Neutral Citation Number: [2023] EWHC 1677 (Admin)

Case No: CO/1477/2021

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

Wednesday, 5th July 2023

Before:

MR JUSTICE FORDHAM

- -

Between:

THE KING (on the application of MARK TATTERSALL)	**Claimant**
- and -	
NHS ENGLAND	**Defendant**

- -

- -

Benjamin Hawkin (by Direct Access) for the **Claimant**
Edward Morgan KC (instructed by Hill Dickinson LLP) for the **Defendant**

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Hearing dates: 17/5/23 & 18/5/23
Further evidence filed by the Claimant: 6/6/23
Draft judgment circulated: 26/6/23

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

INTRODUCTION

1. This case is about a provision which I will call "the Curtailment Provision". It is found within a scheme called the "Gold Guide", whose full title is "Reference Guide for Postgraduate Foundation and Specialty Training in the UK". The Gold Guide is a published document available online. It confers the right of appeal to which the Curtailment Provision relates. The Curtailment Provision, which first appeared in the 8th edition of the Gold Guide (31.3.20) ("GG8") at §4.173, says:

> ***Where there have been reasonable endeavours to progress the appeal and the appeal has not taken place within one year of the decision date, then the original decision is final. The Postgraduate Dean has discretion to consider requests for a reasonable postponement of the appeal beyond a year from the decision date in exceptional circumstances.***

2. These are judicial review proceedings. The Claimant is Dr Tattersall. The decision which is the target for judicial review was made on 26.1.21. I will call it "the Impugned Decision". The decision-maker was Professor Jane Mamelok, acting as Postgraduate Dean ("PD") for "HENW". HENW is Health Education England ("HEE")'s North West Region ("NWR"). At the substantive hearing, I granted an unopposed application, pursuant to CPR19.4(1), for NHS England to replace HEE as Defendant. That was appropriate because HEE's functions have now (as of 1.4.23) transferred to NHS England, against whom any Order of this Court would necessarily now need to be made. When in this judgment I say "HEE", I mean "HEE, now NHS England". In making the Impugned Decision, Professor Mamelok was dealing with an appeal ("the Appeal") which Dr Tattersall had commenced on 20.8.15. The Appeal challenged a decision taken on 7.8.15 ("the Appealed Decision"). That decision had been taken by Professor Mamelok's predecessor as PD, Professor Jacky Hayden. In the Impugned Decision, Professor Mamelok decided as follows: that the Curtailment Provision was applicable to the Appeal; that there had been reasonable endeavours by HEE to progress the Appeal; that the Appeal had not taken place within one year of the decision date (7.8.15); that it was not appropriate to exercise the discretion to grant any further reasonable postponement; that the Appealed Decision was therefore "final"; and that she would not in those circumstances take any further steps such as convening an Appeal Panel and scheduling an appeal hearing.

3. The central issues and arguments which I have to address fall within three basic heads. These reflect three alternative bases on which Dr Tattersall challenges the Impugned Decision. They concern the lawfulness (see §21 below), applicability (§32 below) and application (§40 below) of the Curtailment Provision. Before turning to each of these, I am going to give my description of some contextual features of the case as I saw them.

Training

4. HEE is a public body responsible for leading and supervising education, training and workplace development in the UK health sector. That includes accredited postgraduate training (in this judgment, "Training"). It includes implementing Training in accordance with the curricula approved by the General Medical Council ("GMC") which body regulates doctors (GG8 §2.26). HEE is organised into regions, of which HENW is one, each of which has a PD. Under the Gold Guide, the PD – which includes the PD's nominee (GG8 §1.8) – discharges a number of responsibilities, including

"quality management" of Training programmes (GG8 §2.33) and "decision making" (GG8 §1.2). Suppose I am a postgraduate doctor pursuing a relevant specialism and wishing to become a Consultant. Training is a route by which I can progress towards that goal. That progress will mean securing relevant Training appointments, with Training contracts, as a "Trainee". It will mean my 'clocking-up' the relevant number of years of Training, for example 7 years. The content of the Training will be regulated by the Royal College in my specialism. Once I have completed the relevant number of years' Training, I can then take an examination, with a view to achieving a Fellowship with the Royal College. If I am successful in achieving that Fellowship, I can then receive entry on the specialist Register held by the GMC. That will mean I have become eligible to be appointed as a Consultant.

5. During my Training, I need to hold a National Training Number ("NTN"). An NTN is described (GG8 §3.35) as "held for so long as" a Trainee is in speciality Training or is out of programme on statutory grounds or by agreement with the PD. One NTN may be replaced with another, for example if I move from Training in one HEE region to another. If I take 'time out' of my Training, there is a question about whether I can then return and continue, keeping the 'credit' of the Training which I had previously clocked-up. Suppose I had clocked-up three years of Training before my 'time out'. A question would be whether I can restart as if I were now in year 4. The answer to that question will depend on the circumstances. It is not difficult to see why. I may have gone 'cold'. The curriculum may have 'moved on'. The Royal College will need to be involved in the decision whether I should resume, keeping my clocked-up credit.

6. During my Training there are 'regulatory' aspects to my position. I will be the subject of a cycle of important annual reviews, known as the Annual Review of Competence Progression ("ARCP"). The ARCP involves decision-making processes which can give rise to certain 'negative outcomes' for a Trainee. A negative ARCP outcome can be the subject of an appeal under the Gold Guide. During my Training – or if my Training has stopped and I am working in the health sector outside the Training programme – I will remain subject to the GMC's fitness to practise regime. I will also remain subject to a programme of 'continuing professional development' requirements, known as "Revalidation". Certain declarations required for Revalidation are included in the ARCP (see GG8 §3.47). One of the consequences of regimes such as ARCP, fitness to practise and Revalidation is that a Trainee needs a "designated body" and a "responsible officer". For a Trainee in the NWR, HENW would be the designated body and the PD for HENW would be the responsible officer. A Trainee who remains within the Training regime in the NWR will generate a volume of important information and materials, including from ACRP and Revalidation, to which HENW would have access.

Dr Tattersall

7. Dr Tattersall's specialist area is Obstetrics and Gynaecology ("O&G"). The relevant Royal College for that specialism is the Royal College of Obstetrics and Gynaecology. Dr Tattersall qualified to practise medicine in 2001. He began working in O&G in 2002. In 2005 he was appointed as a Specialist Registrar for a term of 5 years in London, where he had a Research Training Fellowship from 2006 to 2010. In January 2011, Dr Tattersall took up a 4 year appointment as a Clinical Lecturer at the University of Liverpool. That role combined academic Training at the University of Liverpool with clinical Training at the Liverpool Women's Hospital, a hospital run by Liverpool Women's Hospital NHS Trust. In conjunction with his Training, Dr

Tattersall was issued with an NTN (and, says Mr Morgan KC, a replacement NTN when he moved from London to Liverpool).

8. Dr Tattersall was on a recognised pathway towards an examination-based Fellowship of the Royal College of O&G and entry into the GMC's Specialist Register for O&G. If all went to plan, Dr Tattersall would emerge from that pathway as a Consultant in O&G. However, as things stand, all has not gone according to plan. In the event, Dr Tattersall did not participate in clinical Training after 2010, and in any Training after December 2014. The circumstances in which that position arose are controversial. As everyone agrees, they do not call for any finding by this Court in these proceedings. In the event, Dr Tattersall has continued to discharge clinical duties, as a senior clinician within the specialty of O&G, in a variety of locum capacities.

The Appeal

9. The Appealed Decision (7.8.15) was communicated to Dr Tattersall's British Medical Association ("BMA") representative, Ms Joanne Alliston. By the Appealed Decision, Professor Hayden (as PD of HENW) had concluded that Dr Tattersall's NTN should be withdrawn on the basis of "non-compliance" with the requirements for registering or maintaining his registration with the PD. In the Appealed Decision, Professor Hayden was invoking §6.37c of the Gold Guide 5th Edition of May 2014 ("GG5"), which provided:

> ***The [national] training number will be withdrawn when a trainee… does not comply with the requirements for registering or maintaining their registration with the Postgraduate Dean.***

10. The Gold Guide described a right of appeal as follows (GG5 §7.148), with what I observe is a refreshing use of "their" and "they":

> ***Where the Postgraduate Dean indicates their intention to remove a trainee national training number because of non-compliance with the arrangements under which they hold the training number (paragraph 6.37c), the trainee has a right of appeal to a panel constituted as set out in the process above (7.131-7.145).***

The request for an appeal needed to be made within 10 working days of notification of the appealed decision (GG5 §7.132). It needed to state the grounds of appeal (§7.133), which could include: relevant evidence not being available to the decision-maker; concerns about the process; or concerns about misinterpretation of facts. The appeal would be determined by an Appeal Panel convened by the PD (§7.139) and comprising (§7.140): the PD or a nominated representative as Panel Chair; a college/faculty representative from outside the NWR; a senior doctor from within the NWR and within the O&G specialty; a senior doctor from the NWR but a different specialty; a senior Trainee from a specialty other than O&G; and a lay representative. Under GG5, Dr Tattersall had the right (§7.141): to be represented at the appeal; to address the Panel; and to submit written evidence. On receipt of an appeal request, the PD could arrange for a "review" (§7.134) involving reconsideration by the decision-maker (§7.125). PPG5 provided that an appeal hearing "should normally take place where practicable within 15 working days of the completion of any review and, if no review were arranged, within 15 working days of the request for appeal (§7.137).

11. Dr Tattersall exercised his right of appeal. He did so by a letter of request dated 20.8.15 from Ms Alliston. That letter provided an "outline" of the grounds of appeal, stating

that Dr Tattersall reserved the right to further expand upon these in the future, as and when further information became available. These were the grounds of appeal:

> ***[1] It was unreasonable for HENW to determine that [Dr Tattersall] was subject to the "Gold Guide" and attempt to rely upon the provisions of the same to remove his training number, particularly given that HENW has not considered any argument by Dr Tattersall (despite previously agreeing to do so). [2] Dr Tattersall is only currently not in a training position due to HENW's failure to provide him with / offer him one, which is a failing of HENW's obligations towards Dr Tattersall. At no point has Dr Tattersall refused to take up any training position offered by the [Local Education and Training Board]. [3] Dr Tattersall has complied with all reasonable requirements made of him by HENW and particularly notes that he has: [a] complied with all requirements of which he has been notified by HENW [b] not received further precise details of any requirements that HENW might have, despite requesting the same. [4] HENW's decision appears to have been taken upon misrepresentation of the facts. [5] The relevant rules do not permit the removal of Dr Tattersall's training number in the circumstances.***

12. In September 2016, more than a year after the decision date of the Appealed Decision, an oral hearing of the Appeal commenced, before an Appeal Panel which had been convened. That hearing was, however, adjourned. This was as a consequence of issues relating to the composition of the Appeal Panel. A point had been raised on behalf of Dr Tattersall about a conflict of interest on the part of a member of the Panel. The point was accepted. By that time, Gold Guide 6th edition (February 2016) ("GG6") was in force.

13. Following the September 2016 adjournment, there was a focus on whether Dr Tattersall's case – including the Appeal – was governed by the Gold Guide. As has been seen (§11 above), Dr Tattersall's ground of appeal [1] contested that point and complained about the failure to consider an argument about it. Nearly two years after the September 2016 adjournment, a decision was made on 15.5.18, finding that the Gold Guide was applicable. That decision was challenged by judicial review proceedings in the High Court (reference CO/444/2019). The outcome was a Consent Order made by this Court on 17.5.19 ("the Consent Order"). It recorded that Dr Tattersall ("the Claimant") withdrew his renewed application for permission for judicial review and his claim for judicial review was dismissed, on the basis of a position described in the Schedule to the Consent Order. The Schedule included this (at §§2-4):

> ***[2] The Claimant agrees that he will be subject to the Gold Guide (and not the Orange Guide) for the purpose of his assessments, determinations, appeals and any other training related decisions. [3] The Claimant wishes to continue to pursue his appeal against the removal of his National Training Number on 7th August 2015. [4] The parties agree to a mediation in respect of the Claimant's training options after the determination of his appeal against the removal of his National Training Number.***

14. Dr Tattersall's position was – and is – that he hopes, through the Appeal or otherwise, to be allowed to return to the Training programme and achieve a Certificate of Completion of Training. He wants to retain the years of Training as a credit which he has clocked-up. Dr Tattersall says that, where an NTN is withdrawn and unless that withdrawal is overturned, the Trainee will lose any ability to resume with clocked-up credit. HEE says: (1) even if an NTN is reinstated, a Trainee would need to secure a new Training appointment to get into Training; (2) the Trainee would not necessarily keep the clocked-up credit, and the relevant Royal College would need to be satisfied that this was appropriate; and (3) if a Trainee does not keep clocked-up credit they may

be able to progress by relying on their past Training, through an alternative evidence-based pathway to achieving a Fellowship.

15. In my judgment, it is appropriate – and sufficient – to proceed on the following basis. The holding of an NTN is a matter of importance to a Trainee. A Trainee stands, in principle, to be disadvantaged by the withdrawal of an NTN. A finding of non-compliance with the requirements for registering or maintaining their registration with the PD is a significant adverse finding about a Trainee's conduct. All of this is reflected in the fact that the Gold Guide provides for a right of appeal. The right of appeal affords the opportunity for a specialist Appeal Panel to consider the merits and justification for the withdrawal and the adverse finding. Dr Tattersall's concerns – about being disadvantaged by the Appealed Decision withdrawing the NTN and by the finding of non-compliance – are concerns that he was entitled to raise. Dr Tattersall had, and exercised, a right of appeal. By the time of the 5.9.16 adjournment of the Appeal, more than a year had already passed since the Appealed Decision (7.8.15). By the time of the Consent Order (17.5.19), 3 years 9 months had passed since the Appealed Decision. It was in that context that the Consent Order embodied a recognition that the Appeal was to be pursued and determined. The Impugned Decision means Dr Tattersall has lost his opportunity to seek to persuade an Appeal Panel, on the merits, that it should (a) say that the finding of non-compliance in the Appealed Decision was wrong (b) say that the NTN should be reinstated and/or (c) say something else favourable to Dr Tattersall about what has happened or should happen next.

Judicial Review

16. This claim for judicial review challenging the Impugned Decision (26.1.21) was commenced on 21.4.21. Permission for judicial review was granted on 10.11.21. As it was put in Mr Hawkin's skeleton argument (10.5.23), it is of relevance that Dr Tattersall suffers from long-standing depression and anxiety and that in 2019 he was given a diagnosis of Autistic Spectrum Disorder ("ASD"); and it was during proceedings brought by Dr Tattersall against the NHS Trust and the University that it was accepted that in 2019 he was given that diagnosis of ASD. It is also relevant to record that the substantive hearing of this judicial review claim had been due to be heard on 27.7.22. I adjourned the case on that occasion, because – as was recognised by Mr Hawkin and Mr Morgan KC – a question had arisen as to Dr Tattersall's capacity to litigate these proceedings. I made directions and a Mental Capacity Assessment (6.5.23) was eventually obtained. That report concluded that the Claimant clearly had mental capacity to litigate. On the basis of that evidence, I was satisfied on that issue. Nobody and no evidence supported any contrary view. I should also record that there had been exchanges with this Court about "reasonable adjustments". In the event, Dr Tattersall communicated through Mr Hawkin his preference not to attend the hearing, provided that – as I confirmed – his presence was not required by the Court and no adverse inference would be drawn. So far as materials are concerned, I gave such permission at the start of the hearing as was required for all parties to rely on the further evidence and materials which had been filed and served, a course to which nobody objected. At the hearing, a factual question arose (§72 below), which led me to allow Dr Tattersall time to provide an answer. In the event he produced a short witness statement (5.6.22), all of whose contents he asked me to consider, as I have. One of the points he makes is to describe receiving a recent diagnosis (on 24.5.23) of Combined

Type ADHD which he believes may underlie many of the difficulties he describes encountering with executive function.

The Impugned Decision

17. The substance of the Impugned Decision was as follows. Having carefully considered the history of this matter, the decision had been made: (i) that it was not appropriate to grant any further extensions of time for the conduct of the Appeal; (ii) that it was no longer possible to conduct the Appeal in a manner consistent with the aims and objectives of the Gold Guide; (iii) that, in light of all of the circumstances, it was not appropriate to convene an appeal against the Appealed Decision; and (iv) that in consequence the removal of the NTN would stand as final. Dr Tattersall was not precluded from seeking the issue of a NTN in line with any Training programme which he might wish to pursue in due course. But the Appealed Decision stood, with effect from 7.8.15, and the Appeal was at an end.

18. The Impugned Decision emphasised these as key points. In the period since the Consent Order there had been "ensuing delay". Dr Tattersall had been invited to supplement and revise his grounds of appeal but did not avail himself of that opportunity. In extensive correspondence, consistent efforts had been adopted by HENW to facilitate the conduct of an appeal hearing, demonstrating a preparedness to accommodate Dr Tattersall and collaborate with him in bringing a resolution to his outstanding appeal. The correspondence issued on behalf of HENW had recommenced within days of the Consent Order. It had consistently confirmed the scope and purpose of the Appeal and the process to be followed. It had attempted to secure Dr Tattersall's engagement with the process. There had been repeated attempts to secure the input of specialist Occupational Health advisers, through an Occupational Health Assessment. However, as a result of Dr Tattersall's lack of meaningful engagement and collaboration, attempts to convene an appeal hearing had been thwarted and a further period approaching two years had elapsed, throughout which period Dr Tattersall had been participating in full time clinical practice as a locum. A total period approaching 6 years had elapsed since the Appealed Decision to remove Dr Tattersall's NTN. In the intervening period, every effort had been made to accommodate Dr Tattersall's perspectives, preferences and the conditions he had sought to impose. In each instance, HENW had sought to act in a manner which was consistent with the spirit (as well as the letter) of the Gold Guide. The Gold Guide was concerned with those participating in or seeking to undertake postgraduate specialist Training, with default time limits which anticipated that decisions would be reached within a 12-month period, enabling the Trainee to address adverse decisions by appropriate means of remediation, recommitment and collaboration. The Gold Guide also made clear that all Trainee doctors are obliged to adhere with the requirements of GMC's "Good Medical Practice", and that an NTN was coterminous with participation in specialty training, with regulatory compliance and the PD discharging the role of responsible officer. It was for the PD to determine the extent or scope of any extensions of time.

19. The Impugned Decision also identified these "reasons". The decision was recognised as unwelcome to Dr Tattersall. It had not been taken lightly. Professor Mamelok had consulted with peers, including the external and independent Appeal Panel Chair, Dr Geoff Smith (Regional PD for HEE South West). It had been confirmed that the circumstances of the case and the efforts undertaken by HENW to secure a resolution to the Appeal, were unprecedented. The decision had been reached after careful

examination and review of the entire history of the case, including the following: (a) the factors contributing to delays in progressing the Appeal including outstanding issues that had been determined by the Consent Order (17.5.19); (b) the attempts to progress the Appeal subsequently and factors undermining it being heard in the expected time frame; (c) the fact that the Appeal was well out of the time anticipated by the Gold Guide (even treating the 12 months as reset from 17.5.19), and this had implications for testimony of individuals involved due to the passage of time; (d) the fact that 6 years in total had elapsed during which Dr Tattersall had given no indication of any wish to embark upon specialty Training and indeed had resisted attempts by HENW to encourage that; (e) the reality that a period approaching 2 years had elapsed since the Consent Order resolving the applicability of the Gold Guide, despite which Dr Tattersall had not demonstrated any commitment to the pursuit of the Appeal securing its resolution in line with the demands of the Gold Guide; and (f) that in all the circumstances, the conduct of the Appeal would be futile and/or disproportionate.

20. Under a heading "interests of justice", the Impugned Decision made these points. Every effort had been made to accommodate Dr Tattersall in a manner consistent with the Gold Guide and the specialty Training regime to which it was directed. By contrast, Dr Tattersall had engaged with HENW in a manner which showed little or no commitment to resolution of any process or resumption in a way which could be considered consistent with the collaboration required of any Trainee. The fact that Dr Tattersall has chosen to prioritise his time and resources on other matters was a choice, which he was entitled to make. It was noted that, throughout the relevant period, Dr Tattersall had remained in clinical practice and was understood to have operated without impediment. Repeated opportunities had been given to Dr Tattersall, which he had declined or failed to take. In these exceptional circumstances, and given his ability to reapply for a NTN in the usual manner, there was no injustice to Dr Tattersall in coming to the Impugned Decision.

LAWFULNESS OF THE CURTAILMENT PROVISION

21. This is the first of the three basic heads into which the issues and arguments fall. I accept Mr Hawkin's submission that, if the Curtailment Provision is unlawful, it would follow that the Impugned Decision is also unlawful. That is because the Impugned Decision has disposed of the Appeal by purported application of the Curtailment Provision. On the face of it, absent the Curtailment Provision, the "outcome" of curtailing the Appeal in this way would have been different. I cannot say what an Appeal Panel would have said or done, had it heard the Appeal.

Lawfulness: Dr Tattersall's Argument

22. Mr Hawkin argued on behalf of Dr Tattersall – in essence, as I saw it – as follows. The Curtailment Provision is so unfair – so draconian – as to be unlawful. It is a clear violation of basic standards of procedural fairness. It is an unlawful and unreasonable rule. It is deeply problematic and flawed; fundamentally wrong; and offensive in public law terms. It adopts a position which can never be justified as fair or reasonable, even as a last resort. It takes a guaranteed appeal right. It takes a properly commenced appeal which is on foot and current, brought by an appellant who has expressed no intention to withdraw or abandon it. It then purports to permit the action of peremptorily extinguishing that extant appeal, depriving that appellant of the merits-determination by the specialist Appeal Panel. Appeal rights are important safeguards. Where such a

safeguard is provided, the presumption is that the issues will be permitted to be resolved on their merits, through the appeal. That is why rights of appeal are an 'alternative remedy' to judicial review: R (Willford) v Financial Services Authority [2013] EWCA Civ 677 at §36. It is never fair or justifiable to take an extant appeal and then decide it has been 'timed-out' by reference to the criteria in the Curtailment Provision: an appeal not having taken place within one year of the appealed decision; reasonable endeavours to progress the appeal; and an absence of exceptional circumstances to justify an extension of time. There are always other, and obviously less draconian, ways of dealing with extant appeals where the passage of time and circumstances call for finality. Basic standards of fairness and reasonableness require consideration of the appeal's substantive merits. The alternatives which achieve promptness and finality, with a merits determination, will always include the following: an Appeal Panel being convened and a hearing listing at short notice; the hearing proceeding in an appellant's absence; or the determination of the appeal by the Appeal Panel on the papers without a hearing at all. Determination of an appeal "on written submissions" is a feature of the Gold Guide (GG6 §§7.135, 7.139; GG8 §4.174), albeit "if the Trainee agrees". Even absent such agreement, that course could lawfully be adopted, as a last resort derogation (GG8 §1.11) and less draconian alternative to peremptory dismissal of the appeal.

23. No authority supports – as lawful, reasonable or fair – a provision whose application will involve an extant appeal failing, without consideration of its merits. Saleem v Secretary of State for the Home Department [2001] 1 WLR 443 identifies the applicable legal standards. The curtailment provision in Saleem was unlawful because, as the then Hale LJ pointed out (at 458F-459F), common law standards of procedural fairness were violated. These were analogous to Article 6 ECHR principles: ensuring that a provision could not impair the essence of a right of appeal, could not constitute an unjustified and disproportionate interference with that right, and needed to strike a fair balance. Article 6 would in any event apply directly in the present case, given that the implications for livelihood and education mean that a civil right or obligation was being determined. Just as in Saleem, so too here, there is a curtailment provision which is unlawful, as well as being unfair, and unreasonable.

24. There are two further points. First, the structure of the Curtailment Provision in any event makes it contrary to law. The text of GG8 §4.173 (§1 above) refers to the PD's discretion, to postpone the appeal in exceptional circumstances, but only as an 'afterthought' after already hitting the 'brick wall' of finality. Only then does GG8 §4.174 refer to an appeal being "dealt with on written submissions". The discretion to extend time, and the consideration of less severe alternatives, cannot lawfully arise only after the appeal has already been 'timed-out'. Secondly, the role of the PD, also and in any event, makes the Curtailment Provision contrary to law. The application of the Curtailment Provision – and specifically the discretion to allow a reasonable postponement in exceptional circumstances – is entrusted by GG8 §4.173 to the PD. But the PD is the decision-maker in relation to the withdrawal of an NTN (GG8 §3.99) and that can be the very decision under appeal (GG §4.166). The Curtailment Provision thus makes the PD a 'judge in their own cause', empowered to shut out an appeal against their own decision.

Lawfulness: My Analysis

25. Those are Dr Tattersall's arguments on the unlawfulness of the Curtailment Provision. But I am not able to accept them. In my judgment, accepting the submissions of Mr Morgan KC for HEE, the Curtailment Provision is not unlawful. It is a lawful feature of the Gold Guide. It does not offend public law principles of fairness, reasonableness, or lawfulness (including statutory human rights protection). I will explain why I have arrived at that conclusion.

26. I think the analysis needs to begin by remembering that the right of appeal, with which the Curtailment Provision is concerned, is a right arising by reason of the Gold Guide itself. Mr Hawkin rightly accepted this. The appeal has no other originating source. This is not a situation where a right of appeal has arisen by virtue of some anterior instrument or other superior source. This is not a right arising from primary or secondary legislation, constitutional value or common law principle. The Gold Guide – including the Curtailment Provision – is not 'cutting down' on some freestanding procedural right arising from a superior source. There would be no appeal at all unless conferred by the Gold Guide. So, it is the Gold Guide which confers the right of appeal. And it is the Gold Guide which regulates, shapes and circumscribes that appeal.

27. Next, it is important to appreciate that the appeal rights for which the Gold Guide makes provision, are rights which arise in a particular context and setting, with particular features. This is a special setting regarding governance, regulation and compliance. As seen in the present case, there is the special context of Training. That context and setting provide the backcloth for the clear recognition of the temporal values of promptness and finality. The Gold Guide expressly provides (GG8 §4.173) that the appeal hearing itself should normally take place within 30 working days of the appeal request, which is itself required within 10 working days of notification of the decision to which the right of appeal applies. There are other contextual features. The structure and content of the Curtailment Provision require – as a precondition to the curtailment of the appeal – that there have been reasonable endeavours (by HEE) to progress the appeal. That same structure and content also allow for a discretion, to allow a reasonable postponement (including a further postponement), in exceptional circumstances. As to that discretion, I cannot accept Mr Hawkin's submission that the discretion is encountered only after his 'brick wall' of finality has been encountered. The finality is subject to the discretion. No other interpretation or application makes sense. So, it would make no difference if the Curtailment Provision had been drafted as follows:

> ***(1) Where there have been reasonable endeavours to progress the appeal and the appeal has not taken place within one year of the decision date, then – subject to the discretion in (2) below – the original decision is final. (2) The Postgraduate Dean has discretion to consider requests for a reasonable postponement of the appeal beyond a year from the decision date in exceptional circumstances.***

Nothing in the Curtailment Provision prevents consideration being given to all the circumstances, including any relevant alternative ways forward. That could be relevant to whether "there have been reasonable endeavours to progress the appeal". It could also be relevant to "reasonable postponement" and "exceptional circumstances".

28. There is, in my judgment, no inherent unfairness, unreasonableness or unlawfulness in the Curtailment Provision, given its nature and in its contextual setting. The Curtailment Provision does not fail to strike a fair balance or impair the essence of the right of appeal. Alongside the points about the special regulatory context and the origin

of the right of appeal, three points are critical. The first is that it is a necessary precondition that there must have been "reasonable endeavours to progress the appeal". Unless it can lawfully be concluded that this precondition has been satisfied, the Curtailment Provision cannot lawfully be applied to an appeal. The second is that there is the ever-present discretion to allow reasonable postponement in exceptional circumstances. In public law, a discretionary power carries with it a duty to consider exercising that discretionary power. So, unless it can lawfully be concluded that there should be no reasonable postponement – or no reasonable further postponement – in exceptional circumstances, the Curtailment Provision cannot lawfully be applied to an appeal. The third is that the assessment of the precondition requiring "reasonable endeavours to progress the appeal", and the approach to the discretionary power to allow a "reasonable postponement" in "exceptional circumstances", are decisions of a public authority decision-maker to which enforceable common law standards apply. Describing those familiar common law standards has classically – and for good reason – attracted the shorthand formula 'lawfulness, reasonableness and fairness'. I am using that same shorthand formula in this judgment. Here, in the analysis, the important point is this. The application of the Curtailment Provision – in the facts and circumstances of an individual case – must be lawful, reasonable and fair.

29. I think Mr Hawkin was right to identify the Saleem case as an authority which assists the analysis. He did not persuade me that there is here decision-making constituting the Article 6 "determination of a civil right or obligation". But I agree with him that nothing turns on that in the analysis. In Saleem, there was a right of appeal against an adverse asylum decision. That was a statutory right of appeal arising by virtue of a superior instrument of law, namely s.20 of the Immigration Act 1971. The Lord Chancellor, empowered (by s.22 of the 1971 Act) to make rules for "regulating the exercise of the right of appeal conferred by" the 1971 Act, had made the Asylum Appeals (Procedure) Rules 1996. Rule 35 made provision for circumstances in which an extant and properly commenced appeal could be treated as abandoned, and rejected without determination of its merits. Rule 42 made provision about circumstances in which a notice (including a notice of hearing) was to be "deemed to have been received" by an appellant. The unanimous Court of Appeal, agreeing with Hooper J, concluded that Rule 42 was unlawful in rigidly precluding an extant appeal from being determined on its merits, even if the appellant were demonstrably blameless. The unlawfulness lay in the fact that Rule 42 operated with "this severity", and "such severity", which impact was unreasonable and unlawful (as not "regulating" the appeal but removing and destroying it). As expressed by Hale LJ in Article 6 terms, Rule 42 did not strike a fair balance but impaired the essence of the right of appeal.

30. In my judgment, that cannot be said of the Curtailment Provision. In fact, Saleem best assists because of its sharp contrast with the present case. The Curtailment Provision does not rigidly exclude consideration of the circumstances. It does what Rule 42 unlawfully and unreasonably failed to do: it incorporates a discretion. There are two unmistakeable features of Saleem. The first is that Rules 35 and 42 combined to mean that an extant appeal could be disposed of without a determination on the merits. The second is that the Court of Appeal did not say that disposing of an extant appeal without a determination on the merits was inherently unlawful, unreasonable or unfair. Mr Hawkin's answer is that the Court of Appeal did not need to consider that point. But it would have been a fundamental and direct, obvious and prior, illegality. Saleem does not support the proposition that any provision which curtails an extant appeal – other

than by a determination on the merits – is inherently unlawful, unreasonable or unfair, including as being incompatible with Article 6 standards. I was shown no other authority which supports that proposition.

31. Nor in my judgment is the Curtailment Provision unlawful on the ground that it makes the PD 'judge in their own cause'. Some appealable decisions are decisions of the PD. That includes a decision to withdraw an NTN on grounds of non-compliance. The PD convenes the Appeal Panel. The Curtailment Provision gives to the PD the function of addressing whether there have been reasonable endeavours to progress the appeal and whether reasonable postponement is appropriate on grounds of exceptional circumstances. It is not unusual for a decision-maker to retain a function referable to an appeal. To take two examples: magistrates may have to decide whether to state a case; a High Court judge in an extradition case may have to decide whether to certify a question of law of general public importance. The PD's functions in applying the Curtailment Provision are required to be lawful, reasonable and fair. There is the safeguard of judicial review, as this case illustrates. The PD's functions arise – as does the right of appeal itself – in a very specific regulatory context, under the Gold Guide. The PD is an office-holder. In the present case, the Appealed Decision was not a decision of Professor Mamelok, but her predecessor Professor Hayden. The Gold Guide makes express provision that PD includes a person "nominated" by the PD to "act" on the PD's "behalf" (GG8 §1.8). If, on the particular facts of an individual case, there were some decision or act requiring discharge by a nominee, there is provision for such an arrangement to be made.

APPLICABILITY OF THE CURTAILMENT PROVISION

32. This is the second basic head into which the issues and arguments fall. As with lawfulness (§21 above), I accept Mr Hawkin's submission that, if the Curtailment Provision is in law inapplicable, it would follow that the Impugned Decision is unlawful.

Applicability: Dr Tattersall's Argument

33. On this head, Mr Hawkin argued – in essence, as I saw it – as follows. The Curtailment Provision was not lawfully applicable to the Appeal. That is by reason of orthodox public law legitimate expectation principles (discussed in cases such as Paponette v Attorney General of Trinidad and Tobago [2010] UKPC 32 [2012] 1 AC 1 at §30; United Policyholders Group v Attorney General of Trinidad and Tobago [2016] UKPC 17 [2016] 1 WLR 3383 at §§37-39 and Re Finucane's Application for Judicial Review [2019] UKSC 7 [2019] 3 All ER 191 at §62). There are two distinct bases on which the legitimate expectation arose. Either of these is sufficient.

34. The first basis on which a legitimate expectation arose is GG5 (§10 above). That was the edition of the Gold Guide which was in force at the time of the Appealed Decision. GG5 provided at §7.148 that where a Trainee's NTN was removed by the PD:

> ***… the Trainee has a right of appeal to a panel constituted as set out in the process above (§§7.131-7.145).***

There was, by reference to GG5, a clear and unqualified practice (or promise) of a procedural entitlement to an appeal being determined by a properly constituted panel, in

accordance with the provisions of GG5. Once an appealable decision was made while GG5 was in force, this was a crystallised (or vested) right. In this case the right of appeal was duly exercised. When GG5 was replaced with later editions of the Gold Guide, the appeal provisions from GG5 continued to apply to the extant appeal. The purported application to the Appeal of the Curtailment Provision, first introduced in GG8, was an unlawful breach of that legitimate expectation.

35. The second basis on which a legitimate expectation arose is the action taken in relation to the Appeal in September 2016 (§12 above). On 5.9.16, the Appeal Panel – convened to determine the Appeal on its merits – decided to adjourn for a reconvened hearing, with a differently constituted Panel. At that stage, the period of one year – later described in the Curtailment Provision (GG8, 31.3.20) – had already elapsed since the date of the Appealed Decision (7.8.15). The actions in September 2016 were a clear and unqualified promise (or practice): that the Appeal would be determined on its merits by an Appeal Panel; that the Appeal would not be 'timed-out' on the basis of not having been determined within one year of the Appeal Decision; that any extension of time beyond one year was being granted; and that any test for an extension of time beyond one year had already been met. The purported application to the Appeal of the Curtailment Provision, first introduced in GG8, was an unlawful breach of that legitimate expectation.

Applicability: My Analysis

36. Those are Dr Tattersall's arguments on applicability. Again, however, I am not able to accept them. In my judgment, the Curtailment Provision – treated as applicable to the Appeal – involved no breach of any legitimate expectation. I will explain why, accepting the submissions of Mr Morgan KC, I have arrived at that conclusion.

37. So far as concerns GG5 and legitimate expectation, the starting-point has to be the nature of the Gold Guide with its regular new editions. GG5 itself was clear and explicit about the nature of new Gold Guide editions. GG5 stated that new editions of the Gold Guide would come into force from time to time, taking immediate effect and replacing the previous provisions in a previous edition. GG5 said, on its first page, that: "This edition replaces all previous editions of the Gold Guide with immediate effect". It also stated expressly that there would be future "up-dating of the Guide", after being "reviewed annually". The clear practice – reflected in GG5 itself – was for each new edition of the Gold Guide to replace each previous edition, in its entirety, with immediate effect. There was nothing in GG5 approaching a clear practice or promise, to the effect that the appeal provisions of GG5 would continue to apply to any appeal from any decision made while GG5 was in force. Mr Hawkin was unable to identify any provision within GG5 which said or implied this. In the same way, there was nothing approaching a clear practice or promise that a previous edition continued to take effect in relation to any extant appeal against any appealable decision taken while a previous edition was in force. The successive Gold Guide editions do not operate by reference to 'savings' and 'transitional provisions' in the regulation of appeals. What was needed – to return to a point which I have been emphasising – was that any decision under any new provision would be made lawfully, reasonably and fairly.

38. So far as concerns actions in September 2016 and legitimate expectation, there was nothing approaching a clear promise or practice in HEE's actions at that time, or at any time, to the effect that no new provision of the Gold Guide could impact on the Appeal.

The convening of an Appeal Panel and the September 2016 adjournment of the Appeal were actions in the conduct of the Appeal, consistent with the then-applicable provisions of the Gold Guide. So for that matter was the Consent Order (17.5.19) which – as Mr Morgan KC accepts – was certainly action recognising the extant Appeal and referring to a subsequent merits determination by an Appeal Panel (§13 above). But there was no action constituting a clear and unqualified representation, that a merits-determination by a Panel would ensue come what may, irrespective of any changes in the provisions within the Gold Guide and irrespective of any circumstances which subsequently arose.

39. In all of these respects, Dr Tattersall's legal entitlement was to lawful, fair and reasonable decision-making under the Gold Guide including in the application of any provision in any new edition of the Gold Guide coming into effect. The introduction and invocation of the Curtailment Provision did not involve any breach of a legitimate expectation. What it did was to introduce a rule and criteria whose application needed to be lawful, reasonable and fair in the context and circumstances of the case. If the Impugned Decision was an application of the Curtailment Provision which was incompatible with these basic public law standards, the claim for judicial review will succeed, for that reason. Otherwise, it must fail.

APPLICATION OF THE CURTAILMENT PROVISION

Application: Dr Tattersall's Argument

40. This brings me to the third of the basic heads under which the issues and arguments fall. Mr Hawkin argued – in essence, as I saw it – as follows. The Impugned Decision, treating the Appeal as 'timed-out', was a decision which is incompatible with basic public law standards. Its impact and implications involve the denial of an important procedural right relating to important issues. The Appeal was designed to secure a merits determination, in relation to precisely this type of adverse decision, before a specialist Appeal Panel. The Appeal Panel would be able to consider whether the adverse conclusions as to non-compliance were justified and what response to his case was and is appropriate. The Impugned Decision removes any chance for Dr Tattersall to have his NTN, and his 'clocked-up' credit, restored to him. It removes any chance for the following to be considered by a specialist Appeal Panel: whether the finding of non-compliance against him was justified; whether his position as to the alleged non-compliance stands to be vindicated; whether his criticisms of HEE are relevant and well-founded; his explanation of events and circumstances; his ASD diagnosis (and now ADHD diagnosis); whether his NTN should be restored; what should happen next and what views can appropriately be expressed. The impact and implications for Dr Tattersall – in removing all of this – are severe, brutal and arbitrary. The Impugned Decision was a response which was procedurally unfair, substantively unfair and unreasonable. Given the impact for education and livelihood, it was also an interference with his Article 8 ECHR rights to respect for his private life, which interference was unjustified and so unlawful.

41. This was a wholly exceptional case, which has been described by HEE itself as unprecedented (§19 above). The Impugned Decision involved invoking against Dr Tattersall a provision within GG8, an edition of the Gold Guide which had come into force only on 31.3.20. That was a one-year rule being applied to an extant appeal, 4½ years after the Appealed Decision (7.8.15) and the prompt commencement of the

Appeal (20.8.15). It was a decision which involved extinguishing an extant right of appeal, validly commenced. It involved taking that course, in reliance on the passage of time, as exceeding one year from the Appealed Decision. But the one year period had elapsed in August 2016. The Appeal was already 'historic'. It was 'historic' when adjourned by the Appeal Panel (5.9.16) specifically so that Dr Tattersall's appeal could be dealt with by merits determination by a Panel and in a procedurally fair way. It was 'historic' during the period when there was the consideration and resolution of the legal question raised by Ground of Appeal [1], namely as to the applicability of the Gold Guide. It was 'historic' when embodied in the Consent Order (17.5.19), a High Court Order which recorded that the Appeal would be pursued and determined. The 'historic' nature of the Appeal is a given, and has been accepted throughout. It and the passage of more than a year's delay from the Appealed Decision, cannot in these circumstances begin to justify the peremptory dismissal of the Appeal without convening an Appeal Panel and without that Panel determining the Appeal on its merits.

42. HEE's actions in the conduct of the Appeal could not lawfully, fairly or reasonably be regarded as constituting "reasonable endeavours to progress the appeal" as required by the Curtailment Provision. There were repeated failures to convene an Appeal Panel. It is wrong and unjustified to characterise HEE as having made every effort to accommodate Dr Tattersall. Instead, HEE erected blocks for Dr Tattersall to overcome. On the facts of this case, Professor Mamelok was moreover acting as a 'judge in her own cause'. It was not just that the Appeal was itself against a PD decision. It is also that Professor Mamelok had explained in correspondence that she intended to act in the role of a 'presenting officer' at the hearing of the Appeal before a Panel, presenting HEE's case in support of the Impugned Decision. That means she was effectively the 'prosecutor' in the Appeal which she then acted to extinguish.

43. So far as concerns Dr Tattersall's own conduct, it is wrong and unjustified for the Impugned Decision to characterise Dr Tattersall's actions as having thwarted the progress of the Appeal by HEE, or as having rendered the resolution of the Appeal impossible. There was no lack of engagement by or on behalf of Dr Tattersall. There was a response by Ms Alliston to each and every letter and email from HEE. Those responses, moreover, raised valid issues. Dr Tattersall maintained that he was pursuing the Appeal, throughout. There was never any indication of abandoning it. Dr Tattersall was always ready and willing for an Appeal Panel to be convened. He and Ms Alliston repeatedly asked Professor Mamelok to proceed. The position adopted, and the steps taken, by Dr Tattersall – through Ms Alliston – were reasonable. His engagement also needs to be seen in light of his diagnosis of ASD (and now ADHD), and his complicated life. As to the specific topic of an Occupational Health Assessment ("OHA"), referenced in the Impugned Decision, the position is this. Dr Tattersall legitimately needed reasonable notice of appointments. He was legitimately concerned that the final letter of referral was only belatedly provided. He was also legitimately concerned to discover that there had been prior discussion about the case between HEE and the OHA service provider. Next, as to the specific topic of information which was belatedly sought by HEE's solicitors, the position is this. There was no applicable rule which required that information to be provided. HEE was no longer Dr Tattersall's 'designated body' and the PD was no longer his 'responsible officer'. Dr Tattersall, now acting as a locum and not an HENW Trainee, was being regulated externally. This was not a "formal inquiry" or "complaints procedure" with which a practitioner has a duty of cooperation under the GMC's "Good Medical Practice" (at §72). This was Dr

Tattersall's appeal. But even if there were felt to be some ongoing regulatory concern about Dr Tattersall, that was itself a reinforcing reason as to why any merits questions needed a determination by an Appeal Panel.

44. Even putting all of that to one side, and even if there had been any lack of engagement by Dr Tattersall – and indeed however bad that non-engagement was said or perceived to have been – none of that could justify as lawful, fair and reasonable the course that was taken. HEE never wrote a 'firm but fair' letter saying what was required of Dr Tattersall for the Appeal to be determined on the merits. Instead, HEE went from a position which was not 'firm' to one which was not 'fair'. There was never a sufficient warning. HEE never gave Dr Tattersall a 'last chance'. It never brought matters to a head. It never gave a concrete date by which the Appeal was to be resolved. A 'firm but fair' position adopted by HEE would have galvanised Dr Tattersall into action. He would have been able to deal with the case and would have done so. That is evidenced by the way he engaged in other legal proceedings. He would have been galvanised by a firmer approach. After the Consent Order, HEE never convened a Panel or listed a hearing. The Impugned Decision ignored all of the less draconian alternatives. These included a merits-determination at a Panel hearing, convened promptly after gathering and collating relevant documents. Speed is achievable. Indeed, GG8 itself (at §4.173) describes merits-determination by a Panel as achievable within 6 weeks of an appeal. Other less draconian alternatives included a Panel hearing in Dr Tattersall's absence; determination on the papers (with or without Dr Tattersall's participation); and determination by reference to the original Grounds of Appeal (as they stood when a Panel was convened in September 2016). All of these alternatives were overlooked. Each would have involved merits-determination by a Panel. Each would have achieved promptness.

45. In all the circumstances, it was unlawful, unreasonable and/or unfair: to apply the Curtailment Provision in the way in which it was applied in the Impugned Decision; to conclude that there had been reasonable endeavours to progress the appeal; to rely on the passage of time; to fail to recognise the circumstances as exceptional; to fail to conclude that postponement was reasonable; and to fail to adopt a less draconian alternative.

Application: Events from Consent Order to Impugned Decision

46. In order to assess the legal merits of these arguments – and in considering the Impugned Decision (§§17-20 above) – it is, in my judgment, necessary and appropriate to examine with care and in detail what happened in the 20 month period between the Consent Order (17.5.19) and the Impugned Decision (26.1.21). I cannot agree with Mr Hawkin who advocated a broad-brush, high level approach to the communications. I agree with Mr Morgan KC that this head of challenge, regarding the application of the Curtailment Provision, can only properly be assessed by 'delving into the detail'. That is what I will now do. The position is fully documented in contemporaneous correspondence. For presentational reasons, I will summarise what happened by breaking it down into temporal chunks. I should make clear that I do not doubt that Ms Alliston was acting throughout in liaison with Dr Tattersall, and that the letters which she wrote were faithfully recording his position and reflecting his instructions.

47. Here is what happened in May 2019. The Consent Order was dated 17.5.19. Four days later (21.5.19), Professor Mamelok wrote to Dr Tattersall regarding the arrangements

for the Appeal. She said that an Appeal Panel would be convened in accordance with the Gold Guide, whose latest edition (GG7 31.1.18) now governed the Appeal. She explained that – given the passage of time, the change of role of the previous Panel Chair and the unavailability of other previous Panel members – she proposed to convene a new Appeal Panel. She explained that she was writing to give notice of the Appeal Panel hearing. She offered Dr Tattersall the opportunity to refresh and resubmit his grounds of appeal. She asked for his 'unavailability dates' between 1.9.19 and 30.11.19, to be provided by Dr Tattersall no later than 11.6.19. She referred to Dr Tattersall's recent diagnosis of ASD, recognising that this may impact on the appeal arrangements including "reasonable adjustments". She said that, if Dr Tattersall considered that "reasonable adjustments" may be needed, HEE would arrange an OHA to provide guidance on that aspect of the Appeal. She made clear that HEE's intention was for the Panel hearing of the Appeal to take place by 30.11.19 at the latest. That gave a full 6 months. Professor Mamelok gave Dr Tattersall a clear deadline of 11.6.19 (21 days) for a response as to whether reasonable adjustments were considered to be needed, any new grounds of appeal document, and his unavailability dates between 1.9.19 and 30.11.19.

48. This is what happened in June 2019:

i) Two weeks later, on 4.6.19 – 7 days before the deadline of 11.6.19 – Professor Mamelok wrote to Ms Alliston. She referred to the upcoming deadline (11.6.19) and explained that she wanted to give a "gentle nudge" to ensure that the requested response was received within that deadline. She pointed out that her letter (21.5.19) had indicated a Panel hearing window between September and November 2019 to give Dr Tattersall "plenty of time to prepare".

ii) A week later, on deadline day (11.6.19), Ms Alliston replied. She said that a full response to the letter of 21.5.19, including replacement grounds of appeal, had been delayed by Dr Tattersall's recent diagnosis of ASD. She said Dr Tattersall wanted to place on record his disappointment and unhappiness with HEE's handling of his situation, recording that he was feeling bullied and pressurised. She confirmed that Dr Tattersall did wish to progress the Appeal and was requesting arrangements for the Appeal to be heard. She said that Dr Tattersall was currently seeking professional advice and support. She confirmed that it would be necessary to consider reasonable adjustments and said it would be necessary for Dr Tattersall to have "legal support" during the Appeal as a reasonable adjustment. She said Dr Tattersall was agreeable to HEE consulting Dr Tattersall's psychologist with regard to what reasonable adjustments were necessary. She asked that reasonable adjustments be considered first, before other matters were progressed. That included any filing of any replacement grounds of appeal. She registered a concern at Professor Mamelok's proposal to act as 'presenting officer' at the appeal hearing. She requested consideration by HEE of mediation as an alternative option in moving matters forward. Pausing there, I interpose this. HEE had set a deadline, for three things. One had been provided: an indication that reasonable adjustments were being sought. The other two had not: any replacement grounds of appeal; and unavailability dates for September to November 2019.

iii) Professor Mamelok replied immediately, by email, the same day (11.6.19). She repeated that HEE required Dr Tattersall's availability in the appeal hearing

window September to November 2019. She repeated the request for any new grounds of appeal document "by return". She confirmed that Dr Tattersall could have his own legal support for the appeal hearing. She confirmed that the Appeal was being managed in accordance with the Gold Guide as required by the consent order.

iv) A week later (18.6.19) there had been no response. The availability dates and replacement grounds had still not been provided. Professor Mamelok wrote again. She repeated that arranging the hearing of the Appeal made it "essential" that HEE had Dr Tattersall's availability dates in the window September to November 2019. She dealt with the point that had been raised about her appearing in a 'presenting officer' role. She repeated that revised grounds of appeal had not been received and said that HTE was willing to extend the deadline to 2.7.19 (a further 14 days) for revised grounds of appeal (or confirmation that Dr Tattersall was content to rely on the original grounds of appeal) and his availability dates. She made clear that she wished to hear from Ms Alliston by 2.7.19 at the latest.

49. Here is what happened in July 2019:

i) Two weeks later, the second deadline day (2.7.19) arrived and passed, with no response. Professor Mamelok therefore sent an email promptly, early the next day (3.7.19). In it, she recorded that Dr Tattersall had not responded within the extended deadline of 2.7.19, to provide his availability dates and replacement grounds of appeal. Professor Mamelok said that HEE was sending "one final chaser" and if it had not received a response by 11.7.19 (a further week), HEE would "draw the matter to a close" and move to mediation.

ii) This provoked the following communications that same day (3.7.19). First, there was an immediate email (3.7.19) from Ms Alliston which recorded Dr Tattersall's position as being that his disability made the timescale being pursued, and the pressures being placed upon him by HEE, unreasonable. Ms Alliston recorded that no advice had yet been sought by HEE from Dr Tattersall's psychologist, on the question of reasonable adjustments. She requested that HEE should provide Dr Tattersall with funding for legal advice and representation. She asked for clarification about varying the composition of the Appeal Panel and about Professor Mamelok acting as presenting officer. She repeated that Dr Tattersall wished to consider mediation as an appropriate way forward. Secondly, there was a telephone conversation (3.7.19) between Professor Mamelok and Ms Alliston. Thirdly, there was an email from Professor Mamelok to Ms Alliston (3.7.19), requesting details of Dr Tattersall's psychologist so as to seek advice from them as to what reasonable adjustments might be required for the Appeal because of the stated disability. The letter gave an explanation of the appropriateness of Professor Mamelok acting as presenting officer at the appeal hearing.

iii) A week later, the latest deadline day (11.7.19) passed. No replacement grounds of appeal had been provided. No availability dates have been provided. It was in those circumstances that, four days later (on 15.7.19), Professor Mamelok wrote to Ms Alliston again. This letter recorded the requests that had been made and the deadlines that had been given. It referred to the time that had passed since the Appealed Decision and the need to progress the Appeal. Having made no progress in relation to reasonable adjustments in the light of the recent diagnosis

of ASD, Professor Mamelok stated that HEE would now adopt a different course: HEE would itself arrange the OHA, for Dr Tattersall to attend. The doctor conducting the OHA would, if necessary, be able to seek information from Dr Tattersall's treating psychologist. To that end, Dr Tattersall's availability dates for the OHA, over the next two months, were required. A new deadline of 29.7.19 (14 days) was given for the supply of those availability dates. As to mediation, the letter emphasised that the Consent Order had provided for mediation to take place after the Appeal.

iv) On the eve of the latest deadline day (29.7.19), Ms Alliston wrote by email (28.7.19) setting out Dr Tattersall's position. It was that HEE was adopting an approach which was "bullying and unreasonable". There was a restatement of Dr Tattersall's wish to proceed first to mediation. As to the OHA appointment, availability dates from 2.9.19 to 19.10.19 were provided. The email said that Dr Tattersall was requesting sight of any OHA referral beforehand "so that he can be aware if appropriate questions are asked". The email said that Dr Tattersall wished to be accompanied at the OHA appointment.

v) Two days later (30.7.19), Professor Mamelok replied. She recorded HEE's concern that Dr Tattersall was criticising its approach to the Appeal as being bullying and unreasonable. She emphasised that HEE had "repeatedly" stated that the Appeal should be moved forward in a "timely" way. She reiterated that under the Consent Order mediation was to follow after the Appeal had been dealt with. She wrote that further delay would be prejudicial to any re-entry to Training should the Appeal succeed. She said it was "imperative" that HEE "either progresses the appeal without further delay or draws it to a close". She said that Dr Tattersall had already exceeded the time within which a Trainee would normally be permitted to return to specialty Training. She said that HEE had communicated with Dr Tattersall promptly and properly and had endeavoured to progress the Appeal. She emphasised that HEE had noted Dr Tattersall's concerns and HEE was committed to considering reasonable adjustments. She said that HEE would now itself arrange an OHA appointment in line with Dr Tattersall's stated availability providing suggested dates and times. She asked that Dr Tattersall provide his replacement grounds of appeal by a new deadline of 14.8.19 (14 days), which would support HEE's attempts to progress the Appeal without unnecessary delay. She reiterated the need for availability dates for the appeal hearing, giving a new time window for the appeal of 1.9.19 to 31.1.20.

50. Here is what happened in August 2019:

i) Professor Mamelok promptly (1.8.19) emailed Ms Alliston a link for the OHA provider and attached a copy of the draft referral so that it could be run past Dr Tattersall.

ii) Four days later (5.8.19), Professor Mamelok emailed Dr Tattersall direct. She had emailed Ms Alliston but had received an out of office reply saying Ms Alliston was away until 7.8.19. In her email to Dr Tattersall, Professor Mamelok gave details of an OHA appointment which could be secured for 2pm on 17.8.19, which HEE would underwrite at a cost of £2,000. In this email, Professor Mamelok said "please forgive the direct approach but I have received an out of office email from Joanne Alliston at the BMA and if I am to progress this I would

need a response before her return on 7 August 2019". The email confirmed that Dr Tattersall would be able to be accompanied at the OHA appointment.

iii) This email met with an immediate response from Dr Tattersall (5.8.19). He emphasised that Professor Mamelok had been asked not to contact him directly in light of the distress which it caused him given his recent diagnosis. He complained that there appeared to be no genuine need for the direct contact. He said he wished to make a formal complaint. He described Professor Mamelok's email (5.8.19) as an attempt to make him agree HEE's plans without being properly advised. On 7.8.19, Professor Mamelok apologised for the direct email, explaining that it had been sent in good faith because of the timescales of the OHA appointment and because an out of office response been received from Ms Alliston. Professor Mamelok confirmed that the formal complaint would be passed on, as it was. I interpose this. In due course, an investigation report was produced which elicited an email from Ms Alliston (4.11.19) in which Dr Tattersall was recorded as accepting Professor Mamelok's apology.

iv) By 7.8.19 it was said in her out of office email response that Ms Alliston was returning to the office. The latest deadline date was 14.8.19, as set in the letter of 30.7.19, for any replacement grounds of appeal and of available dates for the hearing. That deadline date arrived. No grounds of appeal were received. Nor were any availability dates for the hearing of the Appeal. In those circumstances, Professor Mamelok sent an email (14.8.19) referring to the deadline and asking whether a response was going to be forthcoming.

v) There was no response to that email. Five days later (19.8.19), Professor Mamelok wrote once again. She highlighted the need for Dr Tattersall to respond to her repeated requests for information in relation to the arrangements for the Appeal. She highlighted the consequences of not responding. She reiterated the requests most recently made in the letter of 30.7.19. She recorded that HEE had not received any response to that request, for any finalised grounds of appeal together with availability dates for the new and later Panel hearing window (September 2019 to January 2020). She said this: "we would like to provide Dr Tattersall with a final opportunity to provide his grounds of appeal and dates of unavailability to attend an appeal between 1 September 2019 and 31 January 2020". She gave yet another deadline, this time of 3.9.19 (a further 14 days). Professor Mamelok said that if the requested information had not been received by that date, HEE would rely on the grounds of appeal way already provided and arrange to fix a hearing of the Appeal.

51. Here is what happened in September 2019:

i) The latest deadline day was 3.9.19. It expired, and the requested information was not provided. On 4.9.19, at Ms Alliston's request, there was a telephone call between Professor Mamelok and Ms Alliston. In it, Ms Alliston suggested that Dr Tattersall give his broad availability for an Appeal Panel hearing to be held in January 2020 or February 2020. She explained that Dr Tattersall would wish to replace the original grounds of appeal. She said that Dr Tattersall was unwell and not coping well with his diagnosis and its impact. She said that she would provide a response (in the present week) to the letter of 19.8.19.

ii) On 13.9.19, Ms Alliston provided her substantive response to Professor Mamelok's letter of 19.8.19. In it, Ms Alliston recorded that Dr Tattersall was currently feeling too unwell to focus and concentrate on the Appeal and the ongoing correspondence. She said that HEE's actions and requests for information were causing a significant risk to his health. She asked that Dr Tattersall "be allowed reasonable time to consider and respond appropriately once he has sought any professional advice necessary". She repeated an earlier request that HEE should provide funding for legal support. Ms Alliston recorded Dr Tattersall's agreement that an independent OHA was required. She said Dr Tattersall was willing to attend such an appointment on a Saturday in London, being available on alternative weekends, but would need to ensure he was available to attend on any specific date. She attached a track changes 'mark-up' version of the draft referral which Professor Mamelok had provided on 1.8.19, asking that a copy of the updated referral letter be provided before any arrangements were made with an OHA provider. As to grounds of appeal, she said Dr Tattersall was too unwell to review the original grounds or provide an updated version, while his request for HEE-funded legal representation was outstanding. Professor Mamelok replied the same day (13.9.19) to acknowledge this letter.

52. This is what happened in October 2019:

i) Three weeks later (3.10.19), Professor Mamelok sent a substantive response to Ms Alliston's letter of 13.9.19. She expressed HEE's sympathy for Dr Tattersall's situation, emphasising however that it was in his interests to move forward with the Appeal in a timely way. She communicated that HEE would postpone the hearing of the Appeal until the OHA and information about reasonable adjustments had been received. In order to progress the OHA, she put forward a new way of dealing with that matter. This would involve Dr Tattersall or the BMA on his behalf making the OHA booking arrangements themselves, directly with the independent provider. HEE would reimburse Dr Tattersall's travel expenses and pay the independent provider's fees. Professor Mamelok confirmed that she had amended the referral in accordance with the track changes 'mark-up' comments and said the finalised referral would be provided with the other documentation needed when booking the OHA appointment. The letter went on to give HEE's reasons for declining to provide funding for legal assistance. It reiterated the concerns that had been expressed regarding further delays to the appeal process. It identified, as an alternative way forward, that the Appeal could be heard in Dr Tattersall's absence with the BMA presenting Dr Tattersall's case on his behalf.

ii) More than three weeks passed, with no response to Professor Mamelok's letter of 3.10.19. And so, on 29.10.19, Professor Mamelok wrote a further letter. She reiterated the contents of the letter of 3.10.19. She recorded that HEE had "not heard from you as to how Dr Tattersall wishes to proceed" and HEE was therefore unable to progress the various matters. She recorded that HEE had agreed to fund an independent OHA, to determine what reasonable adjustments might be required for the appeal process which was currently postponed. She recorded that this had not been progressed and that HEE had not received confirmation of Dr Tattersall's willingness to engage in that process and adopt

that new approach of making an OHA appointment direct. She emphasised that HEE needed confirmation from Dr Tattersall to implement appropriate supportive measures (reasonable adjustments). Professor Mamelok stated that the Appeal could not be postponed indefinitely and that HEE would need to see some evidence that Dr Tattersall was engaging with the process. She gave a new deadline, asking for confirmation by 12.11.19 (14 days) that the information had been passed to Dr Tattersall.

53. This is what happened in November 2019:

i) Six days later (4.11.19) Ms Alliston wrote to acknowledge that the appeal hearing was being postponed until the OHA and reasonable adjustments had been resolved. She said that Dr Tattersall remained agreeable to undertake the proposed assessment "over the coming months". She said Dr Tattersall was willing to make the necessary arrangements directly with the OHA provider. She said she awaited the updated referral letter. She asked for HEE to reconsider the request to fund Dr Tattersall's legal assistance.

ii) The next day (5.11.19) Professor Mamelok wrote acknowledging Dr Tattersall's agreement to schedule the OHA appointment directly. She said that she would now proceed to make the necessary arrangement to progress the OHA.

iii) Two weeks later (20.11.19), Professor Mamelok wrote to say she had now spoken to the independent OHA provider and clarified the issues with the provider. The letter recorded that the purpose of the OHA was to assess Dr Tattersall's fitness to prepare for and participate in the forthcoming appeal and to advise on reasonable adjustments. She listed the information which would be required by the OHA provider. She confirmed that the "agreed referral letter" had been provided to the OHA provider. She asked Ms Alliston to pass on the required information so that Dr Tattersall could provide it direct when booking the OHA. She gave the contact details. I interpose that the reference to the "agreed" referral letter followed on from what had been said (3.10.19) in confirming that the referral had been amended in accordance with the track changes 'mark-up' comments.

iv) Six days later (26.11.19) Professor Mamelok emailed to confirm that there would need to be two OHA appointments and asked that Dr Tattersall now confirm his availability and book the OHA appointment slots direct.

54. Here is what happened in December 2019 and January 2020:

i) Two months passed. Then on 31.1.20, Ms Alliston wrote a letter which referred to the "recent" correspondence. She said she was now in a position to provide an "initial" response. She referred to the letter of 20.11.19. She said that, although the "agreed referral letter" was described as having been sent to her by Professor Mamelok, on her "review of the correspondence" it "would appear" that Ms Alliston had yet to receive a copy of the updated referral letter. She requested a copy. She said that Dr Tattersall "is keen to engage" with the OHA provider and "is in the process of considering what additional information he has available to share as part of the assessment process". She said that, before sending that information to the OHA provider, Dr Tattersall "would like to consider the details of the referral letter".

ii) I interpose that this was a striking position for a number of reasons. Two months had been allowed to pass. There was no indication that Dr Tattersall had done anything at all to progress matters. It was now being said – for the first time – that the "agreed referral letter" referred to in the letter of 20.11.19 had not been received. It was also being said that Dr Tattersall would need to "consider" the "details" of the referral letter, even though it had twice been confirmed (3.10.19, 31.1.20) that it was the "agreed" referral letter amended in accordance with the track changes mark-up (13.9.19). And it was being said that Dr Tattersall was in the "process" of "considering" the sharing of "information".

55. This is what happened in February 2020:

i) Four days later (3.2.20), Professor Mamelok wrote to Ms Alliston recording that a copy of the agreed referral letter had been sent to Ms Alliston in November 2019, but sending a further copy.

ii) Four days after that (7.2.20), Ms Alliston wrote maintaining that the referral letter had been received for the first time, and not in November 2019. Ms Alliston said it was now necessary to meet with Dr Tattersall and that they would then revert.

iii) I interpose that this is another striking position for a number of reasons. Ms Alliston and Dr Tattersall could see the "agreed referral letter". They knew the terms of the draft referral letter provided 6 months earlier (1.8.19). They knew the terms of Dr Tattersall's track-changes 'mark-up', provided 6 weeks later by Ms Alliston (13.9.19). They knew this had twice been described (13.9.19, 20.11.19) as the "agreed referral letter" amended in accordance with the track changes mark-up. Ms Alliston had been reviewing this correspondence. There was no suggestion – and I add that there has been no subsequent suggestion – that the terms of the "agreed referral letter" were other than what had been agreed based on the 'track-changes'.

iv) It was at this point (on 7.2.20) that Professor Mamelok wrote a separate letter which specifically drew Ms Alliston and Dr Tattersall's attention to the Curtailment Provision. She explained that the new Gold Guide (GG8) had been approved, to take effect from 31.3.20. She referred to there being some urgency, to progress the case. She said that she would not wish unreasonably to apply the Curtailment Provision. Her solution was that she would be willing to treat the "starting point for the one-year time limit" as having been "reset" as 17.5.19 (the date of the Consent Order). That would mean the Appeal "must be heard no later than 17 May 2020". Professor Mamelok emphasised that the Appeal had already been deferred. She emphasised that Dr Tattersall had been out of his specialty Training programme for just over 5 years. She said that, irrespective of the reasons for the delay and the need to make reasonable adjustments, it was not in Dr Tattersall's interests or those of HEE to allow the Appeal to run on indefinitely. She said she considered that the Appeal should be heard "no later than the end of June 2020". She said it was now "imperative" to make provision for the appeal. She asked for confirmation that Dr Tattersall had made the arrangements for the OHA.

56. Here is what happened in March 2020 to May 2020.

i) Five weeks passed. There was no response to say that Dr Tattersall had made the arrangements for the OHA. It was now mid-March 2020. The Appeal was due to be heard by the end of June 2020.

ii) Then the Covid-19 pandemic hit. People were by now being asked to stop non-essential contact and travel (19.3.20). Then the first national lock-down was announced (23.3.20). Work was done from home where possible. Meetings and appointments were held remotely.

iii) Two months into the pandemic (19.5.20), Ms Alliston wrote, apologising for the delay and referring to the unprecedented Covid situation. She said that, having now spoken to Dr Tattersall and having reviewed the most recent correspondence, there were "several points" to raise and "consider further". First, there were said to be concerns about how the referral had been managed by HEE. I interpose that no concern was raised about the terms of the "agreed referral letter". Dr Tattersall was said to be concerned that there had been conversations between HEE and the OHA provider which could potentially jeopardise the provider's ability to act independently. I interpose that: (1) this was a reference to what had been said in the opening sentence of a letter written 6 months earlier (20.11.19), in which Professor Mamelok had said she had spoken to the independent OHA provider to clarify the issues; and (2) no concern or question had ever been raised after 20.11.19, including in the letters of 31.1.20 and 7.2.20. Secondly, Covid had made it impossible for Dr Tattersall to travel to London for the OHA and an online consultation was said to be "likely to cause him difficulty" and not "ideal" in the "circumstances". Thirdly, a hearing of the Appeal by the end of June 2020 was clearly not going to be possible, nor Dr Tattersall's preparations for such an appeal. Fourthly, it was said that HEE should not now convene a new Appeal Panel but reconvene the old panel. I interpose that this was a new disagreement with the position described a year earlier (21.5.19). Fifthly, it was now said that rather than identifying reasonable adjustments, the (original) Appeal Panel should be convened and the question of what reasonable adjustments were considered necessary was a question which should be considered by the Panel.

iv) Professor Mamelok responded the same day (19.5.20). She acknowledged the impact of Covid, that the process would be paused and on hold, and that the June deadline for the appeal hearing had been rendered redundant. She recorded that HEE remained committed to moving this matter on as soon as practically possible was normal business assumes.

57. This is what happened in June 2020:

i) Three weeks later (9.6.20) Professor Mamelok wrote to Ms Alliston. She referred to the practical position after the passage of time. She reiterated the concerns that the Appeal might now be futile. She referred to the Curtailment Provision. She reiterated the timelines, referring to attempts to progress the appeal process and bring the matter to a close in a timely way, and to the reasonable endeavours to progress the Appeal. She referred to Dr Tattersall's failure to progress the OHA which had frustrated bringing the matter to a timely close. Regarding the pandemic and the June 2020 deadline set for determining the Appeal, she said that only 4 months could reasonably be attributed to the impact of the pandemic. She emphasised that it remained important, for all involved, that the appeal

hearing be completed within a reasonable period when usual business resumed. Against that backcloth, Professor Mamelok said that she considered it reasonable to extend the one-year time limit in the Curtailment Provision for 4 months due to the impact of the pandemic. She gave as the new deadline by which the Appeal "must be concluded" as 31.10.20 "at the latest". She made clear that she considered it "unlikely" that any further extension "will be allowed'. She asked for a response and confirmation by 23.6.20 (2 weeks) that Dr Tattersall wished to continue with the Appeal.

ii) I interpose, pausing there, that the position as at 6.6.20 was very clear. After several earlier deadlines, Professor Mamelok was identifying what she was characterising as an intended final extension for the disposal of the Appeal, by the end of October 2020 at the latest. The 4 month period (March 2020 to June 2020) would be written off as attributable to the pandemic. This gave a window of time of nearly 5 months. Attention had specifically been drawn to Dr Tattersall's failure to progress the OHA (whose purpose was to elicit advice as to reasonable adjustments). Dr Tattersall knew that he could put in replacement grounds of appeal if he wished. It had been indicated that he wished to take that course, but that these had never been provided. He knew that this was an important stage. He had specifically been made aware, and then reminded, of the Curtailment Provision.

iii) On the day which Professor Mamelok had set for a response (23.6.20), Ms Alliston wrote setting out Dr Tattersall's position. The letter raised a host of points. They included the following. (1) It was unreasonable to have expected a response by 23.6.20. (2) HEE had refused to make reasonable adjustments. (3) Dr Tattersall now wished to discuss arrangements for the hearing of the Appeal with the Chair of the Appeal Panel, not with Professor Mamelok, to ensure "impartiality". (4) It was unreasonable to be asked repeatedly whether Dr Tattersall wished to continue with the Appeal, a wish which he had confirmed. Dr Tattersall did not regard the Appeal as futile and wished to move forward with arrangements. (5) The reason why the Appeal had not been heard was largely due to the failures of HEE when originally convening an Appeal Panel in 2015/2016. (6) There were concerns as to Professor Mamelok's position, in having a presenting officer role at the hearing of the Appeal. (7) Dr Tattersall did not accept the applicability of GG8 or the Curtailment Provision. HEE's attempts to rely on the Curtailment Provision as applicable raised concerns of potentially deliberate delays to the Appeal process by HEE, in the hope that Dr Tattersall would withdraw the Appeal. (8) The original Appeal Panel should be reconvened, not a new Panel convened. (9) HEE had not made reasonable attempts to progress the Appeal in a timely fashion. (10) Dr Tattersall was concerned that references to the "utility" of the Appeal suggested that the hearing would not be fair. (11) The OHA had not taken place, and the reasons for this were HEE's failure to agree a letter of instruction to the provider and HEE's actions in having conversations with the provider without Dr Tattersall's knowledge or agreement. (12) Although Dr Tattersall remained willing to attend an OHA, it may be more appropriate for the Appeal Panel to consider requests for reasonable adjustments.

58. This is what happened in July 2020. A month later (28.7.20) a letter was written on behalf of HEE by its solicitors (Hill Dickinson) to Dr Tattersall. They explained that

they were instructed in connection with HEE's attempts to progress the Appeal. They said that, despite extensive efforts on the part of HEE, it had not been possible to progress the Appeal. They referred to the Curtailment Provision. They referred to tolerance and indulgence which HEE had shown, to secure Dr Tattersall's participation in bringing the Appeal to a satisfactory conclusion. They referred to reasonable requirements, about Dr Tattersall's participation in an OHA, to identify reasonable adjustments. They referred to his failure to attend OHA appointments. They explained that HEE was now giving consideration to the listing of the hearing of the Appeal. They referred to the passage of 6 years since Dr Tattersall's last participation in any form of Training, and the fact that HEE was no longer his designated body and the PD no longer his responsible officer. They said that, in order to discharge HEE's regulatory obligations and ensure that relevant materials were available to the appeal process, Dr Tattersall was required to provide information under a number of heads. These were: clinical positions held; retention of GMC registration; any investigation or proceedings; any criminal prosecution or conviction; any finding or determination by regulatory body, court or tribunal (with any details); periods of sickness or absence (with any details); and any circumstances which might impact on the ability to enter into or complete Training. Hill Dickinson's letter explained that upon receipt of the information HEE would give consideration to the progress of the Appeal and any additional measures that may be required to facilitate its conclusion. Hill Dickinson asked, recognising that Dr Tattersall had stipulated that he would not correspond directly with HEE, that a response should be to them as HEE's solicitors.

59. Here is what happened in August 2020:

i) A month later (28.8.20) Ms Alliston responded to Hill Dickinson, as follows. Dr Tattersall welcomed the listing of the Appeal. He remained willing to participate in an OHA. It was then said that:

> ***arrangements for assessments at short notice and without consideration of Dr Tattersall's work and family commitments has previously led to cancellations and further delays in an [OHA] being completed.***

Ms Alliston then said "for the record" that the "referral" had been sent to the OHA provider without being shared for Dr Tattersall's consideration. She referred to HEE's communications with the provider which had "led to a breakdown in Dr Tattersall's confidence in the independent OHA provider". She repeated that the Appeal Panel should consider what course was appropriate in relation to reasonable adjustments. So far as the requested information was concerned, none of this was provided. Instead, its relevance was questioned. Dr Tattersall wanted clarification of how it was relevant and why it was required at this stage.

ii) I interpose that the passage which I have quoted from this letter (28.8.20) is striking as a description of actions relating to an OHA which were being said to have "led" to "delays". The post-hearing witness statement of Dr Tattersall (5.6.23) says the reasons why an OHA was not obtained are "explained in the correspondence". As Mr Morgan KC pointed out, there is only evidence of one arrangement made by HEE for an OHA which led to a cancellation. That was the appointment which HEE identified to take place on 17.8.19, communicated direct to Dr Tattersall in Professor Mamelok's email of 5.8.19.

60. This is what happened in September and October 2020. Five weeks later (2.10.20), Hill Dickinson replied, responding to the query as to the relevance of the information sought. They apologised for the delay, explaining that Professor Mamelok had been away from work with ill health. Hill Dickinson said that effectively managing the appeal process meant that various questions required consideration. More than 6 years had elapsed since Dr Tattersall had participated in any form of Training. HEE would need to consider the information in addressing whether it was appropriate to continue with the appeal process.

61. Here is what happened in November and December 2020.

    i) A month later (3.11.20), Ms Alliston replied. She repeated that Dr Tattersall wished for the hearing of the Appeal to take place. Recognising that the end of October 2020 had now passed, she submitted that for the purposes of GG8 and the Curtailment Provision there were exceptional circumstances. She said Dr Tattersall was concerned: that the information being requested was an attempt to avoid a hearing of the Appeal taking place; that the information did not have any specific relevance to the issues on the Appeal, and that the Appeal should now be heard.

    ii) A week later (12.11.20), Hill Dickinson confirmed that HEE would now "review the information available to consider whether it continues to be both reasonable and proportionate to progress with Dr Tattersall's appeal".

    iii) On 18.12.20, Ms Alliston asked for an update and repeated Dr Tattersall's request that the original Appeal Panel now be reconvened. The same day (18.12.20), Hill Dickinson replied to confirm that the review was being undertaken. That completed the sequence of events when the Impugned Decision (§§17-20 above) was made and communicated.

Application: My Analysis

62. I have identified the essence of the arguments on behalf of Dr Tattersall (§§40-45) above). But I am unable to accept them. In my judgment, viewed in the light of an appreciation of the sequence of events and communications after the Consent Order (§§47-61 above), it is clear that the reasoned Impugned Decision (§§17-20 above) was lawful, reasonable and fair.

63. The Impugned Decision rightly recognised the applicability of the Curtailment Provision. I have already made and explained my findings that this was in law correct. The Curtailment Provision was lawful and was in law applicable. It required consideration of whether the Appeal had not taken place within a year of the decision date, a criterion which was plainly satisfied. Professor Mamelok drew the Curtailment Provision to Ms Alliston and Dr Tattersall's attention (letters of 7.2.20 and 9.6.20). Dr Tattersall contested the applicability of the Curtailment Provision (letter of 23.6.20).

64. The Curtailment Provision required consideration of whether there had been reasonable endeavours to progress the Appeal. In the Impugned Decision, Dr Mamelok concluded that there had been reasonable endeavours – on the part of HEE – to progress the Appeal. That conclusion, in my judgment, was fully justified. It was lawful, reasonable and fair. Dr Tattersall's contention (letter of 23.6.20) that HEE had not made

reasonable attempts to progress the Appeal in a timely fashion was unfounded. The detailed sequence of events that I have set out reflects repeated, conscientious and transparent attempts to bring the appeal to a conclusion. It involved clear requests for information. It involved clear deadlines. It involved several attempts, by different means, to have an OHA produced, so that the question of reasonable adjustments could be addressed.

65. The Curtailment Provision required consideration of whether a further postponement would be reasonable in the exceptional circumstances. Professor Mamelok had (as foreshadowed by her letter of 7.2.20) decided that she would treat the one year as beginning on 17.5.19. She had then decided (letter of 9.6.20) to grant a further reasonable postponement in exceptional circumstances because of the pandemic, giving a new deadline for the Appeal to be disposed of by 31.10.20. On behalf of Dr Tattersall, it was contended (in Ms Alliston's letter of 3.11.20) that there were exceptional circumstances justifying a further extension. In the Impugned Decision, Professor Mamelok rejected that contention. In my judgment, that decision was lawful, reasonable and fair.

66. I find it helpful to test the position by considering various things that were being asked of, and offered to, Dr Tattersall. First, Dr Tattersall had been given the opportunity to provide replacement grounds of appeal, if he wished to do so. That was raised from the very beginning (letters of 21.5.19, 30.7.19, 19.8.19). It was made clear on his behalf that he would wish to take that course (telephone call of 4.9.19, letter of 13.9.19). A request for HEE to provide funding for legal advice and representation had been made (email of 3.7.19, letter of 13.9.19) but this had been refused (letter of 3.10.19). That refusal was lawful, reasonable and fair. Replacement grounds of appeal were never provided, in the entirety of the period between May 2019 and October 2020. That is notwithstanding that Dr Tattersall was being assisted throughout by the same representative (Ms Alliston) who had drafted the original grounds of appeal on (20.8.15). They had been formulated and filed within 13 days of the Appealed Decision (7.8.15). Secondly, Dr Tattersall had been asked for availability dates. At no stage, notwithstanding repeated deadlines, had he ever given availability (or unavailability) dates for a hearing of the Appeal. Thirdly, Dr Tattersall was being asked to do his part to ensure that an informed decision could be taken about reasonable adjustments. From the start (letter of 21.5.19) HEE said it would arrange an OHA to inform that aspect of the Appeal. From July 2019 HEE sought to progress the OHA by making the arrangements for the appointment (letters of 15.7.19, 30.7.19). From October 2019 HEE sought to progress the OHA by Dr Tattersall or the BMA making the OHA appointment direct (letters of 3.10.19, 29.10.19). The importance and urgency of this was obvious and repeatedly emphasised. It was never actioned by Dr Tattersall. He later raised a number of different reasons, at different times, which were said to explain or excuse this. But none did. Apart from his giving dates (email of 28.7.19) for an OHA appointment between 2.9.19 and 19.10.19, and his providing his track changes 'mark-up' of the referral letter (13.9.19), there is no evidence that Dr Tattersall did anything or took any step. He later sought at various times, unconvincingly and strikingly, to attribute this to actions in fixing appointments, to what had happened with the agreed referral letter, and to what happened with a communication between Professor Mamelok and the OHA provider, and finally to argue that all of this should await the convening (or reconvening) of an Appeal Panel.

67. The position is a stark one. Dr Tattersall repeatedly said that he wanted to pursue the Appeal. But I cannot find in the evidence that was before HEE in making the Impugned Decision, nor for that matter in the evidence for this Court, any single concrete act constituting substantive progress of the Appeal on his part. He wanted replacement grounds of appeal but never provided them. He wanted reasonable adjustments but never made or attended any OHA appointment so these could be identified, even when a provider was identified, even when HEE funding was confirmed, and even when a referral letter was "agreed". He did not provide HEE with any description of any step or attempt.

68. Then, when 'compliance' information was sought by Hill Dickinson (letter of 28.7.20), Dr Tattersall's approach was twofold: to question its relevance; and to fail to provide it. The information sought was appropriate and relevant. Because HENW was no longer Dr Tattersall's Competent Authority, and because he had been away from Training for so long (6 years), there was an information gap as to 'regulatory' aspects, whose nature I explained at the outset (§6 above). The Appeal was being pursued by Dr Tattersall to get his Training position back on track (§§14-15 above). The "utility" of the appeal had squarely been raised by HEE. A decision needed to be taken about 'where next' for the Appeal. The circumstances as to Dr Tattersall's regulatory position, which HEE would ordinarily have known, were capable of being part of the circumstances. The questions asked were straightforward and could readily have been answered by Dr Tattersall. He chose not to do so and to take a stand which declined to accept their relevance.

69. There are a number of relevant strands to what had happened. The grounds of appeal were apt for clarification and elaboration. Dates had appropriately been sought. Successive deadlines had appropriately been set. The OHA was appropriate, as a prompt next step, to identify reasonable adjustments. The one year was fairly and reasonably 'reset' to June 2020. A four-month extension was reasonably and fairly provided, to October 2020, in the context of the pandemic. The requirements which were identified, and the steps of engagement which were needed, constituted action which was both "firm" and "fair". But it was also fruitless. It met with inaction and inertia, resistance and complaint. I accept Mr Morgan KC's submission that, once the detailed sequence of events is considered and understood, the clear picture is that Dr Tattersall was the author of the lack of progress of the Appeal. And it is not as if there was from his engagement some limited, but appreciable, progress of the Appeal since May 2019. The truth is that there had been no progress at all.

70. It was also, in my judgment, lawful for the Impugned Decision to be informed by concerns about apparent utility. Dr Tattersall's last clinical Training was back in 2010. His last (non-clinical) Training was back in 2014. If the apparent utility of the Appeal had been strong, that would have been a consideration which could lawfully be regarded as relevant in the exercise of a discretion in his favour. But, by the same logic, the obvious and legitimate concerns about the apparent utility being weak were a factor which it was proper to have in mind.

71. There was no unlawful, unreasonable or unfair failure to adopt a 'less draconian' alternative course. At no stage did Dr Tattersall say that he wished for the hearing of the Appeal to go ahead on the existing grounds of appeal. He did not take up the suggestion (letter of 3.10.19) that the hearing could go ahead in his absence, with his BMA Representative making points on his behalf . It is, in my judgment, obvious that had the Appeal been kept alive through a further "exceptional circumstances"

extension, a further significant further period of time would have ensued. Dr Tattersall would have maintained – as he was maintaining – that reasonable adjustments needed to be identified and then implemented. He would have wanted to make and marshal argument and evidence. Mr Hawkin points to GG8 §4.174 which refers to an appeal being "dealt with on written submissions". That is a course described as available "if the Trainee agrees". But it is obvious that Dr Tattersall did not agree and would have protested. And even leaving that to one side, there would have been a need for the "written submissions". All of this arises in a case in which the setting of deadlines and the urging the importance of expeditious resolution had all been repeatedly tried. In my judgment, in all the circumstances and for all these reasons, the application of the Curtailment Provision was fully compatible with public law standards.

Other Proceedings

72. There is a footnote to my analysis on this topic. As part of his argument, Mr Morgan KC invited me to have regard to a parallel sequence of events which arose in relation to various other proceedings in which Dr Tattersall had been involved. I accept Mr Hawkin's submission that the parallel sequence of events does not assist me, in circumstances where it cannot be shown that Professor Mamelok was aware of it or was relying on it in the Impugned Decision. I have put it to one side. I add this. There was a specific factual point which arose at the substantive hearing. It arose out of what was recorded in a judgment (28.2.22) of the Employment Tribunal in Tattersall v Southport and Ormskirk Hospital NHS Trust Case No. 2411032/20 at §§32 and 34. The question was whether that Tribunal had a report on 'reasonable adjustments' (dated "30.5.19"). On that question, I accept Dr Tattersall's explanation in his witness statement (5.6.22), that there was a typo and this was a reference to the 'ASD diagnosis' (dated "13.5.19").

CONCLUSION

73. For the reasons I have given, I am unable to accept any of the arguments advanced on behalf of Dr Tattersall. I am satisfied that there is no ground, in the application of public law standards, on which the Impugned Decision falls to be overturned. The claim for judicial review is dismissed.

74. Having circulated this judgment as a confidential draft, I am able to deal here with the two consequential matters arising. First, costs. Excluding the adjourned hearing of 22 July 2022 – as to which there is no order as to costs – I order that Dr Tattersall pay HEE's costs of and incidental to the proceedings, to be the subject of detailed assessment on the standard basis, if not agreed. Pursuant to CPR 44.2(8), I order that Dr Tattersall pay HEE the sum of £10,000 (including VAT) on account of costs, within 28 days. HEE has succeeded in the proceedings and is, in my judgment, entitled to these orders. I agree with both parties that provision for a detailed assessment is appropriate. There is no good reason to decline to order a payment on account – it is not "wrong and unfair" as Dr Tattersall submits – and the sum is reasonable in all the circumstances, as is the extended period of 28 days (instead of 14 days under CPR 44.7). The points raised by Dr Tattersall do not justify a different order, in particular: (a) that the proceedings would have been avoided if HEE had considered the Appeal on its merits; (b) that documents disclosed by HEE required considering; (c) that HEE relied on decisions and judgments in other proceedings (§72 above); or (d) Dr Tattersall's ASD and ADHD. That leaves permission to appeal. Dr Tattersall asks me to grant permission on the basis that there is an issue of general public importance, with a reasonable

prospect of success in the Court of Appeal. It is whether an appeal curtailment provision of this nature can ever be lawful, reasonable and fair, given the less draconian merits-determination alternative always available. I refuse permission to appeal. My assessment is that an appeal would not have a real prospect of success; nor is there any other compelling reason for an appeal to be heard.