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EMPLOYMENT TRIBUNALS

Claimant:	**Mrs H. Jaleel**
Respondent:	**Southend University Hospital NHS Foundation Trust**
Heard at:	**East London Hearing Centre**
On:	**27 and 28 June, 2 and 3 July, 17 October 2019** **18 October (in Chambers)**
Before:	**Employment Judge Massarella**
Members:	**Mr G. Tomey** **Mr M. Wood**

Representation

Claimant:	Mr O. Ojo (Solicitor)
Respondent:	Mr B. Gil (Counsel)

JUDGMENT

The Judgment of the Tribunal is that:

1. the Claimant's claims of direct race discrimination, harassment related to race and victimisation under the Equality Act 2010 fail and are dismissed;

2. the Claimant's claim of unfair (constructive) dismissal succeeds.

REASONS

1. By a claim form presented on 30 July 2018, after an ACAS early conciliation period between 26 June and 11 July 2018, the Claimant, Mrs Henna Jaleel,

complained of race discrimination (direct discrimination, harassment related to race and victimisation) and unfair (constructive) dismissal. She was employed by the Respondent, Southend University Hospital NHS Foundation Trust, between 11 December 2002 and 31 July 2018 as a Consultant in Sexual Health Medicine.

2. The Respondent denied that there was any conduct in response to which the Claimant was entitled to resign and treat herself as having been dismissed; it denied discrimination in any form. The Respondent also raised limitation issues.

The Hearing

3. This hearing was originally listed for five days but, owing to a lack of judicial resources, the Tribunal was unable to sit on the first of those days and the listing was reduced to four days. After discussion with the parties, it was agreed that the hearing would continue, on the understanding that it would probably go part-heard, which it did. The earliest dates that the Tribunal and the parties could reconvene were in October 2019. The parties attended for the first of two days; the Tribunal deliberated in Chambers on the second. Unfortunately, and again because of pressure on judicial resources, there was then a delay in writing up and sending out the judgment, for which the Tribunal apologises.

4. In our initial discussion with the parties it was agreed that the focus of the hearing would be on liability only; evidence and submissions would not be required at this stage on issues of remedy, including on contribution and *Polkey*.

5. We had an agreed bundle of documents, running to some 750 pages, and a supplementary bundle running to some 300 pages.

6. We heard evidence from the Claimant; she identifies her race as Asian and Pakistani. For the Respondent we heard evidence from Mr Neil Rothnie, Medical Director; Ms Traci Maton, who between 2016 and 2018 was Associate Director of Medicine; Ms Caroline Howard, Clinical Director of Medicine; Ms Sue Bridge, Associate Director of Human Resources; and Ms Fiona Kennedy, Senior HR Business Partner/Deputy Head of HR.

The Issues

7. The issues for determination were set out in an agreed list of issues, which is included at Appendix A of this Judgment.

8. At the beginning of the hearing, and after discussion with the parties, an additional allegation was added to the list of issues in relation to the decision to re-advertise the Claimant's role as Director of Medical Education ('DME') on 31 January 2018, which was an allegation of direct race discrimination; it was numbered as Issue 3(H)(ii). It was agreed that the omission of this issue from the agreed list was an oversight and the Respondent raised no objection to its inclusion.

Findings of Fact

9. The Claimant commenced employment as a Consultant in Genitourinary Medicine on 11 December 2002. In around 2008 Genitourinary Medicine was renamed Sexual Health Medicine within the Trust.

10. In addition to her substantive role, she held a number of other management positions at various points between 2005 and the termination of her employment in 2018. These included Departmental Lead (2012 onwards) and Clinical Leadership for writing tenders for services (2013-2014).

11. She was a highly valued member of the Department with a strong track record of excellence. There was no challenge to her evidence that during her time with the Respondent she had no complaints against her from patients or junior colleagues. She received positive feedback at her yearly appraisals, including eight Excellence awards between 2006 and 2012.

12. In December 2012, Mr Neil Rothnie (Breast Surgeon and head of Breast Cancer Services) was appointed Medical Director. Between 2014 and February 2017 the Claimant reported to Clinical Director Dr John Day.

'SHORE'

13. In 2014 sexual health services in the Southend region were put out to tender. The Claimant was closely involved in the Respondent's bid, which was successful. In April 2015 the Respondent's Sexual Health Department started working in collaboration with Essex Partnership Trust (then South Essex Partnership Trust) under a new name: Sexual Health Outreach Reproduction and Education ('SHORE').

The Director of Medical Education Appointment

14. In January 2015, Professor John Kinnear announced that he was standing down from the role of Director of Medical Education ('DME'). He invited expressions of interest; the closing date was 30 January 2015. Professor Kinnear, who is white, had held the role for nine years. It had never been advertised during his tenure, although there were three-year break points in his contract, which were not exercised. He told the Claimant that he had never had a separate review in his role as DME, but that a review of the post was carried out as part of his general annual appraisal.

15. The DME post, and the accompanying remuneration, was in addition to the substantive role and salary of a Consultant.

16. Although the Claimant accepts that she was encouraged by Professor Kinnear to apply, she asserts that this was only because two white candidates, Dr Emily Simpson and Dr Lucy Coward, both of whom are white, had been approached to apply but had declined to do so. The only evidence in relation to this was the Claimant's account of what she inferred from her discussions with Dr Kinnear. This is not an issue in the case and no finding is required, or indeed possible given the scant nature of the evidence.

17. The Claimant was interviewed for, and offered, the role of DME on 19 March 2015. Mr Rothnie was on the panel which appointed her and became her line manager in relation to this role. The Claimant asserts in her statement that his demeanour at the interview, coupled with the fact that there was a short delay in his announcing her appointment, suggested that he was not supportive of her appointment. The Tribunal rejects that evidence. Had Mr Rothnie not considered her suitable for the role, we have no doubt he would not have approved her appointment.

18. The Claimant was paid an additional £8733 per annum in respect of the DME role. The role was a fixed-term appointment for three years, subject to extension following review; it was described as a temporary role with an end date of 31 March 2018; it came with 1 PA responsibility payment ('PA' stands for Programmed Activity, which equates to 4 hours per week).

19. Although the Claimant initially had an Associate DME working with her, Dr Simpson, she resigned from the Trust towards the end of 2015. At the time Mr Rothnie did not support the Claimant's suggestion that the post of Associate should be advertised. The Claimant felt that this was a deliberate decision taken by him to disadvantage her. Mr Rothnie explained that he did not appoint an Associate because at the time there was no separate funding for the post, and we accept that evidence. However, he planned to put an Associate in place in due course. He later did so, in circumstances which we set out below.

Complaints by Trainees in Medicine

20. Soon after taking up the post of DME the Claimant started to receive reports that some trainees in Medicine were raising concerns about the way that they were treated by Consultants. She understood that they were reporting these matters directly to the School of Medicine and the General Medical Council ('GMC'), rather than raising them internally.

21. There was an issue before us as to whether these complaints included complaints of race discrimination. In her witness statement the Claimant referred at several points to complaints by trainees of 'undermining and discrimination' by Consultants.

22. It was not disputed that the trainees had raised complaints of bullying/harassment, and 'undermining behaviour' by Consultants; however, we were not referred to any contemporaneous evidence which suggested that these included complaints of discrimination. In an email of 3 August 2016, the Claimant raised concerns about two particular trainees; there is no mention of race in that email. In response to a question from the Tribunal, the Claimant said that trainees 'did not talk to me about racial discrimination'. When she attended an investigatory meeting related to these allegations in November 2016 (which we refer to below) she was asked by the investigator whether there was 'a theme to the concerns'. In her reply she referred only to 'undermining behaviour' and 'bullying and harassment', not to discrimination or to race.

23. In the course of cross-examination, the Claimant made assertions about the meaning of the term 'undermining'. At one point she stated that 'undermining' was a coded word for race discrimination, but that this might only be understood by non-white people. However, in response to questions from the Tribunal she said that undermining was something distinct from discrimination, a separate and subtler thing. The Tribunal notes that in December 2015 the Claimant herself produced a draft proposal on 'Issues with Undermining in the Trust'. In that draft she made the point that the Respondent already had a policy about discrimination (its 'Staff Dignity and Respect Policy') but that it 'does not cover undermining'. At no point in that document does the Claimant make a link between undermining and race discrimination.

24. In the light of the Claimant's own, somewhat inconsistent, evidence and the

views stated in her own draft proposal, the Tribunal finds that undermining was not used by the Claimant or others as a code word for race discrimination, nor was it used interchangeably with it.

25. We find that the trainees did not make complaints of race discrimination. The fact that the Claimant was prepared to say in her statement that they did, but in oral evidence accepted that they did not, cast doubt on the credibility of her evidence on the issue of whether other alleged complaints of discrimination were made, by her or by others.

The Claimant's Illness in 2015

26. Shortly after assuming the role of DME, in late May 2015, the Claimant was diagnosed with breast cancer. On 26 May 2015 she underwent surgery; that surgery was performed by Mr Rothnie. She was off sick for two weeks immediately afterwards, but returned to work on 11 June 2015. She then underwent radiotherapy but continued to work through most of the following period, until the side-effects caused her to take a further period of sickness absence. She returned to work full-time on 8 September 2015.

'Dr K'

27. In June 2016, a complaint was made about a female Asian Consultant - who was not a witness before us and whom we will refer to as 'Dr K' - by one of her colleagues, criticising her manner in interacting with others.

28. On 20 July 2016, the School of Medicine had a visit from Health Education England ('HEE') and the GMC to assess the training standards in the Directorate of Medicine.

29. Shortly before the meeting Dr K approached the Claimant and complained that she had been bullied and undermined by three Consultant colleagues (two of whom were white, one of whom was BAME). The Claimant advised Dr K to raise her concerns under the Respondent's policy. The Claimant met Dr K again on 21 July 2016; Dr K said that she did not feel able to make a formal written complaint of bullying and harassment as she was fearful of the consequences.

30. We find that Dr K did not mention race discrimination in either of these two interactions with the Claimant. That is consistent with the Claimant's later email of 5 August 2016 in which she records only that Dr K had 'mentioned herself being undermined by' three colleagues.

Protected Act 1: 'on or about 21 July 2016, the Claimant told the Medical Director, Neil Rothnie And the Chief Operating Officer, Jon Findlay of the complaints received from the School of Medicine about general undermining of trainee doctors by Consultants which the Claimant understood to be race related and demanded that the complaints be investigated'.

31. The Claimant was given confidential feedback about the trainees' complaints by the Head of School of Medicine and the Postgraduate Dean; she was told the identities of four Consultants against whom the complaints were made. A follow-up visit was scheduled for November 2016. In her witness statement the Claimant again

characterised these complaints as being in part race-related; we have already found that they were not.

32. On 21 July 2016, the Claimant sent an email to Mr Rothnie and Mr Findlay, which she contends was the first of her protected acts under the victimisation legislation. It contains the names of the four individuals who she said were the subject of complaints of allegations of 'bullying and harassment' and 'nurturing an environment of undermining, bullying and harassment'. There is no mention of race, or of discrimination, in that email. Although in the list of issues it is alleged that she 'demanded that the complaints be investigated', the email contains no such demand and that assertion is not pursued in her witness statement.

Issue 3(A): on 21 July [2016] Jon Findlay the Respondent's Chief Operating Officer informed the Claimant that the two white Consultants would not be investigated (direct race discrimination).

33. The Claimant discussed the email with Mr Findlay on 22 July 2016. He later sent her an email about the same matter (the names of the Consultants against whom allegations were made are omitted):

> 'I have spoken to Ian Barton today and although concerns were raised about the four individuals, he thinks that in the final report they will say that two individuals [*names omitted*] were named by both junior and senior medical staff as displaying bullying and undermining behaviour to the extent that it could potentially impact on patient care'.

34. The Claimant was unhappy that the email referred only to two Consultants, rather than four. We find that Mr Findlay was merely reporting to her what he had been told by HEE; his email was about what he understood HEE was proposing to do, not what he was proposing to do. The Claimant accepted in cross-examination that Mr Findlay had not told her that he had sought, or would seek, to influence the decision in order to exclude two Consultants; there is no evidence that he had done so.

35. Mr Ojo made no reference to this allegation in his closing submissions. We note Mr Gil's submission that HEE is not a party to proceedings and that, even if HEE had narrowed the scope of its investigation (which it later emerged it had not) the Respondent would not be vicariously liable for its decisions. In any event, we find that there was no detriment to the Claimant personally in relation to this incident: she suffered no disadvantage as a result of this email.

Issue 3(B): 'the Claimant requested that Mr Neil Rothnie should in his capacity as the Medical Director talk to Dr K and ensure that the matter including the previous complaint is properly investigated. This request was dismissed by Mr Neil Rothnie (direct discrimination).

36. On 4 August 2016, Mr Rothnie asked the Claimant to provide further details of her conversation with the School of Medicine. She did so in an email of 5 August 2016. In that email she also relayed the conversation she had had with Dr K, referred to briefly above. The references to Dr K in that email are as follows:

> 'Dr Barton said that Dr K has spoken in confidence to him and has indicated that she has been a victim of bullying and harassment both by

> [*two Consultant colleagues*]. He further added that in view [of] this she is actively looking for a new job elsewhere.
>
> …
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> Also on the day of School of Medicine visit, just a few minutes prior to the initial meeting with the School of Medicine Dr K came to see me in the Education Centre. She mentioned about trainees complaining of being bullied by [*two Consultants*]. She said that trainees have complained that [*one of them*] has a demeaning attitude towards them and does embarrass them in front of others.
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> She then mentioned herself being undermined by [*three colleagues*]. I was surprised by Dr K's revelation of herself being undermined by her colleagues. She looked distressed and tearful. I sympathised with her and advised that if she feels strongly about the situation she should follow the Trust Policy on it.'

37. At no point in this email is there any reference to race discrimination, whether in relation to Dr K, or at all. Nor is there any request for Mr Rothnie to speak to Dr K and ensure that her concerns were being properly investigated. The Claimant maintained that she had been hampered in writing this email by being asked to provide it at short notice. We reject that contention: it is a lengthy email, which is clearly the product of some thought; even if there was pressure of time on her, there is no indication that it led her to omit material information.

38. We accept Mr Rothnie's evidence that he had been separately made aware of Dr K's concerns by Mr Mike Salter, Senior Consultant and Clinical Director for Surgery. Mr Salter told him that Dr K was reluctant to take things further; Mr Rothnie asked Mr Salter to ask Dr K whether she would be prepared to put her concerns in writing or to speak with him to go through the issues. Mr Rothnie was told that Dr K did not want to take the matter further or pursue a formal grievance. That is consistent with what Dr K independently told the Claimant and Ms Maton (as set out below). Mr Rothnie was, however, involved in the commissioning of the larger report which we refer to below and which included consideration of Dr K's allegations. There is no evidence that Mr Rothnie dismissed Dr K's concerns.

39. We find that this incident did not occur as described.

<u>Mediation Involving Dr K</u>

40. What did happen, however, was an attempt at mediation between Dr K and one of the Consultants, which was facilitated by Ms Maton. She held a meeting with the two colleagues on 19 July 2016, then spoke to them both individually by way of feedback and followed this up with letters in mid-August. In those letters Ms Maton set out with care, and in considerable detail, Dr K's concerns; she also referred to concerns raised by the Consultant about Dr K. Her approach was even-handed and impartial. She proposed a number of alternatives to Dr K: a mediated session between herself and the Consultant; identifying a coach for her to provide support; and further contact with Occupational Health to identify supportive measures. Ms Maton was quite clear that Dr K did not wish to raise a formal grievance and we accept that evidence.

41. On 15 August 2016, Dr K informed Ms Maton at a meeting that she intended

to resign. She explained that, although she felt bullied by the Consultant in question at work, she had a friendly relationship with him outside work. Ms Maton's notes of that meeting record the following:

> 'She said that [*the Consultant*] would be aware of her involvement and she could not forgive herself for making his time miserable … I tried to reason with her but was unsuccessful she was adamant she would do anything to not upset him and that resigning felt her only option … She said that sometimes he looked at her as if she was a worker on the plantation and that she was the slave and he was the master.'

42. In cross-examination, and to the Tribunal's surprise, Ms Maton declined to accept that the last statement in her notes had a racial connotation. We find that it unarguably does; it indicates that Dr K did consider that race played a part in the Consultant's treatment of her. This in turn is supportive of the Claimant's evidence that Dr K expressed to the Claimant that she thought that race was a factor in the treatment and we find that she did. The question for us, however, is whether the Claimant then referred to race in advocating on Dr K's behalf to other people. We consider that issue further below.

43. On 15 August 2016, Dr K submitted her resignation. Ms Maton suggested that she consider taking a period of sabbatical leave instead; Dr K gave some thought to this but ultimately decided not to do so.

44. Dr K met the Claimant on 21 October 2016. The Claimant's evidence was that Dr K said that she did not think there was any point in raising a grievance. She suggested that the Respondent was planting patient safety concerns against her. The Claimant says that Dr K made allegations of racism against Mr Rothnie, but that Dr K declined to go on the record in respect of these matters. We heard no direct evidence from Dr K about these matters and we decline to make any findings to that effect. The only evidence is second-hand evidence from the Claimant and, in view of the unreliability of her evidence as to the making of allegations of discrimination, which we have noted above, we do not find that evidence to be convincing.

<u>The Investigation into the Trainees' Complaints</u>

45. On 20 October 2016, an external investigator, Mr Nigel Youngman, was appointed to look into the trainees' complaints, with terms of reference to investigate undermining by Consultants. The investigation covered allegations against all four of the Consultants (including the two whom the Claimant alleged were going to be improperly omitted) and also allegations made by Dr K against the two Consultants who she considered had bullied and harassed her. The eventual report, completed in January 2017, was lengthy and detailed. It upheld complaints about two specific incidents but concluded that there was no evidence that the Consultants were contributing to a culture which did not promote dignity and respect.

46. There is no reference to allegations of race discrimination in the report. On 10 November 2016 the Claimant had attended an interview with Mr Youngman. There is no record of any mention by her of race in the notes of that meeting, nor any complaint about the ambit of the investigation.

Protected Act 2: 'on or after 21 October 2016 and following the Claimant's meeting with [Dr K], the Claimant met with the Respondent's medical director, Mr Neil Rothnie, during which she raised the issue of the treatment of [Dr K] with him'.

47. In her witness statement the Claimant stated that these conversations with Mr Rothnie took place on two occasions: one when they were walking from the education centre toward the main hospital building in October 2016; the other during a one-to-one meeting in a Trust meeting room in November 2016. She alleges that on both occasions Mr Rothnie dismissed her request to investigate Dr K's concerns.

48. In the course of re-examination, the Claimant was asked exactly what she told Mr Rothnie. She replied that she told Mr Rothnie that Dr K had told her that she was being bullied and thought that this was because of the colour of her skin.

49. However, the Claimant went further and stated that Dr K said she was being treated 'like a slave in her department'. We do not find this part of her evidence at all credible. If Dr K had used that very powerful language to the Claimant, as she had done to Ms Maton, we have no doubt that the Claimant would have included it in her witness statement. She did not. The Claimant accepted that she had not seen the notes of this meeting, which contain the reference to this language, until they were disclosed in the course of these proceedings. We consider it more likely that this was when she first learnt that Dr K had used it. Consequently, we find that she could not have quoted this language to Mr Rothnie when she spoke to him in October 2016.

50. We then went on to consider the likelihood of the Claimant raising issues of race on Dr K's behalf at all. The Claimant refers in her statement to a comment which Dr K made in the conversation with her on 21 October 2016 that 'she feels she is treated like this because of her race and because she is a woman but if she talked about this in the Trust, her career will be completely ruined'. The Claimant goes on to record that she asked Dr K if she would repeat what she had said on the record:

> 'she said no! She stated that if she did, she feared that she will have difficulties in substantiating or proving the allegations and things will only get worse for her as the perpetrators would further collude to prevent her from getting a job elsewhere especially that they had the support of the Medical Director'.

51. We accept that Dr K may have expressed herself in that way to the Claimant. However, given the Claimant's account of how forcefully Dr K had expressed her wish not to make a formal allegation of any sort, including of race discrimination, and that she feared the consequences if she did, we find it implausible that the Claimant would have overridden those wishes and raised an allegation of race discrimination to Mr Rothnie on Dr K's behalf.

52. We find that the Claimant did not make an allegation of race discrimination on Dr K's behalf to Mr Rothnie during their conversations in October or November 2016.

Issue 3(C): 'at the meeting on or after 21 October 2016 between the Claimant and the Medical Director, he advised the Claimant that there were some patient safety issues against Dr K (harassment/victimisation).

53. According to the Claimant on one of these occasions Mr Rothnie told her that

Dr K 'has her own problems and is leaving because she had some patient safety issues'. Mr Rothnie denies making such a statement or even being aware of any patient safety issues in relation to Dr K. There is no note of Mr Rothnie making a remark of this sort. On this issue at least, we have found his evidence to be more reliable than that of the Claimant and we find that he did not do so.

Issue 3(D): 'in the period from October 2016 to February 2017 the Claimant was given additional tasks over and above that which she would usually be given' (direct discrimination/harassment/victimisation/constructive dismissal).

(i): 'to prioritise patients on postcode rather than clinical needs'.

(ii): to undertake off-site clinics.

(iii): an expectation to cover nurses'clinic when nurses are unplanned annual leave.

(iv): to undertake contraceptive clinics which are normally run by GPs.

54. It is the Claimant's case that, in or around mid-November 2016, she began to get what she describes as 'peculiar directives from the Associate Director, Traci Maton.

55. The Claimant's evidence in her statement as to these instructions is scant: she gives no specific dates on which she was instructed to act in the way described; she refers to no specific documents containing those instructions. Her evidence is of the most general kind only.

56. With regard to the allegation that Traci Maton instructed her to prioritise patients on a postcode basis, rather than by reference to their clinical needs, Ms Maton was taken in cross-examination to an email of 22 March 2017: it was put to her that she was suggesting in that email the patient should be dealt with by reference to their postcode. Ms Maton responded that she was suggesting that Dr Jaleel should concentrate on patients where the Respondent had secured a contract. We find, on the balance of probabilities, that she asked the Claimant to prioritise patients on a postcode basis and that she did so in order to ensure that the Respondent discharged its contractual obligations. It was not suggested to Ms Maton in cross-examination, nor argued in closing submissions, that that there was anything improper in this and we do not find that there was.

57. With regard to the allegation in respect of the three other matters, Traci Maton accepted that the Claimant was asked to do this work. We accept Ms Maton's evidence that the provision of these services was in a transitional state: the long-term aim was to move to a service provided in part by Consultants and no longer by sessional GPs, which would be a cost saving to the Respondent. However, there had been a delay in implementing that transition. While it was not strictly within the Claimant's job description to deliver the services herself, she was one of the individuals who was responsible for delivering the transition: she was the clinical lead in this area. The Respondent was contractually required to deliver the services (as a result of its tender) and, if it failed to do so, it might be fined. We accept Ms Maton's evidence that she was asking the Claimant for assistance in an attempt to ensure that the services were delivered. That was her motive for acting as she did.

58. The Claimant raised these matters in her grievance and, in her report the

investigating officer, Claire Burns concluded as follows:

> 'The investigation found that there was a lack of understanding of Sexual Health Consultant job planning, and that managing a Sexual Health Consultant job plan in the same way as a physician's job plan is not appropriate. The actions taken by [Ms Maton] were in line with the expectations for a physician, however there was not an understanding for the joint working for HIV at Barts, and the need to be available for patients in the clinic but not with a full clinic load. The service has since moved from Medicine to Women's and Children's Directorate… You [*the Claimant*] confirmed at your investigation meeting that you are happy with the new arrangements.
>
> …
>
> Based on the information available to me I am partially upholding your grievance on this issue. It does not appear that there was any malice in [Ms Maton's] approach (especially when considering that there was a drive on job planning across the trust at the time), however there does appear to have been a lack of understanding on the uniqueness of Sexual Health Consultant job planning, which, had you been able to meet as requested, may have been resolved quickly and amicably.'

59. We accept that Ms Maton acted as she did because of lack of experience and understanding; that is consistent with the Claimant's evidence in her statement that, when she discussed these issues with Dr Day 'he agreed that there is some recent confusion in Traci Maton's understanding of sexual health working and that he had explained this to her recently'. We further accept that Ms Maton acted with the aim of ensuring service delivery. We reject the Claimant's later assertion, made in the course of cross-examination, that Ms Maton's actions were wilful and targeted at her; there is no evidence to substantiate that.

60. Although Ms Maton's motive for acting as she did is understandable, nonetheless she was asking the Claimant to do work which was outside the remit of her job and this put additional pressure on the Claimant, who already had a demanding role. It was sufficiently adverse treatment to cause the Claimant to raise a grievance, which was partially upheld.

<u>The suggestions that the Claimant stand down from the DME role</u>

61. The Claimant stated that, at a regular one-to-one meeting in November 2016, Ms Maton suggested that, if the Claimant was feeling under pressure, she might wish to step down from the position of DME and that there may be someone ready to take up the post in her place. Ms Maton accepted in cross-examination that she may have suggested this. We find that she did.

62. On 6 February 2017, the Claimant had a meeting with Professor Kinnear. She told him about the suggestion that she might wish to stand out from the DME role and the pressure she felt she was under. Professor Kinnear replied: 'well Lucy [Coward] should be ready by now if you want to give up'.

63. The Claimant took these conversations as an indicator that there was a wish to replace her in the DME role with Dr Coward. The fact that these observations had

been made also fuelled her later mistrust of the process which the Respondent initiated in 2018 to re-advertise the DME role.

Issue 3(E): 'on 24 March 2017, Dr Caroline Howard declined to sign the Claimant's half day professional leave for a regional meeting as Director of Medical Education. The Claimant contends that the refusal to approve the half day leave was intended to frustrate the Claimant for her position in regard to Dr K's racial discrimination allegation complaint' (victimisation/harassment/constructive dismissal).

64. In February 2017, Dr Caroline Howard was appointed as interim Clinical Director Medicine, succeeding Dr Day. The Claimant reported to her and she became the person who signed off the Claimant's job plan.

65. We note that, by the time Dr Howard took up her post, Dr K had already resigned. We accept Dr Howard's evidence that she knew nothing about the issues which had been raised by or about Dr K.

66. When Dr Howard took up her post she discovered that there were issues with record-keeping throughout Medicine: everything (clinical records, governance issues, incident investigations, leave requests and sickness records) required attention.

67. On 23 March 2017, the Claimant (through Ms Sue Wilkinson, Foundation Programme Coordinator) asked Dr Howard to sign off a request for half a day's professional leave to attend the Director of Education Managers' joint meeting on 11 April 2017.

68. On 24 March 2017, Dr Howard replied as follows:

> 'I have had issues with the Consultant cover of off-site clinics raised to me by Traci Maton as AD – until I can understand if this leave request will further impact on this, and also check other cover within the specialty, I'm afraid I cannot sign this off Henna.
>
> I am happy to discuss if required but I understand at present you and your colleague's leave requests have had clinical patient impact so this has to be considered prior to me signing any further requests off.'

69. The Claimant accepted in cross-examination that she had cancelled a clinic in in order to attend the proposed meeting. She further accepted that, from Dr Howard's perspective, she was asking for leave some two and half weeks' before taking it, which was shorter than the required notice. She agreed that it was proper for Dr Howard to wish to investigate possible clinical impact.

70. We find that there was nothing inappropriate about Dr Howard's email: she was raising a query in the context of a legitimate general concern she had; she was not definitively refusing the request, rather she was asking for clarification as to what impact it might have on service delivery; moreover, she was offering to have a discussion with the Claimant about the issue. We accept Dr Howard's evidence that this was only one of a series of similar emails which she wrote to a number of Consultants, some of whom were white and male, because of wider concerns that she had in relation to leave conflicting with service delivery.

Issue 3(G): 'on or about 27 March 2017, Dr Howard emailed the Claimant and confirmed that the Claimant can only attend the regional meeting a study leave provided that the Claimant agrees to pay back the costs of covering her clinic'. (Victimisation/harassment/constructive dismissal).

Issue 3(D)(v): paying back the clinical time while on planned leave. (direct discrimination/harassment/victimisation/constructive dismissal).

71. On 27 March 2017, the Claimant replied to Dr Howard stating that she wanted to discuss the matter urgently and suggesting a time. Dr Howard replied, explaining that she could not meet at that time but proposing an alternative. On 27 March 2017 the Claimant wrote to Mr Rothnie complaining about Dr Howard's decision, copying Dr Howard in.

72. Later the same afternoon Dr Howard replied, copying Mr Rothnie in, taking issue with part of the Claimant account. She said again that she had not declined the request and proposed a meeting with the Claimant. The email included the following passages [original format retained]:

> 'as far as I understand it additional paid roles should not result in lost clinical time – the time should be paid back (as often I appreciate that the commitment will fall in clinical hours).
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> …
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> To that end Traci will schedule a meeting with you and I to go through your and your colleague's job plans to ensure there is absolute transparency and clarity of what you are contracted and paid to do. This will also allow us to make an assessment of capacity for the service which is a process we are completing for all specialties.
>
> If you could clarify Henna what you would actually be contracted to be doing on 11 April (half or whole day) from a service provision then we can see what is possible from both a notice point of view and clinical payback time if needed.'

73. The Tribunal notes that Dr Howard referred to pay back time 'if needed'. We find that this left open the possibility of the Claimant *not* being required to pay the time back, depending on the outcome of their further discussions at the proposed meeting.

74. Later the same day the Claimant replied to Dr Howard, copying Mr Rothnie in. She explained that the clinic had been cancelled more than six weeks earlier and asserted that she now believed (based on what other DMEs had told her) that, in fact, there was no requirement for her to seek Dr Howard's approval for the leave. As for paying back time she wrote:

> 'if you will ask me to pay the clinical time back, I would like the assurance/evidence that all Consultants across the trust are paying back the clinical time for deanery/regional/other NHS work, otherwise it could be seen as punitive/discriminatory to me.'

75. On 29 March 2017, Dr Howard emailed the Claimant, offering to meet with her and Mr Rothnie her to discuss the matter. She assured the Claimant that she herself

paid back clinical time which she used in her other roles. She finished by saying that, because she was about to go on leave herself, she could not meet the Claimant before 11 April 2017. As a gesture of goodwill, she agreed that the Claimant could take the requested leave as long as the clinical time was paid back at a later date.

76. Unfortunately, the planned meeting did not take place because other events intervened, as will be described below.

Issue 3(F): 'on [28] March 2017, the Claimant complained to the Respondent's Medical Director, Mr Neil Rothnie, about her treatment by Dr Howard and her refusal to approve her attendance at the regional meeting but Neil Rothnie instead supported Dr Howard.' (Victimisation/harassment/constructive dismissal).

77. On 28 March 2017, Mr Rothnie intervened in the sequence of communications between the Claimant and Dr Howard to provide his observations:

> 'We need some clarity around this and I am happy to meet and discuss.
>
> …
>
> I am not clear whether you took on the PAs for your DME role in addition to your allocated PAs or whether they were substituted for clinical PAs.
>
> It would be sensible to design your job plans so that any regular DME commitments are included and, wherever possible, do not clash with clinical activity. Your job plan should include the sessions for DME work and a review is appropriate.
>
> …
>
> Happy to discuss further but we do need clarity.'

Issue 3(H): 'on 4 May 2017 Dr Lucy Coward was appointed the Director of Medical Education, while the Claimant was still in post without any advertisement and due process and without any warning to the Claimant that she is being replaced and even when the post was not vacant.' (Direct discrimination / harassment /victimisation/constructive dismissal).

78. On 28 March 2017, the Claimant collapsed while at work. She suffered a head injury and was taken to A&E, where she was admitted and treated for a suspected stroke. She was later diagnosed with work-related stress. On 31 March 2017 the Claimant's GP signed her off until 13 April 2017.

79. On 20 April 2017, Mr Rothnie learnt from OH that the Claimant would be away for at least two months. On 2 May 2017 the Claimant was invited to a sickness absence meeting but the next day OH wrote that the Claimant was not fit to attend such a meeting and specified that any communication should only be in writing. There is a psychiatric report from around this time, which summarises the reasons for her work-related stress. There is no reference to race discrimination in that document.

80. The Tribunal accepted Mr Rothnie's evidence that the Respondent needed someone to take responsibility for Medical Education on a day-to-day basis during the Claimant's absence, especially in circumstances when it was unclear when she would be returning. There was a requirement to attend meetings, to prepare for HEE visits

and to deal with practical matters such as signing cheques etc. This led to the appointment of Dr Lucy Coward as Associate DME.

81. However, we found the timing of that appointment somewhat surprising: it was made on 1 April 2017, only three days after the Claimant started her sick leave and the day after the GP fit note on 31 March 2017, which signed her off for a relatively short period. Mr Rothnie's evidence was that the Respondent had been seeking to identify funding for some time and that this became all the more urgent in her absence.

82. The Claimant's pleaded allegation is that Dr Coward had been appointed as Director of Medical Education in her absence. That was incorrect: Dr Coward had been appointed Associate Director of Medical Education. The Claimant accepted that this was not her post; it was a different post. Dr Coward was subsequently made Interim DME when it became clear that the Claimant was going to be absent for some time. The Claimant remained in post and continued to be paid in respect of her DME duties throughout her period of sickness absence and beyond. She was not replaced; arrangements were simply made to cover the DME role. For those reason, this allegation must fail.

83. On 23 May 2017, the Respondent received further advice from OH confirming that contact with the Claimant should only be in writing. Further advice on 14 June 2017 was that 'clinically she is not yet well enough to engage in discussions in relation to work'. OH proposed to review her in two months' time at which point they anticipated that she would be able to engage with the Trust. On 14 July 2017 the advice was that 'clinically it would be detrimental and delay her recovery if contact was made at this stage'. In the circumstances, we find that the Respondent cannot be criticised for not keeping the Claimant updated about arrangements made to cover her DME duties in her absence.

<u>Protected Act 3: 'on 25 August 2017 the Claimant submitted a grievance in relation to various issues including how the Claimant had been treated following her complaint and demanded that the allegations of race discrimination by Dr K be investigated'.</u>

84. Towards the end of her period of sickness absence, on 17 August 2017, the Claimant wrote to Mr Rothnie, explaining that she had been diagnosed with work-related stress and indicated that she was now in a position to discuss with the organisation the causes of that stress. The short letter referred in general terms to a 'lack of support' from senior management in relation to both her substantive role and her role as DME. No further details were provided but the Claimant indicated that she would be pursuing those matters with support from the BMA.

85. By letter dated 24 August 2017, Mr Rothnie acknowledged her letter and correspondence from her BMA representative confirming that she wished her concerns to be addressed to the grievance policy. He invited her to set out the detail of her grievance.

86. The detailed grievance was dated 30 August 2017 (stamped as received by the Respondent's HR department on 5 September 2017). The complaints were against Ms Maton and Dr Howard. Their main focus was Ms Maton's requiring the Claimant to do work which did not fall within her role; and Dr Howard's handling of her leave request in March.

87. There is no reference to discrimination in the grievance; there is no reference to the Claimant's race being a factor in the matters complained of; there is no mention of the EqA; there is no mention of Dr K and no demand for an investigation.

The Management of the Claimant's Grievance

88. Mr Rothnie was designated as case manager on the Claimant's grievance. There was nothing improper in that: he was not the subject of a complaint at that stage.

89. On 14 September 2017, the Claimant informed the Respondent that she was ready to return to work and set out in an email how she proposed to manage a phased return to work. This was consistent with OH advice that she make her own proposals regarding arrangements for her return to work. On 19 September 2017 Mr James Currell was assigned as her line manager, since Dr Howard was one of the subjects of her grievance. This showed a due regard for an obvious potential conflict. Mr Currell agreed her proposed phased return.

90. The Claimant returned to work on 2 October 2017. She was offered the opportunity to resume the DME role but told Mr Currell that she would not be performing any DME duties until her grievance was resolved.

91. She had a meeting with Mr Rothnie on 16 October 2017, at which there was another discussion about whether the Claimant would resume her DME role. The Claimant gave no undertaking to do so, pending advice from the BMA. They discussed Dr Coward's role and the Claimant asked Mr Rothnie whether Dr Coward would now step down. He replied that she would not, as she had been appointed to the Associate role, which was different from the Claimant's. This reinforced the Claimant's suspicion that it was Mr Rothnie's long-term aim to replace her in the DME role. It is plain that she felt vulnerable in that role.

92. On 9 November 2017, the Claimant wrote to Ms Clare Panniker, the Respondent's Chief Executive, drawing her attention to concerns which she felt had been dismissed and alluding to the treatment she had received from Ms Maton and Dr Howard. She said that she had brought these matters to the attention of Mr Rothnie but that no appropriate action had been taken. She concluded by stating that she felt that she was subjected to 'an abuse of power which has violated my dignity and created an intimidating environment'. Although that language sets out part of the test for discriminatory harassment, there is no reference to race being a factor in the alleged treatment in that letter, nor is there any allegation that she had been replaced as DME by Dr Coward. In any event, the letter was not relied on by the Claimant as a protected act.

93. On 24 November 2017, the Claimant's BMA representative made the first explicit complaints against Mr Rothnie on the Claimant's behalf. They consisted of ten individual allegations:

> 'a. My appointment as DME, which was undertaken through due diligence and process, was never announced by Mr Neil Rothnie, on behalf of the Trust.
>
> b. I was never given a written contract for my role as DME.

> c. I was never offered a RTW meeting, following my return after my breast cancer treatment to discuss my role as DME and how would I cope in my role as DME following my cancer treatment, radiotherapy and surgery.
>
> d. Mr Neil Rothnie did not facilitate my attendance at the Clinical Directors and Additional Directors meeting.
>
> e. The initiatives I undertook as DME were not recognised by Mr Rothnie.
>
> f. I was not supported by Mr Rothnie to attend regional meetings as DME.
>
> g. I provided Mr Rothnie with reports of undermining against named individuals. He did not provide me with any feedback, progress, or action taken on these reports.
>
> h. Mr Rothnie colluded with the Clinical Director Medicine and the Additional Director Medicine in undermining me.
>
> i. When I was off sick because of "work-related stress", Dr Lucy Coward was appointed as Associate Director of Medical Education without any advertisement or selection process. Her appointment was announced by Mr Rothnie.
>
> j. On my return after six months of sick leave because of "work-related stress", I was not assigned an interim CD as line manager in place of Dr Caroline Howard.'

94. As will be apparent, there was no allegation of race discrimination in that email.

95. Shortly thereafter, Mr Rothnie was removed as the case manager on the Claimant's grievance and replaced by Mr James Fisher. Again, that decision showed a due regard to the potential for a conflict of interest.

Issue 3(H)(ii)): 'the decision to readvertise the Claimant's DME role on 31 January 2018' (direct race discrimination).

96. On 23 January 2018, Mr Rothnie wrote to the Claimant informing her that the DME post was to be advertised as her tenure would end on 31 March 2018. He wrote:

> 'I am writing to inform you that the Trust will be advertising the post shortly to ensure the post is filled from 1 April 2018.
>
> I would usually arrange to meet with you to review your performance for the year however I understand that you have not returned to the Director of Medical Education role since her return to work and feel this wouldn't be appropriate with your outstanding grievance.
>
> I would therefore like to take this opportunity to thank you for the work you have done since you were appointed to the post of Director of

> Medical Education in April 2015 and would welcome an application from you should you wish to reapply for the post.'

97. The Tribunal notes Mr Rothnie's observation that it would not be appropriate for him to review the Claimant's performance in the DME role, given that she had an outstanding grievance which included allegations about his management of the DME role. The Tribunal understands why he might have considered it inappropriate for him to conduct that review; it was less clear why it would not have been possible for another senior manager to conduct the review on the Respondent's behalf.

98. The post was advertised on 31 January 2018. The Claimant was extremely unhappy with the decision to do so. She considered that it was further evidence of a plan by Mr Rothnie to replace her with Dr Coward. She was particularly struck by the fact that Dr Coward had been appointed as Associate while she was on sick leave and in circumstances where Mr Rothnie had previously insisted that there was no funding for an Associate to support her.

99. Nonetheless, albeit reluctantly, she applied for the role; she had been expressly invited to do so by Mr Rothnie himself. The closing date for applications for the DME post was 19 February 2018. The Claimant was invited to an interview on 16 April 2018.

The Elaboration of the Claimant's Grievance

100. On 5 February 2018, Mr Fisher wrote, summarising the grievance: there is no mention of race, nor any mention of Dr K.

101. The Claimant produced a statement for the grievance on 12th February 2018. That document did contain references to her being 'treated differently' and mentioned the Equality Act 2010. However, even then the Claimant makes no express reference to race being a factor in the treatment she was complaining about. In any event, this document was not relied on by the Claimant as a protected act for the purposes of her victimisation claim, as Mr Ojo confirmed in the course of the hearing.

102. We accept Mr Rothnie's evidence that he had not seen this detailed statement before the Claimant attended the interview for the DME post on 16 April 2018 and was not aware that she had made an allegation of differential treatment. There is nothing in the documents before us to suggest that it had been sent to him by that date.

Issue 3(I): 'on 7 March 2018, the Claimant was invited to attend an interview for the post of the Director of Medical Education on 16 April 2018. On the day of the interview and five minutes before it started, the Claimant was notified of the interview panel which included the Medical Director, Neil Rothnie, against whom the Claimant had an outstanding and unresolved grievance. The Claimant objected to Mr Rothnie sitting on the interview panel. The Claimant's objection was ignored with the director of HR insisting that Mr Rothnie must sit on the panel' (victimisation/harassment/constructive dismissal).

103. When the Claimant arrived for her interview for the DME role, and shortly before the interview was about to begin, she was informed that Mr Rothnie was on the panel.

104. Mr Rothnie's evidence in his statement was that there were two applicants for the role, the Claimant and Dr Coward, both of whom were shortlisted and invited to interview. He stated that no decision had been taken as to who would be appointed; that would be a panel decision.

105. Mr Rothnie accepted that at the point when the Claimant was invited for an interview he was aware that the Claimant had an outstanding grievance against him. He accepted that he had probably seen the email from the Claimant's BMA representative of 24 November 2017, which set out the Claimant's allegations against him, or at least had had its substance communicated to him. One of those allegations, of course, related to the appointment of Dr Coward (now the Claimant's competitor for the substantive role of DME) as Associate DME the previous year.

106. His oral evidence was that the organisation of the interviews for the DME post was conducted by the Postgraduate Medical Education Department and that he was not party to it. He said that he had assumed the candidates would be aware who was going to be on the interview panel; he thought there was nothing inappropriate in his being on the panel.

107. The Tribunal considers that it ought to have been obvious to Mr Rothnie that it was profoundly inappropriate for him to sit on a selection panel in circumstances where one of the candidates had raised a grievance against him personally, which had yet to be resolved. It was all the more inappropriate in circumstances where the majority of the complaints in that grievance related to the very role being recruited for. The inappropriateness was compounded by the fact that one of those allegations expressly related to the only other candidate in the selection process, Dr Coward. There was an obvious conflict of interest.

108. We reject the Respondent's suggestion that the Claimant ought to have known that Mr Rothnie would be on the panel. The only document referred to which supported this was the Job Description, which stated that the panel would include 'Medical Director (or representative)'. On any ordinary reading that left open the possibility that Mr Rothnie could be replaced by someone else. There is no reference in the correspondence inviting the Claimant to the interview to Mr Rothnie's being on the panel.

109. The Claimant made a contemporaneous note of the events of 16 April 2018. We find that her note is accurate and is consistent with her account elsewhere of the events of that day. When she arrived, she was met by Ms Parton, a manager in Medical Education. The Claimant asked her who was on the panel; Ms Parton said that the panel was composed of Mr Bill Irish (Postgraduate Dean), Ms Sue Bridge from HR and Mr Rothnie. The Claimant was shocked by this information.

110. She was shown into the interview room and was told that Mr Rothnie would be chairing the panel. He began to make his introductions, at which point the Claimant interrupted to say that in her view there was a clear conflict of interest because she had raised a grievance against him with regard to the very role for which she was being interviewed. Ms Bridge asked her how long she had known about the composition of the panel. The Claimant explained that she had only just discovered it.

111. The Claimant's note records the following exchange [original format retained]:

> 'Then I addressed to Neil and told him that I am surprised he is sitting in the panel. I am sorry.
>
> In a deep and low-pitched voice, leaning forward, Neil asked me, "OK, so you do not want to proceed?"
>
> I replied: No, because the panel is biased. I explained again that there is a conflict of interest as I have just mentioned.
>
> Neal asked again: "I will ask you again, do you want to proceed?"
>
> I said: No.
>
> Neal asked me again: "OK so you do not want to proceed"?
>
> I found this repeated question very intimidating and overwhelming. However, I replied again, "No, I do not want to proceed unless the panel is changed".
>
> Neil replied, "OK we can't change the panel at a short notice".

112. Mr Rothnie was taken to this note by the Tribunal and asked for his comment. He denied that he had been intimidating; he stated that the phrases in quotation marks did not sound like him; he observed that the Claimant's account as to what he said about the panel not changing 'does not accord with my memory'.

113. The Tribunal finds, on the balance of probabilities, that Mr Rothnie did question the Claimant repeatedly, and in a challenging manner, as to whether she was refusing to continue with the interview if he remained on the panel.

114. The Claimant's note then records that Ms Bridge asked her to step outside, while the panel discussed the position. She was kept waiting for around 10 minutes. Ms Bridge then emerged and informed her that the interview would not go ahead on that day, solely because the Claimant had not been forewarned of the presence of Mr Rothnie on the panel. However, as the DME would involve reporting to Mr Rothnie, he would remain on the panel when it reconvened but he would not be the sole decision maker as there would be a representative from HR and another person on the panel. Ms Bridge said that she would consider how they could give the Claimant reassurance about the fairness of the process and would revert to her about this.

115. Ms Bridge accepted in cross-examination that she told the Claimant that Mr Rothnie would remain on the panel, that it would be 'normal practice' for him to do so. Again, the Tribunal finds that that was wholly inappropriate in the circumstances. The Claimant had raised a legitimate (indeed obvious) conflict of interest. The only reasonable course of action was to reassure the Claimant that an alternative panel member would be found, as was clearly provided for by the job description referred to above.

116. According to the Claimant's note, she then left the building. We accept her evidence and reject Ms Bridge's account in her statement that she (Ms Bridge) went back into the room, agreed with the panel that Mr Rothnie would be replaced by Dr Celia Skinner, Chief Medical Officer, and then went out to inform the Claimant of this before the Claimant left. We consider it implausible that Ms Bridge would have committed to telling the Claimant that Dr Skinner would be on the panel without first

consulting the latter as to her willingness, and availability, to do so. We note Mr Rothnie's oral evidence that they did not have dates or availability to be able to reschedule on the day.

117. Moreover, the Claimant's account is consistent with the account that she gave at the grievance investigation meeting on 20 April 2018 with Clare Burns, in which she said:

> 'Sue Bridge (SB) stated that the interview would not proceed as HJ [the Claimant] was not notified of the panel in advance and hence would be rearranged. HJ would be advised of the new date. SB further advised HJ that NR has to remain on the panel as the line manager of the DME post. When HJ suggested NR could be deputised, SB did not comment on this but replied that she would come back to HJ as to how the bias could be mitigated. HJ said that she has not heard anything from SB to date'.

118. A decision was eventually taken to replace Mr Rothnie with Dr Skinner, but we find that it was taken at a later point and was not communicated to the Claimant on the day of the interview. We consider that the best evidence as to when that decision was communicated to her is the email of 10 May 2018, in which Ms Barton wrote to the Claimant inviting her to a new interview on 25 June 2018 and notifying her that the interview panel would consist of Dr Skinner, Prof Irish and Ms Bridge. By that point the Claimant had already resigned.

Issue 3(J): 'on 20 April 2018 the Claimant attended the grievance meeting whereby she amended her grievance to include further allegation of removing her from the post of the Director of Medical Education and advertising the same to allow a white candidate, Dr Lucy Coward, to take over the post. It was also amended to include the complaint relating to the failure of the Medical Director, Neil Rothnie, to recuse himself from sitting on the interview panel during the interview on 16 April 2018. The requests to amend her grievance were disregarded' (victimisation/harassment/constructive dismissal).

119. On 20 April 2018, the Claimant attended a grievance meeting with Ms Clare Burns, in which she raised additional matters relating to the handling of the DME appointment, including Mr Rothnie's attendance at the interview. We accept Mr Gil's submission that there is no suggestion in the notes at this meeting that these matters were disregarded; indeed, the grievance report addressed them as does the eventual outcome letter. For these reasons this claim fails.

Issue 3(K): 'on or about 4 May 2018 The Claimant was removed from her post as the Director of Medical Education and Dr Lucy Coward was appointed permanently as a consequence of her being an Asian supporting another Asian colleague and requesting that a complaint of racial abuse and discrimination against white colleagues be investigated (direct discrimination/harassment/victimisation/constructive dismissal).

120. On 1 May 2018, the Claimant resigned, giving three months' notice. The letter of resignation simply says:

> 'I would like to hand in my resignation. My contractual notice period is three months. Therefore, my last day of employment in the Trust would be 31 July 2018.

Kindly acknowledge.'

121. Insofar as the Claimant asserts that Dr Coward was appointed to the DME role on 4 May 2018, it is a matter of record that she was not appointed until July 2018.

122. The effective date of termination of the Claimant's employment was 31 July 2018.

The Law

Time Limits

123. S.123(1)(a) EqA provides that a claim of discrimination must be brought within three months, starting with the date of the act to which the complaint relates.

124. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

125. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. That is a very broad discretion. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

126. Failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278 at para 16). There is no requirement for exceptional circumstances to justify an extension (*Pathan v South London Islamic Centre,* UKEAT/0312/13/DM at para 17).

The Burden of Proof

127. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

128. The effect of these provisions was conveniently summarised by Underhill LJ in

Base Childrenswear Ltd v Otshudi [2019] EWCA Civ 1648 (at para 18):

> **'18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*. He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.**

129. In *Hewage v Grampian Health Board* [2012] ICR 1054 the Supreme Court held (at para 32) that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Harassment Related to Race

130. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

> **(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.**

> **(5)The relevant protected characteristics are—**
> **…**
> **race**
> **…**
> **religion**
> **...**

131. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

132. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 (at para 22):

> **'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'**

133. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at para 47) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

134. He further held (at para 13):

> **'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'**

<u>The Relationship Between Harassment and Other Forms of Discrimination</u>

135. S.212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment. Thus, a Claimant cannot succeed in a claim of both harassment and direct discrimination in respect of the same conduct. Nor can a Claimant succeed in a claim of both harassment and victimisation in respect of the same conduct: a finding of victimisation under s.27 EqA necessarily involves a finding of detriment. However, there is nothing in the statutory language to prevent him from advancing claims in respect of the same conduct by reference to these causes of action in the alternative.

Direct Discrimination

136. S.13(1) EqA provides:

> **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.**

137. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

138. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at para 30.

139. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010, the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic (para 36).

140. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment': see per Lord Hope of Craighead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 (at para 35). An unjustified sense of grievance does not fall into that category.

Victimisation

141. S.27 EqA provides as follows:

> **(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.**
>
> **(2) 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 Act;**
> **(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.**
>
> **…**

142. An employee must identify a specific protected act, or believed protected act, in order to fix the employer with liability, and must show that the employer knew about that specific act, and that the employer subjected her to a detriment because of it (*Peninsula Business Services Ltd v Baker* [2017] IRLR 394, EAT).

143. In *Durrani v London Borough of Ealing* UKEAT/0454/2013, Langstaff P was asked to consider was whether it is necessary to use the words 'race discrimination' in order for a complaint or grievance to amount to a protected act. He held that it was not, so long as the context made it clear and went on to say this:

> **'[…] I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies. As Mr Davies points out, the Tribunal found as a fact that the Claimant did not attribute any treatment (at the time) to the fact that he is British of Pakistani origin. That finding of fact alone means that there is no evidence that an employer, seeking to cause detriment to the Claimant as a result of making the complaint he did, could have been victimising him for a complaint made by reference to, under, or associated with the relevant Act.'**

Unfair (constructive) Dismissal

144. The Claimant relies on a breach of the implied term of trust and confidence. Where an employer breaches the implied term of trust and confidence, the breach is inevitably fundamental: *Morrow v Safeway Stores plc* [2002] IRLR 9.

145. The law of constructive dismissal in a case where the employee relies on a cumulative breach was comprehensively reviewed by the Court of Appeal in London *Borough of Waltham Forest v Omilaju* [2005] IRLR 35 at para 14 onwards:

> **14. The following basic propositions of law can be derived from the authorities:**
>
> **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
>
> **2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**
>
> **3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).**
>
> **4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).**

> **5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:**
>
> > **"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."**
>
> **15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:**
>
> > **"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."**
>
> 16. **Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.**

146. Those principles were further considered by the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 at para 55:

> **'(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?'**

147. In *Sawar v SKF UK Ltd* [2010] UKEAT 0355/09 Langstaff J emphasised that the particular context in which the treatment complained of as amounting to a breach of the implied term occurred is important in determining whether or not there has been a breach of that term.

148. In *Bournemouth University Higher Education Corporation v Buckland* [2010] ICR 908, CA the Court of Appeal held that, when considering whether a breach of the implied term or any other fundamental term has occurred, it is not appropriate to ask whether the employer's actions lay within the band of reasonable responses available to an employer. That test is confined to considerations of fairness for the purposes of the statutory claim of unfair dismissal and is not apposite to determining whether there has been a constructive dismissal, which is a purely contractual test.

149. The employer's repudiatory breach need only be an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Nottinghamshire County Council v Meikle* [2005] 1 ICR 1 (at para 29).

150. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 (at 828-829).

Submissions

151. Both representatives provided written submissions, which the Tribunal took into consideration. They supplemented them with oral submissions. We have had regard to their respective submissions in making findings of fact above and reaching our conclusions below. We mean no disrespect to the representatives by not summarising their arguments in what is already a lengthy judgment.

Conclusion: Victimisation

152. The Tribunal concludes that the Claimant did not do a protected act within the meaning of s.27 EqA.

152.1. *Protected Act 1*: we have already found (para 32) that the email of 21 July 2016 concerning the trainees' complaints contained no mention of race or discrimination. We accept Mr Gil's submission that a generalised reference to 'harassment', absent any suggestion that race was a factor in the alleged treatment, should not be taken as an allegation of harassment as it is defined in the EqA. We conclude that, in this context, it was being used simply to mean unwanted treatment, akin to bullying. We have already found that 'undermining' is not a coded reference to race discrimination. Moreover, the absence of any reference, explicit or implicit, to race as a factor in this email is consistent with the Claimant's oral evidence to us that the trainees did not, in fact, complain of race discrimination and she did not represent them as having done so on this occasion. We conclude that this was not a protected act.

152.2. *Protected Act 2*: we have already found (paras 47-52) that the Claimant did not make an allegation of race discrimination to Mr Rothnie on Dr K's behalf in October or November 2016. There is no evidence to suggest that she raised issues of race at all with Mr Rothnie in relation to Dr K. We conclude that she did not do a protected act in those conversations with Mr Rothnie.

152.3. *Protected Act 3*: we have already found (para 86) that the grievance of 25 August 2017 did not contain an allegation of discrimination, or of a breach of the Equality Act 2010, nor did it contain references to Dr K. There was no reference to the Claimant's own race, or that of Dr K, in this document. We conclude that the Claimant did not do a protected act.

153. In the absence of a protected act, the Claimant's complaints of victimisation must fail.

Conclusions: time limits in relation to the complaints of direct race discrimination and harassment related to race

154. The Claimant notified ACAS on 26 June 2018 of her intention to issue proceedings and the EC certificate was issued on 11 July 2018. The ET1 was presented on 30 July 2018. Any act before 27 March 2018 is *prima facie* out of time.

155. The question of time limits was not addressed by the Claimant specifically in her witness evidence, nor did Mr Ojo deal with it in his written submissions. It was only when he was invited to do so in response to oral submissions made by Mr Gil that he made essentially a single submission: he relied on the Claimant's period of sickness in 2017 as justification for the delay and argued that it was not reasonable to expect her to issue during that period, especially given that her sickness absence related to her mental health.

156. Mr Gil argued that there was no evidence to suggest that the Claimant could not have issued proceedings in relation to the 2016/2017 matters earlier, even in the light of her sickness absence. He reminded us that the burden in respect of any extension of time rests on the Claimant and suggested that she had not placed any evidence before the Tribunal in support of such an argument. He submitted that only the more recent allegations from 2018 ought to be considered by the Tribunal.

<u>The 2016/2017 Allegations of Discrimination</u>

157. All the allegations of discrimination in relation to 2016/2017 are long out of time.

158. No submission was made by Mr Ojo that her claims related to conduct extending over a period and we find that they were not. We conclude that there were breaks in the continuum (or the 'state of affairs' to use the language of *Hendricks*) between the different acts alleged; moreover, the decisions were taken by different individuals; there was no evidence that those individuals were acting other than independently of each other. There are no acts relied on in relation to Dr Coward and Ms Maton after the Claimant commenced sickness absence in March 2017. The allegations against Mr Rothnie prior to 2018 centre on his handling of the Claimant's concerns about Dr K (who resigned in 2016), the trainee complaints (the report into which was completed in January 2017) and his intervention in the dispute between the Claimant and Dr Coward (also in 2017). We are not satisfied that there is any discernible connection between his handling of those matters and the conduct alleged against him in 2018.

159. We then considered whether it would be just and equitable to extend time in respect of the matters relating to the allegations in relation to 2016/2017. We had

regard to the following factors.

159.1. The only explanation provided as to why the Claimant did not issue her proceedings sooner was because she had had a substantial period of sickness absence between March and September 2017. We accept that for the majority of that period at least it would not have been reasonable to expect the Claimant to take action. However, the position changed in around August 2017. At that point she was able to instigate internal grievance proceedings, with the advice and support of the BMA. She returned to work in September 2017 and there was no evidence before us that she was under any disadvantage by reason of her health thereafter. We conclude that from that point onwards the Claimant's health cannot account for the delay.

159.2. Although it was not expressly argued on her behalf, we had regard to the fact that, from then on, she was pursuing her complaints by way of an internal grievance. That may be a factor, albeit not a determinative one, in favour of the Tribunal's extending time.

159.3. We find that there is clear prejudice to the Respondent in terms of its ability to deal with these matters relating to 2017 comprehensively: by the time the Claimant issued proceedings in July 2018, the issues relating to 2017 were at least six months old and in many instances well over a year old. It was clear from the fallibility of some of the evidence on both sides that memories had faded in relation to these matters, in particular where there was no documentary record of the event in question.

159.4. Although the Claimant would suffer prejudice by not being able to pursue these matters, she is, for reasons set out below, still able to pursue complaints in relation to the events of 2018, as well as her complaint of unfair (constructive) dismissal.

159.5. We consider that the prejudice to the Respondent outweighs the prejudice to the Claimant.

160. Weighing all these factors in the balance, in particular our conclusions as to the absence of a convincing explanation for the delay in issuing proceedings and the balance of prejudice, we conclude that it is not just and equitable to extend time in relation to the claims about matters in 2016/2017.

161. Mr Gil sensibly took a more forgiving approach in his submissions in relation to the allegations from 2018. There is a strongly arguable connection between the decision to advertise the DME role in January 2018 and the later conduct of the interview in April 2018. We conclude that this did relate to conduct extending over a period and that the earlier allegation is thereby brought within time; alternatively, we find that it is just and equitable to extend time in relation to the January 2018 allegation. There is no identifiable prejudice to the Respondent in time being extended, whereas the Claimant would be significantly prejudiced by not being able to make arguments in respect of the whole recruitment process.

Conclusion: the allegations of harassment related to race / direct race discrimination in 2018

162. Turning to the discrimination complaints in respect of which the Tribunal the Tribunal has accepted jurisdiction, a number of them fail on their facts.

162.1. Issue 3(J) - The events did not occur as alleged: Ms Burns did not disregard the matters which the Claimant raised at the grievance meeting with her.

162.2. Issue 3(K) - The events did not occur as alleged: the Claimant was not removed from her post as DME on 4 May 2018 and Dr Coward was not appointed in her place on that date. The Claimant could not be re-appointed to the advertised DME post because, by the time the interviews took place, she had withdrawn her candidacy.

163. The remaining allegations of race discrimination, in respect of which the Tribunal has accepted jurisdiction are as follows.

163.1. Issue 3(H)(ii), direct race discrimination - The decision to re-advertise the Claimant's DME role on 31 January 2018.

163.2. Issue 3(I), harassment related to race - The conduct of the interview on 16 April 2018.

<u>Is there evidence from which the Tribunal could reasonably conclude that the treatment was because of/related to race?</u>

164. With regard to the re-advertising of the DME, the Claimant can plainly point to a difference of treatment and a difference of race as between her and Professor Kinnear: he held the role for some nine years without the role being re-advertised; he is white. Arguably, there was a significant difference in the material circumstances between the two of them: Professor Kinnear continued to perform the role throughout the whole of his tenure, whereas the Claimant had declined to do so since her return from sickness absence. However, we will set that aside for the time being.

165. As for the conduct of the interview on 16 April 2018, the Tribunal has no doubt that the presence of Mr Rothnie on the panel, his behaviour when the Claimant questioned it, his refusal to recuse himself and Ms Bridge's handling of the Claimant's objection were all 'unwanted conduct': we accept the Claimant's evidence that she was shocked by these events. As this allegation was advanced as a claim of harassment related to race, there was no requirement on her to point to an actual or hypothetical comparator.

166. The Tribunal went on to consider whether the Claimant had discharged the burden on her to show evidence from which the Tribunal could reasonably conclude that the decision to re-advertise the role was 'because of' race; and that Mr Rothnie's decision not to recuse himself from the interview panel was 'related to' race.

167. The only evidence which the Claimant led in her statement was her account of conversations she had had with other BAME colleagues who considered was that there was a culture of race discrimination in the organisation and, specifically, that race might be a factor in Mr Rothnie's treatment of her and other colleagues. That was

opinion evidence which, by its nature is of very limited probative value. Moreover, it was hearsay opinion evidence: we heard no direct evidence from the individuals concerned. We concluded that this evidence was not sufficient to discharge the burden on the Claimant to provide evidence from which we could reasonably conclude that her race played any part in the treatment complained of.

168. As for Mr Ojo's further submissions (at paragraph 26 of his closing submission), far from pointing us to 'overwhelming evidence' that race played a part in the treatment of the Claimant, they did not begin to raise a *prima facie* case of race discrimination. In the Tribunal's view they fell into the trap of assuming that pointing to less favourable, or adverse, treatment and a difference of race is in itself sufficient to discharge the burden, which the authorities are clear it is not. We could discern nothing in those submissions which was sufficient to provide the 'something more' from which we could reasonably conclude that race was a factor in respect of the two surviving complaints of race discrimination.

169. Those two claims accordingly fail because the Claimant has not discharged the initial burden on her to show that race was a factor in the alleged treatment.

Conclusion: Constructive Dismissal

Matters Which Formed No Part of a Breach of the Implied Term

170. The Tribunal has rejected a number of the matters which the Claimant relies on as elements of the alleged breach of the implied term of trust and confidence, either because we have found as a matter of fact that they did not occur; alternatively, if they did occur there was reasonable and proper cause for them.

170.1. Issue 3(E), 3(D) and 3(G): there was nothing improper in Dr Howard's emails in relation to the issue of the Claimant's request to take leave to attend a regional meeting of DMEs. Throughout the correspondence Dr Howard acted appropriately and professionally: she raised legitimate concerns about ensuring that non-clinical activities did not impact on the delivery of clinical services; her emails were robust but not discourteous; she acted flexibly in agreeing to the leave before she was able properly to explore the issues with the Claimant. The Claimant disagreed with Dr Howard's approach, as she was entitled to do. Had the Claimant and Dr Howard been able to have the face-to-face discussion which they both intended to have, the Tribunal considers it likely that they would have been able to resolve these issues between them. The Tribunal concludes that Dr Howard had reasonable and proper cause for responding to the Claimant as she did.

170.2. Issue 3(F): as for Mr Rothnie's intervention in his email of 26 March 2017, we find that this was a measured and reasonable response. It raised legitimate issues and left their resolution for future discussion without expressing a definitive view either way. He did not 'support' Dr Howard except insofar as he agreed with the need for further clarity. The Tribunal finds that the incident did not occur as alleged. There was nothing improper in Mr Rothnie's intervention, which was

helpful and conciliatory; he had reasonable and proper cause for acting as he did.

170.3. Issue 3(H): as we have already found, this did not occur as alleged; Dr Coward was not appointed DME while the Claimant was still in post.

170.4. Issue 3(J): we have already found that this did not occur.

170.5. Issue 3(K): we have already found that this did not occur. Moreover, the appointment of Dr Coward to the role of DME post-dated the Claimant's resignation and cannot have played any part in it.

Matters Which Contributed to a Breach of the Implied Term

171. There are two remaining matters relied on by the Claimant in respect of her constructive dismissal claim, which remain to be considered in the context of her contention that there was a breach of the implied term of trust and confidence.

172. With regard to Issue 3(D), we consider that Ms Burns' conclusion (cited above at para 58) to have been a reasonable conclusion. However, the requests which Ms Maton made of the Claimant were, as Ms Burns found, inappropriate given the Claimant's role; this leads us to conclude that she did not have 'reasonable and proper cause' to impose these duties unilaterally, as she did.

173. Viewed objectively, they put additional pressure on the Claimant, who already had a demanding role; it was sufficiently adverse conduct that the Claimant reasonably elected to raise a grievance in respect of it, which was partially upheld. We do not, however, consider that this, in itself, was conduct likely *seriously* to damage the relationship of trust and confidence.

174. We take a different view of the Respondent's conduct in relation to the DME interview (Issue 3(1)). It is clear from the Claimant's witness statement that the events of 16 April 2018 had a very considerable impact, subjectively, on her trust in the organisation. She wrote in her statement: 'the turn of event[s] at the interview left me with lost hope'. The Tribunal must, however, consider whether the Respondent's conduct (effectively, that of Mr Rothnie and Ms Bridge) on that occasion, *viewed objectively*, was likely seriously to damage the relationship of trust and confidence between employer and employee. We conclude that it was.

175. Mr Rothnie acted improperly in agreeing to sit on the panel. He knew that the fact of the Claimant's grievance against him gave rise to a potential conflict: it was in part for that reason that he had decided not to conduct a review of the Claimant's performance in the DME role; it was for that reason that he had been replaced as case manager of the grievance. He knew that much of the substance of the grievance related to his conduct in relation to the DME role; the Claimant had alleged that he had been unsupportive of her in the role. He knew that the Claimant was unhappy with the appointment of Dr Coward as Associate Director of Medical Education and that Dr Coward was the only other candidate for the DME role in April. Against that background, his decision to sit on the DME recruitment panel was, in the Tribunal's view, perverse.

176. His response to the Claimant's objection to his presence compounded the matter. When the Claimant suggested that he recuse himself, he challenged her repeatedly and inappropriately. Even after private discussion, Ms Bridge communicated to the Claimant that Mr Rothnie would not recuse himself from the panel. The Tribunal considered that his conduct was wilful.

177. Viewed objectively, his conduct would suggest to a reasonable observer that he was indifferent to the risk of actual or perceived bias in the conduct of an important recruitment exercise, which would affect the Claimant both professionally and financially. Given his seniority in the organisation, and the fact that he was the Claimant's direct line manager in relation to that very role, this was likely seriously to damage the relationship of trust and confidence between employer and employee. It is fundamental to a sound employment relationship that important matters of recruitment are, and are seen to be, conducted fairly and without the appearance of bias.

178. We asked ourselves whether there was reasonable and proper cause for Mr Rothnie's conduct. The only explanation advanced for it was that it was important for him to be on the panel because he would be the line manager of the successful candidate. However, we have already found that there was provision within the recruitment material for someone else to sit on the panel in his place. Indeed, that was eventually proposed, albeit after the Claimant's resignation. There was no reasonable and proper cause for his conduct.

179. As for Ms Bridge's conduct on the day, whether she agreed or disagreed with the position that she communicated to the Claimant, the fact that a senior HR manager within the Respondent company appeared to be condoning the inappropriate conduct of a recruitment exercise would, in the Tribunal's view, be likely further to damage a reasonable employee's trust in the organisation, viewed objectively.

180. We find that the Respondent's conduct of the interview on 16 April 2018 was, in itself, a breach of the implied term of trust and confidence and it was, accordingly, a repudiatory breach of contract, in response to which the Claimant was entitled to resign and claim constructive dismissal.

181. If we are wrong about that, we conclude that the Respondent's conduct of the interview, taken together with Ms Maton's inappropriate imposition of duties on the Claimant in 2016/2017, was likely seriously to damage the relationship of trust and confidence and was a repudiatory breach of contract, in response to which the Claimant was entitled to resign and claim constructive dismissal.

<u>The Claimant's Resignation</u>

182. The letter of resignation is silent as to the reason for her decision. There is nothing particularly unusual in that.

183. The Tribunal concludes that the Claimant, when she resigned, had in mind both of the two matters which we have concluded formed a breach of the implied term. Ms Maton's conduct had been part of her formal grievance from the outset; she raised the conduct of the interview at the meeting on 20 April 2018. We conclude that the Claimant also had in mind concerns other than these two matters when she resigned, matters which the Tribunal have not upheld. However, it is enough that we are satisfied that the relevant matters formed part of the reason for the resignation; they

need not be the sole reason or even the predominant reason. We note that the Claimant was not cross-examined as to the reasons for her resignation.

Affirmation

184. The Claimant resigned some two weeks after 16 April 2018. It cannot seriously be suggested that, by this short delay, she affirmed the contract and Mr Gil sensibly did not press the point in his written or oral submissions.

The fairness of the dismissal

185. The Respondent has not proved that the Claimant was dismissed for one of the potentially fair reasons within s.98 Employment Rights Act 1996. Accordingly, her claim of unfair (constructive) dismissal succeeds.

Remedy

186. There will be a remedy hearing to determine what compensation the Claimant is entitled to. The parties shall provide their dates to avoid for a one-day hearing within seven days of this judgment being sent out. If for any reason either party considers that one day is insufficient, it shall explain why in its reply. The Tribunal will then list the hearing and give directions.

Employment Judge Massarella

Date: 17 February 2020

APPENDIX: AGREED LIST OF ISSUES

INTRODUCTION

1. The Claimant brings claims of:

    a. harassment related to race (s.26 and s.40 Equality Act 2010 ('EqA');

    b. direct race discrimination (s.13, 39(2)(b), 39(2)(d)) EqA;

    c. victimisation for doing a protected act contrary to provisions of (s.27, 39(4)(b), 39(4)(d) EqA);

    d. constructive unfair dismissal (s.95(2) Employment Rights Act 1996 ('ERA')).

2. The Claimant relies on the protected characteristic of race as defined by section 9 of the Equality Act 2010. The Claimant describes her race and ethnicity as Asian, and specifically that she is Pakistani.

FACTUAL ISSUES

3. The Claimant relies on the following allegations in respect of each of the above heads of claims:

    a. On 21 July 2016, Jon Findlay, the Respondent Chief Operating Officer informed the Claimant that the 2 white Consultants would not be investigated. **(Direct discrimination).**

    b. The Claimant requested that Mr Neil Rothnie should in his capacity as the Medical Director talk to [Dr K] and ensure that the matter including the previous complaint is properly investigated. This request was dismissed by Mr Neil Rothnie **(Direct discrimination).**

    c. At the meeting between on or after 21 October 2016 between the Claimant and the Medical Director, he advised the Claimant that there were some patient safety issues against [Dr K]. **(Harassment / Victimisation).**

    d. In the period from October 2016 to February 2017, the Claimant was given additional tasks over and above that which she would usually be given. For example: **(Direct discrimination / Harassment I Victimisation / Constructive Dismissal).**

        I. To prioritise patients on post code rather than clinical needs,

II. Undertake off-site clinics
III. An expectation to cover nurses' clinic when nurses are on planned annual leave,
IV. Undertake contraceptive clinics which are normally run by GPs,
V. Paying back the clinical time while on planned leave.

e. On 24 March 2017, Dr Caroline Howard declined to sign the Claimant's half-day professional leave for a regional meeting as Director of Medical Education. The Claimant contends that the refusal to approve the half day leave was intended to frustrate the Claimant for her position in the [Dr K] racial discrimination allegation complaint. **(Victimisation / Harassment / Constructive Dismissal).**

f. On 27 March 2017, the Claimant complained to the Respondent's Medical Director, Mr Neil Rothnie about her treatment by Dr Howard and her refusal to approve her attendance at the regional meeting but Neil Rothnie instead supported Dr Howard. **(Victimisation / Harassment/ Constructive Dismissal)**.

g. On or about 27 March 2017, Dr Howard emailed the Claimant and confirmed that the Claimant can only attend the regional meeting as study leave provided that the Claimant agrees to pay back the costs of covering her clinic. **(Victimisation/ Harassment / Constructive Dismissal).**

h. On 4 May 2017, Dr Lucy Coward was appointed the Director of Medical Education, whilst the Claimant was still in post and without any advertisement and due process and without any warning to the Claimant that she is being replaced and even when the post was not vacant. **(Direct discrimination / Harassment / Victimisation / Constructive Dismissal).**

Additional issue 3(h)(ii): The Respondent re-advertised the Claimant's role as Director of Medical Education ('DME') on 31 January 2018 (**Direct discrimination**).

i. On 7 March 2018, the Claimant was invited to attend an interview for the post of the Director of Medical Education on 16 April 2018. On the day of the interview and 5 minutes before it started, the Claimant was notified of the interview panel which included the Medical Director, Neil Rothnie against whom the Claimant had an outstanding and unresolved grievance. The Claimant objected to Mr Rothnie sitting on the interview panel. The Claimant's objection was ignored with the Director of HR insisting that Mr Rothnie must sit on the panel. **(Victimisation / Harassment / Constructive Dismissal).**

j. On 20 April 2018, the Claimant attended the grievance meeting whereby she amended her grievance to include further allegation of removing her from the post of the Director of Medical Education and advertising the same to allow a white candidate, Dr Lucy Coward to take over the post. It was also amended to include the complaint relating to the failure of the Medical Director, Neil Rothnie to recuse himself from sitting on the interview Panel during the interview on 16 April 2018. The requests to amend her grievance were disregarded. **(Victimisation / Harassment / Constructive Dismissal).**

k. On or about 4th May 2018, the Claimant was removed from her post as the Director of Medical Education and Dr Lucy Coward was appointed permanently as a consequence of her being an Asian supporting another Asian colleague and requesting that a complaint of racial abuse and discrimination against white colleagues be investigated. **(Direct Discrimination / Harassment / Victimisation / Constructive Dismissal).**

4. The above allegations are denied by the Respondent.

LEGAL ISSUES

5. Out of Time and Continuing Acts

a. In respect of those of the Claimant's claims that arose prior to 27 March 2018, the Respondent asserts that those allegations are out of time.

I. Do any or all of those matters form part of a course of conduct by the Respondent extending over a period of time such as to render them in time?
II. If not, is it just and equitable to extend time in respect of those allegations?

6. Harassment (s.26 EqA)

a. Did the Respondent act as alleged at paragraphs 3(c, d, e, f, g, h, I, j, k) above?
b. If so, did the Respondent engage in unwanted conduct related to the Claimant's race?
c. Did the unwanted conduct have the purpose or effect of violating the Claimant's dignity, and/or did the conduct create an intimidating, hostile, degrading, humiliating, or offensive environment for the Claimant?
d. Was it reasonable for the conduct to have that effect?

7. Direct race discrimination (s.13 EqA)

a. The Claimant currently relies on Lucy Coward and Prof John Kinnear in support of her s.13 claims. In the alternative she relies upon a hypothetical Comparator who is white British Consultant and of the same experience and qualification as the Claimant.
b. The Claimant relies on each of the alleged acts as set out at paragraphs 3(a, b, d, h, k) above.
c. In respect of each of the claims of direct discrimination, did the Respondent act as alleged?
d. If so, did the Respondent:
    I. treat the Claimant less favourably than it treated or would have treated her comparators; and if so
    II. did it do so because of her race?

8. Victimisation (s.27 EqA)

a. Did the Claimant do a protected act or did the Respondent believe that the Claimant had done or may do a protected act? The Claimant relies on the following protected acts:

    I. On or about 21 July 2016, the Claimant informed the Medical Director of the Respondent, Mr Neil Rothnie and the Chief Operating Officer, Jon Findlay of the Complaint received from the School of Medicine about general undermining of trainee doctors by Consultants which the Claimant understood to be race related and demanded that the complaints be investigated. **The Respondent denies this alleged protected act.**

    II. On or after 21 October 2016 and following the Claimant's meeting with [Dr K], the Claimant met with the Respondent's Medical Director, Mr Neil Rothnie during which she raised the issue of the treatment of [Dr K] with him. **The Respondent denies this alleged protected act.**

    III. On 25 August 2017, the Claimant submitted a grievance in relation to various issues including how the Claimant had been treated following her complaint and demanded that the allegations of racial discrimination by [Dr K] be investigated. **The Respondent denies this alleged protected act.**

b. Did the Respondent act as alleged at paragraphs 3(c, d, e, f, g, h, I, j, k) above?

c. If the Respondent did act as alleged at paragraphs 3(c, d, e, f, g, h, I, j.

k), above, did it subject the Claimant to a detriment by doing so?

d. Did the Respondent subject the Claimant to a detriment because of the protected act?

9. Constructive Unfair Dismissal

a. Did the Respondent commit a fundamental breach of the Claimant's contract of employment amounting to a repudiation of that contract? The Claimant relies on the acts set out at paragraphs 3(d, e, f, g, h, I, j, k) above as alleged breaches of the implied term of trust and confidence.

b. Did the Respondent act reasonably throughout the relevant period by:

I. investigating the Claimant's grievances (including that her job plan had been reviewed) (paragraphs 3(d and j));
II. explaining to the Claimant that a request for leave to attend a regional meeting would be considered against the needs of the service and not automatically granted (paragraph 3(e-g));
III. appointing an interim Director of Medical Education as cover (not a replacement) for the Claimant whilst she was on long-term sick leave (paragraph 3(h and k));
IV. following Occupational Health advice not to contact the Claimant (therefore not contacting to discuss the specifics surrounding an appointment of an interim Director of Medical Education) (paragraph 3(h)); and
V. offering the Claimant an opportunity to be interviewed on a different day by a panel not including the Medical Director (paragraph 3(i)).

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

d. 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) and (2) ERA?

10. Remedy

a. If the Claimant was unfairly dismissed:

I. What basic award is she entitled to under s.119 ERA? What compensatory award would be just and equitable in all the circumstances?

b. In particular:

   I. has the Claimant reasonably mitigated her loss?
   II. should any compensatory award be reduced to take account of the chance that the Claimant would have been dismissed in any event; and
   III. should any basic and/or compensatory awards be reduced by reason of the Claimant's own conduct?

c. What award should be made for non-financial loss in relation to the claims brought under the Equality Act 2010. In particular for:

   I. personal injury;
   II. injury to feelings.