UK EAT Before His Honlur Judge JR Reild QC, Mr C Lewis, Mr R.Lyons : 11th June 2004

JUDGMENT : HIS HONOUR JUDGE J R REID QC

1. This is an appeal from a decision of an Employment Tribunal held at Reading in over 5 days in March 2003, followed by a decision meeting on 28 April. The decision was sent to the parties on 22 May 2003. The proceedings were the second set of Employment Tribunal proceedings between the parties. By its decision the Tribunal held that Dr Gammon was not constructively dismissed by the Stoke Mandeville Hospital NHS Trust ("the Trust"), that her complaint of discrimination contrary to the **Sex Discrimination Act 1975** failed and that her claim that she was subjected to detriment by reason of having made a protected disclosure contrary to section 47B of the **Employment Rights Act 1996** failed.

2. Dr Gammon began employment with the Trust on 1 January 1993 as a consultant within the Trust's A&E Department and was appointed Lead Clinician within the A&E Department with effect from 1 July 1999.

3. By a first application to the Employment Tribunal dated 23 April 2001 she complained that:
   a) she had been subjected to detriment short of dismissal by reason of her making a public interest disclosure; and
   b) she had been treated less favourably on grounds of her sex.

   The hearing of that application commenced on 7 January 2002.

4. On 9 January 2002 the Tribunal made a number of preliminary observations relating to the case. On 10 January 2002 the parties reached a negotiated settlement, the terms of which were incorporated into a decision of the Tribunal, by which:
   a) the Trust admitted liability in respect of Dr Gammon's application relating to public interest disclosure; and
   b) she withdrew her application relating to sex discrimination.

5. On 15 February 2002 she resigned from her employment with the Trust. On 2 May 2002 she made a second application to the Tribunal. On 21 November 2002 her application for review of the first decision was refused and directions given.

6. The principal issues in the second application were defined by the parties as follows:
   "(1) Was Dr Gammon constructively dismissed by reason of the matters set out in various paragraphs 26 of her details of complaint (whether taken separately or in combination)?
   (2) If so, what was the reason for her dismissal, in particular:
      a) was the reason or principal reason for her dismissal the fact that she had made a protected disclosure (Employment Rights Act 1996 s 103A), or
      b) was the reason or principal reason for her dismissal the fact that she had (by her first application) asserted a breach of her statutory rights (Employment Rights Act 1996 s104 (l) (a); Sex Discrimination Act 1975 s6 (2) (b), 4 (l) (a)).
   (3) Was she treated less favourably than Dr B on the grounds of her sex and subjected to a detriment (dismissal or action short of dismissal) (Sex Discrimination Act 1975 ss6 (2) (a), (b), l (l) (a))?
   (4) Was she subjected to a detriment (short of dismissal) by reason of making a protected disclosure (Employment Rights Act 1996 s 47B)?"

7. The background to these proceedings, as found by the Employment Tribunal which dealt with the second application, was as follows.

8. On 10 October 1999 Dr Gammon made a formal report setting out serious concerns of a number of staff in the Trust's A&E department, including herself, regarding the personal conduct and professional conduct and competence of her consultant colleague, Dr B, a male. For a number of reasons including the Trust's approach in treating the report as resulting from personal conflict between her and Dr B she believed that she had been subject to detriment contrary to s 47B **Employment Rights Act 1996**. She also complained of sex discrimination. One of the consequences of the formal report was that Dr B went on study leave and on secondment to a hospital in Oxford.

9. At the hearing concluding on 10 January 2002 (following criticism from the Tribunal of the reliance that the Trust had placed on outside reports from FAEM and the Tavistock Trust and the contents of their

reports) the Trust admitted liability in respect of the complaint of being subjected to a detriment on the grounds of making a public interest disclosure and Dr Gammon withdrew her application under the **Sex Discrimination Act 1975**. The parties agreed terms which were annexed to the Tribunal's decision. These terms provided for an agreed return to work of the applicant no later than 15 March 2002 as Consultant and Lead Clinician in the A&E Department. There was to be circulated to all Board members, Executive Officers and Consultants within the Trust and staff within the A&E Department an agreed letter by which the Trust accepted that Dr Gammon and other staff of the A&E department had acted in good faith in raising their concerns and that she in her role as lead clinician properly raised concerns. The Trust accepted that it was not a personality conflict and regretted if the position had been portrayed otherwise.

10. It was also agreed that an independent investigator would be appointed by agreement in accordance with a procedure set out. The terms were: *"The investigator shall take all steps it considers appropriate (without further guidance from the Trust's Officers as to procedures to be adopted by the investigator) to investigate and report in writing upon the handling to date by the Trust Officers of the concern raised in Dr Gammon's public interest disclosure dated 4 October 1999, including the Trust's initiation, supervision and reliance upon the reports and processes of the Faculty of Accident and Emergency Medicine (FAEM) and the Tavistock Consultancy Service and to make written recommendations as to future decisions and conduct of the Trust with a view to avoiding such problems in the future. For the avoidance of doubt, this will not include any investigation of the specific incidents raised by Dr Gammon in that disclosure".*

The Trust, in the settlement agreement, acknowledged that there had been weaknesses in and the procedures surrounding the reports of FAEM and Tavistock Consultancy Service. Dr Gammon was to have a full say and participation in any issues relating to staffing levels in her role as Lead Clinician. She was to be on holiday leave until the resumption of her duties. It was also part of the agreement, which Dr Gammon said was important to her, that her return to work should not be subject to any pre-condition.

11. The agreed statement was circulated under the joint signatures of Mrs Wise, Chief Executive of the Trust, and Dr Tudway, Medical Director and Consultant, on 10 January 2002. The Trust went beyond its obligations under the settlement agreement and circulated this statement to a number of additional people at Dr Gammon's request. Mrs Wise also prepared the press statement in conjunction with the Press Officer. She faxed the statement to Dr Gammon who took issue with the fact that there was emphasis on the sex discrimination element of her claim and did not mention her claim under the **Public Interest Disclosure Act 1998**. Mrs Wise believed that she had incorporated into the final version her requested amendments and that it accorded with the settlement agreement. She said that in any event she was not obliged to seek Dr Gammon's comments or approval. Mrs Wise's belief was that when the statement was sent off Dr Gammon was not unhappy with the contents.

12. On 16 January Dr Gammon had a meeting with Sandra Cotter the Clinical Nurse Specialist in the A&E, and Mr David Griffiths, General Manager for Critical Care, to prepare for the meeting on 18 January with Mr Newton the Director of Operations. They met on 18 January to consider the strategic direction for the A&E Department. Dr Gammon thought it was a positive meeting although she was concerned that Mr Newton seemed to say that the Tribunal had made no findings. In fact, he was one of the people who had been circulated by Mr Wise and Dr Tudway with the agreed statement.

13. Mr Newton confirmed the discussions regarding the areas for staff together with the possibility of a third consultant appointment. By a letter of 6 February 2002 to Ms K Westlake, the Medical Personnel Officer, Dr Gammon said that it would not be appropriate at that juncture to recruit for staff grade posts; and one of the reasons was that the current job description might not comply with the **European Working Time Directive**. On 12 February when Dr Gammon attended a meeting in A&E to progress the staffing strategy, she was contacted by Mr Newton who wished to proceed with the appointment of staff grade doctors for A&E. She raised with Mr Newton the provisions of paragraph 4 of the Settlement Agreement that staffing issues in A&E had to be resolved in consultation with her. Mr Newton said that he was unaware of that clause.

14. On 22 January 2002 Dr Gammon wrote to Dr Woodbridge, the Chairman of the Trust, who was also a solicitor. She sent her nominations for the appointment of the investigator pursuant to the settlement. On that date, Mrs Wise sent to Dr Gammon her nominated individuals or organisations to undertake the review. In fact Dr Gammon did not get this letter until 29 January via her representative. This puzzled her because she had a conversation on 23 January with Mr Arthur who had been appointed to promote mediation in the whole matter and who had indicated Mrs Wise had not decided whether to nominate the Kings Fund. Furthermore, Dr Gammon pointed out that under the settlement agreement, both parties were required to nominate organisations by 24 January. Even more perplexing for her was a letter received from Mr Woodbridge of 25 January where he indicated that it was not necessary to meet with her or her representative in connection with the appointment of the investigator and that she would be notified of the Board's choice in due course. This was at odds with the Settlement Agreement which provided for the investigator to be appointed by agreement between the parties, or in default of agreement by a third party. He also referred to the fact that Mrs Wise had submitted her proposals for the nomination of the investigator. Dr Gammon's BMA Representative raised her concerns that the Chairman's letter was in breach of the settlement agreement with Mrs Wise. Mrs Wise agreed with the contention put forward on Dr Gammon's behalf. The procedure for appointing the investigator was concluded by 31 January 2002 in a report submitted to the Board by Mrs Wise setting out the nominations of both Dr Gammon and herself.

15. On 23 January Dr Gammon met Mr Arthur of the NHS Clinical Governments team as he endeavoured to re-establish effective working relationships within the A&E Department pursuant to Clause 5 of the Settlement Agreement. According to her he told her he was under the impression that one of the outcomes of the Tribunal was an agreement that there were different ways for two consultants to work and this needed to be reconciled before she would return to work. Dr Gammon was very distressed that Mr Arthur seemed to have been given the impression the matter was about personal conflict or different working practices. Under Clause 5 (b) of the Settlement Agreement, participation in such a process was not a pre-condition to the applicant's return to work. Dr Gammon raised with Mr Arthur difficulties that she had experienced in communicating with the Trust and that there had been no communication since the Tribunal hearing to discuss her return to work. She told Mr Arthur that the date on which she wished to return to work was 18 February.

16. On 27 January 2002 the Observer newspaper published an article regarding the A&E Department and referring in particular to nine allegations of clinical problems within it relating to Dr B. The article stated Dr Gammon was not the source of any of the documents on which the article was based. She issued a press statement through the BMA office. She said that she felt that members of the Trust were blaming her for the Observer article and suspected that she had disclosed documents to the press.

17. The Observer article put considerable pressure on the Trust. David Lidington MP wrote, seeking assurances about patients' safety and whistle blowing procedures at the hospital. Mrs Wise realised that she would have to allay concerns of third parties regarding the safety of the A&E Department and wrote to FAEM on 29 January seeking an assurance that the Faculty's Report was as a result of a robust investigation and that there had been no evidence arising from the investigation that the practice of Mr B was unsafe or that he was considered clinically incompetent. The FAEM gave such an assurance on 2 February 2002.

18. Mrs Wise replied to Mr Lidington on 4 February referring to the letter from the FAEM. She assured him that there was no evidence that patient safety was at risk. In respect of the Observer's allegations that the Trust's handling of Dr Gammon's case was badly flawed she added that clearly she had her own personal views.

19. Mrs Wise sent a letter to all consultant staff and members of the A&E department referring to the Observer article which reiterated the FAEM's comment that the assessors found no evidence of clinical incompetence on the part of Mr B. Dr Gammon was disenchanted with the fact that the Trust appeared to be attempting to rely on the report of the FAEM when in paragraph 7 of the agreement the Trust had acknowledged that there were weaknesses in its report. Her solicitor, Ms Hadley, raised Dr Gammon's concern that Mrs Wise's letter of 6 February had breached the terms of the settlement agreement.

20. The other notable event during this period was a meeting on 29 January 2002 of the Clinical Management Board. Perhaps unsurprisingly, Dr Gammon's husband, Mr Benjamin, was told by Dr Tudway that it would not be appropriate for him to attend. It is also unsurprising in the fairly febrile atmosphere that reports of the meeting should have leaked out. According to Dr Gammon the suggestion that she might need retraining before returning to work was raised. As far as the Trust was concerned this was not the case. The focus of the discussion was on giving her appropriate support on her return to work.

21. On 1 February 2002 Mr Arthur informed Dr Gammon that he was withdrawing from the mediation because he believed that a third party who had more specialist skills than him needed to be involved. On 6 February there was a meeting of the Medical Advisory Council who wrote to Mrs Wise suggesting that prior to Dr Gammon returning to work there should be an agreement between A&E Consultants regarding working practices and future plans for medical staffing. They fully supported the provision of an immediate and continuing mediator for the A&E Department and this position should ideally be established before her return. Dr Gammon was concerned and upset because she believed that this meeting had discussed her fitness to return to work. There were no clinical issues regarding her performance as opposed to Dr B. Dr Knight gave evidence that Dr Gammon may have formed this impression on the strength of the conversation between her husband and a Dr Bunsell. He said that there was no issue as to her fitness for return to work. Her clinical competence was not discussed. The purpose of the discussion was an orderly return in the A & E Department. Dr Gammon's concerns were raised in a letter of 7 February and Dr Knight wrote to her on 9 February assuring her that the remit had been not to judge fitness to return but to consider the manner in which she was helped to return to work.

22. At 5.30 p.m. on 6 February Dr Gammon, together with her BMA representative Mr Pymer, met Mrs Wise. Ms Sue Debenham was requested by Mrs Wise to sit in on the meeting. The purpose was to discuss matters relating to Dr Gammon's return to work. This was so acrimonious a meeting that during its course Mrs Wise had to leave for a few minutes to compose herself. According to Mrs Wise Dr Gammon was angered by the fact that Mr Arthur had withdrawn from the mediation process and appeared to be of the view that she was responsible whilst the reality was that Mr Arthur had decided he did not have the skills necessary to mediate in such a matter. Ideally Mrs Wise wanted there to be a meeting with Dr B before Dr Gammon returned to work but in an endeavour to move matters forward she agreed to most of Dr Gammon's demands at this meeting including one that she did not have to have this meeting with Dr B. As far as Dr Gammon was concerned there was no requirement on her to do so under the Settlement Agreement. Mr Pymer wrote a letter to Mrs Wise on 7 February 2002 confirming the main points of the meeting of 6 February. He concluded by stating that he was glad that the parties were able to make agreements on the important practical matters and to agree a firm date for her return to work on Monday 18 February 2002.

23. The issues raised in the press articles percolated through to MPs and there was an adjournment debate in the House of Commons on 8 February regarding matters at the hospital. Ms Hadley, for Dr Gammon, wrote to the Trust's solicitor on 12 February quoting what was said in the House and suggested that if it reflected what the Trust had told the MPs then it constituted a further breach of the settlement agreement. The letter said they wished to advise Dr Gammon on her position as soon as possible bearing in mind her proposed return to work on 18 February and required a response by close of business the following day. Mr Pryer of the Trust's solicitors responded on 14 February. He stated that his clients had no communication whatsoever with Ms Blears MP so they were unable to comment on her contribution to the adjournment debate. He had been advised that Dr Gammon's representative Mr Pymer had written to Mrs Wise requesting another joint meeting this coming Friday 15 February. Dr Gammon's solicitors said that it was considered that a further such meeting following on so soon from the last one would not be appropriate.

24. On 14 February Mr Pymer wrote a lengthy letter to Mrs Wise referring to Dr Gammon's view that there were breaches of the terms of the settlement agreement. He also disagreed with Mrs Wise's decision that a further meeting prior to Dr Gammon's return to work was not necessary. He maintained that the publication of the Observer article did not justify the breach of the agreement. He stated that if the Trust

refused to have such a meeting or having had such a meeting refused to accommodate their reasonable request to remedy breaches of the agreement then Ms Hadley and he would have no option but to advise Dr Gammon as to her position with particular regard to her future employment with the Trust.

25. Mrs Wise responded by e-mail that she did not consider a meeting appropriate because she felt unable to discuss matters raised in Mr Pymer's letter as she believed legal representation would be required. She confirmed this in writing on 15 February but said nevertheless she was happy to meet to discuss arrangements for Dr Gammon's return to work.

26. By letter of 15 February 2002 Dr Gammon resigned her position. She said that the Trust, although it had admitted liability for her claim under the whistle blowing legislation, had consistently taken action which had not recognised the consequence of that admission. She referred to the contents of letters from Mrs Wise to staff, the FAEM and to Mr Lidington MP and this was the final straw. Mrs Wise responded on 18 February saying that she was disappointed with Dr Gammon's resignation because she had been working very hard on arranging for her return to work within the timescale agreed. On 3 May 2002 Dr Gammon commenced the proceedings the subject of this appeal.

27. In this appeal, she complains about 5 aspects of the second hearing and decision:
(a) The fairness of the hearing;
(b) The Tribunal's misconstruction of its remit;
(c) The Tribunal's misconstruction of the Settlement Agreement;
(d) The lack of evidence for some of the Tribunal's findings of fact; and
(e) The Tribunal's failure to deal with one aspect of her complaint, or (alternatively) if it was dealt with, then the decision was not "***Meek*** *compliant"* because Dr Gammon could not tell why she lost.

28. In order to understand the complaints about the fairness of the hearing it is necessary to deal with the events which occurred at the hearing. In doing so we have to make findings of fact as to what occurred based on the affidavit evidence placed before us and the comments supplied by the members of the Tribunal commenting on Dr Gammon's affidavits. Happily there are no material differences between the various accounts, though inevitably the different participants saw matters from rather different standpoints.

29. The hearing had been set down for 5 days. Both counsel had supplied the Tribunal with a reading list, and at the commencement of the hearing the Chairman said that the Tribunal members would take the day to read the papers. The Chairman also suggested that the parties might use the time seeing if there was a possibility of settlement. There is disagreement as to the extent and possible usefulness of those discussions, but nothing turns on that divergence of view.

30. On the second morning the Tribunal took a further period of just over an hour to complete its reading but before they did so Dr Gammon's counsel told the Tribunal that the failure to settle had nothing to do with money, to which the Chairman replied with an obvious remark of a type frequently made to the effect that principles could be expensive things. The hearing commenced at 11.22 am.

31. The Chairman then suggested that as the Tribunal had read the witness statements together with relevant documentation and skeleton arguments it might give a preliminary indication of its views subject to cross-examination and submissions and the fact that it was a preliminary view only. Dr Gammon's counsel asked to take instructions and it was agreed that a preliminary view would be helpful. The Chairman then gave what was described as a *"snapshot":* that having read the witness statements and subject to cross-examination and submissions, the Tribunal's preliminary view was that they did not "*at that juncture*" see anything in the claim for sex discrimination. Dr Gammon "could be in with a shout on constructive dismissal" although the strict contractual test in reality meant that only approximately 10% of applicants bringing cases of constructive dismissal succeeded but that is not to say that this was not one of them or that she might not get home on the principle of the last straw. No view was expressed on the detriment claim under the **Public Interest Immunity Act**. These views were expressly said to be subject to be *"an initial view*" and *"subject to cross-examination and submissions".*

32. The Chairman also indicated that the lay members were concerned that putting the dispute in the public forum might ventilate painful matters and damage public confidence in the Trust. The Tribunal had

formed the preliminary view that the claim in the schedule of loss for removals and travelling (which were in the order of £150,000 to £200,000) seemed wholly fanciful. There was a sustainable claim for injury to feelings- described by the Chairman as "*mid-range* ***Vento***". As regards Dr Gammon's claim for £24,500 loss of earnings between June and September, the Tribunal noted that this was a period of school holidays and thought therefore there might be arguments regarding mitigation. The Tribunal went on to observe that some of the matters on which it was being asked to adjudicate were more appropriate for the County Court (this picked up an observation in the Trust's skeleton argument) and to the effect that some points seemed more appropriate to a question for Henley Management College. It was clearly in the Tribunal's mind that Dr Gammon might be wanting admissions of mismanagement by the Trust, which the Tribunal could not compel.

33. Counsel asked to see the Tribunal on their own (i.e. excluding the press which was represented) and it was revealed that the Trust had made an open offer of settlement of £70,000. The Chairman described this as "generous". At this stage the Chairman was minded to ask the parties to disclose any "without prejudice" offer, but wisely desisted in the face of objections from both counsel.

34. The hearing proceeded with a short opening from counsel for Dr Gammon. Dr Gammon was then called to give evidence and was still being cross-examined at the conclusion of the day's hearing.

35. The following morning before the hearing recommenced the Tribunal asked to see counsel again, and again pressed on them the desirability of settlement. The Chairman said in relation to a comment from Dr Gammon's counsel that it was not about money, that it was not necessarily as simple as that, taking into account the overriding objective of the Tribunal's 2001 Procedure Regulations. The fact was that the open offer was probably twice what Dr Gammon might get if she succeeded in her case discounting for the moment the possibility of success under Sex Discrimination or alternatively she could lose. There could then be the matter of conduct of the proceedings and there could be a dimension on costs.

36. Counsel for Dr Gammon asked for some time to speak to his client. He returned to say she was not intransigent but it was difficult to address the issue in the middle of her evidence. The hearing resumed just after 11am. Unhappily, it never proved possible for the parties to reach agreement. The proceedings continued to their conclusion, the decision and this appeal.

37. We shall deal with each of the five heads of complaint separately, although in the course of oral argument counsel for Dr Gammon elided the grounds somewhat and sought to add a different gloss to some of them.

38. In respect of the first head (the fairness of the hearing) the submissions made on behalf of Dr Gammon were as follows.

(1) Whilst in moderation it is appropriate to encourage settlement, the Tribunal went too far in making repeated attempts in the course of the hearing to encourage settlement. It would not accept that the parties had attempted to reach agreement but could not do so.

(2) The Tribunal's over-insistence was shown by its indication that it would require the parties to reveal to the Tribunal their last without prejudice offers (even though it did not persist in this suggestion).

(3) The Tribunal required Dr Gammon to disclose the Trust's open offer and the Chairman stated of the open offer that it was a "generous offer (having regard to the ceiling on claims of constructive dismissal)". Since there is no cap on unfair dismissal claims where the reason for the dismissal was whistle-blowing (**Employment Rights Act 1996** s 124 (1 A)) this aspect of the case cannot have been in the Tribunal's mind.

(4) The Tribunal interrupted Dr Gammon's evidence in order to ask the parties once again to attempt to settle, warning of the costs implications of proceeding. This was of particular concern as Dr Gammon was supported by her union which had to take its own decision about the costs warning. The repeated adjournments did nothing but upset Dr Gammon and prolonged the hearing, so that an adjournment was necessary at the end of the allotted 5 days whilst written submissions were prepared.

(5) The way in which the Tribunal pressed for a settlement was such that it would have led a reasonable and fair-minded observer to conclude that the Tribunal was biased. Accordingly the decision should be set aside.

(6) The well-known passages in **Porter v Magill** [2002] 2 AC 357 (at paras 102 and 103) and **Lawal v Northern Spirit Ltd** [2003] ICR 856 (at para 14) show that where there may be a public perception of unconscious bias in the mind of a reasonable member of the public who is not complacent or unduly sensitive or suspicious the decision should be set aside. Here an objective observer would have perceived apparent bias.

(7) **Southwark LBC v Jiminez** [2003] ICR 1176 confirms that there is a boundary which a Tribunal must not cross in urging settlement on the parties: "*the permitted line*" as Peter Gibson LJ called it at para 32. The Tribunal's over-insistence crossed the line. Therefore the decision should be set aside.

39. On behalf of the Trust counsel submitted:

(1) The question is whether the fair-minded and informed observer, having considered the facts, would consider that there was a real possibility that the tribunal was biased. A "premature expression of a concluded view or the manifesting of a closed mind by the tribunal may amount to the appearance of bias": per Peter Gibson LJ in **Jiminez v Southwark LBC** at para. 25.

(2) The Tribunal was dealing with a publicly funded hospital involved in a long-running dispute with a consultant that had already been the focus of negative press and political attention. The Tribunal's acts in encouraging settlement were motivated by a desire to avoid the further washing of "*dirty linen*" with all the attendant damage that would do to public confidence in an A&E department of a hospital. It is not improper for a Tribunal to encourage settlement even in circumstances where (unlike the present case) both sides appear to have no interest in settlement discussions.

(3) Comments made by the Tribunal as to the Schedule of Loss were not directed at liability or the respective strengths of the parties' cases. The particular comments made by the Tribunal in respect of the Schedule of Loss were not indicative of a closed mind in any case. Whilst the Tribunal did regard part of the Schedule as "fanciful", one aspect was described as "sustainable" and in respect of another it was said that "there may be arguments". These clearly indicate that the Tribunal was still open to persuasion in respect of compensation.

(4) An invitation to one party to withdraw its claim or to settle by capitulating entirely might in some circumstances be indicative of a closed mind, but in this case the Tribunal was encouraging a settlement that would inevitably involve a payment by the Trust. If the Tribunal had been biased against Dr Gammon, that would not have been so.

(5) The Tribunal's "*snap shot*" of the merits was simply an indication of the Tribunal's thinking based on the documents read (including witness statements). There is nothing improper in this, particularly as Dr Gammon's counsel consented to being given such an indication. There was no basis for suggesting that the Tribunal had reached a concluded view. In fact, the Tribunal was clearly at pains to point out the provisional nature of its views.

(6) The Tribunal's comments did not amount to a costs warning, that is to say, an indication to a party that costs would inevitably follow if a certain course was not adopted. At most, Dr Gammon was being informed that the possibility of costs should be borne in mind. In view of the Trust's open offer and the Tribunals view "at that juncture" that the sex discrimination claim lacked merit, it was perfectly proper to provide that information.

(7) As to the interruption of proceedings, the so-called interruption took place during a natural break in the proceedings, i.e. between the end of the second and the start of the third day. Dr Gammon was not interrupted *'mid-flow'*. Moreover, the Tribunal ensured that she was not present when the comments were made. Her apparent upset appears to stem more from being left in the dark by her advisers for a short time rather than from anything that the Tribunal had said.

(8) In any case, Dr Gammon's perception of her treatment by the Tribunal is not to the point. The objective observer would see a Tribunal doing its utmost to encourage a settlement in a difficult

dispute which the Tribunal's decision might do little to resolve. In fact, the Tribunal repeatedly refer to Dr Gammon in their reasons in complimentary terms which are inconsistent with an appearance of bias against her. The objective observer would not, therefore, have observed a hearing that appeared unfair.

40. In our view the question is whether an objective impartial observer, attending the whole proceedings and being familiar with the procedure and practice of the Tribunal, would have perceived apparent bias. We put the question in that form in reliance on the judgment of Peter Gibson LJ in **Southwark LBC v Jiminez**, paras 25 to 32, which usefully deals with the relevant earlier authorities. It does not seem to us that nowadays it is necessary to go back to those earlier authorities. It is not material that Dr Gammon felt that the Tribunal was biased against her any more than it is material that the Tribunal felt that it was being scrupulously fair.

41. The Tribunal was entitled to press the parties to settle in a robust manner. The manner in which it did so was not as robust as that adopted by Jacob J in **Hart and anor v Relentless Records Ltd and others** [2002] EWHC 1984 (Ch). This was a case in which the Tribunal could properly take the view that everybody's interests would be best served by an agreement if such an agreement was possible. Whilst Dr Gammon could have obtained findings in her favour on some or all of her heads of claim, the remedy could only be in money. She had taken up a post with another NHS Trust. The Tribunal was entitled to consider also the public interest of avoiding the public washing of dirty linen about the practices of the A&E department of the hospital. Unlike the position in **Peter Simper & Co Ltd v Cooke** [1986] IRLR 19 there was nothing said or done which would have indicated to an objective bystander that the Tribunal had formed any fixed final view about the merits any of Dr Gammon's claims or the extent of any compensation to be awarded.

42. The fact that the last effort that the Tribunal made to persuade the parties to settle was made during the course of Dr Gammon's evidence is immaterial. The intervention before the third day of the hearing commenced cannot be said to have interrupted her evidence in any objectionable way. It is not as if the Tribunal had called a halt in mid-questioning with Dr Gammon physically present in the witness box and being questioned.

43. The so-called "*costs warning*" was not inappropriate. The Tribunal was aware of a substantial offer of settlement which, in their preliminary view, was likely to be substantially more than Dr Gammon would recover if she was successful. In the event, although Dr Gammon failed, no order for costs was made and the Tribunal indicated at the conclusion of the evidence that Dr Gammon did not have to worry about costs. It may be that the Tribunal did not have in mind all the material factors when the Chairman said what he did. It was open to counsel for Dr Gammon to have raised any apparent lacuna at that stage or to deal with the supposedly missed points in due course in making submissions to the Tribunal. The giving of the warning did not influence the way in which the hearing proceeded, nor could the fact that it was given (particularly in the muted terms in which it was) have led any objective bystander to perceive bias in the Tribunal.

44. In our judgment neither individually nor collectively do the matters about which Dr Gammon complains come anywhere near showing that the Tribunal gave an appearance of bias against her.

45. During the course of oral argument counsel for Dr Gammon elided the second ground of complaint (the Tribunal's misconstruction of its remit) into a further allegation of apparent bias. He submitted that her case was based upon breaches of the trust and confidence term, including those arising from breach of the Settlement Agreement. These were matters within the Tribunal's remit and it was obliged to consider them openly and carefully. However the Tribunal showed that its mind was clouded by its misperceptions as to its remit. Its suggestion that the application was akin to a *"test question for an organisation such a Henley Management College"* demonstrated its reluctance to perform its function. Further, the observation *"Indeed, the dissection of the Settlement Agreement and any alleged breaches are more a matter for a different forum namely the County Court"* showed a disinclination to consider her case properly. Dr Gammon was asking the Tribunal to consider whether the actions of the Trust's management were calculated or likely to destroy or seriously undermine the relationship of trust and confidence. This was a matter for an employment tribunal and her case was fully within the Tribunal's jurisdiction. It

necessarily involved a careful consideration of management action, from which the Tribunal should not have shied away. Its failure to deal properly with the point indicated a mind closed against Dr Gammon's case.

46. Counsel then submitted that comments made by one of the lay members when commenting on Dr Gammon's affidavit supporting her allegation of bias showed a mind closed against Dr Gammon's case because the member wrote: *"The Henley reference related to the over-riding relationship issues which clearly existed in the department"*. It was submitted that this was in conflict with the Trust's acknowledgement in the Settlement Agreement that *"the Trust accepts that Dr Gammon properly raised [these] concerns in her role as Lead Clinician. It accepts that this was not a personality conflict and regrets if the position has been portrayed otherwise"*. The Tribunal's concern that the issues raised "were issues in the main of clinical and corporate governance which should be resolved outside the Tribunal forum" (as the other lay member put it when commenting on Dr Gammon's affidavit) prevented the Tribunal properly considering the case before them and that its mind was clouded against her and that it did not approach the questions she asked of it in a fair and even handed manner.

47. The response of counsel for the Trust was that the sole basis for this ground of appeal appeared to be the Tribunal's reference to the "*Henley Management College*" and the "*County Court"*. However, in merely stating that parts of Dr Gammon's case appeared to be more suited to those forums, the Tribunal was hardly abdicating its responsibility to consider her claim. This ground, it was submitted, was spurious and ignored the overwhelming majority of the Tribunal's reasons that dealt precisely with the issues that were set out by the parties at the commencement of the case.

48. In the context of the intractable relationship difficulties between Dr Gammon and the Trust's senior management, the reference to a "*test question*" at the Henley Management College was perfectly understandable. As for the reference to the County Court, it was one of the Trust's principal observations that any dispute about the Settlement Agreement (like any dispute relating to any compromise agreement) was one that was better dealt with by the County Court. It cannot be an error of law merely to restate an observation made by a party in submissions.

49. In our view there is no substance in Dr Gammon's complaints. The Tribunal was anxious that the parties should settle. It believed that "*these proceedings should not have been pursued over this period they were in this Tribunal and commonsense should have prevailed"* (see para 42 of the Decision) but when the parties did not settle, it proceeded with the hearing over a number of days.

50. The basis of the claim that the Trust was in breach of the implied term of trust and confidence in Dr Gammon's contract of employment was that the Trust had broken the terms of the Settlement Agreement. It was perfectly justifiable for the Tribunal to observe that "*it seemed that the Tribunal was being asked to adjudicate in some areas of management actions and consultant competencies which was not within its remit but more so a test question for an organization such as Henley Management College."* This comment did not indicate that the Tribunal was abrogating its responsibility or was not taking its task seriously, but rather that the underlying problem was one ill-suited to resolution in an Employment Tribunal. Similarly it was not improper for the Tribunal (echoing a submission made to it on behalf of the Trust) to observe that the "dissection of the Settlement Agreement and any alleged breaches were more a matter for a different forum namely the County Court". It would indeed have made the Tribunal's task easier if the County Court had decided on the issues as to whether there had been any breaches of the Settlement Agreement, and it may well be that these legal questions were better suited to a Court rather than the supposedly more informal forum of an Employment Tribunal. As it was the Tribunal was set a twofold task: (1) were there breaches of the Settlement Agreement, and (2) if so, did those breaches undermine the implied trust and confidence term in Dr Gammon's contract of employment? It set about dealing with the task it was set. No objective observer would have concluded that the Tribunal's mind was clouded by misconceptions or that it showed a disinclination to deal properly and fairly with Dr Gammon's complaints.

51. The third ground of complaint was expressed as being that the Tribunal misconstrued the Settlement Agreement. The way it was put on behalf of Dr Gammon was that the Tribunal's approach to this question essentially meant that she was not entitled to rely upon breaches (and anticipated breaches) of

the Settlement Agreement to show that her trust and confidence in the Trust had been wholly undermined. The Settlement Agreement had been carefully drafted in order to establish an environment in which she could return to work despite the fact that the Trust had unlawfully subjected her to a detriment. Although the Settlement Agreement was not itself a contract of employment, it was the platform from which Dr Gammon's trust and confidence in the Trust was to be restored and any departure from the agreement inevitably undermined that trust and confidence. The Tribunal approached this as if she was endeavouring to impose her will upon the Trust. This misconstrued the function of the Settlement Agreement. She was entitled to secure that her rights under it were adhered to. If it did not do so, she would have no remedy other than treating her contract of employment as being broken.

52. In answer counsel for the Trust submitted that the Tribunal was perfectly entitled to find as a fact (as it did) that, *"the applicant and her advisers spent considerable time arguing and nit-picking on the minutiae of this agreement..."*. The Tribunal held that, *"...none of the matters alleged by the applicant individually or taken as a whole were either a breach of her contract or the last straw"*, a finding which must be read with the first of the agreed issues which itself referred back to paragraph 26 of the IT1. Since the Extended Reasons were prepared for the benefit of parties who are familiar with the detail of their cases, and as such "do not need to be spelt out in the detail required were they to be directed towards a stranger to the dispute" per Keene J in **Derby Specialist Fabrication Ltd v Burton** [2001] ICR 833, the finding is a sufficient statement of the Tribunal's findings in respect of Dr Gammon's case. That is to say, the Tribunal expressly found that there was no breach in any of the ways alleged by Dr Gammon: the essence of this complaint was she did not like the Tribunal's finding.

53. In our judgment the Tribunal finding that "none of the matters alleged by the applicant individually or taken as a whole were either a breach of her contract or the last straw" was sufficient. They were entitled to hold (and no serious argument was raised against this on behalf of Dr Gammon) that *"the applicant and her advisers spent considerable time arguing and nit-picking on the minutiae of this agreement..."* and *"the whole conduct of discussions emanating from the applicant and her advisers between the settlement and the resignation had elements of hectoring and nit-picking"*. There was no requirement for them to go through each of the trivia relied on in paragraph 26 of the IT1.

54. The Tribunal dealt expressly with what Dr Gammon described as *"the pivotal reason of her resignation"*, namely that Mrs Wise would not meet her to discuss the interpretation of the Settlement Agreement. It held that this was not a breach of contract and that Mrs Wise was genuinely endeavouring to secure an orderly return to work for Dr Gammon. Even if it had held that there was some breach of the Settlement Agreement, it would not follow automatically that the duty of trust and confidence was undermined with a resulting breach of the employment contract. This would depend on the nature and severity of the breach. The Tribunal dealt quite adequately with the case being put and rejected it.

55. The fourth complaint was that the Tribunal made findings for which there was no evidence. There were three findings which were said not to be justified by the evidence. They were:
(i) the Tribunal's expressed that belief that Dr Gammon and her advisers wished to reopen the issue of Dr B's clinical competence;
(ii) the finding that Dr Woodbridge's letter of 25 January 2002 was prepared "by mistake"; and
(iii) the finding that Dr B had been "monitored by his peers" whilst on secondment to a hospital in Oxford.

56. These points can be dealt with briefly. There was evidence both from Mrs Wise in her witness statement and from Dr Gammon herself in cross-examination which justified the first finding. Dr Gammon in response to a question referring to the FAEM report which said that there was no clinical incompetence on the part of Dr B said *"That conclusion is in dispute and I say the investigation was not done properly."*

57. The letter from Dr Woodbridge proposed an appointment procedure which, as the Tribunal found, "was clearly at odds with the settlement agreement". The Tribunal was clearly negativing any suggestion that he was deliberately attempting to sabotage the settlement agreement by his letter. It is noticeable that in his written closing submissions to the Employment Tribunal counsel for Dr Gammon referred to the

contents of the letter as *"the mistake"*. In our view the Tribunal were entitled to describe the course of action suggested in the letter (though not carried out) as being "by mistake".

58. As to Dr B being monitored by his peers, there was evidence that he was seconded to another hospital and he underwent monitoring of his progress, meetings with Dr Tudway as to his personal conduct, a re-induction programme and job planning meetings. The finding of fact was amply justified.

59. The final point taken on behalf of Dr Gammon was that the Tribunal failed to make findings on an important aspect of her case. This "important aspect" was her assertion as to actions allegedly taken by the Trust with respect to the FAEM report. This report had been criticised by the first Employment Tribunal, but following the Observer article and when the parliamentary question was raised Mrs Wise had referred back to FAEM for its confirmation that the report was the result of "robust investigation" and that there was no evidence that Dr B's practices were unsafe or that he was considered clinically incompetent. It was submitted that the Tribunal could not properly assess whether the Trust's actions in acting in this way had undermined her trust and confidence without making primary findings of fact as to whether the Trust had taken the actions with respect to the FAEM report about which Dr Gammon complained. Only at that stage could the Tribunal consider the broader question whether the Trust's conduct in that respect was a repudiatory breach of her employment contract or part of a course of conduct which amounted to such a breach.

60. The complaints made by Dr Gammon were:
    (a) The Trust stated expressly that it would continue to rely upon the FAEM report even if the investigator concluded that it should never have done so, thereby rendering the entire process of investigation nugatory.
    (b) By inviting FAEM to state that "a robust investigation was undertaken" it ignored the fact that it had recognised that there were weaknesses in the FAEM's report; bypassed the mechanism prescribed in the Settlement Agreement for adjudging the propriety of the Respondent's reliance upon the FAEM's report; and ought once again to rely again upon a report criticised by the first Tribunal.

61. It was submitted that the second Tribunal found that Mrs Wise's motives in reverting to FAEM were to shore up confidence on a particularly difficult issue for the Trust but the Tribunal made no findings about the issues raised whether the Trust's actions in so doing were in breach of the Settlement Agreement and thereby undermined Dr Gammon's trust and confidence in the Trust. Those issues were as to the propriety of its seeking assurances from the FAEM; as to the propriety of the Trust relying upon the assurances given by the FAEM; as to the contention that the Chief Executive could have made "*emollient noises to MPs and the press*" without reference to the FAEM report; and as to Dr Gammon's allegation that Mrs Wise had initially denied any contact with the FAEM to Dr Gammon and her representative at the stormy meeting on 6 February 2002. It was said that without considering this aspect of the case, the Tribunal could not properly determine her primary complaint.

62. In response counsel for the Trust submitted that the Tribunal did not misconstrue or ignore a fundamental element of Dr Gammon's case. The Tribunal's Reasons showed that the Tribunal did make express findings in respect of all the allegations of breach. A substantial part of the Reasons was dedicated to her "*disenchantment*" with the Trust's reliance on the FAEM report. In any event her claim was simply that the Tribunal failed to make a specific finding of breach of one aspect of the Settlement Agreement (which was the subject of differing interpretations between the parties). The Tribunal was entitled to, and did consider, not only alleged breaches of the Settlement Agreement but the broader question of repudiatory breach by the Trust. Its decision was that overall there was no repudiatory breach and that decision could not be impugned by reliance upon the Tribunal's approach to the close (and disputed) detail of one provision of the Settlement Agreement. As to the specific matters relied on by Dr Gammon: the Tribunal concluded that, "Mrs Wise as Chief Executive of the Trust had no option but to have a comfort note regarding Dr B's competence. We regard Mrs Wise's approach in this as wholly reasonable." As to the meeting on 6 February 2002, the Tribunal expressly preferred the evidence of the Respondent.

63. By way of reply counsel for Dr Gammon responded that if the Tribunal had indeed dealt with all the issues as submitted on behalf of the Trust, then the reasoning was so sparse and defective that Dr Gammon could not tell why she had lost and the decision was not *"**Meek** compliant"*.

64. In our view the Tribunal dealt with the issues which Dr Gammon identified perfectly adequately. It found that the Trust had no option but to obtain a "*comfort note*" and that Mrs Wise's approach was "wholly reasonable". The FAEM was the obvious first port of call in dealing with any attack on Dr B's competence as it was his professional body. No alternative source of comfort was available in the time frame suggested on behalf of Dr Gammon. It is true that the Tribunal's decision did not specifically state that in so acting the Trust was not in breach of contract, but it was plainly implicit in the decision. It found specifically that the Trust's conduct was not a breach of the Settlement Agreement: "*none of the matters alleged by the applicant individually or taken as a whole were either a breach of her contract or the last straw*". We should add that even if the reliance on the FAEM report in the Trust's essential efforts to preserve public confidence in its work was a breach of the Settlement Agreement, it could not have properly been regarded either as undermining the obligation of trust and confidence or (in the light of the Tribunal's other findings) as the "*last straw*". As to the last point taken, the Tribunal expressly accepted the evidence of Mrs Wise and Ms Debenham as to what occurred at the meeting of 6 February, and thereby clearly rejected Dr Gammon's evidence that Mrs Wise initially denied any contact with the FAEM.

65. As to Mrs Gammon's alternative submission that she could not know from the reasons why she had lost, this seems to us fanciful. A fair reading of the Decision could not leave her in any real doubt as to the reasons why her claim failed. There were sufficient findings and the decision was "***Meek** compliant"* in all respects.

66. It follows that all the challenges to the decision mounted on behalf of Dr Gammon fail and the appeal will be dismissed.

COSTS

67. We have been asked by the unsuccessful Appellant for leave to appeal to the Court of Appeal. That application is refused. The application does not identify any point of law of general, or any, interest or importance, nor is there any other special reason why it would be appropriate to grant leave.

68. We have also been asked to award costs to the successful Respondent its costs of the unsuccessful appeal. We have considered the written submissions of both parties and the statement of costs submitted on behalf of the Respondent.

69. The Appellant submitted that it was unfair to characterise her appeal as a forum to continue "her unreasonable pursuit of a non-monetary remedy." She asserted it "reflected her sense of grievance at the conduct and outcome of the original Tribunal hearing." The pursuit of a forlorn appeal because of a sense of grievance is not, however, a proper exercise of the right to appeal.

70. The EAT's own Practice Direction warns that the unsuccessful pursuit of an allegation of bias may put the appellant at risk of an order for costs. This was not a borderline case. The allegations were not properly particularised at the outset and were refined even during the course of the hearing. The assertion of misconduct by the Tribunal lacked any substance. It is, however, irrelevant that the appellant was supported and funded by her advisers, the BMA.

71. In our judgment the pursuit of the appeal in respect of the criticisms of the Employment Tribunal can properly be characterised as unreasonable and vexatious. In those circumstances we take the view that the proper order is to award the respondent costs in respect of that part of the appeal. We assess the appropriate sum as being £6000, representing (in round terms) 70% of the amount claimed and reflecting the fact that a substantial part of the appeal was concerned with the issue of the Employment Tribunal's alleged misconduct.

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