Case Numbers: 3201328/2017 &
3200136/2018

JJE/MF

EMPLOYMENT TRIBUNALS

Claimant: **Ms E Osei**

Respondent: **Basildon & Thurrock University Hospital NHS Trust**

Heard at: **East London Hearing Centre**

On: **15 - 18 May & 23 May (In Chambers) 2018**

Before: **Employment Judge Brown** **Members: Mr T Burrows**
Ms H Edwards

Representation

Claimant: **Mr M Maitland-Jones (Counsel)**

Respondent: **Ms K Fudakowski (Counsel)**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The Respondent victimised the Claimant by Mr Shah's conduct on 16 June 2017;

(2) It is just and equitable to extend time for the Claimant's complaint of victimisation in that regard;

(3) The Claimant's other complaints against the Respondent, of race discrimination, harassment and victimisation in relation to the actions of Mrs Archer, Miss Woodley, Mrs Eastell, Mrs Blackboro, Ms Adegunle, Mr Shah and Dr Sharma on 5 June 2017, fail and are dismissed;

(4) The Respondent did not constructively dismiss the Claimant.

(5) The Remedy Hearing will proceed on 1 October 2018 in respect of the Claimant's successful claim of victimisation regarding Mr Shah's conduct on 16 June 2017.

The majority decision of the Employment Tribunal (Ms Edwards and Mr Burrows) is also that:-

(5) Dr Sharma did not subject the Claimant to race discrimination or harassment on 6 June 2017.

The minority decision of the Employment Tribunal (EJ Brown) is that:-

(6) Dr Sharma subjected the Claimant to race harassment or race discrimination on 6 June 2017.

REASONS

Preliminary

1. The Claimant, a nurse, brought complaints of direct race discrimination, race harassment, victimisation and constructive unfair dismissal, against the Respondent, her former employer. The parties had agreed the issues for the Tribunal to determine. They were as follows:-

> "**DISCRIMINATION**
>
> ***Jurisdiction***
>
> 1. The Respondent accepts that acts referred to in the Claim Form and occurring after 1 July 2017 are in time.
>
> 2. In respect of any act or omission referred to in the Claim Form that is alleged to constitute unlawful race discrimination that occurred between 11 January 2016 and 1 July 2017:
>
> (a) Do such acts/omissions constitute part of conduct extending over a period for the purposes of Equality Act 2010 ("EqA10"), section 123(3)(a)?
>
> (b) If not, would it be just and equitable to extend time in respect of such acts/omissions pursuant to EqA10, section 123(1)(b)?
>
> 3. The Respondent accepts that acts referred to in the Amended Details of Claim and Further Particulars and occurring after 22 October 2017 are in time.
>
> 4. In respect of any act or omission referred to in the Amended Details of Claim and Further Particulars that is alleged to constitute unlawful race discrimination, harassment or victimisation that occurred between 11 January 2016 and 22 October 2017:

(a) Do such acts/omissions constitute part of conduct extending over a period for the purposes of Equality Act 2010 ("EqA10"), section 123(3)(a)?

(b) If not, would it be just and equitable to extend time in respect of such acts/omissions pursuant to EqA10, section 123(1)(b)?

5. Does the Tribunal have jurisdiction to hear the Claimant's claim for breach of contract in relation to the Respondent's alleged breach of s.20 of the Employment Contract? If yes, did the Respondent breach s.20 of the Employment Contract?

Direct Race Discrimination

6. The Claimant is of Black African race and ethnicity.

7. Was the Claimant subjected to less favourable treatment because of her race, contrary to section 13 of the Equality Act 2010?

8. Did the Respondent act in the following ways as alleged by the Claimant:

(a) At around 14:25 on 5 June 2017, Dr Sharma allegedly stated *"I am the consultant/anaesthetist, I treat patients, I don't treat numbers. Numbers are for monkeys. Monkeys treat numbers";*

(b) On 6 June 2017, Dr Sharma threatened to report the Claimant to the Nursing and Midwifery Council.

(c) On 11 September 2017, Miss Archer and Miss Woodley allegedly:

i) refused to look at the Claimant's medical records; and

ii) refused to accept the Claimant's medical records.

…

(h) On 12 September 2017, Mrs Eastell allegedly used her professional authority against the Claimant by:

i) Preventing the Claimant from having a break at 15:00;

ii) starving and dehydrating the Claimant for three hours;

iii) not allowing other staff to relieve the Claimant for her break;

iv) At approximately 18:00, standing at the door of the coffee room and screaming at the Claimant that she could not have her coffee break until the Claimant had discharged the patient she was attending;

v) At approximately 18:00, saying to the Claimant "I'm in charge and you should do what I say and I insist you should get up now and follow me"; and

vi) At approximately 18:03 allegedly approaching the Claimant with her fingers towards the Claimant's face.

(i) On 8 June 2017 Miss Archer, during a call with the Claimant:

i) allegedly did not allow the Claimant to explain why she had reported Dr Sharma's behaviour to Mr Stewart Watling on 6 June 2017; and (C's further particulars page 3)

ii) Interrogated the Claimant. (C's further particulars page 3)

(j) On 11 September 2017, Miss Archer and Miss Claire Woodley (C's further particulars page 3, last paragraph):

i) allegedly refusing to accept the Claimant's medical records;

ii) issuing a written warning;

iii) redeploying the Claimant;

iv) Not redeploying Dr Sharma.

(k) On 14 September 2017, Mrs Roslyn Blackboro and Ms Aralola Adegunle allegedly insisting on redeploying the Claimant rather than dealing with Mrs Eastell's behaviour (C's further particulars page 4).

9. If so, do any of those acts amount to less favourable treatment? The Claimant relies upon Mrs Eastell as comparator in materially the same circumstances as the Claimant in respect of her s.13 claims.

10. Did the Respondent act in the way alleged because of the Claimant's race?

Harassment

11. Did the Respondent engage in unwanted conduct by acting as follows:

(a) The allegations set out above at paragraphs 7a and 7b above regarding Dr Sharma;

(b) On 5 June 2017, Dr Sharma shouted at the Claimant "look, I don't care about your concerns; your concern does not matter to me. I am the consultant/*anaesthetist* and I make the decisions for the patient";

(c) On 16 June 2017, Mr Shah allegedly stating: "mirror, mirror on the wall, you look at yourself first before you look at someone else…if you are looking for a sack, I tell you now that is not going to happen."

12. Was the conduct at paragraph 11 above related to the Claimant's race?

13. Did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (*section 26(1), EqA10*)?

14. Was it reasonable for the conduct to have the effect?

Victimisation

15. Has the Claimant done a protected act for the purposes of EqA10 section 27? The Claimant relies on the following as protected acts:

    (a) the complaint that the Claimant had made to Mrs Eastell and Miss Archer against Dr Sharma on 5 June 2017, alleging racial abuse;

    (b) the complaint that the Claimant made to Mr Stewart Watling regarding Dr Sharma's behaviour on 6 June 2017; and

    (c) the complaint contained in the email from the Claimant to Miss Archer on 8 June 2017.

16. Did the Respondent subject the Claimant to a detriment because of the alleged acts at paragraph 8 above?

17. The detriments relied upon by the Claimant are:

    (a) On 14 June 2017 Mrs Eastell allegedly insisting that there were two eye witnesses in respect of the Claimant's complaint;

    (b) On 16 June 2017, Mr Shah's alleged aggression, intimidation, degrading and hostility towards the Claimant.

    (c) On 16 June 2017, Miss Archer and Mrs Blackboro:

        i) Allegedly insisting that the Claimant be redeployed;

        ii) Not redeploying Dr Sharma.

    (d) On 11 September 2017, Miss Archer and Miss Woodley:

        i) allegedly refusing to accept the Claimant's medical records;

        ii) issuing a written warning;

        iii) redeploying the Claimant;

        iv) Not redeploying Dr Sharma.

    (e) On 12 September 2017, Mrs Eastell:

        i) allegedly ignoring the Claimant's request for a food and refreshment break; and

ii) allegedly behaving aggressively, hostile and in a humiliating and harassing way towards the Claimant.

(f) On 14 September 2017 Ms Aralola Adegunle, allegedly deciding to redeploy the Claimant to the Urology Department.

Reasonable Steps

18. Did the Respondent take all reasonable steps to prevent the employees complained of from doing the alleged unlawful discriminatory acts or harassment, or from doing things of that description?

Constructive Unfair Dismissal

19. Did the Respondent, its employees, or its agents commit a fundamental breach of the Claimant's contract of employment amounting to a repudiation of that contract? The Claimant alleges that the Respondent breached the Equality and Diversity, Discrimination, Bullying, Harassment, Equal and Fair treatment sections within the Contract. The alleged acts upon which the Claimant relies as constituting such breach are:

(a) Dr Sheelaj Sharma allegedly racially abused the Claimant by:

i) On 5 June 2017 becoming angry with the Claimant, stating that he did not care about her concerns and stating "I make the decisions for the patient";

ii) On 5 June 2017, telephoning the ward sister **[Claimant: Dr Sheelaj Sharma initiated the telephone call to the Ward Sister. Therefore in principle, Dr Sharma should be able to provide the name of the Ward Sister]** and stating "the recovery nurse is treating numbers. I am the consultant anaesthetist and I treat the patient. I don't treat numbers, numbers are for monkeys. Monkeys treat numbers";

iii) On 6 June 2017, threatening to report the Claimant to the Nursing and Midwifery Council **[Claimant: to Dr J. Robinson, SN Clareysa Linao, SN Lanie Hierco, SN Aislinn Terry, Alan Dixon, SN Nicolina Halm , SN Celeste Maria Azcarraga, SN Remi and SN Jhansy Joy].**

(b) Mr Samir Shah on 16 June 2017 victimising the Claimant by:

i) Being aggressive and insisting that the Claimant agree to accept an informal apology from Dr Sharma;

ii) Commenting that people should look themselves in the mirror before criticising others;

iii) Stating "If you are looking for Dr Sharma to be sacked I can tell you that it's not going to happen".

(c) On 11 September 2017, Miss Archer and Miss Woodley:

i) allegedly refusing to accept the Claimant's medical records;

ii) issuing a written warning;

iii) encouraging the Claimant to change her job from working as a Theatre Recovery Nurse;

iv) Stating to the Claimant that they would not be redeploying Dr Sharma.

(d) Wendy Eastell:

i) not providing all of the witness statements that she had gathered from the witnesses on 5 June 2017 to HR when requested;

ii) becoming hostile and angry after the Claimant challenged her regarding providing the statements;

iii) On 12 September 2017: refusing to let the Claimant have her break; keeping the Claimant in the theatre recovery for many hours without respite and refusing the Claimant's requests for food and refreshment.

(e) On 14 September 2017 Ms Aralola Adegunle, deciding to redeploy the Claimant to the Urology Department**.**

(f) Mrs Blackboro and Ms Adegunle refusing to intervene to resolve the issues between Petra Orebanwo and Augusta Aikhionbare and the Claimant.

(g) On 29 September 2017 at approximately 10:50am, Ms Adegunle holding a meeting with the Claimant and stating that the email she was holding was the reason for stopping her redeployment to the Urology Department and insisting that the Claimant could not remain in the department for longer than four weeks.

(h) On 29 September 2017, Mrs Blackboro attempting to redeploy the Claimant to Bulphan Ward.

(i) The Respondent allegedly not informing the Claimant of the outcome of her grievance.

(j) The Respondent allegedly not fairly investigating the Claimant's grievance.

20. If the Respondent did commit a fundamental breach of the Claimant's contract of employment amounting to a repudiation of that contract, did the Claimant resign in response to such a breach?

21. If so, did the Claimant nevertheless delay in resigning and thereby affirm her contract of employment?

22. If the Claimant was constructively dismissed, what was the reason or principal reason for her dismissal and is it a potentially fair reason within section 98(1)(b)&(2) of the Employment Rights Act 1996 ('ERA')?

23. Was any such dismissal fair within the meaning of ERA, s98(4)?

Remedy

24. If the Claimant was unlawfully discriminated against, what compensation should the Claimant be awarded under EqA10, section 124?

25. If the Claimant was unfairly dismissed:

    (a) to what basic award is she entitled under ERA, s119; and

    (b) what compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by the Claimant under ERA, s123?

26. In particular:

    (a) has the Claimant reasonably mitigated her losses;

    (b) should any compensatory award be reduced to take account of the chance that the Claimant would have been dismissed in any event; and

    (c) should any basic and/or compensatory awards be reduced by reason of the Claimant's own culpable or blameworthy conduct pursuant to ERA, ss122(2) and/or 123(6)?"

2. The Claimant confirmed, at the start of the hearing, that she was not relying on any alleged events in January or February 2017 as complaints of race discrimination.

3. The Tribunal heard evidence from the Claimant. It heard evidence from Marcus Pittman, Consultant Physician and Clinical Speciality Unit Lead and investigating officer; Wendy Eastell, Clinical Lead Recovery Nurse and the Claimant's line manager; Denise Archer, Theatre Manager and Sister Eastell's line manager; Roslyn Blackboro, Head of Nursing; Dr Sheelaj Sharma, Consultant Anaesthetist; Mr Samir Shah, Consultant Cardiothoracic Surgeon and formerly Director of the Respondent's Surgical Division; and Aralola Adegunle, Human Resources Business Partner.

4. There was a bundle of documents. Some extra documents were added to it. The Respondent had prepared a chronology. The Claimant submitted an opening statement. Both parties made submissions, including written submissions from the Respondent. The Tribunal reserved its judgment and set a provisional remedy hearing for 1 October 2018.

Findings of Fact

5. The Respondent employed the Claimant as a Band 5 Nurse from 11 January 2016. The Claimant is of Black African race and ethnicity. At the time of the matters in question, the Claimant was employed as a nurse working in the Respondent's Recovery Unit, caring for patients who were recovering after surgery and anaesthesia. Nurses in the Recovery Unit also care for intensive care patients and high dependency patients. They monitor patients' airways, breathing, fluid balance, post operative bleeding, medication issues and they treat shock and emergencies which arise, amongst other things.

6. The Recovery Unit is ethnically diverse, with black African nurses and nurses of Indian descent, as well as white British nurses, working in the Unit. The doctors working in the Unit include doctors of Indian subcontinent descent.

7. From about six months after the Claimant started working in the Recovery Unit, the Claimant made complaints about various of her colleagues to Denise Archer, Theatre Manager and Wendy Eastell, Clinical Lead Recovery Nurse (the Claimant's line manager).

8. As part of her claim, the Claimant had made allegations of race discrimination against her managers relating to their treatment of her in early 2017. These pre June 2017 discrimination allegations were withdrawn by the Claimant at the Employment Tribunal.

9. Mrs Archer told the Tribunal that she and Wendy Eastell would sit down with the Claimant in 2016 and 2017 when the Claimant raised issues concerning other staff. Mrs Archer said that they would seek to resolve the Claimant's issues locally and informally. Mrs Archer told the Tribunal that the Claimant always seemed happy with the outcome and had emailed Mrs Archer with thanks. Mrs Archer also told the Tribunal that, otherwise, she did not have problems with the Claimant and considered that the Claimant was a nice, respectful person, who was always grateful for everything Mrs Archer did. She said that the Claimant's behaviour towards Mrs Archer was not challenging, at that point, and that she considered that she had a good rapport with the Claimant.

10. Dr Sheelaj Sharma is a Consultant Anaesthetist working in the Respondent's surgery wards and specialising in anaesthetics for orthopaedic surgery and trauma.

11. On 5 June 2017, a 93 year old patient had undergone surgery for a fractured femur under general anaesthetic. Dr Sheelaj Sharma was the anaesthetist administering the anaesthetic. The patient had a pacemaker and a degree of heart failure. After surgery, the patient was allocated to the Claimant as the nurse in the Recovery Unit.

12. During the afternoon of 5 June 2017, the Claimant became increasingly concerned that the patient's blood pressure was low, and falling. She sent messages through to Dr Sharma in theatre about her concerns. Dr Sharma was not concerned about the patient's low blood pressure because the patient had presented with low blood pressure before the surgery. He did not want to administer blood or fluid intravenously to the patient because of the risk that that might pose to the patient's heart.

13. At about 5pm on 5 June 2017, Dr Sharma was preparing to leave the Recovery Unit. He was happy for the patient to be discharged to the surgery wards, but the Claimant did not agree, because the patient's blood pressure and haemacue did not

accord with the figures for blood pressure and haemacue normally required for discharge to the wards. Dr Jonty Robinson was the anaesthetist on call that night and Dr Sharma therefore undertook a handover of the patient to him, with the Claimant present. Other nurses were aware that the Claimant was not happy about the patient being discharged to the ward, including Lanie Hierco, Assistant Clinical Lead and Marie Celeste, a nurse.

14. The Claimant contended that, during the handover, when she expressed her concerns about the patient being discharged to the ward, Dr Sharma said that he did not care about her concerns and it was he who made decisions for the patient. The Claimant told the Tribunal that he spoke loudly and aggressively to her.

15. In evidence at the Tribunal, Dr Sharma denied that he had said this and told the Tribunal that he was explaining to the Claimant that there was a plan for patient and the patient was well, alert and asking for food and that he was educating the Claimant.

16. None of the other witnesses on the day gave evidence to the Tribunal, but they were interviewed during the Respondent's internal grievance investigation process. Dr Jonty Robinson told the grievance investigation that, when the Claimant had said that she was not happy, Dr Sharma had said "Well, it is not my job to make you happy." (p.244). Dr Robinson said that Dr Sharma's interactions with the Claimant were defensive, short and brash and that the way things were said by Dr Sharma to the Claimant was not very nice (p.246).

17. Nurse Maria Celeste was asked by the investigator, concerning the interaction between the Claimant and Dr Sharma, whether either person was rude. Nurse Celeste said that Dr Sharma was being intimidating, by being loud and repeating himself (p.289).

18. Lanie Hierco told the investigating officer that Dr Sharma was talking loudly, that all the staff heard everything and that his level of volume was excessive and unnecessary (p.276).

19. On the evidence, the Tribunal found that the witnesses to the investigation were more supportive of the Claimant's account than Dr Sharma's. The Tribunal found that Dr Sharma said to the Claimant, when she was raising her concerns with him, words to the effect that he was, "not there to make her happy." It finds that his tone to the Claimant was loud and unpleasant.

20. Dr Jonty Robinson asked Dr Sharma to telephone the ward himself, to explain the treatment plan to the ward, and establish whether the ward would agree to take the patient. Dr Sharma did so.

21. The Claimant told the Tribunal that, during the call, she heard Dr Sharma say that he had no concerns about the patient and, while the recovery nurse seemed unhappy to discharge the patient, the recovery nurse was treating numbers. She told the Tribunal that Dr Sharma yelled across the recovery room, "I am a Consultant Anaesthetist. I treat the patients I don't treat numbers. Numbers are for monkeys. Monkeys treat numbers".

22. Dr Sharma told the Tribunal that he was explaining to the ward nurse that the numerical blood pressure normally identified as a cause for concern was not worrisome in this patient, who should be treated individually. He told the Tribunal that he said, "We clinicians treat a patient as a whole and not just numbers. Monkeys treat numbers and we

treat patients." Dr Sharma told the Tribunal that, in his medical training in India, an Indian moral story, "The Monkey and the Cap-Seller," is used to tell students not to blindly follow a single care plan in response to similar test results, but rather to treat patients individually. The story involves a cap-seller from whom monkeys have stolen all his caps and are wearing them, copying him. The cap-seller throws his own cap down to the ground and the monkeys copy him, by throwing their caps down from the tree - so the cap-seller cleverly recovers the caps and the monkeys have been tricked by copying.

23. Dr Sharma was cross-examined about his use of the word monkey. He agreed that, in the past, he had heard about a mixed race test cricketer, Andrew Symonds, being subjected to monkey noises by Indian cricket crowds. He said he had forgotten about this when he used the term "monkey" and did not intend, and was not aware, that it would be perceived as racist and derogatory towards black people. He also said that there was a monkey God, Hanuman, in India and that monkeys are respected there. Dr Sharma told the Tribunal that he came to the UK in 2004, when he joined Barts Health NHS Trust as a Registrar. Dr Sharma also told the Tribunal that he had his back to the Claimant when he was on the telephone and was not looking at her.

24. Again, no other witnesses to the telephone call gave evidence to the Tribunal, but witnesses were interviewed by the grievance investigator. Recovery Staff Nurse Oluremi Olusanya told the investigator, "Dr Sharma said on the telephone, "we look after patients, it is only monkeys that look after numbers"." Staff Nurse Olusanya said that she looked at Dr Sharma when he said this and did not smile because she was thinking: "We are not monkeys for God's sake, we are just looking after patients as well". She told investigators that she believed that Dr Sharma was making a distinction between doctors as clinicians and nurses as monkeys. She said that she believed that he was definitely talking about nursing staff (pp.282-283).

25. Dr Robinson told the investigation that Dr Sharma used the phrase, "I am a Consultant Anaesthetist. I treat patients, I don't treat numbers, numbers are for monkeys". He said, of this, that he did not think that it was directed at anyone in particular. He said:

> "… but I think it was a very very poor choice of words indeed. I can't comment on the belief system of my colleagues but given the environment and … tensions of emotions it lacks any … finesse to say anything like that." (pp.244-245).

26. On all the evidence, the Tribunal found as follows. Dr Sharma did say that he treated patients, not numbers, and that monkeys treated numbers, or words very similar. He said this in the context of the Claimant and Dr Sharma having had a professional disagreement about a particular patient's "numbers," or figures, for blood pressure and haemacue and disagreement about whether the patient should be treated in a standard way for such numbers. Dr Sharma was drawing a distinction between himself, who did not treat numbers, and others who did. The Tribunal decided that it was reasonable to conclude that Dr Sharma had the Claimant in mind as one of the people who treated numbers.

27. Having heard Dr Sharma's evidence and having taken into account all the other evidence, however, the Tribunal unanimously accepted Dr Sharma's explanation for his use of the word "monkey"; that he had in mind the parable of the monkey and the cap-seller and used the word monkey to describe people who unthinkingly and unwisely simply replicate the actions of others.

28. On the same day, the 5 June, the Claimant emailed Sister Wendy Eastell saying,

> "Dr Sharma stated loudly on the phone that he has no concerns with the patient and that the recovery nurse seems unhappy discharging the patient with those vital signs … Dr Sharma then stated "I deal with patients, I don't deal with numbers. Numbers are for monkeys. Monkeys deal with numbers."

She said:

> "I would appreciate it if Dr Sharma could explain that statement made so loudly publicly please, because I was just intervening on behalf of the patient as any qualified nurse would do and did not expect(ed) to be insulted …"

(page - additional email handed to the Tribunal).

29. The next day, 6 June, Dr Sharma was in the Recovery Unit and was told that, in contradiction to the treatment plan he had created, the patient had been given fluid and blood in an attempt to correct his low blood pressure, by the night anaesthetist registrar, who had telephoned the on-call consultant, Dr Robinson. This had led to patient developing left ventricular heart failure and pulmonary oedema.

30. Dr Sharma told the Tribunal that he saw the patient in question on the morning of 6 May, in the company of Lanie Hierco, the Recovery Nurse. He said he was upset and frustrated that the patient had been placed at risk, potentially of death, by a treatment approach he had gone to great efforts to avoid. In his witness statement he said:

> "As Ms Osei had mentioned the GMC and NMC to me the night before, I was reminded of it then. I said to Ms Hierco that as clinicians are accountable to the GMC, nurses are accountable to the NMC and … nurses could be complained about to the NMC. I also said to Ms Hierco that I wanted to speak to Wendy Eastell … about the incident, as she was Ms Osei's manager."

31. Dr Sharma told the Tribunal, in oral evidence, that, on the previous day, the 5 June, the Claimant had remarked to him during their discussions that he was accountable to the GMC and she was accountable to NMC.

32. While the Claimant denied that she had said anything about accountability on 5 June, the Tribunal accepted Dr Sharma's evidence that the Claimant had said to him that they were both accountable to their own professional bodies on 5 June.

33. The majority of the Tribunal, Mr Burrows and Ms Edwards, found that the reason Dr Sharma had said the Claimant could be reported to the NMC was that he was following on from the Claimant and his discussion about accountability the previous day. Dr Sharma was frustrated that the situation had been built up and his orders had been countermanded and the Claimant had not listened to him. The majority also accepted Dr Sharma's evidence that the reason that he wanted to speak to Wendy Eastell was that he wished to avoid a repetition of the situation, albeit that Dr Sharma did not give this explanation to Ms Hierco at the time.

34. The minority decision (Employment Judge Brown) did not accept Dr Sharma's

explanation of why he said that the Claimant could be reported to the NMC and he wanted to speak to Wendy Eastell. Employment Judge Brown found that Dr Sharma treated the Claimant differently to the doctors who were in fact responsible for the treatment which had so alarmed him. However, Dr Sharma did not suggest that he took any action in respect of the doctors. On his own witness statement, he was told that it was the doctors who were responsible for the treatment. The minority did not accept his explanation that, in those circumstances, he thought back to the previous day and his discussion with the Claimant and that this was why he then said the Claimant could be reported to the NMC and that he wanted to speak to her manager. Dr Sharma was clear in his witness statement that he wanted to speak to Wendy Eastell Clinical Lead Recovery Nurse about the incident, as she was Ms Osei's manager. He clearly had the Claimant in mind personally.

35. Dr Sharma said in his witness statement that serious and avoidable harm had been caused to the patient and that his comment about the NMC was of expression of his resulting frustration. However Employment Judge Brown did not accept that as an explanation, because the serious and avoidable harm had not been caused by the Claimant.

36. Staff Nurse Jhansy Joy overheard Dr Sharma's comments about being able to report the Claimant to the NMC and telephoned the Claimant to tell her about this (p.250). Also on 6 June 2017 the Claimant emailed Denise Archer and Wendy Eastell, again, as well as Stuart Watling, Human Resources Adviser, once more complaining about Dr Sharma's comments on 5 June 2017, including his comments about monkeys dealing with numbers (pp.172-173).

37. Mrs Archer had been on annual leave. She returned to work on 7 June 2017 and found the Claimant's emails. She escalated the matter to Mr Samir Shah, Divisional Director, and asked that the matter be dealt with urgently. Mrs Archer also emailed the Claimant, asking to meet her and saying that she had escalated the matter to the Divisional Director and that she was appalled by what had happened (p.171).

38. The Claimant replied on 8 June 2017, thanking Mrs Archer for her support (p.176).

39. The Respondent has a bullying and harassment at work policy (pp.98a-l). This policy says (98a):

> "Main imperative of this Document is:
>
> 1. Bullying, harassment and intimidation are unacceptable. All employees have the right to be treated with consideration, dignity and respect.
>
> …
>
> 3. If you feel you are being bullied, harassed or intimidated you should discuss your concerns with your line manager, your Trade Union representative or a HR Representative.
>
> If informal attempts to resolve the situation have not been successful, or if you feel that the acts complained about may not be resolved informally, this may be raised with your Line Manager, your Trade Union representative, or a HR Representative, who will advise on the next steps."

40. The policy provides for an informal procedure and a formal procedure. Paragraph 5, the informal procedure, provides (p.98g):

> "… Where possible the matter will be resolved through informal discussion and agreement about future behaviour."

Paragraph 6, the formal procedure, provides as follows:

> "Whilst it is always the Trust's intention to resolve difficulties informally, it recognises that this may not on occasion be possible.
>
> If informal attempts to resolve the situation have not been successful, or if you feel that the acts complained about may not be resolved informally, this may be raised with your Line Manager … who will advise on the next steps, for example, formal investigation.
>
> A decision to conduct a formal investigation should be made by an appropriately senior manager jointly with the HR Manager.
>
> … This investigation and any action arising from it will be carried out in line with the Trust Conduct and Capability procedure.
>
> A detailed response will be given to both parties outlining the results of the investigation and what action, if any, is being taken in respect of the complaint. This may result in a meeting under the Trust Conduct and Capability policy being convened …
>
> In some circumstances it may be considered appropriate to transfer one of the parties involved on either a temporary or permanent basis. The decision on whether to move one party, and which party to move, will be dependent on a range of factors and practicalities but should never be on the basis that either party may appear to be discriminated against."

41. On 8 June 2017, the Claimant spoke to Mrs Archer about the events of the 5 June and the Claimant's subsequent emails.

42. There was a conflict of evidence between the Claimant and Mrs Archer about what was said in this telephone call between them on 8 June.

43. Mrs Archer told the Tribunal that she told the Claimant that she would be collecting witness statements and would arrange an informal counselling session. Mrs Archer was not cross-examined in any detail about her account. The Claimant told the Tribunal that Mrs Archer was harsh and criticised the Claimant bitterly for escalating matters to Mr Watling. The Claimant said, as a result, she sent an email to Mrs Archer on 8 June explaining herself (p.176). In that email the Claimant said, "Thank you very much for your kind support regarding the incident…" The Claimant explained briefly her view of events that took place on 5 June and then said that she had heard that Dr Sharma was threatening to report her to Sister Wendy Eastell and the NMC on 6 June 2017. She said,

> "At the point I felt the desperate need to speak to someone … but, as Sister Wendy

was off and so was Sister Denise, I found the need to report the incident to Mr Stuart Watling in HR.

…

My sincere apologies for any inconvenience this may have caused." (p.176)

44. Mrs Archer maintained her explanation of the telephone call on 8 June at the Tribunal. It appeared to the Tribunal that, on 8 June, the Claimant and Mrs Archer's relationship was still a positive one; the Claimant had thanked Mrs Archer for her support. On the evidence, the Tribunal concluded that the interaction between the Claimant and Mrs Archer of 8 June was friendly and supportive, as Mrs Archer described.

45. On 12 June 2017, Mrs Archer met with the Claimant to discuss the incident with Dr Sharma. Mrs Archer explained the informal counselling process and told the Claimant that Mrs Archer would chair an informal counselling meeting, with Sister Wendy Eastell attending for support. Mrs Archer told the Claimant that minutes would be taken. Also on 12 June 2017, Dr Sharma was told about the Claimant's complaint.

46. Mrs Archer asked Wendy Eastell to collect witness statements from those who had witnessed events on 5 and 6 June. On the evidence before the Tribunal, the Tribunal found that two witnesses gave their witness statements direct to Mrs Eastell and the rest gave theirs to Denise Archer. Mrs Eastell gave some detailed evidence about this. She said that two eye witnesses had given her statements and she had passed these on to Denise Archer in the informal counselling meeting which took place on 14 June. Denise Archer then said that she would collect the rest of the statements. Mrs Eastell was cross-examined in some detail about this matter and she maintained that she had only ever received two witness statements and that Mrs Archer had collected the rest. As Mrs Eastell knew what process was adopted and the Claimant did not know who exactly had passed witness statements to which manager, the Tribunal accepted Mrs Eastell's evidence about the number of witness statements she received and passed on.

47. Mrs Archer conducted an informal counselling session on 14 June 2017. Dr Sharma attended with Tahir Akhtar, Consultant, to support him. The Claimant attended with Wendy Eastell to support her. The Divisional Director's PA took notes (p.178).

48. At the meeting, the Claimant read out a statement (p.178a). In it, she said that it was unlawful to racially abuse and harass anyone. She said that, while Dr Sharma may have his personal beliefs of disrespecting women, nurses and particularly black people, he should bear in mind that the law in the United Kingdom would not tolerate it and would deal with him accordingly. She said that she wanted concrete disciplinary action to take place by management. The Claimant also talked about the statement that Dr Sharma had made about not treating numbers and monkeys treating numbers. The Claimant said that she felt that this was a racial statement aimed at her (p.178). She also said that the next morning Dr Sharma had said that he wanted to report her to the NMC. She said that, if Dr Sharma had apologised at that point, then she may have accepted.

49. Dr Sharma responded that he felt terrible that he had upset the Claimant to that extent. He said that the statement about monkeys was used by him because it had been used in a conference that he had attended. He said that the monkey statement was not used as a derogatory term, or aimed at the Claimant directly. He promised that he had

used it in error and apologised wholeheartedly.

50. In evidence at the Tribunal, Dr Sharma accepted that he also talked about education and the need for education and training arising out of the incident.

51. At the end of the meeting, the notes recorded that the Claimant was not prepared to accept either a verbal, or written, apology from Dr Sharma. Denise Archer closed the meeting and advised both parties that the formal complaint would now move to the next stage and an investigation would be undertaken.

52. On 7 June 2017 Denise Archer had forwarded the Claimant's complaint regarding racial abuse by Dr Sharma to Mr Samir Shah, Consultant Cardiothoracic Surgeon and Director for the Division of Surgery (pp.171-173).

53. Mr Shah responded to Denise Archer saying: "Thank you for including me in the email trail below, Denise. Please reassure Eva that I am aware of matters and will oversee the process" (p.171).

54. It appears that, by 16 June 2017, Mr Shah, Divisional Director for Surgery, was aware that the Claimant wanted to pursue a formal, rather than informal, complaint in relation to Dr Sharma's.

55. On 16 June 2017, Mr Shah decided that he would speak to the Claimant himself. He went to the Recovery Unit and told Mrs Archer that he wished to speak to the Claimant. He told the Tribunal that he wanted to meet the Claimant to ensure her well-being, reassure her that the matter was being taken seriously, informally ascertain her version of events and concerns and establish if this is a matter that could be resolved informally. In oral evidence, he told the Tribunal that he wanted to attempt an informal resolution. He said he had not been present at the meeting on 14 June and wanted to be sure, in his own mind, that the appropriate process had been adhered to. He said he wanted to talk with the Claimant about the process and what a formal procedure would entail.

56. Mr Shah told the Tribunal that he was conscious that, if he approached the Claimant himself, even in an informal way, it might stress her and so he asked Mrs Archer to accompany him to the meeting.

57. The Claimant contended that, in the meeting, Mr Shah was aggressive and insisted that the Claimant agree to accept an informal apology from Dr Sharma, commented that people should look at themselves in the mirror before criticising others and stated that, if the Claimant was looking for Dr Sharma to be sacked, then he could tell the Claimant now that that was not going to happen.

58. Mr Shah told the Tribunal, in oral evidence, that he did say that the Claimant would need to look at her own behaviour as part of the process. He said that, in the conversation, he was reflecting that this was a very serious situation, a race situation, and people could lose their jobs over it. He said: "In that context I said no-one will be sacked over this." Mr Shah told the Tribunal that he did say that people had to reflect on their own behaviour during due process. Mrs Archer also remembered him saying that the Claimant would have to reflect. Mrs Archer told the Tribunal that Mr Shah used the words, "mirror mirror".

59. In oral evidence, Mrs Archer said that Mr Shah gave an example of an occasion when he had been in theatre and, during a surgical procedure, he had asked a nurse repeatedly to hand him surgical instruments and the nurse had repeatedly simply pointed to the instruments and not handed them to him. Mr Shah said that he was annoyed by her behaviour and the nurse had then complained to him about how he had behaved. The point Mr Shah was making was that his irritation had been caused by the nurse's repeated lack of cooperation. Mr Shah suggested that the Claimant might accept a written apology from Dr Sharma.

60. Mrs Archer told the Tribunal that she did not think that the Claimant understood everything that Mr Shah was saying that the Claimant looked confused and upset. Mrs Archer said that she called the meeting to a halt during a natural hiatus.

61. Mr Shah closed the meeting by telling the Claimant that he would ask the Clinical Service Unit Lead to meet with Dr Sharma, with a view to Dr Sharma reflecting on his behaviour, to organise a meeting for all the parties involved and for Dr Sharma to produce a written apology. He said that this did not preclude the Claimant from the option of raising a formal grievance against Dr Sharma.

62. The Tribunal found, regarding Mr Shah's meeting with the Claimant, that Mr Shah did not *insist* that the Claimant agreed to accept an informal apology from Dr Sharma. Mr Shah called the meeting to explore whether the Claimant would be happy for him to deal with Mr Sharma himself, rather than taking it through a more formal route.

63. However, Mr Shah did say "mirror mirror" to the Claimant and said that people needed to examine their own behaviour. He gave an example of a complaint made by a nurse about Mr Shah's behaviour, in which the nurse herself had been at fault. The implication of that was that the Claimant was at fault. Mr Shah was telling the Claimant that she should look at her own behaviour before deciding to pursue a formal complaint. He said that, if the Claimant was looking for Dr Sharma to be sacked, that was not going to happen, or words to that effect. The Tribunal concluded that, by saying these things to the Claimant, Mr Shah, who was a very senior manager and Consultant at the hospital, was putting the Claimant, a very junior employee, under considerable pressure to accept an informal resolution of her grievance, rather than a formal one.

64. On 16 June, after the meeting with Mr Shah, Mrs Archer arranged to meet with the Claimant and Roslyn Blackboro, Head of Nursing, to clarify with the Claimant that it was her choice as to how to progress the matter. Mrs Archer and Mrs Blackboro raised the possibility of temporary redeployment with the Claimant. The Claimant was worried about coming into contact with Dr Sharma during the grievance process. They said that, as Dr Sharma was a "gas man" (who anaesthetises patients in a theatre setting) he could not be moved to, for example, Intensive Care. The Claimant said that she did not want to move posts on temporary redeployment.

65. Also that day, Dave Burton, the Claimant's Union representative, sought a meeting with Roslyn Blackboro, to clarify Mr Shah's meeting with the Claimant. Mr Shah came to the meeting. He made a file note afterwards, saying that the purpose of the meeting with Mr Burton was "To reassure David that there was no intention to do anything other than support and deal with the matter between Staff Nurse Eva Osei and Dr Sheelaj Sharma. The right to pursue formal action remains unaffected," p179b.

66. As a result, it was agreed that the Claimant could pursue her grievance formally. The Claimant then sent a formal grievance to Roslyn Blackboro Head of Nursing on 26 June 2017 (pp180.184).

67. In the Claimant's grievance, the Claimant said that she wished to raise a formal grievance against Dr Sharma for racial abuse, bullying, harassment, intimidation and humiliation. The Claimant said that, while Dr Sharma had offered a verbal and written apology during a meeting on 14 June 2017, " .. none of his apology seemed sincere to me". The Claimant set out her version of events of 5 and 6 June 2017. She said that Dr Sharma had shouted loudly at her, " .. look, I don't care about your concerns, your concern does not matter to me. I am the consultant/anaesthetist and I make the decisions for the patient." She also said that he said, "I am the consultant/anaesthetist, I treat patients, I don't treat numbers. Numbers are for monkeys. Monkeys treat numbers". She stated that Dr Sharma had screamed out loud across the recovery room. The Claimant added that this was a racial insult and that Dr Sharma had used his position maliciously to insult her race and ethnicity. She said that, the following day, Dr Sharma had carried on with further intimidation and harassment, asking to report the Claimant to Sister Wendy and threatening to report her to the NMC. The Claimant stated that she was extremely stressed and had become very hesitant about coming to work in case she met Dr Sharma in the corridor. She said that her sleep pattern was affected whenever she thought of going back to work the next day and she could not eat properly due to stress and anxiety.

68. The Claimant also said that Mr Shah had convened a meeting with the Claimant on 16 June 2017, which she was led to believe would outline the process of a formal grievance and possible expectations. She said, "However, Mr Samir Shah rather came across as condoning the behaviour and actions of Dr Sharma who has abused me. Mr Shah was extremely intimidating and insisted on me agreeing to informal apology letter from Dr Sharma which I had already given reasons for refusing it. Mr Shah made statements like, " .. *mirror, mirror on the wall, you look at yourself first before you look at someone else*" Mr Shah then stated, "If you are looking for a sack, I tell you now that it is not going to happen"." The Claimant said that she had replied that she would never intend or wish for anybody's job to be taken away from them as they might have families to support, but that she would like lessons to be learnt. She said that her line manager Sister Denise Archer had intervened that she could see that the Claimant was extremely uncomfortable. The Claimant said that Mr Shah was a Divisional Director had demonstrated why Dr Sharma felt comfortable to racially abuse, harass and bully a nurse (pp.180-184).

69. The Claimant told Mrs Blackboro, after she submitted her formal grievance, that she wished the grievance investigation to concentrate on her complaint about Dr Sharma, rather than encompassing her complaint about Mr Shah.

70. Senior managers held a case conference on 6 July 2017 and appointed Dr Marcus Pittman to be the case investigator. Mrs Blackboro also met with the Claimant on 6 July 2017, to update her with the progress of the grievance. Mrs Blackboro told the Claimant that she should contact her if any issues arose with Dr Sharma during the investigation process and, if situation in the Recovery Unit were to become untenable, then Mrs Blackboro would seek to move the Claimant to CCU for some Level 2 training. The Claimant did not reject such a move as a possibility for the future, but the Claimant chose to stay in the Recovery Unit in the meantime.

71. Terms of reference for the investigation were drawn up dated 11 July 2017 (p.188) and the Claimant was invited to an investigatory interview to be held on 31 July 2017 (p.191).

72. Dr Pittman interviewed the Claimant on 31 July 2017 (pp.208-216). He interviewed Dr Sharma on 3 August 2017 (pp.217-231). Dr Pittman interviewed Nurse Linao on 4 August 2017 (pp.237-240) and Dr Jonty Robinson on 4 August 2017 (pp.241-248). Dr Pittman interviewed Nurse Jhansy Joy on 7 August 2017 (pp.249-253). He interviewed Dr Luke Hounsom on 14 August 2017 (pp.265-268) and Dr Abdul Jadran on the same day (pp.269-272). There were further interviews with Nurse Lanie Hierco on 16 August 2017 (pp.275-277; and Dr Memanth Venkatesh (pp.278-279) the same day. There was an interview with Nurse Oluremi Olusanya on 29 August 2017 (pp.281-285) and an interview with Nurse Maria Celeste on 11 September 2017 (pp.288-289).

73. Dr Pittman told the Tribunal that transcripts needed to be produced of witness interviews, which took some time and resulted in delay.

74. The Claimant had had some absences in 2016 and 2017. She was off work for 4 days in October 2016 with depression; for a further 4 days in January 2017 with stress and one day on 5 April 2017 with a headache. She was then off work with stress from 1 to 2 July 2017. The Claimant was then signed off by her GP for 18 days from 3 to 20 August 2017. Her GP wrote her a letter on 5 September 2017 (p.285a) saying, "I have seen her in surgery few times as she is stressed due to problems at work. She is also a known case of blood pressure, and at this early age already on 3 blood pressure medication.…Because of stress at work is affecting her she had sick note in past."

75. Following the Claimant's absence from work in August 2017, she was asked to attend a sickness absence review meeting on 11 September 2017 (pp.290-291). Denise Archer conducted the meeting and was advised by Claire Woodley, HR Adviser.

76. The Claimant brought along her GP's letter and an Occupational health report which the Claimant had obtained in March 2017 following a self-referral.

77. The Claimant alleged that Mrs Archer and Ms Woodley refused to look at the Claimant's medical records and refused to accept them during this meeting. There was a dispute of fact about whether the Claimant offered these documents to Mrs Archer and Ms Woodley. Mrs Archer said that the Claimant briefly showed them to Ms Woodley and her in the meeting, but did not allow Mrs Archer to read them in any detail.

78. The Tribunal noted that, in the Claimant's email to Mr Watling, sent the day after the relevant meeting, pp292 293, the Claimant simply said that Mrs Archer had disregarded the letter from her GP and the report from occupational health. She did not say that Mrs Archer had refused to look at the Claimant's medical records. The Tribunal finds that Mrs Archer did not refuse to look at, or accept, the Claimant's medical records at the meeting.

79. At the meeting, the Claimant's absence from work was discussed. It was noted that her 18 days' absence due to stress in August 2017 was related to a grievance the Claimant submitted in relation to a doctor. The notes of the meeting record that, in relation to that last sickness episode, the hospital had been happy to move the Claimant

to support her, but that the Claimant had declined a move. The notes also record that, at the meeting, the Claimant was asked if the Recovery Unit was the right environment for her, as it was a stressful place. The Claimant replied that she felt okay to work there. The notes record that a question was raised about occupational health referral. Mrs Archer told the Tribunal that the Claimant had declined occupational health referral. The Claimant told the Tribunal that it was not offered. The Tribunal concluded that the fact that the Claimant had previously self referred to occupational health indicated that the Claimant preferred to manage her interaction with occupational health herself, rather than being referred by her managers.

80. At the meeting, Mrs Archer told the Claimant that she would be giving her a Stage 1 written warning regarding her attendance levels.

81. Mrs Archer told the Tribunal that Ms Woodley, Human Resources Partner, had advised Mrs Archer to give the Claimant a written warning, in accordance with the Respondent's Absence policy, because of the number of the Claimant's absences. There was no cross-examination of the Respondents' witnesses about the Absence policy during the ET hearing.

82. On 12 September 2017, the Claimant wrote to Mr Watling in Human Resources about the meeting that she had had with Sister Denise Archer and Claire Woodley on 11 September. She said that Sister Denise Archer had disregarded the Claimant's medical evidence and intended to give the Claimant a written warning for being off sick. She said that, during the meeting, she tried to remind Mrs Archer about the bullying she suffered in the department as a new member of staff. She said that Mrs Archer kept saying that she did not understand why the Claimant felt stressed about recent racial abuse. The Claimant said that the Respondent offering to move the Claimant to a different department, while the abuser still remained in the department, seemed like a punishment on the Claimant's part for reporting the abuse. The Claimant reported that Mrs Archer had said that the person in question was an anaesthetist, who could not be moved to a different department, but that an orderly or nurse could be moved. The Claimant said that she would like to find out if the Respondent had a discriminatory policy against members of staff to allow professionals who racially abuse others, while punishing the people who had been affected (pp292-293).

83. On 12 September 2017, the Claimant and Ms Wendy Eastell were both at work. It was an extremely busy day. The Claimant was working an 11 hour shift that day and was entitled to a short morning break, a half an hour lunch break, and a short afternoon break. It was not in dispute that nurses took breaks when they were able to, depending on how busy the ward was and the nurses' responsibilities to relevant patients. The Claimant had been able to take her morning and lunchtime breaks. However, she was looking after a particular patient in the afternoon and Sister Eastell told her that she would not be able to take her afternoon break until after the patient had been transferred from the Unit. The patient went to the ward at about 17.30 that evening. When the Claimant returned from the ward, she took her break. It was customary for nurses to try to catch their manager's eye before taking a break. Around 18.00 Mrs Eastell passed the tea room and saw the Claimant inside. When Mrs Eastell subsequently returned to the tea room, the Claimant was having something to eat. There was a dispute of fact at what happened when Mrs Eastell entered the coffee room.

84. The Claimant told the Tribunal that Mrs Eastell stood at the door, shouting that the

Claimant should stop having her break and follow Mrs Eastell to discharge another patient to the Urology ward. The Claimant said that she reminded Mrs Eastell that she had not had a break previously and was taking it now. The Claimant told the Tribunal that, 3 minutes later, Mrs Eastell returned, looking furious and approached the Claimant with her fingers towards her face, aggressively invading the Claimant's personal space. The Claimant said that she screamed at Mrs Eastell to walk away and Mrs Eastell eventually responded, "Fine, I will walk away but I will speak to you later". The Claimant said that she broke down in tears and her dinner had to be thrown away. The Claimant said that Sister Nicola Tunbridge came into the coffee room while the Claimant was in tears.

85. Mrs Eastell told the Tribunal that she went to the tea room where the Claimant was eating her dinner and started to talk to the Claimant from the doorway. She said that the Claimant interrupted her and shouted that Mrs Eastell had said that she could go to her tea break after taking the patient back to the ward. The Claimant said it was not fair as Mrs Eastell had had her tea break the Claimant was entitled to hers. Mrs Eastell told the Tribunal that the Claimant came round the table to where Mrs Eastell stood and came towards her face, shouting. Mrs Eastell said that she felt belittled and embarrassed and had said that they could continue the conversation at a later time, when the Unit was not so busy. Mrs Eastell said she then returned to the Recovery Unit.

86. On 12 September 2017, Sister Nicola Tunbridge wrote a statement in which she said, "Whilst in recovery late Tuesday afternoon I became aware that Wendy was querying where Eva Osei was and that she had left the department for quite a while taking a patient back. .. Later Wendy came back into recovery and I heard her say that Eva was in the team room having her break… I walked into the coffee room to get my bag and as I was leaving Wendy was going into the coffee room to ask Eva to return to Recovery. Wendy was not given the opportunity by Eva to finish speaking as Eva stood up and came round the table towards Wendy and started and started shouting at her. At this point Wendy turned and left the tea room. .. Eva remained in the tea room stating her case to those around her including myself…".

87. The Claimant produced a witness statement from Coilard Mwakamela, which had been sent by email on 5 January 2018, some months after the event in question. Mr Mwakamela said that Sister Eastell had come to the tea room and insisted that the Claimant stop having her break and follow her to Recovery and that, two to three minutes later, Sister Wendy Eastell had returned to call the Claimant again, seemingly furious. Mr Mwakamela said that, as Sister Wendy came towards the Claimant, the Claimant asked Sister Wendy to step away; that Sister Wendy approached much closer and pointed her fingers towards Eva and that the Claimant screamed out loud for Sister Wendy to back off.

88. On the balance of evidence, the Tribunal preferred Mrs Eastell's account; Sister Tunbridge's statement appeared to have been more contemporaneous than Mr Mwakamela's statement and supported Mrs Eastell's version of events. The Tribunal therefore found that Mrs Eastell went to the coffee room to ask the Claimant to return from her break, but that the Claimant stood up, came round the table and started shouting at Mrs Eastell, whereupon Mrs Eastell left the room.

89. The Claimant sent an email, dated 13 September 2017, complaining about Mrs Eastell's bullying and harassment to Roslyn Blackboro, Claire Woodley and Aralola Adegunle at Human Resources. The complaint was copied to Denise Archer. In it, the Claimant Sister Wendy had screamed at the Claimant to return to the Unit and, later, had

come towards the Claimant with her fingers pointing at her face. The Claimant said that bullying and harassment was continuing towards her and that victims were punished for being unwell, regardless of physical and emotional distress. She said, "I am therefore seeking for immediate intervention please as the situation seems to escalate completely out of control and this is definitely damaging my health and wellbeing." (pp.303-304)

90. When Denise Archer received the email that day, she emailed Aralola Adegunle and Roslyn Blackboro, saying that she was unable to deal with the Claimant any more; the Claimant had, in the past, made damming complaints about most of the Band 5s in Recovery and had now accused Wendy Eastell of bullying and harassment and had twisted what Mrs Archer had said in the sickness meeting. Mrs Archer said: "This girl is a loose cannon and I think has serious issues … I do not think this environment is suited to her. I am requesting that we look at moving her to another area of the Trust." (pp.302-303)

91. Ms Adegunle replied later the same day 13 September saying, "I will review the re-deployment process to determine the grounds on which we can re-deploy Eva and aim to get back to you either today or tomorrow." (p.302)

92. On 14 September 2017, Aralola Adegunle met the Claimant, along with Roslyn Blackboro. The Claimant made a number of allegations against Wendy Eastell and Ms Adegunle and Blackboro discussed redeployment on the grounds of health; the Claimant had said that her blood pressure had been affected by workplace stress and she was concerned about the impact on her kidneys. The Claimant said, however, that she was concerned about being redeployed, as she felt that staff would talk about her and that she would get a reputation as being difficult to work with. Ms Adegunle reassured the Claimant that, if she were to be redeployed, details as to why she was being redeployed would be kept confidential. The Claimant queried again why she was being moved, rather than Dr Sharma. Mediation was raised as an alternative to redeployment, but it was said that mediation was voluntary and all parties needed to be in agreement.

93. The Claimant was told that she would be given details on redeployment opportunities within the Trust. The Claimant said that she needed time to think about her options and Mrs Blackboro agreed that the Claimant could take the rest of the week off as annual leave, to think about her options (pp.309-310).

94. The Claimant was provided with some potential redeployment options. On 17 September 2017, she expressed an interest in three Band 6 posts, including a Urology Oncology Associate Nurse Specialist post. The Claimant set out her experience of caring for Urology patients post surgery in Recovery (pp.317-318).

95. Mrs Blackboro approved the Claimant's redeployment to the Urology Team. She considered that the Claimant had shown an interest in the post and some of the skills that she had learnt in Recovery were transferrable.

96. On 20 September 2017, Petra Orebanwo, Urology Oncology Nurse Specialist emailed Mrs Blackboro, amongst others, concerning the Claimant's redeployment. Ms Orebanwo said that the Urology Oncology Department had undertaken a competitive interview process, had seen a number of very well qualified candidates, but that the Claimant had been given a post without significant previous experience. Ms Orebanwo said that she was utterly speechless and now felt worthless to the department.

97. Mrs Blackboro replied to Ms Orebanwo, saying that she was sorry to hear that she felt that way, but that Mrs Blackboro had to redeploy the Claimant and, under the rules of redeployment, the Claimant would had to be given the option to trial jobs that she had some skills to undertake. Mrs Blackboro said that the 4 week trial would determine whether the employee would fit within the team, could be trained to undertake the work required and was happy in the role. She said that this would all be evaluated at the end of the 4 weeks and that, if there were issues, then the redeployment could be stopped (p.323).

98. Mrs Blackboro emailed the nurse members of the Urology Oncology team, amongst others, confirming that the Claimant would start her 4 week trial redeployment within the Urology Oncology Service. She said, "I am sure that any one of you who found yourselves in a situation where you could no longer do your substantive post, you would be grateful that the Trust could find you alternative employment. Speaking as someone who was injured in my early career before this law was in place and who had to find something outside of the Trust I worked in with no help whilst constantly under the threat of sacking I would have much preferred this option."

99. Mrs Blackboro said that the Claimant had a 4 week period with the Urology Oncology team for it to decide whether she had the capability and aptitude to do the job. Mrs Blackboro said, "If at the end of this period you think that she is not the right person and can give myself and Lola (our HRBP) sound reasons i.e. more than you just don't like her then it will be up to us to find her something else and your advert will be set to run again. …I hope, as a team, you can be the professionals I know you to be and give her a fair chance…" (p. 325a)

100. The Claimant had discussed the redeployment opportunity with friends and decided that it was a potentially good opportunity for her. She emailed Ros Blackboro and Aralola Adegunle expressing her gratitude for their support. She said, "I have taken all your advice on board which I believe will help me in my new career adventure." (p.326)

101. The Claimant sent a further email to Roslyn Blackboro, setting out her gratitude for reaching out to the Claimant on the racial issue and intervening during the Claimant's recent challenge in Recovery. She said, "I am very grateful for … your intervention and all your kind support in this redeployment process." (p.327)

102. Unfortunately, when the Claimant joined the Urology Oncology team, things did not go well. The Claimant was told by her managers in the Unit to listen and learn for a week. However, she attended a multi-disciplinary meeting on her second day in the Unit and was vocal during the meeting, including seeking to arrange training for herself. It was felt by the other attendees at the meeting she had behaved inappropriately. The Claimant felt that she was not being welcomed to the Unit.

103. On 29 September 2017, the Claimant met with Ms Adegunle to discuss the issues she had been having in the Urology department. At the meeting Ms Adegunle had, in her possession, an email sent from Emma Chaplin McMillan, Lead Cancer Nurse. Ms Chaplin's email said, "I was very disappointed today to hear that the Urology Oncology Specialist Nurse post has been currently filled with a Band 5 staff nurse who needed redeploying. …The cancer nurse specialist post requires at least 5 years post registration experience and they should have extensive experience in Oncology or the Speciality they

are in. These are highly specialist roles that require services to be nurse led and have excellent communication skills. The post was advertised and we had 18 applicants, all with excellent experience, a ward manager from a urology ward, and non-medical prescribers. … The Urology service is over stretched, we are not meeting our targets and cancer patients are being affected. Having the correct workforce to manage these complex cases is extremely important.… Could you please let me know if this is likely to be a permanent move or can we re-advertise for the post to be filled with the specific job specification required?"

104. Mrs Blackboro had responded very shortly afterwards saying to the distribution list including, Nurse Specialist in Oncology, "My feeling is that this redeployment will not be suitable and therefore the application process will then continue. However we are duty bound to undertake a trial period. .. I have explained all this at length to the Urology team. I have also said that if they show me that she is not suitable at 4 weeks then I will withdraw the candidate. – maybe we withdraw sooner as yesterday I was given some information regarding a skill set I believed she had which in fact is not correct. I need to discuss further with Lola the HR Business Partner." (p.333a)

105. In her evidence to the Tribunal, Ms Adegunle said that, during the meeting on 29 September, Ms Adegunle explained to the Claimant that her line manager was the decision-maker and it was their responsibility to meet with her regularly and review her progress to determine whether the Urology role was suitable. Ms Adegunle advised the Claimant to liaise with Vincent Celis, Matron and General Surgery and Urology, regarding this. The Claimant confirmed that she did not wish to return to the Urology ward after this meeting. She withdrew from the redeployment.

106. The Claimant spoke further with Mrs Blackboro, who offered to the Claimant the possibility of working on Bulphan Ward while Human Resources helped the Claimant look for another redeployment option; this arrangement would have fitted in with the Claimant's childcare responsibilities. The Claimant said that she wanted to take the week as annual leave, to consider her position. Mrs Blackboro emailed the Claimant on 2 October 2017, recording their conversation (pp.336-337).

107. The Claimant responded that day, saying that she had chosen to work in theatre recovery, which was her specialist area; she had not done anything wrong to be moved in the first place, so her rights should not be taken away from her. She said that Bulphan ward was not a specialist area and that she had a right to choose. (p.336)

108. The Claimant was sent a second redeployment list on 4 October 2017 (p.352). At around the same time, Ms Adegunle asked the manager of the Respondent's Cath labs section whether the Claimant could be redeployed there, on a 4 week trial basis (p.358). Ms Adegunle discussed briefly, with the manager of Cath labs, the fact that the Claimant needed to be redeployed. Ms Adegunle tried to set up a convenient time for the manager to meet with the Claimant and Ms Blackboro, Head of Nursing, to discuss the matter but, in the meantime, on 9 October 2017, the Claimant went down to the Cath Lab section herself and spoke to Lynda Pilley, Senior Sister in Cath labs. The Claimant told the Tribunal that Lynda Pilley had been informed about the Claimant needing redeployment and that Ms Adegunle had advised Lynda Pilley to get all the details from the Claimant herself. The Claimant told Lynda Pilley of the background and her complaint against Dr Sharma.

109. On 16 October 2017, the Claimant handed in her resignation (p.379a). The Claimant said, "I would like to give my resignation notice due to the ongoing issues, discrimination and social injustice which has been affecting health and well-being."

110. On 18 October 2017, the Respondent sent the Claimant a written warning regarding her sickness, arising out of the meeting on 11 September 2017 (p.382).

111. The Claimant told the Tribunal that all the reasons that she had resigned were set out, in full, in a document that she handed to an Absence and Sickness Appeal hearing on 10 November 2017 (pp.410-416).

112. In that document, she talked about allegations and bullying by Maggie Tandai Banda (a Band 6 theatre recovery nurse) in October 2016 and other members of the Recovery Unit staff at that time. She said that she had not been invited to a staff dinner in January 2017. She said that another member of staff had called her evil in April 2017. The Claimant stated that, on 5 and 6 June 2017, she was racially abused and bullied by Dr Sharma and that, during an informal meeting on 14 June, it had come to light that Wendy Eastell had handed in only 2 out of 9 eye witness statements. The Claimant said that, when she had asked Ms Eastell what had happened to the rest of the statements, Wendy Eastell was not happy about being exposed. The Claimant said that Ms Eastell's discrimination worsened until the 12 September 2017, when Ms Eastell nearly physically attacked the Claimant after starving her for three hours. She said that persistent racist and bullying, harassment, discrimination and humiliation had affected her physical health and well-being. The Claimant said that she had been given a warning about her absence during the meeting on 11 September 2017. She said that Dr Sharma had carried on with his career and normal life as though nothing had happened that the Claimant had been exposed to stigmatisation in redeployment and endless victimisation. She said that she suffered victimisation and further bullying by nurses in the Urology team, which was as a result of stigmatisation attached to redeployment. She said that Dr Sharma, Wendy Eastell and Maggie had not been disciplined and that management had created an environment which accommodated racism, bullying, harassment, discrimination and forced redeployment with no support. She said that those were the reasons that she had given to resign from the Trust on 16 October 2017.

113. The Claimant's resignation took effect on 12 November 2017.

114. Dr Pittman completed his investigation report on 11 November 2017 (p.417).

115. On 22 December 2017, Dr Sharma was invited to a disciplinary hearing, to take place on 15 January 2018, to respond to the following allegations:

> "1) The nature of the language used in the verbal communications between Dr Sharma and Ms Osei 5th and 6th June 2017
>
> 2) Your alleged use of phrase "I am the consultant/anaesthetist, I treat the patients, I don't treat numbers. Numbers are for monkeys. Monkeys treat numbers"." (p.432)

116. Dr Sharma attended a disciplinary hearing on 22 January 2018. On 29 January 2018 Dr Sharma was given a final written warning (p.434). Dr Sharma was told that the allegations were upheld against him and that the verbal communications and his use of

the phrase alleged caused a breakdown in the communication between the Claimant and Ms Osei, ".. which had the potential to compromise the care of your patients" (p.435).

117. The Respondent's witnesses told the Tribunal that Dr Sharma's speciality was in anaesthetising patients using gas, during surgery. The witnesses said that Dr Sharma did not have skills as an "intensivist", so he could not be redeployed to that role.

118. Mr Shah told the Tribunal that general anaesthetists, like the Claimant, have certain sub-specialities, with some having particular interests like nerve blocks, maternity specialities and pain management. He said that, when it came to deploying anaesthetists, they were deployed to make use of their skill sets, but when they were "on call," they covered everything. He said that, as a general anaesthetist Dr Sharma, had an interest in pain management and nerve blocks, which would include epidurals. He said that, when Dr Sharma was on call, he would cover maternity wards, but that there was a sub set of anaesthetists who would do maternity work during normal working hours. He said that intensivists work a completely separate rota and their "on calls" were in Intensive Care and Critical Care. The Respondent's witnesses told the Tribunal that Dr Sharma's particular speciality was in orthopaedic surgery anaesthesia.

119. The Tribunal accepted the Respondent's evidence that it deployed anaesthetists according to their particular speciality and that Dr Sharma was deployed to use his specialist skills in orthopaedic surgery.

120. With regard to redeployment possibilities, the Tribunal found that Dr Sharma certainly could not have been redeployed as an intensivist, because he did not have the relevant skills.

121. With regard to redeploying to other areas of general anaesthetics, the Tribunal found that other areas of general anaesthetics were not the Claimant's speciality and that the Trust deploys people according to their speciality.

122. The Tribunal found that Dr Sharma was deployed to his area of speciality and that it was easier to redeploy a Band 5 nurse, who did not have an anaesthetist's specialist skills in one particular area. The Tribunal considered that it was necessarily the case that it would be easier to redeploy junior nurses than specialist doctors because there are generally fewer specialist doctors than junior nurses in hospitals.

Relevant Law

Equality Act 2010

123. By *s39(2)(d) &(4)(d) Equality Act 2010*, an employer must not discriminate against an employee, or victimize an employee by subjecting him to a detriment.

124. By *s40(1)(a) EqA 2010* an employer (A) must not, in relation to employment by A harass a person (B) who is an employee of A's.

125. Direct discrimination is defined in *s13 EqA 2010*.

126. Victimisation is defined in *s27* and harassment is defined in *s26.*

127. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

128. Time limits are set out in *s123 EqA 2010,* which makes provision for continuing acts.

Direct Discrimination

129. Direct discrimination is defined in *s13(1) EqA 2010:*

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

130. Race is a protected characteristic, *s4 EqA 2010.*

131. By *s9 EqA 2010*, race includes colour; nationality; ethnic or national origins.

132. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Victimisation

133. By *27 Eq A 2010*, " (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(*a*) B does a protected act, or
(*b*) A believes that B has done, or may do, a protected act.

Each of the following is a protected act—
(*a*) bringing proceedings under this Act;
(*b*) giving evidence or information in connection with proceedings under this A
(*c*) doing any other thing for the purposes of or in connection with this Act;
(*d*) making an allegation (whether or not express) that A or another person has contravened this Act."

134. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Elements of Direct Discrimination

135. Accordingly, for a Claimant to succeed in a direct race discrimination complaint , it must be found that:

(a) A Respondent has treated the Claimant **less favourably** than a comparator in the same relevant circumstances;

(b) The less favourable treatment was because of race as defined in s9 EqA, or religion, **causation**;

(c) that the treatment in question constitutes an unlawful act such as a detriment.

136. According to the legacy caselaw, the requirement for comparison in the same or not

materially different circumstances applies equally to actual and to hypothetical comparators, as highlighted in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

Victimisation: Elements

137. For a Claimant to succeed in a victimization complaint, it must be found that:

(a) A Respondent has subjected the Claimant to a detriment;
(b) That the Respondent did so because the Claimant had done a protected act or that the Respondent believed that the Claimant had done, or may do a protected act;
(c) that the treatment in question constituted an unlawful act such as a detriment under s39 EqA.

138. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the EqA 2010.

"Because"- Causation

139. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29].

140. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77], "..the real reason, the core reason, the causa causans, the motive, for the treatment complained of .. must be identified."

141. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, per Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

142. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that the ET must find that, by reason of the act or acts complained of, a reasonable worker would, or might, take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.

Harassment

143. s26 Eq A provides
"(1) A person (A) harasses another (B) if—
(*a*) A engages in unwanted conduct related to a relevant protected characteristic, and
(*b*) the conduct has the purpose or effect of—

(*i*) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
…..
(4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—
(*a*) the perception of B;
(*b*) the other circumstances of the case;
(*c*) whether it is reasonable for the conduct to have that effect."

144. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of *s.3A RRA 1976*: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race (or ethnic or national origins).

145. It will be a healthy discipline for a tribunal in any case brought under this section specifically to address in its reasons each of the three elements in order to establish whether any issue arises in relation to that element and to ensure that clear factual findings are made on each element in relation to which an issue arises.

146. Element (iii) involves an inquiry into perpetrator's grounds for acting as he did. It is logically distinct from any issue which may arise for the purpose of element (ii) about whether he intended to produce the proscribed consequences.

147. This guidance is instructive in respect of harassment claims under *s26 EqA,* albeit under the EqA, the conduct must be for a reason which "relates to" race, rather than "on the grounds of" race.

Burden of Proof

148. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

149. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does <u>not</u> simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

150. The EAT has commented *In London Borough Of Islington v Ladele* [2009] IRLR 15 at [40] that it may be that the employee has treated the claimant unreasonably. "That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson said in *Zafar v Glasgow City Council* [1997] IRLR 229: '.. it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in

the same circumstances.'

151. In the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ indicated, the inference is then drawn not from the unreasonable treatment itself – or at least not simply from that fact – but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment."

Constructive Dismissal

152. *s 94 Employment Rights Act 1996* states that an employee has the right not to be unfairly dismissed by his employer. In order to bring a claim of unfair dismissal, the employee must have been dismissed.

153. By *s95(1)(c) ERA 1996*, an employee is dismissed by his employer if the employee terminates the contract under which he is employed, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is known as constructive dismissal.

154. In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:

i) The employer has committed a repudiatory breach of contract.
ii) The employee has left because of the breach, *Walker v Josiah Wedgewood & Sons Ltd* [1978] ICR 744;
iii) The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

155. The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that, first the Respondent has committed a repudiatory breach of his contract, second that he had left because of that breach and third, that he has not waived that breach.

156. Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9.

157. In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680 and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

158. The question of whether the employer has committed a fundamental breach of the

contract of employment is not to be judged by the range of reasonable responses test. The test is an objective one, a breach occurs when the proscribed conduct takes place.

159. To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in *Tullett Prebon v BGC* [2011] IRLR 420, CA, para 20.

160. Once a repudiatory breach has occurred, it is not capable of being remedied so as to preclude acceptance. The wronged party has a choice of whether to treat the breach as terminal. However, the wronged party cannot ordinarily expect to continue with the contract for very long without being considered to have affirmed the breach, *Buckland* per Sedley LJ, at paragraph [44].

Resignation in Response to Breach

161. In *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703, CA the Court of Appeal held that what was necessary was that the employee resigned in response, at least in part, to the fundamental breach by the employer; as Keene LJ put it:

''The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer.''

162. In *Wright v North Ayrshire Council* [2014] IRLR 4, EAT, Langstaff P said that, once a repudiatory breach of the employment contract by the employer has been established in relation to a constructive dismissal claim, the correct approach, where there was more than one reason why an employee left a job, was to examine whether any of them was a response to the breach. If the breach played a part in the resignation, then the employee has been constructively dismissed. However, Langstaff P also said that where, there is a variety of reasons for a resignation, but only one of them is a response to repudiatory conduct, a tribunal may wish to evaluate whether in any event the claimant would have left employment and adjust an award accordingly.

Reasonableness

163. If the Claimant establishes that he has been dismissed, the ET goes on to consider whether the Respondent has shown a potentially fair reason for the dismissal and, if so whether the dismissal was in fact fair under *s98(4) ERA*. In considering *s98(4)* the ET applies a neutral burden of proof.

Time Limits

164. By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of

i) the period of three months starting with the date of the act to which the

complaint relates or

ii) such other period as the Employment Tribunal thinks just and equitable.

165. Where a claim has been brought out of time the Employment Tribunal can extend time for its presentation where it is just and equitable to do so. In *Robertson v Bexley Community Centre T/a Leisure* Link [2003] IRLR 434 the Court of Appeal stated that there is no presumption that an Employment Tribunal should extend time unless they can justify a failure to exercise the discretion. Quite the reverse; a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In exercising their discretion to allow out of time claims to proceed, Tribunals may have regard to the checklist contained in s33 Limitation Act 1980 as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336. Factors which can be considered include the prejudice each party would suffer as a result of the decision reached, the circumstances of the case and, in particular, the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any requests of information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Discussion and Decision

166. In coming to its decision the Tribunal has taken into account all its findings of fact. Nevertheless, for convenience, the Tribunal has separately addressed each of the issues as set out in the List of Issues.

Direct Race discrimination

<u>On 5 June 2017 Dr Sharma stating: "I am the consultant/anaesthetist, I treat the patients, I don't treat numbers. Numbers are for monkeys. Monkeys treat numbers</u>"

167. The Tribunal has decided that Dr Sharma did use these words, or very similar words, but that he did so because he was referring to a parable about a cap-seller and monkeys. He was making the point that people should not blindly give treatment to patients simply on the basis of the patients' test readings, but should treat patients as individuals, because their particular readings may be normal for them. The Tribunal concluded that Dr Sharma was not referring to the Claimant's race at all and that her race was not any part of the reason that he used the phrase.

<u>On 6 June 2017 Dr Sharma threatening to report the Claimant to the Nursing and Midwifery Council</u>

168. The Tribunal has found that Dr Sharma did not threaten to report the Claimant to the Nursing and Midwifery Council, but said that he could report nurses to the Nursing and Midwifery Council. The majority of the Tribunal concluded that he did so because the Claimant had referred to Dr Sharma and her respective professional responsibilities and professional bodies on the previous day.

169. The minority did not accept Dr Sharma's explanation. The minority considered that Dr Sharma had treated the Claimant less favourably by commenting that he could report

nurses, by which he meant the Claimant, to the NMC and saying that he wanted to speak to her manager. Dr Sharma treated the Claimant less favourably than the doctors, who were in the same, or not materially different circumstances, to the Claimant. There was no suggestion that the doctors, one of whom was Dr Jonty Robinson, were black African. The doctors and the Claimant had been involved in the care of the patient – indeed, the doctors were directly involved in the patient's care, in that they decided to administer fluids to the patient. Dr Sharma's behaviour towards the Claimant was unreasonable because she was not responsible for that decision. While unreasonableness, on its own, is not sufficient to shift the burden of proof to the Respondent, it can be relevant, taking into account other circumstances, in deciding whether the burden of proof does shift. Given that there was unreasonable and less favourable treatment of the Claimant than the doctors, in the same circumstances, the minority decided that the burden of proof did shift to the Respondent to show that race was not the reason for the less favourable treatment.

170. The minority decided that the Respondent had not provided a cogent explanation for the difference in treatment – Dr Sharma treated the Claimant more harshly than the doctors who were, in fact, responsible for the relevant clinical decisions. Applying *Igen v Wong,* EJ Brown considered that the Respondent had not discharged the burden of proof and that Dr Sharma did discriminate against the Claimant because of race.

<u>On 11 September 2017, Mrs Archer and Ms Woodley allegedly refusing to look at the Claimant's medical records, or accept the Claimant's medical record</u>

171. The Tribunal decided, on the evidence, that Ms Woodley and Mrs Archer did not act in this way. That allegation failed on the facts.

<u>12 September 2017, Mrs Eastell using her professional authority against the Claimant by preventing the Claimant from having a break, starving the Claimant for three hours, not allowing other staff to relieve the Claimant for her break, screaming at the Claimant in the coffee room that she could not have her break, saying: "I'm in charge and you should do what I say and I insist you should get up now and follow me" and approaching the Claimant with her fingers towards the Claimant's face</u>

172. The Tribunal has decided that Mrs Eastell told the Claimant that she could have a break when she had taken the patient she was looking after to the ward. It was not in dispute that nurses took breaks when they were able to, depending on their responsibilities to relevant patients and how busy the ward was. It had been an unusually busy day and it had simply not been possible for the Claimant to have a break, given her responsibilities to relevant patients, before 18.00. Mrs Eastell had not prevented the Claimant from having a break; but had indicated to her when she would be able to have her break. The Employment Tribunal has not accepted the Claimant's version of events regarding what Mrs Eastell said when she entered the coffee room. It preferred Mrs Eastell's version of events and found that the Claimant had shouted at Mrs Eastell, rather than the other way round. The allegations regarding Mrs Eastell's conduct in the coffee room at around 6pm failed on their facts.

173. The Tribunal found that the only reason that the Claimant could not take a break before 18.00 was that the Claimant was caring for a patient and that nurses, in general, took breaks when they were able to do so, in accordance with their care and responsibilities. This was nothing to do with the Claimant's race.

On 8 June 2017, Mrs Archer not allowing the Claimant to explain why she reported Dr Sharma's behaviour to Stuart Watling and interrogating the Claimant

174. Those allegations failed on their facts. Mrs Archer did not behave in that way.

11 September 2017, Mrs Archer and Ms Claire Woodley refusing to accept the Claimant's medical records, issuing a written warning, redeploying the Claimant not redeploying Dr Sharma

175. The Tribunal has already found that Mrs Archer and Ms Woodley did not refuse to accept the Claimant's medical records. Mrs Archer and Ms Woodley did issue the Claimant with a written warning. Ms Woodley, who was a Human Resources Partner, advised that a written warning was appropriate, pursuant to the Respondent's Absence policy, because of the number of the Claimant's absences. The Claimant had, indeed, been off work on several occasions during 2016 and 2017.

176. The Tribunal decided that there was no evidence that an employee, who had been off on the same number of occasions, but who was of a different race, would have avoided a formal written warning. It appeared that the Claimant was treated in accordance with the Respondent's Absence policy.

177. Insofar as the Claimant contended that it was discriminatory to give her a written warning, because her most recent and most significant absence arose out of her grievance against Dr Sharma, the Tribunal concluded that there was no evidence that a person who was not black African, who had been absent in those circumstances, would have been treated differently.

178. The Tribunal accepted the Respondent's evidence that the Claimant refused to be referred to occupational health. Had she agreed to be referred to occupational health, then the Respondent might have decided not to give her a warning.

179. At the meeting, redeployment of the Claimant was discussed and Mrs Archer reiterated that Dr Sharma could not be redeployed. It had already been explained to the Claimant, on other occasions, that, as Dr Sharma was a "gas man" (who anaesthetises patients in a theatre setting), he could not be moved to, for example, Intensive Care.

180. The Tribunal accepted the Respondent's evidence regarding why it was considerably easier to redeploy the Claimant, a junior nurse, than Dr Sharma, a specialist anaesthetist. The Tribunal decided that the Claimant and Dr Sharma were in materially different circumstances. They had very different skill sets and Dr Sharma was considerably more specialist than the Claimant, so it was therefore more difficult to move him.

181. On the evidence, the Tribunal found that the Respondent decided not to move Dr Sharma because it wanted to use his specialist skills and that it was easier to redeploy the Claimant. This was nothing to do with race.

On 14 September 2017, Roslyn Blackboro and Aralola Adegunle insisting on redeploying the Claimant, rather than dealing with Mrs Eastell's behaviour

182. The Tribunal found, on the facts, that the Claimant agreed to being redeployed,

even if Mrs Blackboro and Ms Adegunle were also encouraging the Claimant to be redeployed on health grounds. They had good reason to encourage the Claimant, given that there had been a considerable breakdown in the relationship between the Claimant and Mrs Eastell. Insofar as the Respondent treated the Claimant differently to Mrs Eastell, the Claimant had been off work, sick. on a number of occasions due to stress. The Claimant was also saying that she was ill because of stress. Mrs Eastell was not ill because of stress, so the Claimant and Mrs Eastell were not in the same material circumstances.

183. The Tribunal accepted the Respondent's evidence that the Claimant agreed to be redeployed and that the Respondent suggested redeployment on health grounds. This was nothing to do with the Claimant's race.

Harassment

On 5 June 2017 Dr Sharma stating: "I am the consultant/anaesthetist, I treat the patients, I don't treat numbers. Numbers are for monkeys. Monkeys treat numbers"; On 6 June 2017 Dr Sharma threatening to report the Claimant to the Nursing and Midwifery Council

184. See the findings of the Tribunal above.

185. The Tribunal unanimously concluded that Dr Sharma's words on 5 June were nothing to do with race. The Tribunal majority also concluded that Dr Sharma's words on 6 June 2017 were nothing to do with race – they were not related to race and could not amount to harassment under *s26 EqA 2010*.

186. The minority decided that Dr Sharma's words on 6 June 2017 were because of race. They were therefore also related to race. The minority also decided that the words did have the effect of creating an intimidating and hostile environment for the Claimant, which she described in her email of 8 June 2017 to Mrs Archer, "At the point I felt the desperate need to speak to someone." EJ Brown considered that it was reasonable for Dr Sharma's words to have the prohibited effect on a junior nurse. Dr Sharma said the words to a nurse colleague, about the Claimant, and Dr Sharma could easily foresee – and perhaps intended - that they would be relayed to the Claimant. The threat to report the Claimant to the NMC threatened her career and was made by a Consultant doctor who had a much higher status than the Claimant in the hospital and health service hierarchy. In all the circumstances, the threat was unreasonable and oppressive and EJ Brown concluded that Dr Sharma's words on 6 June 2017 also fulfilled the definition of race harassment.

5 June 2017, Dr Sharma saying I don't care about your concerns your concerns does not matter to me I am the consultant anaesthetist and I make decisions for the patient

187. The Tribunal has decided that Dr Sharma did say words along the lines of, "not being there to make the Claimant happy." The Tribunal has decided that he did speak in a loud and unpleasant way to the Claimant. However, the Tribunal accepted Dr Sharma's explanation that he was frustrated and was concerned with patient care. The Tribunal found that his treatment of the Claimant was not related to race. The allegation of race harassment failed.

On 16 June 2017, Mr Shah saying mirror, mirror on the wall look at yourself first before

you look at someone else

188. Mr Shah did use the words alleged, but there was no evidence that he did so for a reason related to race. The allegation of race harassment failed. However, see further, below, regarding victimisation.

Victimisation

189. The Claimant did a number of protected acts, including: complaining to Mrs Eastell and Mrs Archer on 5 June 2017, alleging that Dr Sharma had racially abused her; complaining to Mr Stuart Watling on 6 June 2017 saying that Dr Sharma had used racist language; and repeating the complaint to Mrs Archer on 8 June 2017. Indeed, it was quite clear that the Claimant repeated those allegations on a number of occasions including at the informal meeting on 14 June 2017.

14 June Mrs Eastell insisting there were two eye witnesses

190. The Tribunal has found that Mrs Eastell was truthful in her account to the Claimant that she had received two witness statements. She was not saying there were only two eye witnesses, she was simply that she had only received two statements. This was nothing to do with the Claimant having raised a complaint of race discrimination.

16 June 2017 Mr Shah's behaviour towards the Claimant

191. The Tribunal found that Mr Shah did say that the Claimant should look at herself in the mirror, giving an example of a nurse who had behaved unreasonably, to illustrate his point. He said that, if the Claimant was looking for anyone to be dismissed, that would not happen. He did all this to put pressure on the Claimant to pursue an informal, rather than a formal complaint. In the circumstances that Mr Shah was a very senior employee and the Claimant was a very junior one, it was reasonable for the Claimant to feel - and the Tribunal found that the Claimant did feel - intimidated by Mr Shah's behaviour. That was evidenced by the fact that, very shortly afterwards, her trade union representative went to the Head of Nursing, to clarify what Mr Shah's intention had been.

192. Mr Shah was aware, from the outset, that the Claimant was making a race discrimination complaint against Dr Sharma. The Tribunal found that the behaviour of Mr Shah on 16 June 2017 towards the Claimant amounted to a detriment. A reasonable employee would feel intimidated and by Mr Shah and worried about her grievance and how she would be seen by senior employees thereafter. The words suggested that the outcome of the grievance had been predetermined and that the Claimant would not receive a fair and impartial outcome.

193. The Tribunal also found that part of the reason Mr Shah behaved in that way was because the Claimant had made a complaint of race discrimination against a doctor at the hospital. Mr Shah referred to the nature of the complaint during the conversation – saying that it was a race matter and a very serious one. He clearly had on mind the nature of the grievance when he was speaking to the Claimant.

194. Mr Shah therefore victimised the Claimant by his behaviour on 16 June.

Dr Sharma's Actions on 5 and 6 June 2017

195. There was no evidence that Dr Sharma knew that the Claimant had, or believed that the Claimant would, make any allegation under the *Equality Act 2010.* On the Tribunal's findings, Dr Sharma was not told of the Claimant's discrimination complaint until 12 June 2017. The Tribunal was satisfied that Dr Sharma did not victimise the Claimant.

16 June 2017 Mrs Archer and Mrs Blackboro allegedly insisting the Claimant be redeployed and not redeploying Dr Sharma; 11 September 2017 Mrs Archer and Miss Woodley redeploying the Claimant and not Dr Sharma

196. Tribunal has found that the reason for suggesting redeployment of the Claimant and not Dr Sharma was the relative ease with which the Claimant could be moved compared with Dr Sharma, given their respective level of specialisation. Further, by September, the Claimant had been off work, ill with stress and her relationship with Sister Eastell had significantly broken down. While the Claimant's grievance was part of the background circumstances, it was not itself part of the reason that redeployment was suggested for the Claimant.

Statutory Defence

197. The Tribunal heard little, or nothing, about the Respondent's training of Mr Shah regarding victimisation. The Tribunal does not find that the statutory defence has been satisfied in relation to Mr Shah's actions.

Constructive Unfair Dismissal

198. The majority of the Tribunal has found that Dr Sharma did not subject the Claimant to race harassment or discrimination by threatening to report her to the Nursing and Midwifery Council on 6 June 2017.

199. The Tribunal unanimously decided that Dr Sharma did not subject the Claimant to race harassment or discrimination on 5 June 2017.

200. The Tribunal has decided that Mr Shah victimised the Claimant on 16 June.

201. With regard to the other allegations against Mrs Archer, Mrs Eastell, Ms Woodley, Ms Adegunle and Mrs Blackboro, the Tribunal has accepted the Respondent's evidence and explanations in relation to each allegation. It has therefore decided that the Respondent acted with reasonable and proper cause in relation to those matters.

202. The Respondent did not inform the Claimant of the outcome of her grievance before she resigned.

203. Nevertheless, the Tribunal concluded that Dr Pittman investigated the Claimant's grievance fairly and interviewed relevant witnesses. Dr Pittman told the Tribunal that transcripts needed to be produced of witness interviews, which took some time. The last witness was been interviewed in September.

204. When the Claimant resigned, she said that she had complained about Dr Sharma, but that no action had been taken against him. Dr Pittman concluded his report in November 2017, shortly after the Claimant had resigned. The Tribunal noted that the

interviews with witnesses were extremely detailed the transcripts produced were lengthy. Dr Pittman said that producing the transcripts resulted in delay. The delay had reasonable and proper cause.

205. The Claimant did not chase an outcome to the investigation before her resignation.

206. Her appeal she did not mention Mr Shah's treatment of her as a reason for her resignation, so the Tribunal found that Mr Shah's treatment was not one of the reasons she resigned.

207. The Tribunal, taking into account the majority's finding on Dr Sharma's conduct on 6 June, concluded that all the other actions of the Respondent, taken together, were done with reasonable and proper cause. Therefore, the relationship of trust and confidence between employer and employee was not seriously damaged by the Respondent's actions. The Claimant was not entitled to resign and claim constructive dismissal.

Time Limits

208. Mr Shah victimised the Claimant on 16 June 2017. The Claimant presented her complaint to the ET on 13 October 2017, following ACAS Early Conciliation on 1 – 2 October 2017. She therefore contacted ACAS just over 2 weeks after the three month primary time limit had expired. That was a reasonably short delay.

209. It was clear that the Claimant raised concerns about Mr Shah's behaviour immediately following the meeting – Mr Shah met with the Claimant's Trade Union representative later the same day, because of these concerns. Furthermore, the Claimant set out her complaint about Mr Shah's behaviour in her grievance dated 26 June 2017, only 10 days after the meeting in question. While the Claimant later said that she wanted the grievance to deal with only Dr Sharma's conduct, the Respondent was aware of her detailed criticism of Mr Shah at a very early stage.

210. The Tribunal concluded that the Respondent was not disadvantaged by the relatively short delay in submitting the ET claim. The Respondent was able to call all its relevant witnesses to give evidence on the victimisation allegation; Mr Shah, Mrs Archer and Ms Blackboro.

211. The Tribunal also considered that the Claimant had shown some good reasons for the delay in submitting her ET claim. She had raised a grievance which was being investigated by the Respondent. The Tribunal found that the Claimant was significantly affected by stress and anxiety during the 3 month primary time limit. She was unable to work for 18 days and, thereafter, took two further periods of absence away from work, described as annual leave, to reflect, following incidents in the workplace. It was clear that, while the Claimant had previously taken some time away from work in 2016/2017, she became substantially more distressed, for longer periods, after the incidents on 5 and 6 June 2018. The Tribunal unanimously concluded that Dr Sharma's behaviour to the Claimant on 5 June 2018 was unpleasant and distressing, even if it did not amount to harassment or discrimination, and that the Claimant was not at fault in feeling stressed and ill after it.

212. It was clear that the Claimant continued to feel ill and stressed throughout the 3 month primary time limit. She was further distressed when she was given a formal warning

about her attendance following her August 2017 sick leave.

213. The ET was satisfied that the Claimant was considerably distressed and preoccupied by the events of 5 and 6 June 2017 throughout the primary limitation period.

214. The Tribunal considered that, if time were not extended, the Claimant would be deprived of a remedy for an act of victimisation which was a serious matter – a Divisional Director victimising a very junior member of staff in relation to her good faith complaint of race discrimination. Likewise, the Respondent would not be liable for an act of victimisation, the facts of which it was almost immediately aware, and which it was able to defend at Tribunal, calling all its relevant witnesses.

215. The ET took into account all the circumstances of the case. The Claimant had the assistance of a Union representative for at least some time during the 3 month limitation period. She knew of the facts giving rise to the cause of action. She was able to write letters of grievance and to participate in hearings during the period. The Claimant did not pursue the grievance against Mr Shah. On the other hand, the ET considered that it was understandable that the Claimant would not wish to pursue a grievance against, not one, but two, very senior members of medical staff, especially given the way Mr Shah had reacted to her complaint against Dr Sharma. The Respondent was still aware of the Claimant's complaint about Mr Shah.

216. The Claimant must convince the Tribunal that it is just and equitable to extend time; the exercise of the discretion is the exception rather than the rule.

217. The Tribunal has had regard to the checklist contained in s33 Limitation Act 1980 as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336.

218. It concluded that it was just and equitable to extend time for presentation of the claim. There would be considerable prejudice to the Claimant if time were not extended, in that she would be deprived of a remedy to which she would otherwise be entitled; but very little corresponding prejudice to the Respondent. It was able to defend the relevant allegation on the merits. The delay was relatively short and the Claimant was significantly affected by ill health and stress during primary limitation period. There will have been little, or no, effect on the cogency of the evidence, because the allegation was highlighted by the Claimant at a very early stage. While other factors pointed away from exercising the discretion to extend time, including the Claimant's knowledge and access to Union assistance at some points, the Tribunal concluded that it would be just to permit the Claimant to pursue her complaint of victimisation regarding the conduct of a senior member of Respondent's organisation towards her.

Employment Judge Brown

22 June 2018