EMPLOYMENT TRIBUNALS

Claimant: **Ms D Shillingford**

Respondent: **Barts Health NHS Trust**

Heard at: **East London Hearing Centre**

On: **6 – 9 August 2019; 15 & 18 November 2019; 12 May 2020 (Preliminary Hearing by telephone); 23 & 24 November 2020 After that by Cloud Video Platform (Hybrid) 25 November 2020 (in chambers)**

Before: **Employment Judge B Speker OBE DL**
Members: **Mr M Wood**
Ms T Jansen

Representation
Claimant: In person
Respondent: Mr L Harris (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:-

(1) The Claimant was fairly dismissed and her claim of unfair dismissal is dismissed.

(2) The claim of discrimination on grounds of race is unsuccessful and is dismissed.

REASONS

Introduction

1 The claims to the Tribunal in this case allege unfair dismissal and discrimination on the grounds of race. These arose out of the Claimant's employment with Barts Health NHS Trust, latterly as Patient Pathway Care Co-ordinator. The claims related to events in the last five years of her service, the employment having been from 19 March 2007 until dismissal on 23 April 2018.

2 On 8 November 2018 Case Management Orders were made by Employment Judge Gilbert as well as listing the case for an estimated five day hearing to take place on 6, 7, 8, 9 and 13 August 2019.

3 A Preliminary Hearing was held on 26 November 2018 by Employment Judge Jones. The Claimant attended in person and Mr Harris represented the Respondent. A draft list of issues which had been prepared by the Respondent, in accordance with directions from Employment Judge Gilbert, was discussed in detail in order to identify the detailed issues and this list was to be finalised by the Respondent and sent to the Tribunal. Orders were also made with regard to the provision of further and better particulars and witness statements.

4 On 9 May 2019 a Preliminary Hearing (Closed) took place before Employment Judge Warren and the representation was as before. There was further detailed discussion with regard to the list of issues. An application was made by the Claimant with regard to her race discrimination claim and this was partially granted. Aspects of the disciplinary process about which the Claimant complained were ultimately set out as an annex A to the list of issues to be before the Tribunal for determination. It was also determined and clarified that the protected act upon which the Claimant was relying in relation to her victimisation claim was a grievance letter which she sent on 18 May 2015 and not the earlier grievance in 2015, which was the basis upon which the Respondent claimed to have deferred proceeding with disciplinary action until that 2015 grievance and subsequent appeal had been concluded.

5 The hearing before Employment Judge Warren was extending and included allowing the Claimant considerable additional time to consider her position and produce other materials. It was resulting from this hearing that the final list of issues was completed and is contained in a document from the Respondent's solicitors dated 23 May 2019. That is the list of issues which were to be addressed by the Tribunal at the final hearing.

6 The final hearing commenced on 6 August 2019 before the full Tribunal. From the outset it was known that the case would not be completed in the 4 days listed because one of the Respondent's witnesses Mr Gibbs was not available that week and therefore the parties knew that the case would have to be adjourned part-heard. It was clarified at the beginning of the hearing that the Tribunal was to address the list of issues referred to, which are at pages 105 – 109 in the bundle of documents.

7 On the first day of the hearing 6 August, time was spent by the Tribunal reading a suggested list of documents from the bundle as well as the statements. The bundle consisted of four lever arch files and extended to over 1600 pages. On 7 August the Tribunal heard oral evidence from Alison Heron, Assistant Director midwifery and gynaecology, who conducted the Claimant's disciplinary hearing and was the dismisser. On 8 August the Tribunal heard evidence from Joseph McQuillan, head orthoptist and general manager and from Helen Wensley, divisional manager and the grievance commissioning manager, who dealt with the Claimant's 2015 grievance.

8 On 9 August the Tribunal heard evidence from Alishan Kasmani, service manager who was the line manager of Ros Doyle (the Claimant's line manager). The Tribunal also considered a written statement from Rosanna (known as Ros) Doyle, the Claimant's line

manager, who did not give evidence and did not attend the Tribunal hearing at any stage. The Tribunal also heard oral evidence from Sue Applewhaite-Wallace who attended pursuant to a witness order granted to the Claimant. When she gave her evidence there was no witness statement for her although one was provided subsequently by the Claimant.

9 The case was then adjourned to reconvene for two further days to be completed. The first two convenient consecutive days which could be found were Friday 15 November and Monday 18 November 2019. On 15 November the Tribunal heard evidence from Daniel Gibbs, Director of Operations, who had heard the Claimant's appeal against dismissal and from Michael Dooley, the Claimant's GMS trade union officer.

10 On 18 November, the 6th day of the hearing, evidence was heard Popy Begum an administrative assistant who was called pursuant to a witness order issued on application by the Claimant. The Claimant then commenced her evidence referring to a number of written statements which she had produced. The case then had to be adjourned part-heard and was relisted for 20 and 21 February 2020 but for administrative reasons the case could not proceed on 20 February and was adjourned to be listed on convenient dates in May or June 2020. Complications then occurred as a result of the Covid-19 pandemic and the case was therefore listed on 12 May 2020 for a telephone directions conference call which the three members of the Tribunal conducted remotely from their private telephones. The claimant and Mr Harris participated. At that hearing further directions were given in order to identify a convenient time for the case to be continued and concluded and also requiring the Claimant to submit an up to date schedule of loss. Both sides were also asked to have their written submissions ready and for these to be exchanged prior to the commencement of the next hearing.

11 The case was then heard for two further days on 23 and 24 November 2020. The Tribunal had refused an application for Mr Dooley to be recalled as he had already been released and his evidence had been given and cross-examination had taken place and Mr Harris indicated he had no further questions to raise with him. On 23 November the Tribunal heard the continued cross-examination of the Claimant which was completed by the end of that day. On 24 November 2020 the Tribunal asked questions of the Claimant. The Claimant then produced a revised schedule of loss which was discussed in detail. It was clear that this was not an accurate document although it had been requested as far back as May 2020. As the hearing had been expressly listed for liability only, it was decided that the contents of the schedule of loss should not be taken further at that time. Following this detailed submissions were addressed to the Tribunal by Mr Harris in writing and orally. The complainant presented her written submissions and spoke to them in detail.

12 In view of the volume of evidence of documentation and the fact that the hearing had spanned a period from 6 August 2019 until 24 November 2020 the Tribunal decided that the fair and appropriate course was to reserve judgment for detailed deliberations and for the judgment to be sent out to the party with reasons when it was completed.

13 In considering all of the documents and the statements of those witnesses referred to above, the Tribunal was also provided with statements by Andrew Coombes and Michel Bacon for the Claimant as well as an additional statement by Ros Doyle. We were also provided with a cast list identifying 28 individuals to whom reference was made

in the hearing and the documentation, and a chronology.

The Issues

14 As stated these were set out in a document prepared by the Respondent's solicitors dated 23 May 2019 following detailed discussion at the Preliminary Hearing and they were agreed by both sides. The list of issues is as follows:

1. **INTRODUCTION**

C is pursuing claims of

(i) direct race discrimination under s13 Equality Act 2010 ("EqA");

(ii) victimisation under s27 EqA and

(iii) unfair dismissal under s.95 and s.98 Employment Rights Act 1996 ("ERA").

2. **JURISDICTION**

2.1 Were C's claims presented to the Tribunal before the end of the period of three months beginning when the act complained of was done?

2.2 In so far as C is complaining that R omitted to act, when did R make the decision not to act?

2.3 Did the matters complained of amount to conduct extending over a period ending within the period of three months prior to the presentation of the claim?

2.4 To the extent that any of C's complaints under the Equality Act 2010 are out of time, would it be just and equitable for the Tribunal to extend time for the bringing of the complaint?

3. **DIRECT RACE DISCRIMINATION**

3.1 Was C subjected to the acts set out at subparagraphs 3.1.1 – 3.1.8 below and if so, did any of them amount to acts of direct discrimination because of her race (which she has identified as British Black heritage) contrary to s13 of the EqA?

3.1.1 Since 2012 to the date of C's dismissal, Ros Doyle picked on and singled out C and spoke to C in a disrespectful and degrading manner. C relies on the examples set out below:

3.1.2 In 2015 or 2016 Ros Doyle told Harun Miah that she did not want her to approach C for help. Ros Doyle then turned to C and told her not to help Harun Miah. This happened in the Claimant's workstation at the Royal London Hospital and Harun Miah was present.

3.1.3 In late July to August 2016, Ros Doyle, Alishan Kasmani and Joe McQuillan restricted C from taking annual leave, did not grant her full

request for leave and did not give C a clear explanation for this. This happened at the Royal London Hospital via email correspondence.

3.1.4 From around 2014 to the date of dismissal Ros Doyle, Alishan Kasmani and Joe McQuillan relentlessly targeted C by putting her under pressure, undermining her credibility and setting her up to fail. This happened at the Royal London Hospital.

3.1.5 On 24 March 2015, Claire Williamson unnecessarily requested to see C's ID badge. This happened on the 10th floor, at the ID entrance at the double doors, via the corridor where C worked. Sonia was present but did not stay (C is unsure of Sonia's surname but thinks it is Anjos).

3.1.6 Subjecting her to disciplinary action whereas others not of British Black heritage were not disciplined for similar actions. C relies on the following examples of actions where other individuals have not been disciplined for actions similar to those for which she was subject to disciplinary action:

(i) On 21st October, 8th, 16th and 25th November and 2nd December 2016 Karen Wong and Ros Doyle were not disciplined for taking a break;

(ii) On 6th June 2016 and 30th October 2012 Karen Wong and Ros Doyle were not disciplined for breaching confidentiality when they accidentally sent a document containing confidential information to a printer in a different department;

(iii) Karen Wong was not disciplined for never activating her answerphone.

3.1.7 Failing to deal comprehensively with C's grievance.

3.1.8 The unfair manner in which C's disciplinary process was handled (the specifics of unfairness are set out in annex 1).

4. **VICTIMISATION**

4.1 Did C do a protected act under s27(2) EqA when on 18th May 2017 by raising a grievance?

4.2 If so, did Ros Doyle, Alishan Kasmani, Joe McQuillan, Leslie Corman, Michael Pantlin and Alwen Williams subject C to a detriment because she did that protected act, by pursuing a disciplinary process against her and treating her unfairly during that process? (The specifics of unfairness are recorded at annex 1).

5. **UNFAIR DISMISSAL**

5.1 What was the reason for C's dismissal and was it a potentially fair reason under s.98(1) and (2) ERA? R says it was gross misconduct.

5.2 If it was a potentially fair reason, did R act reasonably in treating the reason for dismissal as a sufficient reason for summary dismissal? In particular:

(i) Did R hold an honest and genuine belief that C was guilty of alleged misconduct?

(ii) If yes, did R have reasonable grounds on which to base that belief?

(iii) Did R carry out as much investigation as was reasonable in the circumstances?

5.3 Was the dismissal within the range of reasonable responses open to a reasonable employer under s98(4) ERA?

6. **REMEDY**

Discrimination/Victimisation

If C's claim for discrimination and/or victimisation is successful:

6.1 To what compensation, if any, is C entitled (including for injury to feelings)?

Unfair Dismissal

If C's claim for unfair dismissal is successful:

6.1.1 To what basic award is C entitled?

6.1.2 To what compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by C? In particular:

(i) Would C have been dismissed in any event and would such dismissal have been fair?

(ii) Should any compensatory award be reduced to take account of the chance that C would have been dismissed in any event?

(iii) Should any basic and/or compensatory awards be reduced by reason of C's own culpable or blameworthy conduct (if any)?

6.1.3 Has C reasonably mitigated her losses?

Annex 1: Alleged Unfairness in the Disciplinary process:

1. Allowing a lawyer to assist the disciplinary panel;

2. Late service of the bundle on C;

3. Late notification of allegations against her;

4. C being unable to contact witnesses as she was not allowed to contact anyone from R;

5. C having delayed access to documentation;

6. Preventing C from relying on her own bundle of documents;

7. R's bundle containing references to allegations that had been withdrawn;

8. R not producing witness statements;

9. R failing to adequately take into account the fact that there was no formal grievance against C;

10. Failing to open the case against C by explaining the allegations;

11. A panel member fell asleep;

12. Failing to give proper weight to the evidence;

13. Allowing Ros Doyle to give evidence in camera;

14. Not giving C sufficient time to question Joe McQuillan;

15. Relying on historical allegations;

16. Not giving adequate account to C's previous exemplary conduct.

15 The Tribunal found the following facts:

15.1 The Respondent is a large NHS Trust providing hospital services through a number of sites including Barts and Royal London, the Claimant having been employed at Royal London.

15.2 The Claimant's employment with the Trust commenced on 19 March 2007 and for many years she worked as a medical secretary.

15.3 In 2012 there was a restructure as a result of which the Claimant became a patient pathway care co-ordinator in a small team which was managed by Ros Doyle a senior patient care co-ordinator. Ros Doyle managed the Band 2s and Band 4s secretarial staff and she was managed by Alishan Kasmani, who was service manager in ophthalmology a role he had held since 2014. In turn he was line managed by Joseph McQuillan who was head of orthoptist and ophthalmology general manager from 2016.

15.4 On 8 May 2015 the Claimant submitted a written grievance (1365/6) and which related to the way that she was treated and not listened to by her managers, an incident regarding the Claimant refusing to give access to a consultant office and an issue as to her being requested to show her ID badge. She also complained of a mess caused on her desk by her line manager apparently searching for something on it. Shortly after this on 21 May 2015 David Maslen-Jones, the senior service manager in ophthalmology, commissioned Katherine Page, service delivery manager, to investigate allegations of unprofessional conduct and behaviour on the part of the Claimant and surrounded concerns as to the Claimant's actions

and behaviours which amounted to a breach of trust values, whether there was unauthorised absence from the workplace and whether the Claimant's response to management instructions amounted to unprofessional behaviour. There were six incidents in all.

15.5 On 11 August 2015 the Claimant was informed that the disciplinary process which had been commenced in relation to her was to be put on hold whilst her grievance issued on 8 May 2015 was investigated.

15.6 A detailed investigation of the Claimant's grievance was undertaken by Graham Booth, interim general manager of theatres and pain, and he produced a report. Mr Booth was delayed in his investigation because of various postponements requested by the Claimant and her refusals to engage. Mr Hall was delayed in interviewing other staff members referred to, until he could speak to the Claimant. There were further delays in the process because of the Claimant's refusal to respond to requests for evidence. Ultimately the investigation report was submitted to Helen Wensley who was commissioned to consider the Claimant's grievance. She invited the Claimant in May 2016 to attend a grievance outcome meeting which the Claimant declined. Accordingly Helen Wensley considered the matter. She concluded in the outcome letter dated 5 July 2016 that none of the grievances raised by the Claimant were upheld. Helen Wensley stated that she had arranged with the Claimant to have a face-to-face meeting with the associate director of employee support and wellbeing and Adnan Masood, HR business partner along with the Claimant's union representative Michelle Bacon in order to offer the Claimant support. The Claimant was also told of her rights to appeal against the grievance outcome.

15.7 On 21 July 2016 the Claimant submitted a written appeal against the grievance outcome. The Claimant supplemented this by a further 12-page document raising issues which she wished to have considered at her grievance appeal. The grievance appeal hearing took place before Pamela Humphrey, associate director of nursing commencing on 12 October 2016 and being reconvened on 21 November 2016. The Claimant was represented by Stephen Jones from the GMB. The grievance appeal outcome letter from Pamela Humphrey was sent to the Claimant on 12 December 2016. This addressed the issue of delay in dealing with the grievance and the attempts which were made to engage the Claimant. The conclusion was that none of the allegations in the grievance were withheld and the appeal was unsuccessful. Pamela Humphrey took exception to the suggestions made by the Claimant and her representative that the appeal process was unfair and that the appeal panel was biased towards the management team. It was explained that the appeal panel consisted of independent trusted staff who would have no previous knowledge or dealings with the grievance and that Pamela Humphrey herself did not work in the Claimant's division or CAG nor at the Royal London Hospital site. Following the outcome of the Claimant's grievance appeal, the Respondent made arrangements to resume the investigation of the disciplinary matters against the Claimant which had

been put on hold.

15.8 On 6 January 2017 Alishan Kasmani commissioned Bridget Prosser of Capsticks Law Firm to undertake investigation of the allegations of unprofessional conduct and behaviour which were made against the Claimant. The investigation was to be in accordance with the Trust's disciplinary policy. It was explained that investigations had been put on hold pending the outcome of the Claimant's grievance appeal and also that further allegations regarding the Claimant's conduct and behaviour had arisen in the meantime and were also to be investigated. The commissioning letter listed six existing allegations and four new allegations. Ms Prosser was instructed to interview all witnesses and review all relevant documents and was told at this stage that the persons to be spoken to would be Claire Williamson, Barbara Miller, Alishan Kasmani, Joe McQuillan and the Claimant herself. An investigation report was to be presented by Bridget Prosser to Mr Kasmani to enable him to determine formal action under the disciplinary policy as necessary.

15.9 On 22 February 2017 the Claimant was notified by Alishan Kasmani and Leslie Coman, HR manager that she was being suspended in relation to nine allegations together with three further allegations mentioned to her at that time. A request had been made to speak to the Claimant confidentially with regard to the proposed suspension but the Claimant did not wish to have a private meeting at that time and accordingly she was informed in the workplace of the suspension. She was given the opportunity to remove personal items and it was explained that suspension was not punitive and did not amount to disciplinary action. She was told that during her suspension she should make herself available to attend meetings and that Lesley Coman as a member of the HR team would be available to answer questions. She was also told of that the services of the Trust Occupational Health department and confidential counselling service via CIC were available to her. The suspension and these arrangements were confirmed in a letter of 24 February 2017 (402 – 404). It was made clear that the Claimant's access to the site was restricted to formal health appointments or a requirement to attend meetings. It was not stated in the letter that the Claimant was told not to contact colleagues and other staff. This is of significance as the Claimant later suggested that such a restriction was put in place and that this impeded her in preparing for the disciplinary hearing. In the event the Claimant remained employed on full pay but did not attend again for work from the date of suspension up to her dismissal on 23 April 2018.

15.10 On 19 April 2017 Bridget Prosser was instructed to investigate some additional allegations against the Claimant with regard to challenging and intimidating email exchanges, refusal to follow reasonable instruction using threatening and intimidating language with her line manager and refusing to follow a reasonable instruction with regard to her work assignment.

15.11 On 11 April 2017 Bridget Prosser wrote to the Claimant indicating that she

had been appointed as the designated case investigator and that she was external to the Trust and worked as an employment solicitor at Capsticks. She stated that she would be investigating under the Trust disciplinary policy and that she wished to meet the Claimant to hear her evidence as to the concerns raised. She suggested meeting on 21 April and indicated the Claimant's right to be accompanied by a trade union representative or a workplace colleague.

15.12 The Claimant requested that Bridget Prosser provide answers to a list of questions and the reply was sent to the Claimant on 8 May 2017 (481 – 482). Bridget Prosser continue to press the Claimant to meet with her. On 16 May the Claimant wrote again to Bridget Prosser again asking a further list of questions and requesting information and documentation. Bridget Prosser replied indicating that she felt the questions had already been answered and repeating the invitation to meet. The Claimant replied on Friday 18 May stating that she had raised a grievance with Alwen Williams, chief executive of the Trust regarding concerns as to the disciplinary process and the behaviour of members of staff. On that day the Claimant sent a letter to Mrs Alwen Williams (1427 – 1428) raising a grievance as to being unfairly and unprofessionally treated with regard to the disciplinary process. She complained about the circumstances of the suspension and she accused the Trust of being institutionally racist "indirectly to those of black heritage that we are "aggressive and loud". She complained of the nature of the allegations which were being made against her and stated that she wished there to be an independent HR member involved who had not been previously involved in her grievance. She also stated as follows:

"I also object to the following members of staff being involved in this disciplinary and grievance process: Lesley Coman, Amanda Harcus, Adnan Masood, Umer Shaik, Ros Doyle, Alishal Kasmani, Jo McQuillan, Stephen Hall, David Maslen-Jones, Katherine Page, Katherine Enderley-Brown, Graham Booth, Pamela Humphrey, Helen Wensley, Anthony Fitzgerald, Claire Borden, Matthew Davenport, Janet Woolward, Colin Ainsworth, Pat Wandera, Page Abela Stewart Cooper all members of the Trust office, surgery CAG and general medicine CAG". She indicated that she wanted the rest of the grievance in this letter to be "taken seriously." This letter was identified by the Claimant in her case as being the 'protected act' in respect of her victimisation claim.

15.13 During the investigation Bridget Prosser interviewed all of those persons listed on the commissioning letter, including the Claimant who was interviewed at length on 6 and 15 June 2017in relation to which there was a 43 page transcript. The investigation report by Bridget Prosser was submitted to the Trust on 25 July 2017 and resubmitted on 28 July 2017. It was a lengthy report running into 479 pages. It included an executive summary which summarised the evidence to support the allegations. It also contained a detailed analysis of the evidence based findings and there were attached to the report 16 appendices which included the detailed interview records of all of those who were seen as well as the

exchanges of emails and other correspondence. There were extremely detailed verbatim notes of each of the interview sessions running to 157 pages (542 – 699). In relation to the 12 issues the report concluded that there was evidence to support 10 of these and the report therefore omitted those issues which had been numbered 2 and 4 (960). The report explained in detail the basis of the conclusion reached with regard to each of the 10 issues and pointed to the evidence relevant to each. On 4 October 2017 the Claimant was informed that having considered the report, the Trust had decided to instigate formal disciplinary action against the claimant and that she would be required to attend a disciplinary meeting. The letter to her from Rita Wallace, General Manager Children's Community Services listed the allegations (10) which would be considered by a disciplinary meeting. Two copies of the investigation report were provided to the Claimant for her and her representative if applicable and it was stated that the report formed the basis of the management case and would be referred to at the panel. She was advised that she should bring the report with her to the meeting. She was reminded that the Trust had a confidential staff counselling service. The Claimant was then informed that the panel was intending to meet on 29 November (morning) 30 November and 1 December 2017. In the correspondence following the production of the report, the Claimant did not make any objection to the fact that Bridget Prosser had been commissioned to undertake the investigation.

15.14 The Claimant indicated that the dates proposed were not convenient. The Claimant also raised issues as to the accuracy of the notes of her interview with Bridget Prosser. It was confirmed that the report had been redacted to remove reference two issues 2 and 4 which were not to proceed.

15.15 As a result of requests from the Claimant and to suit the availability of her trade union representative, the disciplinary hearing which had been scheduled for 6 and 7 December 2017 was postponed and the new dates set were Monday 8th and Tuesday 9th January 2018. As there had been two postponements, it was made clear in the letter to the Claimant that no further changes would be considered. The letter inviting the Claimant to the hearing was from Alison Herron, Associate Director of Midwifery for Maternity Gynaecology and Fertility Services at Royal London Hospital as she had been commissioned to chair the disciplinary hearing. In the letter to the Claimant of 14 December it was stated as follows:-

"if you wish to submit your own written case and/or supporting statements, you must submit them to me at least three working days before the disciplinary meeting for circulation to the panel members and appropriate officers in advance. If you wish to call any witnesses you should let me have details of their names and the evidence they intend contributing to the case at least three working days in advance of the meeting for consideration. In the event that I do not consider that a witness can contribute any evidence that is relevant, I shall consult with the CCS HR Team/Corporate HR Team concerning his attendance; however my

decision will then be final."

15.16 The Claimant was reminded of her right to be represented by a trade union representative or a colleague.

15.17 The disciplinary hearing commenced at 9.30am on Monday 8 January 2018. It was chaired by Alison Herron accompanied by Kwaku Agyepong, HR Business Partner. At the commencement of the hearing Michael Dooley, the Claimant's representative was in attendance as was Bridget Prosser, legal director of Capsticks, who was to present the management case. Esraa Makhjavami, HR Adviser was present as note-taker. The Claimant is reported as not having attended until 11.18 a.m. As the panel had been waiting since 9.30am, the agreed starting time and the Claimant had not sent any communication to the Trust or to Alison Herron, the panel decided to commence the hearing at 10.30am. There was then discussion as to the question of witnesses. It had been made clear that the witnesses who were present were part of the presentation of the management case as set out in Bridget Prosser's report. It was explained to Mr Dooley that the Claimant had been advised that if she wished to call witnesses herself (other than those set out in a list supplied to her by the Trust of witnesses being called to support the management case) then she could do so. Alison Herron pointed out that because the hearing had been listed for two days then there would be an opportunity for any witnesses called by the Claimant to be in attendance on the second day. After the Claimant arrived at 11.18a.m., the hearing continued for the rest of the day. Shortly after the lunch break, there was discussion about calling Ros Doyle who had been waiting to give evidence since 9.30am. There was mention of her having health difficulties and there being an Occupational Health report and the Alison Herron indicated that it would only be acceptable to Ros Doyle if the Claimant was not in the room when Rod Doyle gave her evidence. Although Mr Dooley raised an objection, it was agreed that the hearing proceed to hear Ros Doyle's evidence with Mr Dooley being in the room and able to ask questions on the Claimant's behalf. The Claimant left the hearing and waited in a separate area. It had been indicated by the Claimant that she needed to leave the hearing by 4.30pm due to child care responsibilities. Mr Dooley asked questions of Ros Doyle and the notes indicated that at times she became tearful. Shortly before 4.30pm the Claimant entered the room saying that she needed to leave and wished to pass on some further documents. There was an issue regarding this as Ros Doyle had communicated that she had been intimidated and felt uncomfortable by the Claimant having entered the room. The Claimant left. Mr Dooley was given the opportunity to continue asking questions but it was clear that he wished to defer further questions until the next day and the matter was adjourned. On that first afternoon Ros Doyle had been waiting for four hours before being brought into the hearing and then gave evidence for approximately two and a half hours and was questioned. There was discussion about the Claimant wishing to call Andrew Coombs as a witness on the second day.

15.18 On Tuesday 9 January 2018 at 9.30am, the disciplinary hearing was

reconvened. However, there was preliminary discussion for an hour about the fact that Ros Doyle had indicated she had been very distressed by the previous day's events and in view of her medical difficulties she did not wish to have any further questioning from Mr Dooley and she did not want him or Ms Shillingford in the room. The Chair, taking all of this into account, put it to Mr Dooley that he should not be present but should submit written questions if he had further questions and these could be put to Ros Doyle by the Chair. Mr Dooley expressed vociferous opposition to this course and suggested that it was unfair and that the only problem was that Ms Doyle was nervous. He also said that the proposed procedure would deprive him of the opportunity of putting supplementary questions. However, Mr Dooley conceded that he had formed the view that Ms Doyle appeared unwell. In the event the hearing proceeded without the Claimant or Mr Dooley in attendance. Ros Doyle was asked questions mainly by the Chair and Bridget Prosser for a further two hours and the hearing was then adjourned at 12.04pm. Ms Doyle left.

15.19 The hearing was then reconvened with the Claimant and Mr Dooley in attendance. Mr McQuillan was called to give evidence but it was already known that he had to leave at 1.30pm to deal with clinical commitments. Accordingly, he was only present giving evidence for 30 minutes. It had been explained that he was scheduled to attend for a longer period of time and he had been there in the morning but the hearing had been put back largely because of the very late start on the first day when the Claimant had not been present. For the rest of the afternoon of the second day Bridget Prosser continued presenting the management case. Towards the end of the hearing the Claimant indicated she wished to call Mr Coombes but it was decided that it was too late in the day and it was conceded that the hearing would not finish that day and that arrangements could be made to call Mr Coombes when the disciplinary hearing reconvened.

15.20 There was a delay in arranging reconvened dates resulting from the unavailability of Mr Dooley for various reasons and the Claimant also indicated various dates were not convenient for her. Accordingly the third day of the disciplinary hearing was not until Friday 16 March 2018. The Claimant indicated that she was still wishing to call Andrew Coombes but he was not available that day. There was then further presentation by Bridget Prosser who was then asked questions in detail by Mr Dooley and the Claimant. It was indicated that the Claimant had a long statement and that she would be reading this out and this took place. She also stated that she wished to provide a further statement which she would provide for the next hearing. There was then an adjournment after 3.00pm on the basis that the Claimant would be sending her complete statement electronically by Monday 19 March and there would be a half day session on 20 March from 12noon until 4.30pm.

15.21 On Wednesday 20 March 2018 the hearing reconvened at 12noon. The Claimant's promised further statement had not all been provided to the panel but after discussion it was agreed that the matter would proceed. The Claimant then addressed the panel at considerable length in relation

to all of the issues and answered questions. On her behalf Mr Dooley summed up to the panel. There was no mitigation with regard to the Claimant's history or with regard to alternatives to dismissal. The Claimant as she conceded during questioning did not offer any apology to the Trust particularly with regard to the allegation of taking unauthorised leave. The disciplinary hearing had lasted for 3 ½ days.

15.22 On 23 April 2018 the outcome letter from Alison Herron was sent to the Claimant. This was a 10-page letter (1166 – 1175). It set out the findings which can be summarised as follows: allegation 1 not substantiated; allegation 3 partly substantiated and partly found established, allegation 5 substantiated, allegation 6 substantiated, allegation 7 (unauthorised absence on leave substantiated), allegation 8 substantiated, allegation 9 not substantiated, allegation 10 not substantiated, allegation 11 not substantiated, allegation 12 substantiated. This summarised that the panel had found 6 of the allegations to have been proven and had come to the conclusion that the Claimant's behaviour amounted to gross misconduct with respect to the following:

(1) Bullying and harassing behaviour.

(2) Serious refusal to carry out a reasonable instruction.

(3) Unauthorised absence without reasonable explanation for serious breaches of trust and confidence. It was stated that the level of sanction had been considered and having considered the full range available, the panel concluded that summary dismissal was appropriate. The letter stated that the panel found that the Claimant did not provide adequate insight and that the reflection through the lengthy hearing was that there was acceptance of her own responsibility in behaving and communicating in accordance with the Trust values and behaviour. She did not have an understanding of the role of the manager who had responsibilities for overseeing the service priorities on a daily basis and the panel was not assured that if a similar situation arose in future the Claimant would have behaved differently. The decision therefore was that the Claimant was summarily dismissed from the Trust without notice and that Monday 23 April 2018 would be recorded as her last day of service with the Trust. The right of appeal was communicated.

15.23 On 27 April 2018 the Claimant appealed against the disciplinary outcome and the dismissal. The Claimant prepared a statement setting out her grounds of appeal and there was a management report prepared by Alison Herron dated 24 May 2018. The appeal hearing took place on Monday 4 June 2018 at 3.00pm. It was chaired by Dan Gibbs, Director of Operations and he was accompanied on the panel by Mark Warren, Associate Director for cancer and diagnostics and Damian McGuiness, Assistant Director of People for RLH and MEH. Alison Herron and Kwaku Agyepong attended to present the management response to the appeal. The appeal hearing took place on 16 July 2018. The Claimant

complained that she had not received the minutes of the disciplinary hearing by that time. At the appeal the focus of the submissions by the Claimant and her representative was on alleged unfairness with the process but there is no record of any submissions being made as to the penalty imposed or alternatives to it.

15.24 On 27 July 2018 Mr Gibbs wrote to the Claimant informing her of the outcome of her appeal. The letter went into detail with regard to the various findings and also commented upon the various aspects of alleged unfairness. Mr Gibbs stated that due consideration had been given to all of the evidence and submissions it was decided that the decision to dismiss would be upheld and the appeal was unsuccessful.

15.25 On 12 June the Claimant submitted an early conciliation notice to Acas and the certificate was issued on 4 August 2018 the Claimant presented her claim to the Tribunal on 31 August 2018.

Submissions

16 On behalf of the Respondent Mr Harris provided the Tribunal with written closing submissions on which he addressed us in detail. He drew attention to the crucial items of documentary evidence in relation to the different allegations made against the Claimant. He also answered point by point the allegations in annex 1 as to alleged failure with regard to procedure. He referred the Tribunal to the Burchell test with regard to dismissal on the ground of conduct and the approach that should be taken by the Tribunal. He argued that none of the procedural issues raised affected the fairness of the dismissal and he argued that applying the Polkey principle that none of the procedural issues, if addressed in a different way, would have changed the outcome and that the Claimant would have been fairly dismissed in any event. He said that on the principle of contributory fault, the Claimant should be found to have contributed to 100 percent.

17 In relation to the allegation of race discrimination, he submitted that no prima facie case had been established and that there had been no questioning with regard to the witnesses in relation to the allegations of race discrimination. Furthermore there was no evidence in the substantial bundle of documents in relation to this. He said that it was only the Tribunal which had raised questions relevant to the discrimination claim. As to the claim of victimisation this was not made out bearing in mind the date of the alleged protected act, namely the letter of grievance to the Chief Executive, was at a time when the disciplinary process was already in course and the Claimant had been suspended.

18 On her own behalf the Claimant provided written submissions to the Tribunal and referred the Tribunal to the grounds of her appeal as well as to Mr Dooley's witness statement. She took particular exception to the fact that she had been excluded for part of the disciplinary hearing. She objected to many aspects of the conduct of the investigation and the hearing. She claimed that the process had been unfair. She argued that the investigation report should have been effectively redacted and considered that she had been prejudiced by the fact that the disciplinary hearing was aware that there had been other complaints against her. She said that Mr Agyepong had been sleeping at various times within the hearing and that this was unfair. Although she had not challenged the impartiality of Mr Gibbs who held the appeal, she argued that the appeal itself was unfair

and that she had not had sufficient opportunity to present her case. She said that management had set her up to fail and that there was a plan for a long period of time to have her removed from her job. She claimed that she had been unsupported throughout the whole process. She argued that management had failed to tackle problems regarding the way in which Ros Doyle had managed her and her colleagues. She argued that she was being treated differently from colleagues who were white and that stereotypes were used which was prejudicial.

The Law

19 Employment Rights Act 1996

20 Section 98(1) In determining whether the dismissal of an employee is unfair, it is for the employer to show (a) the reason (or if more than one, the principal reason) for the dismissal and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the employee held. Section 98(2) sets out potentially fair reasons: capability or qualifications, conduct, redundancy, contravention of duty, restriction or enactment

21 Section 98(4) The statutory test. *Where the employer has fulfilled the requirement of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer –*

(a) depends on whether in the circumstances (including the size and administrative resources 0f the employer's undertaking) the employer acted reasonably or unreasonably in treating is as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

22 Equality Act 2010 Section 13(1*) A person (A) discriminates against another (B) if, because of a protected characteristic , A treats B less favourably than A treats or would treat others.* Section 27(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 B has done, or may do, a protected act*

Findings of Fact

23 The Tribunal considered in depth the very substantial amount of documentation in the bundle as well as the lengthy evidence heard from all of the witnesses. In reaching our findings we addressed the issues clearly set out in the detailed list of issues referred to dated 23 May 2019 (105 – 109).

Unfair Dismissal

24 Under Section 98 (1) of the Employment Rights Act 1996 in determining for the purposes of this part of the Act whether dismissal is fair or unfair it is for the employer to show (a) the reason (or if more than one the principal reason) for the dismissal and (a)

that it is a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Potentially permissible reasons relates to capability or qualification, conduct, retirement, redundancy or the ability to carry out work without contravening a duty or legislation. In this case it was clear that the decision to dismiss the Claimant was made on the basis of her conduct. The letter confirming the outcome of the disciplinary procedure lists a number of allegations which were proved against the Claimant with regard to her behaviour including an unacceptable attitude towards other colleagues and refusing to carry out clear instructions. Of these the most significant was that the Claimant had taken 19 days leave when this had not been authorised by her three managers and was in direct breach of the Respondent's disciplinary code, which includes the taking of unauthorised leave as an example of gross misconduct. It was clear that from the Respondent's point of view that this offence, even on its own would have been the reason for the dismissal of the Claimant. This was also confirmed by Dan Gibbs, who heard the Claimant's appeal, that he considered that the dismissal was appropriate because of the taking of the unauthorised leave and the circumstances surrounding it. In this context we deal with the relevant issues from the list of issues as follows:

5.1 what was the reason for the Claimant's dismissal and was it a potentially fair reason under 98(1) and 2 of Employment Rights Act 1996? The Respondent says it was conduct namely gross misconduct. We find that the reason for dismissal was conduct which is a potentially fair reason.

5.2 If it was a potentially fair reason did the Respondent act reasonably in treating the reason for dismissal as a sufficient reason for summary dismissal? In particular:-

(1) Did the Respondent hold an honest and genuine belief that the Claimant was guilty of alleged misconduct;

(2) If yes, did the Respondent have reasonable ground on which to base that belief;

(3) Did the Respondent carry out as much investigation as was reasonable in the circumstances.

25 The questions in the list of issues as set out above mirror the test in the well known case of *British Home Stores Ltd v Burchell [1978] IRLR 379 EAT* and confirmed in the case of *Weddel & C Ltd v Tapper [1980] IRLR 96 CA*. This is the proper approach in assessing whether in treating the conduct of the Claimant as a sufficient reason to dismiss, the Respondent had addressed this properly. Our findings with regard to these three elements are as follows:

(1) We find that the Respondent did hold an honest and genuine belief that the Claimant was guilty of the alleged misconduct. This applied in relation to the findings set out in the disciplinary outcome letter with regard to those issues which were found to be established. Having heard the evidence of Alison Herron we conclude that she as the representative of the Respondent was honest and genuine in her belief that the Claimant was guilty of the alleged misconduct.

In relation to question 2 we find that the Respondent did have reasonable grounds on which to base that belief. This resulted from a most intensive and thorough investigation which had been carried out by a person independent of the Trust namely Bridget Prosser. The Tribunal agreed that this was one of the most extensive and thorough investigations carried out in relation to allegations of misconduct of the type alleged and were particularly impressive as an investigation bearing in mind that the Claimant as an employee at the level she was (and this a point that the Claimant made herself) was extensive and thorough. The report itself with the appendices contained over 130 pages including verbatim accounts of interviews of all of those who were connected with the issues which had been raised. The report by Bridget Prosser was evidenced based to a very high degree indeed and included all of the material which could be needed in order to provide the Respondent with reasonable grounds upon which to base the belief that the Claimant was guilty of the misconduct. As to question 3, we find that the Respondent carried as much investigation as was reasonable and indeed we found that the investigation went very much further than could have been expected. The Respondent took an immense amount of time and considered the detailed investigations despite periods where the Claimant herself was uncooperative and disinclined to engage in the process. The disciplinary hearing itself extended into nearly four days which is a demonstration of the extent to which the Respondent took the case extremely seriously and gave every opportunity for the Claimant to raise issues and challenge them.

26 Was the dismissal within the range of reasonable responses open to a reasonable employer under Section 98(4) Employment Rights Act 1996? This asks us to consider the statutory test of unfair dismissal set out in that section. In doing so the Tribunal bore in mind the principles established in the case of *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT* as reinforced by *HSBC Bank Plc (formerly Midland Bank Plc) v Madden [2000] IRLR 827 CA*. These authorities established that the correct approach for a Tribunal to adopt in answering the question posed by Section 98(4) is as follows:

(1) the starting point should be the words of Section 98(4) themselves.

(2) in applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (members of the Employment Tribunal) considered the dismissal to be fair.

(3) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

(4) in many though not all cases there is a band of responses to the employee's conduct within which one employer might reasonably take one view another quite reasonably take another.

(5) the function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

27 In considering the fairness of the decision to dismiss the Claimant, we applied our minds in particular to what were the major matters resulting in the Claimant being dismissed. Of the greatest importance was allegation 7 namely that the Claimant had taken unauthorised absence when she was expressly told that she was not permitted to take the extra days off. The evidence clearly showed that the Respondent's procedure entitled employees to ask for periods of up to 10 days absence (two weeks). This would be the norm. The policy referred to the possibility that in exceptional circumstances a request or application could be made for an additional five days leave of absence. The Claimant wished to visit Dominica where there was to be a memorial service for her late father who had died some time earlier. The Claimant proceeded to book flights on March 16 for her to be in Dominica in August of that year. She approached her manager and requested what would be 19 days leave of absence. She was told by Ros Doyle that consent would be given for her to take the exceptional leave of 15 days which was 5 extra days, but that there was no permission to take the additional 4 days. The Claimant pursued her request for this permission but they were declined by Ros Doyle, and her Manager Mr Kasmani and his manager Mr McQuillan, who was head of the unit. Reasons were given with regard to operational need, explaining that the full 19 days would interfere particularly with the busy period for the department at that time. It was therefore made abundantly clear to the Claimant by three separate managers that she did not have permission to take 19 days leave.

28 There was evidence to the effect that the claimant could have altered her flights for limited cost before she left the UK. However, she did not do so and she proceeded to go to Dominica and to take the full 19 days. She did not communicate with the Respondent at any time during her absence to indicate that, as she claimed, she had attempted to make arrangements to reschedule the return flight within the 15 days which had been allowed. The Claimant subsequently and in evidence to the Tribunal suggested that it would have cost her £4,000 to change the tickets form Dominica for her and her son. No evidence of this was ever produced to the respondent or to the tribunal.. In evidence to the Tribunal the Claimant confirmed that she had booked the flights at a time when she knew she did not have permission to take the amount of leave she was proposing to take but she had proceeded on the basis that she felt she had got a good price for the tickets. The Claimant maintained that she expected that permission should have been given for the leave and that the Trust was being unreasonable and unfair and lacking in care to refuse that leave. The Claimant was aware that taking unauthorised absence as she did was a serious matter and she did not contradict the fact that the policy listed this type of unauthorised absence as gross misconduct. She was aware that in behaving as she did she was placing herself at risk of being dismissed.

29 The evidence given by the Tribunal with regard to her failure to contact the Respondent was found by the Tribunal to be implausible, contradictory and evasive. She sought to blame her lack of contact on hurricanes affecting Dominica and suggesting that this resulted in total lack of communication between that island and the outside world for a number of days. She was aware throughout her stay in Dominica that the tickets which she held would get her back to the UK several days outside the period for which she had permitted leave of absence. She informed the Tribunal that issues such as her employment and permission from her employer were at the back of her mind and that she had other issues upon which she wished to focus.

30 The Tribunal did not find this convincing and it is apparent that the Respondent was also unconvinced. It was of relevance that this was against a background of the Claimant's attitude towards her management. It is appropriate to mention at this stage that the Claimant had declined to be managed personally by Ros Doyle to the extent that she refused to attend any meetings face to face with Ros Doyle for more than a year before she was suspended and her refusals included declining to attend meetings with Ros Doyle's manager, Mr Kasmani or his manager Mr McQuillan. She would also insist on corresponding only by email and copying in her trade union representative to any such email communication. The Tribunal found it extremely unusual for an employee to be permitted to behave in such a way that she could decline effective management or what would be regarded as normal communication with those who were employed to manage her. This showed a level of defiance against the Trust and its managers which made it extremely difficult for her to be managed. It is expected that those who are working in an organisation and particularly those within a team will have what will be regarded as normal communication. This did not appear to be accepted as far as the Claimant was concerned. She had an antagonistic approach to those by whom she did not wish to be managed.

31 There were other findings made against her with regard to her inappropriate and aggressive approach in communicating with her colleagues, emails which she sent which were threatening and intimidating and instances where she failed and refused to follow reasonable management instructions.

32 As to allegation 3 the Respondent found that there was clear email evidence that the Claimant had been told precisely which breaks she could take and the Claimant had proceeded to disregard this which amounted to unauthorised absence.

33 Allegation 5 related to Claimant refusing to allow a senior director access to a consultant's office in order to make a call. The Claimant repeatedly declined the instruction and request even though the request was made by a senior director of the Trust and even though she was directly instructed by Mr Kasmani, Ros Doyle's Line Manager to comply and was told that he would take responsibility. This was a flagrant example of refusal to carry out a reasonable instruction. Her insistence that she had to follow an instruction from Mr Coombes was unacceptable.

34 Allegation 6 referred to intimidating and bullying behaviour towards colleagues and managers these were confirmed in emails produced at the disciplinary hearing and seen by the Tribunal, these all showed conduct by the Claimant which was unacceptable to the Trust.

35 Allegation 7 was the issue of annual leave already dealt with.

36 Allegation 8 related to an email sent by the Claimant to Mr Kasmani ending with the words "I promise on my father's grave that I will address this matters (sic) for your blatant incompetence" This was viewed as entirely inappropriate and threatening and should not be sent by any employee and particularly not to a senior manager.

37 Allegation 12 related to further instances of threatening and intimidating language in media exchanges with Ros Doyle concerning a work assessment. This was a further demonstration of the Claimant's lack of willingness to deal in a proper manner with her line

manager or to accept what were reasonable instructions.

Procedural Issues

38 The Claimant alleged unfairness with regards to the disciplinary process and this is relevant in considering whether the decision to dismiss was reasonable and fair under the Section 98(4). We deal with each of the items in annex 1 as follows:

(1) Allowing a lawyer to assist the disciplinary panel. This referred to the decision of the Trust to commission Bridget Prosser of Capsticks to undertake the investigation and following that to conduct the disciplinary hearing on behalf of the Trust by presenting the management case. The Tribunal noted that the Respondent was being scrupulous in seeking to have an independent person to undertake the investigation particularly bearing in mind that the Claimant had raised issues with regard to her not wishing people to be involved in the process when she felt that they were biased against her or in some cases discriminatory towards her. It is noted that from the outset of Bridget Prosser's involvement, the Claimant was aware that she was a lawyer and that no stage did she object to her having been appointed. She then raised a grievance with the Chief Executive on Friday 18 May 2017. At that stage Bridget Prosser had already been engaged in the investigatory process for several months. When in that letter the Claimant raised objection to the very lengthy list of people and departments who she did not wish to have involved, she expressly did not make any reference to Bridget Prosser. Therefore the Tribunal does not find that there was any basis for the Claimant to allege at a later stage that it was unfair for Bridget Prosser to be engaged. It was entirely appropriate and understandable for the Trust to seek to have an independent person to carry out what was a lengthy and detailed investigation and the production of the report referred to. As the matter then went to a full disciplinary hearing it was again reasonable for the Trust to engage Bridget Prosser to present the report bearing in mind it was such a lengthy and detailed report, that she was the person who had undertaken the interviews with all of the witnesses and was entirely familiar with the case and that she would be appropriately placed in order efficiently to present the case at the disciplinary hearing. Bridget Prosser also undertook two very lengthy meetings with the Claimant in order to seek her responses to the various matters which had been raised within the investigation. The engagement of Bridget Prosser was consistent with the approach of the Respondent which was to involve people in the process who are entirely independent of the Claimant and had no prior involvement with her. This included Alison Herron who conducted the disciplinary hearing and Dan Gibbs who heard her appeal. It was a further indication of the independence of fairness of Bridget Prosser, that as a result of her investigation she found that certain of the issues raised were not substantiated and should not be taken further.

(2) Late service of the bundle on the Claimant. The Claimant had been provided with the investigation report on 4 October 2017 which was in good time before the intended disciplinary hearing in December. In the event, that was postponed at the request of her union representative and reconvened

on 8 January 2018 which was three months after the Claimant had been provided with what was described as the bundle.

(3) Late notification of allegations against her. From the evidence there was not substance in this as the allegations were communicated to the Claimant at an early stage and was set out in the investigation report and in the invitation to the disciplinary hearing.

(4) The Claimant being unable to contact witnesses as she was not allowed to contact anyone from the Respondent. This was based upon an allegation the Claimant made that when she was suspended she was told that she could not contact anyone at the site. She interpreted this as meaning that she could not contact anyone who she wished to be a witness. There was no basis for her making that suggestion. Furthermore, in the invitation to her to attend the disciplinary hearing she was told that she should tell the Chair the name of any witnesses she intended to call. Although that invitation was shortly before the first proposed date, the hearing did not commence until some time later in January and was then adjourned until March. Therefore there was ample opportunity for the Claimant to contact witnesses throughout a period when she knew that she was entitled to do so. Furthermore it was noted that she was supported and represented throughout this whole period by her union representative. At every stage the Claimant was encouraged to approach HR if she had any queries. She was also supported by the offer of assistance by Occupational Health and of counselling. During the hearing Alison Herron told the Claimant several times that she was allowed to call witnesses.

(5) Claimant having delayed access to documentation. Whilst there was a difficulty in the Claimant having access to her emails shortly before the first date arranged for the disciplinary hearing, when the date was put back, significantly there was ample opportunity for the Claimant to have such access. She had access from 14 December 2017 which was three weeks before the disciplinary hearing.

(6) Preventing Claimant from relying on her own bundle of documents. There was no substance in this because what was described by the Claimant as her own bundle was in fact a set of the same documents which had been produced by Bridget Prosser as the management case. It was clear that the bundle produced for use at the disciplinary hearing had been redacted in order to blank out clearly those charges which originally had been made against the Claimant but which were not pursued to the disciplinary hearing. The fact that the Claimant still had details of those in the original bundle did not represent any unfairness as is repeated below..

(7) Preventing the Claimant from relying on her own bundle of documents. The Claimant was not prevented from relying upon any documents which she wished to put in. She was told at several stages that she could produce additional documents. It appeared from the evidence that the item which she described has her own bundle did not contain anything additional which she wished to put to the disciplinary hearing apart from what was already in the

management bundle. It was clear and it was emphasised at the disciplinary hearing that the allegations which had been withdrawn were effectively redacted in the bundle which was before the disciplinary panel. There was no challenge to the effect that there had been this redaction.

(8) The respondent not producing witness statements. The Claimant was suggesting that rather than producing transcripts of question and answer sessions undertaken by Bridget Prosser there should have been documents which fitted the definition of "statement". This appeared to be seeking to make an inappropriate relationship between internal disciplinary proceedings and proceedings being undertaken in Courts or Tribunals where the use of statements is more regular. Essentially the answers which were given to Bridget Prosser by those who were interviewed were fully and comprehensively set out in the transcripts of the. There was no unfairness in the fact that these were in the format in which the comments of the various witnesses were expressed rather than being statements. The interview notes were effectively a representation of the witnesses' own words of the witnesses rather than, as can occur, statements drawn up based upon what witnesses have said.

(9) Respondent failing to adequately take into account the fact that there was no formal grievance against the Claimant. Clearly there is no requirement for there to be a grievance against an individual prior to their being disciplined and facing charges. This allegation of unfairness appeared to be based upon a misunderstanding of the process. In addition it would be entirely unusual for a grievance to be issued in the circumstances of some allegations of misconduct against an employee.

(10) Failing to open the case against the Claimant by explaining the allegations. This referred to the events on the first day of the disciplinary hearing. The hearing was scheduled to commence at 9.30am. Everyone was present and in attendance apart from the Claimant herself. She did not take steps to communicate promptly to the Trust that she was delayed and eventually communicated to her representative by email that she was delayed. Mr Dooley had not known that she was going to arrive late. The fact that she did not attend at the beginning of the hearing and presented herself 1 ¾ hours after the commencement meant that all of those who were scheduled to attend and had other commitments were waiting for the hearing to commence. Eventually after 10.30 Alison Herron decided that some progress should be made and that Mr Dooley could represent the Claimant's interests. Very little was achieved accomplished but certainly time was lost. There was no unfairness in the fact that the hearing did not start at 9.30 with the presentation of the case because the Claimant was not in attendance. The notes of the hearing clearly show that the management case was presented and that it was after that that the Claimant was questioned and given the opportunity of answering each of the matters put to her. The fact that the disciplinary hearing lasted for nearly four days shows the thoroughness of the process and the opportunities given for the Claimant to present her case. The fact that the Respondent was able to sum up the charges before the Claimant answered them was not unfair in any respect.

(11) A panel member fell asleep. This referred to Mr Kwaku Agyepong HR Business Partner. There was reference to the fact that he felt unwell at times and he may have fallen asleep which Alison Herron felt was unlikely and that if did occur it was for brief periods and played no part in the outcome of the hearing. At the Tribunal hearing the Claimant sought to suggest that he slept for long periods of time which was not plausible. Whilst it is of course undesirable that anyone who is present at the disciplinary hearing in order to perform a specific function should not be paying full attention to it, the Tribunal did not find that if his attention drifted for short periods of time that this affected the outcome in the case. The Claimant has failed to identify any element in the process which was adversely affected by any inattention on the part of the HR Adviser. Furthermore, this could have been raised at the appeal hearing if the Claimant felt that it had any adverse effect other than having caused the Claimant some annoyance or lack of confidence in the individual. In particular it was clear that Mr Agyepong was not the decision-maker.

(12) Failing to give proper weight to the evidence. This is an adverse suggestion against Alison Herron who, on the evidence, took the hearing extremely seriously and as stated conducted a lengthy hearing over nearly four days. Her conclusions were logically and coherently expressed and we found no basis for any allegation that she failed to give proper weight to the evidence. She expressed her conclusion fully and the reasons for it.

(13) Allowing Ros Doyle to give evidence in camera. The Tribunal's initial impression of this aspect of the conduct of the hearing was that on the face of it there was unfairness. It is an elementary principle of justice that a party should be present for the effective part of any hearing involving them and this should also apply to internal disciplinary proceedings. There appeared to be reasons why the witness Ros Doyle was discomforted by having to give evidence in the presence of the Claimant and this was consistent with the issues showing the very poor relationship which existed between them which gave rise to some of the allegations. There was also clear evidence that Ros Doyle's health was fragile although we were not in a position to form any view as to the reason for this or whether it was connected in any way with the Claimant's conduct. However, Alison Doyle had to deal with the question of the fairness of the hearing and seek to reach a conclusion. The facts showed that Ros Doyle had been at the hearing from the arranged commencement of 9.30am and ultimately had to wait for four hours before being told she was to give evidence. This was largely because of the Claimant's very late arrival at the hearing without a consistent explanation. When it came to her giving evidence, Ros Doyle made it clear that she would be extremely unwilling to do so whilst the Claimant was in the room. This was discussed with the Claimant and Mr Dooley. Whilst objections were made Mr Dooley ultimately agreed that the hearing proceed that afternoon with him in the room able to ask questions of Ros Doyle but with the Claimant waiting in another room and the Claimant agreed to do this. The next day having been cross-examined by Mr Dooley the previous afternoon for 2 ½ hours, Ros Doyle stated that she was not prepared to resume her evidence unless Mr Doyle was also out of the room. Alison Herron indicated that the opportunity could be given to Mr Dooley to set out questions in

writing which Alison Herron would put to Ros Doyle. Mr Dooley declined to do this on the basis that it would be an unsatisfactory procedure and he would not have the opportunity of asking supplementary questions. Accordingly the hearing went on with Ros Doyle answering questions to Alison Herron and Bridget Prosser after which Ros Doyle was released. Alison Herron had taken into account that bearing in mind Ros Doyle's refusal to proceed with the Claimant or her representative in the room and the obvious risks to the health and wellbeing of Ros Doyle that as a responsible employer the Respondent had to make proper allowance for Ros Doyle as well as ensuring a fair hearing for the Claimant. Accordingly the alternative taken by Alison Herron was as described. The Tribunal did not find that this was ideal and there were other options which would have been open such as the use of evidence by telephone or video or screens. However allowance was made for this by Alison Herron as was highlighted in detail by Mr Harris. The Tribunal took the trouble of going through each of the allegations and examining what evidence was given by Ros Doyle in relation to these. It was very clear that in any instance where there was a conflict between the evidence of the Claimant and Ros Doyle, the panel did not make any adverse finding against the claimant. Where a finding was made it was only if there was clear email evidence or other documentary evidence with regard to what was alleged. The Tribunal was therefore able to conclude that whilst in principle it is inappropriate to exclude a party or their representative from any part of the hearing, it did not in the present case play any material part and did not make the process unfair. The Tribunal also concluded that if this were unfair then on the Polkey principle the outcome would have been the same even if this had not occurred. Certainly it was undesirable for evidence to be heard in the absence of the claimant and her representative. Alison Herron was in a dilemma and resolved it as described. The Tribunal concluded that in all the circumstances this feature was not so central as to make the dismissal unfair. Furthermore, there was an appeal hearing at which the Claimant had the opportunity of having this addressed. The finding set out in the outcome letter show that the findings against the Claimant were based entirely on documentary evidence and not upon any oral evidence from Ros Doyle.

(14) Not giving the Claimant sufficient time to question Joe McQuillan. Mr McQuillan who had clinical commitments was scheduled to attend the hearing and did so at the appointed time although he had made it clear that he would need to leave by 1.30pm on the second day in order to deal with clinical commitments. The fact that time was short in the event appeared to result entirely from the fact that the Claimant had attended on the first day 1 ¾ hours late. This pushed the whole schedule back and was the direct reason why Mr McQuillan had to leave after having answered questions for only 30 minutes. However, the Claimant did not identify any specific questions which she intended to be put to Mr McQuillan and which were not put to him. Accordingly whilst again it was unfortunate that the time allowed for him to be questioned was less than had been anticipated, the Tribunal did not find that this amounted to any significant unfairness as far as the Claimant was concerned.

(15) Relying on historical allegations. It is not accepted that the allegations were

historical. They were put forward promptly and the process was delayed whilst the Claimant's own grievance was investigated. The allegations against the Claimant were not historical in fact they were brought forward promptly but were put on hold as part of the disciplinary process in order to deal with the Claimant's grievance and ultimate appeal. There was considerable delay in finalising grievance which as stated was largely contributed to by lack of engagement and delay on the part of the Claimant and her adviser.

(16) Not giving adequate account to the Claimant's previous exemplary record. Alison Herron conceded that she did not have full details of the Claimant's work history or any evidence with regard to matters such as appraisals. She stated that this was in accordance with the policy that someone conducting a disciplinary hearing should not be prejudiced by any previous knowledge about the person the subject of the hearing. The Claimant having been aware that she was at risk of dismissal did not at any stage raise any question of mitigation and in particular did not express any apology or regret for any of the matters against her and no expression of remorse. Most particularly there was no apology tendered by her or her representative in relation to the offence of taking unauthorised leave. When this was put to her by the Employment Judge she said that at no stage had anyone ever asked her to apologise so this was felt to be indicative of the Claimant's attitude and consistent with her approach to management generally and her own managers in particular. It would have been expected that at the disciplinary hearing the Claimant would have sought to try to mitigate any penalty which was in the mind of the panel and show some remorse for anything found against her. This was significantly absent. It was also significant that the claimant had the opportunity of a full appeal hearing and at that stage could have made the point that her previous record should have been given taking more into account. However it was clear that her concentration at the appeal was on her denial of the charges and her allegations of procedural unfairness and bias against everyone involved with the process. Her submissions did not appear to suggest that there was unfairness in relation to her record or in deciding to dismiss her rather than some alternative outcome. It was specifically put to her to indicate what she felt more important - substance or procedure and policy and she promptly answered that she considered that policy and procedure were more important.

39 Taking all of these findings into account the Tribunal considered the question in issue 5.3 namely; was the dismissal within the range of reasonable responses open to a reasonable employer under Section 98(4)? The Tribunal concluded unanimously that the employer acted reasonably in treating the reason stated namely the claimant's conduct as a sufficient reason for dismissing the Claimant and the Tribunal considered that this was so in accordance with equity and the substantial merits of the case. The substantial merits of the case included all of the findings against the Claimant with regard to her attitude towards her managers which would impact upon the question of whether she should continue to be employed bearing in mind the finding of gross misconduct against her. Applying *Iceland Frozen Food Ltd* and *HSBC v Midland Bank* the Tribunal found that the decision to dismiss the Claimant in all these circumstances was within the band of reasonable responses open to a reasonable employer. Whilst it may be that some

employers would have chosen not to dismiss her, we find that for the Respondent to have decided to dismiss was within that band of reasonable responses and on that basis we find the dismissal to have been fair.

40 Whilst as indicated there were aspects of procedure which the Claimant felt to be unfair, we did not find that within the long list which she put forward there was anything which made this an unfair dismissal.

41 With the significant and combined experience of the members of the Tribunal our conclusion was that this was an extremely, thorough, comprehensive and independent investigation prior to what was a very lengthy and fair disciplinary process. The Respondent was scrupulous in seeking to ensure that everything was considered in the greatest detail in fairness to the Claimant. The Tribunal must comment that there were very many instances in which it was concluded that the Claimant had been uncooperative and evasive and had behaved in a manner which appeared to be directed towards extending the entire process and preventing an earlier decision having been reached. This related to both the very lengthy investigation of her grievance and the appeal, the investigation of the misconduct allegations and bringing these to a disciplinary hearing and having the hearing concluded.

42 **Direct race discrimination**:

3.1 Was the Claimant subjected to the acts set out in subparagraphs 311 and 318 below and if so did any of them amount to acts of direct discrimination because of her race (which she has identified as British black heritage contrary to Section 13 of the Equality Act 2010? Applying Section 13, the Claimant's suggestion was that she was treated less favourably because of her race. It was significant that the Claimant did not put to the Trust witnesses any specific questions with regard to the race discrimination aspect of her case. It was clear that the Claimant sought to use an allegation of race discrimination as part of her claim and included this in the grievance letter addressed to Mrs Alwen Williams on Friday 18 May 2017 stating "one of the things I have noticed is the institutional racism by the Trust indirectly to those of black heritage that we are "aggressive and loud". This was an allegation which appeared to be inconsistent with the Claimant's history within the Trust. The Tribunal was entirely unconvinced that any of the items listed on page 106 and 107 of the bundle amounted to direct discrimination. There were instances of various types and comments with regard to how she was managed in very many respects. However no convincing evidence was produced to support any of these instances and there was no basis for the Tribunal to find that there was any prima facie case of unfair treatment. We did not find that the stage was reached in order to require the Respondent to justify a case against the allegations of race discrimination. There was some unconvincing and anecdotal suggestion that others of a different racial type from the Claimant received different treatment in relation to other possibly unrelated issues. Such was the weakness of the race discrimination case that the Tribunal unanimously decided that there was no substance in it and that the Claimant was merely seeking to categorise difficulties in the workplace to the fact that she was from a different race type and make accusations that a large number of people in

the organisation were motivated against her because of race.

43 It was common ground that the Trust is an employer which has a very diverse workforce at every level. The allegation made of institutional racism appeared to be without any justification or substance and is an extremely damaging allegation to make without any evidence of any kind. In view of the conclusion which we reached with regards to the allegations of race discrimination we did not proceed to examine in detail the jurisdictional issue although it is quite clear that some of the allegations of race discrimination are very significantly out of time. For example the first allegation commenced in 2012 arguing that Ros Doyle singled the claimant out for disrespectful and degrading treatment whereas there was no detailed evidence with regard to this; similarly there were allegations that racially motivated ill treatment of her was proceeding in 2014 and 2015. During these periods there was no reason why the Claimant could not have issued an application or a grievance with regard to alleged racial discrimination but she did not do so.

44 For these reasons we find that the direct race discrimination claim was not made out and it is therefore dismissed.

Victimisation

45 This was a claim made by the Claimant and set out in issues 4.1 and 4.2.

4.1 Did the Claimant do a protected act under Section 27(2) Equality Act when on 18 May 2017 by raising a grievance? (SIC). It was clear that at the directions hearing before Employment Judge Warren there was detailed discussion with regard to this aspect of the Claimants' case. Within those detailed discussions the Claimant made it apparent that she claimed that the protected act was the letter which she sent on 18 May 2017 that is the letter (1427) which the Claimant sent to Mrs Alwen Williams, Chief Executive of the Trust where she mentioned institutional racism.

4.2 if so did Ros Doyle, Alishan Kasmani, Jo McQuillan, Lesley Coman, Michael Pantlin and Alwen Williams subject the Claimant to detriment because she did that protected act by pursuing a disciplinary process against her and treating her unfairly during that process?

The Tribunal notes in particular that the date of the letter which the Claimant says was her protected act was 18 May 2017. The disciplinary process had been commenced against the Claimant on 21 May 2015 and it was recommenced following the conclusion of the grievance and grievance appeal on 6 January 2017 when Bridget Prosser was commissioned by the Trust to carry out the investigation. Accordingly that investigation, which was known to the Claimant because by February she had been suspended. The formal disciplinary process was ongoing for some three months prior to the writing of the letter of 18 May. The Tribunal was entirely unconvinced that the progressing of the disciplinary process related in any way to the fact that the Claimant had written the letter referred to. On the elemental principle of cause and effect we did

not find that the writing of the letter resulted in the disciplinary process or in it being pursued. It was apparent from the evidence that the disciplinary process had been commenced. Accordingly we unanimously find that the Claimant was not subjected to a detriment because she wrote the letter of 18 May 2017. The victimisation claim is entirely without merit and we dismiss it.

46 For the above reasons we unanimously find that none of the claims are made out and therefore all of the claims are dismissed.

Employment Judge Speker OBE DL
Date: 7 December 2020