

Judgment : Mr Justice Underhill : QBD. Admin Div. 26<sup>th</sup> June 2006.

## INTRODUCTORY

1. These proceedings comprise two actions arising out of the same factual history. The first action was begun in the Newcastle-upon-Tyne County Court on 12th June 2003 but has subsequently been transferred to the High Court with the reference HQ05X00350: the Defendant is the Newcastle Primary Care Trust. The second was issued in the High Court on 10th November 2003 with the reference HQ03X03464: the Newcastle Primary Care Trust is the First Defendant but a large number of individual employees or officers of the Trust are also Defendants. By order of Eady J. dated 7th June 2005 the two actions have been case managed and ordered to be tried together. The Claimant has throughout the proceedings been unrepresented and appears in person (though she has been fortunate enough to have the support during the hearing of both her mother and her daughter). Mr. Geoffrey Brown of counsel appears for the Trust in the first action and Mr. Adam Wolanski of counsel appears for all the Defendants (including the Trust) in the second action.
2. It is not possible clearly to identify the issues in the proceedings without giving some summary of the facts which give rise to them. I do so as follows, though the summary is not intended to be comprehensive and I defer detailed consideration of areas of dispute:
  - (1) *The Claimant.* The Claimant is a dentist. Between 1975 and her dismissal in May 2001 she was employed as a Senior Dental Officer in the Community Dental Service ("the Service") in Newcastle. For most of the period with which these proceedings are concerned her employer was the Newcastle City Health Trust, but the Newcastle Primary Care Trust became responsible for the Service and those employed in it with effect from 1st April 2001 and succeeded to all relevant obligations: I refer to the two without differentiation as "the Trust". The Service provides dental services to certain classes of patients – principally schoolchildren and the elderly, but also mentally ill or phobic patients - for whom ordinary NHS dental services may be less appropriate or accessible. The Claimant's work was partly clinic-based and partly domiciliary (in which term is included visits to schools and old people's homes). At the start of the period with which this litigation is concerned she was based at a clinic operated by the Trust at Shieldfield, though she also worked one half-day a week at its Lemington clinic. It is relevant to add that in addition to her qualifications as a dentist the Claimant has a law degree, obtained in 1981 at a time when she was engaged in contentious matrimonial proceedings: she is on any view an intelligent and able woman.
  - (2) *The March 2000 complaint.* On 14th March 2000 four "dental service assistants" – more commonly known as dental nurses - employed by the Trust lodged a complaint under its formal Grievance Procedure to the effect that they did not wish to work with the Claimant. The nurses in question were Janice Falkous, Jennifer Smith, Natasha Weisser, and Tere Peart, who are respectively the Ninth to Twelfth Defendants in the second action. Later in the month they lodged written statements in support of the grievance. I shall need to analyse the allegations made in those statements in more detail in due course, but for present purposes their gist can be summarised as being that the Claimant was liable to outbursts of anger or emotion, or other erratic and unstable behaviour, which made it uncomfortable and sometimes even frightening to work with her. The focus in the statements was on her behaviour towards other staff, but there were also allegations about her conduct towards patients. A number of particular incidents were identified, some of them going back several years. I will refer to the grievance and its supporting statements as "the March 2000 complaint" or "the March 2000 allegations".
  - (3) *Mr. Ferguson.* The Claimant had for some time prior to the March 2000 complaint had a poor working relationship with her immediate manager, Miles Ferguson (the Sixth Defendant in the second action). Mr. Ferguson was Clinical Director of Dental Services and based at the headquarters of the Community Dental Service at the Arthur's Hill clinic. The Claimant had to take six months' sickness absence between February and August 1999, and she regards Mr. Ferguson's conduct towards her as a principal cause of that. She believes that it was Mr. Ferguson who instigated the nurses to make the March 2000 complaint. She believes that he did so because of a grievance which she had brought against him in October 1999. That grievance had in fact been dismissed in January 2000 by the relevant manager, Jill Prendergast (originally the Fourth Defendant in the second action, though the claim against her has since been struck out); but the Claimant believes that Mrs. Prendergast had shown a willingness to address the underlying problems in a way which involved express or implied criticism of Mr. Ferguson and which he resented.
  - (4) *Mrs. Prendergast's decision not to investigate the March 2000 complaint.* It fell to Mrs. Prendergast to deal with the March 2000 complaint. She was, for reasons which I discuss below, loath that it should go through the full grievance procedure. At a meeting with the Claimant on 21st June 2000 she notified her of the complaint, and gave her copies of the nurses' statements; but she told her that she intended to take no action in connection with it. She confirmed her position in a letter of the same date, which I set out in para. 132 below. The precise effect of what Mrs. Prendergast said at the meeting and in the letter is in dispute.
  - (5) *The Claimant's approaches for supporting statements.* The Claimant was profoundly dissatisfied with the approach taken by Mrs. Prendergast. She was very hurt and upset by the March 2000 allegations and believed them to be groundless. She wanted an investigation in which she could vindicate herself. With that aim she sought to obtain statements from other dental nurses in the team rebutting some of the allegations comprised in the complaint. Those she approached included Kerry Fawcett (the Thirteenth Defendant in the second action). These approaches came to the notice of Mrs. Prendergast. She regarded the canvassing of staff in this way as undesirable and disruptive; and at a meeting on 3rd July 2000 she told the Claimant that she should stop.
  - (6) *The suspension of the Claimant.* In the course of August 2000 it transpired that the Claimant had continued in various ways to solicit support in response to the March 2000 complaint. Mrs. Prendergast took the view that this was a direct breach of her instruction of 3rd July and decided that she had to invoke the Trust's formal disciplinary procedure. The Claimant was accordingly suspended on 1st September 2000.
  - (7) *The disciplinary investigation.* The first stage of the Trust's disciplinary procedure consisted of an investigation. This was conducted by Paula Whitty, the Trust's Deputy Director of Clinical Governance – she was originally the Fifth Defendant in the second action but the claim against her also has been struck out - with the assistance of a manager from the Human Resources Department, Alison Bolingbroke. Although the trigger for the disciplinary procedure was the very specific issue of the Claimant's alleged disregard of Mrs. Prendergast's instruction of 3rd July 2001, Dr. Whitty and Mrs. Bolingbroke ("the investigators") took the view that they should receive evidence about the wider background. Accordingly over the course of September and October 2000 they interviewed a large number of the Claimant's colleagues, including Mr.

Ferguson and the four nurses who had made the original allegations. In their interviews the nurses repeated the substance of the March 2000 allegations. Other interviewees – in particular Mrs. Fawcett and two dentists, Helen Nagaj and Dianne Tabari (respectively the Seventh and Eighth Defendants in the second action) - also made allegations about the Claimant's conduct which were of a similar character to, and covered some of the same episodes as, the March 2000 allegations. In the course of her interview Ms. Nagaj referred to a letter which she had written to Mr. Ferguson on 25th November 1999 questioning the Claimant's fitness to practise (see para. 106 below). I will refer to the allegations made by these other interviewees as "the further allegations" and to both sets of allegations together as simply "the allegations". Typed notes of interview were produced and subsequently signed by each interviewee. These were shown to the Claimant, who prepared and gave the investigators a lengthy document rebutting the allegations. They also conducted three interviews with her.

- (8) *The Investigation Report.* The result of the investigation was a report dated 8th March 2001 which recommended that the matter be referred to a disciplinary hearing. The report made a clear distinction between the specific matters which had given rise to the initiation of disciplinary proceedings, i.e. the Claimant's conduct following the meeting of 21st June, ("the narrow issue"), and the wider question of her relationship with her colleagues over a longer period, as revealed by the allegations ("the broader issue"). As to the former, it made full factual findings. As to the latter, it recorded that there had been "a pattern of allegations" of misconduct on her part but forbore from making findings on the truth of those allegations. The report attached all the notes of interview and the Claimant's rebuttal document.
- (9) *The Claimant's grievance.* The Claimant's attitude to the disciplinary investigation was that it ought not to be limited to the narrow issue but should remedy the failure of Mrs. Prendergast to investigate the March 2000 allegations and should make express findings as to whether those allegations (and, when she became aware of them, the further allegations) were true. In order to try to ensure that that took place, on 30th January 2001 she wrote to the Trust making a formal complaint against the four nurses, together with Mrs. Fawcett, Ms. Nagaj and Helen Chater (another dental nurse), "for making false allegations with respect to my professional conduct". The letter also complained that Mrs. Prendergast had failed to investigate the March 2000 allegations. I give the text of the letter at para. 151 below. The complaint was not separately investigated: the extent to which it was subsumed in the disciplinary investigation is discussed below.
- (10) *The disciplinary hearing.* The disciplinary procedure culminated in a hearing on 2nd and 3rd May 2001. The Claimant was accompanied by a representative from the Medical Protection Society. The panel heard oral evidence from three of the four nurses who had made the March 2000 allegations (Mrs. Peart was unavailable); three of the nurses who had been approached for statements, including Mrs. Fawcett; and various other witnesses, including Mrs. Prendergast, Mr. Ferguson and Mrs. Tabari.
- (11) *The dismissal decision.* The decision of the panel was that the Claimant should be dismissed. I give the text of the relevant parts of the formal dismissal letter, dated 8th May 2001, at para. 157 below. The gist however was that dismissal was necessary because the Claimant's disruptive behaviour, not only since June 2000 but over previous years, had led to a complete breakdown in working relationships.
- (12) *The appeal.* The Claimant appealed against the dismissal decision. The appeal took the form of a full re-hearing, on 4th and 5th September 2001, before a panel consisting of three members of the Trust's Board. They heard evidence from most (though not all) of the same witnesses as had given evidence at the hearing in May. The Claimant was represented by counsel.
- (13) *The appeal decision.* A very full decision letter was written on 7th September 2001. The dismissal decision was upheld. The reasoning is not identically expressed to that of the original panel, but it is broadly similar in as much as the appeal panel found against the Claimant on the narrow issue but regarded the breakdown in working relationships as decisive in reaching the conclusion that she should be dismissed: see para. 161 below.
- (14) *Employment Tribunal proceedings.* The Claimant has brought proceedings in the Employment Tribunal for unfair dismissal. These have been stayed pending the outcome of the present proceedings.
- (15) *The Claimant's campaign for an investigation: the correspondence with Mr. Smith and Mr. Flory.* The Claimant did not believe that the disciplinary procedure constituted a proper investigation of the allegations against her. She was determined to do whatever she could to procure such an investigation – quite apart from any remedy in relation to her dismissal. She wrote both to the press and to her MP. She also reported Mr. Ferguson and Mrs. Tabari to the General Dental Council. Most relevantly for the purpose of these proceedings, on 25th October 2002 she wrote to Bob Smith, the Chief Executive of the Trust, (the Second Defendant in the second action) asking that the Trust investigate a large number of matters arising out of the history summarised above, including the making of "malicious false allegations" by Ms. Nagaj, Mrs. Smith, Mrs. Falkous and Ms. Weisser. When she did not get a satisfactory reply she wrote also to David Flory, the Chief Executive of the Northumberland Tyne and Wear Strategic Health Authority. The correspondence concluded with a letter dated 14th January 2003 from Mr. Smith to the Claimant, copied to Mr. Flory, in which he said (among other things): *I have carefully considered the information provided to you, and the previous investigation undertaken under the Grievance Procedure, Disciplinary Procedure, a risk assessment exercise and the referral of Mr Ferguson to the General Dental Council. For your information I enclose a chronology of these events. Having considered the remit of these investigations, and the evidence presented therein, I cannot accept that there was evidence indicating that allegations made against you were false. The issues raised by you have been raised and considered by these previous investigations. Therefore, I do not believe that any further investigation is either necessary or appropriate. Accordingly, I cannot accept that the Trust has failed to consider and investigate the various issues raised.*
- (16) *Overview.* It is the Claimant's case that the entire sequence of events summarised above is the result of a conspiracy against her. Mr. Ferguson was the ringleader, motivated by revenge; but Mrs. Tabari was his accomplice, motivated by ambition for promotion within the Service.

3. Against that factual background, it is possible to set out the nature of the claims brought in the two actions and the issues to which they give rise.

#### THE FIRST ACTION

4. The Particulars of Claim in the first action (and indeed in the second action) are drafted by the Claimant herself rather than by solicitors or counsel. Nevertheless they are well structured and set out with reasonable clarity the nature of her various claims. I

have been over them carefully with her in order to make sure that I understand the case that she wishes to make and to check that her substantive case is not obscured by any technical drafting deficiency.

5. The claim is brought in contract and in tort. I take those two heads in turn.

#### Contract

6. The Claimant alleges a breach of the so-called contractual duty of trust and confidence ("the *Malik* duty" – see *Malik v. Bank of Credit and Commerce International SA* [1998] AC 20): Particulars of Claim para. 31. The specific breaches are pleaded as follows:

The Defendant was in breach of the implied term of trust and confidence referred to paragraph 5.1 because it had no reasonable grounds:

- 31.1 for failing to follow its own grievance procedure;
- 31.2 for failing to investigate the allegation made against the Claimant;
- 31.3 for accepting the allegations as being true without any evidence to substantiate this;
- 31.4 for threatening the Claimant with disciplinary [sic] if further allegations were made; 31.5 for not allowing the Claimant to defend herself;
- 31.6 for ignoring the Claimant's requests for an investigation and the Claimant's formal grievance;
- 31.7 for encouraging those responsible to repeat the allegations despite evidence to show the allegations were false.
7. Those alleged breaches can be grouped as follows:
- (1) Mrs. Prendergast's response to the March 2000 allegations. This is the case pleaded at paras. 31.1-5 and the first part of 31.6 (based on factual averments at paras. 22-28). It is put in various ways, but all relate to the way that Mrs. Prendergast decided to handle the March 2000 allegations in June 2000: see para. 2 (4) above. The gist is that her conduct amounted to an unjustified failure to investigate the allegations and that indeed she accepted the allegations as true and warned that the Claimant would be disciplined if there were any further complaint.
- (2) Failure to investigate the January 2001 complaint. The final words of para. 31.6 – read with para. 29 – are intended to complain that the Trust failed to investigate the Claimant's January 2001 complaint: cf. para. 2 (9) above.
- (3) Encouragement of false evidence. The case pleaded at para. 31.7 – read with para. 30 – is, as I confirmed with the Claimant, that by taking statements from the four nurses and calling them (with the exception of Mrs. Peart) as witnesses in the disciplinary proceedings the Trust was effectively encouraging them to repeat their allegations despite evidence that they were false.
8. I do not propose to set out here the details of the Defence. It is sufficient to say that the Trust contends that it handled the original March 2000 grievance, the disciplinary proceedings against the Claimant and her complaint of January 2001 entirely in accordance with her contractual rights. Although the Trust's version of certain incidents which feature in the allegations against the Claimant is pleaded, there is no explicit adoption of the truth of every matter stated in those allegations.

#### Tort

9. The claim is in negligence. Para. 32 of the Particulars of Claim pleads that the Defendant owed the Claimant a duty of care (sc. *qua* employee) and breached that duty by unreasonably exposing her to a foreseeable risk of injury. The gist of the case is that the Trust knew (by reason of her sickness absence in 1999) that the Claimant was vulnerable to stress and should have foreseen that if allegations were made against her which she was not then given the opportunity to refute that would cause her injury. Reference is also made to the duty to provide a safe system of work and to the duty under reg. 3 of the Management of Health and Safety at Work Regulations 1999; but these are in practice simply alternative labels for the same basic complaint. Thus the acts or omissions complained of are essentially the same as are relied on for the purpose of the claim in contract – Mrs. Prendergast's failure to investigate the March 2000 allegations and her acceptance of them as true. The Defendant denies any breach of duty.

#### "Background"

10. In addition to the matters pleaded as giving rise to the causes of action identified above, the Claimant also pleads – at paras. 9-21 of the Particulars of Claim – a summary of the troubled history of her relationship with Mr. Ferguson up to January 2000 (as briefly referred to in para. 2 (3) above). They include: (at para. 9) an unparticularised allegation of sexual harassment; (at para. 18) an allegation that Mr. Ferguson "hounded the Claimant relentlessly, constantly complaining and criticising everything she did"; and (at para. 21) an allegation that he "instigated" the March 2000 allegations. Although these allegations are serious, they are – as the Claimant specifically confirmed to me – not relied on as such as giving rise to any claim against the Trust in the first action. They are said to be "background" and also to be relevant to the negligence claim to the extent that they help to show that it was foreseeable that the Claimant would be injured by the Trust's failure to investigate the allegations against her.

#### Damage

11. The Claimant's pleaded damage can be analysed under four heads –
- (1) **Physical injury.** The Claimant pleads generally that her health suffered as a result of the making of the allegations "and the actions of the Defendant", exacerbated by the failure to investigate and the ignoring of her own grievance. Some of the specific symptoms which she mentions are psychiatric in character or more in the nature of stress, but the physical effects pleaded are (a) a rise in blood pressure, to which she attributes "a series of bloodshot eyes"; (b) difficulty sleeping; (c) constant heart palpitations; (d) dizzy spells; (e) "two strokes affecting her right eye which [have] permanently affected her vision and also her eyelid"; and (f) numbness and paraesthesiae in her left leg. She has been prescribed daily aspirin.
- (2) **Psychiatric injury.** The Claimant pleads that she suffers from "clinical depression and severe anxiety and stress".
- (3) **Distress.** The Claimant alleges that the making of the allegations and the Trust's actions caused her extreme distress. She was shocked and devastated and feels as if she is living in a nightmare.
- (4) **Financial loss.** The Claimant claims that it is unlikely that she will be able to work as a dentist again – apparently, though this is not expressly pleaded, because of the breaches complained of or their consequences. She has pleaded a schedule of special damage claiming financial loss on that basis totalling several hundreds of thousands of pounds.
12. At the pre-trial review, which took place on 3rd and 10th February 2006, Tugendhat J. dismissed the claims for psychiatric injury. He did so because the psychiatric experts instructed by either party – Dr. A.M. Reveley and Dr. P. Tayler – had agreed in a joint statement that the Claimant's condition, which they characterised as an obsessive-compulsive personality disorder and

an anxiety disorder, was "likely to have been lifelong and innate and ... not likely to have arisen on account of events at her workplace"; and he accepted the Trust's submission that on the basis of that evidence the Claimant would be unable to prove that any psychiatric condition from which she was suffering was caused by the acts and omissions complained of. Accordingly there is no surviving claim for psychiatric injury.

13. Again, I need not at this stage set out in detail the Trust's case as regards loss. Each of the surviving three heads of damage is in issue. A core submission for the Trust is that the absence of any expert evidence in support of the Claimant's case on physical injury is fatal to that head of her claim.

#### THE SECOND ACTION

14. I will not seek to analyse the causes of action originally pleaded in these proceedings because extensive parts of them were struck out by Eady J. in a judgment dated 11th November 2004 ([2004] EWHC 2554 (QB)). What now survive are (a) claims under s. 1 of the Protection from Harassment Act 1977 against the First and Second and Sixth to Thirteenth Defendants (the claims against the Third to Fifth Defendants having been struck out), and (b) a claim in defamation against the Second Defendant. I take those in turn.

#### (a) The Harassment Claim

15. The harassment alleged is pleaded at para. 20.1 of the Particulars of Claim. It falls under three heads:
- (1) "*Repeatedly alleging gross professional misconduct despite having evidence to the contrary*". I established with the Claimant precisely what this head of harassment is intended to cover. The allegations in question are:
    - (a) the March 2000 allegations, which are pleaded at para. 6.1 (and elaborated at para. 7) of the Particulars of Claim, at least in so far as these allege "gross professional misconduct" – the relevant Defendants being the Ninth to Twelfth Defendants, i.e. the four dental nurses; and
    - (b) the allegations made by Ms. Nagaj, Mrs. Tabari and Mrs. Fawcett (the Seventh, Eighth and Thirteenth Defendants) in their interviews with the disciplinary procedure investigators (see para. 2 (7) above) – these are pleaded at paras. 11.1 and 11.3-4 of the Particulars of Claim. They are described as "repeated" because they were maintained, and to some extent reinforced, at each stage in the disciplinary proceedings: see paras. 12 and 13 of the Particulars of Claim. Mr. Ferguson (the Sixth Defendant) is said to be liable in respect of all these allegations because they were made at his instigation as part of a "campaign of harassment" by him: see para. 4.3.1. The phrase "despite having evidence to the contrary" no longer adds anything material: the Claimant explained to me that it was directed at the role of the Third to Fifth Defendants, who are not now in the frame.
  - (2) "*Accusing the Claimant of not working and omitting her figures from the returns*". This is an allegation specifically against Mr. Ferguson and is particularised at para. 4.3.2 of the Particulars of Claim. The claim is that, as part of his campaign of harassment, Mr. Ferguson omitted to record work done by the Claimant in making his regular returns to the Trust for the months of April-July 2000; and that he had previously written to the Trust accusing her of not carrying out any work.
  - (3) "*Writing to the Claimant's patients and informing them falsely that they cannot receive treatment from the Claimant*". This, again, is an allegation specifically against Mr. Ferguson and is particularised at para. 4.3.3 of the Particulars of Claim.
16. These averments do not involve the First or Second Defendants. However it is clear from Further Information supplied by the Claimant that she contends that Mr Smith's conduct of the correspondence with her summarised in para. 2 (15) above constituted harassment within the meaning of the Act; and she has also made clear in the interlocutory proceedings that she contends that the Trust is vicariously liable for the acts of the individual Defendants. Although these claims are not explicitly pleaded in the Particulars of Claim, Mr. Wolanski confirmed on behalf of both these Defendants that no point is taken on that omission.
17. The Claimant pleads essentially the same loss and damage as flowing from the Defendants' harassment as is pleaded in the first action; but, as in the case of that action, the claim for psychiatric injury was struck out by Tugendhat J. There is also a claim for aggravated damages and an injunction.
18. The Defendants deny that any of the pleaded acts constitute harassment. Again, an elaborate analysis of the various particular issues at this stage is unnecessary. As regards the March 2000 allegations and the allegations made in the course of the disciplinary procedure, it is averred that each of the Defendants acted reasonably. The March 2000 complainants are averred to have had a genuine belief in the truth of their complaints; and in so far as the Defendants gave evidence in the disciplinary proceedings their evidence is averred to have been truthful.

#### (b) The Defamation Claim

19. The defamatory publication relied on is the copying to Mr. Flory of Mr. Smith's letter to the Claimant of 14th January 2003: see para. 2 (15) above. The issues can be analysed as follows.
20. *Meaning*. The Claimant's case is that the words "I cannot accept that there was evidence indicating that allegations made against you were false" meant that – in short – the March 2000 allegations and the allegations made by various witnesses in the course of the investigation were true, and, broadly, that her conduct was such that she was unfit to practise as a dentist: that meaning is pleaded with more detail at para. 30.4 of the Particulars of Claim, but I need not rehearse it in full at this stage (see para. 190 below). Mr. Smith denies that meaning or any defamatory meaning: Defence para. 41.2. But for the purpose of justification (if necessary) he advances a meaning "that the Claimant had conducted herself in a manner justifying her dismissal by the First Defendant": Defence para. 43.
21. *Meaning defamatory*. It is not in issue that the meaning pleaded would, if established, be defamatory.
22. *Qualified privilege/malice*. Mr. Smith pleads that the publication attracts qualified privilege: Defence para. 42. This is accepted by the Claimant: Reply para. 69. No plea of malice is made specifically by way of answer to that plea; but the Claimant had already in the Particulars of Claim alleged malice or malicious conduct on the part of the Defendants in general and Mr. Smith in particular (see in particular para. 30.7.1 of the Particulars of Claim) and she subsequently served a pleading entitled "Further Details of Malice" dated 19th July 2004. She also relies on a document now incorporated in her witness statement but previously deployed before Eady J. in which she seeks to demonstrate that Mr. Smith must have been aware that the allegations against her were false. The essential allegations against Mr. Smith are that he "knew from the information available to him that the content of his letter was false or alternatively ... was indifferent to its truth or falsity" and that "from

the evidence [he] must have known the allegations of professional misconduct made against the Claimant were false, unless he deliberately abstained from availing himself of the information readily to hand".

23. *Falsity/justification.* Mr. Smith does not seek to justify the words in the meaning pleaded, but he does seek to justify the meaning set out at para. 20 above, i.e. that the Claimant had conducted herself in a manner justifying her dismissal. The facts now relied on in support of that plea are pleaded in para. 43 of the Defence under the following heads:

- (1) "the Claimant's unnecessarily confrontational and unprofessional conduct with colleagues ... leading to a breakdown to working relationships";
- (2) "repeated and unreasonable frustration of attempts to improve working relationships with colleagues";
- (3) "the Claimant's wilful disregard for proper practice and procedure and unreasonable refusal to comply with instructions given to her by [Mr. Ferguson] and others in authority at [the Trust]".

(A fourth pleaded head - "insensitive treatment of patients by the Claimant at South Benwell school" – is not now pursued.) The particular matters pleaded under each head cover, as one would expect, much the same ground as the disciplinary investigation. In particular, they assert the Defendants' versions of most of the incidents raised in the March 2000 allegations and the further allegations. But it should be noted that their pleading as particulars of justification puts in issue the truth of those allegations more directly than do the pleadings in the first action or, in these proceedings, the defence to the harassment claim, where it may be enough to show that the allegations were made in good faith and/or reasonably. There are also one or two specific allegations pleaded which do not feature in the early history (for example, that sometimes the Claimant carried out domiciliary visits without being accompanied by a dental nurse and that she was often late in to work).

24. *Damage.* The Claimant alleges, in general terms, damage to her personal and professional reputation: see para. 30.6. She claims financial loss on the basis that Mr Smith has deprived her of the opportunity of ever being employed in dentistry again (para. 30.9): this is not quantified, but I can assume that the Claimant relies on the figures supplied in the first action. She also pleads claims for aggravated and exemplary damages (paras. 30.7 and 30.8 respectively). The claim for exemplary damages was struck out by Tugendhat J. As for the claim for aggravated damages, the particulars are voluminous, and I need not set them out here.

#### THE STRUCTURE OF THE JUDGMENT

25. In view of the areas of overlap, this is not a case in which it makes sense to consider the issues in the two actions in detail one-by-one. Rather, what is called for is a chronological account, making the necessary findings on disputed factual issues, including issues of reasonableness and good faith. Once those findings are made, the disposal of the claims in both actions can be reasonably shortly dealt with. There are however some general matters which it is better to address before becoming involved in the detailed narrative. Accordingly, I structure the remainder of this judgment as follows:

- (A) **The Claimant.** In this section I deal with general matters about the Claimant as a witness and a person. Inevitably this will involve some anticipation of findings which I make in later sections.
- (B) **Mr. Ferguson and the Claimant.** In this section I will deal with the "background" allegations about Mr. Ferguson's harassment of the Claimant, i.e. prior to the sequence of events leading to the making of the March 2000 allegations.
- (C) **The Claimant's conduct up to March 2000.** The principal focus under this head will be a narrative, with commentary, of the events leading up to the making of the March 2000 allegations and which are referred to in them. Although it may not, depending on my decision on other issues, be strictly necessary that I make findings as to the truth of the matters alleged against the Claimant I will so far as possible do so.
- (D) **The March 2000 Complaint.** In this section I will seek to analyse what the allegations in fact amounted to and whether they were made reasonably and in good faith.
- (E) **The conduct of Mrs. Prendergast.** This is self-explanatory. Although Mrs. Prendergast is no longer a Defendant, her actions/omissions in mid-2000 remain central to the claim in the first action.
- (F) **The disciplinary proceedings.** I include under this head the questions of what was done or not done about the Claimant's January 2001 complaint; the further allegations; and the repetition or amplification of the allegations made in the course of the investigation and the two hearings.
- (G) **The correspondence between the Claimant, Mr Smith and Mr Flory**
- (H) **Application of those findings to the claims**
- (I) **Loss/damage**

26. I should make it plain that although I will endeavour to make findings on every important factual issue I cannot hope to address specifically every point made by any of the parties in the voluminous secondary pleadings or in the still more voluminous witness statements and the extensive oral evidence. I have tried to deal with incidents in proportion to the importance attached to them by the parties at the time and in their evidence before me.

#### (A) THE CLAIMANT

##### THE CLAIMANT'S PERSONALITY

27. This is a case where I must make some general findings about the Claimant's personality, because that is fundamental both to the allegations which are at the centre of the case and to my assessment of her reliability as a witness. I base my findings partly on the evidence which I have heard or read (which includes the psychiatric evidence) and partly on my own observation of her over a trial lasting nearly three weeks. So far as the evidence is concerned, I have had regard both to general judgments made by the witnesses, many of whom have worked with her over a long period, and to the evidence of her conduct on a number of specific occasions. As regards the latter, I deal with these in detail in the narrative sections and there is inevitably an element of anticipation in referring to them here. As regards my own observation, I am well aware of the great strain imposed on any litigant in person in conducting a trial; and I have borne this in mind in making my assessment.

28. The Claimant has an unusual and complex personality, and I will not try, even if I were qualified for the attempt, to put forward any overall psychological analysis. But I must refer to four personality traits which in my judgment clearly appear from the evidence.

29. First, the Claimant has what the authors of the joint psychiatric report referred to at para. 17 above describe as "the rigid thinking pattern and lifestyle which is in keeping with an obsessive-compulsive personality disorder". That is a technical description, but the reference to a rigidity of outlook accords with my own observation, and that of witnesses, that the Claimant finds it very difficult to accept that there is any way of looking at things but her own. In cross-examination she would often fail to understand or engage with a question which required her to see matters from another person's perspective: her

answers would simply slip into the groove of her own perception. One consequence of this rigidity is that when colleagues and others behave in ways that fail to conform to her view of the world, she tends to account for their conduct on the basis that they are hostile to her (or are being used by others who are). Once she has developed in this way a perception that others are her enemies, the grievance becomes deeply-rooted and ineradicable; and the perception of hostility is indeed "obsessive". I will not rehearse here the many instances of these characteristics appearing both in the evidence and in the course of the trial. But I will refer to one piece of the evidence which I found telling and does not otherwise feature in the narrative. One of the colleagues interviewed by the disciplinary investigators was Val Dalton, who had worked as the Claimant's dental nurse from 1975 to 1993: she remained employed in the Community Dental Service thereafter but in a non-clinical role. The Claimant holds Mrs. Dalton in high regard, as plainly did other colleagues who gave evidence. Mrs. Dalton did not give evidence before me, but I have her signed note of her interview with the investigators. She told them that she liked the Claimant, but she went on to say that "[the Claimant] doesn't always see others' points of view, she can sometimes hold grudges, she insisted on things from time to time". That assessment, from a sympathetic colleague, closely echoes in lay language the psychiatrists' reference to rigidity and obsessiveness.

30. Secondly, and no doubt related to the first trait, the Claimant has little insight into her own behaviour and little appreciation of the impression that she may be making on others. A striking feature of the case has been her refusal throughout to acknowledge that there was ever any difficulty in her working relationships with colleagues. There were, she believed, two people who were deliberately hostile to her – Mr. Ferguson and Mrs. Tabari – but otherwise she believes that her relations with her nurses and, so far as their paths crossed, with her fellow-dentists were very good – even when (as in the case of Ms. Weisser) she may have had a low opinion of them. She thus finds it hard to account for the fact that so many of them gave a completely different picture in their grievance statements and their evidence to the investigators, and she can only resort to the explanation that they were pressurised into making false complaints. As I find below, that is not the case; but the Claimant's belief that she got on well with so many people whose own perception was very different is a good illustration of her lack of insight in matters of relationships.
31. Thirdly, although the Claimant's general demeanour is quiet and indeed somewhat reserved, she is a highly-strung and deeply emotional person. On occasion her emotions can boil over in outbursts of unhappiness or anger. On other occasions this trait manifests itself more as moodiness or irritability. That conclusion is primarily based on the evidence which I review below; but, again, it was supported by my own observation. Although the Claimant never lost her temper in court, and indeed behaved throughout with courtesy towards the Court and generally with self-control, it was clear that her emotions were only kept with great difficulty below the surface. As I have said, I recognise how stressful the trial will have been to her; but the evidence is to a considerable extent concerned with her behaviour under stress. In this connection I was struck by the evidence of Mrs. Wright, another dentist employed in the Service who had known the Claimant for over 25 years: her assessment had the advantage that she had had very little involvement in any of the events leading to these proceedings and had never fallen out with the Claimant. She was called by the Trust to give evidence of one or two comparatively minor matters supportive of its case. In cross-examination the Claimant suggested that the two of them had been friends outside work. Mrs. Wright acknowledged that they had got on well as colleagues, but she denied that they had ever become friends and she made it clear that she had deliberately kept her distance. She said: "I liked [the Claimant]. I wanted to help her. But I felt that there were a lot of personal problems and baggage ... I just wanted to keep it on a work footing". It is not part of my task to analyse the "personal problems and baggage" that Mrs. Wright referred to; but her evidence is of value as confirming that the Claimant struck even sympathetic colleagues as a troubled personality. It is characteristic of the Claimant's incomprehension of how others can have a different perspective from her own that she sought in her cross-examination and closing submissions to account for Mrs. Wright's evidence by alleging – wholly implausibly – that it was motivated by guilt at having on occasions many years previously borrowed (with Mr. Ferguson's permission) Trust equipment when carrying out private domiciliary visits.
32. The final trait which I should mention is rather more specific. Three of the dental nurses who worked with the Claimant – Mrs. Smith, Ms. Weisser and Mrs. Fawcett - mentioned in their witness statements that she showed an interest, which struck them as unusual, in the work and lives of other dentists with whom they worked, in particular Mr. Ferguson, Mrs. Tabari and Ms Nagaj. They felt that she was sometimes positively manipulative in attempting to obtain information about her colleagues which they felt awkward about giving. As will appear below, I regard each of these witnesses as honest and I accept what they say about this, particularly since a fourth nurse – Marion Irvine – volunteered a similar observation in cross-examination.
33. These characteristics made the Claimant a difficult person to work with. That was most evidently so on the occasions when she completely lost her temper. But, quite apart from those dramatic manifestations, several dental nurses found both her insistence on things being done "her way" and her emotional volatility – which they could sense even when it was under control – unnerving. (One illustration, described by two of her nurses, is her angry and erratic driving when under stress - nurses accompany dentists on domiciliary visits and the witnesses accordingly had occasion to be driven by the Claimant quite frequently.) They found that working with the Claimant put them on edge. They could not predict her moods and did not know where they were with her. It was put different ways by different nurses. I summarise as part of the narrative below the evidence of Mrs. Falkous, Ms. Weisser and Mrs. Fawcett, but their effect can be summarised in the evidence of Ms. Chater in her witness statement that the Claimant "was a moody person and her moods were very unpredictable, which could make things uncomfortable".
34. The Claimant disputes this account of her personality. She was able to adduce character evidence from friends and associates of good standing who spoke sincerely of her caring qualities and of the pride she took in her professional work. She is indeed an intelligent and interesting person, and I have no difficulty in accepting that she is liked and esteemed by many people. Nor need I question that in ordinary working contacts with other professionals with whom she had to deal on an occasional basis she had good working relationships: she adduced, for example, a supportive statement from the proprietor of the dental laboratory which she used. But what this case is principally concerned with is her working relationships with others in the Community Dental Service, particularly (though not exclusively) with those with whom she came into regular contact. That is not the same thing. The evidence is in my view clear that in those circumstances her personality gave rise to real problems. The Claimant points out that there were several nurses who had no difficulty working with her; and some of them – most notably Carolyn McBride - said so in terms in their evidence to the Trust's investigation. But that does not mean that those who claimed that their experience was different were not telling the truth. Different personalities inter-act differently. In fact even some of those who worked with the Claimant for long periods without any problems becoming overt nevertheless did not find the experience easy. I heard particularly convincing evidence to that effect from Mrs. Fawcett, who worked extensively with the Claimant in the period running up to her suspension in September 2000. She gave evidence, which I fully accept, that she

found working with the Claimant (at least in the later part of the period) stressful and difficult. She put up with it, until the final straw which I describe in para. 137 below, because she is not the complaining type; and because she did not complain it was the Claimant's belief, as she told me, that they got on particularly well. It is typical of the Claimant's outlook that, having herself found Mrs. Fawcett amenable and easy to work with, she could not accept that the converse was not the case. (Her relationship with Mrs. Dalton may be another example: see para. 58 below.)

35. This assessment inevitably focuses on certain negative characteristics of the Claimant's personality, and I fear that it will be very hurtful to her. That cannot be avoided if I am to do justice to all the parties, but it is only fair to her to emphasise that the difficult areas in her personality do not constitute the whole picture. She has many positive qualities. Several of those who fell out with her nevertheless acknowledged that she could often be kind or pleasant. Mrs. Falkous, one of the March 2000 complainants, told the disciplinary investigators that despite the difficulty that she had found in working with the Claimant "there were many pleasant times – deep down DM was not a nasty person"; and I have noted above the examples of Mrs. Wright and Mrs. Dalton, who both said that they liked the Claimant while being aware of the problems in her personality. It is important to make the point that the episodes of overtly difficult behaviour were the exception and not the rule: with some people for all of the time, and with most people for some of the time, day-to-day work was conducted in a professional and sometimes friendly atmosphere. But the trouble was that she could not be counted on to relate professionally to all staff all the time: in Mrs. Tabari's words to the disciplinary investigators, she "can be very pleasant but [she is] unpredictable". Mrs. Fawcett told the investigators that "she had never worked with such a character before. It was usually a friendly relationship but DM had outbursts". The Claimant asked rhetorically in opening whether she could have presented differently at different times; but the answer is yes.

#### THE CLAIMANT AS A WITNESS

36. The characteristics which I have identified above also bear on the Claimant's reliability as a witness. Her solipsistic outlook means that her accounts of both her own conduct and of other people's in any kind of contentious encounter are, while perfectly sincere, unreliable: to an unusual degree she sees, and recalls, only her own image of what occurred. Further, her rigidity of outlook does not permit her to admit that she may be mistaken; and in cases where her account is contradicted by what appears to be clear objective evidence she is forced to resort to frankly fanciful hypotheses – such as forgery, or lying by those who have no motive to lie, or witnesses having been suborned - in order to account for the contradiction.
37. I give in the course of Section C below several examples of the Claimant's unreliability as a witness. But I should mention here, because it does not otherwise fit into the narrative, one point relied on heavily by Mr. Wolanski as evidencing dishonest evidence on her part. On 10th July 2004 a Newcastle newspaper called *The Journal* featured a front-page story about these proceedings under the heading "Dentist Sues over Smears". The inside page contained a large photograph of the Claimant at her home, for which she had plainly posed, and the story contained quotes attributed to a conversation with the reporter "last night". Some of the content of the story was seriously inaccurate, including the statement in the introductory paragraph that the Claimant's dismissal was as a result of a whispering campaign "triggered by her boss being disciplined for sexually harassing her": Mr. Ferguson was named, and a photograph of him (clearly unposed) also appeared. Mr. Ferguson had never been disciplined by the Trust, for sexual harassment or anything else, and although following her dismissal the Claimant had made a complaint to the General Dental Council alleging (among other things) sexual harassment that complaint had been rejected. The story will of course have been both damaging and upsetting to Mr. Ferguson; and it was Mr. Wolanski's submission that in giving such a story to the press the Claimant was acting vindictively. When asked about the story in cross-examination, the Claimant said that she had spoken to the reporter only on the phone and had made a point of not saying anything about the nature of her claims but only about the effect which her suspension and subsequent events had had on her: as regards the case itself, the reporter had only had the pleadings to go on, and he must have misunderstood them. (Indeed she at first said that she had not spoken to the reporter at all, but I am not sure that that was really what she meant.) Mr. Wolanski submitted that this was a demonstrably untruthful answer. I am not sure that I would go so far as that. I am indeed sceptical about whether the Claimant really managed in her conversation with the reporter scrupulously to avoid any discussion of the substance of her case, and her willingness to co-operate in the story shows her eagerness to advance her cause by any means; but there is much room for misunderstanding in a telephone conversation with a journalist, and I am not entirely satisfied that the inaccuracies in the story were deliberately planted by the Claimant. If this were the only ground for impugning the Claimant's reliability I would be cautious about attaching much weight to it; but it is not.

#### THE CLAIMANT AS A DENTIST

38. There is no issue in the case about the Claimant's technical abilities as a dentist. The evidence is clear that she was highly regarded, both by her colleagues and by her nurses, several of whom asked her to undertake treatment on themselves or their family or friends.
39. There is however an issue about the Claimant's manner towards patients. Some of the dental nurses were to a greater or lesser extent critical of her in this respect. Specifically:
- Mrs. Fawcett gave evidence that the Claimant "did not come across as overly sensitive" with patients; she "had no emotional involvement with them, she simply did the job". She also said that the Claimant disliked having to deal with mentally ill patients. Mrs. Fawcett confirmed evidence which she gave at the appeal hearing to the effect that, since the Claimant had left, several families who had come instead to see Mr. Pollock, whose nurse she became, had expressed relief that she had gone: more than one had said that the children had found her "frightening" and one little girl had referred to her as "the evil dentist". Mr. Pollock gave evidence confirming the substance of Mrs. Fawcett's account as regards the reaction from the families whom he saw: he remembered the little girl in question referring to the Claimant as "the old witch" (or, possibly, "bitch"). He now works for a different Trust in Scotland and had no conceivable motive not to tell the truth. The Claimant put to him in cross-examination that he was lying because he wanted to return to work for the Trust: that allegation of an ulterior motive is characteristic of the Claimant's response to evidence that she could not accept. I am entirely satisfied that Mr. Pollock was telling the truth.
  - Mrs. Falkous gave evidence that the Claimant "never spoke to patients and was not warm towards them: patients sometimes commented that she was miserable". She described her manner as "abrupt" and "offhand". Like Mrs. Fawcett, she said that the Claimant did not appear to welcome treating patients with mental health problems, though she said that she was good with the elderly.

- Most centrally to the case, Mrs. Smith in her March 2000 grievance statement described the Claimant as having an "impatient manner" towards difficult clients, which she described as "rude and unprofessional"; and in the disciplinary hearing she spoke of the Claimant having a "rude manner towards the patients". In her evidence before me she explained that it was more a matter of tone than substance. She referred to one incident where a child who had a hole that required filling but was being difficult was told by the Claimant that he would simply have to go home untreated. I accept that this occurred, but its seriousness should not be overstated – in fact the child was persuaded to stay by the mother and the treatment was concluded; but Mrs. Smith advanced it as an example of the Claimant being "very short" with a misbehaving child.
40. The Claimant does not accept any of these allegations. She regards all three nurses as part of a conspiracy to tell falsehoods against her. She produced testimonials from patients and witness statements (including one from Ms. Davison, the warden of a home for the elderly) speaking warmly not only of her technical ability but of her "chair-side manner"; and she referred to what was said in the disciplinary interviews by other dental nurses praising her manner – in particular, the interview note of Margaret Young stating that she was "lovely with patients and lovely with the elderly" and of Mrs. Dalton, who said that she "would bend over backwards for patients". She also makes the point that if her manner was so bad patients need not have come back or indeed have followed her, as many did, when she changed clinics: there were (as she demonstrated with maps) plenty of dentists nearby offering NHS treatment.
41. I find that the evidence of Mrs. Fawcett best describes the Claimant's manner with patients: she was a careful and moderate witness and, as will appear below, I reject the Claimant's allegation that she was a party to any conspiracy. To the extent that the written statements of Mrs. Falkous and Mrs. Smith go further than that and can be read as alleging that the Claimant was consistently or grossly rude to patients, I do not believe that that is fair - though I do not believe that that is what either of them intended to convey. The picture which emerges from the evidence is not that the Claimant was generally rude to patients in any crude sense; but that she did not to any great extent engage with them as individuals. That seems to me consistent with her personality as I have assessed it above. Many patients will no doubt have been untroubled by this approach, and some may indeed have found her detachment calming. I also accept the Claimant's evidence that there were some individual patients with whom for one reason or another she developed a particular rapport. But some sensitive patients, and particularly perhaps some children, will have found her manner uncomfortable or indeed "miserable", and it will have been these who welcomed her departure. The epithet "evil" is of course nonsense if taken literally, and I suspect that even the child who used it was doing so light-heartedly and by way of conscious hyperbole; but it expressed the fact that the Claimant had made her uneasy. I can accept that there will have been occasions, particularly perhaps when she was under stress, in which the Claimant's highly-strung temperament displayed itself more overtly in a flash of abruptness or anger – as in the incident mentioned by Mrs. Smith – but these will have been rare.
42. Having made those findings, I must emphasise that it was never suggested by the Trust that there was anything about the Claimant's manner with patients which merited formal action. Wherever exactly it fell, it was within an acceptable range. It has only become an issue in the case because of certain remarks made by the dental nurses in the March 2000 allegations and in the course of the disciplinary proceedings. I suspect that both those who positively liked the Claimant's manner and those who positively disliked it were a minority, and no real conclusions can be drawn from the fact that most patients continued to come back to her: there is a considerable inertia factor among patients and most will not make the effort to change without some very strong reason.
43. It is convenient to address here three other allegations about the Claimant's working practices. They are not very serious in themselves and they are largely peripheral to the issues. Nevertheless, they feature in the evidence and the pleadings and I should deal with them.
44. *Lateness for work.* Three of the dental nurses who worked regularly with the Claimant – Mrs. Falkous, Ms. Weisser and Mrs. Fawcett – gave evidence that she was often late getting into work. Mr. Ferguson made a similar allegation, although that was necessarily largely based on what he had heard from others. On this basis the Trust pleads in the second action that "the Claimant was consistently late in arriving for work" (Defence para. 43.17). The Claimant denied this allegation. She accepted that she sometimes arrived at the clinic after the start of working hours but she said that on such occasions she would have been on a work-related visit, e.g. to the laboratory or to a school or other institution where she had patients; and that was also what she tended to say at the time if asked where she had been. The witnesses to whom this explanation was put in cross-examination were sceptical about it. I accept that their judgment that the Claimant was sometimes late without good reason was genuine and also – so far as a finding is required – that it was correct: they were all reliable witnesses and they were well-placed to form a view as to the reasons for the Claimant's lateness. I suspect that the Claimant's lateness was a symptom of a degree of disorganisation in her life at the time, which in turn reflected the stresses which she was experiencing. But it was never a sufficiently serious problem to require disciplinary action.
45. *Domiciliary visits.* The Trust alleges in the second action (Defence para. 43.13) that the Claimant sometimes made domiciliary visits without being accompanied by a dental nurse. I think it most unlikely that the Claimant ever carried out any kind of dental treatment without being accompanied by a nurse. It is part of her own case that she sometimes visited schools or old people's homes on her own. Such visits might be described as "domiciliary", and to the extent that they did not involve treatment there is no reason why she should have been accompanied. I suspect that this allegation is connected with that considered in the preceding paragraph, i.e. that it is based on the occasions when the Claimant sought to explain her lateness by reference to having been paying "domiciliary" visits.
46. *Record cards.* It was the evidence of Mr. Ferguson and Ms. Weisser that the Claimant sometimes failed to return patient record cards which she took with her on domiciliary visits: she left them at home or in her car. An allegation to this effect is pleaded at para. 43.14 of the Defence in the second action. I accept that evidence. It is supported by contemporary documents showing the problems caused by the absence of records during the Claimant's period of sickness absence in early 1999. Again, however, the problem was not grave: it was simply a symptom of the Claimant's somewhat disorganised approach to her work at this time.

#### THE CLAIMANT'S CONTRACT

47. Few of the issues in these proceedings turn on the express terms of the Claimant's contract of employment. Nevertheless, I should set out briefly the overall contractual position. The nearest thing to a definitive statement of at least the principal terms of the Claimant's employment at the relevant time is a document entitled "Amendment to Main Conditions of Service" issued by Newcastle Health Authority at the time in 1991 when she was appointed a "Full-time Senior Dental Officer – Special Needs" (I



am not sure if this was a nominal or substantive change in her job, but nothing turns on that). The document was signed by her on 25th January 1991 as an acceptance of the amendments contained in it. Although presented as an amendment, it appears to provide for most of the essential terms. Under the heading "General Terms", it states:

*Your new appointment is subject to the terms and conditions of service laid down by the General Whitley Council for the Health Service, the Administrative Dental Service Officers and Community Clinical Dental Service Officers Whitley Council and the Authority's Policies and Procedures.*

48. There was also in existence at the relevant times a written Grievance Procedure published by the City Health Trust. It is not a negotiated agreement (although there was evidence that the union had been consulted in relation to it): it appears to have been drafted in the Human Resources Department, and the authors both of the original version and of a subsequent amendment are named at the foot of the document. It provides for "complaints" (not otherwise defined) which cannot be resolved informally to be dealt with under a three-stage process. Stage 1 is initiated by the employee making a complaint in writing "to the appropriate line manager" who must respond in writing. I need not set out the details of the procedure that follows thereafter: there is provision for a series of steps triggered by written requests and responses and subject to strict time limits. The contractual status of the procedure is nowhere explicitly stated. It is not explicitly referred to in the amendment document referred to above – though it might be covered by the phrase "the Authority's Policies and Procedures" – nor in any other contractual document in the possession of the parties. I am told that there is nothing in the relevant Whitley Council agreements providing for a grievance procedure.

**(B) MR. FERGUSON AND THE CLAIMANT**

49. It is the Claimant's case that from the early 1990s Mr. Ferguson began to harass her. There are essentially two elements to the alleged harassment, though no doubt the Claimant would say that they were connected. First, she says that he showed her unwanted sexual attentions. Secondly, she says that he visited and phoned her at work and interfered in her practice to an unnecessary degree and did not leave her free to get on with her work in the way that she thought best. I have already noted that in neither respect are these allegations directly relied on: they are simply said to be "background". For that reason I can deal with them more briefly than would be necessary if they were central to the case. Nevertheless it is necessary that I make findings on them. To some extent my conclusions depend on findings which I make in Section C below; but a degree of overlap is inevitable.
50. I take first the allegation of sexual harassment. There are essentially three elements to what is alleged:
- (a) that Mr. Ferguson on a number of occasions gave the Claimant lifts in his car and took advantage of doing so to touch her unnecessarily when helping her with her seat-belt and so forth, and that on one particular occasion in 1991 he kissed her and touched her breasts;
  - (b) that Mr. Ferguson continually "leered" at her and looked unnecessarily at her breasts;
  - (c) that on one occasion he made coarse and personal remarks about her menstrual problems, suggesting that she should have a hysterectomy.

Each of these allegations is emphatically denied by Mr. Ferguson. He does recall one occasion when, in the context of a discussion (which he did not initiate) about menstrual problems, he referred to his mother having had a hysterectomy, and he suggests that this may be the origin of "element (c)"; but if so his remark was intended sympathetically and was not in any way inappropriate. As regards (a), he did recall an incident when he and the Claimant had been talking in her car about her belief that her ex-husband was attempting to burgle her home and the clinic (as to this, see para. 59 below) and when apparently by way of thanks for his sympathy she made as if to kiss him on the cheek – from which he had recoiled. But this was plainly completely different from the incident which she described.

51. I do not accept any of the Claimant's allegations. My principal reason is my assessment of the Claimant and Mr. Ferguson as witnesses. I have already explained why I feel obliged to treat the Claimant as an unreliable witness. I am of course aware that the fact that she has a troubled personality is not by itself a sufficient reason for rejecting her evidence, particularly since, whereas it is (comparatively) easy to see how a distorted perception could give rise to "elements (b) and (c)", her account of the alleged sexual assault is more difficult to account for in that way. But the fact remains that on a very large number of issues I have had to find her evidence to be simply wrong; and it would be a strong thing for me to find that on this – almost uniquely among the disputed factual issues in the case – her recollection is to be preferred. And in any event I regard Mr. Ferguson as a truthful witness. He was not always particularly clear or articulate in his evidence, but I had the firm impression that he was trying to tell the truth as he recalled it.
52. My conclusion is reinforced by the fact that the allegation of sexual harassment emerged piecemeal and very late in the history of this matter. No complaint was ever made while the Claimant was employed by the Trust, even in the context of the disciplinary proceedings, or (as the Claimant accepted in cross-examination) to her family or to any of the doctors whom she saw over this period. The Claimant says that she did on one occasion raise it with Dr. Kaiser (the Programme Manager for the Trust's Child and Adolescent Health Programme Children Services, and subsequently its Head of Operational Services). But it was Dr. Kaiser's evidence that she does not recall any such allegation ever being made to her and that she would certainly have remembered it if it had been made. I accept that evidence. I can understand a reluctance to raise an allegation of sexual harassment while the Claimant was still trying to get on with her work; but her silence is more difficult to understand at a time when she was suspended and was at risk of losing her job unless she put the whole story before the Trust. The allegation was not in fact made until late 2001, when the Claimant complained about Mr. Ferguson to the General Dental Council; and even in the present proceedings it was left in extremely general terms until the service of the Claimant's witness statement. As I say, I rely on this point by way of reinforcement rather than as a primary reason for rejecting the Claimant's evidence, since it is well-known that victims of any kind of sexual abuse can find it very difficult to complain.
53. I turn to the allegations of "ordinary" harassment. It is common ground that from some point in the mid-1990s the Claimant was very disenchanted with Mr. Ferguson. She was aggrieved by his decisions on certain specific issues – for example, concerning the re-charging of the cost of private phone calls and his refusal (as she understood it) to give her compassionate leave when her mother had unexpectedly to go into hospital – and she developed the perception that he was "picking on" her in a way that he did not pick on her colleagues. She regarded his manner towards her as unsympathetic and authoritarian and such that it was impossible to have a reasonable discussion of issues. This perception culminated in the meeting of July 20th 1998 to which I refer below: see para. 69. It was the evidence of Mrs. Falkous and of other nurses with whom the Claimant worked in this and subsequent periods that she was often critical of Mr. Ferguson to them – referring to him as a "bastard" or "that

bloody man" and asking them to take messages rather than speak to him herself when he called. Although the Claimant denied that she was rude about Mr. Ferguson to the nurses, I accept their evidence.

54. It is impossible now to reconstruct how the deterioration in the relationship between the Claimant and Mr. Ferguson started or to apportion blame. It may perhaps be that Mr. Ferguson was at times rather insensitive in dealing with the Claimant (though dealing with her was not easy), but I am satisfied that there was no conduct on his part which could fairly be described as harassment. I base that conclusion partly on my assessment of the Claimant and Mr. Ferguson as people and as witnesses but partly also on the views of Mr. Ferguson's colleagues, several of whom both at the time and in their evidence to me paid tribute to him as a fair and conscientious manager. Mr. Ferguson struck me as a phlegmatic man whose preference was to avoid confrontation rather than to look for trouble. The poor relationship between Mr. Ferguson and the Claimant was apparent to the other dentists. Both Mrs. Wright and Mrs. Tabari gave evidence, which I accept, that the Claimant's manner towards Mr. Ferguson in staff meetings was sometimes rude.
55. I have no doubt that as problems with the Claimant accumulated – as I describe in section C below - Mr. Ferguson felt obliged to take a closer interest in what she was doing: the fact, which she now suggests is sinister, that he took fairly full notes of most of his conversations with her is in my view entirely natural behaviour in the context of the difficulties which he faced in dealing with her. It may well be that the Claimant perceived that he was keeping a closer eye on her than on her colleagues, and she no doubt found that irksome and upsetting. It may also be that on occasions he showed his impatience or exasperation with what he perceived to be unreasonable conduct on her part: he found the entire situation increasingly stressful, and I am sure that in the final stages of his relationship with the Claimant he had developed a fairly strong antipathy to her. But I do not believe that he had initially any kind of hostility to her, nor did he ever engage in the kind of persecution which she alleges.
56. Having reached that conclusion, I do not need to attempt any more sophisticated psychological analysis of what precisely went wrong in the working relationship between the Claimant and Mr. Ferguson. The truth is that the Claimant's personality, as I have analysed it above, was such that there was a high risk that the frictions or disagreements liable to occur between any employee and any manager were in her case liable to lead sooner or later into a perception of hostility and an eventual falling-out.

**(C) THE CLAIMANT'S CONDUCT UP TO MARCH 2000  
1975 TO FEBRUARY 1997**

57. The Claimant started to work for the Trust in 1975. Until towards the end of 1991 she worked under Mr. Carmichael, the Consultant in Dental Public Health. His retirement in that year coincided with the introduction of the purchaser/provider dichotomy in the NHS, so that day-to-day management of the service became the responsibility of Mr. Ferguson, as Dental Services Manager, while Mr. Carmichael's successor as Consultant, Mr. David Evans, retained certain responsibilities as "purchaser". By the Claimant's account her working relationship with Mr. Carmichael was very good. But there is in the documents before me a file note dated 20th September 1991, apparently made by Mr. Carmichael for the benefit of Mr. Ferguson as his successor, setting out in some detail a meeting which he had recently had with the Claimant in which she had asked for changes in her job description – one of the changes being that her responsibilities should include giving "advice on legal matters appertaining to the Community Dental Service because she has a law degree". The note explains that he had been obliged to turn down her request but that she was "very disappointed" and that he wanted to warn Mr. Ferguson (and other senior managers) because he "may well have to deal with this difficulty again in the future" and "I fear that a very firm line will be required". The note is a long way from any of the matters directly in issue in this case but I think it worth drawing attention to for a number of reasons:
- (1) The Claimant in her evidence adamantly denied that any such meeting ever took place. She says that she never made the requests attributed to her and gives various other reasons why she says that Mr. Carmichael would not have written a note in these terms. She says that the note is bogus and put it to Mr. Ferguson in cross-examination that he had forged it. I cannot accept that. The note has every appearance of authenticity, and its contents are of a kind which it is unlikely that it would have occurred to even the most subtle forger to invent.
  - (2) If the note is genuine it undermines her evidence that her relationship with Mr. Carmichael was entirely harmonious. The note makes it quite clear that he regarded her as likely to cause trouble. That fits into the pattern which I describe in para. 30 above.
  - (3) The importance attached by the Claimant to her law degree is significant in view of evidence (which she denies) that she referred to it on later occasions in connection with her complaints against Mr. Ferguson.
  - (4) Overall, it is an early and clear example of the unreliability of the Claimant's evidence about her working relationships.
58. The Claimant's regular dental nurse until 1993 was Val Dalton. It was the Claimant's evidence that her working relationship with Mrs. Dalton was excellent; but Mr. Ferguson gave evidence that there had in fact been problems and that in about 1993 he had been approached by each of them asking not to have to work any more with the other. The Claimant said that, as regards her, that was a lie by Mr. Ferguson; that she had been happy with Mrs. Dalton; and that she believed that Mrs. Dalton had stopped working for her only because she had developed a skin problem which made it hard for her to continue with clinical work. Mrs. Dalton did not give evidence before me but Mr. Ferguson's version is to some extent confirmed by the signed note of her interview referred to in para. 29 above. In that note she is recorded as saying that she had been shocked to learn in 1991 or 1992 that the Claimant had complained to Mr. Ferguson, without first raising it with her, about the way in which she was operating the appointment system for patients. She said that at times she had not felt like coming into work with the Claimant; but she had realised that "it wasn't just her". Again, this is a long way from the issues which ultimately I have to resolve, but it is worth noting because it is another example of the unreliability of the Claimant's evidence on matters concerning personal relationships: she has convinced herself that there was a harmonious golden age in contrast to the later period when she was let down or betrayed by a series of colleagues, but this does not reflect the true position. I also heard evidence from Mrs. Fawcett, Mrs. Falkous and Mrs. Peart, who were also friendly with Mrs. Dalton, that they knew from her that she had not always found her relationship with the Claimant easy.
59. Mrs. Dalton was replaced as the Claimant's regular dental nurse by Janice Falkous, who worked for her from 1993 to 1997. She was one of the four nurses who submitted the March 2000 complaint, and I accordingly have the benefit not only of her evidence before me but of the statements that she made and the evidence that she gave in the course of the grievance and the disciplinary procedures. In summary, it was her evidence that she and the Claimant got on alright at first but that the Claimant became increasingly unstable and her behaviour increasingly erratic. She would have arguments with Mr Ferguson. She would also have arguments with her mother and her daughter Claudia (now Mrs. De Pla) either on the phone or when they

visited the surgery (as her daughter quite often did). These arguments – which Mrs. Falkous described as "complete blow-ups" – would leave her in a bad mood so that she was sharp and critical with her. She also became obsessed with the idea that her ex-husband might try to burgle her home or the surgery: this led to her taking various unusual security precautions, including fixing a kettle lid to the wall so that it could act as a convex mirror and asking Mrs. Falkous to use it to keep watch when she should have been getting on with her work. On one occasion she asked Mrs. Falkous to accompany her in an attempt to catch her ex-husband at her home. She also thought that he was trying to poison her mother. She was liable to "fly into a rage" if things went wrong. Mrs. Falkous described one occasion when she lost her temper when a patient was not ready for a domiciliary visit and in her temper reversed her car into a lamp-post. She also described an occasion when she "yelled at" Yvonne Birkett, the clinic co-ordinator, over a rumour that her room might be changed. This type of behaviour made Mrs. Falkous edgy and uncomfortable, to the extent that she began herself to suffer from an anxiety state. Mrs. Falkous did not allege that patient care was actually compromised, or that she witnessed any misbehaviour in front of patients; but she was concerned that a continued deterioration in the Claimant's mental health might lead to an effect on patients.

60. It was the Claimant's case that essentially the entirety of Mrs. Falkous's evidence as summarised above was untrue. She drew attention to the fact that Mrs. Falkous was herself going through matrimonial difficulties at the time and suggested that this had distorted her perception. She had never had rows with Mr. Ferguson or with her mother or daughter in Mrs. Falkous's presence. She had had no concerns about her ex-husband and the evidence about, for example, the kettle-lid was a fabrication. She did not lose her temper. I do not accept any of this. I found Mrs. Falkous to be a truthful witness. Her evidence on other matters which are disputed by the Claimant is corroborated by a contemporary note: see para. 63 below. The overall picture which she paints is consistent with that painted by the other nurses who worked for the Claimant. The particular allegations about the Claimant's fears about her ex-husband are not of a kind which would readily be fabricated and are corroborated by similar evidence given by Mr. Ferguson and Mrs. Peart. Mr. Ferguson's evidence was that the Claimant had raised with him her concerns that her ex-husband was burgling her home and the clinic and discussed security precautions: he says that she was very convincing, although he thought the allegations "rather bizarre" and was concerned that they may have been due to her imagination. Mrs. Peart said that the Claimant asked her if her husband, who is a police officer, could assist her in trying to detect her ex-husband burgling her home. I am satisfied that the Claimant did indeed have what Mrs. Falkous described as "family issues" at this time – though I know nothing of the details – and that they did affect her behaviour.
61. There are two incidents from this period which particularly feature in the evidence and with which I should deal.
62. *The incident of 28th November 1996.* It was the evidence of Mr. Ferguson that on 28th November 1996 the Claimant arrived unannounced, accompanied by Mrs. Falkous, at a mobile dental unit where he was seeing patients in order to complain about a decision of his about her leave arrangements. She was angry and insistent, to such an extent that Mr. Ferguson felt that he had to ask the patients who were awaiting treatment to leave the caravan. He made a note of the incident. His account is corroborated by the note of the investigators' interview with Ms. Chater in September 2000: Ms. Chater was with Mr. Ferguson at the time and she describes the Claimant as red-faced and shouting. The Claimant denies that any such incident occurred. She says that she never visited Mr. Ferguson at the mobile dental unit and would not even have known where it was. I do not accept this. It would not have been difficult to find out where Mr. Ferguson – who was after all the head of the Service – was to be found on any particular occasion. I do not accept that Mr. Ferguson's note is fabricated or that he and Ms. Chater were lying. Indeed their account is positively plausible since although the Claimant denies the incident itself she accepts that she did feel angry about the leave decisions which were said to be the subject of it.
63. *The incident of 24th February 1997.* On 24th February 1997 the Claimant returned to the surgery after a short period of illness (accompanied by her daughter) to find workmen in her office. According to Mrs. Falkous the Claimant became very angry with her for not having warned her about the work, and also about not having phoned her at home during her absence to see how she was. She described the Claimant as having become red-faced and "hysterical" and said that both Claudia and the Claimant had shouted at her, saying that she was "no kind of friend". Mrs. Falkous was reduced to tears. She left the room and called Mr. Ferguson. He came round and, according to his evidence, tried to calm the situation; but the Claimant refused to see Mrs. Falkous or apologise to her – instead she said that she would never forgive her or forget what she had done. There was a further altercation later in the day when the Claimant's daughter returned to the clinic and upbraided Mrs. Falkous. Mrs. Falkous went home. She refused to work for the Claimant any more, and her duties were re-arranged so that she did not have to do so. The Claimant denies this account. She says that it was true that on the day in question she had returned to find workmen in her room and had been unhappy about it but she says that neither she nor her daughter had been in any way rude or angry with Mrs. Falkous: Mrs. de Pla gave evidence to the same effect. I prefer the evidence of Mrs. Falkous and Mr. Ferguson. Mrs. Falkous was, as I have already said, patently a truthful witness. Both she and Mr. Ferguson made notes the same day (in Mrs. Falkous's case the note was actually written out by her sister); and I am satisfied that these are authentic and accurate. Quite apart from these points, it is hard to see why, if there had been no such incident, Mrs. Falkous ceased with immediate effect to be the Claimant's nurse. (I should say that in rejecting the evidence not only of the Claimant but of Mrs. de Pla I do not need to find that Mrs. de Pla was deliberately lying to me. She is plainly very close to her mother and there has been ample opportunity over the nine years since this incident for her recollection to have become distorted.)

#### FEBRUARY 1997 TO AUGUST 1998

64. Since Mrs. Falkous would no longer work for the Claimant Mr. Ferguson arranged for her to be replaced as her regular dental nurse by Natasha Weisser. In her evidence before me, and in her cross-examination of Ms. Weisser and Mr. Ferguson, the Claimant made a wide-ranging attack on Ms. Weisser's character and abilities. She said that Ms. Weisser was doing other work in the evenings and at week-ends, which she said often left her too tired to work properly as a dental nurse; that she had made careless mistakes in developing X-rays; that she had been charged by the police with assault (this referred to a minor altercation between Ms. Weisser and another woman, which was never brought to Court); that she insisted on doing things her own way, disregarding instructions from the Claimant; that she wore a tongue stud (which was said to be inconsistent with the Trust's commitment to oral hygiene); that she had wantonly damaged the Trust's property (this referred to an incident when she had taken a damaged slat out of one of the surgery blinds); and that she unilaterally made ill-considered changes to the clinic's filing systems. It is clear that these criticisms reflect the view which she had of Ms. Weisser at the time and that she made her disapproval felt, though possibly not always by direct challenge. There is a memo in the papers from Mr. Ferguson to the Claimant dated 2nd March 1998 in which he refers to the Claimant's refusal to take Ms. Weisser with her on domiciliary visits because she said that she was overweight and that this had damaged the front seat of her car. The Claimant denied that she had ever said anything of the sort, but she was unable to account for the memo save by saying that it had been created in order to discredit her. I do not accept this.

65. It is unnecessary for me to decide to what extent the Claimant's criticisms of Ms. Weisser were justified. There may have been some basis for some of them. Ms. Weisser was a young woman of strong personality, and Mr. Ferguson accepted in cross-examination that he sometimes had difficulty himself in getting her to do things as he wanted. I can see how she and the Claimant might have rubbed one another up the wrong way. But the nature of some of the criticisms and the lack of proportion with which the Claimant has harped on them, both in the events following March 2000 and in the current litigation, vividly illustrate some of the personality traits to which I refer above. In the end, however, what matters for present purposes is that the Claimant disapproved of Ms. Weisser, and I have no doubt that she made this felt. Further, the Claimant continued to be liable to outbursts of anger or emotion at work. She was particularly angry and upset when she had to deal with Mr. Ferguson. It was Ms. Weisser's evidence, which I accept, that the tension in the atmosphere between them got her down to such an extent that she took three weeks' sick leave: the leave was nominally attributed to back pain, but it was in fact the consequence of work-related stress.
66. There are two episodes in particular as between the Claimant and Ms. Weisser to which I need to refer because they featured in the March 2000 allegations.
67. *The broken handpiece.* On 5th December 1997 a piece of equipment being used by the Claimant broke in the patient's mouth. According to the account given by Ms. Weisser in her March 2000 statement (which she told me derived from an account written contemporaneously in her diary, which is not now retained), there was a disagreement between her and the Claimant as to what decontamination procedures they should follow as regards the breakage, and the Claimant became increasingly agitated and irrational. The incident culminated in the Claimant going "berserk" and accusing Ms. Weisser of trying to poison her: her face went red and her eyes bulged and she was "spitting words in my face". Patients who were in the next room observed the Claimant's conduct. The Claimant accepted that there had been an occasion when a handpiece broke in the manner described, but she denied that she had lost her temper in any way. I do not accept this. Ms. Weisser gave her evidence about the incident convincingly, and it is consistent with several other accounts of the Claimant losing all self-control in moments of stress. The Claimant said that she could identify from the clinic diary which family will have been in the waiting room at the time of the alleged incident and that she could demonstrate that they continued to return for treatment thereafter: she submitted that they would not have done so if they had witnessed an incident of the kind described by Ms. Weisser. But even if those facts are accepted, it would not be a basis for concluding that Ms. Weisser's evidence was fabricated: there is nothing incredible about the family returning for treatment even if they had seen something of the incident.
68. *The Claimant's visit to Ms Weisser's flat.* In June 1998 Ms. Weisser injured her ankle, which was put in plaster, and was unable to come into work. She had with her at home a set of keys and the "order book" for Shieldfield. The Claimant decided to call at her flat in Whitley Bay and collect them. On the morning of 26th June she drove there with the dental nurse who was replacing Ms. Weisser, Kerry Fawcett: she had tried to ring first but could get no answer. On her account, there was nothing untoward in the visit: she simply asked for the keys and was given them and then left. But Ms. Weisser saw it differently. She resented being visited at home, with no prior notice. She said that the Claimant, instead of waiting at the door, had followed her into the flat and had, intrusively, looked into her bedroom, where her sister was in bed: her sister confirmed this in evidence before me. She believed that the Claimant's tone was accusatorial: she thought that she did not believe that she was really injured and that she had come round to check up on her. In my view the truth lies somewhere between the two accounts. I do not believe that any of the Claimant's overt acts were objectionable: Ms. Weisser should not have had the keys, and there was nothing wrong in principle in the Claimant calling to collect them. In a contemporary note Mrs. Fawcett, who witnessed the encounter, described the conversation as "*amiable but business-like*"; and she told Mr. Ferguson, who recorded it in a contemporary note, that the Claimant had "behaved perfectly well towards [Ms. Weisser]". It would have been better if the Claimant had not called unannounced and if she had not gone into the flat itself but waited at the door - I accept the evidence of Ms. Weisser and her sister that she did come sufficiently far into the flat to look into the bedroom - but in another context those would be matters of no significance. However, the visit has to be viewed against the background of the already poor relationship between the Claimant and Ms. Weisser. I have no doubt that Ms. Weisser was right to detect a tone of suspicion and confrontation in the Claimant's conduct. It is significant that Mrs. Fawcett, despite the evidence which I have quoted above, thought the visit unnecessary: she asked the Claimant before they set out whether they really needed to go, but she said that the Claimant was insistent.
69. The Claimant's visit to Ms. Weisser's flat set in train a series of further events. For Ms. Weisser it brought to a head her resentment about the way in which she thought the Claimant was treating her. She complained to Mr. Ferguson. There were then a series of meetings and discussions between Mr. Ferguson (who took advice from the Trust's Human Resources Department) and both the Claimant and Ms. Weisser, each complaining about the other. This culminated in Mr. Ferguson making an appointment for the Claimant to come to see him on 20th July 1998 in order to discuss the situation. His account of the meeting is contained in a contemporary manuscript note, which I accept as substantially accurate. The Claimant ventilated in forceful terms her complaints about Ms. Weisser and said that she was not prepared to go on working with her. She then turned to Mr. Ferguson and said that he was "horrible" to her and picked on her. There was some discussion of past incidents. The Claimant then produced a tape-recorder from her pocket and said that she had been recording the meeting: she then left the room. Mr. Ferguson's account of the meeting was not seriously disputed by the Claimant. She now says that her reason for taping the meeting was to provide evidence of sexual harassment, but I do not accept that: I believe that, as she said at the time, she did it in order to show that his conduct towards her was, as she believed, unreasonable. (I should add that the Trust applied to me at the start of the trial for disclosure of the tape, but the Claimant said that the quality had been very poor and she had not kept it.)
70. The Claimant's conduct at this meeting was in turn regarded by Mr. Ferguson as bringing to a head the problems which he had been experiencing with her for some time. With the advice of the Human Resources Department, he decided to make a formal complaint under the Trust's Grievance Procedure about the Claimant's conduct in tape-recording the meeting without his prior knowledge or consent - but although that was the trigger his purpose was to try to achieve a resolution of the various difficulties which had arisen about the Claimant's working relationships with both himself and Ms. Weisser. Responsibility for dealing with the complaint fell to Dr Kaiser: the Community Dental Service at that time formed part of her unit for management purposes. She asked her General Manager, Sue Nelson (who was Mr. Ferguson's immediate line manager as regards non-clinical matters), to investigate it.
71. Ms. Nelson met the Claimant, accompanied by Martin Jones, a representative from the British Dental Association, on 1st October 1998. In the course of the meeting Mr. Jones referred on more than one occasion to the Claimant being "depressed"

and stressed, and to her health being affected. That corresponded to the impression that Ms. Nelson had. Accordingly Dr. Kaiser asked the Claimant to be assessed by Dr. Harrison, of the Department of Environmental and Occupational Health at Newcastle University. She agreed, and Dr. Harrison saw her on 21st January 1999. He assessed her as fit for work, although he also said that "there is now a chronic underlying level of anxiety about coming to work ... projected particularly onto [Ms. Weisser and Mr. Ferguson]" and that intervention was needed to prevent further deterioration. But shortly afterwards the Claimant saw Dr. Harrison again and said that she no longer felt able to cope. She went off sick on 9th February 1999 and remained away until the beginning of August 1999. In those circumstances no further steps were taken with regard to Mr. Ferguson's complaint.

72. The evidence about the nature of the Claimant's condition at the time she went off work is rather scant; but she was prescribed anti-depressants by her GP and she also underwent a course of counselling with a psychotherapist, Dr. Greta Mushat. I have no reason to doubt that she was indeed depressed: she was prescribed Prozac, although she said in evidence that she did not take it. It is indeed clear from the behaviour which I have recounted above that there had for some time been a problem or problems – whether endogenous or exogenous - affecting the Claimant's mental health and wellbeing. I am not able to, and need not, decide what those problems may have been (for example whether they had anything to do with the "family issues" referred to Mrs. Falkous), save to say that I do not believe that they related to any misconduct or persecution on the part of Mr. Ferguson.

#### AUGUST 1999 – FEBRUARY 2000

##### The Claimant's Return to Work

73. The Trust was notified in the course of July that the Claimant was likely soon to be fit to return to work. Ms. Nelson and Mr. Ferguson expected that arrangements would be made for her return on a phased basis. That was normal practice in the case of any return from a prolonged sickness absence and had indeed been specifically recommended by Dr. Harrison. Ms. Nelson wrote to the Claimant on 15th July asking her to notify her when she was ready, in order to arrange a meeting at which the necessary plans could be made. There were also particular reasons why her return needed to be carefully planned. The Shieldfield clinic was in the course of being closed down: a replacement clinic known as "Geoffrey Rhodes" was planned but was not likely to be ready until September. Mr. Ferguson was not anxious for her to return to Lemington, because the entire patient load there had in the Claimant's absence been taken on by another of the dentists, Ms. Nagaq. Another clinic used by the Service, at Walkergate, had only right-handed equipment: the Claimant is left-handed. Thus there was no immediately obvious place from which she could undertake clinic work. Likewise there was no dental nurse available to work with her full-time: even if Ms. Weisser had been willing, she was absent on maternity leave.
74. In the event, however, the Claimant appeared without prior appointment at Arthur's Hill on the morning of 2nd August 1999. It was her evidence that the purpose of her visit was to ask Mr. Ferguson to attend a meeting the following week between herself and Ms. Nelson. That may have been part of her object but it is clear that she was intending to resume full-time work in advance of that meeting and wanted to arrange for a nurse to work with her with effect from 4th August. Mr. Ferguson was taken by surprise and was not prepared to arrange anything until the Claimant had seen Ms. Nelson. The Claimant was not at all happy with this. It was Mr. Ferguson's evidence that she was aggressive and unwilling to take no for an answer and that he was eventually obliged to tell her – politely but firmly - to leave the building. It was the Claimant's evidence that it was she who was polite but firm and Mr. Ferguson had told her in offensive terms that she had no clinic and no nurse and should "get out". The truth is no doubt somewhere in between. Mr. Ferguson was surprised and no doubt pretty displeased at the Claimant's unexpected re-appearance, and he may not have behaved perfectly in an awkward situation. But I have no doubt that the Claimant had arrived ready for trouble and that she became increasingly angry and unreasonable. I have the advantage not only of Mr. Ferguson's contemporary note, which may contain an element of self-justification, but also of accounts from two of the other members of staff who were present at the time. Mrs. Fawcett described the Claimant coming into the staff room "demanding" a meeting with Mr. Ferguson and then as having lost her temper. She also said that the Claimant tried to involve her by saying "look at the way he is speaking to me, you are my witness Kerry". Another dental nurse, Susan Oliver, who did not give evidence, wrote a contemporary note of the incident describing the Claimant's demeanour as "agitated". She too recalled the Claimant invoking the other staff members as "witnesses" of Mr. Ferguson's alleged rudeness. The Claimant suggested to Mr. Ferguson that he had asked Ms. Oliver to write this note, and that may well be the case; but it does not follow that I should treat its contents as unreliable, particularly since even the Claimant's own account describes her having asked one of those present (Mr. Yeaman) to be a witness (though she says that he affected to have seen nothing).
75. Regrettably, that incident set the tone for the period of the Claimant's return to work, which took effect from the following week. She was convinced that Mr. Ferguson had during her absence been, and remained following her return, determined to make things as difficult for her as possible. I need not review her various complaints but I have no doubt that she was not in a calm frame of mind when she decided to come back to work and her behaviour remained erratic over the following months. She met Ms. Nelson on 5th August. Ms. Nelson's contemporary notes describe her as "angry, tearful and talking in a loud voice". It was clear that she was very angry with Mr. Ferguson, and she spoke of making a formal complaint against him, referring to the fact that she had a law degree and knew her rights. At a meeting with Ms. Nelson the following week to review her first week back she again rehearsed her complaints against Mr. Ferguson and spoke of suing the Trust for a large sum of money. The Claimant denied in cross-examination having said these things, but I am satisfied that she did. Ms. Nelson gave evidence to me, and I am satisfied that her notes are genuine and substantially accurate; and in fact the very threats which the Claimant denies having made in these conversations she on her own case made shortly afterwards.

##### The Initiation of Formal Procedures

76. Ms. Nelson asked the Claimant and Mr. Ferguson to attend a mediation meeting on 15th September at which an attempt could be made to resolve their differences. They both attended but the meeting was a failure. The Claimant arrived with a prepared script which detailed her grievance against Mr. Ferguson and culminated by saying that she had four options – to sue the Trust as vicariously liable for Mr. Ferguson's conduct; to sue Mr. Ferguson himself for defamation; to make a formal complaint against him; or, finally, to agree to the proposed mediation – but that the last was only possible if Mr. Ferguson would make a "public apology for his comments on 2nd August". (The script was disclosed, though only in a form edited after the meeting to add the Claimant's – somewhat tendentious – account of Mr. Ferguson's and Ms. Nelson's contributions to the meeting.) The Claimant says that she conducted herself in this way deliberately on the advice of Dr. Mushat, who had said that she should be strong and that it was important that Ms. Nelson and Mr. Ferguson appreciate the extent and depth of her grievance. If it is really the case that the Claimant's behaviour was exactly as Dr. Mushat recommended, which I am bound to

say I doubt, I fear that she was not well-advised. It is of course important to bring grievances out into the open; but if there is a genuine intention to resolve them constructively the way in which they are aired is equally important. Ms. Nelson described the Claimant's remarks as a "tirade"; and on the evidence of the Claimant's own script and notes that does not appear to be an exaggeration. To demand a public apology as the precondition for mediation was not constructive.

77. Ms. Nelson was understandably very troubled by the Claimant's behaviour at the meeting. She wrote to Dr. Harrison on 17th September 1999 expressing concerns about the Claimant's mental health and asking for his advice. She also asked Mr. Ferguson for his comments. He responded on 22nd September 1999. His letter makes clear the extent of the problem which he believed was being caused by the Claimant's "obsessive and determined attacks on me" – not just for himself but for other members of staff. He identified a number of specific problems caused by "her egocentricity [and] her disregard for other people's feelings, needs or opinions" and pointed out that it was seriously demoralising if these problems were not addressed. The letter concludes:

*Just a few of my many thoughts !!! Feelings ? Yes I'm worried, yes I feel threatened. But it is under control and is not I hope interfering with my work.*

As I have noted above, by this time it is clear that Mr. Ferguson – not unreasonably – was pretty fed up with the Claimant; and Ms. Nelson recorded that colleagues were concerned at the effect on his health of the stress caused by the Claimant's conduct. The impression that I get from the letter, however, is that he regarded her as an affliction to be borne and, so far as possible, coped with and not as an enemy to be destroyed.

78. In those circumstances the Trust felt that it had no alternative but to resurrect Mr. Ferguson's original grievance, which had been in limbo since the Claimant's sickness absence. In the event, however, the Claimant herself brought matters to a head by lodging her own grievance. By letter dated 19th October 1999 to the Director of Human Resources she complained both generally of harassing behaviour by Mr. Ferguson over several years and more particularly of his conduct on 2nd August.

#### **Other Issues involving Mr. Ferguson**

79. There are five other issues involving the relationship of the Claimant and Mr. Ferguson at (or about) this time with which I need briefly to deal.
80. *Letters to patients.* It is the Claimant's case that during her sickness absence Mr. Ferguson wrote letters to patients whom she had been treating at Shieldfield telling them that they could no longer be treated by her. The Trust has disclosed two forms of standard letter which were indeed sent during her absence to a number of patients either who were no longer children or who were no longer residents of Newcastle. The Claimant acknowledged that those letters were unexceptionable, but said that she had been told by patients of other letters in different and more objectionable terms. Mr. Ferguson denied that there were any letters to patients save in the terms of those disclosed, and I am satisfied that that is the case. No doubt one or more patients, or relatives of theirs, gave the Claimant some account of the letters referred to above which was either inaccurate at the time or has become distorted in the Claimant's recollection by reason of her hostility towards Mr. Ferguson.
81. *Inaccurate returns.* Mr. Ferguson, with the assistance of Mr. Yeaman, compiled on a monthly basis returns of the work done by each of the dentists in the Service, stating *inter alia* the number of patients treated and the number of domiciliary visits performed. It is the Claimant's case that the figures shown in the returns for April-July 2000 seriously understate the work that she was doing; and that this was done deliberately by him in order to undermine her position with the Trust. Mr. Ferguson acknowledges that there was an error for April, though not for subsequent months; but he says that the error was innocent. He also points out that the returns are sent in draft to each dentist for checking, so that the Claimant had the opportunity to correct any errors; and that it was in any event of virtually no significance since the figures in the returns do not feed into performance or salary reviews and are only used for the production of annual figures which are submitted to the Trust in a rolled-up form which does not identify individual dentists. I accept his evidence in this regard. The Claimant's perception of a sinister purpose reflects her perception of Mr. Ferguson at this time but it does not reflect reality.
82. *Working arrangements on the Claimant's return.* As I have already noted, when the Claimant returned to work in August 1999 there was no clinic immediately available for her to work from. In the result she was for three or four months – until Geoffrey Rhodes became operational, which in the event was not until December – able only to do domiciliary work. The Claimant suggested that this lacuna was the result of deliberate arrangement on Mr. Ferguson's part and in particular that she ought to have been allowed to go back to Lemington. I do not accept this. I believe that Mr. Ferguson had *bona fide* management reasons for not disturbing the *status quo*. I accept that his letter of 22nd September 1999 reveals that he was unsympathetic to the Claimant's professed problems in using the right-handed equipment at Walkergate; but that does not justify any inference that he was deliberately making life difficult for her. The Claimant also put to Mr. Ferguson a comment made by Ms. Nelson in a letter to Dr. Harrison dated 17th September 1999 to the effect that she was at that point "doing no clinical work at all": she suggested that that information had been provided to Ms. Nelson by Mr. Ferguson. He agreed that the statement was wrong in that she was doing a good deal of domiciliary work; but he denied having said anything to that effect to Ms. Nelson. I accept that: even if he had the motive to malign the Claimant, it is in the highest degree unlikely that he would have said anything so demonstrably untrue. It is not at all unlikely that he said something to Ms. Nelson the effect that she was not doing any *clinic* (as opposed to *clinical*) work, since he said something not dissimilar in his letter of a week later; and it may be that Ms. Nelson misunderstood the position, though her own recollection in cross-examination was that her statement was based on information from the dental nurses. Mr. Ferguson did however accept that he did not believe that at this time the Claimant was working fully and effectively, partly because of not having a proper base but partly also because of her state of mind. That belief was genuine and reasonable.
83. *Lemington keys.* The Claimant had a set of keys to the Lemington clinic. Since it was not intended that she should use the clinic any more she was asked to return them; but she repeatedly failed to do so. This caused considerable inconvenience to Ms. Nagaj who did not have a set of her own and was dependent on her dental nurse opening and locking up.
84. *Equipment for Geoffrey Rhodes.* It was originally Mr. Ferguson's intention that the equipment at the Shieldfield clinic should be moved to the new clinic at the Geoffrey Rhodes centre. He accepted in cross-examination that this was not at all satisfactory because the Shieldfield equipment was old and unreliable and was likely to cause problems, if indeed it were usable at all, once it were moved; but he said that the funding simply did not exist for the purchase of new equipment. In the event, the purchase of new equipment was in fact authorised. It was the Claimant's case that this only occurred as a result of her going over the heads of Mr. Ferguson and Dr. Kaiser and obtaining the authority of Dr. Evans to go over budget if necessary. Mr.

Ferguson accepted that this was indeed how it happened, though Dr. Kaiser was less sure. But the importance of the point is that the Claimant regards Mr. Ferguson's fainéance as the result of his hostility to her. I do not accept this. It may be that Mr. Ferguson was not as imaginative or energetic as he could have been in securing the necessary funding, but I do not believe that this reflected any deliberate wish on his part to do the Claimant down.

#### Incidents Involving Other Staff

85. In addition to these developments in the relationship between the Claimant and Mr. Ferguson, four incidents occurred during this period involving the Claimant and other members of staff with which I need to deal in particular.

#### The visit to Denton Park

86. During her sickness absence some of the Claimant's patients had been treated by Ms. Nagaj. Immediately following her return to work the Claimant visited Mrs. Smith, Ms. Nagaj's dental nurse, at the Denton Park clinic and asked for the record cards of the patients in question. Mrs. Smith told her that she did not know which the patients were and the Claimant left. But Mrs. Smith was troubled by the visit. She could not see why the Claimant needed the record cards in the first place – the treatments in question had been concluded – and if the Claimant really needed them she thought that she should have asked Ms. Nagaj rather than her: she did not however like to challenge the Claimant outright. She also thought that the Claimant's demeanour was odd: she described her in the March 2000 grievance statement as being exaggeratedly nice so as to gain Mrs. Smith's co-operation in what was in fact an attempt to undermine Ms. Nagaj. (In the later disciplinary interview Mrs. Smith described the Claimant as "dancing round the room", which the Claimant suggests is absurd and discredits her entire account; but clearly the phrase was not meant literally – Mrs. Smith said in cross-examination that she had intended to mean that the Claimant was very "fidgety".)
87. The Claimant accepts that the visit took place but denies that there was anything unusual about it. However, I believe that Mrs. Smith's perceptions at the time were genuine. I also believe that they were reasonable. It is in fact clear from the evidence before me that the Claimant resented Ms. Nagaj having seen any of "her" patients and was disposed to be critical of the treatment they received. I believe that this was part at least of her reason for wanting to see the record cards; that she was aware that Ms. Nagaj might be reluctant to hand them over if she knew why they were wanted; and that this was reflected in her demeanour towards Mrs. Smith.
88. Mrs. Smith made no contemporary note of the Denton Park incident, but at some later point – probably when she was being asked to collect her thoughts for the purpose of making her March 2000 grievance statement – she did write a manuscript note covering various points including this incident. In the note she says that she did not directly challenge the Claimant's request for the records because she had seen how the Claimant had behaved "at Walkergate" and was frightened to confront her. In fact, however, the "Walkergate incident" referred to (as to which see paras. 96-100 below) did not occur until three months later. The Claimant relied on this discrepancy as evidence that the note is a fabrication. But the note does not purport to be contemporary. It was written several months after both incidents, and there is nothing particularly surprising in a degree of confusion having arisen about chronology and detail. What matters for present purposes is the broad character of the incident; and on that I am satisfied that Mrs. Smith's account is reliable.

#### South Benwell school

89. On 1st October 1999 the Claimant visited South Benwell primary school to conduct a routine dental screening. She was accompanied by Mrs. Fawcett. It was not a school which she had been to regularly: it was usually visited by a different dentist, Tracey Welbury. As regards the nursery class, screening was impossible because the children had just been given biscuits to eat, so she arranged to come back a week later, i.e. on 8th October. What happened next is disputed. The most contemporary evidence is an "Incident Report" written by Mrs. Tabari (so I find) within hours of the events they describe, but the episode is also covered in the March 2000 grievance statements and in the records of the disciplinary investigation, and I heard oral evidence from Mrs. Falkous, Mrs. Tabari and Mrs. Welbury. My findings are as follows:
- (1) In the course of a telephone conversation which occurred either on 7th October or early in the morning of 8th October Mrs. Falkous was told by a person at South Benwell school, whom she understood to be the school secretary, that staff had complained about the dentist who had visited the previous week, i.e. the Claimant. The substance of the complaint was that she had had an inappropriate manner with the children; that some of the children had been upset; and that the Head of Nursery was concerned about the re-inspection due for the 8th. The informant reported a comment by someone other than a teacher – either a classroom assistant or a dinner-lady – to the effect that the children had been treated like, or worse than, animals. There are some uncertainties about the detail of this conversation. Specifically:
    - (a) It is impossible now to know precisely how the complaint was framed. Mrs. Tabari's contemporary note describes the Claimant's alleged treatment of the children as "rough": elsewhere the term "abrupt" is used. Mrs. Falkous's March 2000 grievance statement says that the Claimant's treatment of the children was said to have been described as "appalling": whether or not that was the precise adjective used, I am satisfied that the report was in strong terms. (It is also unclear whether the reference to the treatment of animals may have been specifically to "dogs and horses".)
    - (b) The Incident Report states that the conversation took place in the context of a call from Mrs. Falkous to the school about some outstanding paperwork. Mrs. Welbury, who was in the same room as Mrs. Falkous when the conversation occurred, recalls that the school phoned specially. I think it more probable that the Incident Report is right, since it is virtually contemporary; but nothing turns on the point.
    - (c) The Incident Report puts the conversation on 7th October whereas Mrs. Welbury recalls it as occurring on the morning of the 8th. Again, nothing turns on the point, but if necessary I would prefer the date given in the Report. These minor discrepancies do not affect my conclusion as to the core finding stated above.
  - (2) Mrs. Welbury was in the office with Mrs. Falkous when she took the call, and Mrs. Falkous told her about it straightaway.
  - (3) Shortly after 9 a.m. on 8th October Mrs. Welbury rang Mrs. Tabari, who was deputising for Mr. Ferguson (who was on holiday) and reported what Mrs. Falkous had told her. She said that she was concerned that the Service's relationship with the school would be damaged if the Claimant returned there. Mrs. Tabari rang the school in order to speak to the Head of Nursery, Mrs. Whitlock. She spoke first to a person whom she understood to be the school secretary, who confirmed that some staff had been unhappy with the Claimant's visit the previous week, and mentioned that a mother had in fact come to the nursery that day to accompany her young child because her older child had been upset by the dentist's visit the previous week. She was then put through to Mrs. Whitlock. Mrs. Whitlock's principal concern was that the Claimant had resisted a suggestion from her on 1st October that the inspection of the younger children should be deferred until later in

- the school year, since many of whom had only just joined: the Claimant had said she was required to perform it on the date notified. Mrs. Whitlock told Mrs. Tabari that if that were really so she would prefer the inspection to be carried out by "their usual dentist". Mrs. Tabari said that she would try to forestall the Claimant's visit but it might be too late.
- (4) I need not rehearse the detailed sequence of events thereafter. In summary, both Mrs. Welbury and Mrs. Tabari spoke to the Claimant, but the Claimant proceeded with the visit. There is no suggestion that anything untoward occurred at the school. The Claimant was upset at the attempts by Mrs. Tabari and Mrs. Welbury to dissuade her from going. She asked Mrs. Welbury why she had not spoken to her before involving Mrs. Tabari: her demeanour was flustered and angry.
- (5) Mrs. Tabari wrote the Incident Report so that Mr. Ferguson should have a record of what had occurred when he got back from holiday. When he came back he asked the Claimant whether anything untoward had happened at the school. She told him that nothing had and he was content to leave it there.
90. I find that Mrs. Tabari's actions on hearing what Mrs. Falkous had been told were taken in good faith and were reasonable. Having received such a report, and having had it confirmed directly by the school, it was perfectly legitimate for her to take the view that it would be better for the Claimant not to proceed with the visit on 8th October. Once a "client" has developed an adverse perception of a dentist – however unjustifiably - it may well be diplomatic to avoid further contact; and it made sense for her to give weight to the concerns of Mrs. Welbury, who knew the school well. I also find that the Claimant was unnecessarily inflexible in failing to respond to the suggestion that the visit of 8th October be postponed, which she clearly resented as an attempted interference by Mrs. Tabari.
91. It is the Claimant's case that there was no complaint from the school to Mrs. Falkous nor to Mrs. Tabari: she had not treated the children in any way inappropriately on 1st October, and since there had been nothing to complain about there could not have been any complaint. She adduced evidence from the school secretary at the time, Terese Wilkinson, who said that she could recall no complaints having been made either to her or by her about the Claimant; and from the then Deputy Head Teacher, Julia Bayes, who also said that she could recall no complaint being made about the Claimant and that she thought it very likely that if one had been made she would have known of it. Both witnesses said that any formal complaint would have been made through the Head Teacher. Ms. Wilkinson was not cross-examined: Mrs. Bayes was cross-examined, but there was no direct challenge to her evidence. When the Claimant cross-examined Mrs. Falkous and Mrs. Tabari it was on the straightforward basis that their evidence was fabricated. As for Mrs. Welbury - a patently honest witness, with no possible axe to grind - the Claimant accepted that her evidence was given in good faith but pointed out that she herself had not spoken to the school and had acted on what Mrs. Falkous told her: her case was that Mrs. Falkous and Mrs. Tabari had staged a bogus phone-call from the school in Mrs. Welbury's presence by which she was misled.
92. I do not accept the Claimant's case in this regard. Mrs. Falkous and Mrs. Tabari were in my view honest witnesses, and even if I had any doubt on that question the suggestion that they would have gone through the kind of elaborate charade necessary to deceive Mrs. Welbury is incredible. I am quite satisfied that conversations in the terms found at (1) and (3) in para. 89 above took place. As for the evidence of Ms. Wilkinson, either it was (contrary to their understanding) not she who spoke to Mrs. Falkous and Mrs. Tabari or she has since forgotten the incident. I accept that both alternatives are a little surprising; but they are in my view much more likely than that the entire episode is a fabrication. I accept her evidence and that of Mrs. Bayes that a formal complaint would properly be made by the Head Teacher rather than the school secretary; but this was not a formal complaint, and it is clear in any event from the Incident Report that the school secretary was acting not on her own initiative but on that of Mrs. Whitlock, who seems to have been the principal progenitor of the events of 7th/8th October. (I should say that I heard no evidence from Mrs. Whitlock: a witness statement was served but she was not in the event called and her statement was not relied on by either party.)
93. Of course a finding that the complaint was made is not the same as a finding that it was justified. However, I have no doubt that something happened in the course of the Claimant's visit to South Benwell on 1st October which left a bad impression with someone: such complaints do not come out of nothing. Since the evidence is vague and second-hand it is impossible to say what that something was. I have already found that on occasion the Claimant's manner with patients could be unsympathetic, and presumably some such behaviour was noted on that occasion. But tales tend to grow in the telling. I do not believe that the Claimant treated the children "roughly", in the sense that that word would normally be understood – still less that she treated them "worse than animals", which is obvious and silly hyperbole. Mrs. Fawcett, who was the Claimant's nurse on 1st October, noted nothing untoward. The Claimant's colleagues did not believe that she had done anything seriously wrong. Mr. Ferguson told me in his evidence that children and those caring for them can sometimes be over-sensitive with dentists, which was why, as noted above, he was content to accept, having spoken to the Claimant, that nothing had occurred that required any further action on his part.
94. Having said that, I should also record that the episode – whether or not justifiably – left some mark at South Benwell school. Both Mrs. Falkous and another of the dental nurses, Marion Irvine, gave evidence that on a subsequent occasion the school secretary expressed concern about whether a projected inspection would be carried out by the Claimant because of her conduct on the previous occasion. The Claimant adduced unchallenged evidence from Ms. Wilkinson's successor as school secretary, Ms. Wright, to the effect that she could recall no such conversation; but I am satisfied that Mrs. Falkous and Mrs. Irvine were telling the truth.
95. The "South Benwell incident" is in itself of very limited importance. It was not relied on by the Trust in the disciplinary investigation; nor in the event was it relied on before me as part of the Trust's defence of justification (see para. 23 above). I have however felt obliged to go into it in such detail because of the direct attack made on the truthfulness of Mrs. Falkous and Mrs. Tabari; and also because it is one of the incidents in which the Claimant's conduct towards patients (as opposed to other staff) is impugned, and it is these which have caused her the most distress.

#### **Walkergate**

96. On 14th October 1999 the Claimant went to Arthur's Hill and asked Bill Yeaman, the Administrative Assistant, to allow her access to the computer in Mr. Ferguson's office (Mr. Ferguson was still on holiday) in order to check the records which he maintained of the work done by the dentists in the Service. This was because of what she understood Mr. Ferguson to have told Ms Nelson about her not doing any work – cf. para. 82 above. There is a dispute as to whether she said that she wanted to check her own figures, but Mr. Yeaman did not understand her request to be so limited. He told her that it would be contrary to his instructions from Mr. Ferguson for her to have access to the figures. In a note made the same evening – which, as amplified in his evidence before me, I accept as accurate - Mr. Yeaman described her as then becoming "very agitated":



she made derogatory references to Mr. Ferguson and called Mr. Yeaman himself a "traitor". She continued to insist until Mr. Yeaman said that it would also be contrary to his instructions from Mrs. Tabari (as Mr. Ferguson's deputy). The Claimant then said that she was going to go straight over to the Walkergate clinic, where Mrs. Tabari worked, and raise the matter with her. She "stormed out". Mr. Yeaman was shocked by her demeanour. (Ms. McBride, a colleague in no way hostile to the Claimant, told the disciplinary hearing in May 2001 that she had seen Mr. Yeaman shortly afterwards and found him "really shaken" by how the Claimant had behaved to him.) He telephoned Mrs. Tabari to alert her to what had happened.

97. What happened when the Claimant arrived at Walkergate is the subject of notes written shortly after the event by Mrs. Tabari and (as regards part of the incident) by Mrs. Smith. I also heard evidence not only from the two of them but from Patricia Stewart, an administrator based at Walkergate (which is a clinic providing the services of a number of different Trust departments) and who was in the reception area there at the time of the incident. I find them all to have been honest witnesses and although there are some differences of detail their evidence is broadly to the same effect. What, as I find it, happened can be summarised as follows. When the Claimant arrived at the clinic Mrs. Tabari was in an upstairs room working with Mrs. Smith. The Claimant was very angry. She told the receptionist that she wanted to speak to Mrs. Tabari but although Mrs. Tabari was called and said she would come down the Claimant did not wait but herself went upstairs and told Mrs. Tabari that she wanted to speak to her at once: her voice was raised and her manner was aggressive and, as Mrs. Smith perceived it, "threatening". Mrs. Tabari came out of the room and suggested that they go to the dental waiting room to speak, but while they were still in the corridor the Claimant began to ventilate her grievances. As she went on she became, as Mrs. Tabari put it, "completely enraged". She not only complained about being denied access to the figures on the computer but made a variety of wild and offensive remarks about both Mrs. Tabari and Mr. Ferguson. Among other things she said that Mrs. Tabari was more favourably treated by Mr. Ferguson than she was; and she accused her of acting beyond her authority in trying to stop her visiting South Benwell school, of not consulting her before standing for membership of a committee for which she (the Claimant) was better qualified because of her law degree; and of "stabbing her in the back". She repeatedly described Mr. Ferguson as a bastard.
98. The Claimant accepts that she went to Walkergate to see Mrs. Tabari and that she had a conversation with her en route to, and in, the dental waiting room in which she raised (most of) the points identified above; but she denies that she lost her temper or raised her voice or was in any way offensive to Mrs. Tabari. This is wholly implausible. It is evident from the very fact that the Claimant went straight over to Walkergate that she was angry, and her raising of the list of matters that she did is only explicable on the basis that she had indeed lost her temper and was lashing out. I believe in fact that the Claimant recognised at the time, or shortly afterwards, that she had behaved badly. It was Mrs. Tabari's evidence that the Claimant telephoned her a week later and said that she should not have said the things that she had, which Mrs. Tabari took as an apology. Mr. Yeaman also recorded in his note that she visited him the following day to apologise. I accept the evidence of both of them. Her willingness to apologise does the Claimant credit and makes it all the sadder that she has since lost the capacity which she then apparently still had of recognising when she had misbehaved.
99. The Claimant's conduct on this occasion made a deep impression on those who witnessed it. Mrs. Tabari had borne the brunt of it and was the most upset. She was very distressed and was reduced to tears. She could not put the incident out of her mind – to the extent that she accepted, somewhat reluctantly, a suggestion from the Head of Human Resources that she have a meeting with a counsellor. Mrs. Stewart described the Claimant as "like a mad woman, shouting and screaming". She told Mrs. Tabari that she must report what had happened. Mrs. Smith was extremely frightened by the violence of the Claimant's manner and thought that she was about to attack Mrs. Tabari. This fear was in my view misplaced, because I do not believe that the Claimant has any propensity to physical violence, but it was not unreasonable: anger often inspires a fear of physical violence. Other people in the building had to a greater or lesser extent witnessed the Claimant's behaviour, and I have no doubt that the news travelled quickly. Among other things, Ms. Birkett sent an e-mail to Ms. Nelson giving a brief account of the incident and warning that complaints were likely to follow. I believe that the incident will have brought to a head a perception among many staff in the Community Dental Service, based on the previous incidents to which I have referred and other contacts with the Claimant, that she was in a poor frame of mind and not behaving normally.
100. Mrs. Tabari wrote a very full report of the Walkergate incident which she submitted to the Human Resources Department. She also copied it to the British Dental Association under cover of a moderately worded letter in which she made it plain that she had only reported the matter reluctantly. She said that she recognised that the Claimant's behaviour had its roots in her poor relationship with Mr. Ferguson but that it was important for the sake of all concerned that the situation between the two of them now be resolved.
101. In view of the central role which the Claimant assigns to Mrs. Tabari in the conspiracy against her, I should say explicitly that I found her to be a straightforward and honest person. The Claimant believes her to have been consumed by ambition, and that she resented her as a potential rival: she attached great importance to an inaccurate statement on the Service's website misdescribing Mrs. Tabari's job title and to a letter in which she is wrongly ascribed the description "FDS". I am satisfied that these were errors for which Mrs. Tabari personally had no responsibility and that they are of no significance. The rivalry between her and Mrs. Tabari existed only in the Claimant's mind.

**The "car boot incident"**

102. On 28th October 1999 the Claimant made a domiciliary visit with Mrs. Peart as her dental nurse. On their return to the Geoffrey Rhodes Centre they were unpacking the equipment in the boot of the Claimant's car when Mrs. Peart accidentally brought the lid down so that it struck the Claimant's head. The Claimant acted as if she was in extreme pain. They went into the Centre, and in view of the Claimant's apparent condition Mrs. Peart called a nurse. The nurse examined her and could find no significant injury but the Claimant continued to act as if she had suffered a major injury – moaning, rocking to and fro, shouting at Mrs. Peart if she made the least noise and refusing any offers of help from her. She was eventually taken to casualty, where – again – no significant injury was found. Mr. Ferguson was aware of the incident because Mrs. Peart called him from the Centre to discuss what should be done; and it was he who in the event arranged for another dental nurse, Ms. McBride, to take the Claimant to casualty.
103. The significance of this incident, such as it is, lies in the Claimant's alleged conduct towards Mrs. Peart. It was Mrs. Peart's perception that, rather than attempting to reassure her that no real harm had been done, the Claimant was making a meal of the incident – with the result that she (Mrs. Peart) was made to feel maximum guilt and concern. The Claimant phoned her later but Mrs. Peart did not accept the Claimant's suggestion that the purpose of this call had been to reassure her.

104. I accept that the Claimant's reaction to her injury was – objectively viewed – disproportionate. But she had suffered a nasty shock and, I am sure, some real pain; and I believe that her apparent overreaction was a reflection of her personality generally (intensified by the fragile psychological state which she was by that stage in). I do not believe that she intended to make Mrs. Peart feel bad. Mrs. Peart's perception to the contrary may in turn reflect her own fragile condition. She had in the past been bullied by a different dentist and had only recently and with reluctance been persuaded to return to some clinical work: she also had a serious illness in her immediate family. It was clear to me that she was very sensitive and easily upset. However, what matters for present purposes was that her perception that the Claimant was over-reacting in order to make her feel bad was – as I find - genuine. Although she was in one sense the perpetrator rather than the victim in the incident Mrs. Peart was extremely upset by it, an upset witnessed also by Mrs. Wright. She became added to the number of nurses who had been seriously disturbed by the experience of working with the Claimant. The Claimant attaches significance to the fact that Mrs. Peart in February 2000 sent her a birthday card; but that fact does not persuade me that Mrs. Peart's upset was other than genuine.

**The Letters from Ms. Nagaj and Mrs. Welbury**

105. On 22nd November 1999 Mrs. Welbury wrote to Mr. Ferguson in the following terms:

*I would like to confirm the conversations we have had over the past few months regarding the treatment of patients.*

*As you are already aware, I am concerned that a certain member of our staff is cleared to treat patients following her return to work after a six month illness.*

*I am not aware of any details of her sick leave, however I do not feel she has conducted herself in a professional manner since she returned to work. I am concerned that her "outbursts" may affect a member of the public in the future. All the incidents reported about this dentist since August 1999 have involved members of staff within several departments of the Trust, except for the complaint I have received from South Benwell School. I know you have received a written report from the Senior Dental Officer involved, and I do not intend to go into any details in this letter. However, it does highlight that there is potential for an incident to occur with a member of the public/patients.*

*The Disciplinary Rules and Procedure document produced by the Trust (procedure no TP(HR)02), state a definition for unacceptable behaviour (section 9).*

*I would be grateful if you would arrange for this dentist to be given a chance to be advised of the problems that have arisen, and to be given the chance to rectify these. I would not like to wait for an adverse event to occur before steps are taken to prevent such an occurrence.*

106. Three days later, on 25th November 1999 Ms. Nagaj – another dental officer employed in the Service - wrote to Mr. Ferguson as follows:

*I am writing to you to ask for your reassurance about the fitness to practice of the colleague I have spoken to you about.*

*Although I personally have only been party to one minor episode of inappropriate behaviour, other members of the department have expressed concern to me about episodes that they have witnessed. I feel I have a professional duty to raise this matter [to] you as I am worried about our patients and staff.*

*As the problem has involved Trust staff outside our department and indeed people outside the Trust I would like to be assured this is being addressed by a suitable person, to safeguard our patients.*

107. Both letters plainly refer to the Claimant and in particular, though not only, to the Walkergate incident. They were both passed by Mr. Ferguson to Ms. Nelson under cover of a letter dated 26th November 1999. It is the Claimant's case – put to Ms. Nagaj in cross-examination - that her letter was written at the instigation of Mr. Ferguson, who wanted support in the light of the Claimant's recently lodged grievance against him, and did not reflect any genuine concern felt by her about the Claimant's fitness to practise. No such case was explicitly put to Mrs. Welbury as regards her letter. The Claimant told me in closing submissions that she accepted that Mrs. Welbury had acted in good faith; but she said that she was very 'suggestible' and had been persuaded to write to Mr. Ferguson or Mrs. Tabari.

108. I am satisfied that both these letters were written in good faith. I believe that both Mrs. Welbury and Ms. Nagaj had been very concerned by what they heard about, in particular, the Walkergate incident. Mrs. Tabari was a colleague of both of them, and it is clear that they had had an account from her (and probably also from others) of how the Claimant had behaved: indeed Mrs. Welbury's letter refers to Mrs. Tabari's report. Mrs. Smith, who had witnessed the incident, worked mostly with Ms. Nagaj: she told Ms. Nagaj about it. Ms. Nagaj said in her evidence to me, and I accept, that she was struck by how deeply upset Mrs. Smith – a normally robust person - had been about the incident, and she formed the view that the Claimant's conduct must indeed have been serious. Both had experiences of their own of emotional behaviour on the part of the Claimant which, though much less dramatic, supported what they heard from others. Mrs. Welbury had been challenged by her in relation to South Benwell: see para. 89 (4) above. Ms. Nagaj had had a telephone conversation with the Claimant some time previously in which the Claimant had lost her temper when she had queried the Claimant's conduct in booking in a patient for her (Ms. Nagaj) without asking her first: according to Ms. Nagaj the Claimant "screamed down the phone at her". The Claimant denied Ms. Nagaj's account of this conversation. I have no doubt that it happened, but it was not by itself of much significance, as Ms. Nagaj later acknowledged to the disciplinary investigators (see para. 146 below). But the point is that neither dentist was acting entirely on hearsay.

109. Although the trigger for the letters was an incident between the Claimant and other members of staff, both are drafted so as to focus on the risk of the Claimant's emotional behaviour prejudicing patient care. There was in fact no evidence that that had happened so far, and I think that the risk was in fact slight: although the Claimant was plainly not in a good frame of mind, the principal effect was on her relations with other staff rather than on her treatment of patients. That indeed appears to have been the assessment of Mr. Ferguson. I suspect that, whether consciously or unconsciously, Ms. Nagaj and Mrs. Welbury emphasised the issue of risk to patients in order to make sure that their letters were taken seriously: further, personnel issues were not their direct concern, whereas they had a professional responsibility if issues of patient safety were engaged. Ms. Nagaj was willing to accept in cross-examination that her letter was not particularly well worded and that the reference to the Claimant's "fitness to practise" was ambiguous. That does not however mean that I believe that she and Mrs. Welbury did not genuinely think that there was a risk to patients. I can well see how it may have appeared to them that there was a real risk of

the Claimant's poor mental state affecting her concentration or her clinical judgment or her conduct towards difficult patients; and I find that they expressed the fears that they did in good faith and reasonably.

110. My conclusion that Ms. Nagaj and Mrs. Welbury acted in good faith is not inconsistent with there having been a degree of collaboration both between the two of them and between either or both of them and Mr. Ferguson. It is unlikely to be a coincidence that the letters are written so close in time (or that – oddly – they forbear from naming the Claimant), and it may well be that Mr. Ferguson told them that their concerns could not be taken further unless they were prepared to put them in writing: indeed he seems to have accepted in cross-examination that this was possible, though his evidence on the point was confused. Nor do I exclude the possibility – though there is no evidence on the point – that Ms. Nagaj and Mrs. Welbury raised the issue when they did because they knew that matters were coming to a head formally between Mr. Ferguson and the Claimant: that would account for the sixweek time lag between the Walkergate incident and the writing of the letters. But all that would only be of significance if Mrs. Welbury and Ms. Nagaj did not genuinely feel the concerns which they expressed in their letters or believe that they needed to be addressed; and I am satisfied that they did. I am also satisfied that Mr. Ferguson did not actively instigate the sending of the letters. It is significant that in his covering letter to Ms. Nelson he expressly contemplates that Ms Nelson will be able to reassure Mrs. Welbury and Ms. Nagaj that the Claimant could safely continue to work. There is no sign whatever that he believed that the Claimant was "unfit to practise" – as opposed to being a thorn in his side.

#### The Round Robin of 17th January 2000

111. On 17th January 2000 someone in the Department – it is impossible now to identify who – typed a short statement addressed "to whom it may concern" and reading as follows:

*We would like you to know that we think that Mr Ferguson is a reasonable, fair and approachable manager.*

*If a contentious situation arises, he always tries to see both sides of the story.*

*He is also understanding and sympathetic if anyone has a problem.*

The statement was signed, then or over the following days, by fifteen members of the department, including Mrs. Tabari and Ms. Nagaj and eleven dental nurses (including all those who are Defendants in these proceedings).

112. It is the Claimant's case that those who signed the round robin only did so because they were put under improper pressure by Mr. Ferguson, or by Mrs. Tabari as his accomplice, and that it represents further evidence of a conspiracy against her. There is no evidence whatever to support this. Although the precise sequence of events cannot be established, it does indeed seem clear that Mrs. Tabari was a party to the original decision to produce the round robin, even if it was not her idea alone, and that she acted because she knew that Mr. Ferguson was involved in a formal dispute of some kind with the Claimant and she wished to express support for him: he had been advised by the Medical Protection Society that he should consider what witnesses might be relevant to the complaint brought against him by the Claimant, and he had consulted Mrs. Tabari. Likewise, all the witnesses from whom I have heard who signed the round robin accepted that they were aware of the dispute between the Claimant and Mr. Ferguson and signed it for use in that context. But I accept Mrs. Tabari's evidence, and Mr. Ferguson's, that he had no involvement in its production. It was in my judgment a genuine expression of support. I see nothing sinister in this. Of course it is necessary to look with some care at expressions of support from employees for a manager to whom they report: self-interest may to a greater or lesser extent taint the genuineness of the exercise. But I do not believe that to be the predominant motivation in this case. The majority of the signatories gave evidence before me, and I believe them to be straightforward people trying to act fairly in an awkward situation. Most of them had in fact been involved in, or witnesses to, one or more of the incidents of inappropriate behaviour on the part of the Claimant with which I have dealt above; and there is nothing surprising in their wishing to ensure that allegations by her against Mr. Ferguson were not given credit which they did not believe they deserved. That need may have been perceived to be the greater – though no-one explicitly made this point in evidence – because the Service was being made part of a wider unit within the Trust (with the cumbersome title of the Primary, Ambulatory, Child & Adolescent Programme) and the responsibilities previously exercised by Ms. Nelson were passing to Mrs. Prendergast (as Manager of the Programme), who had no previous experience of the Service or the personalities involved.

#### The Resolution of the Claimant's Grievance

113. The Claimant's grievance against Mr. Ferguson was heard at a meeting between them and Mrs. Prendergast on 21st January 2000. Mr. Ferguson had asked for various witnesses to attend but in the event their evidence was not taken. Mrs. Prendergast confirmed the outcome of the meeting in letters to both the Claimant and Mr. Ferguson dated 24th January 2000. She rejected the allegation that there had been any deliberate campaign of harassment on the part of Mr. Ferguson. However she accepted that various substantive points raised by the Claimant, some of which had been the ostensible subjectmatters of some of her disagreements with Mr. Ferguson, showed deficiencies in the way the Service was being run. She appended to her letters a list of "Areas for Action" and suggested that these be addressed at a series of "facilitated weekly meetings" – attended by both Mr. Ferguson and the Claimant (with other members of staff) which she would for the time being chair in the role of facilitator. The identified action points are mostly of an administrative or procedural character (e.g. the introduction of policies for holiday cover or control of clinic keys). Mrs. Prendergast was new to her post and had no previous experience of dealing with the Claimant. I think that, as a good administrator, she took the view that the working relationship between the Claimant and Mr. Ferguson had deteriorated at least partly because of the absence of formal procedures for dealing with potentially contentious issues; and she hoped that relationships could gradually be restored if these causes of conflict were resolved. That was an understandable view, though it did not in my opinion represent the whole picture. Because the Claimant said that she did not like receiving phone calls from Mr. Ferguson, it was agreed that a procedure would be put in place under which, if he wanted to talk to her he would send her a fax first and she would phone him. Mr. Ferguson agreed not to pursue his complaint against the Claimant for tape-recording the meeting of 20th July 1998: Mrs. Prendergast in her letter described that as a "magnanimous offer".
114. Although her grievance had been rejected, the overall outcome was regarded by the Claimant as satisfactory, most of all because of the limitations placed on the degree of contact between herself and Mr. Ferguson. It is her case that it was correspondingly an unwelcome outcome for Mr. Ferguson. Mrs. Prendergast had been at least implicitly critical of the way in which he had been running the Service; and the weekly meetings created *de facto* a shared responsibility for its management which diminished his authority. Indeed, to rub salt in the wounds, Mrs. Prendergast had asked Mr. Ferguson if he minded her writing the episode up for a thesis which she was writing. There is something in this, but not as much as the Claimant suggests.

Mr. Ferguson acknowledged in cross-examination that he had at first not much liked the implication that he had not been doing a good job, or that he would in due course be immortalised in Mrs. Prendergast's thesis as an exemplar of poor management practice. But he is, as I have said, a phlegmatic character and his principal reaction was one of relief that the problem of how to deal with the Claimant was being addressed: that was worth a fair amount of injured pride. I certainly do not accept the Claimant's picture that Mr. Ferguson bitterly resented the outcome. In my judgment he, like Mrs. Prendergast, hoped that a workable *modus vivendi* had been arrived at.

115. It is the Claimant's case that following the resolution of her grievance all her problems were at an end. This was only partly true. It is right that she had had since the end of the year a new base at the Geoffrey Rhodes clinic, with new equipment; she got on well with the two dental nurses now assigned to her – Carolyn McBride and Kerry Fawcett; and the new arrangements brokered by Mrs. Prendergast meant that she did not have to deal much with Mr. Ferguson. But she remained very hostile to Mr. Ferguson: for example, she interpreted as "snooping" a visit which she heard that Mr. Ferguson had paid to her clinic at Geoffrey Rhodes while she was on holiday in March 2000, although as manager he was perfectly entitled to visit it and look at the books and records. It was also Mrs. Prendergast's perception – though not in fact Mr. Ferguson's – that the Claimant continued to act rudely towards Mr. Ferguson in their weekly meetings. The Claimant's personality remained the same, and her equilibrium remained liable to be upset by adverse events, as regrettably occurred with the bringing of the March 2000 complaint, to which I now turn.

#### **(D) THE MARCH 2000 COMPLAINT THE GENESIS OF THE COMPLAINT**

116. The evidence as to how the March 2000 complaint came to be made comes from a number of witnesses – the four complainants themselves, Mr. Ferguson, Ms. Nagaj and the nurses' union representative, Brian Robertson. On the basis of their evidence I find as follows:

- (1) On 1st March 2000 Ms. McBride, who was working as the Claimant's dental nurse, asked for the following morning off. Mr. Ferguson had to arrange cover. Three nurses were available – Mrs. Falkous, Mrs. Peart and Ms. Weisser. Mrs. Peart refused, citing the car boot incident and other criticisms of the Claimant. Mr. Ferguson then asked Mrs. Falkous: he of course knew of their falling-out in 1997 but he hoped that Mrs. Falkous would no longer feel so strongly about the Claimant. But she refused too. That left Ms. Weisser. She agreed, but with explicit reluctance in view of her earlier experiences with the Claimant and only after requesting an assurance that this would be a one-off.
- (2) Something very similar happened the following week, when a nurse was required to work with the Claimant in the week after that. On this occasion Mr. Ferguson asked Mrs. Smith. She was very upset by the request, saying that the Claimant would be aware of the report that she had written about the Walkergate incident, and she refused. Ms. Nagaj was with her when she received the call and was supportive towards her.
- (3) Following the request from Mr. Ferguson Mrs. Smith contacted Mr. Robertson, her UNISON full-time rep, in order to find out what her formal rights were. He explained that if she wished to persist in refusing to work with the Claimant she would have to lodge a formal grievance. He asked whether there were others in a similar position. Mrs. Smith knew that Mrs. Falkous and Mrs. Peart were unhappy about working with the Claimant. (It is unclear, but does not matter, whether she knew specifically about Mr. Ferguson's approaches to them in the previous week.) She drafted a letter to Mr. Ferguson for the three of them to sign and showed it separately to Mrs. Falkous and Mrs. Peart. They agreed to sign it too. She then showed it to Ms. Weisser who said that she wished to be associated with it, so she re-drafted the letter as coming from the four of them. She was unable to recall whether she had shown it to any of the other nurses. The letter read "We the undersigned would like to submit a grievance under the Trust Grievance Procedure as we are no longer prepared to work with Denise Merelie because of her behaviour in the past". It was dated 14th March 2000. All four signed, and it was delivered to Mr. Ferguson.
- (4) Mr. Robertson advised the nurses that it would be necessary to support their initial letter with statements setting out the past behaviour on which they relied. Accordingly over the following two weeks they each, with his assistance, produced a statement. The statements were then delivered to Mrs. Prendergast.
- (5) Mr. Ferguson had no involvement in the bringing of the grievance and no knowledge of it until it was lodged. It was unwelcome to him because it represented another management problem involving the Claimant at a time when he hoped things had turned a corner with her.

117. It is the Claimant's case that that account of events is not true. She says that the complaint was made at the instigation of Mr. Ferguson and that the nurses, Ms. Nagaj and Mr. Ferguson are all lying. She does not, I think, say that Mr. Robertson is lying but she says that he was only brought in by Mrs. Smith once Mr. Ferguson had already induced the nurses to bring the complaint. Even if I had any doubts about the truthfulness of Mrs. Smith or the other witnesses, which I do not, there is no evidence whatever to support the Claimant's assertion. She drew attention to some apparent inconsistencies in Mr. Ferguson's account of when he had his conversation with Mrs. Smith, but that did not lead me to doubt the truthfulness of his overall account. The Claimant acknowledged in cross-examination that she was unable to say how Mr. Ferguson induced the nurses to lie, but she said that it could be inferred that he must have used bribery, blackmail or some other kind of coercion. Her only specific suggestion was that he offered them easier work-patterns: she said that she was told by another dental nurse, Mary Anderson, that Mr. Ferguson had made such an offer to her if she agreed to submit a grievance against the Claimant, but in the absence of any evidence from Ms. Anderson herself I cannot attach any weight to this. There is no evidence that any improper pressure was placed on the nurses, and the allegation derives purely from the Claimant's need to find an explanation for complaints which she cannot bring herself to recognise as genuine.

#### **THE CONTENTS OF THE STATEMENTS**

118. I take the contents of the four nurses' supporting statements in turn.

##### **Jennifer Smith**

119. Mrs. Smith's statement begins "*JS has found working with D Merelie intimidating because ...*" and continues

*DM has a very impatient manner towards clients who may be difficult when being treat [sic]. This is a very unprofessional and rude attitude and it is sometimes frightening to witnesses [sic] and JS finds it intimidating in that she dare not approach DM for fear of reprisal.*

Apart from those general allegations the substance of the statement consists of an account of the Walkergate incident, partly based on her own observation and partly also on what she had since learnt from Mrs. Tabari, and an account of the Denton

Park visit. There was also a short paragraph referring to the Claimant's habit of fishing for information about other colleagues: cf. para. 32 above.

120. It follows from my previous findings that I find that the purely factual content of Mrs. Smith's statement (i.e. principally her accounts of the Denton Park and Walkergate incidents) is broadly true – and certainly that it reflects her genuine and reasonable belief. The two sentences of general comment at the beginning of the statement (quoted above) are rather hard to follow, and I think that two points have got muddled. There is a point about the Claimant's manner with difficult patients, which broadly accords with my findings at para. 41 above: I accept that Mrs. Smith's statement reads more harshly than my finding, but she was describing a real characteristic of the Claimant and the fact that her drafting may – whether through ineptitude or the distortions that the very process of giving a witness statement can engender – give a rather exaggerated impression do not lead me to doubt her good faith. There is then a distinct point about the Claimant's manner being "frightening". It is, I think, clear from the overall context that the intended reference is not to her conduct towards patients but to the Claimant's conduct when she loses her temper – and thus in practice to Walkergate, which as I have found had made a deep impression on Mrs. Smith.
121. The Claimant put it to Mrs. Smith in cross-examination that she had in fact worked with her since the Walkergate incident and that that was inconsistent with her account of having been so frightened by her conduct. Mrs. Smith accepted that she might have done, but said that it was difficult to say no: "dental nurses do as they are told". What had been different about the occasion in March was that she believed that the Claimant had by then seen the statement that she had prepared about Walkergate. I accept that evidence.
122. The Claimant treats the principal allegation in Mrs. Smith's statement as being that she was a risk to patients – specifically that her treatment of patients was "frightening to watch". That is understandable on a literal reading; but I do not think that it is a true reflection of what Mrs. Smith meant or of the effect of the statement read as a whole.

*Tere Peart*

123. The majority of Mrs. Peart's statement consists of an account of the car boot incident. However, there is also a paragraph describing two incidents earlier in October 1999 when the Claimant's conduct towards Mrs. Peart is said to have been condescending and to have made her feel undervalued. The incidents are by themselves very minor, but Mrs. Peart was highly sensitive and I have no doubt that her perception that she had been badly treated by the Claimant was genuine. The Claimant put it to her, as to Mrs. Smith, that she had in fact worked with her on a later occasion (in fact two), which undermined her suggestion that she had a genuine objection to doing so. But that is too mechanistic an approach. Mrs. Peart was at this time in a fragile state and I find nothing incredible in her position having hardened since the car boot incident.

*Janice Falkous*

124. Mrs. Falkous's statement starts by saying "*JF feels that she can no longer work with D Merelie, Senior Dental Officer, because of a series of events as follows*". The wording is poor, because it suggests that up the moment of the grievance Mrs. Falkous had in fact been working with the Claimant, whereas she had of course not done so since February 1997; but this is plainly no more than a clumsiness of drafting (I suspect reflecting the use of a formula suggested by Mr. Robertson). The "events" referred to and then itemised are essentially those with which I have dealt at paras. 59-63 above (incorporating verbatim Mrs. Falkous's contemporary note of the events of 24th February 1997).
125. The Claimant makes the understandable point that it is on the face of it very odd to find Mrs. Falkous submitting a statement relating to her conduct several years previously in an attempt to justify an unwillingness to work with someone with whom she had not in fact worked for over four years. But the oddity is explicable in the context of the fact that Mrs. Falkous had recently been asked by Mr. Ferguson to work with the Claimant again, albeit on a single occasion.

*Natasha Weisser*

126. Ms. Weisser's statement is in a different format to the other complainants', and I suspect had less input from Mr. Robertson. It contains in great detail her account of the events of 5th December 1997 (see para. 67 above) and of the Claimant's visit to her flat in June 1998 (see para. 68). It also deals more generally with her complaints about the Claimant's undermining and over-critical attitude to her, with which I have dealt above. It follows from the findings which I have already made that Ms. Weisser's complaint about the Claimant's behaviour towards her was genuine and was made on reasonable grounds.
127. The Claimant put it to Ms. Weisser that she would not have agreed to work with her on 2nd March 2000 if the contents of her subsequent grievance statement were true; and that they got on very well on that day. Ms. Weisser did not accept either point. She had only agreed with great reluctance, as the evidence of Mr. Ferguson confirmed; and she had not found the day at all easy. I accept her evidence in this regard.

**OVERVIEW ON THE MARCH 2000 COMPLAINT**

128. I find that the March 2000 complaint was lodged, and the supporting statements were written, on the initiative of Mrs. Smith and the other nurses acting in good faith. The nurses were not induced to complain by Mr. Ferguson, Mrs. Tabari or any other third party. The various oddities noted above, and the comparative triviality of some of the allegations, become explicable when one appreciates the particular sequence of events which gave rise to the making of the complaint and that they have their roots in a longer history. The various statements of fact were substantially true and the opinions stated were genuine and had a reasonable basis. It is a great pity that the issue surfaced at the time that it did, when in other respects things appeared to be settling down for the Claimant, but that is the result of a concatenation of circumstances and not of a conspiracy. The truth is that the admittedly fragile restoration of peace between the Claimant and Mr. Ferguson had not addressed the damage done to her relationships with the dental nurses by her past conduct, particularly in the period following her return in August 1999.
129. It is important to emphasise that the main thrust of the statements read overall is, as one would expect, concerned with the Claimant's working relationships and not with her "professional conduct", in the sense of how she behaved in her treatment of patients. There are indeed criticisms of her attitude to patients (though not of her competence), but they are secondary. This is something which the Claimant – focusing as she does on the unfortunate wording of the opening paragraph of Mrs. Smith's statement – has found hard to appreciate.

**(E) THE CONDUCT OF MRS. PRENDERGAST MAY-SEPTEMBER 2000  
THE HANDLING OF THE MARCH 2000 GRIEVANCE**

130. Responsibility for dealing with the March 2000 grievance fell, again, to Mrs. Prendergast. She was away for ten weeks from 6th March 2000, but the nurses and Mr. Robertson were content to await her return. She saw the grievance and the statements when she got back in mid-May. She also received a letter dated 24th May 2000 from the Claimant, who had got wind of the complaint and the identity of the complainants though she had not seen the statements, and who offered her comments on the situation.
131. Mrs. Prendergast's view was that it was undesirable and unnecessary for any formal investigation to take place into the grievance or any formal findings to be made. The issues raised by the complaint only needed to be faced if there was an immediate need for the nurses in question to work with the Claimant, which did not appear to be the case: although problems such as had occurred in March might in theory recur they could probably be avoided. She did not want to disturb the fragile peace recently achieved as a result of the resolution of the Claimant's grievance against Mr. Ferguson. She did not see the statements as raising any issue about the Claimant's conduct or competence as a dentist, such as might have an impact on patients: rightly, she understood them as essentially concerned with working relationships. The various incidents referred to in the grievance statements had occurred many months – in the case of Mrs. Falkous many years – previously, and it would be difficult and disruptive to try to investigate the rights and wrongs so long after the event. It seemed to her that the best course – for the Claimant as well as everyone else – would be to reassure the nurses that they would not have to work with the Claimant for the time being, while working in the longer term to restore relationships so that they were willing to do so in due course if required. But she also believed that the Claimant needed to be warned to be careful to ensure that she did not upset other staff in the future.
132. Accordingly Mrs. Prendergast approached Mr Robertson on behalf of the nurses and established that such a course would be satisfactory from their point of view. She then arranged to meet the Claimant on 21st June 2000. At the meeting she gave her copies of the grievance statements and explained how she proposed to proceed. Her understanding of the outcome of the meeting is set out in a letter of the same date in the following terms:
- Further to our meeting today, I am writing to confirm that I shared with you the issues raised by certain dental nurses within the community dental service (you were provided with a personal copy of the information).*
- We discussed your perception that there were some discrepancies in the detail but acknowledge that in fact what we were focusing on was the over arching issue of working relationships.*
- I advised you that Newcastle City Health Trust has a very stringent approach to allegations of harassment and bullying and that should any such allegations be made in the future, that there will be no alternative but to use the formalised process.*
- I am sure we both hope this will never be necessary and that we can recognise this as an opportunity to draw a line between the past and the future.*
- I explained that I must now meet with the nurses and their union representative and agree the way forward. I will share with you the outcome of that meeting and as you are aware dates have been set for the management meetings where we can take forward the work started with yourself and Miles to create/restate agreed departmental processes which will be expected to be adhered to by all.*
133. It is the Claimant's case that what Mrs. Prendergast said at the meeting, and what is reflected in the letter, constituted a finding that the nurses' complaints were justified and a warning that disciplinary sanctions would be imposed if any further complaints were received. I do not accept this. The whole thrust of Mrs. Prendergast's approach was that she did not wish to investigate the allegations in the statements and that accordingly she was making no findings. The references to the Claimant's future conduct towards other staff certainly implied a view that there were deficiencies in how the Claimant related to other staff (referred to in the letter as "the over arching issue of working relationships") but they did not imply any finding of misconduct. Likewise, the reference to formal procedures having to be invoked in the event of future complaints simply meant what it said: it neither implied any guilt in the past nor was in the nature of a disciplinary warning. (Mrs. Prendergast confirmed in cross-examination that, consistently with that position, she did not intend that anything about the March 2000 complaint should appear on the Claimant's personnel file.) Arguably the distinctions involved are fine but they are nevertheless real. Mrs. Prendergast impressed me as a clearthinking and articulate woman, and I am satisfied that she made her meaning plain. I am not sure to what extent the Claimant failed to understand her at the time and to what extent her recollection has become distorted since. But I suspect that she did not pay real attention to what she was being told. The meeting was the first time that she had seen the grievance statements and it is clear that – understandably – she was shaken and upset by what she read. Mrs. Prendergast's acknowledgment in her letter that they had discussed what the Claimant perceived as "discrepancies in the detail" is a somewhat coyly-worded recognition of the fact that the Claimant disputed the truth of the statements; and however much Mrs. Prendergast may have emphasised that she was not taking a view on their truth or otherwise I doubt whether the Claimant was able to adjust her focus. Indeed she acknowledged in cross-examination that she had been so shocked by the statements that she did not remember much else about the meeting.
134. In my judgment Mrs. Prendergast's decision not to investigate the allegations in the March 2000 grievance statements was entirely reasonable. There was a strong case for not rocking the boat and attempting to maintain the progress achieved since January. It might, with hindsight, have been better not to show the Claimant the statements at all but simply to tell her the nature of the complaints in broad terms. Perhaps too the warnings about future conduct could have been less emphasised than the assurance that no findings were being made about the truth of the statements: that might have given less opportunity for misunderstanding. But these are matters of judgment. Mrs. Prendergast's judgment of how to handle the situation was made in good faith in a delicate situation and it was in my opinion reasonable: there is a very respectable argument that it is better in the long run if all the cards are on the table. The Claimant said in terms in cross-examination that she did not criticise Mrs. Prendergast for showing her the statements: her criticism was that she did not investigate their truth.

#### **THE CLAIMANT'S APPROACHES TO OTHER STAFF AND PATIENTS**

135. The Claimant was not able, despite Mrs. Prendergast's exhortation, to put the past behind her. She found the contents of the statements profoundly upsetting. She wanted to be able to produce evidence that what they said, particularly about her conduct towards patients, was wrong. She asked a number of the dental nurses with whom she worked to provide supportive statements. Those approached were Carolyn McBride, Kerry Fawcett, Margaret Young, Margaret McLean and Mary Anderson. I heard evidence only from Mrs. Fawcett, but all five were interviewed by the disciplinary investigators. The Claimant produced a number of statements, each quite short and addressed to a specific issue, and the nurses were asked to

sign more than one, depending on the areas to which they could speak. There is an issue as to whether the Claimant provided pre-written forms of words or, as she says, produced tailor-made drafts in discussion with each nurse individually. I find that at least in most cases she produced pre-written drafts. Ms. McBride was happy to sign and did so. Mrs. Fawcett was less happy but agreed because she felt under emotional pressure from the Claimant. Ms. Young at first refused but later agreed because the Claimant was so upset by her refusal. Mrs. McLean and Ms. Anderson refused to get involved, but Mrs. McLean said that she felt under pressure from the Claimant.

136. Both Mrs. Fawcett and Mrs. McLean told Mr. Ferguson about the requests, and he told Mrs. Prendergast. She regarded what the Claimant was doing as highly undesirable, both because the Claimant's wish to rake over past issues was the exact opposite of the message she had tried to convey at the meeting of 21st June and because the requests for statements were upsetting to at least some of the nurses and liable to be disruptive. She asked the Claimant to a meeting on 3rd July 2000. There is a full note of the meeting made and signed by a member of the Human Resources staff, Susan Baxter: although the Claimant points out that the note was not signed until 13th October 2000 I have no reason to doubt that it is derived from Ms. Baxter's contemporary notes and is substantially accurate. Mrs. Prendergast recapitulated what she understood had been agreed at the earlier meeting, including the importance of "drawing a line" and looking to the future. She then said that the taking of statements by the Claimant was upsetting staff. The Claimant responded that the March 2000 grievance statements "made her look awful" and that she was devastated by them. Mrs. Prendergast said that, while she understood the Claimant's reaction, acquiring "counter-statements" was not the way forward. She made it clear that she would support the Claimant in finding a way forward (in this connection she asked whether the Claimant wanted some time off work), but she also said explicitly that getting staff to sign statements put them under pressure and was itself a form of harassment and "it therefore had to stop immediately". The note makes clear that Mrs. Prendergast asked the Claimant more than once whether she understood what was being said and that the Claimant said she did. Mrs. Prendergast told me in cross-examination that her apparent failure to get her message through at the earlier meeting had made her particularly anxious to ensure that the Claimant understood her: that was indeed the main reason why she had asked a member of the Human Resources Department to attend. I have no doubt that her message was delivered plainly and explicitly.
137. Notwithstanding the instructions given on 3rd July, in late July and early August the Claimant approached again the nurses who had previously given statements and asked them to rewrite the statements in their own handwriting: she had apparently been advised by the British Dental Association that hand-written statements carried more weight. Mrs. Fawcett agreed to do so but she was finding the Claimant's inability to leave the subject alone, and the atmosphere of emotional tension at work, increasingly upsetting: she was also genuinely concerned for the Claimant and worried about her mental state. On 8th August the Claimant approached her again and asked her to read Mrs. Smith's grievance statement (though certain passages had been tippexed out): Mrs. Fawcett had previously been shown only Mrs. Peart's statement, on the basis that the others were too upsetting. Mrs. Fawcett determined to make a stand. She told the Claimant that enough was enough and that she was not prepared to have any further discussion about the March grievance. There was then an emotional scene between them in which the Claimant, among other things, reproached Mrs. Fawcett for letting her down, saying that she had thought she was a friend.
138. Mrs. Fawcett was very upset and worried. She reported the situation to Mr. Ferguson who in turn reported it to Mrs. Prendergast. On 24th August 2000 Mrs. Prendergast had a long interview with Mrs. Fawcett and her husband, of which a very full note was taken which was subsequently approved by her as accurate. It was clear from the interview – as also in her evidence to me – that Mrs. Fawcett was sympathetic to the Claimant and genuinely concerned about her wellbeing and mental health, but she had had enough. She gave a full account of her own working relationship with the Claimant, which went back several years. She described her difficult and forceful personality and referred to some incidents of which she was aware when the Claimant had lost her temper with other staff in 1998 and 1999. She described eccentric behaviour on the part of the Claimant, including an obsession with security which led her (for example) to fit her own padlocks to her desk. Nevertheless she had herself not found any serious problem in working with the Claimant until the last year and in particular the last few weeks, when the Claimant had been repeatedly tearful and emotional and was plainly obsessed with the subject of the March 2000 grievance. The atmosphere had become extremely stressful and Mrs. Fawcett was finding it increasingly difficult to work with her. It was, as her husband emphasised, affecting her own health. The Claimant's volatility was such that she was nervous about her own safety and feared also that patient care might be compromised.
139. I have no doubt that Mrs. Fawcett in her interview with Mrs. Prendergast was giving an honest and fair account of the Claimant's state of mind as she saw it and of her own reactions. The state of tension created by the Claimant's moods which she described is very similar to that described by Mrs. Falkous and by Ms. Weisser, though it is clear that in recent weeks the situation had become more serious than either of them had encountered. I can understand Mrs. Fawcett's expressed concern about her own safety and the safety of patients, though I in fact doubt whether the risk in either case was very great. For her part, the Claimant denies that she was exhibiting any signs of distress during this period and says that she was simply getting on with her work; but that is simply not plausible. Her own evidence shows how deeply wounded she had been by the March 2000 statements, and I do not believe she was capable of suppressing her emotions in the way she suggests.
140. At about this time Mrs. Prendergast also learnt that the Claimant had approached Mrs. Dalton, as a previous colleague, and her two daughters, as previous patients, and also a clerical officer called Yvonne Lant, asking for statements of support. It also transpired that she had devised, and was distributing to patients, a home-made "patient satisfaction questionnaire": the object of the exercise appeared to be to gather evidence that the allegations about the Claimant's conduct towards patients were untrue.
141. It was the Claimant's case in the disciplinary proceedings that asking the nurses who had already given statements to re-write those statements in manuscript was not a breach of the instruction that she was given on 3rd July, since Mrs. Prendergast had only told her not to seek any further statements and that did not cover merely writing out again a statement already given. Likewise, approaching Mrs. Dalton and her daughters (or Ms. Lant) was not a breach because they were not dental nurses. Mrs. Prendergast's precise words cannot of course now be established: in my view, however, whatever words were used, it should have been plain to the Claimant that her re-approaches to Ms. McBride, Mrs. Anderson and Mrs. Fawcett, and her approach to Mrs. Dalton and her daughters, were the very kind of thing that Mrs. Prendergast intended to put a stop to. They showed that she was not prepared to put the past behind her. They were also liable to upset the staff concerned, as happened in the case of Mrs. Fawcett. In any event, it is clear from Mrs. Fawcett's statement that the Claimant had gone beyond simply asking for re-written statements and was wanting to discuss with staff the substance of the complaints.

142. In these circumstances I believe that it was entirely reasonable of Mrs. Prendergast to invoke the formal disciplinary procedure. The issue was not simply one of disobedience of an instruction. It was clear from Mrs. Fawcett's statement in particular that the Claimant's unwillingness to leave the question of the March 2000 allegations alone was creating a serious personnel problem which needed to be formally addressed. That conclusion does not mean that I do not have real sympathy with the Claimant's position at this time. The contents of the March 2000 grievance statements may have been, as I have found, broadly true; but I can nevertheless appreciate that seeing them was a considerable shock to the Claimant, who was genuinely unaware of the impact of her behaviour on other people. I can understand how difficult she found it to put the issue behind her. But she was not the only person involved. Mrs. Prendergast had to have regard to the welfare of the Service as a whole and the other employees in it.

**(F) THE DISCIPLINARY PROCEEDINGS**

143. I have set out in para. 2 (7)-(13) above the broad outline of the disciplinary proceedings. The issues arising in relation to them in these proceedings are fairly specific, and I confine the discussion below to those elements which are material to those issues. It is not an issue before me whether the Claimant's dismissal was unfair within the meaning of Part IV of the Employment Rights Act 1996 (though there is an issue in the second action as to whether it was "justified") and it is therefore unnecessary for me to consider all aspects of the procedures adopted by the Trust.

**THE DISCIPLINARY INVESTIGATION AND THE INVESTIGATION REPORT**

144. The investigators – Dr. Whitty and Mrs. Bolingbroke - interviewed the staff who were directly involved in what they called "the events leading to Miss Merelie's suspension", i.e. the sequence of events from June 21st 2000: these were, principally, Mrs. Prendergast, Mr. Ferguson and the nurses who had been approached for statements, including Mrs. Fawcett. (In Mrs. Fawcett's case the signed note of her interview with Mrs. Prendergast on 24th August 2000 was also treated as part of the investigation materials.) But they also interviewed a large number of witnesses to "prior events", i.e. essentially the events described in the March 2000 statements: I need not list all these witnesses, but they included the four March 2000 complainants and also Mrs. Tabari, Ms. Nagaj and Ms. Chater. Mr. Ferguson and Mrs. Fawcett fell into both groups: that is, their evidence covered both the events leading up to March 2000 and the events directly leading to the Claimant's suspension. In all, the investigators saw some 22 witnesses: as noted above, typed notes of interview were produced and signed by each interviewee.
145. As also noted above, the investigators had three interviews with the Claimant. The first was a preliminary interview, at which the Claimant was assisted by a representative from the British Dental Association. The other two interviews took place on 30th January 2001 and 6th February 2001 and were very lengthy. The Claimant, who was accompanied by a friend, Mr. Clerey, took the investigators through her response document in detail. She made it clear that she believed that she was the victim of a conspiracy and that the nurses were lying. She also raised various points of concern both about Mrs. Prendergast's failure to investigate and about the investigators' own procedures. The notes of these interviews (which are in summary form only, but which I believe to be accurate as summaries) were signed by Dr. Whitty and Mrs. Bolingbroke, though they do not appear to have been submitted to the Claimant for approval. Mr. Clerey was critical of the fact that they were not more detailed, but it must be recalled that they fell to be read alongside the Claimant's own document.
146. In their interviews the four original complainants substantially repeated, with some elaboration and explanation, the accounts given in the March 2000 statements. The accounts of the other "prior events" witnesses partly dealt with particular incidents involving the Claimant (such as Walkergate) but the witnesses also to varying extents expressed general views about her and her personality (for example, the evidence of Mrs. Dalton referred to in para. 29 above). I need not attempt to summarise the evidence of most of the interviewees. I should however deal with the evidence of Mrs. Tabari and Ms. Nagaj, because it is directly complained of in the second action:
- Mrs. Tabari gave a general description of her working relationship with the Claimant. She said that it was hard to define but the Claimant was "not easy to get on with". She felt she had to be on her guard because things she said might be used out of context. As already quoted, she said that the Claimant "can be very pleasant but unpredictable". She then gave an account of the Walkergate incident and an outline of the South Benwell school episode – in both cases referring to the fact that she had submitted a report. She referred briefly to the fact that in meetings the Claimant behaved aggressively towards Mr. Ferguson and that during the Claimant's sickness absence record cards had been found missing, which had caused difficulties for other staff.
  - Ms. Nagaj referred to the single incident in which she personally had been shouted at by the Claimant (acknowledging that "it was not entirely her fault"). She referred to various incidents involving others (including what appears to be a reference to the incident on 2nd August 1999). And she referred to her letter of November 1999 expressing concern about the Claimant's "fitness to practise". In both cases the accounts given, and views expressed, were in accordance with the evidence given to me with which I have dealt in Sections A-C above.
147. It follows from my findings in Sections A-D above that what each of the relevant Defendants told the investigators in interview was said honestly and in good faith. So far as it was factual, it was substantially true. So far as it consisted of expressions of opinion, the opinions expressed were genuinely held and were reasonable.
148. I should also state explicitly, in view of the way that the Claimant's case is pleaded, that even if in any respect the evidence given to the investigators was "false", that was not as a result of any "encouragement" by them and that they had no reason to doubt the truth of what they were being told. I heard evidence from Dr. Whitty (though not from Mrs. Bolingbroke), and I was impressed by the care and fairness with which she had approached her task. It was put to her in cross-examination that she had not, contrary to what she had told the Claimant at their meeting on 6th February 2001, proceeded by way of "open" questioning but had asked questions calculated to elicit evidence critical of the Claimant. That allegation was not made good by reference to the particular example put; but even if there had been the occasional lapse from strict neutrality of form I am satisfied that as a matter of substance the investigators proceeded entirely neutrally. Their approach was simply to find out what the interviewees had to say about the Claimant, and the answers which they recorded covered the full range from positive to negative with many shades between: indeed they give a good picture of the complex range of emotions which the Claimant evoked from the people who had to work with her.
149. It was Dr. Whitty's evidence, which I accept, that the reason why she and Mrs. Bolingbroke heard evidence relating to the incidents, and the relationship problems, revealed by the March 2000 complaint was that they thought it important to understand the background against which the sequence of events leading to the suspension had arisen. However, as I have already noted – see para. 2 (8) above – as regards "prior events" (or what I have referred to as "the broad issue") they



deliberately made no specific findings about whether the various allegations which they recorded were correct. They confined their conclusions to two comments, as follows:-

- There is evidence that [the Claimant's] relationship with her manager, Miles Ferguson, had broken down.
- There had been a pattern of allegations of harassment and bullying towards her subordinates, her senior manager and her staff.

They exhibited in full the materials that they had gathered, including the Claimant's rebuttal document.

150. The Claimant was deeply disappointed by this approach, because she hoped that the investigators would make findings that vindicated her – particularly on what she saw as the cardinal allegations about her conduct towards patients. I shall deal below with the legal issues arising from the investigators' decision to proceed in the way they did, but I should say here that I believe that it was not only reached in good faith but was reasonable. It was entirely reasonable for them to wish to understand the full background to the problem which had led to the Claimant's suspension: they might indeed have been criticised for taking an artificially restricted approach if they had not done so. But it did not follow that they were obliged to resolve every factual issue revealed by that background. To attempt to do so would have been, as the experience of this trial has shown, an enormously laborious task: both had other work to do and although they were clearly prepared to, and did, put a lot of time and care into their report it was not an appropriate use of the Trust's resources to spend time on issues that were not likely to bear on the actual issues which had to be resolved. As Dr. Whitty put it in cross-examination, it was "important to maintain focus".

#### THE CLAIMANT'S LETTER OF 30TH JANUARY 2001

151. As indicated in para. 2 (9) above, on 30th January 2001, while the investigation was still proceeding, the Claimant wrote to the investigators advancing a complaint of her own. The letter reads as follows:

*Further to our meeting yesterday, I understood that as you are investigating my behaviour it may be some time before those people who made false allegations will be investigated. As you must appreciate I wish to have this matter resolved as quickly as possible and therefore I wish to make a formal complaint against Helen Nagi [sic], Natasha Weisser, Tere Peart, Janice Falcus [sic], Jennifer Smith, Helen Chater, and Kerry Fawcett for making false allegations with respect to my professional conduct. I also want to make a formal complaint against Jill Prendergast for failing to investigate the allegations properly when she had a duty to do so, and failing to reply to my correspondence. In addition, informing me that I need not defend myself when not to do so would be an admission of guilt.*

The "false allegations" in question were – self-evidently - those made by the four original complainants in their March 2000 statements and by Ms. Nagaj, Ms. Chater and Mrs. Fawcett in their statements to the investigators. The allegations specified are those relating to the Claimant's "professional conduct". It is clear that by that she meant – wholly or mainly - the allegations about her conduct towards patients. As noted above, in the case of Ms. Nagaj the Claimant's principal concern was with her letter of 25th November 1999.

152. The date of the letter is that of the first of the two substantive meetings at which the investigators heard the Claimant's response to the allegations. Although the point is not directly confirmed by the note of the meeting (or otherwise covered by evidence), it can reasonably be inferred that the discussion with Mrs. Bolingbroke referred to by the Claimant formed part of the meeting of 30th January (being "the meeting yesterday" – the date on the letter would thus be a minor slip) or at least immediately followed it. What seems to have happened is that the investigators made it clear at the disciplinary meeting that they did not regard the evidence which they had seen as giving rise to any issues of professional conduct *proprement dit* – Dr. Whitty confirmed in cross-examination that that had been her view - and accordingly were not likely to be making findings on what the Claimant believed to be the core aspect of the March 2000 allegations, namely the criticism of her conduct towards patients. The Claimant then ascertained from Mrs. Bolingbroke that it was procedurally open to her to her to bring a grievance of her own; and she did so in order to try to ensure that the investigators made findings on the issues in question.
153. The complaint raised by the letter was formally acknowledged by Mrs. Bolingbroke but it was not thereafter separately dealt with. I consider below what the legal consequences of this were.

#### THE DISCIPLINARY HEARING AND THE DISMISSAL DECISION

154. As noted above, the disciplinary hearing took place on 2nd and 3rd May 2001. The panel consisted of Greg Canning, the Trust's Acting Director of Human Resources, and Dr. Kaiser, now Acting Head of Operational Services. A full note of the hearing was made, although it is not a verbatim shorthand transcript. Most of the witnesses who had made the March 2000 allegations and the further allegations were called and the substance of those allegations was repeated and in some respects amplified.
155. It is part of the Claimant's case that she and her representative (Mr. Ravi Rattan of the Medical Protection Society) were prevented at the hearing from asking questions about what I have referred to as "the broader issue", i.e. the truth or otherwise of the allegations made about her conduct prior to June 2000, or therefore about her complaint of 30th January 2001; and it appears from the transcript that there was a discussion on this point at the start of the hearing on 2nd May 2001. It is in my view clear that the Trust was fully prepared to allow evidence and questioning on the broader issue. The notes record Mrs. Bolingbroke saying that she had told the Claimant that "if a disciplinary hearing is held everything could be discussed on that day" and that she had called witnesses "pertinent to the allegations": since the witnesses called by the Trust included three of the four nurses who had made the March 2000 allegations (Mrs. Peart being unavailable), as well as Mrs. Tabari, it is clear that the allegations in question were not simply those relating to the events following June 21st. The notes of the evidence which follow show no case where any line of questioning relevant to the broader issue was stopped; and it can in fact be seen that the Claimant and Mr. Rattan asked a large number of questions about the broader issue, without any objection from the panel. For example (and without attempting to be exhaustive), Mr. Rattan challenged Mrs. Falkous on her account of the Claimant's erratic behaviour in the period between 1993 and 1997 and the Claimant questioned her about who had made the initial complaint about South Benwell School; Mrs. Fawcett was cross-examined about her evidence that the Claimant drove erratically; the Claimant asked Mrs. Tabari two questions about the Walkergate incident (though she did not attempt a full cross-examination); she cross-examined Ms. Weisser at length about her alleged deficiencies as a nurse and rather more shortly about her allegations about her own conduct; and she cross-examined Mrs. Smith both about her general allegations about her manner towards patients and about the Walkergate incident. The only occasion when the panel intervened to stop a line of questioning was when Mr. Canning pointed out that a particular question was addressing a point which was not in issue.

Although the Claimant provided a witness statement from Mr. Rattan, it contains no complaint about the way the hearing was conducted.

156. The Claimant also complained in her cross-examination that not all the witnesses whom she had wished to have present at the hearing were there, though on further questioning it appeared that her only major complaint was about the absence of Ms. Nagaj. But it is clear that she was in fact informed which witnesses the Trust would be calling and was given the opportunity to write herself to other witnesses whom she wanted to attend. A number of such witnesses were written to but it appears that they did not wish to be involved.
157. The panel's conclusions were set out in a letter signed by Mr. Canning and Dr. Kaiser on 8th May 2001. It identified three issues, with which it dealt as follows:
- (1) *The suspension and investigation.* The panel found that the investigation carried out by Dr. Whitty and Mrs. Bolingbroke had been full and thorough and that the Claimant's suspension had been justified. It held that it was perfectly appropriate "for witnesses to raise concerns about your professional conduct as part of the investigation"; but, it said, "we did not however consider this to be relevant when we made our decision".
  - (2) *The allegations of harassment of both staff and patients.* This heading relates to the Claimant's canvassing of support in response to the March 2000 allegations. The "patients" in question were (a) Mrs. Dalton's daughters and (b) those to whom the questionnaire had been administered. The panel found the Claimant's conduct to have been "inappropriate".
  - (3) *The allegation of disruptive behaviour and its impact on working relationships within the department.* What the panel said under this heading was that it had  
... heard explicit evidence from dental staff that they felt harassed, bullied and intimidated by your behaviour. Furthermore, we are satisfied that there were reasonable grounds that this was indeed the case, and this harassment took place on numerous occasions over a number of years with several individuals within the department.  
Because of this harassment and your behaviour, which we concluded was disruptive, we have found that working relationships had broken down completely and are now irreparable. Indeed Miles Ferguson ... gave evidence that he could not organise the service because so many Dental Nurses were now refusing to work with you. We do not believe that you can change your behaviour. We formed this view in the light of the fact that Jill Prendergast ... actually gave you a specific instruction regarding harassment and two days later you disobeyed this instruction.

The letter continued:

*We have concluded therefore that you cannot return to the department for the reasons outlined above. Clearly because of your specialism there are no opportunities for the Trust to redeploy you. Even after taking account therefore of the factors you described in mitigation and your obvious distress throughout this series of events the Panel have no alternative but to dismiss you.*

158. The reasoning of that letter needs to be teased out a little. The Panel found the Claimant guilty of inappropriate behaviour in her approaches to staff and patients for support, but this does not appear to have been the principal reason for the decision to dismiss, which was that she had, by her own behaviour, caused an irreparable breakdown in working relationships. That conclusion necessarily involved a finding that the March 2000 allegations and the further allegations were (broadly) true to the extent that they impugned the Claimant's behaviour towards other staff (though not necessarily that every detail of the allegations was correct). It did not however require the Panel to reach any conclusion about those aspects of the allegations which concerned her conduct towards patients: that is why the Panel said, in relation to "issue (1)", that the Claimant's "professional conduct" had not been relevant to its decision. Its decision was squarely based on her conduct towards staff and the impact of that conduct on working relationships.

#### THE APPEAL HEARING AND DECISION

159. As noted above, the appeal hearing took place on 4th and 5th September 2001 and took the form of a complete rehearing, with the Claimant being represented by counsel. The grounds of appeal took a number of points, both procedural and substantive. Among them were contentions (a) that the investigators and the disciplinary panel should not have relied on "the broader issue", i.e. on the allegations about the Claimant's conduct pre-June 2000 and (b) (by way of "mitigating circumstances") that the Claimant had repeatedly tried to have the March 2000 allegations investigated, including by her letter of 30th January 2001, but that the Trust had failed to take action. The appeal panel consisted of three members of the Trust Board, including Judith Smith, the recently appointed Director of Human Resources (originally the Third Defendant in the second action, though the claim against her has now been struck out).
160. Again, most of the witnesses who had made the March 2000 allegations and the further allegations were called and repeated (for, now, the third or fourth time) what they had said before – though again with some amplification (in particular, it was at this hearing that Mrs. Fawcett reported the "evil dentist" comment referred to at para. 39 above). There was no restriction on the areas of evidence that could be addressed in questioning, and again the evidence called and the cross-examination covered the broad issue as well as the narrow issue. The only occasion when a line of questioning was stopped related to the identification of individual patients, apparently on grounds of patient confidentiality.
161. The appeal panel set out its decision under a number of headings as follows:
- *Procedural Issues.* The appeal panel addressed explicitly the criticism that it was wrong for the investigators to have taken evidence relating to "the broader issue". It endorsed the approach taken by them in receiving that evidence but not fully investigating it. It said that it  
– like the disciplinary panel – thought it appropriate to consider the full contents of the investigation report, but it said:  
*We did not however take the additional information in section 2 [i.e. the evidence relating to the broader issue] into account in assessing whether the alleged harassment referred to in the letter of suspension had been [sic] taken place but it enabled us to put the allegations in context and to consider the working relationships in the Community Dental Service. It dealt with various other procedural issues and held that the procedures followed by the investigators and the disciplinary panel had been fair.*
  - *Alleged Conduct.* The appeal panel found that the Claimant had, in obtaining statements from colleagues, behaved in a way which they found harassing and disruptive; and that her fault in that regard was aggravated by being repeated after Mrs. Prendergast had told her to stop.

- *Mitigation*. The appeal panel rehearsed various matters relied on by the Claimant in mitigation of her conduct, including her desire to clear her name.
- *Failure to investigate grievances*. The appeal panel addressed the issue "whether it was fair to consider the original grievances without full investigation". It concluded that Mrs. Prendergast's original decision not to investigate the March 2000 grievances was "a positive and genuine attempt to restore relationships", but that the Claimant's conduct in refusing to "move forward" by seeking statements from other staff meant that the circumstances leading up to the grievances "could not be entirely ignored".
- *Sanction for Disciplinary Offence*. The Panel regarded a final written warning as the appropriate sanction for the Claimant's conduct as regards the narrow issue. But that was subject to the considerations reviewed in the following section, namely:-
- *Breakdown of Working Relationships*. This is the longest section of the appeal decision. It commences:

*However, in addition to the disciplinary issue, the investigation has brought to light the difficult working relationships within the Community Dental Service ... and as an employer the Trust has to consider the effect on the provision of the Service and on all employees within the Service. We felt it essential to consider whether good working relationships could be established if you were to be reinstated. We thought therefore that information about working relationships could not be disregarded.*

The Panel then proceeded to review the evidence before it about working relationships, referring explicitly to the March 2000 grievance and to the evidence which it had heard. It noted that five out of the eight dental nurses then working in the Service were not prepared to work with the Claimant. It considered, but rejected as impracticable, a proposal from the Claimant that she could return to work on the basis of support only from the remaining three nurses. It said that it felt that the Claimant "did not recognise the effect that your behaviour had on staff and colleagues", to whom the Trust had a duty of care. Its conclusion was that it was unable to recommend that the Claimant be reinstated in the Service and that since the Trust had no other roles into which she could be redeployed her appeal had to be rejected.

162. In summary, therefore, the appeal panel upheld the Claimant's dismissal principally on the ground that her working relationships had deteriorated to a point at which the Trust could not continue to employ her.

**(G) THE CORRESPONDENCE BETWEEN THE CLAIMANT, MR SMITH AND MR FLORY**

163. Mr. Smith was the Chief Executive of the Trust from its creation until 29th February 2004. On 25th October 2002 the Claimant wrote to him in the following terms:

*I am writing to you because I was advised by my MP and the Department of Health that Newcastle Primary Care Trust need to investigate certain actions of specific dental staff employed in the Community Dental Service. Actions which amount to gross misconduct.*

*The Trust as you will be aware will be in breach of their own regulations if they condone such misconduct and take no action.*

*I was employed as a Senior Dental Officer with the Trust, I enclose a copy of my curriculum vitae and job description. I was dismissed after 26 years, continuous, full time employment for defending myself against false allegations made against me. The Medical Protection Society are representing me in the Employment Tribunal.*

*If I can now give you some brief information about specific irregularities pertaining to particular staff. These will not be considered by the Employment Tribunal and need to be fully investigated by the Trust.*

*I have original documentary evidence to substantiate everything stated.*

1. Malicious false allegations were made by several members of the dental staff relating to my professional competence:

*'Helen (Nagai) has written to the Trust regarding her concerns about Denise Merelie's fitness to practice'. (Helen Nagai, Community Dental Officer, written statement)*

*'DM has a very impatient manner towards patients who may be difficult when being treated. This is a very unprofessional and rude attitude and it is sometimes frightening to witnesses. And Jennifer Smith finds it intimidating in that she dare not approach Denise Merelie for fear of reprisal'. (Jennifer Smith, Dental Nurse, written statement).*

*'Regularly DM would have disagreements with various members of her family in the surgery and sometimes in public and would end up angry, agitated and unstable to the extent that Janice thought she put patients at risk'.*

*The many confrontations DM had with clinic workers left Janice feeling embarrassed edgy and herself unstable. Janice was also frightened in case DM attacked someone all witnessed by Janice'. (Janice Falkous, Dental Nurse, written statement)*

*'I have felt threatened by her volatile behaviour and on several occasions I have felt unsafe to be around her, feared that she may attack me or generally felt she was too unstable to deal with patients. Her rude and abrupt nature has also been mentioned by patients and on one occasion I was asked by a patients mother if she was always that rude because she would rather find another dentist'. (Natasha Weisser, Dental Nurse, written statement)*

These are malicious false allegations which the Trust cannot condone.

2. Miles Ferguson Dental Service Manager has falsified figures for the amount of work carried out by the Dental Department submitted to the Trust and to Mr David Evans (Consultant in Dental Public Health) over a number of years.
3. Natasha Weisser who was my dental nurse (see her statement above) breached many Trust rules however neither Miles Ferguson nor anyone in the Trust took any action. For example: Criminal offence. Natasha was charged by the police after an incident in a public house. The incident involved a girl being attacked and locked in a lavatory. The Trust needed to know the outcome of this case but the outcome was never determined. I was treating children and frail elderly patients. Natasha was moonlighting and working 21 hours out of 24 hours and was incapable of doing her job properly and affecting patient care. Natasha continually negligently developed radiographs (in excess of 50) so that some patients needed to have radiographs taken three times on the same teeth. She refused to refrain from developing radiographs after I had been advised by the Medical Protection Society for patient care was being adversely affected by her actions. Natasha removed surgery blinds, cut slats off other blinds, changed the system of filing and recalls. Wrote on patient's record card that he needed a specific drug when he did not. These are only a few examples, there are many more.

3. Deliberate mismanagement of NHS funding by Miles Ferguson which compromised patient care at Geoffrey Rhodes clinic.

4. Miles Ferguson removed patient record cards and radiographs. Patients requiring treatment also did not have that treatment carried out for six months. Details of specific patients and how patient care affected can be provided. The Trust obviously need to fully investigate. Further details can be provided by me. I am understandably especially concerned about the false allegations made against me. I can be contacted at the address above and would be most grateful for a reply to each of the points raised.
164. Mr. Smith had until then had very little involvement with the issues relating to the Claimant. There had been a formal report to the Trust Board about her dismissal, but that had not involved him learning any detail about the matter. He asked Judith Smith to deal with it for him. On her advice he replied on 15th November 2002 in the following terms:
- I am writing to acknowledge receipt of your letter and enclosures dated 25th October.*
- I have arranged for the allegations made against specific dental staff within Newcastle Primary Care Trust to be reviewed against the Trust's records of previous allegations. These records are in respect of both allegations raised by you and also to consider those obtained as part of the initial investigation and disciplinary interview.*
- The PCT acknowledges and accepts its responsibility to investigate issues of concern, but also needs to ensure that it does not undertake this process more than once in respect of the issues raised. I hope to be able to respond to your letter in more detail in due course. Ms. Smith asked Eversheds, who were the Trust's solicitors, to carry out the review there referred to.*
165. The Claimant did not regard that reply as satisfactory. On 12th December 2002 she wrote to Mr. Smith again, making it clear that she regarded the original investigation as flawed and making a number of points designed to suggest that she was the victim of a conspiracy. She threatened to bring criminal proceedings for harassment if the Trust took no action and said that she had already given her story to the press, who would be publishing it. In addition, on 17th December 2002 she wrote to David Flory, the Chief Executive of the Northumberland Tyne and Wear Strategic Health Authority, as follows:
- I was told by Mr David Evans (Consultant in Dental Public Health) to contact you if I did not receive a satisfactory response to my letters to Mr Bob Smith (Chief Executive Newcastle Primary Care trust) regarding specific members of the Community Dental Service whose actions amount to gross misconduct.*
- I enclose copies of three letters sent to Mr Bob Smith, but he has not taken any action. You will of course be aware that specific proceedings will be instituted by the Department of Health against Primary care Trusts who do not comply with their statutory duties. I am also in the process of providing details of misconduct to the Directorate of Counter Fraud Services. I await your reply.*
166. On 18th December 2002 the Claimant wrote to Mr. Smith:
- Further to my letters of 25th October, 7th November and 12th December 2002, I presume because you have failed to take any action, you condone the misconduct detailed in my letters and consequently I will now take necessary action.*
- I have also written to Mr David Flory, Chief Executive, Newcastle and Tyne and Wear Strategic Authority.*
167. On 27th December 2002 Mr. Flory wrote to Mr. Smith enclosing the letter from the Claimant and asking for his comments. On the same day Judith Smith wrote to the Claimant saying that she could expect a reply within the next four weeks.
168. On 14th January 2003 Mr. Smith sent his substantive reply to the Claimant's letters. I have already given the key paragraphs in para. 2 (15) above, but I should set out the whole letter, which was as follows:
- I refer to your letters of 25 October and 15 November 2002 and my respective acknowledgements.*
- I have carefully considered the information provided to you, and the previous investigation undertaken under the Grievance Procedure, Disciplinary Procedure, a risk assessment exercise and the referral of Mr Ferguson to the General Dental Council. For your information I enclose a chronology of these events.*
- Having considered the remit of these investigations, and the evidence presented therein, I cannot accept that there was evidence indicating that allegations made against you were false. The issues raised by you have been raised and considered by these previous investigations. Therefore, I do not believe that any further investigation is either necessary or appropriate. Accordingly, I cannot accept that the Trust has failed to consider and investigate the various issues raised.*
- Whilst you have referred to gross irregularities with the original investigation, you have not stated which investigation you are referring to nor have you advised what gross irregularities you believe occurred. Having considered the various processes which have been followed, I am satisfied that the matter was the subject of full and thorough investigations and you were given the opportunity to be involved in these processes and put your views forward for consideration. In particular, you had the opportunity to question witnesses on two occasions in the course of the disciplinary process and these witnesses remained clear about their evidence.*
- In relations to the issue concerning Ms Prendergast not carrying out a full investigation of the grievances against you. Again this was fully explained as part of the disciplinary process, at both the disciplinary and appeal hearings, when you and your professional/legal representative were given the opportunity to challenge her evidence.*
- In relation to your reference to the Protection from Harassment Act, clearly this is a matter for yourself. However, the PCT is advised that given all the circumstances of this case any such action is unlikely to succeed.*
- Concerning the publication of your story, again, this is a matter for you. However, I trust that both yourself and any publishers concerned will ensure that legal advice is taken in relation to potential liability for any statements contained therein which may be defamatory in content.*
- I trust this clarifies the PCT's position in this matter.*
- He copied the letter to Mr. Flory because of Mr. Flory's letter to him of 27th December 2002.
169. It was Mr. Smith's evidence, which I accept, that that letter was based on a draft produced by Eversheds in liaison with Judith Smith. Although he discussed the draft with Ms. Smith (and also spoke to Dr. Evans, the Consultant in Dental Public Health) he did not himself study the materials but relied on his team. Its terms are largely self-explanatory, but I should say something about the references in the second paragraph to "the Grievance Procedure, Disciplinary Procedure, a risk assessment exercise and the referral of Mr Ferguson to the General Dental Council". The reference to the disciplinary procedure is straightforward. I have heard no express evidence about what Mr. Smith, or the original draftsman of the letter, meant by the reference to the

grievance procedure; but it is reasonable to suppose that it was in acknowledgement of the Claimant's letter of 30th January 2001. As to "risk assessment exercise and the referral of Mr Ferguson to the General Dental Council", the facts are as follows. The Claimant reported Mr. Ferguson to the General Dental Council in October 2001: the complaint included, but was not limited to, a complaint of sexual harassment, but it does not appear to have been until early January 2002 that the Council notified the complaint to him and to the Trust. At that point Mr. Ferguson was told that he would have to take special leave while the Trust conducted an investigation into whether the allegation of sexual harassment meant that he posed a threat to other staff. Such an investigation duly took place, with inquiries being made of a number of staff: this is the "risk assessment exercise" referred to by Mr. Smith. The conclusion was reached after some weeks that there was no such risk and Mr. Ferguson returned to work. By letter dated 30th April 2002 the General Dental Council likewise informed him that it proposed to take no further action.

170. I shall have to analyse below what the objective meaning of the letter is, in the respects relevant to these proceedings, but in view of the allegation of malice I need also to make a finding as to what Mr. Smith intended by it. I have no doubt that what he intended to convey was that it would be wrong for the Trust to investigate the matters raised by the Claimant because – as he genuinely believed on the briefings that he had received – those matters had already been properly investigated. He did not intend himself to express any view about the findings made. That is what he told me in evidence; it is what appears from the letters of 15th November 2002 and 23rd January 2003; and it is what one would expect his stance to be – it would plainly have been a waste of time, effort and the Trust's resources to re-open issues which, as he was given to understand, had already been thoroughly investigated, but as a prudent man he had no wish to say more than that. I found Mr. Smith to be an honest witness. When he said that the allegations had been investigated he believed that to be true. His belief was (properly) based on what he understood from Ms. Smith, who was the responsible employee within the Trust and who he knew had had assistance from Eversheds. I find that in acting as he did and in writing those letters Mr. Smith acted in good faith and reasonably.

#### **(H) APPLICATION OF THOSE FINDINGS TO THE CLAIMS THE FIRST ACTION**

##### **The Contract Claim**

171. I take in turn the three heads identified in para. 7 above,

##### **(1) Mrs. Prendergast's response to the March 2000 allegations**

172. It seems to me clear that the Claimant had no express contractual right to have the March 2000 allegations against her investigated. Even if the Grievance Procedure confers contractual rights (as to which see para. 178 below) its express terms (summarised at para. 48 above) would confer such rights only on the complainant and not on persons who might be affected by the complaint. As regards an implied term, I can conceive of circumstances where the broader implied duties of employer to employee generally – i.e. "the *Malik* duty" – might require an employer to conduct such an investigation in the interests of the person complained about. But on the facts which I have found this could not conceivably be such a case. I have found that not only did Mrs. Prendergast not take any formal disciplinary step against the Claimant but she did not "accept the truth" of the nurses' allegations. I have also found that she acted in good faith and in what she (reasonably) believed to be in the best interests of the Claimant as well as of the Trust. On those findings the Claimant's *Malik* claim cannot succeed. The *Malik* duty is a duty on the employer not "without reasonable and proper cause to conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee [my emphasis]" (cf. *Gogay v. Hertfordshire County Council* [2000] IRLR 703, at paras. 53-55): even if the failure to investigate was "calculated and likely" to damage the relationship of trust and confidence, on my findings the Trust plainly had reasonable and proper cause not to investigate.

173. I should add that, on the basis of my findings, if Mrs. Prendergast had instigated an investigation into the truth of the nurses' allegations they should have been found to be well-founded. It must be very doubtful in those circumstances whether, even if there was a breach, she would have been entitled to more than nominal damages.

##### **(2) Failure to investigate the 30th January 2001 complaint**

174. The Claimant's letter of 30th January 2001 did not explicitly invoke the Trust's Grievance Procedure, and indeed it was not directed to the appropriate person, namely her line manager. That by itself would not mean that the Trust was not obliged to follow the procedure if on a fair reading the letter was effective to engage it. However, the circumstances here were peculiar. The Claimant wrote the letter in the context of the ongoing disciplinary proceedings and because she was concerned that those proceedings were not going to result in an investigation of the issue of her "professional conduct". Although there is no precise evidence of the terms of her conversation with Mrs. Bolingbroke, it can reasonably be inferred that what the Claimant was requesting, and was understood to be requesting, was that those issues be addressed as part of the disciplinary procedure: I do not think it is realistic to suppose that she expected a wholly distinct process to be gone through. And, as I have found, she was given the opportunity before both the disciplinary and the appeal panels to make her case on the "professional conduct" issue.
175. On that basis a purely formal complaint by the Claimant that the precise machinery and timetable of the Grievance Procedure had not been employed could not succeed. But it has to be acknowledged that even viewed as a matter of substance the Claimant did not get everything that she asked for. Although she was allowed to address the issues in the proceedings, the disciplinary panel did not make findings on all the aspects that she wanted covered. Specifically, it explicitly declined itself to address the issue of "professional conduct" (see para. 157 above, at (1)). Likewise, the approach taken by the appeal panel meant that no findings on that question were necessary.
176. The question therefore is whether, once the Claimant raised a grievance about false statements about her professional conduct – in the sense that the parties understood that phrase – the Trust was contractually obliged to investigate and make findings on that issue.
177. I consider that question first by reference to the *Malik* duty alone, i.e. ignoring any contractual obligations that might arise from the Grievance Procedure. I do not believe that any such obligation can be made out on that basis. The employer's "duty of trust and confidence" cannot create a general obligation to investigate or make findings on any factual dispute relating to the employment which the employee wishes to have investigated. There might be such an obligation in the circumstances of a particular case, but I do not believe that that was so here. If the Claimant's employment was to continue, then it might indeed be arguable that it was necessary for the purpose of the continuing relationship that the boil constituted by the unresolved

allegations about her "professional conduct" should be lanced – though even then it might be said that the issue could reasonably be addressed in other ways. But it was not clear that the relationship was to continue. The primary question for the Trust was in fact whether the relationship should be terminated. If, as in fact transpired, it concluded that the Claimant should be dismissed, there was nothing to be gained by making findings on matters which would not affect any ongoing relationship.

178. Thus if the Claimant is to make any such case it can only be by reference to obligations arising from the Grievance Procedure. As to that, I think it is right to treat the Claimant's request of 30th January 2001 as being made by reference to the Grievance Procedure, albeit subject to the particular understanding outlined above as to how it should be handled. But:

- (1) It has not been proved that the Grievance Procedure formed any part of the Claimant's contract of employment. It is not, as I have said, referred to in any contractual document. Although no doubt a clearly-worded contract could create an obligation on an employer to operate the terms of an identified procedure, I do not think that the fact that a written procedure has been published is enough by itself to justify the conclusion that its terms are themselves to be treated as incorporated into the contract of employment. It is certainly not uncommon for employers' standard paperwork to provide expressly that the terms of a grievance procedure are non-contractual. I would if necessary find that even without such express provision that was the case here: although the terms of the Trust's procedure are reasonably formal and prescriptive, the fact that they appear to have been drafted and amended unilaterally within the Human Resources Department suggests that their status is non-contractual.
- (2) Even if the Grievance Procedure had been, or should be treated as if it had been, expressly incorporated in the Claimant's contract of employment, I do not believe that it can reasonably be understood as imposing an absolute obligation on the Trust to investigate and reach a conclusion on any and every complaint that an employee might choose to make. If an issue is frivolous or trivial or otherwise does not call for investigation in furtherance of the ongoing relationship of employer and employee I do not believe that the employer is obliged to put the machinery into operation. In my opinion, on the facts of the present case the Trust was not obliged to investigate the issue of the Claimant's "professional conduct", notwithstanding that it had been called in question by some of her colleagues, for the same reason as I have given above, i.e. that that question was academic once the Trust had determined that it proposed to terminate her employment on other grounds.

### (3) Encouragement of false evidence

179. As will be clear from my findings above, I am quite satisfied that neither Dr. Whitty and Mrs. Bolingbroke, as the initial investigators, nor anyone else involved in the disciplinary proceedings on the part of the Trust believed that the evidence of the various members of the staff who were approached to give statements would be "false". Nor was there anything in the history leading up to the proceedings that should have put them on notice that that might be the case: specifically, the March 2000 allegations – which the investigators were in practice revisiting - were in no way incredible nor was there reason to suppose that the nurses who made them were malicious or otherwise unreliable witnesses. In fact, of course, my findings go further: I have found all of those who gave evidence in the disciplinary proceedings to have been honest witnesses who told the truth as they saw it, and I have found that on the points on which the Claimant challenges their evidence it was in fact not only honest but substantially correct. There can therefore be no breach of contract – however formulated – in this respect.

180. I ought however, in fairness to the Claimant, to consider a less extreme submission which underlies this head of claim. She contends that it was fundamentally unfair for the Trust to allow the March 2000 allegations to be revived in the disciplinary proceedings, and indeed to be amplified by the further allegations, while at the same time to forbear from reaching a conclusion as to whether they were true. As she put it, she got the worst of both worlds: she suffered all the distress of being faced with the allegations, and seeing them ventilated before senior Trust management, without being given the opportunity to refute them. There is a threshold question as to whether such an issue is justiciable at all in these proceedings, having regard to the decisions of the House of Lords in *Johnson v. Unisys Ltd.* [2003] 1 AC 518 and *Eastwood v Magnox Electric plc* [2004] ICR 1064. But I do not need to enter those murky waters. Even if the issue is justiciable:

- (1) Taking first the position of the investigators, I have already found that it was reasonable for them to proceed in the way that they did: see para. 150 above. If it was reasonable it cannot have been a breach of the "Malik duty".
- (2) Turning to the position of the disciplinary panel, although the investigators had made made no actual findings on the broader issue, they had gathered a great deal of evidential material, all of which was presented to the panel in the investigation report. That material included not only the allegations against the Claimant but her detailed response, both in written form and in the notes of the two interviews which the investigators had with her. Using that material and the further evidence which it heard, the disciplinary panel – unlike the investigators themselves – did make findings on the broader issue. It found in terms that the Claimant had so conducted herself as irreparably to destroy the working relationships: that was, necessarily, a finding that the broad picture painted by the March 2000 allegations, and the further allegations, at least as regards the Claimant's dealings with other staff, was true. The Claimant had the opportunity to rebut the evidence on which that finding was made, not only in her submissions to the investigators but in the hearing itself: see para. 155 above. The same is true for the appeal panel.
- (3) It is true that in making those findings the panels did not condescend to particulars. They did not, for example, make findings on what exactly happened in relation to South Benwell school or in the Walkergate incident. But I do not believe that they were under any contractual obligation to do so. I doubt if the Trust was under any contractual – as opposed to statutory - obligation to give reasons for dismissal at all. But I am in any event sure that it was under no contractual obligation to go beyond the general findings that the panels made in their decision letters and to make the kind of detailed findings which I have made in Section C of this judgment.
- (4) It is also true that the panels made no findings on the so-called "professional conduct" aspect of the broader issue. But I do not believe that the fact that they heard these particular allegations created a contractual obligation on the Trust to make findings on them in circumstances where it did not believe that they were relevant to the issues which it had to decide.

### The Claim in Negligence

181. My findings in relation to the contractual claim are equally fatal to any claim in negligence: the decisions made by the Trust at each stage of the process were reasonable. I should however make it clear that in finding that the Trust acted reasonably I have taken into account what the relevant employees knew, or should reasonably be taken to have known, about her psychological vulnerability. I do not in fact think that Mrs. Prendergast was in June 2000 as aware as she subsequently became of the Claimant's troubled history. She will have learnt something of the background when dealing with her grievance against Mr. Ferguson in January 2000, but that had not required her to hear about most of the matters subsequently raised in the March grievance statements. But even if she had been fully aware of events from late 1998 onwards, including such evidence as was available about the Claimant's sickness absence in 1999, I do not believe that she would or should have

made any different decision about whether to investigate the March 2000 grievance. If anything, her reasoning would have been likely to be reinforced: a formal investigation was more likely to be damaging to the Claimant's well-being than the course which she in fact took.

## THE SECOND ACTION

### The Harassment Claim

182. I need not set out in full the relevant provisions of the Protection from Harassment Act 1997. For present purposes what matters is that it is unlawful for a person to "pursue a course of conduct" which, as he knows or ought to know, constitutes harassment of another. S. 1 (3) provides that a course of conduct will not be unlawful if in the particular circumstances that course of conduct was reasonable. "Harassment" is not defined, but there is some guidance in the case-law, particularly in *Thomas v. News Group Newspapers Ltd.* [2002] EMLR 4 and *Majrowski v. Guy's and St. Thomas's NHS Trust* [2005] QB 848. May LJ in the latter case emphasised that it is not enough that the conduct in question may, and may foreseeably, cause distress: it has to be "oppressive and unreasonable": see para. 82 (at p. 873 D-G). Against that background, I take in turn the three heads identified in para. 15 above.

#### (1) False allegations of gross professional misconduct

183. This is the heart of the harassment case. A variety of acts are relied on against the various Defendants, as follows:

- *Against the Ninth to Twelfth Defendants (i.e. Janice Falkous, Jennifer Smith, Natasha Weisser and Tere Peart)*: the making of the March 2000 allegations and their subsequent repetition and/or amplification in the disciplinary interviews and in evidence to the two hearings;
- *Against the Seventh, Eighth and Thirteenth Defendants (i.e. Helen Nagaj, Dianne Tabari and Kerry Fawcett)*: the making of the allegations in the disciplinary interviews (incorporating, in the case of Ms. Nagaj, her implicit repetition of what she had said in her letter of 25th November 1999) and their subsequent repetition and/or amplification in the disciplinary interviews and in evidence to the two hearings;
- *Against the Sixth Defendant*: the orchestration of all the above allegations.

184. In the case of the first two groups I doubt whether the conduct complained of constituted a "course of conduct". In the case of the March 2000 complainants, their only spontaneous act was the single act of lodging the grievance and its associated statements, and it is very debatable whether repeating the contents of those statements at the request of the Trust in the context of the disciplinary proceedings creates a "course of conduct". The position is *a fortiori* in the case of Ms. Nagaj, Mrs. Tabari and Mrs. Fawcett, against whom all that is relied on is their evidence in the disciplinary proceedings. (I note that the wider role attributed to Mrs. Tabari in the Claimant's evidence is not in fact pleaded against her as harassment.) But it is unnecessary to consider these refinements because on the facts which I have found it is impossible to say that the Defendants acted either unreasonably or oppressively. The March 2000 allegations were made in good faith, and on union advice, by the four nurses in reasonable pursuit of a legitimate aim, namely to ensure that they did not have to work with the Claimant. Their grounds for not wishing to work with her were also reasonable. The subsequent repetition of those allegations and the making of the further allegations in the context of the disciplinary proceedings was entirely reasonable. Even apart from the guidance in the case-law, the conduct of these Defendants could not possibly be characterised as harassment.

185. Although the conduct alleged against Mr. Ferguson would unquestionably constitute harassment I have found that he did not commit those acts.

186. As noted above, the Claimant also intends to advance a harassment claim against Mr. Smith. That claim must fail, both because his correspondence with the Claimant does not in my view constitute a course of conduct but also – and more fundamentally – because on my findings in para. 170 above he did not act in any way oppressively or unreasonably.

#### (2) "Accusing the Claimant of not working and omitting her figures from the returns"

187. I have dealt with this issue at paras. 81 and 82 above. Mr. Ferguson did not "accuse the Claimant of not working". He did, in relation to a single month, omit figures from the returns, but that was an innocent error. In neither respect did he harass the Claimant.

#### (3) "Writing to the Claimant's patients and informing them falsely that they cannot receive treatment from the Claimant"

188. I have dealt with this issue at para. 80 above. Mr. Ferguson did not write letters of the type alleged.

### The Defamation Claim

189. As already indicated, the defamation claim is based entirely on the copying to Mr. Flory of Mr. Smith's letter to the Claimant of 14th January 2003. I take in turn the issues identified in paras. 20-23 above.

#### Meaning

190. In para. 30.3 of the Particulars of Claim the Claimant pleads that Mr. Smith in the letter of 14th January "informed [her] ... that the allegations of gross professional misconduct had been fully and thoroughly investigated and there was no evidence to show that they were false". That is plainly a reference to the third paragraph of the letter, although it paraphrases rather than reproduces the actual words used, which were:

*Having considered the remit of these investigations, and the evidence presented therein, I cannot accept that there was evidence indicating that allegations made against you were false. The issues raised by you have been raised and considered by these previous investigations.*

The Claimant pleads – para. 30.4 – that those words meant that "the allegations of gross professional misconduct" which she then itemises and "the other allegations" (which are not identified) "had been properly and fully investigated and had been found to be well founded". The itemised allegations are (a) that the Claimant should not have been practising dentistry; (b) that she was too unstable to treat patients; (c) that patients were at risk of being injured and being attacked by the Claimant; (d) that when she was carrying out treatment of patients she was rude to patients; and (e) that her treatment of patients was so bad it was frightening to watch. Although this is not quite explicitly stated, it is clear that the actual defamatory meaning complained of is a meaning that the five itemised allegations were true: the statement that they had been investigated is not as such defamatory.

191. I do not believe that the words used by Mr. Smith mean that the five itemised allegations are true. There are two quite distinct points:

- The allegations are not identified in the letter. The Claimant can of course say that they are incorporated by reference because the letter is a response to hers of 25th October 2002 (of which Mr. Flory had a copy), but the pleaded items to some extent gloss the list of "malicious false allegations" given in item 1 of that letter – for example, there is nothing in that list precisely corresponding either to "item (a)" or to "item (c)". If this were the dispositive issue, it might be necessary to analyse more precisely the extent to which the terms of the letter justify the pleading. But it is not necessary, because of the second point, namely:-
- I do not believe that the letter adopts the allegations to which it refers. Mr. Smith nowhere says that they are true. He only says that he does not accept that there was evidence that they were false. That may seem a narrow distinction, but it is in my view a real one in the context of this letter. In another context a statement that "allegation A has not been shown to be false" may well be tantamount to a statement that it is true. But here the reason why the falsity of the allegation was in play was that if it had been shown to be false, it would be no answer to say that it had been investigated; and in that context it seems to me that Mr. Smith's words bear no more than that their literal meaning.

I frame this finding by reference to the five specifically itemised allegations, since the "other allegations" referred to in para. 30.4 are not identified and cannot in my view be treated as part of the Claimant's case. But even if the pleading were wide enough to cover other allegations my reasoning would apply equally.

192. Accordingly I do not believe that the words complained of in Mr. Smith's letter of 23rd January 2003 bear the defamatory meaning pleaded (or indeed any defamatory meaning). I should observe that this conclusion does not depend on a finding that the letter was strictly accurate in stating that "*the issues raised by you have been raised and considered by these previous investigations*". That may depend on what the phrase "*the issues raised by you*" covers, and also – given the careful way in which the investigators, the disciplinary panel and the appeal panel each framed their various findings – on the meaning of "*considered*". (The position is also complicated by the fact that Mr. Smith was referring to the General Dental Council reference and the risk assessment.) But even if it was arguably inaccurate because certain aspects of the Claimant's grievances had never been investigated and/or found to be ill-founded, that is irrelevant on the present question.

#### **Qualified privilege/malice**

193. Even if, contrary to the foregoing, the words bear the defamatory meaning pleaded, I find that they were used without malice. That follows from my findings at para. 170 above: Mr. Smith honestly believed that the words that he used, in the sense that he meant them, were true. Since the Claimant accepts that the publication relied on attracts qualified privilege, the claim would in any event fail on this basis.

#### **Justification**

194. As noted above, Mr. Smith does not seek to justify the words in the meaning pleaded by the Claimant, but he does seek to justify them in the meaning set out at para. 20 above, namely "that the Claimant had conducted herself in a manner justifying her dismissal by the First Defendant". Mr. Wolanski made clear in closing submissions that that averment was not equivalent to an averment that the Claimant had committed a sufficiently serious breach of contract to justify her summary dismissal or that her dismissal was fair within the meaning of the 1996 Act (though there is of course substantial overlap with the issues that would arise in those contexts).
195. I do not believe that the letter of 23rd January bears this meaning any more than it bears that asserted by the Claimant. However, in case I am wrong about that I should say that I do find that the Claimant was guilty of conduct which "justified" her dismissal, in the sense that it was of a kind which – subject to the employment of fair procedures and any relevant "personal mitigation" – could reasonably have led the Trust to dismiss her. I do not wish to be misunderstood here. I do not find – any more than the disciplinary or appeal panels did – that the Claimant had been guilty of "gross professional misconduct" justifying dismissal. I mean simply that by her conduct over several years, culminating in her conduct in the second half of 1999, she was the principal author of a state of affairs which created grave difficulties for her continued employment. Each of the three surviving heads pleaded in para. 43 of the Defence (set out in para. 23 above) is established. My reasons for that view sufficiently appear from my findings in Section C. I do not need to, and do not, make findings on each of the specific matters pleaded under those heads, but many are in fact covered by the findings which I have made above.

#### **I. LOSS**

196. Since I have found against the Claimant on liability in both actions I need make no findings on any issues relating to loss and damage. Indeed it was agreed in the course of the trial that any issues relating to her financial claims should be deferred for further evidence and submissions should that become necessary. But I should deal briefly with three points.
197. First, I should say that even if I had found for the Claimant in any respect as regards liability I should not have found that she had proved that she had suffered any physical injury by reason of any of the breaches of contract or torts relied on by her. The starting-point is that she did not adduce any expert evidence addressing the question of whether all or any of the physical symptoms itemised in para. 11 (1) above were caused by the acts or omissions on the part of the Trust of which she complains. That would not perhaps by itself have necessarily been fatal to her claim. I might in principle have been willing to draw common-sense inferences. But the symptoms in question are not of a kind on which it would be safe to make any findings about causation without expert evidence. Even if some connection with "stress" could properly be inferred – which I am far from sure it could, at least as regards the more serious symptoms – it would be a further major step to connect the stress in question to whatever actual breaches might have been proved, particularly having regard to the findings of the psychiatric experts referred to in para. 12 above. Mr. Brown cross-examined the Claimant thoroughly on the individual components of her claimed injuries, but I should not add to the length of this judgment by analysing the effect of the evidence: it is however fair to say that he effectively exposed some inconsistencies in her account.
198. Secondly, even if I had found for the Claimant in any respect in the first action I could not as a matter of law have awarded damages for distress, whether the claim were framed in tort or in contract – see *Bliss v. South East Thames Regional Health Authority* [1987] ICR 700 and *Gogay* (above). I have been referred to a passage in the current edition of McGregor on Damages questioning whether this line of authority remains good law, but it would on any view be binding on me.
199. Thirdly, in support of her claims for aggravated and exemplary damages against Mr. Smith the Claimant makes in paras. 30.7 and 30.8 of her Particulars of Claim in the second action a number of serious allegations amounting to conscious malice and abuse of power on his part. These are of course quite inconsistent with the findings which I have made above; but I should state explicitly that I regard them as wholly unfounded.



200. The consequence of the first two have those points, given the striking out by Tugendhat J. of the Claimant's claim for psychiatric injury, is that the claims in the first action could not have led to an award of more than nominal damages.

**CONCLUSION**

201. I dismiss the claims in both actions. I regret that this outcome will be a great disappointment to the Claimant. I can only hope that she may find some consolation in the fact that I have found no basis for some of the most serious allegations which she believes (albeit in my view wrongly) to have been made against her, in particular about her treatment of patients.
202. The Claimant has applied for permission to appeal. I refuse that application. My decision on her claims has been based essentially on findings of fact and I do not believe that there is a reasonable prospect of those findings being overturned on appeal.
203. I should like to thank both the Claimant and both counsel and solicitors for the Defendants for the efficient and co-operative way in which the claim was presented. The co-ordination of so large a number of witnesses, some of whom gave evidence by video-link, can not have been easy; but the various adjustments necessitated by the vicissitudes of the trial were managed almost seamlessly. The bundles and the witness statements also were conspicuously well structured and well presented.

Geoffrey Brown (instructed by Eversheds) for the Defendant in the First Action

Adam Wolanski (instructed by Eversheds) for the Defendants in the Second Action