EMPLOYMENT TRIBUNALS

Claimant: Ms A Jackson

Respondent: Manchester University NHS Foundation Trust

Heard at: Manchester **On:** 20, 21, 22, 23, 26, 27 and 28 September 2022, and in chambers on 14 and 19 October 2022

Before: Regional Employment Judge Franey
Ms J K Williamson
Ms E Cadbury

REPRESENTATION:

Claimant: In person
Respondent: Ms L Quigley, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of harassment related to race contrary to section 26 Equality Act 2010 fails and is dismissed.

2. The complaint of direct race discrimination contrary to section 13 Equality Act 2010 fails and is dismissed.

3. The complaint of victimisation contrary to section 27 Equality Act 2010 fails and is dismissed.

4. The complaint of unfair dismissal by way of a constructive dismissal contrary to Part X Employment Rights Act 1996 fails and is dismissed.

REASONS

Introduction

1. By her claim form presented on 8 May 2019 the claimant complained of direct race discrimination, harassment related to race, and victimisation arising out of her continuing employment as a Nursing Assistant by the respondent ("the Trust"). Her claim form explained that she was of Afro-Caribbean ethnicity, and asserted that from October 2017 onwards she had been the subject of a series of false and misleading complaints about her behaviour which had resulted in a move to a different ward in May 2018. That had been followed by an allegation of gross misconduct in relation to an incident in late May 2018, following which she was removed from roles with direct patient contact. She had brought a grievance at the end of 2018 which was still under investigation, but in January 2019 had been informed that there was a further disciplinary investigation into incidents that occurred that month.

2. The response form of 25 June 2019 denied any discriminatory treatment, and asserted that there had been unacceptable behaviour on the part of the claimant which had been addressed informally by way of an action plan prior to an incident on 27 May 2018 which had been formally investigated. Although that was not being pursued as a disciplinary matter there were some concerns about her behaviour to be addressed.

3. The case came before Employment Judge Allen for a case management hearing on 14 November 2019. The claimant indicated she was about to resign her employment and would be seeking to amend her claim so as to complain of constructive unfair dismissal. An outline List of Issues was prepared and directions given for that to be agreed. Provision was made for the case to be heard over eight days in February 2021.

4. The claimant resigned with effect from 19 December 2019 and on 30 December 2019 made an application to amend her claim to add a constructive unfair dismissal complaint. The Trust did not oppose that application and permission to amend the claim was granted in January 2020.

5. Amended grounds of resistance were served by the Trust in January 2020 which denied that there had been any fundamental breach of contract, or any dismissal, and sought further particulars. The claimant was required to provide further particulars of her constructive unfair dismissal complaint, and to identify any comparators. She provided that information on 20 March 2020. She explained that the "final straw" triggering her resignation was the grievance outcome letter of 4 November 2019. She identified three comparators said to be relevant to her victimisation complaint.

6. The hearing of February 2021 was postponed because of the unprecedented demands on the Trust resulting from the COVID-19 pandemic. To her credit the claimant did not oppose the Trust's application to postpone. It was relisted for eight days from Monday 19 September 2022. That day was lost because of the funeral of Her Majesty Queen Elizabeth II, leaving seven days for the main part of the hearing.

7. We agreed at the start of the hearing that the Tribunal would not address any remedy issues: there would be a further remedy hearing if required.

Issues

8. The parties had provided a suggested List of Issues based on the outline annexed to Employment Judge Allen's Case Management Order, and this was discussed and refined during the hearing. The agreed List of Issues on which the Tribunal had to deliberate after hearing the evidence and submissions was as follows:

Factual Allegations

1. What are the facts in relation to the following allegations?

(1) Between October 2017 and April 2018 Samantha Croker raised spurious complaints about the claimant.

(2) Between October 2017 and April 2018 Ruth Baron told the claimant that disciplinary notes would be put on her file without any procedure or investigation whatsoever.

(3) A complaint was made about the 27 May 2018 incident involving Mr H.

(4) That complaint was not investigated properly or without delay in that:

(i) The claimant was not given details of the complaint made against her.

(ii) The claimant was not given an opportunity to discuss the complaint with her Ward Manager first.

(iii) The usual procedure was not followed.

(iv) Vanessa Bryan during a telephone call of 1 June 2018 did not provide details of the complaint or notify the claimant of her right to be accompanied.

(v) At the meeting on 5 June 2018 with Cathy Allen there was a failure to provide specific details of the allegations, a refusal to explain why previous allegations would be taken into account, and a refusal to explain why changes to the claimant's job role were necessary.

(vi) The letter of 5 June 2018 was not posted until 21 June (received by the claimant on 22 June) and was not specific about the allegations against her.

(vii) There was no investigatory interview of the claimant until 19 November 2018.

(5) The claimant's grievance of 29 December 2018 was not handled properly in the way it was addressed, the way it was investigated, the time taken to conclude it, and the outcome.

Section 26 Equality Act 2010 - Harassment

2. Are there facts from which the Tribunal could conclude that any of the treatment in allegations (1)-(4), or the constructive dismissal of the claimant (if that is established) amounted to:

(a) unwanted conduct;

(b) which was related to race; and

(c) had the purpose or effect (subject to section 26(4)) of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3. If so, can the respondent nevertheless show that there was no contravention of section 26?

Section 13 Equality Act 2010 – Direct Discrimination

4. Save in relation to any of allegations (1) – (4), or the constructive dismissal of the claimant (if that is established), which amounted to harassment, are there facts from which the Tribunal could conclude that any of the allegations (1)-(5), or the constructive dismissal of the claimant (if that is established), represented treatment by the respondent which, because of race, was less favourable than the treatment the respondent would have afforded a hypothetical comparator in the same material circumstances as the claimant but who was of a different race?

5. If so, can the respondent nevertheless show that there was no contravention of section 13?

Section 27 Equality Act 2010 – Victimisation

6. Did the respondent subject the claimant to the followed alleged detriments?

(1) Raising a complaint in respect of (1) an issue with a patient on 11 January 2019 and (b) issue with a member of staff on 11 January 2019.

(2) Failing to address the complaint properly in that:

(i) The claimant was called to a meeting on 14/1/19 with Sara Renwick in attendance.

(ii) The claimant was sent home partially suspended.

(iii) The claimant was relocated to the ENT department and not allowed patient contact.

(3) Delaying addressing the 11 January 2019 complaint

(4) Constructively dismissing the claimant (if that is established), and

(5) Deciding as the outcome of the investigation that the claimant was going to face disciplinary action.

7. If so, are there facts from which the Tribunal could conclude that the respondent subjected the claimant to any of these detriments because of her acknowledged protected act in lodging her grievance on 29 December 2018?

8. If so, can the respondent nevertheless show that there was no contravention of section 27?

Equality Act – Time Limits

9. Insofar as any of the matters for which the claimant seeks a remedy occurred on or before 4 January 2019, being three months before presentation of the claim (allowing for the effect of early conciliation), can the claimant show that it formed part of conduct extending over a period ending on or after 3 January 2019?

10. If not, can the claimant nevertheless show that it would be just and equitable to allow a longer period for presentation of her complaint?

Constructive Unfair Dismissal – Part X Employment Rights Act 1996

Dismissal

11. Can the claimant show that her resignation should be construed as a dismissal under section 95(1)(c) in that:

(a) The respondent committed a fundamental breach of the implied term of trust and confidence (i.e. that it would not, without reasonable and proper cause, behave in a way which, when viewed objectively, was calculated or likely to destroy or seriously damage the relationship of trust and confidence) in the following alleged respects:

(i) In the five alleged discriminatory acts set out in paragraph 1 above;

(ii) In the length of time taken to conclude the grievance investigation;

(iii) In the failure in the grievance outcome to acknowledge or accept evidence that showed that there had been harassment, bullying or discrimination;

(iv) In the response to the allegations made against the claimant, including the failure to acknowledge or accept any obvious mitigating factors or indisputable evidence which would have disproven those allegations;

(v) In its breach of policies and procedures?

[The claimant relies on the above matters, both in isolation and cumulatively, and relies on the grievance outcome of 4 November 2019 as the "last straw".]

(b) If so, was that breach a reason for the claimant's resignation?

(c) If so, had the claimant lost the right to resign in response to that breach by affirming the contract, whether by delay or otherwise?

Fairness

12. If the claimant establishes that her resignation was a constructive dismissal, can the respondent show that the reason or principal reason for that dismissal was a potentially fair reason under section 98(2)?

13. If so, was the dismissal fair or unfair, applying the general test of fairness in section 98(4)?

Evidence

9. The parties had agreed a bundle of documents in two lever arch files which ran to just under 800 pages. Any references to page numbers in these Reasons is a reference to that bundle unless otherwise indicated.

10. There was a supplementary bundle prepared by the claimant which added 111 pages. Any reference to page numbers in that bundle will be preceded by the letter "C".

11. We heard from eleven witnesses, each of whom confirmed the truth of a written statement before being questioned.

12. The claimant was the only witness on her side.

13. The Trust called ten witnesses, whose names and roles at the material time were as follows.

- **Cathy Allen** was the Lead Nurse for Adult Integrated Medicine who commissioned the disciplinary investigation into the incident in May 2018.
- **Ruth Baron** was the Ward Manager of Ward AM2 where the claimant worked in 2017 and early 2018.
- **Vanessa Bryan** was the Matron of all the wards on which the claimant worked during 2018.
- **Samantha Croker** was a Band 6 Ward Sister in the ward on which the claimant worked until May 2018.
- **Nicola Dale-Branton** was the Divisional Matron of Surgery who conducted the disciplinary investigation into the January 2019 incidents. Mrs Dale-Branton contracted COVID on the day before she was due to give evidence, and by agreement her evidence was taken remotely by video link.
- **Marnie Deaville** was the Lead Nurse for Specialist Medicine who investigated the claimant's grievance from December 2018.
- **Sara Renwick** was the Head of Nursing in the Division of Medicine until 1 June 2019, and was the person to whom Cathy Allen reported.
- **Jo Rothwell** was the Head of Nursing in the Division of Medical Specialities who reviewed the investigation into the May 2018 incident.
- **Sarah Sankey** was the Matron for the Accident and Emergency Department, and subsequent the Lead Nurse for Emergency Assessment and Access, who carried out the disciplinary investigation into the May 2018 incident.
- **Pamela Taylor** was the Lead Nurse of Inpatient Medical Specialities who took over from Sara Renwick as Commissioning Manager of the disciplinary investigation into the January 2019 incidents.

14. The Trust had intended to call Anya Dykins, a Matron in Adult Integrated Medicine, but the Sickness Absence Management process to which her evidence related was not a significant part of the claimant's case and it was agreed that her statement could be taken as read.

Relevant Legal Principles – Equality Act 2010

Jurisdiction

15. The complaints of race discrimination, harassment and victimisation were brought under the Equality Act 2010. Section 39(2)(d) prohibits discrimination against an employee by subjecting her to a detriment. Section 39(3) prohibits victimisation. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint.

16. The Trust did not dispute that by section 109(1) it was liable for the actions of its employees in the course of their employment.

17. Tribunals should have regard to any relevant provisions of the Code of Practice on Employment issued by the Equality and Human Rights Commission which came into force on 6th April 2011 ("the Code").

Burden of Proof

18. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

19. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

20. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

21. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable …**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

Direct Race Discrimination

22. Direct discrimination is defined in section 13(1) as follows:

> **"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."**

23. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

24. The effect of section 23 is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person of a different race. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to race, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator to identify whether race had any material influence, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Harassment

25. The definition of harassment appears in section 26 and so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**

> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (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.**

26. We had regard to the principles summarised paragraphs 85-89 of **Pemberton v Inwood [2018] ICR 1291**, and to Chapter 7 of the Code which deals with harassment.

Victimisation

27. Victimisation in this context has a specific legal meaning defined by 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 that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act -**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**

28. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why", for which the test is as for direct discrimination.

29. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was

to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC [2013] ICR 337 (House of Lords)**.

Relevant Legal Principles – Employment Rights Act 1996

30. The constructive unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed. The circumstances in which an employee is dismissed are defined by Section 95.

31. Section 95(1)(c) provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

32. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

33. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1998] AC 20** the House of Lords considered the scope of that implied term and Lord Nicholls expressed it as being that the employer would not:

> **"…without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

34. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

35. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

36. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously

damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-14):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term."**

37. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

38. Of course, even if the last straw turns out to be innocuous or trivial, there might still have been a constructive dismissal if previous conduct amounted to a fundamental breach which has not been affirmed: **Williams v Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA**

39. There is also an implied term that an employer will reasonably and promptly give employees an opportunity to seek redress for any grievance: **Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516.** Alternatively, failure to handle a grievance properly might amount to breach of the implied term as to trust and confidence if serious enough to be repudiatory.

Findings of Fact

40. This section of our Reasons sets out the broad chronology of events. There were some points where we had to resolve disputed issues of primary fact in order to

decide the case, and where appropriate we will address these disputes in our discussion and conclusions section below rather than in this section. We will highlight where the factual allegations in paragraph 1 of the list of issues arise in this narrative. Patients are anonymised as their identity is not relevant to our findings.

The Respondent

41. The Trust is a substantial employer with a dedicated Human Resources ("HR") function.

42. Its policies of relevance included the Equality and Diversity Policy (pages 438-454), the Dignity and Respect at Work Policy (pages 501-518) and the Disciplinary Procedure (pages 455-488).

43. The Disciplinary Procedure made provision for informal action by a manager, which might include discussions or counselling on an informal basis, prior to any formal investigation. The formal investigation was governed by clause 9 on page 439 onwards. Clause 9.2 provided for suspension, a decision which the policy said, "should not be taken lightly or without careful consideration of all the circumstances and the nature of the complaint/allegation made".

44. Attached to the Disciplinary Procedure was a guidance note for managers on conducting and concluding an investigation (pages 479-485). It said that investigation meetings should be completed as soon as possible, with a key performance indicator within the Trust being completing an investigation within eight weeks. It said:

> **"If further allegations are made or concerns come to light during the investigation then it should be firmly established what relevance they have in the investigation and the employees in question need to be made aware of those concerns and be afforded the same opportunities to respond and provide information."**

45. The primary events in this case occurred on one of three wards.

46. Ward AM2 was a 28 bed ward with around 30 staff including nursing and support staff. Mrs Baron was the Ward Manager, who reported to Ms Bryan as Matron. Ms Allen was the Lead Nurse for that ward. The claimant worked on ward AM2 from August 2017 until May 2018 when she moved to the Manchester Ward.

47. The Manchester Ward had 24 beds and individual patient rooms and was used by patients who were ready for discharge but who required extra supportive care in the community or who were at the end of life. A number of those patients were vulnerable. The Ward Manager, Amanda Maelor, reported to Ms Bryan as Matron and once again Ms Allen was the Lead Nurse. The claimant worked on the Manchester Ward from 14 May 2018 until 16 July 2018 when she was moved to the Discharge Lounge.

48. The Discharge Lounge was a discrete area for patients who had completed their treatment and were waiting for transport away from the hospital, generally by ambulance, by taxi or with a relative. The claimant worked on the Discharge Lounge from 16 July 2018 until January 2019 when she was moved to the Ear Nose and Throat ("ENT") department.

The Claimant

49. The claimant is a black woman of Afro-Caribbean ethnicity. She was employed by the Trust in March 2017 as a Trainee Nursing Assistant and after completing her NVQ moved to ward AM2 in August 2017 as a Band 2 Assistant. In general the staff nurses on the wards were at Band 5, the Ward Sisters at Band 6 and the Ward Manager at Band 7.

50. When the claimant started on ward AM2 Mrs Baron was on maternity leave, and her post was being covered by Louise Egan. Mrs Baron returned to work in November 2017.

Ward AM2

51. The first part of the claimant's allegations in this case - **Allegations (1) and (2)** - concerned events on ward AM2 between October 2017 and April 2018. In broad terms she alleged that the Ward Sister Samantha Croker made a series of inaccurate or false allegations about the claimant's behaviour, and that as Ward Manager Mrs Baron repeatedly told the claimant that a disciplinary note about such matters would be kept on her file, taking the allegations made by Ms Croker at face value without giving the claimant a chance to explain or believing any account she might give.

52. The occasions on which the claimant relied were itemised in a note at pages C1-C4. The first occasion was given as 16/18 October 2017, but in cross examination the claimant accepted that this date was an error and that the complaints only started once Mrs Baron was back at work in November 2017. In summary, the claimant alleged that during this period:

- She was accused by Ms Croker of telling a patient's family that their mother (the patient) was not ill and was only pretending to be ill, even though other patients and visitors who were present confirmed that they had not heard the claimant say anything like that.

- In November 2017 Mrs Baron told the claimant that Ms Croker had alleged that the claimant was shouting/swearing/arguing with patients and staff on the ward, that this was a first warning and that if it happened again there would be a disciplinary process.

- Between mid November and December 2017 the claimant was taken into the office a further four times by Mrs Baron about similar allegations and was told that there would be a disciplinary authorised by HR. When the claimant protested that the allegations were false Mrs Baron said that she believed them because they came from a trusted source.

53. We will return to those matters in our conclusions.

Incident 28 December 2017

54. On 28 December 2017 the claimant was working with another Healthcare Assistant, Halina, with a patient who was on the end of life pathway. The patient passed away, and an issue arose as to whether the claimant was in some way responsible for this by taking too long to perform personal care duties for the patient. According to the claimant, the matter was reported to Ms Croker by Halina and Ms Croker spoke to the claimant. According to Ms Croker, it was the claimant who asked

her to get involved. It was common ground that the claimant did ask the relatives of the patient who had just died if they would provide a statement about the matter, but there was a sharp dispute as to whether that was done with permission from Ms Croker or not. We will return to that matter in our conclusions.

55. On 30 December 2017 the claimant emailed Mrs Baron (page 81). She said there had been yet another complaint made against her that week which was a serious allegation. She said she had asked Ms Croker for a witness statement about it. Her email said:

> **"Therefore would it be possible for me to have a meeting from you upon your return to discuss this please, as I am now feeling bullied, victimised and intimidated by the number of allegations/complaints that have been made against me since I started on this ward in August, and the allegations that are still being made against me, by what I consider to be a particular core group of colleagues who seem intent on causing me problems."**

56. Mrs Baron was away on leave over that period but responded on 8 January (page 81) saying she would like to discuss it with the claimant but in the meantime asked for a factual statement with dates and times if possible. Behind the scenes Mrs Baron had an email exchange with Lisa Astbury of HR (page 655), who advised that she should "scope the case" and see whether it warranted a formal investigation. It was suggested that Mrs Baron should obtain any key witness statements. It was unclear from the email exchange whether this referred to the incident on 28 December, or the claimant's allegations of victimisation.

57. The claimant and Mrs Baron had a discussion around 11 January 2018. According to Mrs Baron's later statement of 24 September 2018 (page 120), it came about because she had been told that the claimant was shouting on the ward. The claimant disagreed (page C3) and said that she was approached by Mrs Baron to talk about the email. It was common ground, however, that the claimant explained why she felt victimised, and they discussed the incident of 28 December. This discussion was not held in the office but in the treatment room on the ward.

58. The two of them met again on 15 January, when according to the claimant's note (page C3) Mrs Baron told the claimant that five members of staff had approached her last week and said they did not want to work with the claimant. The claimant alleged that Mrs Baron said she was not going to tell her who it was or why they said it, but advised her to keep her head down and not to try and keep upsetting people. When interviewed in September 2019 (page 298) Mrs Baron said she did not think she had given a particular number, but accepted that she raised these concerns in a general way. She denied having told the claimant to apologise to people, which the claimant alleged Mrs Baron had said in a further meeting on 16 January 2018 (page C3).

59. As the claimant left this second meeting she saw the Matron, Miss Bryan (who was new in post), and told her that she was feeling victimised, bullied, harassed and discriminated against. She was advised by Ms Bryan not to pursue any formal complaint until Ms Bryan had discussed it with the Ward Manager (page C4).

60. On 18 January Mrs Baron emailed HR (pages 654-655) asking what policy was applicable for staff on the ward who were using inappropriate language. Her email did not identify the claimant but was part of the email chain from 8 January. The response

was that it could be a disciplinary issue which could be discussed informally in the first instance.

61. That email chain continued on 1 February 2018 when Mrs Baron emailed HR to say that the member of staff in question (i.e. the claimant) was on leave, but "these issues are worsening".

62. Mrs Baron had passed her concerns about the claimant to Ms Bryan. Ms Bryan had a one-to-one meeting with the claimant on 5 February. The following day she emailed Mrs Baron (page 657) to say that the claimant had been told that they would continue to monitor the situation. Mrs Baron had been considering an action plan for the claimant at this point but decided against it.

8 April 2018 – Hair brushing incident

63. There was an incident on the ward involving the claimant on Sunday 8 April 2018. The claimant did two statements about it which appeared between pages 82 and 90. Her account was that while she was doing the hair of a patient in bed four, the patient in bed three asked if she would do her hair as well. The claimant said she would have to go and change the beds in the next bay first and then come back and do it. When she came back into the bay, however, the patient in bed three shouted at the claimant, complaining about the way the claimant had spoken to her, and saying:

> **"Look at you with your big brown eyes and your big brown mouth…"**

64. The claimant said this incident happened in front of Miss Croker, who said she would report it to Mrs Baron. The claimant was worried that her part in it would be misrepresented, so she wrote her statement. Miss Croker later said (page 208) that another patient told her about it.

65. The second part of the incident occurred that evening. The patient's son was present and according to the claimant's statement (page 89) he started shouting at the claimant and threatening her in abusive terms. He threatened to come back the following evening to assault the claimant, saying he knew that she finished work at 8.00pm each night and that he and others would be waiting for her outside. The claimant's account was that she asked a number of members of staff to help her as this was a serious security incident, but they all declined. After the visitor calmed down the claimant's statement said that she heard Miss Croker tell him that she would brief staff at handover about what the claimant had done.

66. The claimant also got another patient, Tracy, to do a short statement (page 91) which confirmed that the patient was abusing and threatening the claimant even though the claimant had not done anything to her or said anything.

67. On 9 April (page 92) the claimant emailed Miss Bryan to say that a serious allegation had been made against her the previous day, and that she had been threatened with violence by the visitor. She asked for a meeting as this was yet another example of bullying, victimisation and harassment. They met later that day. According to Miss Bryan, the claimant gave some general examples of behaviours towards her by colleagues but did not provide any names. It was agreed that a transfer to a different ward might be advisable.

68. Mrs Baron met the claimant to discuss the incident of 8 April on 12 April. The claimant's account was at page C4. According to the claimant, Mrs Baron said there would be disciplinary action authorised by HR. According to Mrs Baron, when she was interviewed in February 2019 (page 205), she was trying to discuss an action plan. There was clearly a disagreement between them. Mrs Baron said that the claimant started shouting and would not stop so was asked to leave.

69. Mrs Baron emailed the action plan to Miss Bryan the same day (page 732). A few days later she sent an email to all staff about the importance of adhering to Trust values (pages 658-659).

70. Mrs Baron wrote to the claimant on 30 April to draw these matters together (page 93). Her letter recorded that the meeting could not proceed because the claimant took exception to what she had started to discuss and refused to proceed any further. It went on to say that the claimant had been booked onto conflict resolution training, and that there would be an action plan to deal with the performance concern. The claimant was invited to an informal meeting on 10 May 2018 with Alistair Cruickshank of HR to discuss her behaviours and attitudes and the proposed action plan. She was given the right to be accompanied.

71. That meeting was rearranged to 15 May because the claimant was on leave.

72. On 11 May her transfer to the Manchester Ward was confirmed with effect from 14 May (page 96).

Action Plan meeting 15 May 2018

73. The action plan meeting on 15 May was conducted by Mrs Baron even though she was no longer the claimant's Ward Manager. Mr Cruikshank was present from HR and the claimant was accompanied by Miss Bryan. The claimant kept a note of the meeting which appeared at page 100. The hair brushing incident on 8 April and the aborted meeting with Mrs Baron on 12 April were discussed, and the claimant said that no-one had asked her for her statement or account. The claimant agreed to attend the training courses but left the meeting.

74. The action plan appeared at pages 101-103. It had two broad standards to be met: (1) speaking to patients professionally, politely and considerately, and (2) doing the same for staff. By 21 May it had been signed by the claimant, Mrs Baron and Ms Maelor, the Ward Manager for the Manchester Ward.

75. The outcome of the meeting was confirmed in a letter of 17 May 2018 from Mrs Baron (pages 104-105). The action plan would remain in place for at least three months, and as well as the conflict resolution training booked for later than month there would be further communications training.

Manchester Ward Incident – Mr H – 27 May 2018

76. The claimant had been on the Manchester Ward for about two weeks when there was an incident with an Asian patient, Mr H. The claimant's statement appeared at pages 107-109. The incident occurred on 27 May 2018.

77. Mr H had dementia. He was sitting at a table and became angry when the claimant picked up a foil wrapper from a handwipe. He stood up and started to claw at the claimant with his hands and shout at her in his own language. She was unable to calm him down and called for help from colleagues. She realised he wanted the foil wrapper, so she gave it to him and he calmed down. His daughter came to visit him, and everything was cleared up. Later on the claimant spoke to the daughter, who had become upset about the incident. The daughter thanked the claimant for how she had dealt with the matter.

78. Contrary to the claimant's account, colleagues formed the view that the claimant had been shouting at the patient. Her colleague Manju Joshua sent an email on 29 May (page 110) saying that:

> **"I am pleased that you had apologised to him and his daughter about your behaviour (shouting at the patient). However, take this as a reflective piece and reflect on your practice and use it as a learning opportunity. I hope that this will not happen again."**

79. Within a day, however, a decision had been taken by Miss Bryan to escalate the matter to Miss Allen (**Allegation (3)**). She regarded complete suspension as a last resort. In the Discharge Lounge the patients were medically fit and there was no significant clinical work. Much of the work was administrative and it would be supervised. She decided it would be an appropriate place for the claimant to work while the investigation was carried out.

80. Ms Bryan rang the claimant on 1 June 2018 to inform her that she was not to come into work and that a meeting would be arranged for 5 June. One of the claimant's allegations of race discrimination or harassment (**Allegation 4(i)-(iv)**) was that she was not given any details of the allegations against her at this stage, had no opportunity to discuss it with her Ward Manager, was given no details by Ms Bryan on 1 June, and that the usual procedure was not followed. We will return to those issues in our conclusions.

81. Miss Allen met the claimant on 5 June (**Allegation 4(v)**). She confirmed that there would be an investigation and that details of the allegation would be provided later. The claimant was to move to the Discharge Lounge.

82. Miss Allen's evidence was that at the meeting the claimant was told that the allegation was that on 27 May 2018 she had shouted at a vulnerable patient with cognitive impairment, and that this had been witnessed by his daughter, who had complained to the Ward Manager. The claimant did not accept that the allegation was put to her in that way, but it was clear that she knew it was about the incident on 27 May 2018.

83. Miss Allen's statement said that she referred to the action plan in place for previous matters. She denied having told the claimant that all those previous allegations would be taken into consideration.

84. The position was set out in a letter dated 5 June 2018 from Miss Allen (pages 111-112). The letter began as follows:

> **"I am writing to inform you that the following allegations in relation to the MFT disciplinary policy have been made that you:**

- **ALLEGATION 1: (Gross misconduct point 01) – Physical, verbal, sexual abuse, harm (e.g. ill-treatment, mishandling), actions or language of a discriminatory nature that infringe the Trust's policies towards a patient being cared for by the Trust, to another employee or another person on Trust premises.**

- **ALLEGATION 2: (Gross misconduct point 18) – bringing the Trust into disrepute.**

- **ALLEGATION 3: (In contravention of Misconduct Point 01) – employees are representatives of the Trust and, as such, it is important to present patients, their relatives, friends and other visitors with a professional and caring image that is re-enforced with attitudes and behaviours demonstrating courtesy, responsiveness and friendliness."**

85. These allegations were simply quotes from particular parts of the disciplinary policy. The letter failed to identify the incident in question or, more importantly, tell the claimant what it was alleged she had done. We will return to that in our conclusions. The failure to provide specifics of the allegations affected the claimant in the months that followed.

86. The letter went on to say that Matron Sarah Sankey had been appointed as investigating manager. No mention was made of the move to the Discharge Lounge or the restriction from direct patient contact.

87. Although the letter was dated 5 June, it was posted on 21 June and the claimant received it the following day (**Allegation 4(vi)**).

88. This was the first investigation Mrs Sankey had done. She took advice from HR on how to proceed. It was clear that the third allegation was taken to refer to previous behaviours on ward AM2, as contact was made with Mrs Baron as well as with Amanda Maelor.

89. Mrs Sankey had decided that the claimant would be interviewed when all other witnesses had been interviewed. In her oral evidence she explained that she was following HR advice. This was not explained to the claimant. The claimant was left wondering what was happening. She was not interviewed until November 2018. We will return to this issue (**Allegation 4(vii)**) in our conclusions.

90. Mrs Sankey wrote to Mrs Baron on 28 July (page 611) inviting her to an investigation meeting on 16 August but asking for a written statement before if possible. Mrs Baron wrote the statement which appeared at pages 113-115 referring to the hairbrush incident in April and to the action plan. At her interview on 16 August (pages 116-117) Mrs Baron said (page 117) that on Ward AM2 the claimant often referred to staff acting in a racially discriminatory way towards her but that she had seen no evidence of it herself.

91. On 16 August Amanda Maelor was also interviewed about the incident on 27 May 2018 and notes of that interview appeared at pages 118-119. She said that staff told her that the claimant had shouted at the patient so loudly that she had been heard in the staffroom, a reasonable distance from the ward. Ms Maelor had been told that the daughter had been so upset that she wanted her father removed from the hospital immediately.

92. Mrs Sankey was unable to progress the investigation as quickly as she would have liked. There was a period when she was covering for another matron, and

there was a CQC inspection. During the autumn she carried out further enquiries. Mrs Baron compiled a statement of 24 September about events in January 2018 (pages 120-122). On 26 September Anu Thomas provided a statement to the effect that Mr H told her the day after the incident that he had been shouted at the previous day.

93. Three members of staff were interviewed on 16 October (pages 124-128). Ms Joshua supported the allegation and said that the shouting could be heard from the far end of the ward. Samantha Croker was interviewed on 17 October (pages 130-131). Miss Croker explained her experience of working with the claimant on ward AM2.

94. By a letter of 26 October 2018 Mrs Sankey invited the claimant to an investigatory interview on 7 November. The letter reproduced the allegations as they had been in Miss Allen's letter of 5 June. No details of the allegations were given. Once she appreciated the claimant's frustration at this (page 667), she sent an email on 14 November 2018 (page 666) to Mrs Renwick asking that the case was discussed again with the claimant.

95. The meeting could not take place because the claimant was ill, and it was rearranged for 19 November. The notes of that meeting appeared at pages 137-138, and when they were sent to the claimant in February 2019 she provided some amendments which appeared at pages 139-140. The claimant gave her verbal account of the incident on 27 May 2018. There was then a discussion about the action plan and the reasons for it.

96. The day after the claimant the claimant provided some documentation to Mrs Sankey.

97. Mrs Sankey prepared her investigation report in December. It appeared at pages 149-164. It set out a chronology of the investigation which showed that the report was submitted on 19 December, although the appendices were not yet attached. The claimant's case and the evidence gathered from others was summarised. The report noted that all the other witness statements contradicted the claimant's explanation that she was shouting for help rather than at the patient Mr H. The concerns raised by Mr H's daughter after the claimant had spoken to her were also noted.

98. The first draft also contained a section about previous behaviours on ward AM2. This was described as allegation 3. The report noted that although the claimant alleged she had been victimised and harassed, there were a number of witness statements alleging unprofessional behaviour and conduct and that there were regular incidents which seemed to correspond to when she was asked to do something.

99. An amended report was emailed by Mrs Sankey to Miss Allen on 4 January 2019 (pages 614-615).

100. On 5 February the claimant requested that Miss Allen have no further involvement in that investigation because she was named in her grievance (see below). Miss Allen had no further involvement. Instead Jo Rothwell considered the report. Mrs Rothwell was not a direct replacement as Commissioning Manager for

Miss Allen, but was asked to review the report because there had been such a gap between the allegations and the report being available. When she wrote to the claimant inviting her to a meeting to discuss the outcome she amended the formulation of the allegations. Rather than repeat what had been said in the letters from Miss Allen and Mrs Sankey, she reformulated them using the body of the report from Mrs Sankey as follows:

> **"ALLEGATION 1 – verbally abusing a patient with limited cognitive ability. The abuse was also witnessed by the individual's relative.**
>
> **ALLEGATION 2 – subsequently following the investigation abusive behaviour towards patient and colleagues identified prior to original incident."**

101. This second allegation was in relation to events in ward AM2 before the incident in May 2018.

102. An outcome meeting was arranged for 2 April 2019 but due to a diary error by managers no-one attended. The claimant asked for the outcome to be conveyed in writing rather than at the re-arranged date of 16 April.

103. That resulted in an outcome letter from Jo Rothwell dated 7 May 2019 (pages 250-251) using the reformulated allegations. The decision was not to proceed to a disciplinary hearing, but there were some concerns which would be discussed with line management.

104. Jo Rothwell issued a second version of this letter on 29 October 2019 at pages 335-336. She said that she had received an incorrect version of the report from Mrs Sankey, and now had the correct version. She confirmed that the decision remained the same.

Move to Discharge Lounge June 2018

105. According to the notes of his interview in February 2019 with Mrs Deaville, a colleague on the Discharge Lounge, Mr Harrison, said that staff on the Discharge Lounge did not want the claimant there. As there were restrictions on patient contact there was a limit to what she could get involved in, but the perception was that she could not be moved.

106. The claimant kept a log of incidents and allegations which appeared at page 595 which showed a minor disagreement with a work colleague in September 2018, and then another colleague, Sandra Bigby, stopped speaking to the claimant. The claimant was told by the Lead Nurse, Sara Renwick, that there had been a complaint accusing her of saying nasty things about a colleague. The log showed that the claimant was not given any details about this, but was warned that there would be disciplinary action.

107. In September 2018 the claimant joined the trade union Unison.

20 December 2018 – Allen Meeting

108. On 20 December 2018 the claimant was called to a meeting in the office with the Lead Nurse, Miss Allen. Miss Allen informed her that another complaint had been received alleging the claimant had been shouting and arguing with colleagues

and vulnerable patients. Miss Allen had designed a form of action plan which was described (not by Miss Allen) as a behavioural matrix (which we did not see). She presented the claimant with a hard copy and sought the claimant's agreement. The document was designed so that the Ward Manager could make entries on it. The claimant would be monitored and could face disciplinary action.

109. The claimant objected to this and reiterated that she felt the victim of discrimination and victimisation. The meeting became heated, and the claimant left.

110. Miss Allen came out of the meeting room and told her PA, Ms Poulton, that she wanted to know what time the claimant came back, and that if there were any further issues they should be escalated to Sara Renwick. The claimant gave a different account, saying she heard Miss Allen shout that if anyone heard the claimant shouting or arguing with any patients or colleagues they should phone Miss Allen straightaway. This was denied by Miss Allen. (At the conclusion of the grievance investigation Mrs Deaville recommended that Miss Allen apologise to the claimant for her behaviour on that occasion (page 370).)

111. On 20 December 2018 (page 673) Miss Allen emailed Mrs Renwick to say that there were a number of statements about the claimant on the Discharge Lounge and she wanted to discuss them. It was unclear what this related to and we did not see those statements.

Claimant's Grievance 29 December 2018 – **Allegation (5)**

112. On 29 December 2018 the claimant lodged a complaint using the bullying and harassment reporting form. It appeared at pages 141-144. It was referred to in this case as the grievance even though it was not lodged under the grievance procedure.

113. The pro forma said that the claimant was:

> **"Feeling victimised, bullied and harassed by colleagues of Band 6 and 7. Feeling stressed, unable to sleep/eat."**

114. It said the treatment had been ongoing for the past 12 months.

115. The narrative referred to the claimant being threatened with disciplinary action every time there was a complaint against her, and that there had been a failure to follow correct policies and procedures. She said she had only been interviewed in November 2018 for allegations made in May. Since that investigation meeting she had been threatened with having further allegations attached to the current one, and had been told that the investigation would look at all allegations made against her since she started her employment in March 2017. None of those allegations had been investigated or proven, and punitive action/sanctions had been taken. The grievance said that further information could be supplied upon request. There was no express mention of race being a factor.

116. Senior managers shared the concern that the investigation was taking too long. On 4 January 2019 (page 678) Mrs Renwick emailed Mrs Sankey to say that she needed the report by close of play that day. It seems at that stage the plan was to proceed to a hearing, in line with Mrs Sankey's view that there was a disciplinary case to answer.

Incident 11 January 2019

117. On 14 January 2019 the claimant was informed by Mrs Renwick that she was being partially suspended and prevented from patient contact whilst a disciplinary investigation ensued into incidents which were said to have occurred on 11 January 2019.

118. The letter of 16 January 2019 (pages 168-169) confirming partial suspension put the two allegations as follows:

- **"ALLEGATION 1 – On Friday 11 January 2019 you were overheard arguing with a vulnerable and confused patient in the Discharge Lounge. You were seen to be rude and aggressive towards this patient. This occurred in front of other patients, relatives and staff. In addition you disconnected a telephone call between the patient and her daughter, stating that you did so as you did not know what the patient was telling her daughter. This follows a pattern of inappropriate behaviour towards elderly and vulnerable patients.**

- **ALLEGATION 2 – On Friday 11 January 2019, in order to prevent further admissions to the Discharge Lounge and thus affecting patient flow and care across the hospital, you behaved in a threatening, intimidating and bullying manner towards another member of staff. You stated that you would not accept further patients and threatened to disconnect a phone call should the phone [call] be made/answered by your colleague."**

119. Efforts were made to get in writing what had been verbally reported. A statement from Ms Yusuf at page 166 supported allegation 1. It said that the claimant had had an argument with a patient, who seemed distressed. The claimant told the patient that she was rude and should not be speaking like that. The argument continued, and Ms Yusuf said that when the patient rang her daughter on the telephone the claimant disconnected the call, saying that she did not know what the patient was telling her daughter.

120. Allegation 2 was supported by an email of 14 January 2019 from Kimberley Balon. It said that on 11 January the claimant had started to say that they would not be taking patients, and that if she were to answer the phone in the Discharge Lounge and take a patient the claimant would cut the telephone off. Ms Balon said in her email that she felt threatened, undermined and that she was being bullied, and had to walk away from the area for a few minutes. Ms Balon had spoken to Ms Poulton and to the Ward Manager, Michelle Milligan-Pawsey, and had been advised to do that statement.

121. There was also material available supporting the claimant, although it was not provided to Mrs Dale-Branton until May 2019. A statement of 14 January at page 255 gave her account of the incident with the patient. It attached (pages 256-257) an email to the claimant's personal email address from a person we will call "CH", the relative of another patient who had been present on 11 January. The patient with whom the claimant had had the disagreement had been swearing and screaming and calling the claimant obscenities. The email from CH said the claimant had dealt with it very calmly and that no-one had come to help her. At one point the patient screamed that the claimant was her slave, using further obscenities which were racist and verbally aggressive. The witness said that not one member of staff stuck up for the claimant, and that when she intervened to protest the patient started abusing her in racial terms as well. CH said that the claimant had been kind

and professional, and dealt with the situation with utter dignity and courage. The statement made clear that it was the claimant who had been the victim of unprovoked racial abuse from the patient.

122. The claimant's statement about the conversation with Ms Balon was also dated 14 January and appeared at pages 260 and 261. She said that it occurred on 7 January not 11 January. She said she had been following procedures in that discussion, because the member of staff concerned had been accepting handovers just before her shift ended in a way which was inappropriate.

123. The restriction from patient contact during the investigation meant that the claimant was moved again out of the Discharge Lounge into the ENT department with effect from 21 January 2019. She remained in that role until she moved to the Renal Ward in April 2019.

124. By the end of January 2019, therefore, there were two investigations ongoing: the investigation of her grievance carried out by Mrs Deaville, and the investigation of the two disciplinary allegations carried out by Nicola Dale-Branton. In addition the claimant had not yet had an outcome to the investigation by Mrs Sankey into the incident in May 2018 (and remained unaware of it until the letter from Mrs Rothwell of 7 May 2019 at pages 250-251).

Grievance Investigation – Marnie Deaville

125. Mrs Deaville invited the claimant to interview by a letter of 17 January 2019 at page 170. The claimant was given the right to be accompanied.

126. The notes of that interview on 21 January appeared at pages 173-174. The claimant said that it all began on ward AM2, and referred to Miss Croker and Mrs Baron. She also identified her grievance was brought against Miss Allen, Mrs Renwick, Mrs Sankey and Mr Cruikshank from HR. She asked that Mrs Deaville interview Mr Harrison, who was a witness to the incident in December 2018 with Miss Allen.

127. The interview notes were sent to the claimant on 29 January (page 175) and the claimant responded on 5 February, making some additions to the notes and asking that Miss Allen and Mrs Renwick have no further involvement in the current investigations. In due course this resulted in the decision on the May 2018 investigation being taken by Mrs Rothwell instead of Miss Allen, and the decision on the January 2019 allegations being taken by Ms Taylor rather than Mrs Renwick.

128. Mrs Deaville interviewed three of the witnesses on 5 February (Cruikshank/Bryan/Harrison – pages 178-185) and two more on 11 February (Allen and Sankey – pages 186-190). Mrs Baron and Miss Croker were interviewed at the end of February, and Mrs Milligan-Pawsey interviewed on 5 March 2019 (pages 213-215).

129. On 4 April 2019 the claimant wrote to the Trust Chief Executive and other senior managers (pages 227-228). She asked for their assistance in resolving her grievance. She said she had initiated early conciliation with ACAS. She provided documentation in support of her complaint and the reason for contacting ACAS. Amongst the documentation she provided was the index of incidents and allegations

in the Discharge Lounge at pages 595-598. In a further email the same day (page 229) she mentioned the meeting with Mrs Rothwell on 2 April which management had not attended.

130. The response to the claimant's complaint came in a letter from the Group Chief Executive, Mike Deegan, of 5 April 2019 at page 232. The matter had been passed to Stella Clayton, the Director of Human Resources for the Manchester Royal Infirmary.

131. Ms Clayton responded to the claimant on 15 April 2019 (page 242). She said that she understood the issues raised were being investigated under the grievance procedure and the letter would be provided to Mrs Deaville and her HR support, Lynn Norbury. Effectively those further matters were fed into the grievance investigation.

132. Mrs Deaville wrote to the claimant on 16 April 2019 to invite her to a further meeting. The letter said it was to confirm that she had all the relevant information and documents. Because the claimant had provided information about the January 2019 investigation, Mrs Deaville wrote to Ms McFarlane and to Ms Yusuf on 23 and 24 April (pages 635-636) to invite them to interview. Ms McFarlane was interviewed on 26 April (pages 248-249), Ms Balon on 20 May (page 269) and Ms Yusuf on 22 May (page 278).

133. In the meantime on 20 May 2019 Mrs Deaville met the claimant a second time about the grievance. The day after that meeting she wrote to the claimant (page 276) to confirm that neither Mrs Renwick nor Mrs Sankey would be involved in any review of the investigations.

134. In early June 2019 the claimant went off sick, and was not to return prior to her resignation. Shortly before going off sick she supplied Mrs Deaville with the outcome letter from Mrs Rothwell of 7 May 2019 about the May 2018 enquiry, together with some material the claimant had prepared about that investigation. She wanted that including in the grievance enquiry.

135. By mid August Mrs Deaville had concluded her enquiry and Lynn Norbury emailed the claimant asking if she would meet Mrs Deaville to discuss the findings and outcome, or whether she wanted it in writing. The claimant preferred the latter (page 293).

136. However, on 28 August Mrs Deaville emailed the claimant to ask whether the additional information which had been supplied was further evidence to be considered, or an additional allegation. This led to an exchange of emails on 3 September where the claimant said she was confused but wanted the additional documentation included. Mrs Deaville said she would write within seven days.

137. In fact Mrs Deaville then undertook interviews of Mrs Sankey (page 297), Mrs Baron (pages 298-299), and Miss Croker (page 304). She told the claimant on 12 September that the outcome would be delayed because of those further enquiries and her leave. She hoped to write with an outcome in the week of 21 October.

138. Mrs Deaville interviewed Miss Allen on 11 October (page 316) and then finalised her report on 29 October. It appeared at pages 337-370 with appendices attached.

Grievance Outcome 4 November 2019

139. Mrs Deaville wrote to the claimant on 4 November 2019 with the outcome of her grievance. The letter appeared at pages 383-389. It said that all the typed notes and documents provided by the claimant had been considered.

140. Some allegations of management failings were upheld. They concerned the following:

- The delay in holding the investigation meeting with the claimant in relation to the May 2018 allegations until November 2018.
- The delay in sending out the notes of that investigation meeting until February 2019.
- The failure to provide specific allegations in writing in that enquiry but instead just quoting the relevant sections of the disciplinary policy.
- Unprofessional behaviour by Miss Allen in the Discharge Lounge on 20 December 2018.

141. The other allegations were not upheld. In particular Mrs Deaville concluded that

- The investigation into the May incident had not taken over six months to start. There had been progress before the claimant was interviewed.
- There had been evidence to support the concerns about conduct and behaviours on all three wards which resulted in the action plan.
- There had been reasonable grounds to pursue the disciplinary investigation into the May 2018 incident.
- There had been reasonable grounds to investigate the January 2019 allegations.
- There had been no threat of including further allegations in the investigation by Mrs Sankey, because previous incidents on ward AM2 had been referenced as background information only. However, the first draft of the Sankey investigation report in error included those matters as another allegation. That had been corrected without affecting the outcome.

142. Most importantly the claimant's allegations that she had been bullied, victimised, discriminated against or harassed for reasons connected with her race were rejected.

143. It was this letter which triggered the claimant's resignation (see below).

January 2019 Allegations – Investigation by Nicola Dale-Branton

144. The letter from Mrs Renwick of 16 January 2019 at page 168 informed the claimant that the investigation would be carried out by Nicola Dale-Branton, a Matron in the Division of Surgery. The purpose of the investigation was said to be to establish the facts of the case and whether there was sufficient evidence to suggest that there is a case to answer.

145. The letter also confirmed that the claimant was being transferred to the Outpatient Clinic in the ENT Department. That was described as a partial suspension on full pay to facilitate a fair and proper investigation, which would be reviewed on a regular basis.

146. Mrs Renwick wrote to Mrs Dale-Branton on 17 January 2019 (pages 171-172) to appoint her as investigating manager. She was asked to agree an initial plan with HR to achieve completion of the investigation within eight weeks, but to contact Mrs Renwick if that was not going to be possible for any reason.

147. A concern arose almost immediately about whether Mrs Dale-Branton had the time or capacity to conduct the investigation. Ms Norbury of HR emailed Mrs Renwick about that on 30 January (page 686). Mrs Renwick spoke to the appropriate manager for Mrs Dale-Branton, Julie Blan, and was assured that Mrs Dale-Branton did have capacity for the investigation.

148. On 15 February 2019 Mrs Dale-Branton wrote to the claimant inviting her to an interview on 27 February (pages 191-192). The allegations from the letter of 16 January were repeated.

149. That same day she wrote to four witnesses (Yusuf/Balon/Poulton/Milligan-Pawsey – pages 193-196) arranging interviews for that same day, 27 February. Ms Poulton provided a brief statement by email on 15 February 2019 (page 197). Mrs Milligan-Pawsey did so on 19 February (page 200). Ms Poulton reported that Ms Balon had been upset following her interaction with the claimant, and had said she felt threatened and bullied. Mrs Milligan-Pawsey said in her statement what Ms Balon had told her, and that Ms Balon said she felt intimidated by the claimant.

150. On 20 February 2019 (page 201) the claimant emailed Mrs Dale-Branton to say that she wanted the investigation to be conducted by a director from a different directorate and would not be attending the meeting on 27 February. Ms Norbury advised Mrs Dale-Branton that the claimant had agreed to reschedule the meeting for a date after 8 March, when it was envisaged that the Sankey investigation would have concluded. (That was delayed because Mrs Sankey was admitted to hospital – page 218).

151. Although the claimant was not interviewed on 27 February, Mrs Dale-Branton did interview Ms Balon (pages 210-211). She wrote to Ms Yusuf with a new date of 7 March (page 212). That interview in fact took place on 17 May 2019.

152. After a period of leave in March 2019 Mrs Dale-Branton wrote to the claimant on 5 April (pages 233-234) inviting her to an interview on 12 April. The same day

she wrote to Ms Yusuf and Ms Dunne to invite them to interviews on 12 April (pages 235-236).

153. It was around that time that the claimant was moved to the Renal Department because there was no work for her to do in ENT Outpatients.

154. The claimant was unable to attend the meeting on 12 April, and neither of the other planned interviews took place that day. Mrs Dale-Branton subsequently invited both the claimant and Ms Yusuf to separate interviews on 17 May 2019 (pages 247, 252-253).

155. The invitation to the claimant to be interviewed on 27 May was issued on 8 May, the same day as she presented her claim form in these proceedings, and the day after the outcome letter on the May 2018 allegation.

156. The interview of Ms Yusuf on 17 May was at 1.30pm. The notes appeared at pages 267-268. She reported that the patient had been distressed and the claimant said, "you can't speak to me like this". The claimant cut off the telephone call between the patient and her daughter. There had been no complaint from the patient or the daughter. She had thought the patient was rude to the claimant but said that "we remain professional". She confirmed that the claimant was still arguing during the discussion with relatives and patients. She said she had not seen that behaviour from the claimant before and that the claimant had been good to her.

157. The notes from the meeting with the claimant appeared at pages 264-266. They were sent to the claimant on 8 October (page 309) and the claimant provided amendments on 21 October (pages 322-328). When asked about the requirement for no patient contact the claimant said that serious allegations had been made on the Manchester Ward which had resulted in that restriction. She provided her two statements responding to the two allegations (255-261), accompanied by the CH email and a note on procedures. She also provided a list of questions (pages 262-263).

158. The claimant also provided an electronic copy of the email from CH. The notes recorded the claimant saying that she had behaved as that statement had indicated.

159. In the interview the claimant went on to give her account of what had happened. She said had cut the patient off from talking to her daughter because she heard the patient use the Arabic word for slave, "abeed". In relation to not taking any further Discharge Lounge patients, the claimant said she had been joking when she said that she would cut off the telephone. She gave a list of the people she said should be interviewed.

160. During that interview the claimant made clear that she thought the incident with Ms Balon had taken place on 7 January, not 11 January. This prompted an exchange of emails on 22 and 23 May (pages 710-711) between Ms Shields and Mrs Renwick. Mrs Dale-Branton was copied into them. Ms Shields asked for clarity as to the date of the telephone incident. The response from Mrs Renwick said as follows:

> **"Dear Clare**
>
> **Please see attached statements. There were in fact two incidents, one on 11 Jan that we included in the investigation and one on 7 January that, having reviewed the comments and detail, we decided not to use in the investigation.**
>
> **I hope this helps."**

161. In her oral evidence Mrs Renwick was unable to recall the detail of this or the statements which were attached to the email. She left the Trust in June 2019 and had not had access to the documents when preparing her statement. To the best of her recollection she was talking about a completely unrelated incident on 7 January 2019 which never formed part of the investigation. That was the understanding of Mrs Dale-Branton too.

162. Once Mrs Renwick left the Trust she was replaced by Miss Taylor as Commissioning Manager.

163. The investigation continued during June and July. Mrs Dale-Branton interviewed Ms Dunne on 3 July (pages 285-286).

164. Mrs Dale-Branton wrote to a number of witnesses inviting them to interviews which they did not attend. For example, she invited Mrs Milligan-Pawsey to three separate interview dates in August and September. Mrs Dale-Branton had to involve the matron responsible for the Discharge Lounge because of the difficulty in getting staff there to attend interviews. Eventually Mrs Dale-Branton was able to interview Mrs Milligan-Pawsey on 26 September (pages 305-306) and Ms Bigby on the same date (pages 307-308).

165. Having completed her interviews Mrs Dale-Branton sent out to those interviewed the notes from their meetings. Mrs Dale-Branton chased up the notes from four witnesses on 24 October (pages 329-332). She had to do the same again on 13 November 2019 (pages 391-394).

166. The claimant was sent the notes from 17 May on 8 October (page 309). In her email correcting the record (page 322) she said:

> **"I would like it included that during the conversation regarding the need to provide witness statements, on this occasion [Clare Shields of HR] agreed to accept the statement from [CH] as a true and accurate account of the alleged incident on 11 January 2019."**

167. On 15 November 2019 Mrs Dale-Branton emailed the claimant to say that she did not accept the amendments to the notes suggested by the claimant were accurate. The amendments would be attached to the report as a separate document. Her email also included the following about the statement from CH:

> **"One further point is that at no time during the interview on 17 May 2019 was it stated that the additional witness statement you submitted from CH was a true and accurate record of events. The only person who can state this is the author of the statement. As requested we have included this statement in the appendices of the investigation report."**

168. In her oral evidence Mrs Dale-Branton said that she had been advised by HR that the CH statement had to be discounted. It was in the form of an email which

came from the claimant's own email address, purporting to forward an email from CH. She said that the claimant was told that the statement could not be used for that reason. The claimant disputed this. There was no record of that discussion in the notes of the meeting. We will return to that issue in our conclusions.

169. The investigation report was finalised on 19 November 2019. That was the day the claimant resigned. She had not seen the report when she resigned.

170. The report appeared at pages 396-409. The notes of interviews and other documents considered were appended to it.

171. On the first allegation about arguing with a vulnerable patient and cutting off the call between the patient and her daughter, the report summarised the accounts given by the claimant and others. The conclusion was that there was sufficient evidence to support the allegation that the claimant had been rude/aggressive in arguing with the patient, but it the fact that the patient had used a racially derogatory phrase in Arabic about the claimant was to be taken into account.

172. The report also made reference to the final line of allegation one as it appeared in the letter from Mrs Renwick of 16 January 2019, which was that:

> **"This follows a pattern of inappropriate behaviour towards elderly and vulnerable patients."**

173. Mrs Dale-Branton said in her report that:

> **"The investigation team were unable to find sufficient information regarding the third element of the allegation which was contained in the commissioning letter. This referred to the alleged pattern of inappropriate behaviour towards elderly and vulnerable patients as no documentation was provided; also they have noted [**the claimant's**] objections to this being included in the allegations given to the investigation team."**

174. In relation to the second allegation about the discussion with Ms Balon, the report noted that the claimant maintained this happened on 7 January, not 11 January, and that the claimant admitted making the remark but said she was joking. It also recorded what Ms Balon said about feeling bullied/threatened and undermined. Her subsequent distress reported to Ms Poulton and Mrs Milligan-Pawsey was recorded. The conclusion was that there was evidence to support this allegation so it should go forward to a disciplinary panel.

<u>Resignation</u>

175. The position the claimant was in when she decided to resign in November 2019 was as follows:

- Following a number of allegations made against her, which she disputed, which had been handled informally, she had been given an action plan and then moved from ward AM2 to the Manchester Ward.

- The allegation of inappropriate behaviour towards a patient with dementia on 27 May 2018 had been investigated; she had not been interviewed until November 2018 and the outcome of the investigation had not been communicated to her until 7 May 2019. Although she was

not to face disciplinary charges, there were concerns to be discussed. That outcome had then been reiterated in a further letter from Mrs Rothwell of 29 October 2019 which said that the earlier letter had been based upon an incorrect version of the investigation report, but the decision stayed the same.

- The claimant's grievance of 29 December 2018 was being investigated by Mrs Deaville and the claimant had just received the outcome letter of 4 November 2019 which upheld some relatively minor aspects of her complaints but found that there been no discriminatory treatment of her.

- Having been moved from the Manchester Ward to the Discharge Lounge in June 2018, and having lodged her grievance in December 2018, the claimant had been under investigation since January for the two allegations in the Discharge Lounge. She did not know what the outcome of that investigation would be, some ten months after it began. In the meantime she had been restricted from patient contact and moved to the ENT Department and then to the Renal Ward, before going off sick in June 2019.

- The claimant had received the email of 15 November from Mrs Dale-Branton saying that her amendments to the notes of interview from 17 May were not accepted.

176. The claimant's resignation letter was dated 19 November 2019 and appeared at page 390. It took effect on 19 December 2019. The claimant said:

> **"I feel that I have no choice but to resign in light of my recent experiences regarding:**
>
> - **A fundamental breach of the implied terms of my contract of employment as defined by section 95(1)(c) of the Employment Rights Act 1996.**
>
> - **A breach of trust and confidence between myself and Manchester NHS Foundation Trust.**
>
> **I consider these to be fundamental and unreasonable breaches of contract on behalf of my employer."**

177. The claimant did not give any other reasons for resigning at that time.

178. After she provided her resignation she decided not to appeal the grievance outcome from Mrs Deaville.

179. On 28 November Miss Taylor wrote to the claimant to say that the investigation report from Mrs Dale-Branton had been considered and that there would be a disciplinary hearing on the two allegations. The wording of allegation one included the final sentence about the "pattern of inappropriate behaviour towards elderly and vulnerable patients". That letter appeared at pages 432-433.

180. However, on 10 January 2020 (page 436) Miss Taylor wrote again to say that as the claimant was no longer an employee of the Trust, the complaint was closed.

181. On 10 December the claimant attended an exit interview with Anya Dykins recorded in a brief form at pages 434-435. In answer to the question why she had decided to leave, the following appeared in note form:

> "Ongoing disputes, grievances and complaint. Feels unable to continue employment due to ongoing and longstanding issues."

Submissions

182. The Tribunal heard oral submissions on 28 September 2022. Ms Quigley had prepared a detailed written submission running to 38 pages and the claimant had also prepared a written submission which ran to five pages. The Tribunal read the written submissions before brief oral submissions.

183. Reference can be made to those written submissions if necessary, and what follows below is a brief summary of the main points made on each side. We will refer to specific points of significance made by either side in our discussions and conclusions section below.

Respondent's Submissions

184. Ms Quigley invited us to conclude that the complaints made about the claimant in the first period were genuine concerns which were dealt with in an entirely normal manner by Miss Croker and Mrs Baron. None of it had been made up or taken out of proportion, and indeed significant forbearance had been shown towards the claimant. It was notable that Miss Bryan did not support the claimant on this part of the case even though she had acted as a confidante. The claimant's repeated assertions that there was "no evidence" overlooked the fact that verbal accounts given in interview did amount to evidence for internal investigation purposes.

185. More generally it was suggested that rather than there having been any element of stereotyping of the claimant as a black woman, she lacked any awareness of the impact of her behaviour on others and it was her behaviour which accounted for the succession of concerns being raised.

186. In relation to the incident on 27 May 2018, the claimant knew all along which incident and which patient it was and the suggestion that she did not know the details of the allegations was not significant. There had been no failure to follow procedure: it had been identified as a potential disciplinary matter, and an independent investigation ensued. There were some failings in relation to the length of time it took and the failure to set out the allegations in the invitation to the interview, but they were relatively minor matters.

187. As for the grievance, there were reasons for delay which were unrelated to race but otherwise it was handled properly. There was a full investigation. There had been no predetermination of the outcome.

188. Overall Ms Quigley invited the Tribunal to conclude that there had been no unwanted conduct related to race, and that the claimant's race had played no part whatsoever in the way she had been treated. In particular there was no evidence to support the suggestion there had been any stereotyping of the claimant, and indeed

it was noteworthy that although the claimant had complained of "discrimination" during this period she had not used the term "race" until into 2019.

189. As to the victimisation complaint, this rested solely on causation. There was a problem for the claimant in that some of those responsible for decisions did not know of her grievance, and even when they did the fact there had been a grievance about discrimination had no impact on the way matters were handled.

190. On time limits Ms Quigley submitted that there was no continuing act, and an absence of any evidence on which the Tribunal could find it just and equitable to extend time.

191. In relation to constructive dismissal, Ms Quigley submitted that there was no breach of the implied term of trust and confidence. There was reasonable and proper cause for each matter on which the claimant relied. In particular, accepting the evidence of others where it conflicted with that of the claimant did not amount to a breach of trust and confidence, and evidence of mitigation was not ignored. Ms Quigley accepted, however, that if there had been a fundamental breach of contract the claimant had not affirmed the contract and it had caused her to resign.

Claimant's Submissions

192. In her written submission the claimant emphasised some matters which had not formally been put in evidence, including the NHS Constitution, the McPherson report and some data about the ethnicity of the NHS workforce. These were not matters which she had mentioned in her witness statement and nor had any of the witnesses been taken to them. Even so, as they were publicly-available material of background relevance only, we did have regard to them.

193. On the specific issues, the claimant drew attention to the threats of assault and racist verbal abuse by patients about which we had heard, and suggested that managers failed to appreciate the significance of this for a black member of staff. She emphasised the lack of incident reporting and the lack of care for her wellbeing. The succession of issues raised about her by colleagues and managers amounted to harassment related to race, or alternatively direct race discrimination. In particular the action plan would have meant that her behaviour was being monitored every minute of every shift.

194. In her oral submission the claimant made the following points:

- She drew attention to inconsistencies in the accounts given by Miss Croker at various stages, which meant that she was not a credible witness.

- It was a poor attempt by the respondent to place so much emphasis on the evidence of Miss Bryan just because Miss Bryan was black.

- On occasion the action she had taken had been authorised by managers, such as when Miss Croker authorised her to speak to the relatives of the deceased patient in December 2017.

- There was a suspicious similarity in the nature of the allegations against her, which were always that she was being arrogant and abusive towards a patient or staff. The claimant observed that the allegations stopped when she was removed from patient contact even though she was still working with staff, and suggested that this undermined the suggestion that it was her behaviour which was the issue.

- She had no choice but to resign when she did. The fact she was off sick was the fault of the way she had been treated. There had been three investigations ongoing at the same time because of the delay in each case. Even though there had been a decision not to pursue discipline against her by Mrs Rothwell, that was still on the basis that they believed she was guilty of the allegations.

- There was a continuing course of discriminatory conduct which meant that all the allegations were in time.

- The grievance investigation by Mrs Deaville had not been done fairly because the questions asked had been constructed to elicit the response needed to justify the action managers wanted to take. It was a biased investigation.

195. In her closing remarks the claimant explained that all she had wanted was for someone to listen to what she had said. There would have been no Employment Tribunal claim had the organisation followed its own policies and procedures which were in place to protect and guide employees and patients. She should have been listened to at the time.

Discussion and Conclusions – Introduction

196. We approached the List of Issues by dealing with the factual allegations one by one and deciding in relation to each factual allegation if it amounted to harassment related to race or direct race discrimination. We then moved to the victimisation allegations and finally the allegation that the claimant had been constructively dismissed.

197. Before considering the specific factual allegations of harassment or direct discrimination, however, we needed to make some findings about two aspects of the narrative which the claimant maintained supported her contention that her race was a factor in how she had been treated.

<u>Moving BAME Staff Between Wards</u>

198. The first preliminary matter was the suggestion in paragraph 21 of the claimant's witness statement that "Mrs Baron only ever asked the BAME support staff to move wards" to help out on an ad hoc basis. We accepted that this was the claimant's genuine perception, and that another BAME colleague had mentioned this to Miss Bryan.

199. Miss Bryan confirmed that she was looking to see if there was evidence to support this. In her interview in February 2019 (pages 181-183) she said that three of the six support workers were BAME, and that the ones moved were in the BAME

group. She also said that she had not seen a reason why certain people were moved, such as a skills mix.

200. In cross examination Mrs Baron said that the decision on who to move on an ad hoc basis was based on how long they had been on the ward and the skills they had. Those with less experience and fewer skills were more likely to be moved to a different ward so that the more experienced and skilled members of staff were maintained in her ward. She said that from time to time staff raised concern about unfair allocation of moves in this way and when that happened a book would be kept for a while to keep a record of it. Her position was that there was no race discrimination in how this was decided.

201. The evidential basis before us was very limited. We did not have, for example, any records showing which staff had been moved at which times, their ethnicity, their length of service and their experience. The period to which Miss Bryan was referring when interviewed was not apparent.

202. Putting that together, we concluded that within this small pool of six support workers there was a correlation between being BAME and being asked to move, but that could equally well have been due to length of service and experience, and did not support the allegation that Mrs Baron had harassed the claimant or subjected her to direct discrimination.

Race Discrimination by Patients or Relatives

203. The second preliminary matter was the handling of incidents where the claimant was the victim of race discrimination by patients or relatives. There were three such occasions in evidence before us.

204. The first was when the claimant was mistaken for another black nurse who had dealt with the patient the previous day. That was not relaied upon by the claimant as a significant matter.

205. The other two, however, were much more significant. The first was the hairbrush incident on 8 April 2018 when the patient made a comment about the claimant having "*big brown eyes and [a] big brown mouth*". Although Miss Croker disputed that this happened in front of her, as the claimant maintained, the words in question were contained in the statement which the claimant wrote at the time. That was followed by a threat of assault from the patient's son that same evening.

206. The second was the incident in the Discharge Lounge on 11 January 2019 when the claimant was called a "slave" in Arabic by a patient, who used the same term in the telephone call with her daughter which the claimant cut off. It was clear from the account of that incident that the claimant was the victim of racist abuse.

207. We noted that the Equality and Diversity Policy contained a number of provisions which made clear that discrimination by patients or relatives would be taken seriously.

- It referred to "third party harassment" on page 442.

- The passage at the top of page 445 said that incidents of racial harassment, including verbal abuse, would be dealt with under the Dignity at Work policy, which defined a racist incident as any incident perceived to be racist by the victim or any other person.

- Section 10 of the policy (page 448) was concerned with handling complaints of discrimination. Paragraph 10.1 said the Trust would investigate all discrimination complaints, even if the discriminator was service user or relative. It said:

  "Any employee who has been discriminated against can expect action to be taken on their behalf and support received from the Trust."

208. Despite those provisions it was clear that in practice there was little or no effort taken to provide support to the claimant when she reported those two instances of verbal racial harassment. There was no incident report completed or any steps taken proactively to offer her support, although there was a recognition in Mrs Dale-Branton's report in relation to the second incident that the racist abuse the claimant had received should be taken into account.

209. Overall, we considered that the claimant was right to feel that there was a lack of support for her in relation to occasions when she reported racist abuse from patients. It seemed to be the position that managers regarded such abuse as an unfortunate feature of the work but that, as professionals, staff had to show resilience and put up with those matters. Management action would not happen in practice unless a complaint under the Dignity at Work policy was made. We concluded that there was a lack of proactive management support if no complaint was made. We understood why the claimant emphasised this matter in her closing submissions and we will return below to the significance of this in relation to the allegations with which we were dealing.

Discussion and Conclusions – Harassment and Direct Discrimination

210. Having addressed those preliminary matters, we turned to the factual allegations contained in the List of Issues. For each allegation we will review the factual position, making findings on any disputed matters, then decide whether it amounted to harassment related to race, or to direct race discrimination.

(1) <u>Between October 2017 and April 2018 Samantha Croker raised spurious complaints about the claimant</u>

211. The claimant accepted in oral evidence that in fact this period began in November 2017 when Mrs Baron returned to work. She relied on the following occasions:

- Being accused by Ms Croker of telling a patient's family that the patient was not ill.

- An allegation in November 2017 that she was shouting, swearing and/or arguing with patients and staff on the ward.

- A further four occasions when such allegations were raised during November and December 2017.

- The incident on 28 December 2017 with Halina when it was suggested that she had hastened the death of a patient by taking too long to perform personal care duties.

- The hairbrush incident on 8 April 2018.

212. The dispute between the parties was in some ways at the heart of this case. The claimant maintained that these allegations were not justified and that they arose because of a stereotypical view of black women as being loud and aggressive. She maintained that this represented a consistent misinterpretation of the position by managers who were acting in a discriminatory way. She emphasised that these allegations stopped when she moved wards and no longer had patient contact, even though she continued to have contact with members of staff in that period and the allegations were never just about arguing with patients.

213. The respondent's case was that the explanation for these repeated issues was simply the claimant's own behaviour. Ms Quigley invited us to conclude that the claimant lacked insight into how her behaviour came across to colleagues and patients, and that this was the source of the recurrence of these incidents. The respondent's case was that there was no race discrimination or racial element in the way these matters were handled by managers, and exactly the same would have been done for a white member of staff behaving in the same way.

214. In evaluating this allegation, we took into account our finding (paragraph 209 above) that the respondent was not as proactive as it ought to have been in supporting the claimant when she reported racist abuse from patients.

215. We also concluded that when Miss Croker was interviewed in February 2019 (page 208) she was probably exaggerating by saying that there was a problem with the claimant on every shift. Beyond that, the claimant suggested that Miss Croker was not a credible witness in our hearing because she had given different accounts in her interviews about the time the patient died whilst the claimant and Halina were providing personal care. That incident happened at the end of December 2017. Miss Croker was interviewed about it by Sarah Sankey in October 2018 (page 130) and by Marnie Deaville in February 2019 (page 208) and again in September 2019 (page 304). We considered the accounts given and concluded that they did not show any surprising variation in the basic factual account. Miss Croker was consistent in saying that the matter was reported to her by Halina, and that Halina told her the claimant had told the family that death might have been hastened when she was turning a patient. Given that she was interviewed for the first time about this matter some ten months after it happened, and then again a further three months and 11 months later, it was hardly surprising that her account was not the same on every occasion. Indeed, Ms Croker made that point herself at the conclusion of the final interview on page 304. We declined to view any inconsistencies as showing any lack of credibility on her part.

216. We also took into account that it was not only Miss Croker reporting inappropriate behaviour by the claimant: a number of other colleagues made reports

of that behaviour from time to time, even though in general such matters were not documented in writing.

217. Importantly, we did not have any evidence of other black members of staff being regularly taken to task by management in the same way, or of any white members of staff behaving in the same way as the claimant but not being taken to task by management. We only had evidence about how the claimant was treated. We declined to infer from that evidence, even with the background material to which the claimant drew our attention in submissions (paragraph 192 above), that there was racist stereotyping of the claimant as a person more likely to behave aggressively because she was black. That proposition was not supported by the evidence before us. More likely, we concluded, was that the claimant's own behaviour had been inappropriate from time to time. We concluded that it was the claimant's own behaviour which was the cause of the reports which Miss Croker repeatedly made to Mrs Baron in the period with which this allegation was concerned.

218. Applying the legal framework, we concluded that there was no harassment related to race. Although Miss Croker's reports to Mrs Baron were unwanted conduct, they were not related to the claimant's race. They were related only to her behaviour.

219. Nor was this direct race discrimination. The claimant was not being treated less favourably because of race, consciously or subconsciously. The evidence we had did not shift the burden of proof to the respondent, but even if it had shifted the burden we would have concluded that the respondent had shown that the reason for the treatment was entirely the way the claimant was behaving. Accordingly this allegation of direct discrimination failed as well.

(2) Between October 2017 and April 2018 Ruth Baron told the claimant that disciplinary notes would be put on her file without any procedure or investigation whatsoever

220. The wording of this paragraph in the List of Issues was derived from the claim form itself (page 14) which made this allegation in these terms. It was also repeated in these terms in paragraph 11 of the claimant's witness statement.

221. However, the claimant's witness statement referred to her earlier index of events at pages C1-C2, which contained a more detailed record of her interactions with Mrs Baron in this period. Those more detailed records did not support the allegation as drawn. The claimant alleged that she was told in November 2017 to take the meeting as a first warning, and that if it happened again she would receive a disciplinary. The same was said on the further four occasions in the month or so that followed. According to those notes, it was only following the hairbrush incident in April 2018 that the claimant was told she would definitely receive a disciplinary action.

222. That was consistent with Mrs Baron's evidence that she would not have told the claimant that a disciplinary note would be placed on file, and with the fact that no such notes existed.

223. We found as a fact that Mrs Baron did not say that a disciplinary note would be placed on file on each occasion. We accepted as broadly accurate the claimant's own record at pages C1 onwards, which is that on each occasion she was told that further conduct of that kind might result in disciplinary action.

224. However, the substantive basis for the allegation was that the claimant was placed in the invidious position of being assumed to have acted wrongly, because Mrs Baron accepted what she was told by Miss Croker, but without being given the chance to clear her name through a proper investigation. We could understand why the claimant made that allegation, and indeed Mrs Baron did assume that the matters being raised with her by Miss Croker were well-founded.

225. We noted, of course, that Mrs Baron did not pursue these matters by way of disciplinary action. Following the incident with Halina while Mrs Baron was on leave at the end of December 2017, Mrs Baron sought advice from HR (page 655). The advice from HR was to "scope this case" and see whether it warranted a formal investigation. There was a further request for HR advice about inappropriate language later that month. After the April hairbrush incident, the decision was taken to proceed with an action plan. None of this amounted to disciplinary action. The claimant did not face any disciplinary investigation until after the incident on 27 May 2018.

226. We concluded that Mrs Baron was dealing with the matter by proceeding on the basis that the concerns raised were well-founded, and that the claimant was behaving inappropriately, but that she only warned the claimant about the possibility of future disciplinary action.

227. Applying the legal test for harassment we were satisfied that this was unwanted conduct but we were satisfied that it was not related to race. The approach taken by Mrs Baron of believing what was reported to her by her Band 6 colleague about a Band 2 nursing assistant would have been exactly the same whatever the race of the Band 2 nursing assistant. Her approach of dealing with it by warning the claimant that further conduct of that kind could result in disciplinary action was also untainted by race. Although we could see the force of the claimant's argument that she was being treated as if guilty without a formal procedure to enable her to clear her name, we were satisfied that this was in no way related to her race.

228. Nor was there any evidence from which we could conclude that the claimant's race had any material influence on this treatment. We rejected the argument based on racial stereotyping for the reasons set out above.

229. The complaints of harassment and direct discrimination on this matter failed.

(3) <u>A complaint was made about the 27 May 2018 incident involving Mr H</u>

230. From the evidence before us it appeared that the complaint about the incident was raised by a colleague, Ms Joshua. In the bundle at page 110 appeared an email Ms Joshua sent to the claimant two days later recording that the claimant had apologised to Mr H and his daughter about her behaviour (shouting at the patient).

231. When interviewed on 16 October 2018 (page 125) Ms Joshua said that she had heard the shouting from the other end of the ward, although she had not known

who was shouting at the time, and that she had never heard anyone shout so loudly before across the length of that ward.

232. Miss Bryan was notified of this incident using the Trust's internal communications system, and although she did not specify the staff nurse in question, we concluded that it was likely to have been Ms Joshua. It was Miss Bryan who escalated the matter to Miss Allen because of concerns about patient safety and recommended that the claimant be moved. It appeared that the Ward Manager, Amanda Maelor, as she said when interviewed (page 118), heard of the incident from staff after it happened but believed that Miss Bryan had been seeking statements. The claimant confirmed in evidence that she was not accusing Miss Bryan or Ms Maelor of discriminating against her.

233. We were satisfied that the fact the complaint was made was in no way related to or because of the claimant's race. Ms Joshua heard someone shouting loudly at the other end of the ward, and after going to see what had happened formed the view that the claimant had been shouting at Mr H, and reported it. This was neither harassment related to race nor direct race discrimination.

(4) <u>"That complaint was not investigated properly or without delay…"</u>

234. This allegation in the List of Issues had seven sub-paragraphs but we will deal with them together. Broadly, the first six sub-allegations related to the inception of the investigation, and the last one related to the delay before the claimant was interviewed.

235. As set out in the summary of facts above, the claimant did not know there would be an investigation until 1 June when Miss Bryan rang her and said she should not come into work but there would be a meeting on 5 June. It was common ground that the claimant was not given any details. Miss Bryan's explanation was that such matters were better discussed face to face.

236. The claimant did not have an opportunity to discuss this with the Ward Manager, Amanda Maelor, before being informed that she had to attend the meeting on 5 June. However, that was simply because Amanda Maelor was not on duty at the time of the incident and by the time she returned to duty a decision had been taken by Miss Allen to proceed with an investigation. The matter had therefore already been escalated to a level above the Ward Manager by the time she was aware of it.

237. The meeting on 5 June was with Miss Allen. There is a dispute about whether the claimant was given details of the allegation. Miss Allen said the claimant was told the allegation was that she had shouted at a vulnerable patient with cognitive impairment and that this had been witnessed by his daughter who had complained to the Ward Manager. The claimant did not accept that the allegation was put in those clear terms.

238. There were no notes kept by either side of the telephone call or the meeting on 5 June, and as set out below the letter issued later that month did not specify what the allegations were. However, we noted what Mr Cruickshank said when interviewed by Mrs Deaville in February 2019 at pages 179-180. He said that the specifics of the allegations were not known by 5 June, and that the claimant was told

at the meeting it was regarding a patient with dementia and that her behaviour had been witnessed by the patient's daughter. He did not say the claimant was told that it was alleged she had been shouting at the patient. He also said that because of the lack of specific details the letter of 5 June simply identified where under the policy the allegations would sit. Miss Allen was new to the Trust and relied on his advice about how to proceed.

239. We were satisfied on the balance of probabilities that the claimant had not been told exactly what it is she was alleged to have done wrong. The email from Ms Joshua at page 110 referring to her having shouted at a patient was sent to her work email address, but she was not working at the time it was sent and did not return to work prior to the 5 June meeting, following which she remained temporarily suspended before resuming work on the Discharge Lounge. Accordingly we concluded that the claimant was right to say that the specific allegation of shouting at Mr H was not put to her in the discussions in early June.

240. However, it was clear that the claimant knew which incident was the subject of the investigation. The incident occurred on Sunday 27 May 2018, and she said in response to a question from the Tribunal that she had been told there was an issue about that incident that same day. That explained why on 28 May the claimant had prepared a statement about the event (pages 107-109). We were satisfied that in the telephone call on 1 June and at the meeting on 5 June the claimant knew it was about the incident with Mr H on 27 May.

241. We accepted the claimant's evidence that she was told at the meeting on 5 June that details would be contained in a letter to be sent out shortly. That was the letter dated 5 June 2018 at pages 111-112, which was not actually posted until 21 June. The letter was not as clear as it should have been. Firstly, it failed to confirm the incident in question and say what it was alleged the claimant had done. The allegations were simply quotes of passages from the disciplinary procedure. That reinforced the claimant's understandable sense that she did not really know what she was being accused of in relation to the incident. Secondly, the letter did not deal with the temporary suspension and the decision to move her to the Discharge Lounge. The delay in posting it was said by Miss Allen to be because her PA was off sick at the time. The claimant accepted in cross examination that there was nothing to indicate that the delay was due to her race.

242. There was no evidence from which we could conclude that this unwanted conduct was related to race, or that it amounted to less favourable treatment because of race than the claimant would have received had she been white. These flaws were not due in any way to the claimant being black. The allegations of harassment and direct discrimination on these matters failed.

243. That left the delay before the claimant was interviewed. Mrs Sankey was asked about this in her evidence. She explained that it was a joint decision between herself and Mr Cruickshank. It was her first investigation as a relatively new lead nurse. She accepted in cross examination that it was a mistake not to have informed the claimant that she would not be interviewed until all the other interviews had been carried out. That was particularly unfortunate in this case, because the lack of detail about the precise allegations meant that the claimant was left in the dark about what she was accused of for a period of several months.

244. The other factor contributing to the delay was workload. There was a CQC inspection in October 2018 which caused a significant amount of work in the period leading up to it, and during the summer both Mr Cruickshank and Mrs Sankey were on leave for two weeks at different times.

245. Regrettable as it was that the delay was not explained to the claimant, however, we were satisfied that there was no evidence from which we could conclude that it was unwanted conduct related to race, or less favourable treatment because of race than if the claimant had been white. Indeed, Mrs Sankey had not met the claimant prior to their interview and therefore it was not even apparent that Mrs Sankey knew that the claimant was black.

246. There was one other aspect of this investigation which was pursued by the claimant even though it did not expressly appear in the List of Issues. It was the inclusion in the investigation of events which occurred on ward AM2 prior to the move to the Manchester Ward. The claimant said in paragraph 45 of her witness statement that at the meeting on 5 June Miss Allen told her that because of the nature and seriousness of the allegations about the recent incident, any previous complaints made against her from any other ward would have to be included. We were satisfied that this was said at this meeting as it was consistent with the formulation of the allegations in the letter of the same date, and the fact that Mrs Sankey understood that events on Ward AM2 were being investigated. Mrs Sankey told us in evidence that she had been advised to look at those matters as background or context, yet they formed a separate allegation of misconduct (allegation 3). From the outset, therefore, this was an investigation not only into the incident with Mr H on 27 May 2018, but also into the earlier incidents on ward AM2. That was simply not apparent to the claimant from the correspondence, and the fact that there was confusion amongst the Trust's own managers about whether it was background or a discrete allegation reflected poorly on the way in which this investigation was set up. But it did not amount to harassment or direct discrimination.

(5) <u>The claimant's grievance of 29 December 2018 was not handled properly in the way it was addressed, the way it was investigated, the time taken to conclude it, and the outcome</u>

247. The criticisms made of the grievance investigation by the claimant can be divided into three main categories: the length of time it took, the way the interviews were conducted, and the outcome.

<u>Delay</u>

248. The grievance was lodged at the end of December 2018 and the outcome letter was dated 4 November 2019. On the face of it 11 months is a lengthy period when the Dignity and Respect at Work Policy said (page 509) that an investigation would be conducted in line with the Disciplinary Policy, which had a KPI of concluding an investigation within eight weeks.

249. It is clear that the investigation began in a prompt fashion. The claimant was interviewed on 21 January to make sure that the allegations were clear, and those interview notes were dispatched to the claimant by the end of that month. Further witness interviews were conducted in February and early March.

250. The claimant provided further information about the investigation into the January 2019 incident when she wrote to the Chief Executive in April 2019. This prompted Mrs Deaville to contact witnesses about that matter, who were interviewed in April and May. The claimant was interviewed by Mrs Deaville a second time on 20 May 2019. The concerns the claimant had about the involvement of Mrs Renwick and Miss Allen were noted and actioned.

251. In June the claimant supplied Mrs Deaville with further information, being the outcome letter from Mrs Rothwell of 7 May 2019 about the May 2018 enquiry.

252. Matters were also delayed because Mrs Deaville had to leave the country to attend to a family matter, and because of annual leave.

253. By mid-August she had concluded her enquiry and Ms Norbury emailed the claimant, who said she would prefer a written outcome. However, at the end of August Mrs Deaville contacted the claimant about the additional information and that led to an exchange of emails on 3 September 2019 where the claimant said she wanted additional information included. Mrs Deaville said she would write again within seven days, but in fact it took longer. There were further interviews in September and again Mrs Deaville promised to give the claimant an outcome in the week of 21 October, a deadline which she missed.

254. Her report was eventually finalised on 29 October and the outcome letter dated 4 November 2019.

255. We were satisfied that there were some delays in the later part of the investigation, after a quick start, but these were attributable to a range of factors. They included Mrs Deaville being absent on leave, and the fact the claimant raised additional information during the process of the investigation. As Mrs Deaville explained in her witness statement, it was also due to a desire to be thorough which led to her reinterviewing some of the witnesses having had legal advice. Indeed, we noted that Mrs Deaville was not impeded in her investigation by the fact the claimant raised additional matters, since rather than choosing not to allow new material to be introduced she took that on board and sought to investigate it as thoroughly as the original allegations. She explained in her evidence how she had to chase up witnesses to get them to come to interviews, sometimes by physically going to where they worked to speak to them, and how she had to pursue them to get the notes returned. We were satisfied that the investigation was conducted thoroughly and diligently, and that the length of time it took was not attributable to any lack of desire on her part to get to the bottom of the allegations made by the claimant.

Conduct of Interviews

256. The second strand concerned the suggestion that witnesses had been interviewed in ways that were designed to lead to the outcome of the rejecting the claimant's complaints. The claimant cross examined Mrs Deaville about two questions in particular from the interview of Ms Milligan.

257. The first on page 213 was a question in these terms:

> **"Did you get the impression that they were picking on Angela, or was it more Angela than the other staff?"**

258. That question produced a response saying that it was more Angela than the others, it was like the claimant would "load the gun", and a lot of her issues were always around racism.

259. The second question on page 214 was put in the following terms:

> **"To clarify, at any point, do you think any patients or staff were racist or picking on Angela?"**

260. That produced the response that if anything it was the other way around.

261. We considered the answers given by Mrs Deaville to these points carefully. She explained that the notes of these interviews were not verbatim, but she maintained that those questions were balanced. Having considered them, we agreed. They gave the possibility of two answers. Each of them contained the alternative, and the alternative put first was the one which favoured the claimant. We rejected the contention that these interviews were conducted in a way that was designed to achieve a pre-determined outcome of rejecting the claimant's grievance.

Outcome

262. The third element was the outcome itself. The overarching allegation of discriminatory behaviour, bullying or harassment was rejected, but a number of allegations were upheld as set out above. Having considered the grievance report and the outcome letter, and the evidence of Mrs Deaville, we were satisfied that that represented a genuine good faith conclusion based on the evidence gathered during the investigation process.

Harassment/Discrimination?

263. We then turned to the legal issues of whether any of these three strands amounted to harassment related to race, or in the alternative to less favourable treatment because of race than the claimant would have received had she been white.

264. This allegation faced an immediate problem which is that in her cross examination the claimant readily confirmed that she was not making any allegation of discriminatory treatment by Mrs Deaville personally. Even when it was explained to her that the Equality Act required us to consider the mental processes, conscious or subconscious, of the decision maker, the claimant still chose not to suggest to Mrs Deaville that her actions had been influenced by race in any way. Nor, properly, did she put that point to Mrs Deaville in cross examining her later in our hearing.

265. Having considered all the evidence we were satisfied that there was no unwanted conduct related to race, and that the claimant's race had no material influence on how Mrs Deaville dealt with the grievance. It was a complicated matter which required careful handling, and the fact that Mrs Deaville undertook a thorough investigation was evidenced by her decision to reinterview certain witnesses towards the end. Of course, we recognised that from the claimant's perspective this was yet another protracted investigation, but we were satisfied that the delay, the way interviews were conducted, and the outcome in no way related to race or were

because of her race. The allegations of harassment related to race and direct discrimination therefore failed.

266. This meant that none of the complaints of harassment or direct race discrimination encompassed in the factual allegations in paragraph 1 of the list of Issues were well founded

Discussion and Conclusions – Victimisation

267. We turned to paragraph 6 of the List of Issues which was about the alleged detriments resulting from the incidents in January 2019, which were put solely as victimisation complaints. It was accepted that the grievance was a protected act, so our focus was on whether there had been a detriment to the claimant, and on causation.

268. We reviewed the way in which this matter developed.

269. It was clear that allegations were made by her colleagues, Ms Yusuf and Ms Balon about inappropriate behaviour on the part of the claimant. The matter was escalated, and the claimant was informed within a few days by the letter of 16 January 2019 of the allegations that she was under a disciplinary investigation. Unlike the previous disciplinary investigation, the allegations were clearly specified in the letter. The claimant did have a concern that at the end of the first allegation there was a reference to an alleged pattern of inappropriate behaviour, a concern made clear in her statement in response at page 255.

270. It was clear that the claimant was subjected to a detriment when the complaints were raised. The allegation that the complaints were not addressed properly, however, was more difficult for the claimant. The decision to remove her from the Discharge Lounge, where there was limited patient contact, to the ENT department where there would be none, could reasonably be seen as a detriment. This was described as a “partial suspension”.

271. As for the investigation Mrs Dale-Branton conducted, however, the allegation that it was significantly delayed was not entirely borne out by a consideration of the sequence of events. The claimant was offered an early interview date on 27 February, but she chose not to attend because she still had a concern about whether Sara Renwick would be the reviewing officer. There was then an agreement between the claimant, her union representative and Ms Norbury that she would not be interviewed by Mrs Dale-Branton until she had the outcome from the investigation conducted by Mrs Sankey. That outcome letter was dated 7 May 2019, and the following day Mrs Dale-Branton wrote to the claimant to invite her to the interview on 17 May. It is difficult to criticise Mrs Dale-Branton for the delay in this period as it was something which the claimant had sought.

272. It was regrettable that the notes of the interview were not sent out to the claimant until 8 October. It would be better practice for interview notes to be sent out immediately rather than delayed until all interviews had been conducted.

273. We accepted Mrs Dale-Branton’s evidence that her investigation was delayed by witnesses not attending for interview. We noted, for example, that Ms Yusuf was allocated four different interview dates between February and the date in May when

she was eventually interviewed. The same was true of Ms Milligan-Pawsey, since Mrs Dale-Branton had to involve her matron to get her to be interviewed. The delay in this investigation over the summer period was due, we concluded, to a combination of factors: the reluctance of witnesses to be interviewed, the operational pressures on Mrs Dale-Branton, and the fact that she was on leave herself for some of this period.

274. The claimant raised an issue about how the email from CH was utilised. The email was sent to the claimant on 14 January in the evening, and she forwarded it from her personal email address to her work email address on 14 May 2019. It was then attached to the claimant's note of 14 January at page 255 and provided to Mrs Dale-Branton during the interview on 17 May 2019. There was a dispute about whether at that interview the claimant was told that the CH statement was a true and accurate report of events, as the claimant later maintained, or whether (as Mrs Dale-Branton said on 15 November 2019) the claimant was not told that because managers could not confirm that. However, it was clear that the statement from CH was attached to the investigation report and the report recommended that the racist treatment of the claimant be taken into account.

275. As for the substantive conclusions in the report, the concerns the claimant expressed about the reliance on a “pattern of inappropriate behaviour” were taken on board because Mrs Dale-Branton recommended that this matter not be taken any further in the absence of evidence about it. The conclusions that there was a disciplinary case to answer on the two main allegations was consistent with the evidence gathered, particularly the evidence from Ms Balon and Ms Yusuf. That did not mean, as the claimant suggested, that the statement from CH had been entirely discounted. There was a case which the claimant could put at any subsequent disciplinary hearing in answer to the allegations that there had been disciplinary misconduct.

276. The key issue, however, was whether any of this amounted to a detriment by reason of the claimant having done a protected act by lodging her grievance at the end of December 2018. We considered that question in the light of all the evidence before us.

277. The claimant accepted that neither Ms Yusuf nor Ms Balon knew of her grievance when the complaints about her were first made. There was no victimisation there. Similarly, to her credit the claimant accepted that Ms Renwick would not have known of the grievance when she decided that those allegations should be the subject of a disciplinary investigation, not least because the grievance did not name her. Again the institution of the disciplinary investigation cannot have been victimisation. The same was true of the decision to move the claimant to a role with no patient contact, even though the use of the phrase “partial suspension” was perhaps unwise.

278. As to the way in which Mrs Dale-Branton conducted the investigation, the claimant was again candid in cross examination. She accepted that delays due to witnesses not turning up for interviews could not be attributed to her grievance. She also accepted that Mrs Dale-Branton did not know of the grievance until the claimant told her of it (and the ET claim) in the interview on 17 May 2019, but the claimant also volunteered that her union representative said that she should not have raised

those matters and that Mrs Dale-Branton did not react negatively to those matters being raised. The claimant also made clear that she was not alleging any personal victimisation by Mrs Dale-Branton, even though it was explained to her again at that point in her cross examination that the Equality Act required the Tribunal to focus on the mental processes of individual decision makers.

279. The claimant also accepted that the decision to bring disciplinary charges against her made by Miss Taylor on consideration of the Dale-Branton report was not attributable to the grievance, as the claimant had no evidence that Miss Taylor even knew of the grievance let alone that she was influenced by it. It was clear that the decision to proceed with disciplinary charges (later reversed because the claimant had resigned) was made simply because of the contents of the report from Mrs Dale-Branton.

280. Putting these matters together we rejected the contention that there was any evidence from which we could conclude that the grievance had any influence on the making of the allegations in January 2019, the decision to move the claimant from patient contact, the decision to start a disciplinary investigation, the conduct of that investigation and the conclusions reached at the end of it. The allegations of victimisation failed and were dismissed.

281. That meant that apart from the constructive dismissal allegation, which we address below, all the individual complaints of discriminatory treatment contrary to the Equality Act 2010 failed on the merits. As a result we did not have to consider the question of time limits at paragraphs 9 and 10 of the List of Issues, because on our findings there was no "continuing act" of discrimination nor any reason to consider whether it would be just and equitable to extend time.

Discussion and Conclusions – Constructive Dismissal

282. We then turned to the constructive dismissal complaint. Our first task was to decide whether the claimant's resignation should be construed as a dismissal. If so, the respondent accepted that it must be an unfair dismissal, but we would still have to decide whether it also amounted to a contravention of the Equality Act 2010.

> 11. Can the claimant show that her resignation should be construed as a dismissal…?

283. We reminded ourselves that the test to be applied here under **Malik** is an objective test. The claimant has to prove that the treatment from the respondent:

- was treatment for which there was no reasonable and proper cause; and
- that when viewed objectively it was serious enough to be likely to destroy or seriously damage the relationship of trust and confidence.

284. The List of Issues in paragraph 11 reflected the claimant's formulation of the claim. There were different elements in the alleged breach of trust and confidence. The first one was the acts alleged to be race discrimination or harassment related to race in paragraph 1 of the List of Issues. For reasons set out above we decided that none of these amounted to unlawful discrimination or harassment, but even so we took them into account in considering how the claimant had been treated.

285. It followed that the matters that were at the heart of the claimant's case on constructive dismissal were the following:

- Her treatment on ward AM2 and the decision to move her;
- The conduct of the investigation by Mrs Sankey and the outcome;
- The length of time taken to conclude the grievance investigation by Mrs Deaville;
- The conclusion reached by Mrs Deaville that there was no harassment, bullying or discrimination;
- The way in which the investigation by Mrs Dale-Branton was being handled at the time the claimant resigned;
- The claimant's assertion that there was a failure to acknowledge or accept any mitigating factors or indisputable evidence which supported her account, her view being that it was always the people making allegations against her who were believed; and
- Breaches of policies and procedures.

286. We considered each in turn, noting that they overlapped with the matters we had already considered under the Equality Act complaints.

Ward AM2

287. The first matter was the series of events on ward AM2. We set out above our findings of primary fact in relation to these matters, and why we did not consider there was any breach of the Equality Act. It flowed from our conclusions earlier that we regarded Miss Croker as having reasonable cause for reporting to Mrs Baron the concerns about the claimant's behaviour as they arose.

288. As for Mrs Baron, it was clear that she accepted the reports she received from Miss Croker, who was a band 6 nurse, about the claimant who was a Band 2 nursing assistant. The fact that these matters were not pursued formally meant that the claimant had no opportunity to set the record straight and "clear her name". We understood why the claimant felt aggrieved by this, particularly when it happened on a number of occasions during the period.

289. However, it is a reality of managerial responsibility that issues are raised by senior members of a team about more junior members, and that it cannot be proportionate to undertake an investigation of each and every incident, let alone a formal disciplinary investigation. It was notable that there was no move to discipline at this stage. Instead, Mrs Baron had gone only as far as an action plan by the time the claimant moved to the Manchester Ward. We did have some concerns about the action plan, as it was very general in nature, but those were not concerns raised by the claimant at the time and she did sign the document. It was of short-lived validity because within a week or so the foil wrapper incident with Mr H occurred in May 2018 and the claimant was moved in June to the Discharge Lounge where there was much less patient contact.

290. Putting these matters together we were satisfied that there was no breach of trust and confidence in the way that matters were handled on ward AM2. The reality was that the successive reports were made for good reason given concerns about how the claimant was behaving, and it was this which was the cause of the situation which resulted in her transfer to the Manchester Ward and the action plan.

Sankey Investigation

291. The second matter related to the investigation of the incident with Mr H in May 2018. As explained above, we concluded that there were some flaws in the way this was handled. In summary they were as follows:

- The allegations made against the claimant were never put to her clearly, either at the meeting on 5 June or in the letter which followed. That said, the claimant did know which incident was being investigated, and once she read the email from Ms Joshua she knew that at least one person was alleging she had shouted at a patient.

- The letter of 5 June was not posted until 21 June 2018.

- The decision was taken not to interview the claimant until all others had been interviewed, but this was not explained to the claimant and as a result she had no opportunity to tell her side of the story until her interview in November 2018.

- There was also a delay in sending out notes of interviews until everyone had been interviewed, falling short (in our view) of being best practice.

- It was not clear to the claimant from the letter of 5 June that allegations about her time on ward AM2 were being considered, although this had been mentioned at the meeting on 5 June, and those allegations did result in a conclusion by Mrs Sankey that there had been inappropriate behaviour. However, Mrs Rothwell decided not to pursue anything to a disciplinary hearing even though there were some concerns to be discussed. This outcome letter left the claimant feeling that there was still a view she had acted inappropriately but that she had been denied the opportunity to clear her name.

292. Overall we concluded that these failings did not mean that the handling of the investigation in isolation breached trust and confidence, bearing in mind the high hurdle of the **Malik** test. The communication was well below what one would expect, both in relation to the formulation of the allegations, and keeping the claimant updated on the progress and scheduling of the investigation. She was left in the dark for several months not knowing exactly what the allegations against her were, which was an invidious position. However, it has to be borne in mind that the claimant was interviewed and given a chance to give her account of the incident in question, and that ultimately the decision was taken not to pursue any disciplinary allegations against her.

293. Whether the way in which this investigation was handled contributed to an overall breach of trust and confidence is a matter to which we will return below.

Deaville Investigation and Conclusion

294. The next element concerned the investigation into the grievance by Mrs Deaville and her conclusion that the claimant had not been the victim of discrimination or harassment.

295. We set out above our conclusions in relation to the delay, which was largely a consequence of external factors, the reluctance of witnesses to attend for interviews, and Mrs Deaville wishing to carry out a thorough investigation even when new information was provided partway through. That did not amount to a breach of trust and confidence.

296. Nor did her eventual conclusion that there was no discrimination, bullying or harassment, because in our judgment that was the correct conclusion for the same reasons that we rejected the Equality Act complaints.

297. The handling of the grievance and the outcome did not in itself amount to a breach of trust and confidence. We will return to whether it contributed to an overall breach below.

Dale-Branton Investigation

298. The third matter concerned the investigation undertaken by Mrs Dale-Branton into the January 2019 allegations. We set out above our primary findings of fact and the reasons why we did not consider this amounted to victimisation because of the grievance.

299. Looked at for the purposes of a breach of trust and confidence, however, we noted that the investigation did take a long time and had not been concluded by the time the claimant resigned in November, 11 months after the incident. It was an investigation that began promptly within a week or so, with the allegations clearly spelled out, and there was then significant activity in February and March with witness interviews. It was at the claimant's own request that her interview was delayed until after she had the outcome letter from the previous disciplinary investigation. The matters raised by the claimant at that investigation interview on 17 May 2019 caused Mrs Dale-Branton to undertake further interviews, and these were delayed because of witnesses who did not turn up and had to be chased. None of that appeared to us to represent any failure by Mrs Dale-Branton to pursue the matter. We did not consider it best practice to delay sending out notes of interviews until after everyone had been interviewed, since this simply meant that there was a delay between the interview and the person receiving the notes of it, but that was not a significant flaw.

300. The real thrust of the claimant's criticism of this investigation, as at the time she resigned, was in relation to the treatment of the statement of the witness CH. At first sight this exonerated the claimant wholly and was available to Mrs Dale-Branton from 17 May 2019. It might have been possible for that statement to have been taken at face value, and for that part of the enquiry to have gone no further, but we were satisfied that there was reasonable cause for Mrs Dale-Branton to continue with her enquiries. Firstly, there was cause for some doubt about the provenance of the statement because it formed an email to the claimant rather than being a freestanding document directly from the individual. It was also clear that the person

concerned had the claimant's personal email address. Secondly, it was not wholly discounted but taken into account as part of the evidence and was eventually appended to the investigation report. There was a dispute about what the claimant was told about this statement at the interview which we resolved as set out above. Thirdly, Mrs Dale-Branton did not overlook the fact that the claimant had been the victim of racist abuse in that incident, and reflected that in her report (although the claimant did not know this at the time she resigned).

301. Overall we were satisfied that the handling of this investigation between January 2019 and the claimant's resignation did not amount to a breach of trust and confidence even though it was still not concluded at the time the claimant resigned. We will consider below whether it contributed to an overall breach of trust and confidence.

Treatment of Supportive Evidence

302. The next element of the constructive dismissal complaint was a more general proposition: that there was a failure to acknowledge or accept any obvious mitigating factors or indisputable evidence which would have disproven the allegations made against the claimant. We recognised that this was a perception which the claimant held strongly about the way she was treated over the period with which we were concerned, although that was due in part to her own lack of insight into how her behaviour was genuinely perceived.

303. In relation to her period on ward AM2, when reports about her made by Miss Croker to Mrs Baron were taken at face value by Mrs Baron, we considered that this was a natural consequence of the management structure and in particular the fact that Miss Croker was significantly senior to the claimant. It has to be borne in mind that these were not formal sanctions but rather informal discussions by a manager seeking to influence the behaviour of the employee in a positive direction. It would be disproportionate and unworkable if each occasion of concerns being raised led to a mini-investigation. Even at its height, the action taken by Mrs Baron was only further management action in the form of an action plan, not any form of disciplinary action.

304. The position was slightly different in relation to Mrs Sankey and Mrs Dale-Branton, who were undertaking disciplinary investigations. Their role was to gather the evidence both for and against the allegations, weigh it up, and make a recommendation about whether there was a disciplinary case to be answered. They were not decision makers. We were satisfied that these investigators did take into account the claimant's accounts of what had happened, and the supporting evidence she provided, even though Mrs Dale-Branton had reservations about the weight to be given to the email from CH.

305. Decisions were, of course, made before the claimant resigned by Jo Rothwell at the conclusion of the Sankey investigation, and by Marnie Deaville in deciding that the grievance should be only partially upheld. The former decision was of concern to the claimant because although it was a decision not to pursue any disciplinary procedures, the outcome letter said that there were concerns about her behaviour which would be addressed in another way. That reinforced the claimant's perception that she was being judged as guilty without an opportunity to clear her name. Although that perception was perhaps understandable, the reality is that

management are entitled to take steps short of disciplinary action where matters come to light which do not warrant formal procedures being invoked.

306. As for Mrs Deaville's decision, her grievance investigation report was a balanced one. A number of allegations of inappropriate behaviour made by the claimant were upheld. The main concern of the claimant was that the overarching allegation of discriminatory and bullying treatment was rejected, but for reasons set out above we considered that that was an interpretation of the evidence for which there was reasonable cause.

307. Putting these matters together, therefore, we concluded that there was no breach of trust and confidence established by a consistent failure to take into account evidence which supported or exonerated the claimant or which acted as mitigating evidence. Those matters were taken into account by managers in a way for which there was reasonable and proper cause.

Breach of Policies and Procedures, and the Cumulative Case

308. The final individual allegation of a breach of trust and confidence was that the Trust consistently failed to follow its own policies and procedures, which was integral to the claimant's cumulative case for there having been a breach of trust and confidence.

309. The claimant's case on policies was set out in a clear and useful section at the end of her witness statement where she quoted from the policies that she said were consistently breached. One of those policies was the Performance Capability Management Policy, but the claimant confirmed in our hearing that there was really no issue about how her absence was managed after she went off sick. The focus was on three policies: the Equality and Diversity Policy at pages 438-454, the Disciplinary Procedure at pages 455-488, and the Dignity and Respect at Work Policy at pages 501-518. We considered each in turn.

310. The case for breaches of the Equality and Diversity Policy was primarily based on the sections of the policy which say that the Trust will not tolerate discrimination, harassment, bullying or racism. The difficulty for the claimant with that proposition is that for reasons set out above we found that there was no discrimination, harassment or victimisation contrary to the Equality Act 2010. The allegation that the Trust acted in breach of these provisions must therefore fail. The ancillary point, however, was about timing. Clause 10.2 of that policy said that the Trust would ensure that complaints of discrimination would be investigated thoroughly and in a timely manner. We were satisfied that the investigation did take longer than anticipated, but that was due to the complexity of the allegations, the introduction of new material part way through, and the desire of Mrs Deaville to deal with the investigation thoroughly. In those circumstances we were satisfied that this provided no support for the proposition that there had been a breach of trust and confidence.

311. The Disciplinary Procedure did have some provisions which on the face of it were not complied with by managers. The informal meetings between Mrs Baron and the claimant were in line with paragraph 4.1, but contrary to paragraph 4.2 no file note of those meetings was made. The claimant was not informed during the disciplinary enquiries by Mrs Sankey and Mrs Dale-Branton of the names of all

witnesses who were being interviewed (clause 9.1.1), and in the Sankey investigation the provisions of guidance note 3 requiring clarity about the allegations were not honoured. Nor was the requirement that notes of investigation meetings be sent to the individual within five working days (page 481) put into effect in these investigations. The investigations both took longer than the key performance indicator of eight weeks.

312. As for the Dignity and Respect at Work Policy, some of the claimant's points were based on the proposition that there had been bullying and harassment, but she also took issue with the timescale. The extract of the formal stage of the policy at page 510 said that the case would be handled "without undue delay" and that the investigations must be conducted "promptly, thoroughly and impartially". As set out above, however, we concluded that Mrs Deaville's investigation was thorough and impartial, and indeed that was part of the reason that it took as long as it did.

313. In evaluating this theme of breaches of procedures we took stock of the whole scope of the case. The managers on ward AM2 were faced with repeated allegations about inappropriate behaviour by the claimant which they sought to deal with informally. Mrs Baron can be criticised for not keeping notes of those interactions, and the action plan was a very broad one. However, that was a difficult situation and management cannot be criticised for seeking to resolve it informally rather than moving straight to discipline.

314. Once moved to the Manchester Ward the claimant was almost immediately involved in the incident with Mr H, which resulted in a disciplinary enquiry. That enquiry had significant communications failings. The allegations were not clearly spelled out at the start, and that error was repeated throughout. The claimant was not told that on HR advice Mrs Sankey was going to interview her last of all, so was left wondering what was happening for many months. However, those flaws in communication did not mean that the investigation itself was fundamentally flawed, since the enquiry was carried out thoroughly and extensive interviews were undertaken before Mrs Sankey prepared her report. The delay was regrettable, but the investigation was essentially sound.

315. The grievance investigation by Mrs Deaville did take longer than anticipated, but that was due to factors which do not provide any scope for criticism of the respondent or which support any breach of trust and confidence. Mrs Deaville's conclusion was a balanced one even though she rejected the claimant's core allegation that there had been discrimination, harassment and bullying.

316. As for the investigation by Mrs Dale-Branton into the Discharge Lounge incidents in January 2019, at the time the claimant resigned that was ongoing but she had been interviewed much earlier in the process, and she had recently been interacting with Mrs Dale-Branton about amendments to the note of her interview. The way in which the statement from CH was handled by Mrs Dale-Branton was something for which there was reasonable cause, even though the claimant thought that the CH statement should have been an immediate and complete exoneration of her. The length of time the investigations took clearly affected the claimant, as did the fact that the Dale-Branton investigation was still ongoing at the time she received the grievance outcome. She was also unhappy that even though Mrs Rothwell said

there would be no disciplinary charges, there were still some issues to be addressed through other means.

317. Finally, the claimant had been moved from post to post since May 2018, and had been restricted from undertaking work with any patient contact since January 2019. Those were all matters which understandably concerned her, and her decision to resign was one which was understandable from her own perspective.

318. However, the Tribunal has to apply an objective test when looking to see whether the conduct as a whole breached the **Malik** test, and we were satisfied that even taken as a whole there was no conduct without reasonable cause which was calculated or likely to destroy or seriously damage trust and confidence. The fundamental issue was that the series of investigations was a consequence of behaviour by the claimant, and although they were not handled perfectly their flaws were essentially matters of poor communication rather than anything showing an intention not to be bound by the terms of the claimant's contract. The outcome of the grievance could not amount to a "last straw" constituting a fundamental breach because it was an entirely proper conclusion for Mrs Deaville to reach.

319. We therefore decided that the claimant's resignation could not be construed as a dismissal. This meant that the unfair dismissal claim failed and was dismissed, and the Equality Act complaints which were predicated on there having been a constructive dismissal were also dismissed.

Conclusion

320. For those reasons all the claimant's complaints failed and were dismissed. There was no breach of the Equality Act 2010 and the claimant's resignation was not a constructive dismissal.

Regional Employment Judge Franey

15 November 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

18 November 2022

FOR THE TRIBUNAL OFFICE