Case No: 2301983/2020

EMPLOYMENT TRIBUNALS

Claimant:	**Mr P Messeri**
Respondent:	**The Royal Hospital for Neuro-Disability**
Heard on:	**6th, 7th,8th 9th and 10th December 2021 and in chambers on 6th January 2022.**
Before:	**Employment Judge Pritchard**
Members:	**Ms B Leverton**
	Mr S Townsend
Interpreter:	Ms B Mazza

Representation

Claimant:	Mr A Peck, counsel
Respondent:	Mr S Sudra, counsel

JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Claimant's claim of direct sex discrimination is dismissed upon withdrawal.

3. The Claimant's claim of direct race discrimination is dismissed.

4. The Claimant's claim of indirect discrimination succeeds.

5. The Claimant's claims of harassment related to race, sex, sexual orientation and/or of a sexual nature are dismissed.

6. The Claimant's claim for breach of contract (notice pay) succeeds.

7. The Respondent made unlawful deductions from the Claimant's wages and the Respondent is ordered to pay to the Claimant the sum of £247.69 gross subject to such deductions for income tax and/or National Insurance as the Respondent is required to make by law.

8. The Respondent failed to compensate the Claimant for untaken holiday and the Respondent is ordered to pay to the Clamant the sum of £509.23 gross subject to such deductions for income tax and/or National Insurance as the Respondent is to make required by law.

REASONS

1. The Claimant claimed: unfair dismissal; race discrimination (direct and indirect); sex discrimination (direct); harassment related to race, sex, sexual orientation, and harassment of a sexual nature; breach of contract (notice pay); unpaid wages and holiday pay. The Respondent resisted the claims.

2. The Tribunal heard evidence from the Claimant and from Anne Warriner (a former colleague) on his behalf. Ricky Mugwagwa (Modern Matron) and Lesley Mill (Director of Service Delivery) gave evidence on the Respondent's behalf. The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties spoke to their written submissions.

Issues

3. The Tribunal was informed at the commencement of the hearing that agreement had been reached in respect of the Claimant's claims for unpaid wages and holiday pay. This agreement is reflected in this judgment.

4. On the second day of the hearing the Claimant withdrew his claim of direct sex discrimination and certain allegations of discrimination and harassment set out in the agreed list of issues were withdrawn. In submissions, the Claimant withdrew the allegation relating to the failure to provide an interpreter as a claim of direct race discrimination.

5. On the fourth day of the hearing, the Respondent conceded that the Claimant had been unfairly dismissed. During submissions, the Respondent conceded that a Polkey reduction would not be appropriate in the circumstances. The Respondent also conceded that the alleged acts/omissions said to be unlawful discrimination / unlawful conduct under the Equality Act 2010 would amount to conduct extending over a period such that the question of time limits would not arise.

6. An agreed list of issues was placed before the Tribunal. Following the various withdrawals and concessions, they can be described as follows.

<u>DIRECT RACE DISCRIMINATION</u>

7. The Claimant predicates his race discrimination complaint on being of Italian origin and/or a non-British, non-native English speaker.

8. Did the Respondent subject the Claimant to treatment falling within s.39 and contrary to s.13 EqA, in any or all of the following alleged ways:

    8.1. The Respondent's and Ricky Mugwagwa's treatment of the Claimant whilst on suspension?

    8.2. The Respondent's and Ricky Mugwagwa's investigation of the Claimant during the disciplinary process?

8.3. The Respondent's, Ricky Mugwagwa's and Lesley Mill's treatment of the Claimant during the disciplinary process?

8.4. The Respondent's and Lesley Mill's treatment of the Claimant during the disciplinary hearing of 18 February 2020?

8.5. The Respondent and Lesley Mill finding that the Claimant had committed gross misconduct?

8.6. The Respondent and Lesley Mill dismissing the Claimant from his role?

9. The specific allegations relied on for the purposes of the Claimant's direct race discrimination complaints are as follows:

9.1. Delay and failure to keep the Claimant informed (Respondent, Ricky Mugwagwa, Lesley Mill);

9.2. Failing to provide sufficient and/or clear information about the Claimant's alleged misconduct (Respondent, Ricky Mugwagwa, Lesley Mill);

9.3. Ignoring or misconstruing the Claimant's evidence (Respondent, Ricky Mugwagwa, Lesley Mill);

9.4. Failing to investigate or discipline other colleagues named in the patient's complaints (Respondent, Ricky Mugwagwa);

9.5. Recommending disciplinary action (Respondent, Ricky Mugwagwa);

9.6. Reaching a conclusion before the investigation had been concluded (Respondent, Ricky Mugwagwa, Lesley Mill);

9.7. On 30 January and 4 February 2020, Ricky Mugwagwa asking additional questions after the First Invitation Letter had been sent out, without explanation (Respondent, Ricky Mugwagwa);

9.8. Reopening of investigation after first investigation report was sent out (Respondent, Lesley Mill);

9.9. Adding new allegations without warning (Respondent, Ricky Mugwagwa, Lesley Mill);

9.10. Ignoring the Claimant's explanations (Respondent, Ricky Mugwagwa, Lesley Mill);

9.11. Ignoring cultural differences (Respondent, Ricky Mugwagwa, Lesley Mill);

9.12. Applying a sanction because of the Claimant's use of language (which did not form part of the allegation or complaint) (Respondent, Lesley Mill).

10. Has the Claimant proved facts from which, in the absence of any other explanation, the Tribunal could decide that the Respondent had treated him, as alleged, less favourably than they would have treated a hypothetical comparator, i.e. a nurse of non-Italian or British nationality (with English as their first language) in materially similar circumstances?

11. If the Claimant was treated less favourably, was the difference in treatment because of the Claimant's race?

12. If the burden of proof has shifted to the Respondent, s.136 EqA, has the Respondent shown that there was no contravention of s.13 EqA?

INDIRECT RACE DISCRIMINATION

13. Did the Respondent apply all or any of the following PCPs?

    13.1. Applying the Disciplinary Policy without providing clarity as to the definition of misconduct and/or sufficient details of allegations of misconduct;

    13.2. Holding Disciplinary Hearings without arranging an interpreter to provide support to employees;

    13.3. A requirement to maintain an expected standard of professional conduct and/or boundaries in the absence of supporting guidance, polices or training to communicate that standard and enable staff to maintain it;

    13.4. Failing to send out full details of specific allegations of misconduct and copies of all supporting evidence at least 7 days before a Disciplinary Hearing;

    13.5. Imposing a disciplinary sanction in respect of an employee's inappropriate use of language?

14. If so, did the Respondent apply that PCP both to the Claimant and to persons of non-Italian or British nationality (with English as their first language)?

15. If so, did or would the application of the PCP put persons who were of Italian and/or non-British nationality (with English as a second language) at a particular disadvantage compared with persons who were not, namely:

    15.1. Not understanding what behaviours may be defined as gross misconduct due to language barriers and cultural differences (as identified in the Disciplinary Policy Equality Impact Assessment Tool);

    15.2. Misunderstanding and/or being misunderstood (in particular in relation to evidence given and/or allegations made);

    15.3. Being subject to findings of gross misconduct;

    15.4. Being dismissed?

16. Was the Claimant put at that disadvantage?

17. Can the Respondent show that the PCP in question was a proportionate means of achieving a legitimate aim?

18. The aims relied upon by the Respondent are to:

    18.1. Consistently manage conduct concerns regarding its staff;

    18.2. Efficiently operating within business and time constraints;

    18.3. Maintaining equity and appropriate standards of conduct amongst its workforce;

    18.4. Providing an enhanced patient experience; and

    18.5. Protecting vulnerable patients.

HARASSMENT

19. It is not in dispute that the Claimant was subjected to the following unwanted conduct (Grounds of Resistance para. 48):

    19.1. The Respondent's and Ricky Mugwagwa's treatment of the Claimant during his suspension;

    19.2. The Respondent's, Ricky Mugwagwa's and Lesley Mill's treatment of the Claimant during the investigation and disciplinary process;

    19.3. The re-opening of his investigation by the Respondent and Lesley Mill after the First Investigation Report had been sent out;

    19.4. On 4 February 2020, the Respondent and Ricky Mugwagwa asking an additional question about and/or making the additional allegation that the Claimant forcibly attempted to kiss a male patient (in the context set out at paras. 44-48 of the Grounds of Claim);

    19.5. The Respondent's and Lesley Mill's treatment of the Claimant during the disciplinary hearing on 18 February 2020;

    19.6. The Respondent's and Lesley Mill's finding of gross misconduct;

    19.7. The Respondent's and Lesley Mill's dismissal of the Claimant.

20. Was the unwanted conduct at 19.4,19.6, and/or 19.7 related to sex?

21. Was the unwanted conduct at 19.1 to 19.3 and 19.5 to 19.7 related to race?

22. Was the unwanted conduct at 19.4 related to sexual orientation?

23. Was the unwanted conduct at 19.4 of a sexual nature?

24. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

25. If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for him?

26. Taking into account the Claimant's perception and the other circumstances of the case, was it reasonable for the alleged conduct to have the effect claimed?

WRONGFUL DISMISSAL

27. Was the Claimant guilty of a repudiatory breach of his employment contract, such that the Respondent was entitled to dismiss the Claimant without notice?

28. If not, to how much notice pay is the Claimant entitled?

REMEDY

29. It was agreed that liability only would be considered at this hearing except for the following issues which might affect compensation:

    29.1. Should any basic and/or compensatory awards be reduced by reason of the Claimant's own culpable or blameworthy conduct pursuant to ss.122(2) and/or 123(6) ERA?

    29.2. Was there any unreasonable failure by the Respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures such that the Claimant's compensation should be increased by up to 25% pursuant to s. 207A Trade Union and Labour Relations (Consolidation) Act 1992?

Findings of fact

30. The Respondent is a charity hospital providing specialist care to patients with a wide range of complex neuro-disabilities. The Respondent employs about 700 members of staff to care for 240 patients. The Respondent employs a multi-ethnic workforce. The Claimant commenced employment with the Respondent on 5 September 2016. At relevant times he worked mainly night shifts on a ward (described in this judgment as "Y Ward") caring for about 16 profoundly disabled patients resident in single occupancy rooms.

31. The Claimant is Italian. English is not his first language. The Claimant describes his English as "limited". The Tribunal would describe the Claimant as having a working knowledge of the English language and able to converse but with a very limited vocabulary. He is far from fluent.

32. The Claimant's contract of employment required the Claimant's adherence to the Respondent's Code of Conduct during his employment. It was a

requirement of employment that the Claimant registered with the Nursing and Midwifery Council (NMC).

33. Among other things, the Respondent's Disciplinary Policy and Appeals Procedure includes the following:

> ***Introduction***
>
> *This policy outlines the procedure to be used when an individual's performance or conduct falls short of the expectations of the RHN and where relevant the code of conduct outlined by the professional body.*
>
> *This policy confirms the steps the organisation will take to address matters of concern regarding individual conduct and performance and the possible outcomes for staff of such measures.*
>
> *The Royal Hospital for Neuro-disability will at all times endeavour to ensure that employees conduct enables them to achieve and maintain a high standard of performance in their work to achieve our objective of high quality care for patients. To this end it will ensure that, through Training, Policies and Procedures and guidance, and supervision from Managers, standards and objectives are established, and all employees are aware of the expected standards of conduct.*
>
> *This policy aims to demonstrate the Hospital's commitment to address the cause of problems and to resolve them effectively and quickly, reducing lengthy processes…*
>
> *The policy promotes prompt action. However time scales may be extended where necessary if there is good reason for a delay. Time scales will depend on the nature of the disciplinary allegations, the complexity of the issues involved and the availability of key personnel.*
>
> *This policy is to be used in conjunction with other Hospital related policies: … Equality and Diversity Policy.*
>
> ***Purpose***
>
> *The Hospital recognises its responsibilities in ensuring there is clarity on how employees should carry out their roles and responsibilities…*
>
> *The Hospital recognises that all its managers must deal with poor conduct issues in a clear, fair and empathetic manner, taking into account the needs of the service and the individual circumstances of each employee and ensuring that requirements under the Equality and Diversity Policy are also met…*
>
> *It is also important that employees do not carry out actions which either places a patient, a fellow employee or the organisation at risk.*
>
> *Where employees do not meet acceptable standards in the workplace, managers should provide constructive and specific feedback and support to assist the employee in meeting the required standards.*

…

Gross misconduct is misconduct of such a serious and fundamental nature that it breaches the contractual relationship between the employee and the Hospital. In the event that an employee commits an act of gross misconduct, the organisation will be entitled to terminate summarily the employee's contract of employment without notice or pay in lieu of notice.

Matters that the organisation views as amounting to gross misconduct include (but are not limited to):

…

- *abuse of patients/residents, or behaviour that breached his trust and confidence, or denotes a lack of humanity and respect*

…

- *Conduct that brings the Hospital's name into disrepute*
- *Depriving a patient of their privacy and dignity*

3.2 Investigations

The purpose of the separate investigation procedure is to allow Managers to investigate any alleged or suspected misconduct on the part of an employee, prior to proceeding to any formal stages. The objective will be to establish all the facts of the particular case before a decision is taken as to whether or not there are proper grounds to invoke the disciplinary procedure.

…

At the conclusion of the investigation, the individual conducting the investigation and the HR Business Partner will together decide whether or not it is appropriate to instigate disciplinary action against the employee. As soon as possible after the conclusion of the investigation (and no later than seven working days after the conclusion of the investigation) the Hospital will inform the employee in writing as to the outcome.

Where it is decided to instigate disciplinary action, the employee will be given full details in writing of the case against him/her and invited to attend a disciplinary hearing….

3.6 Stage 4: Formal Disciplinary Meeting

…

The invitation to the Disciplinary meeting will set out the allegations being made and include any documentation being discussed at the formal meeting. Employees will have 7 days' notice of the meeting, unless it is mutually agreed to meet sooner… The aim of this meeting is to identify

the reasons for the unacceptable standard of conduct and to find ways of assisting the employee to reach an acceptable level of conduct.

…

An outcome to the meeting will be issued formally in writing no later than 7 days after the meeting. The member of Human Resources will submit a summary of the meeting, for all parties to review.

34. The Disciplinary Policy and Appeals Procedure also includes an appeal process.

35. The Disciplinary Policy and Appeals Procedure includes an Equality Impact Assessment Tool and recognises that it might affect one group more or less favourably than another on the basis of culture as follows:

Literacy issues, English as a second language.

Cultural differences could mean that the definition of misconduct is construed differently by different groups.

36. Among other things, the NMC Code of professional standards of practice and behaviour for nurses, midwives and nursing associates provides:

Treat people as individuals and uphold their dignity

…

20.5 treat people in a way that does not take advantage of their vulnerability or cause them upset or distress

37. During his employment, the Claimant undertook a number of training courses, most of which were delivered online.

38. In early 2019, the Claimant suffered personal bereavements: in January his wife suffered a stillbirth and in March his father died from cancer. The Claimant was absent from work from 7 March 2019 suffering from anxiety and depression. Following consultation with occupational health on 12 July 2019, the Claimant returned to work on 29 July 2019.

39. The Claimant was absent from work due to sickness and annual leave from 16 November 2019 to 20 November 2019. He returned to work on 21 November 2019.

40. One of the patients cared for by the Claimant will be described as X in this judgment. X has locked-in syndrome: although he has some ability to move his head, can make facial expressions indicating happiness or unhappiness, and is able to control his eye movement, he otherwise has general paralysis of his voluntary muscles. X communicates by use of an eye-gaze system, an electronic device which allows X to choose letters on the alphabet to compose messages by eye movement. He might also communicate with staff who would point to letters of the alphabet printed onto a plastic sheet. X is able to summon help by moving his head to one side in order to activate an alarm.

Notwithstanding his physical disability, the evidence suggested that X is an intelligent person.

41. By email dated 24 November 2019, the Respondent received an email from X in which he complained about the Claimant:

> *This began with pulling the hair on my arms and pinching my upper body to touching me and inserting fingers into my ears and nose and trying to kiss me and continually accusing me of being Gay - I'm most definitely heterosexual and I'm not the one struggling with my sexuality! This highly unprofessional and unpleasant behaviour has been going on for more than a year - last night has prompted me to write this email. He blatantly behaved this way in front of other night staff! Other male carers have behaved this way! We can deal with it "in-house" but if there is any more I won't hesitate to contact my solicitor and the CQC and POVA and the police! I have never had any problems with the female staff! In future I don't want any aspect of my care done by male nurses!*

42. The following day, X sent a further email to the Respondent which included the following:

> *I would like it known from the beginning that I am in no way homophobic! While I have sympathy for his recent losses of his father and unborn child it doesn't condone his behaviour! What has concerned me the most is that he physically restrained my head to prevent me from reaching the call bell and getting help!*

43. On 26 November 2019, Amanda Goodair, the Respondent's Patient Experience & Safety Officer, held a discussion with X. Mr Mugwagwa was instructed to carry out an investigation and he too spoke to X the following day. Among other things, X said that the Claimant's inappropriate behaviour began around a year ago when the Claimant would enter his room at night and pull the hairs on his arms and upper chest. Ms Goodair's notes of X's complaint include the following:

> *The behaviour escalated from Saturday 16 November 2019 and continued to Saturday 23 November 2019 – occurring on 5 occasions. [The Claimant] inserted his fingers into [X's] ears and nostrils (did not cause pain or injury) and then tried to kiss him on the lips. [X] kept moving his head but [the Claimant] kept trying to kiss him and held [X's] head still with a hand on each side. He held firmly but [X] was still able to turn and avoid contact. Again [the Claimant] would laugh afterwards and accuse [X] of being gay.*
>
> *These 5 incidents were all witnessed as [the Claimant] entered with other staff. The staff members were RN Simona and HCA Paulette – on 3 occasions both of these staff were present and they separately witnessed another incident each. Neither of these 2 staff members laughed or joined in and both said "stop it, leave him alone" to [the Claimant]. [X] would like it known that he considers that these 2 witnesses behaved professionally throughout.*
>
> *[X] clarified that [the Claimant] did sometimes help with his personal care but never behaved or spoke inappropriately during this time.*

[X] confirmed that he tried to address this with [the Claimant] previously. He spoke to him (using the partnered vowel system) and said "just stop, I am not gay". [The Claimant's] only response was to laugh.

[X] reported that 3 other male staff behaved inappropriately. The staff did not touch him inappropriately but would accuse him of being gay - they were usually on their own at the time and never with [the Claimant]. [X] named these staff as HCA T, HCA M, and HCA O.

44. By email dated 28 November 2019, X reminded the Respondent of the three HCAs who had been verbally inappropriate and that from now he would only accept care from female staff. His email included the following:

The 3 HCAs who were Verbally Inappropriate but not anything else were
T – Day Staff and Night Staff and Philipino
M – Day Staff and Nigerian
O – Night Staff and Nigerian

…

The 2 witnesses I have named were both totally professional and it was probably their presence that prevented worse happening! Both nurses on separate occasions and also at the same time said "Stop it" and "Leave Him Alone".

45. On 28 November 2019, the Claimant was suspended on full pay pending an investigation. The suspension was confirmed in a letter to the Claimant which he received on 2 December 2019. The allegations, said to be gross misconduct under the Respondent's Disciplinary and Appeals Procedure, were described as follows:

- *Inappropriate behaviour towards a patient between 16th and 23rd November 2019 by inserting your fingers into the patients ears and nostrils, trying to kiss the patient on the lips, accusing/suggesting that the patient was gay.*

- *Conduct that brings the RHM's name into disrepute*

46. The Respondent reported the matter to the Wandsworth Safeguarding Team who reported it to the police.

47. On 10 December 2019, the Respondent invited the Claimant to attend an investigation meeting the following day. The Claimant was unable to attend for personal and health reasons and the meeting was rescheduled. The investigation meeting took place on 18 December 2019. The Claimant told Mr Mugwagwa that he had a good relationship with X and that to cheer him up he might say to him: *"You ok? You want a kiss from me?"* When asked whether he had had conversations with X about his nose hair or put his fingers in his nose and ears, the Claimant said *"I have talked to him about trimming his nose hair, I haven't put my fingers in his nose or ears, but I have pointed it out to show him where the hair was. So maybe it was misinterpreted while I was doing that"*. The Claimant said that neither X nor any member of staff had ever told him to stop something he was doing. The notes of the meeting record the

Claimant saying that he had hugged X but only after seeking his permission to do so. In evidence before the Tribunal, the Claimant said that the Respondent had misunderstood what he had said, namely that he had simulated a hug with X but not actually touched him.

48. The notes of the meeting suggest it was of short duration. They do not show that the Claimant was asked whether he had pulled the hairs on X's arms and chest or tried to kiss the patient on the lips. The Respondent made no arrangements for an interpreter to be present at the meeting. In evidence, Mr Mugwagwa told the Tribunal that he prepared his subsequent report with the aid of his own notes. Those notes were neither placed in evidence before the Tribunal nor disclosed to the Claimant at any time.

49. On 18 December 2019, Mr Mugwagwa asked further questions of X.

50. RN Simona, who X had identified as having witnessed the Claimant's behaviour, provided the Respondent with a "letter of testimony" which reads as follows:

> *I was struggling to login into the ERR system. I needed assistance, so I noticed [the Claimant] was already in [X's] room. I went inside and asked him to assist me to login into the system as I was struggling to open it for a long time.*
>
> *I didn't notice anything wrong when I went inside the room and I didn't listen to any conversations between them as my whole mind was for him to log me in so as to input my notes into the system as fast as possible because I was already under pressure and stressed with the whole delays.*
>
> *The only thing I could remember was [X] laughing and smiling as usual; he didn't complain or report anything suspicious to me or someone abusing him as at the time I was in his room for a short period of time.*

51. On 24 December 2019, Mr Mugwagwa held an investigation meeting by telephone with HCA Paulette who X had also identified as having witnessed the Claimant's alleged behaviour towards him. HCA Paulette answered "no" to each of the following questions put to her:

    - *Have you ever seen [the Claimant] pulling the hairs on [X's] arms or chest?*
    - *Have you seen [the Claimant] putting his fingers in [X's] nostrils and ears, or pointing closely to his nostrils and ears?*
    - *Have you ever heard [the Claimant] or any other member of staff using the word" gay" while speaking to [X]?*
    - *Have you ever seen [the Claimant hugging[or trying to hug [X]?*
    - *Have you seen [the Claimant] trying to kiss [X] jokingly offering to kiss [X]?*

52. HCA Paulette added that if she had observed any of this behaviour, she would have told the Claimant or any member of staff involved to stop and then reported it.

53. On 27 December 2019, Priscilla Robinson, the Respondent's Senior HR Business Partner, sent a referral form to the Disclosure and Barring Service. By ticking the relevant box Ms Robinson confirmed that the reason for the referral was because she thought the Claimant had harmed a child or vulnerable adult through his actions or inactions.

54. In response to further questions asked of him by Mr Mugwagwa in December 2019, X stated in an email dated 15 January 2020 that:

> *… in the last few weeks was always patting my bottom and saying either "a big hug for you my love" or "a big kiss for you my love" as he left the room – so that he continued to do all this even though he could see I didn't like it!*

55. Ms Goodair reported to Mr Mugwagwa that, having spoken to X, he had no further information that would be helpful. As to the preferred outcome, X said that he would like to see the Claimant "severely warned" and that although he did not want the Claimant to care for him in the future, he was happy for him to be on the ward.

56. Mr Mugwagwa completed his investigation report (incorrectly dated 10.08.2017) which he signed and dated on 22 January 2020. The allegations said to be the subject matter of the report were those which had been set out in the suspension letter referred to above. Mr Mugwagwa noted that the witnesses named by X did not corroborate any of the complaints he had made. Nevertheless, Mr Mugwagwa concluded:

> *However, from the investigation interview with [the Claimant] it is clear that there has been a deviation from conduct that is deemed appropriate and professional for a registered nurse.*

57. With regard to the first allegation, Mr Mugwagwa found that the only part of the allegation that had been corroborated was that of "putting fingers in nose and ears" and refers to the Claimant himself as having discussed grooming with X and putting his finger quite close to X's ears and nose which might have touched protruding hair.

58. With regard to the second allegation, namely conduct bringing the Respondent's name into disrepute, Mr Mugwagwa found that the following concerns arose with regard to the Claimant's conduct:

- *He has stated that he has hugged or attempted to hug [X] on at least one occasion*
- *he has stated that he has made a comment asking [X] "would you like me to kiss you" on at least one occasion*
- *in interview his description of his view on the relationship between him and [X] seems to go beyond what can be considered professional*

59. Mr Mugwagwa recommended disciplinary action relating to the "partially upheld allegation 1 and the allegation 2".

60. Mr Mugwagwa made a further recommendation as follows:

> *Should a hearing be required, [the Claimant] will require support as he struggles with his English. During the interview clarification needed to be repeatedly sought as he either misunderstood the question or he was unable to fully explain himself.*

61. As Mr Mugwagwa said in evidence:

> *I felt that in order to have a more nuanced discussion about the allegations with [the Claimant] at any disciplinary hearing [the Claimant] would benefit from a translator. I differentiated between the level of English required in [the Claimant's] every day role practising as a nurse and that required to respond to allegations as part of a disciplinary process which could result in a sanction being imposed*

62. By letter dated 24 January 2020, the Respondent informed the Claimant that the investigation *"into the incidents that happened on 16 and 23 November 2019"* had "*been completed"* and that he was required to attend a disciplinary hearing on 31 January 2020 with Lesley Mill. Notwithstanding Mr Mugwagwa's recommendation of disciplinary action in relation to the partially upheld first allegation, the descriptions of the first and second allegations were identical to those set out in the suspension letter. The letter informed the Claimant that *"the company views the above matters as potentially serious misconduct/gross misconduct".* A copy of Mr Mugwagwa's investigation report was enclosed with the letter together with other documents.

63. The Claimant replied to confirm that he would attend the disciplinary hearing

> *despite my very bad psycho-physical conditions due to the suspension and its management*

64. By email dated 28 January 2020, Lesley Mill emailed Priscilla Robinson as follows:

> *As we have discussed in person I do not feel that the investigations into the allegations made by [X] from [Y] ward has been completed with a sufficient level of detail.*
>
> *In particular:*
> *I am concerned that there is no timeline despite the stating in the terms of reference that the investigation would ascertain the sequence of events that led to the allegation being made.*
> *The notes of the interview with the staff member do not reflect an in-depth and well-constructed interview and do not address all of the concerns that are alleged by [X].*
> *There are 2 occasions when the notes have incorrect initials*
> *The date of the investigation report is wrong*
> *The original emails from [X] have not been included or referred to*
> *The residents notes have not been examined*

There is no interview with staff member SK although it states there is in the methodology
The letter of testimony provided by SK lacks detail and it is not clear to what date she is referring to
There is no statement from staff member PS although this is referred to in the summary

65. Priscilla Robinson informed the Claimant by email that the disciplinary hearing would have to be rescheduled and that he would be contacted with another date.

66. The Claimant replied:

> *… I was hoping very much that tomorrow we would end anyway this devastating investigative and decision-making process but that's probably not enough. I await your communications regarding a new date, hoping I will be in a position to be there.*

67. On 30 January 2020, Mr Mugwagwa emailed the Claimant apologising for the delay, part of which was said to be the result of awaiting a response from X to additional questions.

68. Mr Mugwagwa asked the Claimant four questions to which the Claimant replied that:

- He had never pulled the hair on X's arms and chest
- He often helped HCA colleagues provide personal care to X including repositioning him
- He had never touched or patted X's bottom, naked or clothed, that was not care related
- He called X "my dear" or "my lovely patient" or "my lovely [X]"

69. Notwithstanding that Mr Mugwagwa had already discounted this aspect of the first allegation within his investigation report, by email dated 4 February 2020, Mr Mugwaga told the Claimant he had one last point he needed to clarify on order to finalise his report:

> *Have you ever tried to kiss [X] on the lips, and then held his head when he tried to move it away?*

70. The Claimant replied, in no uncertain terms, that he had not tried to kiss X on the lips or held his head. The Claimant informed Mr Mugwagwa, in terms, of the extreme distress the investigation was causing him.

71. By email dated 6 February 2020, Priscilla Robinson informed the Claimant that the disciplinary hearing would take place on 18 February 2020 and that he would be sent a complete pack of information to include the investigation report and appendices.

72. By letter dated 7 February 2020, the Claimant was invited to a disciplinary hearing. The letter included the following:

> *I confirm that the investigation into the incidents that happened on 16th and 23rd November 2019 has been completed and you are required to attend a disciplinary hearing at 10:45 am on 18th February 2020 … We will also be calling Sarah Crawford Psychologist to assist us in this case…*
>
> *The purpose of the hearing is to afford you the opportunity to provide an explanation for the following matters of concern:*
>
> - *allegation one: inappropriate behaviour towards a patient between 16th and 23rd November 2019 by inserting your fingers into the patients ears and nostrils, trying to kiss the patient on the lips, accusing/suggesting that the patient was gay*
>
> - *allegation 2: conduct that brings the RHN's name into disrepute*
>
> *The company views the above matters as potentially serious misconduct/gross conduct.*
>
> *I enclose, for your information, copies of the documents that will be used at the hearing. I have also enclosed a copy of the RHM's Disciplinary Policy, of which you are aware and to which we will be making reference.*
>
> *You have the right to be accompanied by a fellow employee or accredited representative of a recognised trade union/professional association and if you wish to exercise this right then, it is your responsibility to make the arrangements and to inform me of your choice of companion in advance of the hearing.*
>
> *…*
>
> *Should you wish to contact any employee who you feel could assist you in preparing an explanation for the allegations made against you, then please contact me in order that arrangements can be made for them to be made available for interview.*

73. Although the letter sent to the Claimant on 7 February 2020 had stated that the investigation had been completed, on 11 February 2020 Mr Mugwagwa asked a number of questions of HCA A who had worked with the Claimant during the period under review. Her answers to those questions were that:

- She had never witnessed the Claimant hugging X
- She had never heard the Claimant call X gay
- She had seen the Claimant blow X a kiss standing by the doorway and address him as "my lovely"
- She had seen the Claimant put his hands on X's nose as if to pinch the tip playfully
- She had never seen the Claimant pull the hair on X's arms and chest

- She had never been told by another member of staff that that they had seen the Claimant doing or saying anything inappropriate
- She had never asked the Claimant to stop doing anything to patients
- She neither saw nor heard anything on 23 November 2020 about X or the Claimant that was inappropriate

74. HCA A added:

> *All I can say about the relationship he has with [X] is that he's quite playful with him. But I haven't noticed any incident for concern except if it happened when no one was there to witness it*

75. Mr Mugwagwa then amended his investigation report. Mr Mugwagwa again recommended that the only part of the first allegation to be considered at a disciplinary hearing was that of "nose hair pulling", the rest of the allegation remaining unsubstantiated due to lack of corroborating evidence or confirmation by witnesses. Mr Mugwagwa repeated his conclusion with regard to the second allegation and added that in the Claimant's written responses he stated that he called X "my dear", "my lovely patient" or "my lovely [X]".

76. Mr Mugwagwa repeated his further recommendation that the Claimant would require support because he struggles with English.

77. Mr Mugwagwa's amended report was sent to the Claimant on 14 February 2020.

78. The disciplinary hearing took place on 18 February 2020. Mr Mugwagwa attended as the investigating officer. Ms Robinson of HR attended with a colleague who took notes. The Claimant was unaccompanied. The Respondent made no arrangements for an interpreter to be present. Sarah Crawford, Psychologist, did not attend.

79. The purpose of the meeting was said to afford the Claimant an opportunity to provide an explanation for the following matters of concern:

    - *Allegation 1: Inappropriate behaviour towards a patient between 16th and 23rd November 2019 by inserting your fingers into the patients ears and nostrils, trying to kiss the patient on the lips, accusing/suggesting the patient was gay*

    - *Allegation 2: Conduct that brings the RHN's name into disrepute*

80. The Claimant was asked if he needed a translator who replied that "it was a good idea but it was not possible".

81. The Claimant denied the allegations, said that he had complied with the NMC Code and that he did not know what he had done wrong. Mr Mugwagwa said that documents recorded daily by staff had been examined and that no concerns had been raised in clinical notes, nor were any verbal concerns raised.

82. Following the disciplinary hearing, Lesley Mill prepared a summary of the evidence she used to come to her conclusion. He found the allegation that the

Claimant had inserted his fingers into the patient's nose and ears was substantiated and that he was therefore guilty of gross misconduct. With regard to allegations that the Claimant tried to kiss the patient on the lips, accused the patient of being gay, and further allegations that the Claimant had pulled the hairs on the patient's chest and arms and patted his bottom, Ms Mill found the evidence inconclusive. With regard to allegation 2, Ms Mill found the allegation substantiated insofar as it related to the finding under allegation 1 and the Claimant had asked X if he wanted a kiss.

83. By letter dated 28 February 2020, Ms Mill informed the Claimant of her decision that he was summarily dismissed and the reasons why.

84. The Claimant did not appeal against the Respondent's decision to dismiss.

85. Following the Claimant's dismissal, the Respondent carried out a Root Cause Analysis dated 8 June 2020. The contributory factors were stated as follows:

> *Staff factors:*
>
> - *Social Factor: [Claimant] stated that his culture is naturally affectionate and tactile which could have been a reason why he felt his behaviour was not inappropriate.*
>
> - *Further discussion with [Claimant] concluded that he was not able to understand that his behaviour was inappropriate.*

86. The root cause of the incident was described as follows:

> *On investigation it was found that the staff member's inappropriate behaviour over time was likely to be due to cultural differences. However, there was also a lack of understanding that the behaviour was not appropriate in a staff/patient setting.*

Applicable law

Direct discrimination

87. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, dismissing him or subjecting him to a detriment.

88. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

89. The House of Lords has considered the test to be applied when determining whether a person discriminated "because of" a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572.

90. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the

Tribunal must consider what consciously or unconsciously was his reason. This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.

91. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case.

92. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

93. Thus, it has been said that the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

94. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. “Could conclude” must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, “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”.

95. If the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799."

96. As Mr Sudra put it in submissions, a common theme running through the case law from King to date is that there must be an evidential foundation to support the theory that the relevant protected characteristic motivated (i.e. had at least a significant influence upon) the act impugned as discriminatory. It follows that a finding of unreasonable treatment cannot by itself justify an inference of discrimination Chief Constable of Kent v Bowler UKEAT/0214/16 EAT.

97. In Laing v Manchester City Council [2006] ICR 1519, the EAT stated, among other things, that:

> *"No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"'*

Harassment

98. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. Section 26(1) of the Equality Act 2010 provides that a person (A) harasses another (B) if:

(a) A engages in unwanted conduct related to a protected characteristic (race in this case); 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.

99. Section 26(2) provides that A also harasses B if:

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

100. 26(4) provides that 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.

101. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

102. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment? Third, was that conduct related to the Claimant's protected characteristic?

103. As explained in the Code of Practice on Employment (2011), unwanted conduct "related to" a protected characteristic has a broad meaning in that the conduct does not have to be because of a protected characteristic. Further, protection is provided because the conduct is dictated by a relevant characteristic, whether or not the worker has the characteristic themselves.

104. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 held that alleged discriminatory words must be considered in context. In Warby the Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

105. Mr Peck referred the Tribunal to the appeal case of Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor [2020] IRLR 495 which set out relevant guiding principles on harassment claims:

    105.1. The test of whether conduct was related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic;

    105.2. Although in many cases the characteristic relied upon would be possessed by the complainant, that is not a necessary ingredient. The conduct merely had to be found to relate to the characteristic itself;

    105.3. Whether or not the conduct was related to the characteristic in question was a matter for the tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact;

    105.4. The fact that a complainant considered that the conduct related to that characteristic is not determinative.

Indirect discrimination

106. Section 19 of the Equality Act 2010 provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.

107. A provision criterion or practice is discriminatory in relation to a protected characteristic of B's if:

    107.1. A applies, or would apply, it to persons with whom B does not share that characteristic,

    107.2. It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared to persons with whom B does not share it,

    107.3. It puts, or would put, B at that disadvantage, and

    107.4. A cannot show it to be a proportionate means of achieving a legitimate aim.

108. The Code of Practice on Employment (2011) explains that the phrase "provision, criterion or practice" is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a "one off" or discretionary decision.

109. Neither party referred to Ishola v Transport for London [2020] IRLR 368 which the Tribunal nevertheless finds of relevance to this case. In Ishola the Court of Appeal made it clear that although a one-off decision or act could amount to a practice, it was not necessarily one; in fact, all three words (provision, criterion and practice) carry the connotation of a state of affairs indicating how a similar case would be treated if it occurred again. On the facts of the Ishola case there was nothing to indicate that the employer's decision would be applied again in the future, or that it was the way that things were generally done. There must be a state of affairs indicating how similar cases are generally treated or how they will be treated in the future.

110. With regard to disparate impact, Mr Peck referred the Tribunal to the guidance set out in Dobson v North Cumbria Integrated Care NHS Foundation Trust [2021] IRLR 729.

Wrongful dismissal

111. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

112. A claim for notice pay is a claim for breach of contract; see Delaney v Staples 1992 ICR 483 HL.

113. In Neary v Dean of Westminster [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.

114. Mr Peck referred to Sandwell and West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09 as authority for the proposition that in order to amount to gross misconduct, the conduct must be a deliberate and wilful contradiction of contractual terms or grossly negligent.

115. In cases of wrongful dismissal, it is necessary for the Respondent to prove that the Claimant had actually committed a repudiatory breach of contract. See: Shaw v B & W Group Ltd UKEAT/0583/11.

Unfair dismissal – contributory conduct

116. Section 122 provides for circumstances in which reductions shall be made to the basic award. Such circumstances include where the Tribunal considers that any conduct of the Claimant before the dismissal was such that it would be just and equitable for such a reduction to be made. Conduct need not have contributed to the dismissal.

117. Section 123(6) provides that where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

118. In Nelson v BBC (No.2) [1979] IRLR 346 CA it was said that before making such a deduction three factors must be satisfied:

    118.1. That there was conduct on the part of the Claimant in connection with his unfair dismissal which was culpable or blameworthy to the extent that it was perverse, foolish, bloody-minded or unreasonable in the circumstances;

    118.2. That the matters to which the unfair dismissal complaint relates were caused or contributed to some extent by the Claimant's action (or inaction) that was culpable or blameworthy;

    118.3. That it is just and equitable to reduce the assessment of the Claimant's loss to a specified extent.

119. The Nelson interpretation also applies to reductions to the basic award; Langston v Dept for Business, Enterprise and Regulatory Reform EAT 0534/09

120. Although a Tribunal is not bound to reduce the basic award and the compensatory award in the same proportions, in light of the similarity in the provisions it is likely only in exceptional circumstances that such deductions would differ; RSPCA v Cruden 1986 ICR 205. If the Tribunal makes different reductions, it must give reasons for doing so; Sterling Granada Contract Services Ltd v Hodgkinson EAT 894/95

ACAS uplift

121. Section 124A of the Employment Rights Act 1996 together with 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer has unreasonably failed to comply with the Code of Practice, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase the compensatory award by up to 25%. Similarly, where an employee has unreasonably failed to comply with the Code, a Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce the compensatory award by up to 25%.

122. Mr Peck referred the Tribunal to Slade and anor v Biggs EA-2019-000687-VP in which it was stated that, when considering what should be the effect of an employer's failure to comply with a relevant Code under section 207A of TULRCA, Tribunals might choose to apply a four-stage test:

    122.1. Is the case such as to make it just and equitable to award any ACAS uplift?

    122.2. If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?

    122.3. Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting?

    122.4. Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?

Conclusion

Direct race discrimination

123. Throughout the Claimant's suspension, he was provided with unclear and confusing information of the allegations against him. The Claimant was inadequately informed of the progress of the investigation which was delayed and it was unclear to him why further questions were being asked after he had been informed that the investigation had been completed. The investigation itself was inadequate given the seriousness of the allegations, as indeed Ms Mill herself recognised as evidenced by her request for further steps to be taken. However, the second investigation report took things little further. It is difficult for this Tribunal to understand how Mr Mugwagwa was able to conclude that the Claimant should be disciplined for putting his fingers in X's ears and nose given the information before him unless he accepted, almost without question, X's version of events.

124. Similarly, it is difficult to understand how Ms Mill reached the conclusion that the Claimant had done so. The Claimant's explanations appear to have been discounted or misconstrued; the Tribunal suspects in part the latter because of his English language limitations. Although Ms Mill said that she

had considered what the Claimant said about cultural differences, this sits uneasily with the conclusion in the Respondent's Root Cause Analysis.

125. In circumstances in which X had clearly stated the dates of the alleged misconduct, on some of which the Claimant was not at work, and in light of the evidence given by those individuals whom X clearly stated had witnessed the misconduct, it would have been reasonable for the Respondent to be a little more circumspect about X's allegations. The Tribunal also notes that, according to the Claimant, X had made a number of complaints in the past. There was no evidence to suggest such complaints had been investigated for veracity.

126. The allegations were imprecisely framed. It appears that the allegation 2, conduct bringing the Respondent's name into disrepute, consisted of further concerns about the Claimant's conduct but without explanation as to why it might bring the Respondent's name into disrepute any more than allegation 1.

127. Although Priscilla Robinson informed the Disclosure and Barring Service that she thought the Claimant had harmed a child or vulnerable adult through his actions or inactions, there was no evidence to suggest this possible prejudgment was communicated to Ms Mill or that it informed Ms Mill's decision.

128. There was little evidence as to whether or not the Respondent investigated or disciplined other employees identified in X's complaints although the Tribunal notes that the allegations against the Claimant were more serious and greater in scope than those alleged against his colleagues.

129. The Tribunal considers the "reason why" the Claimant was subjected to the alleged detriments and was dismissed.

130. Having heard the evidence, the Tribunal finds that the reason for the Respondent's unfair and unreasonable treatment of the Claimant was a lack of care, attention to detail and focus. Indeed, both Mr Mugwagwa and Ms Mill acknowledged the Respondent's shortcomings when giving evidence. The Tribunal is satisfied that neither Mr Mugwagwa nor Ms Mill were motivated, consciously or unconsciously, by race, the fact that the Claimant is Italian or that English is not his first language. Rather, both Mr Mugwagwa and Ms Mill were concerned about a serious complaint made by a vulnerable patient and that concern informed their actions and inactions. It cannot be inferred that the unreasonable way in which they treated the Claimant was because he is Italian or because English is not his first language. In no sense whatsoever did they treat the Claimant as described, or dismiss him, because he is Italian or because English is not his first language.

Harassment

131. The allegations of harassment were said to mirror the allegations of direct discrimination. The Claimant's case is that the unwanted conduct was variously related to race, sex, and/or sexual orientation and of a sexual nature as detailed in the issues described above.

132. At paragraph 48 of its Grounds of Resistance, the Respondent admits that the Claimant was subjected to the unwanted conduct set out in the Claimant's grounds of claim but denies that the conduct was connected to the alleged protected characteristics.

133. Without reaching any conclusion on the question, the Tribunal accepts that the unwanted conduct was capable of having the purpose or effect of either violating the Claimant's dignity or creating an adverse environment for him.

134. The Tribunal has had regard to the context in which the Claimant was subjected to this unwanted conduct. Broadly put, the context was that the Claimant, an Italian male, was accused, among other things, of kissing, hugging and/or asking a vulnerable patient if he wanted to be kissed together with other allegations of wrongdoing. He was treated unreasonably as identified above. In particular, the Tribunal finds that because of his limited use of the English language, the Claimant may have misunderstood and/or been misunderstood.

135. The Tribunal is unable to conclude that the allegations of harassment were related to sex or race. The Claimant's sex and race were simply background to the situation set out in the findings of fact set out above.

136. Nor is the Tribunal able to conclude that because the allegations included that of kissing that the unwanted conduct related to sex or sexual orientation. Nor was the unwanted conduct of a sexual nature. Rather, the unwanted conduct, in particular the further questions asked during an ill-informed and imprecise investigation, was related to the steps taken to deal with serious allegations of wrongdoing. The Respondent's primary concern was the allegation of kissing a patient, an inappropriate and abusive act for a nurse. The primary concern was not that Claimant had kissed a male patient or that it was a sexual act. That was purely the background to the allegation of wrongdoing.

<u>Indirect race discrimination</u>

137. The Tribunal considers the PCPs relied on by the Claimant.

137.1. There was insufficient evidence to show that the Respondent generally applied its disciplinary policy without providing clarity as to the definition of misconduct and/or sufficient details of allegations of misconduct or that the Respondent would do so in the future. The Tribunal further observes that even if this was a PCP, it would be unlikely to put those whose first language is not English in a particular disadvantage. Rather all persons, of whatever race or nationality would be similarly disadvantaged.

137.2. As to the "requirement to maintain an expected standard of professional conduct and/or boundaries in the absence of supporting guidance, polices or training to communicate that standard and enable staff to maintain it" there was insufficient evidence to suggest that such an expectation was required in the absence of training. Rather, the evidence suggested that training was provided and that nurses were required to comply with the NMC Code.

137.3. Turning to alleged PCP: "Failing to send out full details of specific allegations of misconduct and copies of all supporting evidence at least 7 days before a Disciplinary Hearing" there was no evidence to suggest that this was how cases were generally treated or how they will be treated in future.

137.4. The Tribunal accepts that "imposing a disciplinary sanction in respect of an employee's inappropriate use of language" might amount to a PCP. However, there was no evidence to suggest it might put an Italian person at a particular disadvantage. The Tribunal does not accept that an Italian person might use inappropriate language any more than a person of any other nationality and thus be put at a particular disadvantage. The Tribunal declines to make what might be described as stereotypical assumptions about the way Italian persons might express themselves

137.5. Notwithstanding Mr Mugwagwa's recommendation that an interpreter (translator) should be provided, Ms Mill did not make arrangements for an interpreter to attend the disciplinary hearing. The Respondent expected the Claimant to provide an interpreter if he wanted one. The Tribunal infers from this that it was a practice on the Respondent's part that it would hold disciplinary hearings without arranging for an interpreter, instead leaving it to the employee if they felt they needed one. The Tribunal concludes that the Respondent adopted a practice of holding disciplinary hearings without arranging an interpreter to provide support to employees**.** This was a PCP.

138. The Tribunal takes judicial notice that the application of such a PCP puts or would put persons for whom English is not their first language at a particular disadvantage compared to persons for whom English is their first language.

139. Mr Mugwaga was of the view that:

> *in order to have a more nuanced discussion about the allegations with Mr Messeri at any disciplinary hearing Mr Messeri would benefit from a translator. I differentiated between the level of English required in Mr Messeri's every day role practicing as a nurse and that required to respond to allegations as part of a disciplinary process which could result in a sanction being imposed*

140. The Claimant maintains that he was misunderstood about what he said at the disciplinary hearing about hugging. The Tribunal finds this is reflected in the notes of the disciplinary hearing in which the allegation is discussed. As noted there:

> *I mean a different type of hug, maybe yes but in context not a hug, when we turn the patient we have to touch them*
>
> *…*
>
> *The hug is solely a kind of are you ok*

141. The fact that the Claimant uses translation software to fully understand what is written illustrates his limited vocabulary.

142. The Tribunal does not accept Ms Mill's evidence that the Claimant was not disadvantaged because she adapted her style to suit the Claimant's needs. She said she expected a professional NMC nurse to have a certain level of competency and assumed nurses would be able to speak clearly and effectively as part of their role.

143. The Tribunal finds that the Claimant was put at a disadvantage.

144. The Respondent did not put forward any credible evidence to support the legitimate aims relied on, nor any credible evidence as to how not providing an interpreter might be a proportionate means of achieving any such aim.

145. The Tribunal thus concludes that the Respondent indirectly discriminated against the Claimant.

Contribution

146. Mr Sudra submitted that the Claimant's failure to appeal should lead to a finding of contribution. However, the legislation clearly refers to conduct before the dismissal and contribution towards it. Any such failure on the Claimant's part could only have taken place after the dismissal.

147. In any event, the Tribunal would conclude that the Claimant was justified in not appealing having understandably lost trust and confidence in the Respondent to deal with an appeal fairly and reasonably.

148. The Tribunal has considered whether the Claimant asking X if he would like a kiss should lead to a finding that a contribution would be appropriate. However, context is all. As the Claimant explains in his witness statement, X could be a difficult patient and in the circumstances the Tribunal is unable to reach the conclusion that the Claimant's words should lead to deduction for this reason.

149. As for the other allegations of misconduct considered by the Tribunal, the evidence is insufficient to show that the Claimant, in connection with his unfair dismissal, was culpable or blameworthy to the extent that it was perverse, foolish, bloody-minded or unreasonable in the circumstances. The evidence does not lead to the conclusion that it would be just and equitable to reduce compensation.

ACAS uplift

150. Mr Peck submitted that decisions on any appropriate adjustment should be left until any remedy hearing in light of the need for the Tribunal to consider the absolute value of any ACAS uplift, and not just the percentage. Having considered the guidance set out in Slade, the Tribunal agrees that the question of amount of adjustment should be considered at a remedy hearing.

Wrongful dismissal/breach of contract/notice pay

151. The Respondent has failed to show that the Claimant was guilty of gross misconduct and thus entitled to dismiss the Claimant without notice.

Future conduct of the proceedings

152. This case will be listed for a further hearing with an allocation of one day to consider the question of remedy.

153. In the meantime, the parties are encouraged to enter into discussions with a view to settling the question of remedy without recourse to a further hearing with its attendant costs. If the parties reach settlement, they should inform the Tribunal promptly so that the hearing date can be vacated.

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Pritchard

Date: 10 January 2022