**Neutral Citation No. [2016] NICA 1**

| *Ref:* | **WEI9814** |
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| *Delivered:* | **07/01/2016** |

*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

**ON APPEAL FROM AN INDUSTRIAL TRIBUNAL**

**BETWEEN:**

**DR MALGORZATA STADNICK-BOROWIEC**

**Appellant;**

**-and-**

**SOUTHERN HEALTH AND SOCIAL CARE TRUST AND HEALTH AND SOCIAL CARE BOARD**

**Respondents.**

**Before: Gillen LJ, Weatherup LJ and Weir LJ**

**WEIR LJ (delivering the judgment of the court)**

**The nature of the Appeal**

[1] The appellant in this matter appeals the decision of the Industrial Tribunal ("the Tribunal") given on 10 March 2015 by which it dismissed her claims for discrimination on grounds of race and sex; breach of contract; unlawful deduction from wages; unfair dismissal; and detriment and of dismissal on the ground of having made a protected disclosure.

[2] The appellant is a personal litigant who, both before the Tribunal and before us, was assisted by her McKenzie friend, a Dr De Haviland. The respondents were in each forum represented by Mr M Potter BL, instructed by the Directorate of Legal

Services. We are grateful to all three for the manner in which the submissions were presented to the court.

**The background**

[3] The appellant is a medical doctor of Polish nationality who was employed as a G.P. by the first respondent, the Southern Health and Social Care Trust ("the Trust"), in its G.P. out of hours service ("OOH"). The appellant worked for the Trust (or a predecessor) on a permanent basis from 1 October 2006 until she was dismissed with effect from 23 January 2012. The second respondent is the Health and Social Care Board ("the Board") which is responsible for maintaining what is called "the Performers List". A G.P. cannot practice in Northern Ireland unless he or she is entered on this list.

[4] The appellant was initially employed as a salaried G.P by the Southern Area Urgent Care Services but on 1 April 2007 her contract with this body was transferred to the Trust. Further, at the commencement of the appellant's employment there was a Southern Health and Social Care Board which on 1 April 2009 merged with other regional boards to become the Board.

[5] The following descriptions were used before the Tribunal and we adopt them for the purposes of this judgment:

a) G.P. Out of Hours Service ("**OOH**")

This is an urgent care service for medical conditions that cannot wait until a person's GP surgery is next open. In the Trust the OOH is provided from five sites which are open overnight. Other than the OOH the Trust does not itself operate any G.P. practices; rather such practices are operated by doctors who are independent contractors (usually in partnerships) under contracts with the Board. The Trust has no contractual relationship with these practices and no control over them. It was common case that there were no G.P. training practices within the Trust's control.

b) G.P. Register

This is a General Medical Council ("**GMC**") register of G.P.s. All doctors working in general practice in the Health Service in the UK are required to be on this register.

c) Local Advisory and Investigative Panel ("**LAIP**")

This was a panel chaired by a Dr Booth, Medical Advisor to the Board, and comprising three further senior G.P.s (from the Royal College of G.P.s, NIMTDA and the British Medical Association) together with three senior lay members.

d) Maintaining High Professional Standards ("**MHPS**")

This is a framework document which was issued by the Department of Health in 2005 and sets out the process for the initial handling of concerns about doctors and dentists in the NHS. The framework covers action to be taken when a concern first arises about a doctor and any subsequent action to decide whether there needs to be any restriction or suspension placed on a doctor's practice. There are six sections dealing with: action when a concern first arises; restriction of practice and exclusion from work; conduct hearings and disciplinary procedures; procedures for dealing with issues of clinical performance; handling concerns about a practitioner's health and formal procedures and general principles. It was agreed by the parties before the Tribunal that the MHPS document formed part of the appellant's contract and further that it applied in conjunction with the Trust's disciplinary procedure.

e) National Clinical Assessment Service ("**NCAS**")

This is a UK-wide service established in 2001 as an independent advisory body. NCAS works to resolve concerns about the practice of doctors by providing Case Management Services to health care organisations and to individual practitioners. It's aim is to work with all parties to clarify the concerns, understand what is leading to them and make recommendations to help practitioners return to safe practice. Although the employer still retains full responsibility for managing concerns NCAS can provide independent external advice to ensure clinical managers deal with the concerns appropriately. In this case NCAS provided advice and guidance to the Trust and Board in relation to concerns that arose regarding the appellant and also later provided independent assessment services with the agreement of the appellant.

f) Northern Ireland Medical and Dental Training Agency ("**NIMDTA**")

This body is responsible for funding, managing and supporting post-graduate medical and dental education within Northern Ireland.

[5] The Tribunal stated that it had taken account of the witness statements, the oral evidence of the witnesses and all the documentation to which it had been referred. It recorded that it had heard evidence from the appellant on her own behalf and from the following witnesses for the respondents:

On behalf of the Trust:

Dr R Carlile, Clinical Lead in the OOH;
Ms J Johnston, Assistant Director of HR who chaired the grievance hearing;
Dr P Beckett, Associate Medical Director in Primary Care, who chaired the disciplinary hearing in relation to the first dismissal;
Mr K Donaghy, Director of HR who chaired the disciplinary appeal;
Ms M Mallon, Assistant Director of HR who chaired the meeting relating to the GMC outcome and was a decision maker in relation to the second dismissal;

Ms V Toal, Head of Employee Engagement and Relations who chaired the appeal against dismissal;
Ms S Hynds of HR who made the decision to stop the claimant's pay.

On behalf of the Board:

Dr R Thompson, Senior Medical Advisor in Primary Care;
Dr K Booth who was responsible for managing serious concerns about GPs and chaired LAIP.

[6] The appellant was originally recruited as a G.P. by the Board via a locum agency in Letterkenny in 2005. The Board arranged with the agency to move a number of doctors on to sessional contracts with the Board. The appellant was then appointed as a salaried G.P. on 1 October 2006. This contract was transferred to the Trust on 1 April 2007 following the review of public administration and the appellant was employed in its OOH.

**The Incidents of Concern**

[7] There was evidence before the Tribunal of five particular incidents beginning in mid-2006 that led the Trust and the Board to have serious concerns about the appellant's ability to carry out her job.

[8] Incident 1: Tramadol self-administration: in July 2006 the appellant admittedly self-administered an injection of Tramadol while she was working on her own on an OOH shift at night. She said she did this openly and that it was for a severe headache. She agreed that Tramadol can make one drowsy. The appellant's line manager at this time was a Dr Meyer who was asked to investigate this incident. On 4 August 2006 the appellant entered a grievance against Dr Meyer alleging harassment. She denied that the reason for that was because Dr Meyer had been asked to investigate her conduct but rather because she said that she had been told by others that Dr Meyer had said that her career would be "finished". Dr Carlile, who was Clinical Lead in the OOH regarded the issue raised by the appellant as a clash between two colleagues. The evidence of Dr Carlile and Mrs Johnston, Assistant Director of HR, was that the Dr Meyer issue was dealt with informally as an issue of professional colleagues working together rather than as an issue of harassment; that they had spoken with each of the parties separately and then removed Dr Meyer from management responsibility for the appellant. Dr Carlile took over that responsibility. There was a suggestion that the matter would be reviewed a few months later however Mrs Johnston's evidence was that a further meeting did not take place because it was believed the issue had been settled to the appellant's satisfaction.

[9] The Tramadol incident concerned Dr Carlile, because, firstly, the appellant had self-injected a very strong drug which could have impaired her ability to carry out her job and, secondly, she had self-administered a prescription-only drug without prescription when she ought to have asked one of her doctor colleagues by

telephone to prescribe it for her or else gone home sick. In July 2006 the appellant was referred to Occupational Health over this incident. She was not found to have any addiction problem. She told the Occupational Health doctor that administering Tramadol by injection was common practice in Poland. Dr Carlile said he advised the appellant that she must not self-prescribe in the future and that the preliminary informal enquiry into this was concluded in August 2006. He refuted the appellant's claim that he was trying to create a hostile or intimating atmosphere by referring her to Occupational Health. There were further appointments but these were review appointments arranged on the basis of the appellant's Consultant Psychiatrist's report that she was suffering from stress.

[10] Incident 2: death certification procedures: in December 2007 the appellant breached procedures in relation to the confirmation of a death which led to queries by the coroner and a proposal that a body be exhumed. In the event the exhumation did not take place but there were concerns about the appellant's failure to adhere to an important procedure. The appellant did not dispute the facts of this incident but submitted that the problem was in relation to breach of policies and procedures and not her performance, and so this incident should not have been taken into account in assessing her at any point. Dr Carlile sought advice from NCAS following this incident. He refuted the appellant's allegation that the involvement of NCAS ahead of any assessment is outside normal procedure.

[11] Incident 3: confidentiality: in April 2008 Dr Carlile received a complaint by phone from an adult patient about an alleged breach of confidentiality by the appellant in that she had spoken to the patient's mother about him without his permission. This allegation was supported by the call recording of the consultation. The patient said he was considering going to the GMC over breach of confidentiality. Dr Carlile said that he had met with the appellant to bring this to her attention and advise her that it would be wise to take advice in case the patient did refer the matter to the GMC. He refuted the appellant's allegation that he was threatening.

[12] At this stage and following a meeting with the appellant, her representative, and an NCAS representative in June 2008, Dr Carlile agreed to arrange mentoring for the appellant to remedy the perceived deficiencies in her actions in the three incidents described above. Dr Carlile approached a doctor in Keady to undertake the mentoring. However before that arrangement could be finalised two more serious incidents occurred in July 2008. Dr Carlile's evidence, which was accepted by the Tribunal, was that he did not then organise the mentoring because it had been overtaken by these latest events.

[13] Incident 4: patient AB: on 4 August 2008 the Trust received a letter dated 31 July 2008 from the family of an elderly terminally- ill patient, AB, complaining that on 19 July 2008 the appellant had three times in one night refused to perform a home visit to AB whose family was concerned that her pain relief was inadequate. The appellant had allegedly, amongst other things, advised the family to take AB to the hospital or wait and contact AB's GP next day. AB had died the following day. The

appellant did not dispute that it was a breach of good medical practice to refuse to visit AB. Her complaint was that she was dismissed for it rather than given retraining and support.

[14] Incident 5: patient GK: on 31 July 2008 the appellant allegedly gave an inappropriate dose of a drug to GK, an elderly patient, who was then taken to casualty. There GK had to be given a rectifying dose of another drug to counteract the effects of the drug administered by the appellant. The consultant at the casualty department phoned OOH to indicate concern about what had happened and said GK would have been at risk of death had she had a respiratory episode in casualty. When this was brought to Dr Carlile's attention he requested that the consultant set out his concerns in writing. The appellant did not dispute that she had given an overdose to the patient but disputed that the patient might have died. She alleged that Dr Carlile had prompted the consultant to make an adverse report and that this was part of his campaign of discrimination against her. Her reason for making this allegation was that the consultant had stated "Hope this is ok for you Paul" at the end of his email detailing the incident and this in her view showed that Dr Carlile solicited this criticism from a friend.

**The Trust's investigation under the MHPS framework**

[15] Over the course of August and September 2008 the AB and GK incidents were investigated by the Trust under the MHPS framework. The Trust informed the Board of the Tramadol, the AB and the GK incidents. Dr Carlile stated that, on 10 August 2008, the appellant was excluded from work in the interests of patient safety. He remained in contact with NCAS in the interests of discussing concerns with an independent outsider and to obtain advice and guidance. He met with the appellant on 12 August 2008 to explain the decision to exclude her from work.

[16] On 14 August 2008 Dr Carlile, Dr Beckett, the Trust's Associate Medical Director, Dr Thompson, the Acting Medical Director of Primary Care in the Board, and Zoe Parks from the Trust's HR department met the appellant and gave reasons for her exclusion from work, namely to ensure public protection. It was not possible to supervise or restrict her duties because of the nature of the work in OOH which requires a doctor to work on his or her own dealing with telephone enquiries and home visits and referrals to hospital as appropriate. The following day a letter was sent to the appellant confirming the information conveyed in this meeting. The letter stated that the matter was being dealt with under the MHPS framework and that pursuant to that framework the appellant was being temporarily excluded to protect her from the risk of further allegations and ensure the Trust's duty of care to patients. During the initial exclusion period of 4 weeks a preliminary investigation would take place and all resulting documentation forwarded to Dr Loughran, the Trust's Medical Director, who would be Case Manager. The letter also noted that the appellant had, at the meeting the previous day, presented a self-certificate dated 10 August 2008 and that for this reason the Trust was referring her to Occupational Health Services. Dr Carlile again met with the appellant on 11 September 2008 to

advise that the temporary exclusion had been reviewed and extended until a decision to be taken following the investigation. Dr Carlile said he also provided the appellant with consultation notes and other documents that had emerged from the investigation process, that the appellant was given a chance to comment on these and did so and that her comments were considered by Dr Loughran.

[17] On 21 August 2008 Dr Thompson of the Board wrote to the appellant advising her to refrain from locum GP work pending conclusion of the Trust's investigation. Dr Thompson's involvement was as the person responsible for the Performers List. He regarded all the matters of concern about the appellant as being issues of performance.

[18] On 29 September 2008 Dr Loughran issued his decision to the appellant that the AB incident was a conduct issue and would go to a conduct panel in accordance with the MHPS. The GK incident was considered one of poor clinical judgment which would be dealt with via an assessment of the appellant, such assessment to include an action plan, assessment of the appellant by NCAS, and further training if appropriate. As a result of the findings regarding AB, Dr Carlile recommended that a charge of gross misconduct be preferred against the appellant. Dr Carlile stated that until the outcome of the disciplinary hearing the appellant's exclusion was kept under regular review and that the appellant received full pay for all the shifts she had previously booked. He therefore refuted that the exclusion from work was an act of harassment.

**Disciplinary process and first dismissal of the applicant in January 2009**

[19] The Trust then sent the appellant a letter in accordance with Step 1 of the disciplinary and dismissal procedures provided for in the Employment (Northern Ireland) Order 2003 which stated that she was at risk of dismissal. A disciplinary hearing date was arranged for November 2008 but then postponed pending clarification by the High Court in another case of representation rights under the MHPS procedure.

[20] The disciplinary hearing was held on 13 January 2009 and was chaired by Dr Beckett accompanied by Helen Walker, Assistant Director of Human Resources. The appellant was accompanied by a representative from the Medical Defence Union. Dr Carlile presented the investigation report to the panel. The outcome was that the appellant was dismissed with effect from 20 January 2009 for gross misconduct in relation to the AB incident. Importantly, the panel had taken into account the other four incidents in reaching their decision that dismissal should be the sanction. In his statement to the Tribunal Dr Beckett said that he followed the disciplinary procedure to the best of his knowledge and he refuted any allegation of being influenced by sex or race.

**Steps taken by the Board**

[21] In January 2009 Dr Beckett informed Dr Thompson of this decision in view of the Board's duty to manage the Performers List. In the same month Dr Thompson contacted NCAS for advice in relation to the appellant and met with NCAS on 13 March 2009. On 6 February 2009 Dr Thompson advised the appellant that she should refrain from any G.P. work pending the Board's consideration of the matters which had grounded her dismissal. The rationale for asking her to refrain from work was in relation to safeguarding patient safety because of the seriousness of the matters under investigation. Dr Thompson wrote to the appellant on 27 February 2009 to ask her to meet him and NCAS to see if training or support, or conditions on her registration, were necessary.

[22] On 13 March 2009 the appellant met Dr Thompson and NCAS. The outcome of the meeting was that the appellant could only work in a supervised environment in a G.P. practice approved by the Board and that this placement would be funded by the Board. It was agreed that the Board would organise a placement in a G.P. practice approved for the provision of training. Accordingly, on 26 March 2009 the Board placed the appellant on "contingent removal" from the Performers List for a period of 6 months (which was ultimately extended to 31 March 2010). This meant that there were conditions on her practice, namely that she confine her practice to working in a G.P. training practice under supervision and that she undergo an NCAS assessment, with a view to assessing training if necessary, within 6 months of the restrictions being imposed. The Board identified a training practice in Stream Street GP Surgery, Downpatrick, and the appellant's placement there commenced on 1 June 2009.

**Appellant's appeal against her first dismissal and her reinstatement**

[23] The appellant appealed the Trust's decision to dismiss her. An appeal hearing was scheduled for 23 March 2009 but was cancelled by the appellant's representative. The appeal was conducted as a rehearing on 27 April and 18 May 2009. At the hearing the appellant accepted that it would have been good to visit AB, that she could have done things better, and that she needed further training. The appeal panel agreed that the other incidents should not have been taken into account by the disciplinary panel when they did not form part of the single disciplinary charge with which they were dealing.

[24] On 5 June 2009 the appeal panel upheld the finding of gross misconduct but determined that, in light of there having been no previous formal disciplinary action, the sanction of dismissal should be reduced to a final written warning to be in place for 2 years. The Panel directed that the appellant should undertake a 3 month period of retraining organised by NCAS together with a NCAS clinical assessment of her competency for in and out of hours G.P. cover before returning to work. There would be a formal review 6 months after she started back to work. These conditions

were agreed by the appellant and her Medical Defence Union representative. At this stage the appellant was legally represented.

[25] Following her reinstatement the appellant was restored to the payroll backdated to January 2009. However from 18 May 2009 her pay did not include allowances for ad hoc shifts. From that point she received her basic salary only because she had been reinstated on the agreed condition that she undergo assessment with NCAS and would therefore not be doing such shifts in the meanwhile.

**Placement in the Downpatrick G.P. training practice**

[26] The appellant's placement at the G.P. training practice with a Dr. Harney began on 1 June 2009. The Board paid the appellant's wages and a fee to Dr Harney. The estimated costs for this were £35,000. Dr Harney reported that the appellant had little insight and little acceptance of her problems and expressed concerns in relation to the level of supervision the appellant required. She asked for an independent review of video footage. This was undertaken by a Dr Wales who raised a number of wide-ranging concerns. Dr Thompson decided to reduce the pressure on Dr Harney by reducing the appellant's placement from 5 to 2 days per week and he tried to organise extra OOH sessions with a trainer. This did not come to pass apart from one OOH session with Dr Wales in July 2009 due to difficulties in contacting the appellant. The one assessment session with Dr Wales took place in July 2009. The aim was to establish the level of supervision that would be required if the appellant were to get more OOH placements. Dr Wales' report identified very serious shortcomings in her practice and he said that the appellant could only practise in OOH with a "supernumerary supervisor". On 21 August 2009 there was a case conference and a meeting with the appellant. She confirmed that she was willing to go through the NCAS assessment and made no complaint that the reduction in sessions with Dr Harney was a problem.

**The NCAS report**

[27] On 1 September 2009 NCAS received the agreement to NCAS Assessment and Follow-up Action entered into between the appellant, the Trust and the Board. While the Trust and Board's referral to NCAS had been triggered by the initial incidents of concern, the NCAS assessment involved a wider assessment of the appellant as a G.P. in practice. The Trust gave an undertaking on 21 August 2009 to assist with reasonable funding for any remediation that resulted from the NCAS assessment. The NCAS assessment took place over 24-26 November 2009 and involved the appellant being placed in Dr Harney's training practice again. A possible outcome was retraining.

[28] On 15 March 2010 NCAS issued its report to the respondents. The NCAS assessors found serious deficiencies in the appellant's practice and suggested a lack of insight by her into those deficiencies. The recommendations stated:

> "Given the scope of the concerns identified in relation to Stadnik-Borowiec's performance the referring bodies should, in the interests of patient safety, ensure that appropriate safeguards are in place with regard to Dr Stadnik-Borowiec's practice. In particular, the referring bodies should ensure that appropriate restrictions are in place until such time that the referring bodies are satisfied that she is able to practise safely in an unsupervised environment.
>
> The referring bodies will need to consider the feasibility and appropriateness of developing a remediation programme for Dr Stadnik-Borowiec to address the concerns highlighted in this report. If the referring bodies consider that such a programme is impracticable or if Dr Stadnik-Borowiec's progress is unsatisfactory then alternative steps including referral to the GMC will need to be considered".

[29] On 12 March 2010 the appellant responded by way of letter from her then solicitor which stated:

> "In broad terms however Dr Stadnik-Borowiec does not take issue with the content of the draft report and acknowledges the areas in which the NCAS assessment team suggest her performance requires development and considers it of great assistance that these have been clearly identified by NCAS".

**The Trust's consideration of the NCAS report**

[30] On 13 April 2010 the Trust and Board met the appellant and her representative and an NCAS representative to consider the NCAS report and the next steps. On 4 May 2010 the Trust wrote to the appellant to advise that her case would be referred back to the appeal panel to consider the way forward in view of the conditions it placed on her return to work and the recent NCAS report. On 6 May 2010 the appellant's representative objected to this proposal.

**The Board's consideration of the NCAS report and GMC suspension of the appellant**

[31] On 8 April 2010 the NCAS draft action plan was forwarded to the respondents. The Board took steps to consider the cost and feasibility of implementing the recommended remediation and also considered whether GMC referral was necessary because of the large number of areas of concern. The Board considered that the NCAS report outlined so many shortcomings of such a serious nature that it decided to refer the appellant's case to LAIP.

[32] On 13 April 2010 the Board convened a meeting of LAIP, chaired by Dr Booth. The LAIP members were "gravely concerned" about the contents of the

NCAS report and one of those concerns related to the appellant's lack of insight into her own deficiencies. They considered that remediation would be impracticable. Dr Booth considered the NCAS report to be the worst she had ever seen in terms of the clinical and professional performance of a GP. Her evidence was that no detailed costing of any remediation programme was done because the range and nature of concerns were so great. The LAIP decided unanimously to refer the appellant's case to the Board's Referral Committee (comprising one Board executive member and two lay members) and recommended that referral be made to the GMC under Fitness to Practice procedures and that the GMC conduct a full performance assessment of the appellant.

[33] On 6 May 2010 Dr Booth wrote to the appellant to advise that LAIP had met on 13 April 2010 and had advised the Board that the appellant's practice appeared to be seriously deficient and below minimum professional standards and that the Board should refer the appellant to the GMC.

[34] On 18 May 2005 the Board's Referral Committee determined that the appellant should be referred to the GMC. On 20 May 2010 the Board's Referral Committee referred the appellant to the GMC Interim Orders Panel to consider precautionary suspension pending GMC performance assessment of the appellant. The GMC requested extensive information and statistics on the appellant and these were collated by the Trust as employer. On 25 June 2010 the GMC Interim Orders Panel suspended the appellant's registration for a period of 18 months which meant that she could not work as a G.P. anywhere in the U.K.

**The Trust's actions following GMC suspension**

[35] On 28 June 2010 the Trust issued a written invitation to the appellant and her representative to meet to discuss her suspension from the medical register and advised that in view of her objection to the reconvening of the appeal panel the matter would be considered under MHPS. On 13 August 2010 the Trust met with the appellant and her representative and discussed the GMC Interim Orders Panel suspension. The Trust decided to discontinue the appellant's pay in view of the impact of the suspension on her ability to fulfil the terms and conditions of her contract of employment. On 9 September 2010 Dr Carlile wrote to the appellant to indicate that the issues of concern identified in the NCAS report and the remediation programme required further investigation under the formal process under MHPS. On 28 September 2010 Dr Carlile's approach was endorsed by the Trust's MHPS Oversight Committee.

[36] On 17 November 2010 Dr Carlile asked NCAS for advice on a possible way forward under MHPS in a case where the practitioner's performance is so fundamentally flawed that no remediation plan has a realistic chance of success. On 1 December 2010 NCAS responded that the Trust could see if NIMDTA could organise a retraining placement but noted that remediation would be extremely expensive and resource-intensive and stated:

> "Given the difficulties outlined above and the depth and range of the concerns expressed by NCAS's assessors it seems unlikely that an action plan has a realistic chance of success".

[36] As part of the MHPS procedure the view of Dr Fitzpatrick of NCAS was sought and he stated as follows:

> "Following the assessment by NCAS it is clear that Dr Stadnik-Borowiec is not competent to work as a GP and it is questionable if she could perform at the required level of a qualified doctor at all without substantial retraining. Given this the action plan required is therefore not reasonable to implement even if it were possible".

[38] On 6 January 2011 there was a meeting under MHPS between the appellant and her representative, Dr Beckett and Zoe Parks of HR to discuss the formal investigation process. Dr Carlile had contacted NIMDTA regarding the feasibility of arranging a placement aside from the issue of GMC registration. The Trust made it clear that it would not fund the remediation for the following reasons: it would be resource intensive, the cost would be too high, it was not clear if it would be feasible or whether it would be successful and it was also clear that it would take well over a year for the remediation programme to be completed. From January to June 2011 the formal investigation process was suspended owing to the ill-health of the appellant and from August to November 2011 it was further suspended pending the outcome of the GMC Fitness to Practice hearing in October 2011.

**The GMC Fitness to Practice process**

[39] Following assessment of the applicant the GMC assessors' report stated as follows:

> "In our assessment we found Dr Stadnik-Borowiec's levels of performance and competence were so low her response to efforts at remediation so poor and her insight into her learning needs and the ability to address them so limited that in our view to hope for successful remediation would be unrealistic. We saw that she lacked the ability to reflect, learn or improve. The team considers that Dr Stadnik-Borowiec is unsuitable for remedial training."

[40] The GMC assessors presented their report to the GMC Fitness to Practice panel at a hearing. The assessor presenting the report asked that the appellant be struck off the GMC register in view of the seriousness of the deficiencies. However the Fitness to Practice panel issued a decision in November 2011 to lift the GMC suspension and impose conditions upon her registration. The conditions comprised 19 restrictions on the appellant's practice which were to be in place for 2 years from 24 November 2011. The two conditions of most concern to the Trust were:

> "14. You must confine your medical practice to general practice posts as a GP, in a GP training practice where your work will be supervised by a named GP trainer.
>
> 15. You must not undertake any out of hours work or on call duties unless approved by your educational supervisor and with the prior agreement of the GMC".

[41] The GMC decision noted that the appellant had admitted the facts in the case and that she did not contest that her fitness to practice was impaired. She had also stated that she accepted Dr Harney's criticism of her performance. The GMC decision continued:

> "The GMC performance assessment report identifies several areas of good medical practice in which your performance was unacceptable. These include fundamental tenets of the profession such as the provision of good clinical care and good communication. The panel determined that as a result of your deficient professional performance you currently present a risk to patients".

[42] It should be noted that there was no evidence before the Tribunal that the appellant had criticised the GMC decision or alleged that she had been discriminated against. It was common case that the GMC assessors conducted an independent assessment of her abilities as a GP.

[43] Following the GMC's decision, the successor to LAIP, the Regional Professional Panel ("RPP"), wrote to the Council for Health Care Regulatory Excellence ("CHCRE") to ask for action to be taken by them because its view was that the GMC Fitness to Practice panel had been unduly lenient in its decision. The CHCRE rejected that application.

**The appellant's second dismissal in January 2012**

[44] On 9 November 2011 the Trust sent a letter to invite the appellant to a meeting to discuss the implications of the GMC conditions for her contract of employment. The meeting took place on 13 December 2011. A management report prepared by Dr Carlile and Mrs Siobhan Hynds was presented to the appellant in advance of this meeting and to the Director and Assistant Director of the Trust. On 23 January 2012 the Trust concluded it had no alternative but to terminate the appellant's contract of employment as the GMC conditions would make it unlawful to employ the appellant to work as a G.P. in the Trust's OOH service. The reasons given in the letter to the appellant were that:

(i) the appellant could not perform her contractual duties;

(ii) the GMC conditions could not be accommodated; and
(iii) there was no suitable alternative employment available.

[45] On 30 January 2012 the appellant appealed this decision and an appeal hearing took place on 21 August 2012. The outcome, issued on 10 September 2012, was that the original decision be upheld. The statutory restriction point was not relied upon by management on her appeal but in the appeal outcome letter, the Trust outlined to the appellant that they could not be in a position where they could allow her to breach conditions placed by the GMC against her registration because of the significant risk to patients.

**Grievance regarding pay**

[46] On 12 April 2012 the appellant lodged a grievance against the Trust about the decision to stop her pay from 13 August 2010. A letter dated 12 September 2012 rejected the grievance on the basis that, due to suspension by the GMC she could not fulfil parts 4, 6 and 7 of her contract and that there was no alternative employment which could be provided given that her employment was as a G.P. A grievance appeal hearing was held on 8 October 2012. The appellant did not attend. The outcome, issued on 9 October 2012, was that the grievance was not upheld.

**Claims to Industrial Tribunal**

[47] On 23 April 2012 the appellant lodged initial proceedings against the respondents with the Industrial Tribunal claiming unlawful dismissal, unlawful deduction of wages, breach of contract, race, sex and disability discrimination. The claim of disability discrimination was subsequently withdrawn. On 8 January 2013 the appellant lodged further proceedings with the Industrial Tribunal grounded on the same allegations of unfair dismissal, arrears of pay, race and sex discrimination but, on this occasion, adding 15 additional respondents. At pre-hearing reviews the appellant was ordered to pay deposits in order to continue to participate in proceedings in relation to the claims of sex and race discrimination and the 15 additional respondents. The appellant appealed those orders to this Court which proposed a way forward for the consolidation and reduction of the deposits and the future case management of the appellant's claims ([2014] NICA 53).

The hearing before and the decision of the Tribunal

[48] The Tribunal heard the matter over eight hearing days in December 2014 and delivered its unanimous decision in a detailed reasoned decision extending to 36 pages on 10 March 2015 whereby it dismissed all the appellant's claims. At the end of the decision it summarised its conclusions as follows:

> "167. The claimant's case was that there were 15 breaches of contract which constituted facts from which the Tribunal could conclude that acts of

discrimination by the Trust occurred. After careful analysis of the facts and documents we reject the claim that there were any material breaches of policies or procedures amounting to breach of contract.

168. The harassment alleged related to the actions of Dr Carlile, Dr Booth and the termination of the claimant's employment and the end of her career. We reject that claim as both doctors' actions were reasonable and were motivated by concerns for patient safety following NCAS and GMC assessments.

169. The discrimination on grounds of gender concerned both the actual comparator (Dr Meyer) and a hypothetical comparator. The claimant pointed to the repeated breach of policies and procedure and breaches of the contract of employment and departures from practice as evidence from which we [should] conclude discrimination. As set out above we do not accept that there were any material breaches. We also find that the claimant has failed to show less favourable treatment than the actual or hypothetical comparator.

170. The claim for discrimination on grounds of race relies on a hypothetical comparator and relates to the above allegations which we similarly reject. The race claim also rested on the allegation that Dr Meyer was critical about the claimant speaking Polish and that unnecessary comments were made about the claimant being Polish by Mr Ritson, Dr Thompson, Dr Harney and Mr Compton on various documents. It was the claimant who raised with Occupational Health issues about difficulties adjusting to the new country with a second language and she also raised the issue of different practices about injection of Tramadol between Poland and the UK. We find that references to the claimant's ability to speak English and differences in working practice in Poland were entirely appropriate in the context of this case as they were relevant to her abilities at work and were also relevant to the assessment processes which ultimately involves specific assessment of her ability to communicate in English.

171. The hypothetical comparator in relation to the sex and race claims is a non-Polish OOH GP and a male OOH GP. We find that the hypothetical comparator would have been treated the same as the claimant in similar circumstances being circumstances where his or her competence and abilities as a GP were so deficient.

172. In relation to the victimisation claims the hypothetical comparator is an OOH GP who has not done the protected acts. We find that the claimant has failed to show less favourable treatment in that such a comparator who was unable to perform his duties in contract and/or by operation of law would have been treated the same as regards pay and the second dismissal.

173. We reject the claim for breach of contract and unlawful deduction from wages as set out above.

174. We reject the claim of unfair dismissal for the first dismissal on the time point.

175. We reject the claim for unfair dismissal for the second dismissal. The claimant was fairly dismissed on all three grounds relied upon. The actions of the employer as regards procedure and penalty were within the band of reasonable response for a reasonable employer in the circumstances.

176. We reject the claimant's case that there was a widespread conspiracy to end her career and lose her job. We do not find there to have been a continuing state of affairs whereby women and/or Polish doctors, including the claimant, were treated less favourably. Time therefore runs from the date of each allegation. We decline to extend time for those acts which occurred more than three months before presentation of the claim form. The claimant came across to us as an intelligent person who had had the benefit of advice and assistance from the Medical Defence Union and her solicitors. We were given no reason by the claimant for any delay in launching proceedings. The claimant has therefore failed to discharge the burden of persuading us to extend time on just and equitable grounds or on the basis that it

was not reasonably practicable for her to have lodged her claims on time.

177. There was no apparent claim for whistleblowing on the claim form and we also reject that claim on the merits in any event. We find that any impugned decisions, which occurred six years after the Dr Meyer complaint, were not connected to any alleged disclosure in that they were made valid unconnected reasons so we reject any claim that the claimant suffered detriment on grounds of having made a protected disclosure.

178. The catalysts for the assessment processes and the second dismissal were the AB and GK incidents. The full extent of the claimant's deficiencies was then unveiled by the independent NCAS and GMC assessments.

179. Throughout the case Dr de Havilland sought to categorise the claimant's shortcomings as breaches of policies and procedures which required remediation by training. The claimant's side also sought to separate the different incidents of concern and appeared to dispute that a holistic view of her competence could be considered.

180. The GMC's own assessors said that remediation was unlikely to be successful and they applied to the Fitness to Practice Panel for her to be struck off. This shows the depth of concern about the claimant's abilities. We note that the claimant was noted not to have insight into her shortcomings by Dr Beckett, NCAS and GMC assessors. This was of relevance when assessing the chances of remediation.

181. We therefore reject the claimant's characterisation of the respondents' actions as misleading and setting her up to fail. We also reject the claim that there was an attempt to de-skill and isolate her and that individuals were putting forward a misleading picture of her relating to her competence and in particular the use of Tramadol. The claimant admitted key actions in relation to AB, GK and Tramadol, these were legitimate areas of concern, they occurred before any exclusion from the

workplace and it was reasonable for them to be pursued, in the way that they were, by both the Trust and Board.

182. At no point did the claimant criticise NCAS or GMC nor their assessment of her abilities. The claimant sought to make distinction between breach of policies and performance issues and clinical performance issues. Dr Thompson's evidence was that the adverse incidents had raised issues of clinical competence. NCAS and the GMC report concurred with this. We reject the claimant's point that any such distinction had a bearing in this case.

183. It is clear on any reading of the documentation that the claimant's abilities and performance as a GP fell far short of the required standard and required substantial remediation which would have involved a substantial investment of time, resources and money without any guarantee of success given the lack of insight by the claimant into her deficiencies.

184. The claimant's situation was by any measure exceptional as regards the depth of her deficiencies which were confirmed by two independent assessments. These serious shortcomings were accepted by the claimant during the process and these were the drivers which led ultimately to her dismissal.

185. We reject the claimant's case that Dr Carlile and Dr Booth in particular and that all other individuals involved in the Trust and Board processes acted in a discriminating way to manoeuvre her out of the organisation and out of practice as a GP because of her gender and/or race. After careful consideration of the documents and all points made by the claimant and her representative we find no evidence of such a conspiracy. An important thread running through this case was the importance of patient safety and we find that this consideration underpinned the decisions taken by managers. We find patient safety to be an extremely important principle given the job in question.

> 186. The claimant's claims are therefore dismissed in their entirety."

**The appeal to this court**

[49] The appellant appealed from that decision to this court on the following grounds as refined by her skeleton argument:

> "1. The appeal is made on the following points of law grouped here in three limbs.
>
> 1.1 The Tribunal made errors of fact so serious as to amount to errors in law – for example the Tribunal made finding of facts when there was no evidence, or have taken irrelevant considerations therefore these findings were perverse.
>
> 2.1.1 Issue of appellant's insight.
>
> 2.1.2 Issue of appellant's registration.
>
> 2.1.3 The issue of amount of training required by the appellant.
>
> 2.1.4 The issue of amount of funds already expended on the appellant's training.
>
> 2.1.5 The issue of lack of detailed costing of the training required by the appellant.
>
> 2.1.6 The issue of appellant's credibility.
>
> 2.1.7 The issue of 2 years long investigation into allegation of appellant's apparent drug addiction.
>
> 2.1.8 The issue of one continuing act.
>
> 2.1.9 The issue of employer's responsibility for maintaining the skills of the appellant (a highly skilled worker).
>
> 2.1.10 The issue of appellant remaining under MHPS.
>
> 2.1.11 The issue of prolonged exclusion of appellant from clinical work.

2.1.12 The issue of finding the GMC compliant duties for the appellant.

2.1.13 The issue of breach of contract and unlawful deduction of pay.

1.2 Subsequently, the Tribunal made several errors in law.
2.2.1 By rejecting the claims of discrimination on grounds of sex and race.

2.2.2 By rejecting the claims of breach of contract.

2.2.3 By rejecting the claim of unlawful deduction of wages.

2.2.4 By rejecting the claims of unfair dismissal.

2.2.5 By using/defining the comparator wrongly.

2.3 The Tribunal proceeded with procedural unfairness, as allowed a hearsay evidence from the respondent's witnesses without necessary grounds and furthermore accepted that hearsay evidence to make the finding of fact whilst disregarding official documents presented by the claimant and disproving that fact.

2.3.1 The issue of accepting testimony from Mrs Jenny Johnson relating apparent telephone conversation with Immigration office contradicting the correspondence from Immigration office.

2.3.2 The issue of accepting testimony from Dr Carlile that Dr Loughran has "authorised all exclusions" and actually speculation rather than true hearsay relating to Mrs Zoe Parks."

[50] Although categorised by the appellant as "points of law" almost all these points involve a challenge to the factual findings of the Tribunal. We therefore remind ourselves of the principles governing the role of this court when the factual findings of a Tribunal are criticised. These were conveniently drawn together by Coghlin LJ in the appeal to this court in Mihail v Lloyds Banking Group [2014] NICA 24 at paragraph [27]:

> "This is an appeal from an Industrial Tribunal with a statutory jurisdiction. On appeal, this court does not conduct a re-hearing and, unless the factual findings made by the Tribunal are plainly wrong or could not have been reached by any reasonable tribunal, they must be accepted by this court. (McConnell v Police Authority for Northern Ireland [1997] NI 253 per Carswell LCJ; Carlson Wagonlit Travel Limited v Connor [2007] NICA 55 per Girvan LJ at paragraph [25]. In Crofton v Yeboah [2002] IRLR 634 Mummery LJ said at paragraph [93] with reference to an appeal based upon the ground of perversity:
>
>> 'Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in the cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care", British Telecommunications PLC v Sheridan [1990] IRLR 27 at para [34].'
>
> In Curley v Chief Constable of the PSNI [2009] NICA 8 this court observed at paragraph [14]:
>
>> 'It is clear from the relevant authorities that the function of this court is limited when reviewing conclusions of facts reached by the Tribunal and that, provided there was some foundation in fact for any inference drawn by a Tribunal the appellate court should not interfere with the decision even though themselves might have preferred a different inference….'"

[51] Bearing in mind these constraints this court has carefully examined the Tribunal's conclusions of fact and finds no basis upon which it could conclude that the Tribunal has reached a decision which it was not entirely entitled to reach on a proper appreciation of the law and the evidence which it received. It is moreover satisfied that the Tribunal's findings of fact were entirely justified by the evidence and that its process of reasoning from the facts as found in reaching its conclusion

that the appellant's claims failed cannot be faulted. That finding is sufficient to dispose of this appeal in its entirety but in view of the particular importance placed by the appellant upon certain of her submissions we now deal with those in some more detail.

**"Conditional registration"**

[52] The appellant repeatedly laid emphasis before us upon what she contended was a misunderstanding by the Tribunal of the status of her medical registration. She contended, correctly, that under the Medical Act 1983 Section 2(3) ("the Act") medical practitioners are either fully registered or provisionally so or with limited registration and that hers was at all material times a "full registration". We are satisfied that between paragraphs [102] and [110] of its decision the Tribunal demonstrated that it clearly understood that that was the position and indeed at paragraph [103] recorded the acceptance by counsel for the respondents that that was so. The Tribunal was however also right to find that because, by virtue of Section 35D(2)(c) of the Act, the Fitness to Practice Panel had directed that the appellant's registration should for two years be conditional on her compliance with a number of requirements, two of which precluded her from working as an OOH, the appellant's "full registration" was nonetheless conditional upon her compliance with the requirements imposed upon her which restricted the possible scope of her practice. We therefore consider that there is no substance in this point which was a major and recurring plank in the appellant's oral submissions before us.

**"De-skilling"**

[53] The appellant contends that the Tribunal erred in law in finding that the employer was not responsible for any de-skilling that resulted following the appellant's second dismissal. An insuperable obstacle in the way of this argument is the Tribunal's finding at paragraph [115] of its decision that:

> "The claimant has failed to prove the primary fact that de-skilling actually occurred because she was out of the workplace and/or that being out of the workplace materially contributed to the outcome of the NCAS and GMC assessments.
>
> (2) Dismissal was as a consequence of the following chain of events; the claimant's own acts in relation to the AB incident in particular; the consequent exclusion from work which was reasonable; her dismissal and reinstatement with conditions on retraining which the claimant had agreed before she could return to her former duties."

[54] However as the appellant has sought to rely in support of her argument on "de-skilling" upon the authority of William Hill Organisation v Tucker [1998] IRLR 313 we think it right to comment upon the distinction between the material facts of that case and those of the present. In William Hill the employee gave notice of termination of employment to which the employer reacted by placing him upon "gardening leave" for the duration of the notice period. On appeal against a refusal of a judge at first instance to grant an injunction restraining the employee from taking up other employment before the expiry of the notice period the English Court of Appeal held that the judge had been right to conclude that the employer was under a duty to provide the defendant employee with work which was available. However the crucial factual distinction between William Hill and the appellant's situation is that in the former the employer had work available which the employee could have done. By contrast, in the appellant's case she was initially out of the workplace by reason of her exclusion from work from August 2008 pending identification of the issues identified and remained absent pending the outcome of the disciplinary process and was then dismissed under the first dismissal in January 2009. Following her reinstatement it was agreed that she would undertake training before returning to work and she did so. Thereafter the Downpatrick GP who had accepted the appellant for training and NCAS became involved, resulting in her suspension by GMC from June 2010. When the suspension was removed in October/November 2011 it was replaced by the restrictions imposed by the Fitness to Practise Panel earlier described which could not be accommodated in a role as an OOH and the employer had no other post available in its service which could accommodate the appellant while subject to those restrictions. Therefore, while the appellant was no doubt *willing* to engage in her employment during the period prior to her second dismissal, unlike the employee in William Hill she was not *able* to do so while complying with the requirements imposed upon her, subject to which compliance her registration as a medical practitioner had been made conditional. In short, she could not perform the job for which she was employed.

**Conclusion**

[55] This court finds that the appellant's appeal in all its many facets is manifestly ill-founded and must fail. It regrets that the appellant has chosen to invest so much wasted time and effort in pursuing a course which involved unfairly blaming many individuals both from within and without the respondent bodies for her misfortunes. In fact they were plainly brought about initially by her own actions and inaction while working in the post and thereafter by her inability to benefit sufficiently from the considerable efforts and expense employed in seeking to bring her skills to a level adequate for the proper performance of the job for which she was employed. It is to be hoped that she will now, even though belatedly, turn her focus inwards so as to seek to recognise and remedy the shortcomings that have made her unsuited for her employment.