 February the BMA e-mailed again to confirm that this was being pursued [page 288]. It was at last acknowledged by letter of 23 February 2010 at page 290. An investigation was to be undertaken by the Deputy General Manager, Tracey Rawlings. The claimant was interviewed first on 3 March 2010. Further interviews were held during March and April, culminating in an interview with Mr Poulis on 15 April. Regrettably, that interview of Mr Poulis went significantly off track. He was asked about breach of confidentiality following the disciplinary hearing on 20 November 2009, but after a couple of answers which were ambiguous it is clear from the notes [pages 312 – 314] that Mr Poulis was talking about the 2008 allegations against the claimant. He was not brought back to the specific point being investigated: whether any of the panel after the hearing on 20 November 2009 had breached confidentiality.

92. When Mr Scawn was interviewed on 4 March 2010, however, he told Ms Rawlings about what Dr Gilby had said to him at their chance meeting in November 2009. He recalled having spoken to Mr Poulis about it but did not think that he had expressed any view to Mr Poulis about whether Dr Gilby would assist the claimant or not.

93. The notes of her investigations were appended to Ms Rawlings' report of 25 May 2010 at pages 295 – 328. She concluded that there was no evidence of a breach of confidentiality from the individuals on the disciplinary panel in November 2009. That conclusion was based in part upon the fact that she had interviewed the members of the panel who had all denied any such breach. The claimant was invited to a grievance hearing with Dr Page and given a copy of the report. That hearing occurred on 9 June 2010. Dr Page agreed that the investigation had not been satisfactory and that Ms Rawlings should re-interview Mr Poulis and Mr Scawn. Those further interviews were then delayed and the claimant was informed of the reason in a letter of 30 June at page 334. A timeline which appeared at page 374 showed that Mr Poulis had failed to attend two prearranged meetings in June. Eventually Mr Poulis was re-interviewed on 9 July 2010 [page 342]. He said that he had no idea of the dates but that he had told the claimant that Nigel Scawn had said that Sue Gilby's statement would **"bury Elaine Griffiths"**. He accepted he might have said **"shoot her in the foot"** when relaying this to the claimant. He made the point that he had no idea about the details or content of Dr Gilby's letter, but because she had already lied about him he thought he should warn the claimant. We inferred that this

was a reference to her allegation against him which resulted in his verbal warning in 2009.

94. There was then further delay before Mr Scawn could be interviewed. That interview took place on 17 August. The notes are at page 347. Mr Scawn repeated what he had previously said. He did not recall what Dr Gilby had said about whether her statement would support the claimant or not.

95. Ms Rawlings produced a supplementary report on 27 August 2010 at pages 337 – 340, with appendices running to page 349. The grievance hearing before Dr Page resumed on 26 November 2011 and the notes appeared at pages 364 – 374. The claimant was concerned at the delay in the investigation since she lodged her grievance in January 2010, and pointed out inconsistencies in the statements which might be attributable to that delay. The conclusion of the grievance panel was communicated at the end of the hearing [page 372]: the grievance was rejected because there was no evidence that any breach of confidentiality had occurred in relation to the members of the disciplinary hearing panel in November 2009. The claimant was given the right of appeal against that conclusion which she did not exercise. It was confirmed in writing on 26 November 2010 at page 375.

96. At the end of the grievance hearing, however, three other matters were raised. The first related to previous grievance complaints, the second was an acknowledgement that the grievance had taken too long, but the third related to the 2008 matter. It was agreed that there would be a meeting to discuss that, a meeting which subsequently took place on 5 January 2011 (see below).

97. It is right to record that during the grievance meeting the claimant again raised her concerns [page 367] about how Dr Upadhyay had behaved during their discussion on 1 June 2009. She had raised this during the disciplinary hearing in November 2009 but she considered that it had never been properly pursued by the Trust. She suggested it was starting to look like systematic discrimination.

Rota Master Issue – September 2010

98. On 10 September 2010 the claimant e-mailed Mr Fabri (Clinical Lead for Cardiac Surgery) about outpatient cover [page 397]. She had found herself without Registrar cover for patients on 8 September. Her secretary had not been told of the lack of cover so the clinic had not been cancelled or reduced in size. She wanted Mr Fabri to investigate the situation and put a system in place that would prevent a repetition. This issue became known as the "rota master" issue. In her e-mail she said that:

> **"The Registrar covering Mr Mediratta's follow-ups refused to see any of my patients."**

99. She did not name that Registrar.

100. Mr Fabri's response was contained in an e-mail of 12 September 2010 which he copied to the other surgeons. It appeared at page 396. From the copy in our bundle it seemed that the claimant's e-mail to him was included in what he circulated. His response was that it was unhelpful to demand that he took sole

responsibility for the situation but he suggested that a debate was needed to identify solutions.

101. The claimant responded to this general e-mail on 14 September 2010. She copied her reply to the same recipients. Her e-mail was at page 395. She said she was under the impression that as clinical lead Mr Fabri did have responsibility for the running of cardiac services. She said that the lack of communication needed to be addressed at the highest level, which was why she had approached him. Her e-mail went on to say this:

> **"However, those of us with afternoon clinics cannot run on into the night with outpatient staff and the refusal of [the] junior present in the clinic to help out is unacceptable – again this needs to be addressed at the highest level."**

102. The claimant again did not name the junior who had refused to help out but she put those words in her e-mail in bold font to emphasise them.

103. Mr Fabri responded the same day [page 395]. He agreed about the inadequate communication and said he would pursue it. He also said this:

> **"I also entirely agree that refusal by a junior to help, especially when they are aware of the problem, is completely unacceptable and I would be grateful if you [would] give me the name of the individual concerned so that I can deal with him/her personally."**

104. The claimant responded the next morning with an e-mail which named Mr Upadhyay.

105. In the days that followed Mr Fabri spoke to Mr Upadhyay about the allegation he had refused to provide cover. There were no notes kept of that meeting but in the subsequent disciplinary hearing in June 2011 [page 489] Mr Fabri confirmed that he had made Mr Upadhyay aware that the claimant had complained about him.

Mr Upadhyay's Second Complaint 24 September 2010

106. Matters came to a head on 24 September 2010. At 2:52 pm Mr Upadhyay sent an e-mail which appeared at page 389. It was addressed to Anne McEvoy. He said that he had sent several e-mails regarding the outcome of his first complaint against the claimant but had not received any satisfactory answer. He said that guidance was that the employer should make arrangements for the complainant alleged bully not to work together but:

> **"As I was exposed to being in contact with Miss Griffiths since my complaint, it encouraged her to raised complaints against me. This situation is still ongoing as whenever I am working in POCCU or am on call, I have to communicate with her regarding her patients and would be expected to assist her in case of emergency. This is likely to result in more complaints about me by Miss Griffiths."**

107. The reference to POCCU was a reference to the Post-Operative and Critical Care Unit, of which the Intensive Care Unit (or "ITU") formed part. It was a unit of 38 beds, of which beds 1 – 12 were reserved for the most seriously ill patients. The e-mail from Mr Upadhyay ended by suggesting that his career progression had been seriously compromised.

108. There then followed that same day an incident known as the "coffee cup incident". It was said by Mr Upadhyay to have occurred between 3:00 pm and 3:15 pm. That would make it within thirty minutes after he sent his e-mail. The allegation he made was that he had been washing his coffee cup under a running tap when the claimant came in, and without speaking held her cup under the running water on top of his in a way that made him feel intimidated. No words were exchanged. He said that Mr Mediratta and Mr Poulis had been present.

109. Ms McEvoy spoke to Mr Upadhyay following his e-mail and he confirmed that he wanted to pursue a bullying complaint and that his health was being affected. She spoke to Dr Russell and Dr Russell decided that this complaint should be investigated by Ms McEvoy.

Claimant's Sexual Harassment Allegation 29 September 2010

110. On 29 September 2010 Dr Russell met the claimant in the morning to convey to her that there was going to be an investigation into what Mr Upadhyay had said. He conveyed the gist of the allegation. The claimant responded by saying that Mr Upadhyay had not worked with her enough to be exposed to any bullying, and she went on to say that in fact Mr Upadhyay was guilty of sexual harassment against her. No notes were kept of the meeting itself, but Dr Russell wrote to the claimant at page 350 to confirm that Ms McEvoy would investigate the allegations against her.

111. Correspondingly the claimant sent an e-mail at 12:44 pm on 29 September 2010 at page 351 which set out her sexual harassment allegation as follows:

> **"I wish to report my continued sexual harassment by Dr Upadhyay. He made an unfounded allegation about bullying; indeed the tribunal found no evidence to support his allegation despite which they felt he had felt bullied. He now goes on to make a malicious allegation of intimidation despite the fact we have not had a conversation since well before the grievance hearing. This I believe is a further attempt to attack me because of my gender. He made multiple documented sexual remarks in his statement to the Tribunal witnessed by my BMA representative which supports my allegation. I feel acutely distressed by this ongoing act and request that the Trust takes prompt action to stop this harassment."**

112. On 30 September Ms McEvoy spoke to NCAS and the gist of what was discussed was set out in an NCAS letter of 5 October 2010 at page 354. Plainly both sets of allegations had to be investigated, and on 1 October at page 352 Dr Russell acknowledged the claimant's allegation of sexual harassment and confirmed that it would be investigated.

Ms McEvoy's Investigations October 2010 – February 2011

113. Ms McEvoy was appointed to carry out both investigations. The notes of her interviews with the two protagonists and various witnesses appeared as appendices to her respective reports. Those notes did not identify the dates of the interviews in question. It was clear that the claimant was interviewed about both matters in two separate interviews on 5 November 2010, and that Mr Upadhyay was interviewed about both matters on two occasions. It was also clear that in November 2010 Mr Upadhyay went off sick. According to a letter from the Consultant Occupational

Health Physician, Dr Makepeace, on page 403 this was due to a recent deterioration in his mental health, he having found the counter allegation of sexual harassment extremely distressing.

114. The notes of the meeting between Ms McEvoy and the claimant (and her BMA representative) about the sexual harassment allegation appeared at pages 420 – 422. Incorporated into that note was a two-page document from the claimant headed "Grounds for Concern" at pages 419 – 419a. The claimant was emphasising that she had not named Mr Upadhyay in her complaint to Mr Fabri about the rota master issue, and she was suggesting that Mr Fabri had said something to Mr Upadhyay to incite him to make a formal complaint of harassment. She reiterated that patients were her prime concern and that she had concerns about how Mr Upadhyay managed her patients.

115. The note of the meeting prepared by Ms McEvoy ended with the following paragraph on page 422:

> **"During the meeting Joanne Allison, BMA rep, suggested that formal mediation between the two parties might offer an alternative solution to pursuing a formal complaint. Miss Griffiths agreed that she would withdraw her complaint and consider this approach if Mr Upadhyay would withdraw his complaint."**

116. In the course of her investigation of Mr Upadhyay's allegations Ms McEvoy interviewed a Clinical Fellow in Cardiac Surgery, Mr Saleem, [page 408] who recalled that there had been an incident where one of the claimant's patients was bleeding during the night. The claimant had told Mr Saleem over the telephone from home that she was happy for Mr Upadhyay to take the patient back to theatre for re-exploration if Mr Upadhyay felt comfortable to do so.

117. As part of her investigation of the claimant's allegations Ms McEvoy interviewed four female members of staff about Mr Upadhyay's treatment of women. The resulting notes appeared at pages 430-432 and 435.

Meeting 5 January 2011 re 2008 allegations

118. The result of the two McEvoy investigations was still pending when the claimant attended a meeting on 5 January 2011 to discuss the 2008 issue. This meeting had been arranged because of what had been discussed in the grievance hearing on 26 November 2010 (see above). Prior to that meeting the claimant prepared a written statement which appeared at pages 379 – 381. It explained how the claimant's concern about the way the 2008 issue had been handled had developed. Briefly, in October and November 2009 the claimant had received more information about what had happened in 2008 because she had seen Dr Gilby's statement at page 236 and also the interview of Dr Russell conducted by Cath Barton on 30 June 2009 when investigating Mr Upadhyay's first complaint. The claimant had been aware since November 2009 that Dr Gilby said the surgical trainees had to be persuaded to put their complaint in writing [page 236]. Her concerns had been heightened in the summer of 2010 when Mr Poulis told her that a junior surgeon present at the meeting at the end of March 2008 had said that Dr Russell and Dr Page had actively encouraged junior staff to drop their complaints

about the two male surgeons and concentrate on the claimant. The claimant's note for the January 2011 meeting said that at the time she had not wanted Mr Poulis to have to commit this to writing, but that he had now made a formal statement to that effect in the Rawlings investigation. That was, we inferred, a reference to his initial statement to Ms Rawlings on 15 April 2010 at pages 312 – 314.

119. The meeting of 5 January 2011 was recorded in a file note at pages 382 – 383. There was a discussion about the claimant's concerns about how the 2008 complaint was dealt with. One of the people present at the meeting was the Head of HR, Susan Westbury. The note recorded that she advised that the action taken in relation to other named consultants was confidential to each individual. That clearly implied that other consultants had been named at the time. She went on to suggest that the information that Mr Poulis and Sue Gilby had passed to the claimant was based on alleged third party conversations and there was no factual evidence. After a pause to consider matters with her representative the claimant (according to the note):

> **"stated that she accepted that [Dr Russell] had acted appropriately and fairly and apologised for this current situation."**

McEvoy Reports and Final Written Warning June 2011

120. The result of Ms McEvoy's parallel investigations was known in early 2011. On 21 January 2011 she produced her report on Mr Upadhyay's allegations against the claimant. It appeared at pages 384 – 388, with the appendices running through to page 408. Her conclusion was that there was a disciplinary case to answer, and Dr Russell as case manager confirmed that this was so in a letter to the claimant of 24 January 2011 at page 409. The disciplinary matter was to be heard by a panel chaired by Ms Richards, the Director of Nursing, and although it was originally to be held on 16 February 2011 it was delayed for various reasons (including jury service by Dr Russell and BMA commitments) until 2 June 2011.

121. Ms McEvoy's report on the claimant's sexual harassment allegations was produced on 9 February 2011. The report appeared at pages 414 – 417 with appendices running through to page 436. Her finding was that there was no evidence to support the allegations about Mr Upadhyay's treatment of the claimant, and she recommended that there was no case to answer. Dr Russell adopted this recommendation and confirmed in a letter of 16 February at page 439 that there would be no disciplinary proceedings against Mr Upadhyay. The claimant was given the opportunity of pursuing the matter through the grievance procedure if she disagreed with the outcome but did not do so.

122. The claimant set out about preparing her defence to the disciplinary allegations. On 4 March she prepared a detailed response to Mr Upadhyay's allegation at pages 441 – 448. She also provided a witness statement from Victoria Cleary which was signed on 17 March 2011 but which had been drafted some time earlier. It appeared at page 450. It confirmed that she had worked with Mr Upadhyay for several years, never had reason to question his clinical abilities but did have to deal with complaints **"from at least three female patients concerning his apparent**

inability to communicate with them in an open and empathetic manner." She made a passing reference to the PALS issue from 8 June 2009.

123. The management case for the hearing was prepared by Dr Russell. The written document appeared at pages 458 – 471. He reviewed the results of Ms McEvoy's investigation. He provided some information about the complaint the claimant had made about Mr Upadhyay in September 2009 and how Mr Fabri had dealt with that issue, and he pointed out that the panel might be surprised that Dr Saleem confirmed the claimant was happy for Mr Upadhyay to look after one of her patients during the night when she was so critical of his abilities. He reviewed the evidence of the coffee cup incident and pointed out that neither Mr Mediratta nor Mr Poulis recalled the incident. The claimant's position was that she could not recall it at all and she denied any bullying of Mr Upadhyay. Dr Russell suggested that in her September 2010 complaint about the rota master issue the claimant had been aware from the outset that her complaint about the junior who refused to provide cover would lead to Mr Upadhyay being identified and dealt with. Dr Russell suggested that the allegation of sexual harassment that the claimant made on 29 September 2010 was an immediate counter response to Mr Upadhyay's complaint and he referred to the mediation discussion in November 2010 as evidence that the claimant was willing to drop her complaint if Mr Upadhyay dropped his. He recorded that Mr Upadhyay had refused to enter into mediation on that basis.

124. The hearing before the panel chaired by Ms Richards took place on 2 June 2011. The notes appeared at page 472 – 499. Mr Upadhyay gave evidence. On page 477 he mentioned an incident with a patient who had suspected abdominal problems as follows:

> **"I had one patient during early 2010 and the patient had bad suspected abdominal problems. I called [the claimant] and she shouted at me and said 'You are supposed to be Senior Registrar why are you calling me?' "**

125. At the top of page 478 it was put to Mr Upadhyay that in the management case Dr Russell had described how Dr Upadhyay felt uncomfortable and anxious whilst covering ITU. In response Mr Upadhyay was recorded as saying this:

> **"The job plan I had was for 1 – 2 sessions per week on ITU and the response I received from [the claimant] was always aggressive. I found myself double-checking [the claimant]'s patients to ensure I had missed nothing."**

126. On pages 492 – 494 there was recorded a detailed summary by the claimant of her case. In the course of that she said that it looked increasingly as though there was a campaign to discredit her based on the fact she was a female consultant, and she was concerned that the Trust appeared to take all male statements as factually accurate but dismiss hers. She said that she and her BMA rep had raised the issue of sexual harassment in the appeal hearing on 5 February 2010 (before the panel chaired by Mr Cummins – see page 283) but her complaints had been ignored. She suggested there was no evidence that Mr Upadhyay had had any direct clinical contact with her in the relevant period. She made plain her view that Mr Fabri had not properly investigated her complaint about Mr Upadhyay in 2009.

127. The outcome of the disciplinary hearing was conveyed by Ms Richards in a letter of 3 June 2011 at pages 500 – 501. The conclusion was expressed as follows:

> **"I reached the conclusion that the allegation that you bullied, intimidated and harassed this member of staff had been substantiated. Your actions and behaviours in relation to Mr Upadhyay have clearly resulted in him suffering detriment. Whilst you presented a view as to the innocent nature of your actions, I found this unconvincing. There is no doubt in my mind that your actions were motivated to bully and harass Mr Upadhyay, and that this was the impact on him. Your behaviour is serious misconduct. This forms a pattern of serious misconduct since 2008 culminating in you being issued with a first written warning in November 2009 for the same behaviours. It was also noted that the allegations considered at yesterday's hearing occurred during the time whilst that sanction was live on your file.**
>
> **I did consider dismissing you from your employment with the Trust. However, I am willing to give you a final opportunity to change your behaviour. Should further incidents of misconduct occur, this is likely to result in your dismissal from the Trust. This is a final written warning that will remain active for a period of two years and will end on 2 June 2013."**

Appeal Against Final Written Warning

128. The claimant was given the right of appeal, which she exercised 8 June 2011 at page 504. In the meantime, and in the light of what she had said about Mr Fabri and the 2009 complaint about Mr Upadhyay, Dr Russell wrote to her on 6 June [page 503] saying that if she wanted to question Mr Fabri's clinical and managerial competence she should confirm in writing the specific nature and details of her allegation by 14 June 2011. The claimant responded on 22 June by e-mail at page 507a suggesting Mr Fabri had been incorrect in deciding there had been no adverse outcome in one of the two patients' case, but saying she had no issues with his managerial competence. In a reply on 25 July 2011 Dr Russell noted that and the matter went no further.

129. That same day, 25 July 2011, two other matters of relevance occurred. The first was an incident in theatre which concerned the use by the claimant of a product called "Kryptonite". We will return to that matter below. The second was that Dr Russell had to write to a male consultant in relation to whom allegations had been made. His letter appeared at page 1052. Because of what Dr Russell described as **"increasingly unpredictable behaviour"**, the consultant was asked to cease operating and to take sick leave until the issue could be resolved.

130. The claimant's appeal against the final written warning was to be heard on 15 August 2011 by a panel chaired by the Chief Executive, Mr Jain. Mr Cummins was also on the panel. The management's statement of case for the appeal was prepared on 4 August and appeared in the Bundle at pages 509 – 512.

131. The claimant's case for the appeal was set out extensively in written documentation. Her grounds for appeal appeared at pages 513 – 515, her statement of case appeared at pages 516 – 521, and her response to the management case appeared at pages 522 – 524. Her grounds of appeal included the suggestion that Dr Russell had misrepresented both her immediate reaction to Mr Upadhyay's complaint and the nature of the discussion about mediation in

November 2010, and she took particular issue with Mr Upadhyay's allegations when set against the records as to how often she had worked with him. She suggested that she had no cases on the ITU in February 2010 and that there had been no cases with abdominal complications in the last year. She pointed out that he had changed his evidence when confronted with the detail. In the conclusion in her grounds of appeal she alleged that the Trust would accept statements from male members of staff without question but disbelieve the statements made by female members of staff.

132. In preparing for the hearing at which she was to present the management case, Ms Richards reviewed the claimant's statement of case and made some notes on it. She saw that the claimant was taking issue with the data about the types of cases she had handled. (We consider this in more detail in paragraphs 278-87 below but will provide an overview here.) She caused an enquiry to be made of the Clinical Information Team and this produced an e-mail sent to her by James McShane on 12 August 2011 at 3:17 pm.

133. That e-mail appeared at page 1091. Ms Richards had asked for cases dealt with by the claimant with abdominal complications between 1 September and 14 June 2010. Three were identified on 17 November 2009, 16 April 2010 and 16 September 2010 respectively. That e-mail arrived on the Friday afternoon before the appeal hearing on Monday 15 August. The claimant was not given that information before the appeal hearing.

134. The notes of the appeal hearing appeared at pages 535 – 532. The claimant was represented by another person from the BMA. It was a lengthy meeting in which the claimant's case was put forward fully.

135. On page 548 it was recorded that the claimant said that she had had no cases with abdominal pain for the whole of 2010, and in response Ms Richards said that she had had two such cases between April and September 2010. That was because of the enquiry she had made. The claimant had made her own enquiries which did not appear to tally.

136. There was also a discussion about why the claimant had not raised her sexual harassment complaint through the Dignity at Work Policy after the appeal hearing in February 2010.

137. The decision of the appeal panel was to reject the appeal and confirm the final written warning. The outcome letter was dated 16 August 2011 and appeared at pages 553 – 558. The panel noted that the claimant's suggestion that there were no relevant cases during early 2010 was clearly flawed and that this cast doubt over her challenge to Mr Upadhyay's version of events. Having examined the notes of the previous appeal in February 2010 they found no complaint of sexual harassment. The conclusion was that the final written warning had been correctly administered. There was no further right of appeal.

138. The claimant pursued the data issue after the appeal outcome. On 30 August (page 1098) she asked Ms Richards to provide the details, and she was referred to the data team who provided it. They had originally provided the claimant with a

spreadsheet which appeared at pages 1099 – 1102, but which had not recorded abdominal pain for the three patients in question. The outcome of these enquiries was that on 6 September 2011 [page 1103] James McShane e-mailed the claimant to confirm that the information he provided to Ms Richards did accurately reflect what was recorded on the spreadsheet that was provided to the claimant which was drawn from the cardiac surgery database.

139. The claimant did not take this issue any further. She had been excluded by this time (see below). When cross-examined in our hearing she initially said that she did not have access to her e-mails any longer. When it was pointed out that this was an external e-mail address (@doctors.org.uk) she then said that she still had never received it.

Kryptonite Incident

140. The incident which led to the claimant's dismissal was known as the Kryptonite incident and occurred on 25 July 2011.

141. Kryptonite was a product which had not previously been used in the Trust. It was an adhesive which was used to promote bone healing when the sternum of a patient was closed following cardiac surgery. It was distinguishable from bone cement as used by Orthopaedic Surgeons in that it did not require any exothermic reaction, did not need to be prepared in a fume cupboard, and was biodegradable: over time it was absorbed into the patient's body. Its key feature for our purposes, however, was that after a period of time (said to be either 2, 5, or 8 hours in various places) it would have set hard meaning that if the need arose to reopen the sternum of that patient a saw would have to be used. This made it different from the usual practice at the Trust of simply closing the sternum with wires or some other method known as Flexigrips, which would not require use of a sternal saw if the chest had to be reopened following post-surgical complications.

142. The claimant had come across Kryptonite earlier in 2011. It was manufactured by a company of whom the representative was Guy Cooper, but was distributed through a different company called Sorin. Sally Crosby was their representative. The claimant had met Guy Cooper and discussed Kryptonite at a conference in the USA in May 2011, and had discussed the possible use of the product with her fellow consultant Mr Pullan in May 2011. He had not shown any desire to start using the product. She had found out more information about it at a symposium in Liverpool on 9 June 2011.

143. Arrangements had been made in the summer for Sally Crosby to observe the claimant operating on Monday 25 July 2011. This was normal practice for representatives of suppliers. Visitors to theatre of this kind had to be approved in advance in accordance with the theatre visitors' policy. In principle it should not have been possible for a visitor to get through reception, let alone into the theatre without this having been done.

144. At page 638 in the Bundle there appeared an e-mail from Sally Crosby to the claimant on 24 June 2011 seeking to make arrangements about when Ms Crosby could come in. The claimant was then away between 9 and 23 July in Sri Lanka on

a combination of examining and study leave. On 14 July at page 639 Sally Crosby sent an e-mail to the claimant to check that it was okay for her to be in theatre with the claimant on Monday 25 July. That was an appointment made with the claimant's secretary a while ago. Her e-mail also included this sentence:

> **"Guy Cooper is available on 25th, thinking about Kryptonite – would you like me to arrange a sterile sample free of charge you could elect to use with his guidance on this day? Let me know your thoughts."**

145. Crucially, the claimant did not see this e-mail.

146. The following day Sally Crosby e-mailed the Theatre Manager, Julie Simmons. Julie Simmons had responsibility for all non-clinical aspects of the theatre including the admission of visitors. The e-mail appeared at page 629. It sought to check that it was in order for Ms Crosby to visit on 25 July. That e-mail made no mention of Mr Cooper.

147. The precise details of what then ensued on 25 July 2011 were at the heart of the dismissal case and will be considered in detail in our discussion and conclusions. What follows is an overview of the sequence of events which resulted in dismissal.

148. On 25 July the claimant was operating on her first day back at work following her return from Sri Lanka at the weekend. Ms Crosby and Mr Cooper came into her theatre. In the course of the operation Mr Cooper suggested that the claimant might wish to use Kryptonite. A discussion in theatre ensued. The only other clinician with knowledge of the patient's previous medical record was the Consultant Anaesthetist, Mr Palmer. He thought it would be sensible to use Kryptonite and the claimant decided to apply it to the patient's chest. The patient was then returned to the POCCU in the normal way. However, Mr Cooper pointed out to staff that they might need a sternal saw if reopening was needed and hurried arrangements were made for a sternal saw to be available on the POCCU ward. This was not normal practice and once she learned of it the claimant regarded it as an overreaction. Happily there were no complications of that kind. However, staff were concerned that Mr Cooper had managed to be present in the theatre and that Kryptonite had been used for the first time in a way which meant that post-operative management of the claimant might be significantly different. The consequence was that the General Manager, Ms Conley made her concerns about what had happened known to Dr Russell. Dr Russell decided that the incident needed to be investigated and he appointed Dr Page as case manager. Dr Russell also decided that the investigation would be carried out by the Associate Director for Quality Improvement, Dr Mark Jackson, assisted by the Deputy Director of Nursing and Governance, Susan Pemberton. For the sake of brevity we will refer to the investigation as Dr Jackson's investigation. (A critical incident report was also submitted by the Theatre Team Leader Ms Heslop but Dr Russell was very clear that he acted because of Ms Conley's report. We did not see the critical incident report.)

149. Although Dr Russell had decided that Dr Jackson would investigate, the terms of reference were set by Dr Page. They appeared at the heading of Dr Jackson's eventual report on page 587 as follows:

> **"The purpose of this report is to investigate an alleged incident occurring on 25 July 2011 regarding a potential breach of the New Technology Policy in theatres. This concerned the application of Kryptonite (a novel bone cement) to support the sternal closure of a patient operated on by Miss E M Griffiths (EMG).**
>
> **Terms of reference:**
>
> - **to establish the facts in relation to the alleged incident**
> - **to report the findings to the Case Manager."**

150. At 9:15 on 26 July the Theatre Receptionist, Alex Crane, sent an e-mail to Ms Simmons at 9:15 am [page 647] in which she said that on arrival Ms Crosby had said that she did not have permission for her colleague Mr Cooper to come in and that e-mail from Ms Crane said this:

> **"I went and asked Miss Griffiths if it was ok that both reps came into her theatre and that also they had sterile samples for her to use and she said this was fine. So I showed them where to get changed and they went in."**

151. Dr Jackson spoke to the claimant initially on 27 June. The notes appeared at pages 600 – 602. The claimant was recorded as agreeing that it had been an **"unmitigated disaster"**. She was interviewed again the following day [pages 603 – 604] and informed that it would be a disciplinary investigation. The note at page 604 recorded the following:

> **"Mark Jackson went on to explain that the seriousness of these allegations had led to us considering exclusion of Miss Griffiths however due to her expression of remorse at the previous meeting and agreeing short-term measures until the investigation is complete this will not be taken forward at this time."**

152. The decision to investigate was confirmed in a letter to the claimant from Dr Jackson on 29 July 2011 at pages 605 – 606. The claimant was asked to provide a statement detailing her account of events by 5 August.

Sorin Letter and Exclusion

153. Dr Jackson and his colleague proceeded with interviews. They interviewed Ms Simmons on 28 July and Alex Crane on 29 July. They also interviewed Mr Knell-Moore of Sorin, Sally Crosby's boss, on 29 July. The claimant was aware of this because she saw his name in the visitors' book at the hospital. That day she wrote a letter to Sorin which appeared at page 566 (**"the Sorin letter"**). It set out the fact that she wanted to make a formal complaint to Sorin about the events of 25 July 2011, in that neither the product Kryptonite nor the product representative Guy Cooper had gone through the required channels to obtain clearance from the Trust. The claimant had only been informed days later that Mr Cooper had himself gone to the critical care area, insisting that a sternal saw was made available at the bedside and giving instructions to nursing and medical staff. She suggested this was totally unacceptable behaviour on his part. Her letter contained the following paragraph:

> **"Sorin is a highly respected company which I have been associated with for many years and have come to trust. The company is fully aware of the processes required to introduce a new product into UK hospitals. This is why I am particularly upset about**

this apparent attempt to bypass these procedures and the claim that they had appropriate clearance. I find the whole episode to be totally unacceptable. The result is that I am now potentially subject to serious disciplinary action by the Trust. As a dedicated user of your products I may no longer be able to co-operate with the company, and it may jeopardise the introduction of this valuable product into this Trust. I should be grateful if you would investigate the incident fully and prepare a written statement of the facts for submission to the Trust."

154. The claimant sent a copy of this letter to Mr Jain under cover of a letter which was undated but which arrived on 5 August 2011. She also included her account of events as requested by Dr Jackson in a document headed "Incident Report". The letter to Mr Jain was at page 560 and the incident report at pages 561 – 565. The thrust of what she was saying was that she had been informed that the second representative Mr Cooper had permission to be there, and that if the product Kryptonite was made available to her for use in the theatre then she was entitled to assume that it had been properly cleared for use. She emphasised that it was her clinical opinion that Kryptonite would have significant benefit to the patient given the number of other problems which he had. She suggested that she and her patient had been the innocent victims of the Trust's incompetence and that the Trust had failed in its duty to protect her as an employee. She made the point that she had not been provided with a copy of the New Technology Policy and wanted to see it.

155. The claimant's letter and enclosures were passed to Dr Jackson, and on 31 August he and Sue Pemberton had a meeting with Dr Page. That meeting was recorded in the file note of Dr Page at page 567a. It recorded a clear concern that the Sorin letter represented the claimant trying to influence the investigation and could prejudice an objective and accurate outcome. That same day, Miss McEvoy spoke to NCAS and the record of what she told them appeared in the NCAS letter of 2 September 2011 at pages 570 – 572. NCAS were informed by Ms McEvoy that the claimant had a final written warning for bullying and harassment, and that the sending of the Sorin letter by the claimant was perceived at the Trust as being an attempt to influence any investigative process. NCAS advised Ms McEvoy to follow the guidance laid down in MHPS. The letter from NCAS to Ms McEvoy included these paragraphs:

"With regard to the issue of exclusion, I said that this is a matter for the Trust management to decide upon, but the Trust should ensure that sanctions are reasonable and proportionate, and in accordance with the guidance contained in Part II of MHPS. Paragraph 6-8 of Part II of MHPS make clear that the Trust should give due consideration to identifying, if considered feasible and appropriate, alternatives to exclusion such as supervised or non-clinical practice.

We noted that one of the accepted grounds for exclusion is if there is considered to be a clear risk that the practitioner's presence at work could impede the gathering of evidence. You said that the Trust's view is that past experience of managing [the claimant] in disciplinary situations indicates that she may seek to interfere with, or seek to influence the case investigation. You said that the letter she sent relating to her alleged misconduct, as detailed above, could be viewed as a pre-emptive attempt to influence witnesses and participants in the process.

I refer to paragraph 19 of Part II of MHPS which states that the practitioner should be given the opportunity at a meeting to state their case, and to suggest alternatives to exclusion. You said that you intend to meet with her in the near future, and that you

and your colleagues would come to a decision on the exclusion issue after meeting with [the claimant] and her representatives and hearing her comments."

156. The file note from Dr Page at page 567a recorded the decision to exclude the claimant as follows:

"Having discussed things with Glenn Russell, Anne McEvoy and Raj Jain on two occasions over the following sixteen hours, we agreed that this concern was valid. It was also felt that EMG should be excluded from the Trust until the investigation was complete, as being the only way to prevent further attempts to make contact with other witnesses to the incident."

157. Under cross-examination Dr Page said that the concern about witnesses being contacted was not particularly the witnesses from Sorin, but other witnesses. Although the witnesses had all been interviewed by then, many of the statements had still to be signed and it was possible that witnesses might be required to give evidence at a disciplinary hearing. He mentioned the fact that the claimant wanted to be proactive in the investigation, being firm in her views and asking for things to be done, and that she was critical of the Trust in the letter to Sorin. It was clear to Dr Page, he said, that the claimant accepted no responsibility and was resisting the idea that she had done something wrong. In that frame of mind he considered that she would be in a position to influence witnesses.

158. In her evidence Ms McEvoy identified three factors which were in her mind. She explained the delay during August by saying she had been on sick leave to 15 August and Mr Jain had been on leave, but the facts on which she relied were the Sorin letter and its reference to the claimant being disciplined, the way the claimant had behaved towards Mr Upadhyay, and a third factor. She had been informed by Mr Marshall (who had been interviewed in August 2009 by Cath Barton in investigating Mr Upadhyay's first complaint) that the claimant had made a remark to Mr Marshall about future problems with his professional registration and career development. Ms McEvoy interpreted this as the claimant seeking to put pressure on Mr Marshall to support her.

159. Although NCAS had recommended that the practitioner be given the opportunity at a meeting to state her case and suggest alternatives to exclusion, it appeared that this did not happen. Ms McEvoy met the claimant on 2 September 2011 and according to her letter confirming suspension of 5 September [page 670] Ms McEvoy informed the claimant that a decision had been taken by Dr Page to formally exclude her from duty. Exclusion took effect on 2 September 2011 and remained in place until the claimant was dismissed.

Jackson Investigation September – November 2011

160. The formal investigative interview with the claimant occurred on 22 September 2011. The notes appeared at pages 607 – 619. The claimant was accompanied by her BMA representative and a detailed discussion ensued. The claimant said she had no recollection of receiving an e-mail from Sally Crosby and subsequently confirmed that there was no record in her home e-mail account [page 609]. There was discussion about procedures for clearing new products and the claimant distinguished a new product requiring funding or equipment from simply

using samples in a theatre environment. She made the point that she had printed the New Technology Policy off the intranet but the version she had obtained [page 850d] was issue 1.1 from January 2009, had a review date of June 2010 and was not in force in 2011 because after the review date it contained the rubric:

> **"This document is no longer authorised for use after this date".**

161. Dr Jackson responded by saying there was a current version of the Policy and that it was reviewed and updated on an annual basis.

162. The investigatory interview also discussed the comparison between Kryptonite and other products introduced in the Trust without use of the New Technology Procedure. One example was Flexigrips. They were used in addition to wires as an adjunct to sternal closure. They would need to be cooled with ice and a special tool used to remove them, although that could be done on the POCCU ward without going back to theatre. The claimant made the point [page 614] that Flexigrips were introduced by male colleagues without having to go through the New Technology Procedure.

163. After this meeting enquiry was made about Flexigrips. Ms Simmons the Theatre Manager contacted a representative of the supplier, and his e-mail with information at page 57a was forwarded by Julie Simmons to Dr Jackson on 29 September 2011.

164. Ms Simmons was re-interviewed by Dr Jackson on 20 October [page 635] and Sally Crosby interviewed again on 1 November [page 623].

165. Dr Page decided to obtain some external clinical input into the investigatory process. The claimant had no input into the identity of the expert chosen. It was Simon Kendall, a Consultant Cardiothoracic Surgeon at the James Cook University Hospital in Middlesbrough. He was well respected in his field but the respondent did not know whether he had any experience of Kryptonite. Dr Jackson wrote to Mr Kendall on 11 November 2011 at page 582b – c. The draft report [pages 759 – 770] from Dr Jackson was provided, but not any of the appendices. The full details of the claimant's case (in her incident report and the notes of her investigatory meeting on 22 September) were not provided to Mr Kendall. He was asked two questions which he answered in a letter of 17 November at page 675. His letter confirmed that he had considered two information packs regarding Kryptonite, and he gave the opinion that the issues raised were professional misconduct because patient safety was compromised. The basis for the view that patient safety had been compromised was that the risk of a need to reopen with a sternal saw made it very important that the Intensive Care Unit was informed and educated about such technology and prepared for the sternal saw to be available if required. From the documents Mr Kendall received he saw that no such plans had been made. He answered the two questions put to him by saying firstly that it was a matter of professional misconduct rather than personal misconduct and secondly that if the allegations were proven then it was possible that disciplinary action was required. He ended by saying that he would expect a Cardiothoracic Consultant to be familiar with the process for introducing new therapy and technology.

166. Although the final report is not dated, it appears to have been in late November or early December that the Jackson report was finalised [pages 586 – 598]. The conclusion was set out in seven numbered points on page 597. It included the fact that there was no evidence the fact the patient had consented either to the representatives being in theatre or to the use of Kryptonite, that there was no authorisation in place for the use of Kryptonite as a new technology, that the necessary checks had not been undertaken about the use of that product, that there had been no discussion with the theatre team on the use of the product prior to its preparation and application, and that no provision had been put in place for immediate post-operative care of the patient regarding preparation, training and the potential use of the sternal saw.

167. In addition the report offered three recommendations which were described as **"beyond the scope of the investigation"**:

i. Access to the theatre environment should be better controlled.

ii. Refresher training should be undertaken with staff in using the WHO Safe Surgery Checklist (which identifies those present in the theatre and gives an opportunity for any concerns to be raised).

iii. The process for theatre product approval and the New Technology Policy should be harmonised.

168. This third point was a recognition of the fact that the Trust had two different ways of approving new products. The first was through the New Technology Product Policy which put matters before the Clinical Audit and Effectiveness Group ("CAEG) for approval. The second was an informal procedure whereby products were discussed amongst consultants and approved by the Theatre Manager. The informal procedure was appropriate where the products did not represent a significantly different approach or a new technology. The question of whether a product should be introduced under the formal procedure or the informal procedure was a matter of judgment in each case.

169. Whilst the Jackson report was being finalised Ms McEvoy spoke again to NCAS on 17 November 2011 as recorded in their letter to her of the same date at page 583 and 584. That letter included the following paragraph:

> **"We discussed the continuation of the exclusion in this case, given that the case investigation is now effectively completed. I said that this is also a matter of judgment for the Trust, but said that the Trust would need to be explicit in its understanding about the grounds for continuing the exclusion, and it would need to notify [the claimant] in the event that the grounds for exclusion have significantly altered."**

Disciplinary Charges December 2011

170. Having considered the Jackson report in early December with Dr Russell Dr Page decided that the claimant should face disciplinary charges. That was conveyed to her in a letter from Ms McEvoy of 9 December at page 677. The letter made clear that Dr Jackson had re-categorised the claimant's actions as professional misconduct, and that contact with the BMA indicated that it was no

longer appropriate for them to represent the claimant: she would be represented by the Medical Defence Union instead. The disciplinary charges were not specified in that letter.

171. By letter of 29 December 2011 at page 682 the disciplinary hearing was arranged for 20 January 2012. The panel was to be chaired by the Chief Executive Mr Jain. The external medical practitioner was Mr Mark Jones, Consultant Cardiothoracic Surgeon at the University Hospitals of South Manchester.

172. The same day the MDU e-mailed Ms McEvoy [page 684] with a number of queries including a request for the copy of the investigation report, and the e-mail said:

> **"I have presumed that the suspension will remain in place due to the fact that the matter is progressing to a disciplinary hearing (according to your policy document)."**

173. The Jackson report and appendices were provided to the claimant and her adviser in early January 2012. On 9 January 2012 Ms McEvoy told NCAS that the claimant was still excluded until the conclusion of the disciplinary process. The hearing was eventually postponed twice and took place on 28 March 2012.

174. The MDU instructed solicitors to represent the claimant and her solicitor Mr Rowley wrote to the Trust about a number of matters including a request for specific allegations. The response to that letter came on 23 February 2012 at page 706. It confirmed that the specific allegations were those set out in paragraphs 1 – 7 in the conclusion of the Jackson report [page 597]. Further information was provided about the particular parts of the New Technology Policy which had been breached, and the letter made it clear that patient safety had potentially been compromised.

175. On 15 March 2012 Alex Crane was interviewed again by Dr Jackson and she confirmed what she had said in her e-mail of 26 July: that she told the claimant that there was another rep with Sally Crosby from Sorin and that the claimant had said that it was fine for both representatives to come in. The note of that interview appeared at page 700. Julie Simmons also provided some more information on 22 March 2012 at pages 701 – 703.

176. The claimant's case was put on paper prior to the disciplinary hearing on 23 March 2012. It was put clearly and in detail. Her solicitors had prepared a schedule of what they understood the allegations to be at pages 708 – 713, and that was accompanied by a defence statement of case at pages 714 – 724, and a witness statement from the claimant at pages 725 – 746. That witness statement asserted (page 732) that the claimant had not been told that two representatives were going to come into theatre and that she had been led to believe that Julie Simmons as Theatre Manager had cleared the presence of the second representative.

Disciplinary Hearing 28 March 2012 and Dismissal

177. The disciplinary hearing took place on 28 March 2012 before the panel chaired by Mr Jain. The panel consisted of an external medical practitioner, who was Mark Jones, a Consultant Cardiothoracic Surgeon at the University Hospitals of

South Manchester NHS Foundation Trust. His presence on the panel as the external medical practitioner had been agreed with the Local Negotiating Committee of the BMA. The other member of the panel was Susan Westbury providing HR advice. The notes appeared at pages 772 – 802. The witnesses called to the hearing by management were Julie Simmons and Alex Crane. The claimant had called Dr Russell as a witness and gave evidence to the hearing herself. At the outset the claimant's solicitor confirmed that he had no issues with understanding the allegations but wanted to highlight an issue about the New Technology Policy. The issue about the New Technology Policy had been put in the defence statement of case. The Trust disclosed a copy by e-mail on 21 February 2012. It was different from the copy which the claimant had already obtained from the intranet. The Trust copy appeared in our Bundle at page 851a. It too was issue 1.1 from January 2009, but the review date had been changed from June 2010 to June 2011, and the rubric saying that the Policy was not authorised for use after that review date had been removed. The claimant was extremely suspicious about this because it appeared to her that the Policy had been altered so that her argument that it was no longer in force after June 2010 was untenable. This issue was not finalised at the disciplinary hearing. (For the appeal hearing Dr Jackson prepared a statement on 10 August 2012 at page 851 which said that it was not possible to verify which policy was in force on 25 July 2011 because the server that supported the intranet was decommissioned by a partner hospital in August 2011 and all archive material lost. His notes also said that having made enquiries he understood that the rubric **"the document is no longer authorised to use after this date"** had been included in all policies but that ceased some time in 2010.)

178. During the hearing the claimant also raised the issue of "VATS Lobectomy". This was a surgical technique which had been used on one occasion at the respondent in the late 1990s but which was used more regularly from August 2009 by a male consultant, Michael Shackcloth. Between August 2009 and December 2010 it had been performed in eight cases, but was used more regularly following a visit to Copenhagen in November 2010 to observe it in use elsewhere. Mr Shackcloth attended the CAEG on 30 March 2011 and by letter of 6 April 2011 [page 996] the CAEG Administrator confirmed that the Trust was happy for him to continue with the programme to introduce "this new technology". The letter said this:

> **"Your application and subsequent discussion at the meeting demonstrates that you have the necessary arrangements in place for governance, consent and audit. This was approved subject to the following:**
>
> **1. Inform healthcare professionals involved in managing patients receiving this procedure about the new procedure and its introduction at [the respondent].**
>
> **2. Provide the necessary training for nurses in the pre-operative care setting to ensure effective management of these patients post-operatively. Liaise with Cheryl Finney to implement."**

179. It was clear, therefore, that this was on the face of it new technology introduced by a male consultant which had been used before CAEG approval under the new technology policy.

180. After considering matters the panel decided that the claimant should be dismissed. The decision was set out in a dismissal letter dated 4 April 2012 at pages 805 – 809. The letter recorded four allegations having been summarised at the hearing. Those four allegations and the panel's conclusions can be summarised as follows.

181. The first allegation was that the claimant had failed to obtain patient consent to a second medical representative attending in theatre and to use of Kryptonite bone cement. The initial allegation had been that no consent had been obtained to the representatives at all. The conclusion was that there had been failures in the systems to control entry of people and products into the theatre, which was a management and staff failing, but that the claimant had been notified about the presence of Mr Cooper prior to his entry to the theatre. The core conclusion was that the central issue was one of patient safety and obtaining patient consent to the use of Kryptonite was the claimant's responsibility. The panel regarded Kryptonite as a **"novel technique for joining the sternum"**.

182. The second allegation was that the claimant failed to follow the New Technology Policy. The conclusion was that the policy had been circulated to all consultants in 2008, and that even if the Policy was out of date or lapsed the claimant should still have followed its terms, or made an enquiry if there was any uncertainty. The panel rejected the argument that Kryptonite was similar to other substances which enhance bone healing and regarded it as a way of **"cementing the sternum"**.

183. The third allegation was that the claimant failed to notify or discuss her intention to use Kryptonite bone cement with the theatre team, and the conclusion was that she did not make any attempt to consult with the team about the use of this product on the patient.

184. The fourth allegation was that the claimant had not made adequate provision for post-operative care. The use of the word **"proactive"** in this allegation by Dr Page at the hearing had been corrected. The conclusion of the panel was that the claimant had not given due and proper consideration to the potential harm that could result to the patient from inadequate preparation of the Post-surgical Support Team, in POCCU and general ward. Staff should have been made aware of the risks and how to manage them prior to the procedure so they had good time to prepare.

185. The overall conclusion of the panel was that the claimant had committed professional misconduct in contravening patients' rights and compromising patient safety. According to Mr Jain's evidence to our hearing, Mr Jones regarded the claimant's conduct as "8 or 9 out of 10" in seriousness. However, it was not regarded as gross misconduct but it warranted a disciplinary sanction. The mitigating circumstances were considered, including the fact the claimant had been employed for 17 years, but the conclusion was as follows:

> **"... given the nature of the offence and the existence of a final written warning for misconduct, the panel concluded that the appropriate sanction in this case was dismissal for misconduct."**

Appeal Against Dismissal

186. The claimant appealed by letter of 18 April at page 810. Her appeal was confirmed a few days later at page 812. The hearing was set for 27 June 2012 but was delayed at the request of the claimant. It eventually took place on 23 August 2012. The panel was chaired by the Trust Chairman, Mr Large, and the panel included Mr Appleton, a non-Executive Director, and the clinician acting as external adviser was Professor Danny Keenan. The claimant made no objection to Professor Keenan being on the panel, although in her evidence to our hearing she said that Professor Keenan had been unhappy that a female colleague (the claimant) had managed to get the Health Minister to launch the National Service Framework at her hospital not at his.

187. The claimant's grounds of appeal ran to 31 pages and appeared at page 820 – 850. The notes of the appeal hearing appeared between pages 852 and 864. The appeal outcome letter was dated 5 September 2012 and appeared at pages 865 – 867. The appeal was rejected and dismissal confirmed. The six main grounds of appeal were considered in turn in the letter. The appeal panel concluded that the investigation and disciplinary hearing had been fair, that the fact the New Technology Policy was no longer in force in July 2011 was not a defence because it was still a matter of professional responsibility and patient safety. The panel rejected the conclusion that the disciplinary panel had placed inadequate weight on material supporting the claimant and the suggestion that they had made findings unsupported by evidence, and considered that the sanction of dismissal was proportionate and fair.

Events After Dismissal

188. On 7 September 2012 Joanne Allison of the BMA wrote to the claimant [page 868] confirming her recollection of the discussions about mediation in November 2010. She said:

> **"The proposal was made as a genuine attempt to try and resolve the ongoing professional relationship difficulties between yourself and Mr Upadhyay. There were no caveats placed on the proposal made. However from my recollection, we did discuss during the investigatory meeting the possible need for you and Mr Upadhyay to withdraw or place on hold your formal complaints to allow the mediation process a chance of success. Again this was a genuine suggestion, only in order to try and agree an alternative solution to the proposed formal complaint/investigation and to address the ongoing difficulties."**

189. Finally, Mr Upadhyay had made a complaint to the GMC following his second complaint about the claimant and in the course of the GMC investigation into that matter the respondent notified the GMC of the Kryptonite incident and what had happened. The eventual outcome of the GMC enquiry was contained in a letter at page 869 dated 14 May 2013. This was of course not material which was before the Trust during the disciplinary and appeal processes. The conclusion of the GMC was that there was no realistic prospect of establishing that the claimant's fitness to practise could be called into question. The view of the GMC expert about the use of Kryptonite was that it was not essential that it be submitted for consideration by the CAEG but that it was unwise for the claimant to agree to the use of the product when

it was offered. However, the expert recognised that she could have been distracted because it occurred during the operation. He concluded that the claimant had made an error of judgment in using the Kryptonite opportunistically, but that this was not seriously below the standard expected of a Consultant Cardiothoracic Surgeon. As to patient consent, the GMC said this:

> **"The Trust also alleged a failure to obtain informed consent from the patient. On the basis of the expert report and because of the facts of the case, no allegation was put to Ms Griffiths about this. In broad summary there is no requirement to obtain consent for the use of particular products unless they are experimental or part of a research project."**

Submissions

190. A pause after the conclusion of the evidence in the case allowed the representatives to produce detailed written submissions, both of which were most helpful to the Tribunal in its deliberations. References should be made to the written documents for the detail of the submissions. They were supplemented by brief oral submissions.

191. In his oral submission on behalf of the claimant Mr Healy invited us to focus on the findings of the dismissal panel as set out in the dismissal letter, and submitted that upon close examination each of the reasons given for concluding that the claimant had been guilty of misconduct would unravel. He therefore submitted that the dismissal failed to meet the **Burchell** test. If we were against him on that, he submitted that the decision to dismiss the claimant was outside the band of reasonable responses because reliance on the final written warning was untenable: either because that final written warning was tainted by discrimination, or in the alternative because it was a warning about an entirely different kind of conduct and therefore outside the band of reasonable responses to take it into account.

192. As to the discrimination claims, the claimant's case was based upon a detailed examination of the circumstances of each allegation and the way in which it was handled by management, an examination which was addressed in detail in the written submission.

193. For the respondent Mr Gilroy QC invited us to conclude that the claimant's case that there was a campaign of discrimination or victimisation conducted over the period simply did not stand up to scrutiny, partly because of the number of people who must have been drawn into that conspiracy for all the different aspects of her claim to succeed. He suggested that the claimant had found an explanation for every point which apparently stood against her case, and that our evaluation of her claimed lack of insight ought to assist us in deciding whether the employer handled matters in a reasonable and non-discriminatory way. He emphasised the gap between the conclusion of the 2003/2004 claims, and the first allegation of subsequent victimisation on which the claimant relied, being a gap of almost four years.

194. As to dismissal, Mr Gilroy QC emphasised the external input provided at the investigation stage (Mr Kendall), the dismissal stage (Mr Jones) and the appeal

stage (Professor Keenan). He also highlighted that the claimant had representation by experienced solicitors appointed by the Medical Defence Union throughout the disciplinary hearing and appeal, and therefore her case was fully and clearly articulated before the dismissing panel and the appeal panel.

195. As to the relevance of the final warning in the dismissal decision, Mr Gilroy QC submitted that it was within the band of reasonable responses to take the view that the final warning was relevant to any further misconduct, even of a different kind. He also highlighted that the change in the charges to professional misconduct rather than personal misconduct was inconsistent with any conspiracy because it presented the respondent with the obligation to bring in external clinical input.

196. As to time limits, it was submitted that the claimant had failed to show any grounds on which it was just and equitable to extend time, not least given her knowledge of Tribunal procedures from 2003/2004 and her access to BMA advice, but Mr Gilroy QC accepted that if the claimant was right about these matters amounting to a discriminatory campaign culminating in dismissal then there would be an act extending over a period.

Discussion and Conclusions

Part One: Introductory remarks

197. As part of our deliberations we reminded ourselves of the legal framework which is summarised in the annexes to these Reasons.

198. In relation to the discrimination claims we were alive to the point that if there had been a discriminatory campaign against the claimant because of her sex or because of her earlier Tribunal claims, it was unlikely that would feature overtly in the evidence. This was a case, therefore, where we had to find primary facts and then consider carefully what inferences could properly be drawn from those primary facts, assuming there was no adequate explanation. If the inference could reasonably be drawn that there had been sex discrimination or victimisation, the burden would then fall on the respondent to provide a different explanation. However, as **Madarassy** illustrates, the mere fact that the claimant was a woman treated badly, or was a person who had brought a previous sex discrimination complaint and was treated badly, would not be sufficient to shift the burden of proof to the respondent. There must be something more before a Tribunal can properly draw an inference that there has been a contravention of these provisions. In any event, as paragraph 21 of Annex A demonstrates, in some cases the Tribunal can properly dispense with a formal two stage analysis and concentrate on making a positive finding about the "reason why" particular actions were taken.

199. As far as the unfair dismissal claim was concerned the approach to be taken by the Tribunal was in many respects very different. If the respondent were able to establish a potentially fair reason for dismissal, our task under Section 98(4) would not be to make our own findings about the events in question, but rather to decide whether the employer's actions and decisions satisfied the **Burchell** test.

200. Finally, it is right to record that although we were not asked to make any findings about the allegations brought by the claimant in 2003/2004, and although the respondent denied and continues to deny any unlawful treatment of the claimant at any stage during her employment, it would hardly be surprising if the challenges faced by a female Cardiothoracic Surgeon in a minority of one in this Trust were different from those faced by a male surgeon. The claimant clearly believed that that was so. Equally the claimant believed that her earlier Tribunal claim played a significant part in the way she was treated from 2008 onwards. Our role, however, was to examine carefully the circumstances of each of the individual allegations of discriminatory treatment, to see them in their proper context, and to decide (by way of a positive finding or through inference from primary facts which the respondent could not disprove) whether that treatment was on the grounds of or because of sex, was by reason of or because of the protected act, or amounted to unwanted treatment related to sex which satisfied the statutory definition of harassment.

Part Two: Equality Act Allegations

201. Against that background we addressed the specific allegations of discriminatory treatment one by one. For convenience each allegation will be reproduced before we address it.

1a. That the respondent encouraged complaints of bullying by junior members of surgical staff against the claimant in March – July 2008. This allegation was levelled at Dr Russell and Dr Page.

1b. That the respondent treated the claimant less favourably than two male colleagues, Mr Niraj Mediratta and Mr John Chalmers, were treated in that complaints made against those comparators were not pursued beyond a general e-mail to all consultants, but in contrast the claimant was required to undergo informal discussions with the Medical Director which were (according to the List of Issues) equivalent to disciplinary action and a verbal warning.

202. It was convenient to consider these two issues together as they were so closely related.

203. For reasons set out in our summary of the relevant facts we concluded that the Deanery had not identified the names of the consultants who were said to be guilty of bullying, and furthermore that the note of the meeting on 31 March 2008 at page 111 was accurate. We concluded, therefore, that this was a spontaneous complaint by the junior doctors to the Deanery and there was no evidence that it had been encouraged or solicited by management.

204. As to whether the junior doctors were encouraged by management to focus on the claimant, it seemed to us that the description given by Dr Russell at the start of the meeting with the trainee surgical staff on 31 March 2008 as to what would constitute bullying was not done with the intention of focusing the complaint on the claimant, but rather to distinguish between the occasional stress-related outburst in theatre and behaviour which was more regularly displayed and which had an

adverse effect. That was a proper distinction to draw given the nature of surgery and the stresses under which consultants must have to operate.

205. We also rejected Mr Healy's contention that it was only "on reflection" that the claimant's behaviour was identified by Dr Russell as meeting that test. The evidence showed that the trainee surgical staff had a weekly meeting, and the second paragraph of the note, we concluded, showed that it was their conclusion that only the claimant had been bullying them after reflection on what Dr Russell had said. It was they who identified the claimant, not him.

206. Further, the trainee surgical staff were drawing a clear distinction between the other two consultants (who we now know were Mr Mediratta and Mr Chalmers) and the claimant. It was legitimate, we concluded, for Dr Russell to decide that they could be approached in different ways. The behaviour of the male consultants was borderline and therefore a general e-mail would be appropriate. It would be accompanied by regular consultation to see if their behaviour had changed.

207. That was considered not to be sufficient for the claimant, but not because of her sex or because of the earlier Tribunal complaint. It was because the trainees were saying that her behaviour was of a different order from that of the male consultants.

208. The discussion recorded at the end of the note was that Dr Russell said that an informal conversation with the claimant would be appropriate, but that Dr Page then said that she might wish to respond formally in which case a written group complaint would be needed. Mr Healy suggested that this was an example of Dr Page seeking to steer the trainees towards a formal written complaint. We rejected that. It was clear to us that Mr Page was not encouraging a written complaint but rather drawing attention to the fact that management might not be able to take the matter further with the claimant without something in writing. It reflected his anticipation of how the claimant might react, not because of who she was but because any consultant faced with an allegation of bullying might require specifics.

209. Indeed, we regarded it as significant that Dr Russell did not choose to go straight to a formal procedure. The desire to deal with it informally was to the benefit of the claimant. The claimant suggested that Dr Russell realised that he could not pursue it formally because there were no specific allegations, but we consider that it would not have been difficult for Dr Russell to have pressed the trainee surgical staff to come up with some specifics had he been intent on taking it further. As Medical Director he would be likely to hold considerable sway with that group of trainee surgeons.

210. Dr Russell did, however, have to bear in mind that the Deanery would want to know what had happened with the allegations and it was for that reason, we concluded, that he said in his letter of 7 May 2008 at page 116 that he would have **"no hesitation in pursuing a formal conduct investigation regarding this individual"**.

211. The manner in which he took it forward with the claimant was informal. It was not, as the List of Issues suggested, equivalent to disciplinary action and a verbal warning.

212. In paragraph 4 of his written submission Mr Healy suggested that Dr Russell had been inconsistent in his evidence on some features of the trainees' complaint, such as who suggested the general e-mail and when he learnt of the other consultants' names. We found that hardly surprising given that the events occurred in 2008 and such details were not recorded in the notes. We concluded that the names of the consultants regarded by the trainee surgical staff as behaving inappropriately did become known, but not through any formal notification or discussion in the meetings. The names became known more widely through what one witness termed "coffee room chit chat". The trainees would be bound to discuss matters amongst themselves and it appears a reasonable inference that the consultants became aware of this through such means. We did not place the weight on Dr Gilby's statement some eighteen months later that Mr Healy invited us to.

213. The meeting on 30 June 2008 recorded at page 119 was not, we concluded, called because of the incident with Mr Bashir. We accepted, however, that the issue of Mr Bashir had occurred recently and was in the minds of those present in the meeting. There was, however, no evidence that the Bashir issue was raised at the meeting. The diary note kept by Dr Russell at page 119 did not mention it. Had he been engaged in a discriminatory campaign against the claimant at this point with a view to making as much of the allegations as he could, one might have expected that to have been the focus of his note of the meeting. We concluded that the note accurately reflected the position: the trainees felt that the claimant's behaviour had not improved, they wanted to be excused from working with her, and having tried the informal approach without success Dr Russell suggested (as Dr Page had envisaged on 31 March 2008) that something in writing would be needed.

214. Mr Healy was critical of Dr Page's failure to explain to the trainees that there were two versions of events about the Bashir incident. Dr Page explained when interviewed by Ms Barton on 6 July 2009 [page 194] that he had spoken to Mr Bashir and the claimant and each had given a differing account. When cross-examined on this point in our hearing Dr Page said that the fact that Mr Bashir felt he had to say something in theatre was itself significant even though the claimant had a different version of the precise exchange.

215. We concluded that the trainees signed the letter at pages 120 – 122 not because management encouraged or persuaded them to do so, but because the informal approach had not worked and this was the next step. The delay between the date of the letter (6 July) and its receipt in late August was, we concluded, not due to anything sinister but simply reflection of the fact that those weeks covered the holiday period and the letter was eventually signed by fifteen doctors.

216. It was also noteworthy, we concluded, that even when this letter was received Dr Russell still sought to deal with the matter informally. That resulted in the meeting on 7 October 2008. Although the letter itself did not contain any specific allegations (in terms of dates), it would have been open to Dr Russell to have appointed someone to investigate it and to interview the individuals to obtain more details before considering whether there was a disciplinary case to answer. Instead he chose to deal with it by way of a further informal approach, which resulted in coaching to which the claimant agreed.

217. The way in which Dr Russell addressed this issue was comparable, we concluded, with how he addressed the issue in relation to Dr A. In that case he wanted to know through Dr Mudawi whether the trainee wanted to take matters forward formally or not, and he was assiduous in obtaining clarity as to the position. As far as we were aware, Dr A was not only a male consultant but also a consultant who had not previously pursued Tribunal proceedings against the Trust. This supported the respondent's position.

218. Overall our unanimous conclusion on this episode was that it was not related in any way to the claimant's sex or her earlier Tribunal claims. It was driven by the trainees, not by management, and contrary to the claimant's allegation the respondent's managers did not deal with it by way of disciplinary action when they could well have chosen to do so. The approach Dr Russell and his colleagues took, we concluded, was explained by a desire to be seen by the Deanery to be addressing matters in a proactive way but a recognition that the information coming from the trainees warranted an informal approach.

219. The allegations that the handling of this episode amounted to unlawful direct discrimination, sexual harassment or victimisation failed.

2. That allegations of bullying were made by Mr Upadhyay about the claimant following an incident which allegedly occurred on 29 May 2009 and as a result of which the claimant was aggressively confronted by Mr Upadhyay on 1 June 2009. This allegation was levelled at Mr Upadhyay. It was not pursued as victimisation.

220. This allegation (and allegation 5) differed from the remainder of the case in that it was not an allegation made against the claimant's managers. It was alleged by the claimant that Mr Upadhyay himself was guilty of direct sex discrimination and sexual harassment, not her managers. The respondent accepted that it was liable if the claims were well –founded.

221. In his written submission Mr Healy reminded us that Mr Upadhyay was a man of similar age to the claimant who was married and had grown-up children. According to Mr Upadhyay when interviewed in late 2010, his wife was a Consultant in Obstetrics and Gynaecology. His first complaint against the claimant was made on 1 June 2009. He had been working predominantly with the claimant since April 2009 (in succession to Mr Ghotkar).

222. The evidential material from which Mr Healy invited us to infer that Mr Upadhyay would not have made a complaint about a male surgeon who treated him in the same way was set out in paragraphs 11 – 13 of his written submission. Broadly it relied on three component parts: language used by Mr Upadhyay at the subsequent disciplinary hearing on 20 November 2009, other evidence of him exhibiting a poor attitude towards female patients, and his conduct on 1 June 2009 when he spoke to the claimant in her office. Mr Healy submitted that the evidence from these three sources had to be set against the fact that Mr Upadhyay had not been called as a witness by the Trust.

223. Before considering the three component parts on which Mr Healy based the claimant's case it was appropriate, we considered, to look at the background in the light of our finding about the 2008 matter. We found that in 2008 the claimant was genuinely viewed by the trainee surgical staff and staff grade doctors, including Mr Upadhyay, as the worst of the consultants in her treatment of them. There was no evidence before us of any male consultant treating those doctors or Mr Upadhyay in the same way as the claimant. Further, although the coaching notes recorded the claimant trying to change and approaching matters in a positive frame of mind, according to Dr Russell's note at page 118 when first informed of the allegations on 7 May 2008 the claimant had said she would try to change but **"would in all honesty find it difficult"**. It seemed to us unlikely that there had been a significant change in the claimant's behaviour between 2008 and the summer of 2009 despite the coaching. It was clear to us that the claimant remained entirely committed to patient care and that she had a perception that some individuals (including Mr Upadhyay) had failed to give her adequate support.

Mr Upadhay's Behaviour at the Perry Panel November 2009

224. Of the three elements which Mr Healy emphasised, the first was the language used by Mr Upadhyay in the subsequent disciplinary hearing before the Perry panel on 20 November 2009. For this hearing there were two sets of notes. It was plainly a situation in which Mr Upadhyay felt under pressure. He was in a meeting with the person he had accused of bullying him and was being questioned by management and by the claimant's BMA representative. His use of language and answers had to be seen in that light.

225. We rejected the suggestion that his references in the notes to the claimant as **"she"** could give rise to any negative connotation. The use of that word appeared to us to be a natural use of language in a situation where (particularly if the BMA notes are accurate) the questions and answers flowed quickly. It is evident from the notes that on at least one occasion Mr Upadhyay referred to Dr Russell as **"him"**.

226. It was also alleged that he had become heated in his response when questioned by women, being Ms Barton who presented the management case and Ms Alliston the claimant's BMA representative. It followed that the majority of questions he faced were from women rather than from men, although there were some questions asked by Dr Perry as chair of the panel. We did not consider that the fact Mr Upadhyay became agitated or heated during questioning by the women could support any adverse inference about a discriminatory element in his complaints. He was under challenge, particularly by the BMA but also more generally in the hearing itself.

227. The third strand of the language used at the disciplinary hearing was the comment about Mr Upadhyay's wife which appeared in different formulations in both sets of notes and which we quoted above. On the face of it this supported the claimant's case. To answer a question about working with senior staff who were female by referring to his wife appeared to be surprising. However, we bore in mind that his wife is herself a consultant. That makes the reference to his wife a little less surprising than one might consider. Insofar as it mattered, we considered that the

Trust's version was more likely to be accurate, not only because the answer was longer but because the questioning was being undertaken by Ms Alliston and the task of taking notes is more difficult whilst also questioning a witness. It seemed to us that the claimant was right to suggest that this answer provided some degree of support to her contention that his allegations were influenced by her sex.

Mr Upadhyay and Female Patients

228. The second element on which Mr Healy relied was evidence that Mr Upadhyay had treated female patients with a poor attitude. This was primarily a reference to the note from Ms Cleary at page 450, which we were told by the claimant had been compiled earlier albeit not signed until March 2011. That note showed us that there were complaints from at least three female patients concerning Mr Upadhyay. However, that evidence from Ms Cleary fell short of saying that it was only female patients who complained about him and that there were no difficulties with male patients. Having not heard from Ms Cleary in person on this point we were unable to clarify this with her. Similarly, although the PALS form from the complaint by a female patient on 8 June 2009 at page 230 onwards does show that his attitude towards that female patient was seen as inappropriate, there is nothing on the face of that report (even the full version) which suggests that this was because the patient was a woman, whether consciously or subconsciously. We concluded, therefore, that this element did not support the claimant's case about Mr Upadhyay.

1 June 2009

229. The third element was based upon the events of 1 June 2009. We recorded in our findings of fact above the way in which the differing accounts of this discussion were put. We regarded it as significant that the claimant did not suggest that he had behaved aggressively when first interviewed on 30 June 2009. We concluded that the claimant did find his approach to her at the end of the working day (when only the two of them were in her office) to some degree threatening, but not sufficiently to raise it at the time or to mention it when first interviewed about the matter by Cath Barton a month later. Indeed, both parties seemed to accept that the discussion did clear the air to some extent, albeit for a short-lived period. In those circumstances we concluded that despite the claimant's perception there had not been any intimidatory behaviour on the part of Mr Upadhyay.

Conclusion

230. Weighing these matters in the balance it appeared that only the answer about his wife in the subsequent disciplinary hearing lent any appreciable support to the contention that Mr Upadhyay's complaint was tainted by sex discrimination or related to the claimant's sex. Set against that were a number of other factors. Firstly, for reasons set out above we concluded that it was likely on the balance of probabilities that the claimant had behaved in a way which he genuinely found inappropriate, just as in 2008. Secondly, we had no evidence of a direct comparator, namely a male consultant cardiothoracic surgeon behaving in the way the claimant was said to have behaved but in respect of whom Mr Upadhyay made no complaint. Thirdly, and importantly, in Ms McEvoy's investigation in late 2010 of the claimant's sexual harassment complaint against Mr Upadhyay, she interviewed four female colleagues

who gave their view of his behaviour. Three of them were consultants. Dr Rao, a Consultant Cardiologist, had never had any cause for concern whilst interacting with Mr Upadhyay [page 430]. Dr Fewins, Consultant Radiologist, said that Mr Upadhyay did not treat her any differently because she was female [page 431]. Dr Gutowska, Consultant Anaesthetist, had not noticed anything inappropriate in his behaviour [page 432]. Finally, the Ward Manager Linda Mellon told Ms McEvoy that Mr Upadhyay did not have the best bedside manner but treated everybody the same way. She said **"There is no difference in his treatment of male and female patients"**.

231. We concluded that this outweighed any concerns about Mr Upadhyay's answer about his wife in the disciplinary hearing. The explanation for Mr Upadhyay's complaint of bullying about the claimant in June 2009, we concluded, was that he genuinely thought that her behaviour towards him was inappropriate. It was in no sense whatsoever because she was a woman or related to her sex. Unanimously, therefore, we rejected the allegation that this amounted to discriminatory treatment and the allegation failed.

3a. That the respondent pursued disciplinary proceedings resulting in the issue of a written warning to the claimant as a result of Mr Upadhyay's allegations. This allegation was levelled at Dr Russell, Dr Page and Dr Perry.

232. The allegation made by Mr Upadhyay in his e-mail of 1 June 2009 at page 158, as supplemented in his discussion with Dr Page on 2 June, plainly merited investigation. It was a complaint of **"verbal abuse and humiliation"** against a consultant who had undergone coaching at significant cost earlier in the year following a complaint made by fifteen doctors against her.

Decision to Discipline

233. We therefore focused initially on the decision to pursue disciplinary proceedings made by Ms McEvoy following the investigation carried out by Ms Barton. The Barton report of 28 August 2009 [pages 168 – 173] did not make any positive recommendation as to whether disciplinary proceedings should be pursued. It concluded that there were no witnesses to corroborate the specific allegation about the incident on 29 May 2009, but that a number of witnesses (Ghotkar, Marshall and Nisar) had said that they had experienced or witnessed the claimant displaying unacceptable behaviour in theatre.

234. It was accepted by Ms McEvoy that she had discussed this with Dr Russell and we inferred that she would have given a significant degree of weight to his views.

235. The claimant maintained that Dr Russell's influence must constitute either sex discrimination/harassment or victimisation because it could not be explained given the absence of evidence against her. We regarded that argument as flawed. There was evidence that supported the claimant uncovered by Ms Barton, particularly in relation to what was said to have happened on 29 May 2009, but there was also evidence against her. The evidence of Mr Upadhyay about more general inappropriate behaviour was supported by his predecessor Mr Ghotkar, by Mr

Marshall and by Mr Nisar. The Gilby and Thomas statements were not available when Ms McEvoy (in conjunction with Dr Russell) decided that disciplinary proceedings would be brought.

236. In summary, therefore, we concluded that the Barton investigation produced a mixed picture in which there was some evidence in support of part of Mr Upadhyay's allegation. It must also be borne in mind that the claimant was a person against whom an allegation had been made a year earlier and who had undergone coaching since then. We unanimously concluded that the decision to take disciplinary action against the claimant over this complaint was not influenced in any way by her sex or by her previous Tribunal claim. It was a consequence of the allegations and what Ms Barton had produced in her report.

Decision of Perry Panel

237. That left us with the question of whether the decision of the panel chaired by Dr Perry to give the claimant a first written warning was sex discrimination, harassment or victimisation. It is here that the Tribunal was for the first time unable to reach a unanimous view.

238. We explained above our reasons for concluding that there was evidence against the claimant resulting from the Barton investigation. The disciplinary panel had that as well as the evidence from Mr Upadhyay and from the claimant, and it also had the statements of Dr Thomas and Dr Gilby. However, the statements which the claimant presented did not negate the case against her. Dr Gilby's evidence was of limited weight on this point because she had not been there after January 2009, and although when interviewed by Ms Barton Dr Mills was supportive of the claimant [page 186] he said he had not worked with her on a regular enough basis to say anything about how she treated the surgical assistants such as Mr Upadhyay. The one statement which was clearly supportive of the claimant was the statement she obtained from Dr Thomas [page 234], a Consultant Anaesthetist who regularly worked with the claimant and who felt himself well placed to comment on working relationships. He said that he had not witnessed victimisation of any one individual, including Mr Upadhyay, and that all members of the theatre team were treated in the same manner. He said that he had not witnessed any instances of bullying or victimisation.

239. Dr Gilby also said in her statement at page 236 that she had witnessed bullying and harassment at the hospital but not by the claimant. As Chair of the panel Mr Perry would have been aware of her allegation of bullying against Mr Poulis, since he had chaired the appeal by Mr Poulis on 18 September 2009, some two months earlier.

240. In paragraph 21 of his submission Mr Healy suggested that the panel chaired by Mr Perry ignored obvious holes in the evidence or failed to investigate them further. The first was the claimant's contention that she and Mr Upadhyay had hardly worked together, and that she and several of the witnesses had hardly worked together either. It was suggested that an investigation of hospital records would have shown this to have been true. Mr Upadhyay had said when interviewed by Ms Barton [pages 174-175] that the incidents were all the time when he was in theatre

with the claimant. In the disciplinary hearing [page 245] Mr Upadhyay said that he worked between two and four surgery lists each week in total in the period from the beginning of April to early June. However, it seemed to us that his allegation was not put on the basis that he was working with her in theatre very frequently, but simply that each time he did so she found fault with him and took issue with what he was doing. Consequently we concluded that the precise number of occasions on which he worked with her in theatre was not as significant as the claimant considered. Further, insofar as his allegation was perceived as one of **"sustained bullying"** that could be taken to refer to bullying sustained for the duration of an operation.

241. It was also suggested that it was significant that Dr Russell had not been interviewed about the incident on 29 May 2009. According to Mr Upadhyay, however, [page 176] Dr Russell would not have witnessed the incident because he was in the anaesthetic room and the claimant and Mr Upadhyay were in the theatre when it happened. That might explain why Dr Russell did not volunteer anything when interviewed by Ms Barton. Although in cross-examination Dr Perry said he was surprised that Dr Russell had not been spoken to about the incident, from Dr Russell's evidence to our hearing it seemed most unlikely he had heard anything.

242. The claimant contended that her behaviour was no different from that of male consultants. The panel did not have any evidence to that effect. Dr Gilby referred to the claimant as **"exacting and stern in her management of trainees in theatre"**. She said that the claimant would become frustrated when a trainee repeatedly failed to grasp basic cardiac surgical skills. She mentioned one occasion when she spoke to the claimant after an incident to suggest that the claimant should have tempered her response. To that extent although she personally did not witness bullying and harassment her statement was not entirely supportive of the claimant. Neither she nor Dr Thomas said in terms that the claimant and male cardiothoracic surgeons behaved in exactly the same way.

243. As to the absence of any attempt to interview Dr Gilby to get more information, Dr Gilby had left the Trust by then and the suggestion that Ms Behl should have been interviewed was of little weight, we concluded, because there was no evidence at all of what Ms Behl would have said.

244. Mr Healy was also critical of the conduct of the panel hearing. This centred upon the question of the relevance of the 2008 issue. According to the BMA notes at page 250e, the BMA representative raised a query about whether what Mr Fabri had said when interviewed by Ms Barton would form part of the deliberations. The note of Mr Fabri's interview appeared at page 192 – 3, and after referring to a matter going back many years he mentioned the 2008 complaint to the Deanery. In the hearing Dr Perry was recorded as saying:

> **"They are not relevant and therefore will not be taken into account."**

245. The claimant's concern was that the 2008 matter was taken into account in deciding that the appropriate sanction was a first written warning rather than a verbal warning. We rejected the contention that there was anything improper in this. It was clear to us that Dr Perry was saying that the 2008 matter had no relevance to

whether the allegations made by Mr Upadhyay were well-founded or not, but that did not mean that that could not be taken into account when it came to sanction. Mr Healy suggested that the Perry panel had failed to take account of Mr Upadhyay's evidence that matters had improved after his discussion with the claimant on 1 June 2009. That meant, it was submitted, that no disciplinary warning was needed. We rejected that: the evidence of improvement was very short-lived indeed because it only applied to two lists on the following day.

246. Our unanimous conclusion was that the panel chaired by Dr Perry did not act in a way which amounted to sex discrimination, harassment or victimisation in deciding that the claimant was guilty of inappropriate treatment of Mr Upadhyay in a way which merited a disciplinary sanction. However, where we diverged was on the decision to give her a first written warning, rather than a verbal warning which would be the usual sanction for a first disciplinary offence. This turned in part upon a comparison of the claimant's situation with that of Mr Poulis in his appeal against his first written warning, which was also heard by a panel chaired by Mr Perry. It is right to say that it was difficult on the evidence we heard to understand how the first written warning could have been downgraded to a verbal warning on appeal given the allegations made by Dr Gilby against Mr Poulis. When cross-examined on this point Dr Perry was unable to recall the details. The appeal outcome letter for Mr Poulis made a reference to his previous conduct and to mitigation presented on the day of the appeal hearing. We inferred that the reference to previous conduct was the fact that there had been no previous instances of bullying allegations against him, unlike the claimant against whom the allegations had been made in 2008. That would be consistent with Mr Perry and his panel being influenced by the 2008 matter when deciding sanction for the claimant. However there was no evidence at all before us as to what mitigation for his actions Mr Poulis might have presented, particularly when it was acknowledged by Dr Page that the complaint against Mr Poulis was in a sense more serious than that against the claimant. It was certainly more specific.

247. The minority view was that Dr Perry's inability to explain in cross-examination why Mr Poulis received a lesser punishment for an offence which in some ways was more serious cast doubt upon his rationale for imposing on the claimant a first written warning rather than a verbal warning. As this was the claimant's first disciplinary offence, the minority considered that the decision to go to a second-stage punishment was not adequately explained by the respondent. The contrast with how Mr Poulis was treated supported the inference that the decision was tainted by victimisation. The minority conclusion was that Mr Perry had seen an opportunity to give the claimant a harsher disciplinary punishment than that which was in truth merited because he resented her Employment Tribunal claims of 2003 and 2004.

248. The majority view was that such an inference was not justified by all the evidence before us. Both Mr Poulis and the claimant had faced disciplinary sanction, and their respective disciplinary panels had each administered a first written warning. The difference on appeal for Mr Poulis was explained, the majority concluded, by three differences other than the difference in gender or in whether they had committed a protected act. Those differences were (1) the extensive informal process through which the claimant had gone in 2008 when previous allegations

were made; (2) the fact that the allegation against Mr Poulis was of inappropriate behaviour on only one occasion rather than over a period, and (3) that Mr Poulis appeared from the appeal outcome letter to have presented some mitigation at the appeal hearing. The majority concluded that these differences were the reason for the difference in treatment, not gender or the fact of the claimant's earlier Tribunal complaints. By a majority, therefore, this allegation failed.

3b. That the respondent rejected the claimant's appeal against the decision to issue her with a first written warning. This allegation was made against Mr Cummins. [Although it appeared in the Scott Schedule as an allegation of all three types, the clarification of the Scott Schedule did not pursue the victimisation strand].

249. It was confirmed in the clarification of the claimant's Scott Schedule that this was an allegation that the appeal had failed to correct the discriminatory decision of the disciplinary panel chaired by Dr Perry, not that the appeal itself was conducted in a way which amounted to a fresh instance of sex discrimination, harassment or victimisation. It was common ground that this was a review rather than a rehearing of the case against the claimant. The arguments made in relation to the Perry panel's decision were set out at the appeal hearing.

250. It seemed difficult to criticise the Cummins appeal panel for accepting at face value Dr Perry's assurance that evidence from the claimant had been taken into account. The fact that evidence is taken into account does not mean that the panel must reach the decision to which that evidence points. More substantively, Mr Healy criticised the appeal panel for not correcting flaws in the Perry panel approach, in particular the data recording when the claimant and Mr Upadhyay worked together. Mr Healy suggested in paragraph 24 of his written submission that Mr Cummins in cross-examination admitted that he did not look at that data. In fact, what Mr Cummins said was that the data was considered at the appeal, and that he had asked for it to be produced as chair of the appeal. The data produced was discussed in the course of the Cummins appeal as recorded in the note at page 282. The data showed that Mr Upadhyay had worked with the claimant on eight occasions before the incident on 29 May 2009. Mr Cummins and his colleagues on the appeal panel concluded that there was enough opportunity for the claimant to have bullied Mr Upadhyay.

251. Overall, therefore, our conclusion on this issue reflected our conclusion on the written warning itself. The majority view was that the written warning was not discriminatory, and therefore the allegation in relation to the Cummins appeal also failed. The minority view, however, was that the limited nature of the Cummins appeal meant that the discriminatory nature of the first written warning was not corrected and therefore the allegation that a decision on appeal was tainted by victimisation should succeed. Fundamentally the view of the minority was that the appeal panel failed properly to consider the appropriateness of the level of punishment, even though the contrast with Mr Poulis had not been specifically drawn to their attention. By a majority, however, this allegation failed.

4a. That there had been a breach of the duty of confidentiality during the appeal process in that members of the disciplinary panel divulged details of the case, meaning that individuals within the Trust were openly discussing the details of the claimant's appeal. This allegation was levelled against Dr Perry.

252. We unanimously rejected this allegation. There was no evidence of any breach of confidentiality by the Perry disciplinary panel. It was quite apparent that the discussion about the value of Dr Gilby's evidence resulted from Dr Gilby herself speaking to Mr Scawn, who in turn spoke to Mr Poulis. Although there was an unexplained anomaly as to why Mr Poulis conveyed to the claimant that Dr Gilby's evidence would **"shoot her in the foot"** or **"bury her"**, when that was not the case, it may be explained by the fact that Mr Poulis regarded Dr Gilby as a liar given her allegation against him in 2009. In any event there was no evidence from which we could conclude that there had been any breach of confidentiality by the panel. This allegation failed.

4b. That the respondent failed properly to deal with the claimant's grievance concerning that breach of confidentiality, failed to deal with it within a reasonable time and failed to uphold the grievance. This allegation was levelled at Susan Westbury and at Dr Page.

253. This allegation contained two elements: the process by which the grievance was handled (particularly the length of time it took) and the eventual outcome.

Process

254. In relation to process it was clear that the grievance was not handled in accordance with the timescales in the respondent's Grievance Procedure, nor in a reasonable timescale at all. There was delay from the very start because the grievance e-mail of 13 January 2010 at page 303 was not even acknowledged, let alone actioned, by the time of the appeal hearing on 5 February 2010 before the panel chaired by Mr Cummins. That grievance was discussed at that panel, and was resubmitted on 9 February, but the acknowledgement at page 290 did not come until 23 February 2010. That delay was not explained by the respondent.

255. The investigation then undertaken by Ms Rawlings appears to have started promptly, in that the claimant was interviewed on 3 March and Mr Scawn the following day. Further interviews were conducted in the middle of March with two members of the panel and Ms Barton, but Dr Perry was not interviewed until 12 April and Mr Poulis not until 15 April. Given the delay in acknowledging the initial grievance it was reasonable for the claimant to expect swifter progress in this investigation. Further, it then took five weeks for Ms Rawlings to provide her report, the report being issued on 25 May [page 295 – 300].

256. The grievance meeting with Dr Page was then arranged reasonably promptly for 9 June 2010, but it is an unexplained curiosity that no notes were kept by management of this meeting at all. That is consistent with the grievance not being given appropriate attention.

257. The delay which ensued when it was agreed that Ms Rawlings would reinvestigate was mainly due, we concluded, to an apparent reluctance by Mr Poulis to be interviewed again. The timeline of events which appeared at page 374 showed that he twice failed to attend meetings arranged in June 2010, and that Ms Rawlings had to ask Dr Page to intervene to remind him that he needed to be seen. Once he had been interviewed on 9 July there was then a further delay until Mr Scawn was interviewed on 17 August. However, once Ms Rawlings did her supplementary report on 27 August 2010 [pages 337 – 340] the delay in reconvening the grievance hearing until 26 November appears to have been attributable to diary issues and the availability of the claimant's BMA representative.

258. Our unanimous view, therefore, was that the grievance was not acknowledged and initiated sufficiently promptly, that there were delays in interviewing Mr Poulis at both stages of Ms Rawlings' investigation, and that even though Dr Page made the right decision in June 2010 to have the matter reinvestigated, the absence of any notes of that discussion is a concern.

259. Of significant concern too was that when Mr Poulis was first interviewed on 15 April 2010 Ms Rawlings failed to question him about the very matters she was investigating. Her first question on page 312 was about a breach of confidentiality following the disciplinary hearing on 20 November 2009, but it was clear from the second answer that Mr Poulis was talking about the 2008 matter. For example, he said in his fifth answer that:

> **"Everyone was talking about the letter, that there were three names on it and that it was only progressed against EG."**

Albeit inaccurate, that was plainly a reference to 2008 and Ms Rawlings failed to appreciate this and to bring him back to the 2009 issue. That failure resulted in significant delay.

260. The issue for the Tribunal was whether these failings were because the claimant was a woman, or whether they amounted to harassment related to her sex, or alternatively whether they were because of her earlier Tribunal claims. It was here that the Tribunal was unable to reach a unanimous view.

261. The conclusion of the majority was that these failings in the handling of the claimant's grievance were not in any way attributable to her sex or to the earlier Tribunal claims. The majority did not consider that the claimant had proven facts from which we could reasonably conclude that her sex or her earlier tribunal claims were a factor. There was no express or implied reference to such matters in any of the documentation about the grievance, save for references made by the claimant and her representative. We had in evidence no genuinely comparable case of a grievance of a similar nature brought by a male consultant (or one who had not brought any previous Tribunal claims) and which was dealt with in any better way. The comparison which the claimant drew with the bullying allegations made by Mr Upadhyay was not, the majority considered, fruitful because the nature of the allegation was so different. In any event, when one looks at the whole timescale those matters took approximately nine months too (first complaint 1 June 2009; appeal hearing 5 February 2010. Second complaint 24 September 2010; appeal

hearing 15 August 2011). However, although the claimant's feeling that the Trust was not taking her complaint seriously was entirely understandable, the reality was that it was an allegation that people involved in the disciplinary process had breached confidentiality but it was based only on the fact that matters were being discussed openly amongst colleagues. It was clear to Ms Rawlings by 12 April, when she had interviewed all the members of the panel and the investigator Ms Barton, that each of them denied having breached confidentiality. The majority concluded that the grievance was not viewed as particularly serious when first lodged, and that this suspicion was confirmed by the first round of interviews by Ms Rawlings. That was regrettable, and it is certainly a flaw for which the Trust can be criticised. The majority view, however, was that it was not related in any way to the claimant's sex or her earlier Tribunal claims.

262. As to later delay it was clear in June that Mr Poulis was avoiding being interviewed, but the majority concluded that his reluctance was due simply to the fact that he had already been interviewed once about this and felt that he was being dragged into something formal as a consequence of nothing more than **"coffee room chit chat"**. The inference we drew (admittedly, not having heard from Mr Poulis) was that he felt by then it had been blown out of proportion and in any event it was clear even in April 2010 he had difficulty remembering the relevant events.

263. The minority view, however, was that the claimant had proven facts from which victimisation could reasonably be inferred. Those facts were the failure to give the claimant's grievance proper consideration right from the outset, the failure of Ms Rawlings to pursue Mr Poulis to get an answer to the right question, the delays which ensued and the failure to keep notes of the first grievance meeting. These failings had not been adequately explained by the respondent and therefore in the view of the minority it was appropriate to draw the inference that these flaws in the handling of the grievance were by reason of the earlier Tribunal claims. The minority member was not of the view, however, that they were affected in any way by the claimant's sex.

Outcome

264. As to the eventual outcome of the grievance, we were unanimously of the view that it was untainted by sex or by the earlier Tribunal claims. It was the right conclusion because there was no evidence of any kind to support the mistaken belief that the disciplinary panel or the investigator Ms Barton were the source of the discussion about the evidence. On the evidence before our Tribunal the only conclusion tenable was that it came from Dr Gilby speaking to Mr Scawn. We unanimously rejected this element of this allegation.

5. That Mr Upadhyay made a second complaint of bullying against the claimant on 24 September 2010. This allegation was levelled at Mr Upadhyay.

265. To a significant extent this allegation overlapped with allegation 2 as it concerned the reason why Mr Upadhyay made his second complaint of bullying.

266. Insofar as the material on which the claimant invited us to find in her favour on this issue overlapped with the material in relation to allegation 2, we held the same view and were unanimously of the view that it did not justify an inference that the allegation was tainted by sex discrimination or was related to her sex.

267. Indeed, we were able to make a unanimous finding about the reason Mr Upadhyay put his second complaint in as he did. It was clear to us that the immediate trigger was him being told by Mr Fabri that the claimant had named him as having refused to help out in her complaint about the rota master. That, we concluded, was why the e-mail sent by Mr Upadhyay shortly before the coffee cup incident [page 389] focused in the third paragraph on how a requirement for him to work with the claimant had encouraged her to raise complaints about him. He was concerned about further complaints resulting. Our conclusion was that Mr Upadhyay regarded the claimant's complaint about him over the rota master incident as unfounded and this was why he complained. It was unrelated to the claimant's sex in any way and therefore the allegation that it amounted to unlawful discrimination or sexual harassment failed.

6a. That the respondent failed to investigate the second complaint from Mr Upadhyay adequately or at all prior to making a decision as to whether to pursue disciplinary action against the claimant. This allegation was made against Anne McEvoy.

268. The core element of this allegation was that Ms McEvoy failed to investigate Mr Upadhyay's second complaint adequately and that had she done so she would have ascertained that the complaints were fabricated and untruthful.

269. In relation to Mr Upadhyay's allegations Ms McEvoy interviewed him [page 390], the claimant [page 393] and eight others. They included the consultants who were said to have been present during the coffee cup incident (Mr Mediratta and Mr Poulis), Mr Fabri, and the staff nurse Sue Breakwell who had been present on the occasion which generated the rota master complaint. It was a curiosity that the notes of these interviews were not dated, but they appear to have taken place during November and December 2010. Ms McEvoy completed her report on these allegations on 21 January 2011 at pages 384 – 388.

270. In his written submission on this matter Mr Healy concentrated not upon the quality of Ms McEvoy's investigation, but rather on the decision by Dr Russell to pursue disciplinary action and the way in which he presented the management case against the claimant. Strictly speaking that forms part of the next allegation. Looking at Ms McEvoy's investigation in itself, therefore, we concluded that whilst it could have been more thorough (as Dr Russell acknowledged in cross-examination), it was not significantly flawed. Both protagonists had their say and a number of other witnesses were interviewed (including a witness suggested by the claimant, Ms Mellon). Ms McEvoy's conclusion in her report at page 388 that there was a case to answer was in line with the information she discovered. We unanimously decided that this allegation of sex discrimination and harassment or victimisation failed.

6b. That the respondent pursued disciplinary action against the claimant arising out of the second complaint by Mr Upadhyay and

decided to issue the claimant with a final written warning. This allegation was made against Dr Russell and against Ms Richards (formerly Holmes) who chaired the disciplinary panel.

271. This allegation concerned the decisions taken following Ms McEvoy's report, namely the approach taken by Dr Russell as case manager in deciding that disciplinary action should be pursued, in presenting the case thereafter, and then the decision to find the case proven and administer a final written warning.

Decision to Discipline

272. We addressed first Dr Russell's role. Mr Healy made a number of criticisms of this in paragraphs 38 – 40 of his written submission. He correctly recorded that in cross-examination Dr Russell acknowledged that the investigation undertaken by Ms McEvoy was **"not great"**, but (suggested Mr Healy) he took it upon himself to emphasise issues that had been previously overlooked by all. These were said to be the complaint made by the claimant about Mr Upadhyay's treatment of two patients in September 2009, and her complaint of sex discrimination against Mr Upadhyay of 29 September 2010.

273. As to the former, we concluded that Ms McEvoy had not overlooked it: it was part of her investigation. Mr Upadhyay mentioned it to her when interviewed [page 390], and Mr Fabri was interviewed about it by her too [page 401]. Even if briefly, she expressed a view on it in her report at paragraph 4.3 on page 387 when she noted that the September 2009 complaint was the only complaint made against Mr Upadhyay in five years and that on review his care of those patients was considered appropriate.

274. As to the second matter, Ms McEvoy was of course aware of it because she investigated it in parallel with her investigation of Mr Upadhyay's complaint, and Dr Russell was entitled to see it as a second example of the claimant making an allegation against Mr Upadhyay once aware that he had made an allegation against her.

Presentation of Management Case

275. Mr Healy suggested in paragraph 40 of his written submission that Dr Russell took these matters into account in deciding to pursue disciplinary proceedings, and included them in his management statement of case [pages 458 – 471] because he could see that the chances of a finding against the claimant on the basis of Ms McEvoy's report were poor. Mr Healy relied on three aspects in support of that proposition. The first aspect was that neither Mr Poulis nor Mr Mediratta could corroborate the coffee cup incident. That did indeed make the chances of a finding against the claimant very limited on that issue. The second aspect was that the rota master e-mails were a valid concern about outpatient cover and that the claimant had only named Mr Upadhyay upon direct questioning by Mr Fabri. We rejected this. We accepted that the first e-mail from the claimant at page 397 was focused on the rota master cover issue, and only mentioned in passing that a registrar had refused to see any of the claimant's patients. However, the same was not true, we concluded, of her e-mail of 14 September 2010 at page 395 which included in bold

font the statement that **"the refusal of the junior present in the clinic to help out is unacceptable"**, making clear this needed to be addressed at the highest level. It was entirely predictable that Mr Fabri would regard himself as unable to progress it without knowing who that junior was, and his e-mail asking for the name cannot have come as a surprise to the claimant. We concluded that Dr Russell was entitled to take the view that the claimant was aware that the junior present was Mr Upadhyay, that she knew this would come out, but that on investigation Mr Fabri found the complaint to have no substance.

276. Consequently we rejected the contention that Dr Russell's approach on this issue represented in some way an improper attempt to **"beef up"** or **"flesh out"** Ms McEvoy's investigation. His view that it was relevant was a proper one.

277. The third aspect on which Mr Healy suggested Dr Russell saw the chances of a finding as being very poor, thereby explaining the different approach he took in the management's statement of case, related to data about the extent of contact between the claimant and Mr Upadhyay. In paragraph 41 of his written submission Mr Healy suggested that Mr Upadhyay gave entirely inconsistent evidence about the amount of contact, relying on extracts from the disciplinary hearing. That of course was material not available to Dr Russell at the time that he decided that disciplinary action would ensue. However, it is convenient here to consider the data issue in detail.

Data re Claimant/Upadhyay Contact 2009/2010

278. From the evidence before us it was apparent that the allegation by Mr Upadhyay evolved in this way. In his e-mail of 24 September 2010 at page 389 he said that the situation was ongoing whenever he was working in POCCU or on call. When interviewed by Ms McEvoy at page 390 he said that after his June 2009 complaint he did not work directly for the claimant but continued to have contact with her when managing her patients. He said:

> **"This includes 1-2 sessions per week in POCCU, the late on call from 5:00 pm – 8:00 pm as per rota, one in nine weekends on call and one in nine weeks of nights. When I am on call, I have responsibility as Senior Registrar. All clinical decisions are made by me. If I have any concerns about the patients I contact the appropriate consultant to inform them or seek advice."**

279. It seemed to us that Mr Upadhyay was not saying that on every occasion he was on call or working in POCCU he had contact with the claimant, only that those were the occasions when he might have to have contact with her about one of her patients.

280. The next stage at which Mr Upadhyay gave information about his allegation was at the disciplinary hearing on 2 June 2011. On page 477 he was asked how many times approximately he had to make contact with the claimant when he was on call, and his answer was **"4-5 times on nights"**. He gave one example:

> **"I had one patient during early 2010 and the patient had bad suspected abdominal problems. I called [the claimant] and she shouted at me and said "You are supposed to be a Senior Registrar why are you calling me?""**

281. On page 478 he was recorded as saying that he had a job plan for 1-2 sessions per week on ITU, and on page 491 (when questioned by the claimant) he confirmed that contact with the claimant had been over the telephone when he was on call. The claimant then put to Mr Upadhyay that he had said that over the last twelve months she had been called six times during the night by him, and she asked him why four patients went back to theatre but not by him. His response was that he had called her at least four times out of hours. Within a few moments he said that three of the calls had been from the ward.

282. From this we concluded that Mr Upadhyay had never said that he called the claimant six times. That was something she put to him, and his response was that he had called her at least four times. That was consistent with what he had said in the earlier part of the hearing when he said it was **"four or five times"**. Further, the specific patient he mentioned had had suspected abdominal problems and he had put it in early 2010. He had not said February 2010.

283. The claimant's case was that the failure to get to the bottom of this data was part of the flaws in the decision to give her a final written warning. It is convenient therefore to consider what happened after that hearing when the data was further explored.

284. The appeal against the final written warning was arranged for Monday 15 August 2011. The claimant supplied her grounds for appeal, statement of case and response to the management case in August. Ms Richards prepared some notes on the claimant's statement of case which appeared at pages 525 – 533. She noted on page 526 that Mr Upadhyay had not specifically said that the patients were on the ITU and that the cardiac database showed that the claimant had three cases with abdominal complications in November 2009, April 2010 and September 2010. Ms Richards had made an enquiry of the Clinical Information Team and the response came from James McShane on 12 August 2011 at 3:20 pm [page 1091]. He had checked for abdominal complications cases for the claimant between 1 September 2009 and 14 June 2010, and had identified three in November 2009, April 2010 and September 2010. The last case was a case of readmission to the ITU following earlier surgery. This was not disclosed to the claimant before the Jain appeal panel convened at 9:30 the following morning but at the hearing there was discussion about the data. The claimant put her case that the Trust should have checked the records to show that she had no cases with abdominal complications in the last year and no cases on the ITU in February 2010 [page 541]. On page 548 Ms Richards was recorded as providing the information she had obtained at the end of the previous week. The claimant disputed that this could be consistent with Mr Upadhyay's allegations. The conclusion of Mr Jain's panel on the data was addressed in paragraph 5 on page 557 in the outcome letter, where it was noted that the claimant had given a flawed account of events in the period early 2010: she had had cases with abdominal complications during 2010 and there had been an ITU case in February 2010.

285. Following this the claimant made an enquiry herself of the Clinical Information Team. She first e-mailed Ms Richards on 30 August 2011 at page 1098 asking for the names of the relevant patients so she could discuss the discrepancies in the

data, and Ms Holmes referred her to Mr McShane for those names. The claimant e-mailed Andrew Ward who also worked in clinical audit on 31 August 2011 at page 1097. Mr Ward replied on 1 September 2011 saying that the spreadsheet that was attached was the information he had given to Ms Richards, and finally on 6 September 2011 at page 1103 Mr McShane e-mailed the claimant to confirm that the information given to Ms Richards was accurate.

286. As explained above the claimant did not see this final e-mail but it seemed to us that the following conclusions could be drawn about the data. Firstly, there was no trace in the evidence we saw of Mr Upadhyay identifying February 2010. In June 2011 he said **"early 2010"**. Secondly, the claimant confirmed in her evidence to our hearing that if suspected abdominal complications turned out not to be abdominal complications, no record of abdominal complications would appear on the database. It was entirely possible, therefore, that the case which Mr Upadhyay recalled was not one ultimately recorded as abdominal complications. Thirdly, even if it was so recorded, it is conceivable that by saying (in June 2011) that this had occurred in **"early 2010"** he might be referring to November 2009 or April 2010. Fourthly, we rejected the claimant's contention that Mr Upadhyay had been inconsistent in his allegations.

287. In any event, this level of detail was not available to Dr Russell when he decided that disciplinary action should be pursued, and nor was it available to Ms Richards when her panel decided to impose a final written warning. We rejected the contention made in paragraph 41 of Mr Healy's submission that had Ms Richards' panel analysed the databases it would have demonstrated incontrovertibly that there had been no contact between Mr Upadhyay and the claimant. On the contrary, the data was consistent with his allegation.

Decision of Richards Panel

288. We turned then to the decision of the panel chaired by Ms Richards to impose a final written warning. We rejected the contention that the way in which Ms Richards dealt with the data at the appeal stage (by not disclosing it in advance) supported an inference that she had not intended to consider the matter objectively at the panel stage. The data was provided to her at 3:20 pm on Friday afternoon; the appeal hearing began at 9:30 on Monday morning. It was simply a matter of timing.

289. That said, we considered that there was a degree of fluidity about the precise allegations faced by the claimant in this disciplinary process. According to the opening passage of Ms McEvoy's investigation report of 21 January 2011, the allegation made by Mr Upadhyay concerned general behaviour, the coffee cup incident and the rota master complaint. When Dr Russell presented the management case at the start of the hearing [page 473] he dealt with the complaint made about clinical care of two patients in September 2009 as well. As indicated above, however, that was a matter which Mr Upadhyay had himself raised when interviewed by Ms McEvoy at page 390. According to the witness statement Ms Richards prepared for our hearing, however, there were **"four allegations of bullying and harassment"**: the coffee cup incident, the rota master incident, the September

2009 clinical care complaint, and the claimant's counter allegation of sexual harassment in September 2010 followed by her request to withdraw her allegation if Mr Upadhyay did the same (the mediation issue). It was curious that there was no mention in that passage of Ms Richards' witness statement of the general allegation. However, we concluded that it was not appropriate to place too much weight on the way in which the witness statement was formalised for these proceedings: it was dated 30 August 2013 whereas the better guide to the panel decision was contained in the outcome letter of 3 June 2011 at pages 500 – 501. That outcome letter did not expressly itemise the different allegations but rather reached the conclusion **"that the allegation that you bullied, intimidated and harassed this member of staff had been substantiated."**

Conclusions

290. Putting these matters together, our conclusion was that Dr Russell had fleshed out the allegations by providing more information about some of the other matters raised by Mr Upadhyay when interviewed by Ms McEvoy, and that in putting together his management statement of case at pages 458 – 471 he had given the disciplinary panel a clear steer towards finding the claimant guilty of misconduct. That was evident from the passage on page 469 which referred to the **"two options"**. He did not acknowledge the possibility of a third option which was that Mr Upadhyay, whilst genuinely affected, had been over-sensitive to treatment from the claimant and would have tolerated such treatment had it come from anyone else or had it come from any of the male consultants.

291. We also concluded, however, that despite the general nature of part of the allegations made by Mr Upadhyay the disciplinary issues were sufficiently clear to the claimant to enable her to defend her position, and that contrary to her contention a close examination of the data did not disprove Mr Upadhyay's allegations.

292. We considered the key issue to be why Dr Russell had fleshed out the contents of the McEvoy report and gave the panel such a stark choice. The majority view was that he had done so for reasons which were unrelated to the claimant's sex or to her earlier Tribunal claims. Dr Russell was well aware that the claimant had been the subject of two previous allegations of bullying in 2008 and 2009, and that following the latter she was in receipt of a first written warning for her treatment of Mr Upadhyay. Given the involvement of the Deanery in 2008, it would be understandable if Dr Russell was keen to show that firm action was taken when a complaint of bullying was made for the third time. Additionally, it was clear to us that Dr Russell knew more about the background matters (e.g. the 2009 complaint by the claimant about Mr Upadhyay) than Ms McEvoy did and therefore understandable if he provided more information about these relevant matters in his management statement of case. Finally, the note of Ms McEvoy's interview with Mr Upadhyay and his BMA representative at pages 423 – 426 ended with a note of concern on the part of the BMA about a serious issue of discrimination against doctors from a black or minority ethnic background. Taking these factors together the majority could understand why Dr Russell might be keen for the Trust to be seen to be taking the allegation seriously, and we concluded that this was the reason he fleshed out the case. That reason was not related in any way to the claimant's gender or previous tribunal claims.

293. The minority view, in contrast, was that these matters were not the reason for Dr Russell fleshing out the McEvoy report and presenting the panel with the two stark options at the conclusion of his management case. The view of the minority member of the Tribunal was that this was not adequately explained by the respondent and that the primary facts were sufficient to enable an inference to be drawn that the true reason was the earlier Tribunal claims of 2003/2004. In the view of the minority member of the panel the decision to pursue disciplinary action against the claimant was unlawful victimisation, as was the decision to impose a final written warning because the panel chaired by Ms Richards was influenced to a material degree by the approach being taken by Dr Russell as Medical Director.

294. As far as the appeal chaired by Mr Jain was concerned, there was no specific allegation of discrimination or victimisation but we were unanimously of the view that the appeal took the form of a review and therefore did not correct any flaws in the decision of the panel chaired by Ms Richards. By a majority, therefore, this allegation failed.

7. That the respondent failed to consider and properly to determine the claimant's grievance regarding sexual harassment by Mr Upadhyay lodged on 29 September 2010. This allegation was levelled at Ms McEvoy and Dr Russell.

295. This allegation concerned the investigation conducted by Ms McEvoy and the subsequent decision by Dr Russell (his letter 16 February 2011 at page 439) that the allegations would not be pursued by way of a formal disciplinary hearing.

Investigation by Ms McEvoy

296. As far as the investigation was concerned, Mr Healy made four main points in paragraph 35 of his written submission. The first two points were linked. Firstly, he suggested that no attempt was made to investigate the claimant's contention that she had raised issues about Mr Upadhyay's conduct towards her previously. Secondly, he said that Ms McEvoy did not consult the minutes (either version) of the disciplinary hearing before Dr Perry's panel in November 2009 at which discriminatory comments were said to have been made by Mr Upadhyay. The previous concerns about Mr Upadhyay which the claimant said she had raised concerned two occasions. The first was that she had raised issues about his behaviour on 1 June 2009 when preparing her response to his allegations for the disciplinary hearing in November 2009. That November 2009 document appeared at page 215. However, we considered that this was addressed by Ms McEvoy. Her report into the claimant's allegation of sexual harassment of 9 February 2011 appeared at pages 414 – 417 (with the appendices at pages 418 – 436). In paragraph 1.4 on page 415 she noted the allegation about the June 2009 discussion, and at paragraph 4.1 on page 417 she concluded that the issue of the June 2009 meeting had previously been considered and dealt with by the Trust. She asked Mr Upadhyay about what happened on 1 June 2009 when she interviewed him in late 2010, and his account was recorded on pages 423 – 424. Her finding [page 416 paragraph 3.3] was that the claimant had not raised her concerns about how Mr Upadhyay behaved at the time (i.e. in June 2009), and that it had not been pursued

further as an allegation other than raised in her defence of the allegations against her. She noted that it was at odds with Mr Upadhyay's recollection. We concluded that Ms McEvoy had addressed this issue in her investigation.

297. The second earlier complaint which the claimant suggested had not been addressed was the issue about Mr Upadhyay's use of language and demeanour during the disciplinary hearing in November 2009. This had been discussed in the appeal hearing on 5 February 2010. It appeared at page 283 of the notes of that hearing. However, there was no trace of any complaint by the claimant about this other than raising it as part of her appeal. In her grounds of concern for the McEvoy investigation at page 419a and 419b she said that it should be on record that during that hearing he referred to the claimant as **"she"** or **"her"**, and was disrespectful to the other females at the hearing, but she did not take the step of providing Ms McEvoy with the BMA notes of that hearing to assist Ms McEvoy. Although it might have been preferable had Ms McEvoy sought the management notes and considered the contents herself, the failure to do so was not, we concluded, a significant flaw. In any event as we indicated in our own conclusions above about whether Mr Upadhyay brought his complaints because of sex discrimination, any adverse inference against him to be drawn from the notes of that disciplinary hearing would be outweighed by the evidence Ms McEvoy gathered from the female consultants Rao, Fewins and Gutawska. That, indeed, was Ms McEvoy's finding at paragraph 3.6 of her report on page 416.

298. Thirdly, Mr Healy was critical of the fact that Linda Mellon had not been shown the full PALS documentation from the female patient complaint about Mr Upadhyay in June 2009. It was correct that the truncated version which was annexed to Ms McEvoy's report did not contain details of the complaint made by the female patient. However, the full version still did not contain any suggestion that Mr Upadhyay's behaviour towards that patient was related to her being female. It remained a matter of inference which the claimant wished the reader to draw but which was by no means an inevitable inference.

299. Fourthly, Mr Healy criticised the fact that Ms McEvoy did not interview Ms Cleary despite having been provided with an unsigned version of her statement at page 450 (subsequently signed on 17 March 2011). The position is that Ms Cleary had left the employment of the Trust by that stage, and her statement did not suggest in terms that there was a difference between how Mr Upadhyay treated female and male patients. It also had to be weighed against the input from Ms Mellon at page 435 which said clearly that there was no difference in how he treated male and female patients.

300. Putting these matters together the view of the majority members of the Tribunal was that the investigation conducted by Ms McEvoy into the claimant's allegations of sexual harassment was adequate and that any deficiencies in that investigation were not related to the claimant's gender or to her earlier Tribunal complaints. The conclusion which Ms McEvoy reached was largely due to the fact that three female consultants interviewed about Mr Upadhyay did not support the claimant's allegations.

301. In contrast the conclusion of the minority member of the Tribunal on this issue was that the investigation conducted by Ms McEvoy was flawed in not engaging fully with the language used by Mr Upadhyay in the November 2009 disciplinary hearing, in not getting to the bottom of the PALS complaint and finding out from Linda Mellon whether those details assisted her in recalling whether there was a difference in how Mr Upadhyay treated female and male patients, and in not taking steps to contact Ms Cleary to put that specific point to her. The conclusion of the minority member was that these failings had not been adequately explained and that they were due to the fact that the claimant had brought her 2003/2004 Tribunal claims.

Decision of Dr Russell not to Discipline Mr Upadhyay

302. Turning to the decision of Dr Russell not to take any disciplinary action against Mr Upadhyay, the majority view was that it was adequately explained by the fact that the sexual harassment allegation was made as part of the claimant's response to his allegation against her, rather than being made proactively on her part. That was true of each time she raised concerns about sex discrimination on the part of Mr Upadhyay. In November 2009 she raised her concerns in responding to his allegations against her, in February 2010 she raised them as part of her appeal against the first written warning, and in September 2010 she raised the matter because he had made a second allegation of bullying against her. Further, the majority conclusion was that Dr Russell was entitled to take the view that the female colleagues interviewed by Ms McEvoy did not support the claimant's case that Mr Upadhyay had a problem dealing with women in positions of authority, and that any material to be derived from the complaints by female patients (primarily but not exclusively the PALS record) was of limited assistance. His decision not to pursue disciplinary action against Mr Upadhyay was a proper response to the results of Ms McEvoy's investigation.

303. The view of the minority member, however, was that Dr Russell decided not to pursue any disciplinary action against Mr Upadhyay because of the claimant's Tribunal complaints in 2003/2004, and that had it not been for those earlier Tribunal complaints he would have taken her complaint of sexual harassment further. Consequently the conclusion of the minority member of the Tribunal was that Dr Russell's decision amounted to unlawful victimisation. By a majority, however, this allegation failed.

8a. That the respondent decided to subject the claimant to disciplinary proceedings arising out of the "Kryptonite incident" on 25 July 2011. This allegation was levelled at Dr Russell and Dr Page.

304. The claimant's case as to why the decision to pursue disciplinary proceedings amounted to unlawful discrimination, harassment and/or victimisation was set out in paragraphs 44 – 48 of the written closing submissions of Mr Healy. The central allegation was that had it been a male cardiothoracic consultant involved in the Kryptonite issue, or one who had not previously brought tribunal proceedings, the normal approach of allowing a critical incident report to be investigated, without disciplinary action, would have been adopted.

305. As recorded above we found as a fact that the matter came to the attention of Dr Russell as Medical Director not by way of the critical incident report completed by Ms Heslop (which we did not see) but by way of a report to him by Anne Conley. The contention of the claimant was that this resulted in a rush to concentrate on her personal conduct rather than the wider ramifications of the incident.

306. Certain matters were readily apparent from the incident itself, and must have been apparent to Dr Russell and his colleagues when they first learned of it. Firstly, the surrounding circumstances suggested that there may have been failings in the application of policies which were not under the direct control of the claimant on the day in question, such as policies for access to the theatre and for access to POCCU. Secondly, MHPS makes it plain that one of the key elements of its approach was to recognise **"that most failures in standards of care are caused by systems' weaknesses not individuals per se ..."**.

307. In that context one might well question why the matter was pursued as a potentially disciplinary matter against the claimant from the outset.

308. Upon closer examination, however, the following facts emerged. Firstly, the claimant was plainly right at the heart of the incident because it was her clinical decision (as she always accepted) to apply Kryptonite to the patient in question. Secondly, the very first document in evidence before us which raised any concern about what happened was an e-mail from Alex Crane the receptionist on 26 July 2011 at page 647, sent at 9:15 am, which said that she had asked the claimant if it was ok for both representatives to come into the theatre with sterile samples and the claimant had said this was fine.

309. Thirdly, the investigation was not exclusively disciplinary in nature. We acknowledged that the completed report was titled a **"Disciplinary Investigation Report"**, and that when the report closed with three recommendations about improvements to processes for access to theatre, refresher training for the safe surgery checklist and theatre product approval, the authors of the report regarded such matters as **"beyond the scope of the investigation"** [page 597]. However, the terms of reference of the investigation were recorded at the start of the report itself on page 587 as being to establish the facts and to report them to the Case Manager – ostensibly a broad enquiry.

310. Fourthly and finally, when the claimant was first interviewed about this matter on 27 July 2011 by Dr Jackson and Ms Pemberton [pages 600 – 602] it was a preliminary meeting and it was only in the second meeting of 28 July 2011 [pages 603 – 604] that the claimant was informed that a disciplinary investigation would take place. It followed that what the claimant said on 27 July is likely to have informed the decision to make the investigation a disciplinary one. In that preliminary meeting the claimant said that she had been under the impression that the attendance of both representatives had been cleared, that she had not known that they were bringing Kryptonite in, that she was not aware of the process about representatives being allowed into theatre, that she was not aware of the procedure for new technologies being introduced and that she had assumed it was all right to use Kryptonite, and

that she was planning to put in a request to use Kryptonite in the future. The meeting concluded with the following:

> **"Mark Jackson asked if this situation were to happen again how it would be different. Miss Griffiths replied that she would have checked. She stated that everybody needs to be aware of the protocol and be clear about the processes in theatre and that the policy needs to be more widely used.**
>
> **When asked if this product has been used previously Miss Griffiths stated that it had been used a couple of times in England and extensively used abroad.**
>
> **Miss Griffiths explained that at the end of the operation the scrub nurse stated she wasn't happy therefore she did not go on to do the second case. Miss Griffiths stated that she told the rep she would not be doing the second case as it didn't appear to be kosher. She stated that the rep then left and did not appear to be happy.**
>
> **Miss Griffiths stated that she realised that this was an unmitigated disaster and was something that would not normally happen on her watch and that it wouldn't happen again. Miss Griffiths went on to say there are lots of products that come into theatre and that clarification is needed. Miss Griffiths went on to say that there are reps in theatre all of the time."**

We concluded that the approach taken by the claimant at this preliminary meeting (described by Dr Jackson on 28 July 2011 as including an **"expression of remorse"**) was a factor in the subsequent way in which the investigation focused on the disciplinary issue against her.

311. Overall we concluded unanimously that the decision to focus on the claimant's role and to treat the matter as potentially disciplinary from the outset was not in any sense due to her being a woman, or related to her sex or because of her earlier Tribunal claims, but rather because of the nature of the incident (Kryptonite had neither gone through the New Technology Policy, nor been approved informally for use in the theatre), the way it initially came to Dr Russell's attention, and fundamentally because as the cardiothoracic surgeon performing the operation the claimant was ultimately accountable for the decision to use an unauthorised product on the patient. The scope of the Jackson enquiry was sufficiently broad to gather information about the surrounding circumstances, as indeed it did. The claimant's gender and her earlier tribunal claims played no part in the decision and this allegation failed.

9. **That the respondent reported to the National Clinical Assessment Service that the claimant interfered with an ongoing investigation in that she had written to the Chief Executive Officer of Sorin (in relation to the Kryptonite incident) and that she had, via her BMA representative, suggested mediation between herself and Mr Upadhyay. This allegation was levelled at Dr Page and Ms McEvoy. It was put as victimisation only.**

312. Despite its numbering in the List of Issues this allegation concerned events before dismissal so it was convenient to consider it next. It concerned the reports to NCAS made by Ms McEvoy between August and October 2011 which resulted in the NCAS letters of 2 September [page 570], 26 September [page 575] and 11 October

2011 [page 580]. It was put as victimisation only, the protected act being either the 2003/2004 ET claims or the grievance alleging sexual harassment lodged by the claimant in September 2010. The claimant alleged that Ms McEvoy had supported her suggestion that the claimant was likely to interfere with the investigation by reference to two matters: the mediation discussion with the BMA in the course of Ms McEvoy's investigation in November 2010, and the Sorin letter.

313. As to the former, we concluded on the facts that Ms McEvoy had not mentioned the mediation discussion in November 2010 to NCAS. There was no mention of that in the NCAS correspondence, which sought to record the information provided by Ms McEvoy on the telephone. We concluded that had the mediation matter been mentioned it would have been included in one of those three NCAS letters.

314. As to the Sorin letter, it was expressly mentioned to NCAS and was the immediate trigger for the report to NCAS, although there was a delay between the letter being copied to Mr Jain and reaching the attention of Dr Russell, Dr Page and Ms McEvoy.

315. However, we concluded that the decision by Ms McEvoy to mention it was in no sense whatsoever because of the claimant's earlier Tribunal claims, or because of her allegation of sexual harassment against Mr Upadhyay made a year earlier. It was mentioned because management genuinely felt that the Sorin letter was inappropriate and gave rise to a genuine concern that she would seek to influence the investigation. That was an understandable view. The paragraph from the Sorin letter which we quoted in our summary of facts at paragraph 153 above could reasonably be read as an indication to Sorin that it would not be in that company's commercial interests for the claimant to be found guilty of serious disciplinary misconduct. It drew to the attention of Sorin an incentive for Sorin to be supportive of the claimant in the information provided to the Trust. To that extent it was properly seen by management as an attempt to influence the course of the investigation.

316. It is right to record that the claimant believed that Mr Knell-Moore of Sorin had already been interviewed when she wrote her letter, as indeed was the case judging from the note of the interview on pages 640 – 643. However, that was far from the end of the potential involvement of a witness in disciplinary investigation. The witness might still have to approve the notes of his or her interview, and might be required to attend a disciplinary hearing to give evidence. Indeed, the fact that the claimant anticipated that Sorin still had some information to provide to the Trust was evident from the penultimate paragraph of her letter which said:

> **"I should be grateful if you would investigate the incident fully and prepare a written statement of the facts for submission to the Trust."**

317. We took into account the point made by Mr Healy in paragraphs 52 and 53 of his closing submission, which was that the reasons given for excluding the claimant differed between Dr Page and Ms McEvoy. Leaving aside the technical point that the allegation of victimisation related not to the decision to exclude the claimant but to what was said to NCAS, it seemed to us that although the precise basis for the concern varied, and even though the claimant was denied a meeting to state her

case before exclusion as NCAS had recommended, and even though there was delay after the Sorin letter, and although Ms McEvoy's concerns about Mr Marshall were never put to the claimant, at its heart the concerns expressed to NCAS and the consequent exclusion were unrelated to the Tribunal claims ten years earlier and the sexual harassment allegation one year earlier.

318. This allegation of victimisation therefore failed.

8b. That the respondent decided to dismiss the claimant on 28 March 2012. This allegation was levelled at Mr Jain who chaired the disciplinary panel. (There was no allegation against the appeal panel chaired by Mr Appleton itself but it was said that it had failed to correct the discriminatory decision at the dismissal stage.)

319. This issue concerned the reason for dismissal. Was this a dismissal which in no sense whatsoever was related to the claimant's sex or her earlier Tribunal claims? If it was in any sense related to her sex or her earlier claims it would constitute a breach of the Equality Act 2010. This issue formed a central plank of the claimant's case.

320. Mr Healy invited us to approach it by looking at the letter of dismissal and analysing each of the reasons given in that letter for concluding that the claimant had been guilty of misconduct. He suggested in paragraph 55 of his written submission that upon analysis those reasons would unravel and would establish the true reason for dismissal.

Allegation 1: Patient Consent

321. The first allegation was that the claimant had failed to obtain patient consent to a second medical representative in theatre, and had further failed to obtain patient consent to the use of Kryptonite, which was described as a "bone cement". The panel conclusion as set out on page 806 was that there had been failures in the systems designed to control entry into theatres of people and products, which was a management and staff failure, but that the claimant had been notified about the presence of Mr Cooper prior to his entry to the theatre in which she was operating. The panel concluded that the claimant's use of a sample of material that she knew was novel to the respondent in the unplanned way that happened could not be excused by the three alleged system errors, that the central issue was one of patient safety and obtaining patient consent was the claimant's responsibility as it was a clinical matter solely under her control. The panel concluded this [page 87]:

> **"You admitted that you did not gain prior consent from the patient. You claimed that the alleged benefits to the patient's recovery explained this serious departure from Trust policy and common good practice. The panel concluded that you did not give a satisfactory explanation for this serious contravention. Treatment is for the patient to decide. The use of a novel technique for joining the sternum is most certainly a matter for the patient to consent to prior to the use. There were no lifesaving circumstances that would necessitate such a serious breach of the fundamental right of the patient."**

322. As to the presence of the second representative, Mr Cooper, the claimant disputed that she had known of Mr Cooper's presence before he entered the theatre. On the face of it her evidence was contradicted by Alex Crane, not just in her e-mail sent on 26 July at page 647 but in her interview at pages 645 – 646. A close examination of the evidence from Ms Morris, however, showed that she did in fact support the claimant's account. In the typed note of her interview by Dr Jackson, Ms Morris was noted as having said that **"Miss Griffiths had said to bring the reps up"**. Ms Morris had signed that note on 13 September 2011 [page 652]. However, in a handwritten addendum to those notes which appeared at pages 648 – 649 Ms Morris noted that someone came in and stated **"the reps at reception"** but the actual number was not stated. It could have meant **"the rep's at reception"** – i.e. "representative" (singular). Ms Morris said in her note at page 649 that **"that is another reason I think [the claimant] looked surprised when the reps entered theatre"**. On reflection, therefore, Ms Morris had considered that it was not clear how many reps were coming up. That was consistent with the claimant's account. However, although that was the case from the documentation appended to the Jackson report, the panel did not hear from Ms Morris in person. Alex Crane did appear before them, as of course did the claimant. In terms of the live evidence the panel had a direct conflict between the claimant and Alex Crane as to whether the claimant knew that two representatives were coming in. Although one might take the view that Alex Crane in her initial e-mail at page 647 was looking to protect her own position, the fact that management took a different view is not of itself evidence of victimisation of the claimant.

323. As to the question of whether patient consent for the use of Kryptonite should be obtained, it is right to say that the GMC expert subsequently took a different view. However, the dismissal panel did not have the benefit of that input. The clinical input into the panel's decision was from Mr Jones, a Consultant Cardiothoracic Surgeon himself. Although we did not see any discrete document from Mr Jones setting out his view of these matters it appears that the contents of the dismissal letter signed by Mr Jain represented the views of Mr Jones. It was clearly his view as the external clinical expert that the claimant should have sought the consent of the patient to use Kryptonite. Had Mr Jones as the external specialist taken a different view we are satisfied that would have been reflected in the outcome letter from Mr Jain on behalf of the panel.

324. We considered carefully the points made by Mr Healey on behalf of the claimant about the limitations of the view of Mr Jones on consent as conveyed by Mr Jain in cross-examination [closing submission paragraph 57.2 footnote 25]. We considered that it was difficult for the claimant to suggest that the precise nuances of her position were not apparent to Mr Jones when she had set her case out so clearly (with the aid of specialist solicitors) in her statement of case [pages 714 – 724] and her witness statement [pages 725 – 746]. This was all material available to Mr Jones at the disciplinary hearing on 28 March 2012.

325. Consequently on the issue of patient consent we concluded that although the claimant's view that no specific consent was needed was subsequently shared by the GMC, the contrary view taken by Mr Jones and communicated through the panel decision was explicable by a difference in professional opinion rather than by way of

sex discrimination or victimisation. There was no basis on which we could find that Mr Jones's approach was tainted by sex discrimination or victimisation.

Allegation 2: New Technology Policy

326. The second allegation was that the claimant had failed to follow the New Technology Policy. The panel conclusion as set out on page 807 was that this allegation was well-founded, that even if the Policy had been out of date or had lapsed the claimant should have been aware of it, and if there had been any uncertainty she should have made enquiries. The letter said that:

> **"The panel concluded that a senior member of staff with significant experience should have sought permission to use Kryptonite and ensure its safe use in a manner that was consistent with the processes outlined in the Policy."**

327. The discrepancy between the two versions of the New Technology Policy as to its review date and whether it remained in force after that date was not adequately explained; the best that the respondent could do was rely on Dr Jackson's statement at page 851. However, we considered that this discrepancy was of relatively limited significance. The panel were entitled to conclude that even if the Policy was technically no longer in force the claimant could still be criticised for using Kryptonite without checking whether it had been approved or not. Again, although there is room for a difference of opinion between the claimant and the panel about whether Kryptonite should have gone through the New Technology Policy or the informal process of approval by the Theatre Manager, the fact remains that it had gone through neither process. The claimant accepted in her witness statement for our hearing [paragraph 142] that she was aware of the Policy being issued in 2008. It was entirely legitimate to infer that she knew that it had not been approved through that Policy. The judgment of the panel that it should have gone through that process differs from the claimant's judgment, but that was not, we concluded, evidence of sex discrimination or victimisation.

328. Nor, we concluded, did the comparison with Flexigrips and/or VATS Lobectomy assist the claimant in establishing sex discrimination. Although each had been introduced by a male consultant, the circumstances were different. There was evidence in the Bundle [page 991] that VATS Lobectomy was a variation of current techniques rather than a new technique, and that no new technology was required. We accepted Dr Russell's evidence that the procedure went before the CAEG because of cost implications (as recognised by Mr Shackcloth on page 7 of his presentation to the CAEG at page 1015) not because it was a new technology in itself. The reference to **"new technology"** in the CAEG minutes [page 1001] and in the letter of approval of 6 April 2011 [page 996] was referable, we concluded, to that being the terminology used for such meetings.

329. As for Flexigrips, the response from Mr Pullan to an enquiry from the claimant's solicitors at page 994 showed that:

> **"Prior to my first use of this product, the distributor for this product visited LHCH and carried out service training to the theatre team and left educational DVDs with the theatre team and myself. The product was then available to me for my use when the appropriate cases came along. I had already discussed the use of the Flexigrip with**

> **the theatre management team ... and agreed a specific small group of patients for whom this product would be used. When the first patient who fulfilled these criteria came along I briefed the theatre team before the case and went through the instructions of preparation and use. The distributor was not present for this or any of the subsequent cases."**

330. It was apparent that the way in which Flexigrips were introduced into use by Mr Pullen was significantly different from the way in which Kryptonite came to be used by the claimant, and that difference was the reason for the difference in treatment, not the difference in gender between the two surgeons.

Allegation 3: Team not Consulted

331. The third allegation was that the claimant failed to notify or discuss her intention to use Kryptonite bone cement with the theatre team before it was used. The panel conclusion on page 808 of the dismissal letter was that the claimant did not make any attempt to consult with the team about the use of this product on the patient.

332. Taken literally that conclusion was not reconcilable with the evidence. The evidence from Mr Palmer, Ms Morris and the claimant showed that there had been a discussion between the clinicians in theatre prior to the decision to use the product. In cross-examination Mr Jain accepted that the claimant had consulted Mr Palmer the Consultant Anaesthetist, but not the whole team. He went on to explain that this conclusion related to consultation both inside and outside the theatre involving the Registrar.

333. We concluded that this conclusion was not tenable if taken literally, but insofar as it was intended to mean that there had not been a proper consultation with the team before going into theatre, it was a legitimate conclusion if poorly worded.

Allegation 4: Post-Operative Care

334. The fourth allegation was that the claimant has made inadequate provision for post-operative care. The conclusion of the panel on page 808 was that the claimant had not given due and proper consideration to the potential harm that could result to the patient from inadequate preparation of the post-surgical support team in POCCU and general ward. The letter said:

> **"Staff should have been made aware of these risks and how to manage them, prior to the procedure, so that they had good time to prepare for this unusual and significant event."**

335. In seeking to undermine this conclusion Mr Healy relied [paragraph 60.2 of his submission] on the entries made in the nursing and operation notes at page 771, wherein the post-operative critical care booklet the claimant noted that the sternum had been closed with Kryptonite and that a sternal saw would be needed to re-open it after five hours. He also relied upon the general operation note at 771e – 771f, on which the claimant recorded that there had been **"routine closure with addition of Kryptonite glue"**. Finally he relied upon the entry made by the Consultant Anaesthetist in the POCCU booklet that **"new Kryptonite sternum cement"** had been

used. Even had these matters been before the panel, however, they fell short of showing that adequate information had been given: the entries were very limited.

336. Mr Healy also suggested that the panel view that insufficient account was taken of the risk to the patient caused by the use of Kryptonite was untenable. It is clear that this matter was considered by the panel. The use of Kryptonite did entail an increased risk to the patient if the patient were to require urgent re-opening after the Kryptonite had hardened (between two and eight hours after its use) and if that happened outside theatre hours a surgeon or Registrar who was on call would have to be summoned in order to use the sternal saw to re-open the sternum. Understandably the claimant emphasised that this small increase in risk if a need to reopen the sternum arose whilst the patient was on POCCU (which she put at 0.05%) was outweighed by the benefit to this particular patient of having the sternum set together earlier on, enabling the patient to sit more upright in bed and therefore to reduce pulmonary cardiac risk. The claimant's estimate was that the pulmonary risk which was avoided by the use of Kryptonite was in the order of 10%.

337. On this point the Tribunal concluded unanimously that the view taken by the disciplinary panel was tenable and untainted by sex discrimination or victimisation. The panel had material before it from which it could properly conclude that the claimant had not adequately addressed the issue of post-operative care, essentially because she made an assumption that Kryptonite would not be available in her theatre without having been approved by the Theatre Manager through a process which had already taken account of these matters. Essentially this came back to the core point of whether the claimant could properly be criticised for assuming that Kryptonite had been cleared without actually knowing that it had been. We rejected the view that the panel's conclusion on this issue was in any way related to sex discrimination or victimisation.

338. Overall, therefore, we unanimously concluded that the decision of the disciplinary panel that the claimant was guilty of misconduct in the Kryptonite episode was a proper conclusion which in no sense whatsoever was due to the claimant's sex or her protected acts.

Sanction

339. That left the question of the sanction of dismissal for misconduct which was not in itself considered to be gross misconduct.

340. For reasons set out above the conclusion of the minority member of the Tribunal was that the final written warning administered by the Richards panel in June 2011 and upheld on appeal by the Jain panel in August 2011 amounted to unlawful victimisation. In the view of the minority member the decision to dismiss the claimant, relying so heavily on that final warning, therefore also constituted unlawful victimisation.

341. As for the majority of the Tribunal, the final written warning had not been tainted by victimisation (or sex discrimination). We therefore considered whether the imposition of dismissal rather than a different outcome could of itself be regarded as discriminatory or victimisation. Our conclusion was that it could not be so

characterised. Firstly, we rejected the argument that the panel could not reasonably have concluded that the final written warning was in any way relevant. Although the nature of the misconduct involved in the Kryptonite incident was quite different from the misconduct which had given rise to the earlier warnings, the written warning letter from the Richards panel at page 501 said in terms that if any further incidents of misconduct were to occur dismissal would be likely to result. It was permissible for the Jain dismissal panel to conclude that the opportunity **"to change your behaviour"** was an opportunity to refrain from further misconduct, not simply to stop behaviour regarded as bullying. The fact that the Jain panel chose to interpret the final written warning in that way was not suggestive of discrimination or victimisation. (Whether it was within the band of reasonable responses to do so arises in the unfair dismissal claim.)

342. As to the suggestion that a reasonable employer would have considered training on these issues, again the majority view was that the panel had good grounds for considering that training was not an appropriate solution for an experienced and well-regarded senior Cardiothoracic Surgeon. The panel was, after all, dealing with an employee who since 2008 had been the subject of allegations of bullying from fifteen junior doctors (2008), an allegation of bullying from one individual resulting in a first written warning (2009), a second allegation of bullying from the same individual resulting in a final written warning (2010), and a significant error of judgment in relation to the use of a new product during surgery (2011). We concluded that the decision not to offer the claimant retraining was not in any sense due to her gender or to her earlier Tribunal claims but rather to these features of her recent employment history.

343. Although not a discrete matter of complaint, the conclusion of the Tribunal in relation to the appeal panel of which Mr Appleton formed part was that it did not look at matters afresh in a way which made any difference to the conclusion reached by the respective parts of the Tribunal. The view of the minority member, therefore, was that it failed to rectify the victimisation found in the decision to dismiss the claimant; the view of the majority members of the Tribunal was that it did not alter the character of the dismissal decision as one unrelated to sex or victimisation.

Part Three: Equality Act Time Limits

344. As the Tribunal decided by a majority that none of the individual acts said to amount to discrimination or victimisation prior to dismissal were in fact unlawful, we rejected the argument that there had been an act extending over a period which brought the earlier matters within time. Similarly, the Tribunal unanimously rejected the argument that it would be just and equitable to extend time given that the claimant was a person familiar with Employment Tribunal proceedings and her right to pursue a sex discrimination complaint (having done so in 2003/2004), and given that she had access to expert advice through the BMA and latterly the MDU. She had made a decision not to pursue any Tribunal claims in relation to these earlier matters until after her dismissal. Consequently allegations 1-7 were out of time.

345. However, we would unanimously have extended time on the basis it was just and equitable to do so in relation to allegation 8 (communication with NCAS) on the

basis that the claimant was unaware of what had been said until she received a copy of the NCAS letter shortly before lodging claim number 2402311/2013.

Part 4: Unfair Dismissal

346. Before considering the unfair dismissal claim we reminded ourselves that the task required of the Tribunal is very different from that which arose in the discrimination/victimisation complaints. Our task was not to make our own findings but rather to determine whether the employer had shown a potentially fair reason for dismissal, and if so whether dismissal was within the band of reasonable responses using the approach summarised in Annex B. We had particular regard to what was said in **Roldan** about cases where there is a real risk that the career of the employee would be blighted by the dismissal. Although in this case the allegations in relation to Kryptonite were found in themselves not to warrant dismissal, the respondent was aware when the investigation commenced that the claimant was in receipt of a final written warning and therefore it was readily apparent that dismissal might be a consequence if misconduct of any kind were found to have occurred.

347. Turning firstly to the reason for dismissal, we set out above the basis for the minority view that dismissal was tainted by victimisation, and the majority view that it was not. It follows that the minority view was that the dismissal was unfair because the respondent failed to show a potentially fair reason for dismissal. A reason which is tainted by victimisation is not a potentially fair reason.

348. The majority conclusion was that the respondent had shown that the reason for dismissal related to the claimant's conduct, namely her actions in the Kryptonite incident.

349. Turning to the **Burchell** test, we found unanimously that the respondent had a genuine belief the claimant had acted wrongly in the Kryptonite incident and therefore was guilty of misconduct. Similarly we concluded that there were reasonable grounds for that view. The claimant had made an error of judgment in deciding to use Kryptonite without checking that it had been properly approved for use. It was plainly within the band of reasonable responses to view that as misconduct. The presence of the clinicians on the disciplinary and appeal panels supported that conclusion.

350. As to whether that belief had been formed following a reasonably fair investigation and procedure, we considered the five points made by Mr Healey in paragraph 62 of his closing submission. Some of them, we considered, could be discounted. It was within the band of reasonable responses for Mr Jain as Chief Executive to chair the disciplinary panel even though he had sat on the panel which considered the appeal against the final written warning in August 2011. Secondly, although there had been a development of the case that the claimant had to meet, particularly in that the initial focus upon breach of the New Technology Policy had broadened by the time of the disciplinary hearing, we were satisfied that this fell within the band of reasonable responses since it was a complicated matter in which a number of different people had played a part. It was in any event clear to the claimant at all times that it was her use of Kryptonite which was at the centre of the issue. Thirdly, in relation to exclusion we considered that it was within the band of

reasonable responses to continue to exclude the claimant after the investigation because that was in line with the Trust's own policy. Exclusion in itself in any event would not affect the fairness of the dismissal. Fourthly, although there was some merit in the point that Mr Kendall as the independent expert advising the Jackson investigation did not have the benefit of the claimant's view about whether Kryptonite was a new technology, that was a point of little assistance because Mr Kendall did have information leaflets about Kryptonite and in any event he was not party to the decision to dismiss the claimant: it was Mr Jones who performed the equivalent function at the dismissal stage, and Professor Keenan on appeal. Both of those panels had the claimant's explanation fully before them.

351. However, we did consider there was some merit in the argument that MHPS had not been followed in the rush to discipline the claimant rather than look at the wider system failures. The panel were split on whether that took the matter outside the band of reasonable responses. The view of the minority member was that the focus on the claimant and the disciplinary ramifications of her behaviour from the very outset, as opposed to an organisational review based on a critical incident report before any disciplinary consequences for the claimant and others were considered, was a fundamental flaw which took the investigation and disciplinary proceedings outside the band of reasonable responses. In reaching this conclusion particular regard was had to the **Roldan** point.

352. In contrast the decision of the majority of the Tribunal was that the focus on the claimant was understandable given her position as the surgeon who took the clinical decision to use the product in question on the patient in the operating theatre, and that even if the focus had initially been broader, it would have made no difference to the end result as the claimant would have had disciplinary charges to answer in any event. Consequently the majority view was that it was within the band of reasonable responses to focus on possible misconduct by the claimant, particularly when that was not the exclusive concern of the respondent (evidenced by the wider recommendations of the Jackson report on page 597).

353. The majority conclusion that the finding of misconduct was within the band of reasonable responses left us with the question of sanction. As to whether it was within the band of reasonable responses to dismiss the claimant rather than impose a lesser disciplinary punishment, the minority conclusion (relying on paragraph 37(4) of the EAT judgment in **Wincanton** – see Annex B) was that it was outside the band of reasonable responses. There was a distinct difference between the Kryptonite incident and the type of misconduct which formed the basis of the final written warning, and given what was at stake for the claimant no reasonable employer could have decided to dismiss her for what was ultimately an error of judgment in relation to the Kryptonite matter.

354. Contrastingly the conclusion of the majority members of the Tribunal was that although a different outcome such as a final written warning for professional misconduct (as opposed to personal misconduct) might well have been reasonable, the decision to dismiss an employee who was so recently in receipt of a final written warning, even if for a different kind of misconduct, was one which was within the band of reasonable responses. Even giving due regard to the differing

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circumstances of the warning and the Kryptonite incident, as required by paragraph 37(4) of **Wincanton**, the majority considered that it would amount to substitution of our own view for that of the respondent to hold that no reasonable employer could have taken that final warning into account. The employer was ultimately faced with an employee who had progressed year by year through the various stages of the disciplinary procedure: informal approach (2008); first written warning (2009) and final written warning (2010). As the EAT recognised in paragraph 37(6) of **Wincanton**, a final warning will only exceptionally mean that further misconduct will not result in dismissal.

355. Further, the written warning letter from the Richards panel at page 501 said in terms that if any further incidents of misconduct were to occur dismissal would be likely to result. It was permissible in the view of the majority for the Jain dismissal panel to conclude that the opportunity "to change your behaviour" was an opportunity to refrain from further misconduct, not simply to stop behaviour regarded as bullying. The respondent acted reasonably in deciding that enough was enough.

356. By a majority, therefore, the unfair dismissal claim failed.

Part 5: Summary

357. The Tribunal unanimously rejected the complaints of sex discrimination and harassment related to sex. The majority also rejected the victimisation complaint.

358. The minority conclusion on victimisation was that the following aspects were upheld. First was the decision to impose a final written warning (rather than a verbal warning) for Mr Upadhyay's 2009 allegations. Second was the nature and length (but not the outcome) of the investigation into the claimant's grievance about breach of confidentiality. Third was the failure of Ms McEvoy properly to investigate the claimant's grievance in September 2010 about sexual harassment by Mr Upadhyay, and fourth was Dr Russell's decision to reject that grievance and decide that Mr Upadhyay should not face disciplinary charges. Fifth was the way in which Dr Russell presented the management case against the claimant in 2011 following Mr Upadhay's 2010 allegation of bullying and Ms McEvoy's investigation. Sixth was the decision of the Richards panel, influenced by Dr Russell's presentation, to give a final written warning. Seventh was the decision of the Jain panel, having found misconduct over the Kryptonite incident, to impose dismissal because that was based on the final written warning from the Richards panel which was itself unlawful victimisation.

359. As for the unfair dismissal claim, the minority view was that the respondent had failed to show a potentially fair reason for dismissal because the reason was tainted by victimisation.

360. On the majority view that a fair reason had been shown, however, we unanimously decided that the conclusion that the claimant was guilty of misconduct was within the band of reasonable responses.

361. Where the Tribunal then diverged was on sanction: the minority view was that it was outside the band of reasonable responses to rely on the final warning (even

had it not been tainted by victimisation), but the majority disagreed and found the dismissal fair.

David Franey
Employment Judge Franey

Date 11 November 2013

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 November 2013

H. Kwolyn

FOR THE TRIBUNAL OFFICE

[DC]

ANNEX A
Relevant Legal Principles – Discrimination, Harassment and Victimisation

Transitional Provisions

1. The Sex Discrimination Act 1975 ("the 1975 Act") was repealed and replaced by the Equality Act 2010 ("the 2010 Act") with effect from 1 October 2010. The allegations of sex discrimination, harassment and victimisation concerned events falling either side of that date but the claim was presented after that date. The combination of the transitional provisions in the Equality Act 2010 (Commencement No. 4 etc) Order 2010 and the time limit provisions (see below) meant that the 1975 Act remained relevant. Its provisions would apply in relation to events wholly before 1 October 2010, and equally (because of Article 7 of the Order) to acts which extended over a period ending on or after 1st October 2010. Acts in the latter category, just as for acts occurring wholly after 1 October 2010, would also have to be unlawful under the 2010 Act in order for liability to arise. However, it was common ground in this case that despite some differences in wording there was no substantive difference between the relevant provisions of the 1975 Act and the 2010 Act respectively, save for one point about victimisation.

Discrimination in Employment

2. Discrimination by an employer against an employee in the form of detrimental treatment or dismissal was prohibited by section 6(2) of the 1975 Act (section 6(2A) for harassment) and equivalent provisions are found in section 39(2) of the 2010 Act (section 40(1) for harassment).

3. Employers are liable for the discriminatory acts of employees in the course of employment: 1975 Act section 41(1) and 2010 Act section 109(1). (There was no reliance in this case on the defence of having taken all reasonable steps to prevent discriminatory treatment.)

Direct Discrimination

4. Section 1 of the Sex Discrimination Act 1975 provided:

> **(1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if -**
>
> **(a) on the ground of her sex he treats her less favourably than he treats or would treat a man.....**

5. Section 13 of the Equality Act 2010 provides:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

Harassment

6. Section 4A of the Sex Discrimination Act 1975 provided:

(1) For the purposes of this Act, a person subjects a woman to harassment if -

(a) he engages in unwanted conduct that is related to her sex or that of another person and has the purpose or effect -

(i) of violating her dignity, or

(ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her...

(2) Conduct shall be regarded as having the effect mentioned in sub-paragraph (i) or (ii) of subsection (1)(a) ..... only if, having regard to all the circumstances, including in particular the perception of the woman, it should reasonably be considered as having that effect.

7. Section 26 of the Equality Act 2010 provides:

(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of -

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.....

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

8. A person's sex is a relevant protected characteristic for these purposes.

Victimisation

9. Section 4 of the Sex Discrimination Act 1975 provided:

(1) A person ("the discriminator") discriminates against another person ("the person victimised") in any circumstances relevant for the purposes of any provision of this Act if he treats the person victimised less favourably than in those circumstances he treats or would treat other persons, and do so by reason that the person victimised has -

(a) brought proceedings against the discriminator or any other person under this Act ...., or

> (b) given evidence or information in connection with proceedings brought by any person against the discriminator or any other person under this Act.....
>
> (c) otherwise done anything under or by reference to this Act ..... in relation to the discriminator or any other person, or
>
> (d) alleged that the discriminator or any other person has committed an act which (whether or not the allegation so states) would amount to a contravention of this Act.....
>
> (2) Subsection (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.

10. Section 27 of the Equality Act 2010 provides:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act -
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

11. It follows from the above provisions that the protected act must be the real reason for the treatment said to be unlawful. The wording of the 1975 Act ("less favourably") implies a comparison between cases (actual or hypothetical). In ***Chief Constable of West Yorkshire Police v Khan (2001) IRLR 830***, Lord Nicholls said:

> **"The statute is to be regarded as calling for a simple comparison between the treatment afforded to the complainant who has done a protected act and the treatment which was or would be afforded to other employees who have not done the protected act."**

12. The 2010 Act, however, no longer requires some form of comparison – see the recent decision of the Employment Appeal Tribunal ("EAT") in **Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773.** The EAT recognised that in appropriate cases a comparison may still be a useful approach to answering the "reason why" question.

The "Reason Why" Question

13. However, in cases such as this the central task under both iterations of the victimisation provisions, and under the direct discrimination provisions, is to identify

the reason for the treatment. This was made clear by the guidance of Lord Nicholls in **Shamoon v Chief Constable of Royal Ulster Constabulary [2003] IRLR 285:**

> **"Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as [he] was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others."**

14. As Underhill P (as he then was) put it in **Amnesty International v Ahmed [2009] ICR 1450:**

> **"In other cases ... the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: ..... a benign motive is irrelevant."**

15. Where a comparison of cases is necessary, the 2010 Act makes explicit in section 23 what had previously been a principle expounded only in the authorities:

> **"On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case."**

Burden of Proof

16. Section 63A of the 1975 Act provided:

> **(1) This section applies to any complaint presented under section 63 to an employment tribunal.**
>
> **(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent -**
>
> **(a) has committed an act of discrimination or harassment against the complainant which is unlawful by virtue of Part 2 or section 35A or 35B, or**
>
> **(b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination or harassment against the complainant,**
>
> **the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act.**

17. Section 136 of the Equality Act 2010 provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to -

(a) an employment tribunal.....

18. Section 63A was inserted into the 1975 Act in October 2001 in order partially to reverse the burden of proof so as to comply with EU obligations. In the case of *Barton v Investec Henderson Crosthwaite Securities Ltd (2003) IRLR 332*, the EAT issued guidance on the reversed burden. In *Igen Ltd v Wong; (2005) IRLR 258*, the Court of Appeal expressly approved the Barton Guidelines subject to certain minor amendments. The guidelines (which it is accepted apply equally to the 2010 Act) are as follows:

(1) Pursuant to section 63A of the 1975 Act, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the Claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the 1975 Act is to be treated as having been committed against the Claimant. These are referred to below as "such facts".

(2) If the Claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in section 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate

explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the 1975 Act.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the Claimant has proved facts from which conclusions could be drawn that the respondent has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

19. Care must be taken when determining whether and if so when the burden of proof shifts. This was considered by Mummery LJ in **Madarassy v Nomura International Plc [2007] ICR 867.** He emphasised that the guidance derived from **Barton** was no substitute for the statutory provisions but went on to say:

"[55] In my judgment, the correct legal position is made plain in paras 28 and 29 of the judgment in Igen v Wong.

[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 s 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. (Emphasis added) 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 s 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".

20. The guidance offered in **Igen** as refined in **Madarassy** was approved by the Supreme Court in **Hewage v Grampian Health Board [2012] IRLR 870**.

21. However, the focus (see **Shamoon** above) on the "reason why" test may mean it is open to a Tribunal not to adopt the two stage test. In **Laing v Manchester City Council [2006] IRLR 748 (EAT)** Elias P (as he then was) observed that it was legitimate for the Tribunal in some cases (such as where a hypothetical comparator is invoked) to go straight to stage 2 and consider the reasons why the employer acted as it did. This approach was approved by the Court of Appeal in **Brown v London Borough of Croydon and David Johnston [2007] EWCA Civ 32**. In cases where the Tribunal skips stage 1 and moves straight to stage 2 it will be applying its findings of fact for the first time to the issue of why the employer acted as it did. It will not have already rejected the employer's evidence.

22. The Tribunal cannot draw an inference of discrimination from the mere fact that an employer has treated an employee unreasonably. Whilst all unlawful discriminatory treatment is unreasonable, not all unreasonable treatment is discriminatory (**Glasgow City Council v Zafar (1998) IRLR 36, HL**; **Martins v Marks & Spencer plc (1998) IRLR 326, CA**, and **The Law Society and others v Bahl (2004) IRLR 799, CA**).

23. The Tribunal can only make substantive findings of discrimination or victimisation in relation to allegations specifically outlined in each of the four originating applications. It is not open to the Tribunal to make findings by way of substantive matters in relation to any matters not set out therein (**Chapman v Simon (1994) IRLR 124**). Nevertheless, the Tribunal has a discretion to consider matters advanced by the Claimant other than those directly relating to the substantive issues by way of background" material (**Anya v University of Oxford (2001) IRLR 377, CA**). Background material must not be confused, however, with substantive complaint. Importantly, **Anya** emphasises that the function of the Tribunal is to find the primary facts from which it will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of were on the proscribed grounds. If not, the claim fails. If so, the claim succeeds

unless the respondent can displace that inference by establishing a different explanation.

Time Limits

24. Section 76 of the Sex Discrimination Act 1975 provided:

(1) An employment tribunal shall not consider a complaint under section 63 unless it is presented to the tribunal before the end of

(a) the period of three months beginning when the act complained of was done.....

(5) A court or tribunal may nevertheless consider any such complaint or claim which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

(6) For the purposes of this section -

(a) ...

(b) any act extending over a period shall be treated as done at the end of that period, and

(c) a deliberate omission shall be treated as done when the person in question decided upon it,

and in the absence of evidence establishing the contrary a person shall be taken for the purposes of this section to decide upon an omission when he does an act inconsistent with doing the omitted act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the omitted act if it was to be done.

25. Section 123 of the Equality Act 2010 provides:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) .....

(3) For the purposes of this section -

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something -

> (a) **when P does an act inconsistent with doing it, or**
>
> (b) **if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

26. In considering whether conduct extended over a period we had regard to the decision of the Court of Appeal in **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96**. In considering whether it would be just and equitable to exercise our discretion to allow a late claim to proceed, we had regard to decisions such as **Robertson v Bexley Community Centre [2003] IRLR 434**, which shows that the Tribunal has a wide discretion but that it is for the claimant to establish that the discretion should be exercised in his favour and **Chief Constable of Lincolnshire v Caston [2010] IRLR 327** which indicates there is no general principle governing how generously or sparingly the discretion should be exercised.

ANNEX B
Relevant Legal Principles – Unfair Dismissal

1. The unfair dismissal claim was brought under part X of the Employment Rights Act 1996 ("the 1996 Act"). The concept of fairness is set out in section 98. The first stage is to identify the reason for dismissal. Section 98(1) is as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
>
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."**

2. Sub-section (2) then defines the kind of reasons which will fall within sub-section (1) and includes a reason related to the employee's conduct. A reason which relates to the employee's gender, or to a previous employment tribunal claim, will not be a potentially fair reason.

3. If a potentially fair reason is shown section 98(4) is the key provision:

> **"In any case where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case."**

4. Since its origin in the judgment of Mr Justice Arnold in **British Home Stores v Burchell [1980] ICR 303**, and despite the removal in the Employment Act 1980 of the burden previously placed upon the employer, the range or band of reasonable responses test has been affirmed in numerous decisions. There was a summary of the relevant principles contained in the judgment of Aikens LJ in **Orr v Milton Keynes Council [2011] ICR 704**. As regards the fairness test in section 98(4), he summarised the position as follows (para 78):

> **"...(4) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss for the "real reason". That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief. If the answer to each of those**

> **questions is "yes", the employment tribunal must then decide on the reasonableness of the response of the employer.**
>
> **(5) In doing the exercise set out at (4), the employment tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.**
>
> **(6) The employment tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable" employer might have adopted.**
>
> **(7) A particular application of (5) and (6) is that an employment tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."**

5. The band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see **Whitbread plc v Hall [2001] IRLR 275 CA**; and whether the pre-dismissal investigation was fair and appropriate: see **Sainsbury's Supermarkets v Hitt [2003] IRLR 23 CA**.

6. The band of reasonable responses test provides an objective assessment of the employer's behaviour whilst reminding the employment tribunal that the fact that it would have assessed the case before it differently from the employer does not necessarily mean that the employer has acted unfairly. Further, the burden of proof which lay on the employer at the time of **Burchell** was removed by legislation some time ago and there is no burden on either party on the fairness of the dismissal if a potentially fair reason is shown.

7. When determining whether an employer has acted as the hypothetical reasonable employer would do, it will be relevant to have regard to the nature and consequences of the allegations. These are part of all the circumstances of the case. So if the impact of a dismissal for misconduct will damage the employee's opportunity to take up further employment in the same field then a reasonable employer should have regard to the gravity of those consequences when determining the nature and scope of the appropriate investigation.

8. In ***A v B*** **[2003] IRLR 405**, para 60, the EAT said:

> **"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in**

> **the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."**

9. This dictum was approved by the Court of Appeal in **Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457** para 13. That case concerned a registered nurse. The EAT considered there to have been "a real risk that her career would be blighted by this dismissal", albeit that part of the risk was deportation. The test applied in **A v B** and **Roldan** is still whether a reasonable employer could have acted as the employer did. However, more will be expected of a reasonable employer where the allegations of misconduct, and the consequences to the employee if they are proven, are particularly serious.

10. The fairness of a dismissal must be assessed taking into account the appeal: **Taylor v OCS Group Limited [2006] IRLR 613.** The distinction between an appeal by way of a rehearing and an appeal by way of a review is not in itself determinative of the question whether earlier unfairness can be cured on appeal; what matters is the overall fairness of the dismissal.

11. The relevance of an earlier final written warning to a dismissal decision where the employer does not find that gross misconduct has been established has been considered in a number of cases. A helpful recent summary of the law was provided by the EAT chaired by Langstaff P in **Wincanton Group Plc v Stone [2013] IRLR 178** at paragraph 37:

> **"We can summarise our view of the law as it stands, for the benefit of Tribunals who may later have to consider the relevance of an earlier warning. A Tribunal must always begin by remembering that it is considering a question of dismissal to which section 98, and in particular section 98(4), applies. Thus the focus, as we have indicated, is upon the reasonableness or otherwise of the employer's act in treating conduct as a reason for the dismissal. If a Tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid. If it is so satisfied, the earlier warning will not be valid and cannot and should not be relied upon subsequently. Where the earlier warning is valid, then:**
>
> > **(1) The Tribunal should take into account the fact of that warning.**
> >
> > **(2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.**
> >
> > **(3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category**

of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.

(4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.

(5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

(6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur."