



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms L Mujuru

-v-

**Birmingham Women's and Children's
NHS Foundation Trust**

FINAL MERITS HEARING (CONDUCTED IN PUBLIC IN PERSON)

Heard at: **Centre City Tower, Birmingham**

On: **9 to 13 September 2024**

Before: **Employment Judge Perry, Mr J Sharma (by CVP) & Mr D McIntosh**

Appearances

For the Claimant: **No attendance**

For the Respondent: **Mr C McDevitt (counsel)**

JUDGMENT

1. The claimant's complaint that the respondent contravened part 5 Equality Act 2010 is dismissed. The respondent did not subject her to harassment related to race, directly discriminate against the claimant on the ground of race or victimise her.
2. The claimant was not entitled to treat herself as constructively dismissed. Her complaint of constructive unfair dismissal is not well founded and is dismissed.

REASONS

1. This is a claim that was presented on 21 December 2022 following early conciliation that commenced on 14 October and finished on 25 November 2022. Accordingly, any act that occurred before 15 July 2022 is potentially out of time.
2. This claim was case managed at a preliminary hearing ("the CMO") chaired by Employment Judge Ali on 29 September 2023 at which the issues were identified. It includes four complaints:-
 - 2.1. constructive unfair dismissal
 - 2.2. harassment related to race
 - 2.3. direct race discrimination, and
 - 2.4. victimisation.



3. It was clarified at the CMO that the claimant, whom we shall refer to as Ms Mujuru, identifies as Black British (CMO/46 [38]).
4. The respondent, whom we will refer to as BWCH, accepts that the sole protected act, namely Ms Mujuru's grievance of 3 January 2022 [162] is a protected act for the purposes of the Equality Act 2010.
5. Nine acts of discrimination are relied upon for the four complaints. All are relied upon in relation to the constructive unfair dismissal claim. One alleged act is argued as all three forms of discrimination, two further as both harassment and direct discrimination and the remaining six alleged acts, solely as victimisation.
6. We have identified them in turn and the types of complaint that they relate to below and so do not propose to repeat them here.
7. Prior to the hearing Ms Mujuru indicated that she wished to withdraw the claim. Clarification having been sought, she indicated that she did wish to pursue it but did not wish to attend and hinted that her health was at least a factor in her decision. It having been pointed out to her that the weight that would be given to her evidence and that of the witnesses she wished to call would be less if she/they did not attend, she indicated that she neither wished to attend nor wished to provide medical evidence that would ordinarily be required to support an application for a postponement,.
8. At the start of the hearing the tribunal wrote to her to identify several alternatives that she might wish to take. Mr McDevitt raised no objections. That letter also set out the history to matters concerning her purported withdrawal and the correspondence that ensued. We do not propose to repeat it here. Ms Mujuru was given the option to seek to attend remotely, to lodge questions she wished to pose of BWCH's witnesses and/or forward any submissions she wished to make.
9. She responded thanking the tribunal for the offer, identifying several questions she asked the tribunal to address and referred the panel to her witness statement as her submissions.
10. The panel was satisfied that Ms Mujuru wanted the hearing to proceed in her absence and had been able to make an informed decision in that regard. This matter has been listed for some time, BWCH have incurred considerable costs, and being very conscious of the waste of tribunal time if the hearing did not proceed the tribunal decided it was consistent with the overriding objective to proceed with the hearing. The panel took a considerable amount of time to question BWCH's witnesses in relation to the matters in issue, including asking them the questions Ms Mujuru asked to be posed of them.

THE EVIDENCE

11. A bundle was lodged in advance of the hearing of some 746 pages. That was later supplemented by additional documents the panel had sought and so finally extended to some 864 pages.



12. We had before us witness statements from some six witnesses. Ms Mujuru provided a witness statement herself and relied upon a witness statement from a former colleague Mrs Emma Barratt (nee Saunders – we will refer to her as Miss Saunders as that is how she is referred to in the documents and the witness statements of BWCH’s witnesses). Neither attended.
13. Four witnesses were called by BWCH all of whom had provided statements in advance, Miss Annette Newman, Mr Dominic St Louis, Miss Claire White and Mr Jitesh Patel.
14. Given Ms Mujuru did not attend the hearing the panel indicated it intended to provide a reserved judgment so that the parties would receive the decision at the same time and Ms Mujuru would be able to review the reasons that the tribunal gave for its decision. No objection was issued by BWCH. The tribunal subsequently directed the administration team write to the parties to indicate that was the case so Ms Mujuru was aware of that.

THE LAW (SO FAR AS IS RELEVANT)

15. The panel were referred by Mr McDevitt to [Kaur v Leeds Teaching Hospitals NHS Trust](#) [2019] ICR 1, [Glasgow City Council v Zafar](#) [1998] ICR 120, [Madarassy v Nomura](#) [2007] ICR 867 and [Chief Constable of Kent v Bowler](#) UKEAT/0214/16. Copies of those cases were forwarded to Ms Mujuru.

Discrimination – Generally

Timing

16. Section 123 EqA provides so far as is relevant:-

“(1) ... Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 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.

(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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or



(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

17. Those time limits are extended by the statutory provisions concerning early conciliation.
18. An act “occurs when it is done, not when you acquire knowledge of the means of proving that the act done was discriminatory” ¹.
19. The leading authority on “conduct extending over a period” remains as Barclays Bank Plc v Kapur [1991] I.C.R. 208 (HL). That was summarised in the recent Court of Appeal decision in Parr v MSR Partners LLP (formerly Moore Stephens LLP) [2022] EWCA Civ 24:-

“38. ... the ratio of Kapur is that the critical distinction is between a one-off decision and a continuing act or continuing state of affairs, ...

...

42. ... a dismissal, even if discriminatory, is a one-off act with continuing consequences rather than conduct extending over a period, even though the dismissed employee may suffer loss of pay and pension for the rest of his or her life. ...

43. ... The case law does draw a distinction, at any rate when analysing whether the conduct complained of is an “act extending over a period”, between a rule, policy or practice which inevitably leads to the rejection of the claimant and one which involves (in practice and not just on paper) the exercise of a discretion. ...”

20. This does not require some policy, rule or practice in accordance with which decisions were taken from time to time. Instead what a claimant must show is that ***“the numerous alleged incidents of discrimination are linked to one another, and that they are evidence of a continuing discriminatory state of affairs.”*** ² One relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents ³.
21. As to the Tribunal’s just and equitable discretion, this was considered in Arthur v London Eastern Railway Ltd [2007] ICR 193 at [26-36] CA per Mummery LJ and applied in Royal Mail Group Ltd v Jhuti [2018] UKEAT/0020/16 per Simler P.

“29. Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short three-month period is not an isolated incident or a discrete act. Unlike a dismissal, which

¹ Mensah v Royal College of Midwives EAT/124/94 at [11G-H]) and Viridi v Commissioner of Police of the Metropolis [2007] IRLR 24

² Hendricks v The Commissioner of Police of the Metropolis [2003] IRLR 96 (CA) Mummery LJ.

³ British Medical Association v Chaudhary UKEAT/1351/01 & UKEAT/0804/02 [208].



occurs at a specific moment of time, discrimination or other forms of detrimental treatment can spread over a period, sometimes a long period. A vulnerable employee may, for understandable reasons, put up with less favourable treatment or detriment for a long time before making a complaint to a tribunal. It is not always reasonable to expect an employee to take his employer to a tribunal at the first opportunity. So an act extending over a period may be treated as a single continuing act and the particular act occurring in the three-month period may be treated as the last day on which the continuing act occurred. ...

31. ... There must be some relevant connection between the acts in the three-month period and those outside it. The necessary connections were ... (a) being part of a "series" and (b) being acts which are "similar" to one another.

35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the 3 month period and the acts outside the 3 month period. ... It is necessary to look at all the circumstances surrounding the acts. ..."

22. It is plain from the language used that Parliament has given Tribunal's the widest possible discretion. The only requirement placed upon the Tribunal is that it should not leave out of account any significant factor ⁴.

23. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are

"19. ... (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)." ⁴

24. Thus, the exercise of the broad discretion involves a multi-factoral approach considering all the circumstances of the case ⁵ in which no single factor is determinative ⁶. In addition to the length and reason for delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the merits and balance of prejudice, other factors which may be relevant are the extent to which the respondent has co-operated with any request for information; the promptness with which the relevant claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate legal advice once the possibility of taking action is known.

⁴ [Abertawe Bro Morgannwg University Local Health Board v Morgan](#) [2018] ICR 1194 (CA) Leggatt LJ

⁵ [Hutchison v Westward Television Ltd](#) [1977] IRLR 69

⁶ see also [Rathakrishnan v Pizza Express \(Restaurants\) Ltd](#) UKEAT/0073/15 per HHJ Peter Clark



25. The CA in [Robertson v Bexley Community Centre](#)⁷ said this:-

“25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

The burden of proof

26. Where a claimant has shown on balance the other required elements of a complaint are made out and the Tribunal has to consider the reason for the alleged treatment s. 136 EqA applies. That provides that if a claimant can prove facts from which the tribunal could decide, in the absence of any other explanation, that there has been a contravention of the EqA the tribunal must determine that the contravention occurred unless the respondent show the contravention did not occur.
27. The Supreme Court has given guidance given on that section thus⁸:-
- 27.1. A claimant has the burden of proving, on the balance of probabilities, those matters which he wishes the tribunal to find as facts from which the inferences could properly be drawn (in the absence of any other explanation) that an unlawful act was committed (at [30]).
 - 27.2. The Tribunal is not prevented from taking into account evidence adduced by the respondent insofar as it is relevant in deciding whether the burden of proof has moved to the respondent (at [20]).
 - 27.3. That will include any facts proved by the respondent which would prevent the necessary inference from being drawn (at [30]).
 - 27.4. However, explanations (as opposed to evidence) must not be taken into account at the first stage, as the statutory language of s.136(1) requires that the Tribunal must ignore any explanation for those facts given by the respondent and assume that there is no adequate explanation for them (at [22]).
 - 27.5. So, the ET must consider what inferences can be drawn in the absence of any explanation for the treatment complained of but no adverse inference can be drawn from the fact that the employer has not provided an explanation (at [40]).
28. Thus, a difference in treatment alone is not sufficient to establish that discrimination could have occurred and passed the burden of proof to a

⁷ [2003] IRLR 434. Most recently cited by Richardson J in [Vodafone Ltd v Winfield](#) UKEAT/0016/16

⁸ *Efobi v Royal Mail Group Ltd* [2021] ICR 1263 per Lord Leggatt



Respondent, similarly unreasonable conduct without more is not enough either. To that end Mr McDevitt referred us to the headnote in Madarassy:-

“... once a prima facie case was established, the burden of proof moved to the respondent to prove that it had not committed any act of unlawful discrimination, but it did not shift simply on the complainant establishing the facts of a difference in status and a difference in treatment; that it was only once the burden had shifted that the absence of an adequate explanation for the differential treatment became relevant; ...”

and

“54 I am unable to agree ... that the burden of proof shifts to Nomura simply on Ms Madarassy establishing the facts of a difference in status and a difference in the treatment of her. This analysis is not supported by Igen Ltd v Wong [2005] ICR 931 nor by any of the later cases in this court and in the Employment Appeal Tribunal. ...

...

56 The court in Igen Ltd v Wong [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent ‘could have’ committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”

29. He also referred us to Bowler:-

“97. ... Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic. That does not mean that the fact of unreasonable treatment is irrelevant. As Elias P (as he then was) explained in Bahl v the Law Society [2003] IRLR 640 (at [101]).

‘The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will



depend upon why it has rejected the reason that he has given, and whether the primary facts it finds provide another and cogent explanation for the conduct. Persons who have not in fact discriminated on the proscribed grounds may nonetheless sometimes give a false reason for the behaviour. They may rightly consider, for example, that the true reason casts them in a less favourable light, perhaps because it discloses incompetence or insensitivity. ...’“

30. From Zafar, he referred us to its headnote :-

“... to establish discrimination under section 1(1) (a,) of the Race Relations Act 1976 it had to be shown that the complainant had been treated by the person against whom discrimination was alleged less favourably than that person treated or would have treated another, the conduct of a hypothetical reasonable employer or the fact that the respondent Employer had acted unreasonably being irrelevant; that, accordingly, the industrial tribunal had not been entitled to draw an inference of less favourable treatment from the fact that the local authority had acted unreasonably in dismissing the applicant; and that, further, they had not been bound in law to draw the inference of racial prejudice but should have drawn such inferences as they considered proper from their findings of primary fact made after hearing the evidence.”

and 124B&C:-

“... The fact that, for the purposes of the law of unfair dismissal, an employer has acted unreasonably casts no light whatsoever on the question whether he has treated the employee "less favourably" for the purposes of the Act of 1976.”

31. If a claimant can pass the burden to the respondent, the second stage requires a consideration of the subjective reasons which cause the employer to act as he did⁹.

*“At the second stage, the ET must ‘assess not merely whether the [Respondent] has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities’.”*¹⁰

⁹ [Shamoon v Chief Constable of the Royal Ulster Constabulary](#) [2003] ICR 337, at [7].

¹⁰ see the [Igen](#) guidance Annex at [12] and [Laing v Manchester City Council](#) [2006] UKEAT 0128/06, [2006] IRLR 748 [51]



32. Where there are allegations of discrimination over a substantial period, a fragmented approach looking at the individual incidents in isolation from one another should be avoided as it omits a consideration of the wider picture ¹¹.

Inferences

33. When considering what the reason for the treatment complained of was the Tribunal may draw an inference that the alleged perpetrator was motivated (consciously or unconsciously) by the protected characteristic and/or the “something arising” and/or a protected act ¹².
34. Context is important and adverse inferences may be drawn where appropriate from the surrounding circumstances of a respondent’s conduct. If the tribunal can make positive findings on the evidence one way or the other that is an end to the matter ¹³.
35. Like what the Supreme Court decided in Hewage, Elias P as he then was, made clear:-

“If there is a genuine non-discriminatory reason, at least in the absence of clear factors justifying a finding of unconscious discrimination, that is the end of the matter.”

36. He then continued:-

“It would obviously be unjust and inappropriate to find discrimination simply because an explanation given by the employer for the difference in treatment is not one which the Tribunal considers objectively to be justified or reasonable. If that were so, an employer who selected by adopting unacceptable criteria or applied them inconsistently could, for that reason alone, then potentially be liable for a whole range of discrimination claims in addition to the unfair dismissal claim. That would plainly be absurd. Unfairness is not itself sufficient to establish discrimination on grounds of race or sex, as the courts have recently had cause to observe on many occasions”. ¹⁴

before going on to reference Law Society v Bahl ¹⁵ and Glasgow City Council v Zafar ¹⁶.

37. Having made the same point as in the emphasised quote at (33) Elias P In Bahl went on to explain that the effect of a finding of unconscious discrimination was:-

¹¹ London Borough of Ealing v Rihal [2004] IRLR 642 CA applied in Lainig [59] and endorsed in Madarassy v Nomura International [2007] IRLR 246 (CA)

¹² Nagarajan v London Regional Transport [1999] ICR 877, at 885E-G

¹³ Hewage v Grampian Health Board [2012] UKSC 37 at [32]

¹⁴ Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865 at [22]

¹⁵ [2003] IRLR 640, at [127]

¹⁶ [1998] ICR 120



“... the tribunal is really finding that the alleged discriminator has concealed the true reason even from himself...”

he then continued to explain that in such cases:-

“... there will be no basis to infer unlawful discrimination at all. Tribunals can in a proper case make a finding of unconscious discrimination, but it is a significant finding for a tribunal to hold that they can read someone’s mind better than the person himself, and they are not entitled to reach that conclusion merely by way of a hunch or speculation, but only where there is clear evidence to warrant it”.

38. To justify such an inference, the Tribunal must first make clear findings of primary fact from which it is proper and justified to draw such an inference.

Victimisation

39. Section 27 EqA provides:

“(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.”

Protected acts

40. There is no dispute about the protected act falling within s. 27 EqA.



Detriments

41. Detriment has been given a wide meaning by the courts¹⁷ and is assessed objectively; that is how it would be perceived by a reasonable litigant¹⁸. In making that assessment we must bear in mind that an unjustified sense of grievance cannot constitute detriment¹⁹, and whilst it is not a defence per se that the employer behaved honestly and reasonably, save in the most unusual circumstances, it will not be objectively reasonable for an employee to view distress and worry caused by honest and reasonable conduct of the employer as a detriment²⁰. A person may be treated less favourably and yet suffer no detriment.

The causal link

42. Again, like s.13, the words used in s.27 are “because of”. This is not a “but for” approach:- had the claimant not brought a claim, the detriment would not have occurred²¹ instead the tribunal must enquire into the real reason for the treatment complained of and the protected act must be the real reason for the detriment²².
43. A failure to investigate a complaint of discrimination or harassment will not constitute victimisation under s.27 unless there is a link between the fact of the employee making the complaint and the failure to investigate it²³. Where the nature of the complaint meant that the employer found the prospect of dealing with it such that it took no action the EAT has said that an employment tribunal might conclude that the failure to act could conceivably come within the scope of victimisation²³. Inferences can be drawn where an employer puts forward an unsustainable reason for failing to investigate an employee’s complaint²⁴.

Harassment

44. Harassment is prohibited by s.40 EqA. It is defined in s. 26 EqA. Where relevant, it provides as follows:

“ (1) A person (A) harasses another (B) if—

¹⁷ Lord Hoffman in Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 at [53]. Brandon LJ in Ministry of Defence v Jeremiah [1979] IRLR 436 CA, a case involving the interpretation of the 1975 Sex Discrimination Act, stated “... I do not regard the expression 'subjecting to any other detriment', as used in s.6(2)(b), as meaning anything more than 'putting under a disadvantage' ” and went on to say that was a question of fact for the Tribunal. *adopted and approved by the HL in [Shamoon v Chief Constable of the Royal Ulster Constabulary](#) [2003] ICR 337* which in turn referred often to another HL decision in Chief Constable of West Yorkshire Police v Khan (as above).

¹⁸ Ministry of Defence v Jeremiah (as above) [31] per Brightman LJ approved in Chief Constable of West Yorkshire Police v Khan (as above)

¹⁹ Shamoon v Chief Constable of Royal Ulster Constabulary (as above) per **Lord Hope [35]**.

²⁰ Phothecary Witham Weld (a firm) & Anor v. Bullimore & Anor [2010] IRLR 572 (EAT) at [19(3)] applying Derbyshire v. St. Helens Metropolitan Borough Council [2001] ICR 841

²¹ Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065 (CA)

²² Chief Constable of Greater Manchester Police -v- Bailey [2017] EWCA CIV 425.

²³ A v Chief Constable of West Midlands Police EAT 0313/14

²⁴ Iwuchukwu v City Hospitals Sunderland NHS Foundation Trust 2019 IRLR 1022 (CA)



(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B’s dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;?

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

...”

45. The criteria set out in s. 26(1)(b) are sometimes referred to as the “**proscribed consequences**”.

46. That gives rise to the three questions *Richmond Pharmacology v Dhaliwal*²⁵ posed. As the Court of Appeal stated in *Pemberton v Inwood*²⁶ those questions need to be adapted to reflect the changes to the statutory regime following the enactment of the EqA. Pemberton also made clear both the following questions need to be satisfied:-

46.1. If the claimant does not perceive his/her dignity to have been violated, or an adverse environment²⁷ created, then the conduct should not be found to have had that effect.

46.2. If it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

47. Langstaff P in *Betsi Cadwaladr University Health Board v Hughes*²⁸ said this:-

“9. Whether [the conduct] has that effect is a matter of fact is to be judged by a Tribunal ... objectively. In determining that, the subjective perception of the Claimant is relevant, as are the other circumstances

²⁵ [2009] ICR 724 (EAT)

²⁶ [2018] IRLR 542 (CA) per Underhill LJ

²⁷ This is the shorthand adopted in Dhaliwal for the cornucopia of epithets deployed in the statute. Although it is a convenient shorthand, it is important not to lose sight of the force of the particular adjectives used: see *Land Registry v Grant* [2011] ICR 1390 (CA), per Elias LJ at [47].

²⁸ [2014] UKEAT/0179/13



of the case. But, as was pointed out in Dhaliwal it should be reasonable that the actual effect upon the Claimant has occurred.”

48. In assessing those questions the tribunal has to have regard to the terms used by Parliament. Again, in Betsi Cadwaladr Langstaff P said this:-

“12. The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.”

and in Grant v HM Land Registry²⁹ Elias LJ reinforced the same point stating:-

“47 ... Tribunals must not cheapen the significance of these words [“violating dignity”, “intimidating, hostile, degrading, humiliating, offensive”]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”

Direct disability discrimination

49. Direct discrimination is prohibited by s.39 EqA. Section 13 EqA provides that direct discrimination occurs where because, of a protected characteristic, a person is treated less favourably than another person has been or would have been. That is an objective question and involves a comparison.
50. The use of “would” allows for a hypothetical as well as an actual comparison. In making that comparison s.23 EqA requires that the protected characteristic aside there must be no material difference between the circumstances of the complainant and the real or hypothetical comparator “*relating to each case*”³⁰.
51. For a respondent to be guilty of direct discrimination, it is not sufficient for a claimant to have a protected characteristic and to be treated less favourably. The less favourable treatment must be done ‘*because of*’ the protected characteristic. The protected characteristic need not be the sole or even principal reason for the treatment so long as it has a significant influence (that is one *which is more than trivial*) on the reason for the treatment³¹.
52. The question we therefore must address, is consciously or unconsciously, what was the alleged discriminator’s reason for acting as they did? ³² Unlike causation,

²⁹ [2011] IRLR 748 CA

³⁰ The wording in s.23 EqA differs slightly to that used in the DDA 1995 (“relevant circumstances” see Cordell v Foreign & Commonwealth Office [2012] ICR 230 EAT)

³¹ Nagarajan v London Regional Transport 1999 IRLR 572 HL and Igen v Wong [2005] IRLR 258 [37]

³² An example is that of the shop keeper given by Lord Phillips in Governing Body of JFS [2010] 2 AC 728 at [21] “A fat black man goes into a shop to make a purchase. The shop-keeper says ‘I do not serve people like you’. To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that he was black? In the



which is a legal conclusion, the reason why a person acted as s/he did is a subjective question and one of fact³³. The tribunal must not concern itself with is “if the discriminator treated the complainant less favourably on racial grounds, why did he do so?” That question is irrelevant³⁴. Discrimination is not negated by the alleged discriminator’s motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably³⁵.

Constructive unfair dismissal

53. Where, as here, the claimant was an employee, has been continuously employed for 2 years or more and a brought a claim for unfair dismissal the employee has the right not to be unfairly dismissed³⁶. No timing limit arises here because in constructive unfair dismissal complaints based on alleged discriminatory conduct, time begins to run from the date of termination of employment and not from the employer’s repudiatory breach of contract³⁷. Time runs from when the employee resigns or, if the resignation is on notice, from the expiry of the notice.
54. It is for the employee to show that he/she was entitled to treat him/herself as dismissed. The classic test for constructive unfair dismissal is set out in Western Excavating v Sharp. The Court of Appeal has revisited, reviewed and summarised the relevant caselaw in Kaur starting at [35].
55. In this case, if the employee does so, as no potentially fair reason has been advanced that is an end to the matter (in liability terms at least).

OUR FINDINGS OF FACT

Our findings below are made on balance of probabilities based on the evidence we heard and documents we were taken to.

Having made our findings of fact we stepped back and considered if general credibility findings or inferences of discrimination could be drawn. For ease of reading we set out those findings in chronological sequence within what follows.

56. Ms Mujuru started working for BWCH on 5 August 2013, initially we were informed, as a secretary. She subsequently applied for and was promoted to the position of assistant manager of the radiology department, a band 6 post, with effect from May 2021. She reported to a few managers during her time in that role, but at the start of the events that concern us she was managed by Mr Ian Shakespeare (interim operational manager) who was filling that role on an interim basis from September to October 2021.

former case the ground of his refusal was not racial; in the latter it was. The reason why the particular fact triggered his reaction is not relevant to the question of the ground upon which he discriminated.”

³³ Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48 at [29]

³⁴ R. v Birmingham City Council, ex p. EOC [1989] AC 1155, see Lord Goff at 1194.

³⁵ Lady Hale in JFS at [57]

³⁶ s. 94 Employment Rights Act 1996

³⁷ Meikle v Nottinghamshire County Council 2005 ICR 1, CA



57. Ms Mujuru applied and was interviewed for Mr Shakespeare's role, but was unsuccessful. Miss White was appointed as Mr Shakespeare's replacement as operational manager, a band 7 post. She reported at the time to Mr St Louis who was at the time Deputy Director of Operations - Medicine and Genetics, a band 8C role. Organisational charts of BWCH were before us [752 & 753]
58. On 21 October 2021 Ms Mujuru and Miss Noonan, the lead sonographer, interviewed Ms Saunders for the then vacant post of office manager. We find that following that interview Ms Noonan contacted HR to raise a concern about how that interview was arranged and conducted, including
 - 58.1. Miss Noonan only being asked by Ms Mujuru a few minutes before it started to participate in it,
 - 58.2. her not being given time to read the papers or prepare questions and
 - 58.3. that it appeared to Miss Noonan during the interview from the answers that Ms Saunders gave that she had either seen the questions in advance or had been coached on what she was going to be asked.
59. We were told by Miss Noonan and accept for reasons we will shortly address, that her concerns were passed to Mr Shakespeare, who in turn passed them on to Miss White during a handover in the week before she commenced her role.
60. On several occasions in her witness statement Ms Mujuru made a direct assertion that she had asked Ms Noonan if she had raised a complaint about the recruitment process and was told she had not. Miss Noonan told us in reply to a direct question that she had raised such a complaint straight after the interview to HR and Ms Mujuru was wrong in saying that. We return to our findings on that issue at (77).
61. Ms Mujuru was on leave from the day Ms White took up her post week (8 November) to Monday 15 November 2021 inclusive.
62. On 16 November 2021 Mr St Louis told us he was at BWCH (his role was split between two sites and at the time he went there once a week). We find he spoke to Ms Mujuru telling her there was to be a second interview because of the concerns raised and she should prepare questions for that. He told us she did not disagree or suggest otherwise but did say that she had been informed by HR and the second interview could not impact the decision of the first panel.
63. He did not refer to that discussion in his witness statement.
64. Ms White in her witness statement told us [CW/10] that following the direction to complete a second interview from Mr St Louis:-

"I emailed the Claimant at 8:18am [122] on 17 November 2021 to ask her to provide a copy of the Office Manager Job Description so that I could prepare the questions for the second interview appropriately. I also asked the Claimant to confirm the questions that she asked at the



initial interview, and the name of the person in HR that she had confirmed next steps with [112].”

65. Thus, Miss White’s email early on the day following that discussion supported Mr St Louis’ account that that discussion had taken place and that Miss White was aware of it. That is yet further supported by the email from HR we refer to at (67) below. Further, it predated Miss White’s discussion with Ms Mujuru that Miss White referenced at [CW/12] (see (72) below).
66. Contrary to what we find was that instruction to conduct a second interview, at 08:10 on 17 November Ms Mujuru emailed HR with part of an interview form [127] which the emails we have seen make clear was the mechanism by which Ms Saunders was appointed to the role. What appeared to be the second page of the interview form dated 17 November and signed by Ms Mujuru follows at [128]. It made clear Ms Saunders was being appointed and that she was the only interviewee.
67. At 08:21 HR pushed back to Ms Mujuru *“I have just noticed another email off you to set up the interview for this post, shall I hold off doing this until you have spoken to someone or is my colleague ok to proceed with this schedule for you?”* [116].
68. In essence Ms Mujuru was being asked why are you asking for us to arrange a second interview if you are sending the appointment form?
69. Ms Mujuru responded at 08:23 stating *“I am not sure which email you are referring to about setting up interviews”* [116] . At 09:58 [124] having apparently omitted one page of the two pages of the interview form from her earlier email she forwarded to HR both pages of the interview form.
70. Miss White put it thus [CW/11]:-
- “I understand that the Claimant made the decision to action the hire of Ms Saunders on 17 November 2021 [125-128] despite the concerns that had been raised about the - suitability of the interview process in assessing Ms Saunder’s ability to meet the person specification, and the instruction from Mr St Louis to conduct a second interview.”*
71. At 08:35 Miss White emailed HR [135] asking for the details of the person Ms Mujuru she told Mr St Louis she had spoken to in HR.
72. On the 18 November Miss White spoke to Ms Mujuru about the selection process. Ms Mujuru became upset and was permitted by Ms White to go home, remaining off work for a couple of days. Miss White’s account of that conversation was this [CW/12]

“ ... I did not raise the recruitment process situation with the Claimant during this conversation. ... The conversation only arose when the Claimant became upset and shouted ‘I am sick of being undermined’. I asked what she meant and she continued shouting, stating that she



*was referring to people challenging her regarding the hire of the office manager. She went on to state that I had no right to question her decision to hire the new Office Manager (Ms Saunders), and the only person that had any right to speak to HR was Ms Noonan. **She told me that I was not on the interview panel and therefore I had no right to have an opinion.** She also stated no—one else in the department should have the right to undermine her decision. I asked why she had not waited to compete the second interview, as directed by Mr St Louis, but she stated that HR had told her that we have to appoint the person that had been interviewed (Ms Saunders) regardless. She was very emotional, crying by this point and said ‘sack me if you want’. I reassured her that this was not what we would want.”*

[Our emphasis]

73. We accept Miss White’s account of what was said because the view ascribed to Ms Mujuru in our emphasis was in remarkably similar terms to the way Ms Mujuru herself describes matters (including the email she sent to Ms Ward that we address starting at (133)).
74. We find Ms Mujuru’s comments that essentially it was none of Miss White’s business are frankly extraordinary in context of any business, let alone a public (NHS) trust, her management role and the accountability that goes with that. That formed part of a common theme on Ms Mujuru’s part. When challenged by Miss White Ms Mujuru behaved as if she was not accountable to her managers. Ms Mujuru either was unable or unwilling to see that she was.
75. As we will go on to address Miss White started to conduct a fact-finding exercise relating to that recruitment process. We set out the result of that fact-finding exercise at (87) in full. In summary that found other concerns in addition to those raised by Miss Noonan, including
 - 75.1. how had the 44 applicants had been whittled down to a shortlist of five,
 - 75.2. why did BWCH’s records show only one interview was arranged
 - 75.3. had the other four shortlisted candidates been invited to an interview,
 - 75.4. did Ms Saunders have the qualifications to undertake the role and
 - 75.5. other matters.
76. Ms Mujuru later complained to Mr Patel that after only a couple of days in post Ms White was complaining about her performance.
77. We accept Miss Noonan’s evidence that she had raised concerns. Whilst Miss Noonan accepted she had encountered memory problems due to medical issues she has had, before us she was able to clearly discern between what she could and could not recall and was extremely clear on her response to that question.



78. That she passed on the complaint on is supported by Miss White being aware of those concerns. They could have only come from Miss Noonan; other than Ms Mujuru she was the only person on the interview panel. Miss White was not in post at the time.
79. All those matters suggest to us that the concern about the recruitment of Ms Saunders emanated from someone close to or involved in the recruitment exercise. That that was so is supported by Mr St Louis. We find Mr St Louis directed that a second interview take place before Ms Mujuru lodged the forms to complete the appointment of Ms Saunders. Yet further concerns emanated out of that instruction. We find those concerns only arose because of the initial concern raised by Miss Noonan.
80. Ms Mujuru did not attend to be cross examined so her evidence could not be tested, her account in parts was at odds with what she argued at others and in several respects she argued points that were contradicted by the contemporaneous documents. We give little weight to Ms Mujuru's account where unsupported elsewhere by evidence (oral or documentary) that has been tested before us.
81. We find for those reasons that fact finding exercise emanated from the concerns that Miss Noonan had raised.
82. In the light of the issue being raised by Miss Noonan we find Ms White as Ms Mujuru's manager was entitled (if not obliged) to investigate the concerns that had been raised including what appeared at that point to be Ms Mujuru's failure to follow Mr St Louis' instruction.
83. We find that Mr St Louis, Ms Mujuru's second level line manager, instructed Ms Mujuru to conduct a second interview. We find even if not expressed directly, it was or should have been implicit from that instruction that Ms Mujuru was not to appoint to post until the second interview had been conducted. We find that Ms Mujuru's actions appointing to post without holding the second interview was insubordinate and a failure to follow a management instruction. That is reinforced given the push back she received in that email from HR.
84. In the light of the questions concerning the recruitment we find that the instruction from Mr St Louis to defer any appointment until a second interview had been conducted was a reasonable one. We find that Ms Mujuru's view (as set out at (72)) was not a reasonable one to hold, she was accountable to her line managers in the same way her reports were accountable to her, and her appointing to post in contravention of that instruction, was an unreasonable refusal to follow that instruction.
85. We return next to the events as they arose.
86. Ms Mujuru was then off work for a few days. A return to work meeting was conducted following her absence on Monday 22 November 2021 [133].



87. On Friday 26 November 2021 Ms White forwarded to Rachel Morris a HR Business Partner the fact find that she had conducted in relation to the recruitment process at 11:54 [146]:-

“Sorry for the delay in sending this after I left you a VM. I had called recruitment to clarify their feedback and it changed the picture a little. Please see notes of initial findings below and Dom’s support in the email trail. Please let me know what next steps will be.

Initial fact finding has raised following concerns for further investigation. Details and initial findings below (source in brackets) .

1) Shortfalls in the selection process (background to hire)

a. Recruitment originally confirmed that only 1 person was invited to interview, but I have now confirmed that 4 candidates were shortlisted and withdrew prior to the interview date. (follow up discussion with PR) There is some anecdotal information around why one internal person withdrew - that there was no response from LM when trying to obtain an intro/walk round the dept.

b. The 2nd interviewer AN was not given prior notice of interviews, nor input on the questions asked. Candidate was already seated when AN was notified to attend, so unable to read questions in advance. (Discussion with AN) AN deemed the the [sic.] questions asked at interview unsuitable for an Admin Manager position, and this was raised post interview by AN (Questions to be provided)

c. 2nd interviewer AN raised concerns immediately following interview, and has not scored candidate nor agreed appointment as part of the panel. (Discussion with AN)

2) Failure to follow management instruction

a. AN raised concern over questions as soon as interview finished, and confirmed with HR that a 2nd interview should take place. It was confirmed with AN that the person did not need to be hired if there were remaining concerns. AN confirmed this with LM. (Discussion with/notes of AN)

b. On Tuesday 16th November DSL confirmed with LM that CW would complete 2nd interview in AN absence. LM informed DSL that regardless of outcome of that interview HR said that the candidate had to be hired. (Discussion with DSL)



c. On Weds 17th November at 8.08am, CW confirmed via email to LM that it would be taken forward. CW requested name of person in HR spoken to, original questions and JD. (email)

d. On Weds 17th at 9.58am LM confirmed the appointment to recruitment, despite 2nd interview having not taken place. (email from recruitment)

e. On Thurs 18th November during a 1:2:1 regarding another issue, LM confirmed to CW that she had hired ES – stating that it was her decision and others should not be undermining her. (CW)

3) Breach of trust and confidence

a) DSL was informed by LM that HR had advised that we must hire the candidate regardless – when AN had confirmed that this was not the case. CW was due to check this advice, but the hire was actioned prior to the opportunity to discuss with HR and re-interview.

b) When notifying CW of the hire, LM acknowledged that there were concerns from others in the department, and that she was aware of agreed next steps, but stated she should not have been questioned in her decision. LM showed complete disregard for impact on candidate, department and colleagues.

Impact: permanent contract offered to individual without demonstrated skills and experience for role.”

88. At 13:30 that day Miss White met with Ms Mujuru and amongst other matters given Ms Mujuru's reaction at the previous meeting, out of what we accept was a concern for her welfare, offered her a stress risk assessment.
89. Despite Miss White having conducted her fact find on HR advice, on receipt of the fact find Miss White was advised by HR that Ms Mujuru needed to be given the opportunity to provide her own account of events as part of the fact find. Miss White was thus advised to meet with Ms Mujuru. That never occurred for reasons we will go on to.
90. Ms Mujuru was then on prearranged leave from 10 December 2021 until Monday 3 January 2022 (inclusive) (see our findings starting at (169)).
91. Within the space of less than an hour on 3 January 2022 both Ms Mujuru [162] (timed at 16:20), and Ms Saunders [224] (timed at 16:41) wrote to complain about Miss White. Ms Mujuru complained direct to Mr St Louis. Ms Saunders to Ms Mujuru who passed that in turn to Mr St Louis. BWCH argue that it is more than



a coincidence given 3 January, when both those complaints were raised, was a bank holiday.

92. We do not intend to set out Ms Mujuru's complaint in its entirety but suffice to say she raised amongst other matters the following:-

92.1. *"I would like to raise a complaint regarding Claire White's attitude and behaviour towards me."*[162]

92.2. Regarding the recruitment of Ms Saunders: *" 'you should not have done that, you have put the department at risk' ... I found her questioning to be very offensive. I felt very upset and intimidated. She reduced me to tears. I was crying at this point, but she continued saying if I felt that I was struggling in my current role, she could help me get deployed to other departments and she could contact HR on my behalf."* [163/164]

92.3. *"I was so confused and distressed. I went straight to find Dr Balogun who ... calmed me down and she was very supportive. I went home but felt unwell the same day, I had a bad migraine. I suffer from migraines and gastritis and stress is a trigger. Claire had stressed me a lot within a few days of me working with her. I was off sick on Friday 19th November 2021. First time being off sick in years."* [164]

92.4. *"Claire hardly knew me ..., yet she undermined and belittled me."* [164]

92.5. *"I do not feel acknowledged as a manager by Claire. I do not feel valued or supported by Claire."* [164]

92.6. *"I feel like she is discriminating against me. It made me feel like I do not belong in the radiology management team as a black person amongst white managers."* [165]

92.7. *"I am kindly asking you to look into this as Claire is not treating me or other admin staff with the respect and dignity we deserve."* [165]

93. Mr St Louis responded to Ms Mujuru (copying in HR) by email at 09:15 on 5 January under the heading **"Grievance regarding Claire White's attitude and behaviour"** [161]. He acknowledged receipt of Ms Mujuru's email and stated:-

"I am concerned that previous interventions have not been addressing the root cause of the issues in the team as this is the third consecutive operational manager you have raised similar concerns about in the past 6 months or so.

I am arranging for an HR mediated/facilitated session with those involved so that we can have an open and honest conversation and come up with constructive solutions.

I will be in touch with a date in due course."

94. That leads onto the first issue we need to address:-



That Mr St Louis responded by making untrue accusations against her (that she had been complaining about her managers, namely about 3 line managers within 6 months) [CUDL 1 of 9 (2.1.1.1) and V1 of 7 (6.2.1)].

95. We asked Mr St Louis why he did not acknowledge the grievance and arrange to meet Ms Mujuru so he could clarify what the complaint was about rather than, as it appeared to us, to form a view. He told us the reason he replied in that way was because he felt Ms Mujuru was only raising issues concerning Ms White as a response to the concerns being raised by her about the recruitment process. He explained his rationale for that view was this:-
- 95.1. Since being appointed to post in May 2021 (just over six months before) she had made complaints about her two previous managers and was by then also making a complaint against Miss White and
- 95.2. There were several factual inaccuracies in the email.
96. As to (95.1) he told us
- 96.1. [DSL/5] on 11 July 2021 Ms Mujuru had complained about her manager at the time, ZZ [Name redacted] (Operational Manager for Radiology). At that point she had been in post 7/8 weeks. Mr St Louis told us Ms Mujuru's complaint was not about race discrimination, but expectations and their working relationship. He was involved because he was asked to facilitate a mediation session with the two but ZZ went off sick and never returned to the Trust [157, 158-160]
- 96.2. around October 2021 Ms Mujuru had complained about Mr Shakespeare asserting that she did not think that he could do his job [DSL/17]. He told us that arose out of Ms Mujuru blaming Mr Shakespeare for failing to communicate a message to the sonographers when Mr Shakespeare had asked her to do this [94]
97. Contrary to Ms Mujuru's suggestion we find Mr St Louis' statement was correct. We heard Miss White was the third manager she had complained about in the six months since July 2021.
98. In addition Mr St Louis told us [DSL/4] his first contact with Ms Mujuru was in July 2020 (i.e. prior to her taking up her post at the time of the matters that concern us) when she raised a complaint about her then line manager, YY [Name redacted], who was the Radiology Professional Manager [82 & 83]. That issue stemmed from YY needing a private room and YY asking Ms Mujuru and Ms Saunders to move out of the room they were in and go to another room. Ms Mujuru alleged that she had been discriminated against on the grounds of race because other members of the management team (who were not white) had not made this same request to Ms Mujuru.
99. YY's concern is clear from her email having been notified of the complaint:- *"... I would like to say that I am appalled at being accused of being racist by a colleague. It is not true and I am deeply anxious and concerned that such an*



allegation has been made. I have spoken to my line manager regarding this serious accusation.”

100. We were told that complaint was resolved at a meeting that Mr St Louis attended with Ms Mujuru, her then new line manager, ZZ, and YY [84]. It was agreed that there had been a misunderstanding, and YY apologised to Ms Mujuru for any upset caused; Ms Mujuru accepted the apology and everyone moved on.
101. A point we noted from that is that Ms Mujuru complained that she was being discriminated against on grounds of race yet she was treated YY in the same way as Ms Saunders (who we were informed was white (although she did not set out how she described herself in her statement)) who was also asked to move. It is difficult to see how that could be less favourable treatment and race discrimination.
102. As to (95.2) Mr St Louis he told us there were numerous factual inaccuracies in what Ms Mujuru had said:-
 - 102.1. She was wrong to say she had not been off sick for years because she had COVID the preceding September
 - 102.2. She was wrong to allege the Blue Obstetrics Box had never been worse than since Miss White started because
 - 102.2.1. that had been an ongoing issue for years. In Mr St Louis' view it was never better than it was then and was not the black hole it had been before and
 - 102.2.2. Ms Mujuru had been off for the previous 3½ weeks so was not able to comment on the up to date position.
 - 102.3. Her comment *“It made me feel like I do not belong in the radiology management team as a black person amongst white managers”* was wrong – the only managers in department at that time Mr St Louis who described himself as mixed race – Black Caribbean and White British, Ms Majuru and Ms White and the Clinical lead at that time was Moji Balugun who self described, we were told as Black African. Thus the radiology management team was not a team of white managers and it was misleading to suggest that.
 - 102.4. Finally, he told us that as Ms Mujuru and Miss White had worked together for less than 20 days working he was concerned as to how Ms Mujuru had come to the view she had when Miss White was still settling into a new department.
103. Mr St Louis told us he formed the view Ms Mujuru had struggled with the greater accountability and scrutiny that being in a more senior position entailed following her promotion, the need to explain/justify her actions that went along side that and that she struggled with having line managers pushing back at her.



104. His view was that given both complaints were sent within a few minutes of each other and on a bank holiday, Ms Mujuru's complaint was coordinated with Ms Saunders, whose appointment the investigation related to.
105. He felt Ms Mujuru's complaint was nothing to do with race discrimination but because she was struggling, she had taken umbrage that Ms White was investigating the recruitment issue, this was a retaliation and deflecting from that.
106. Ms Mujuru responded that day "*Many thanks for looking into this. I will wait to hear from you.*" [257].
107. The following day (6 January 2022) both Ms Mujuru [LM/6] and Mr St Louis [DSL/25 - 26] told us they discussed how to resolve Ms Mujuru's concerns.

Ms Mujuru alleges [CUDL 2 of 9 (2.1.1.2) and V2 of 7 (6.2.2)] that Mr St Louis did not address her complaint about Claire White made in her grievance of 3 January 2022.

108. Mr St Louis asserts that having discussed her concerns with Ms Mujuru that she was happy for him to feedback her concerns to Miss White, beyond that she was content for him to manage the issue with Miss White as he saw fit and that Ms Mujuru agreed that that could be done on an informal basis. He points out in support that Ms Mujuru had told him that in the two days that she and Miss White had been back at work working together since their respective breaks there had been no issues at all. Mr St Louis also told us that given he was conscious Ms White was about to go on extended break that he asked Ms Mujuru if she was agreeable that he delay addressing that with Ms White until her return. Which she was.
109. Ms Mujuru disputes that she agreed that matters could be dealt with informally because "*the concerns I raised which were particularly serious*". What she wanted as an outcome was that "*... [Miss White] to be spoken to and the matter formally handled so that it will be on the records*" [LM/17].
110. This issue thus concerns an allegation that either
 - 110.1. that he failed to address her grievance adequately or at all and/or
 - 110.2. what Ms St Louis told us was agreed, was wrong.
111. We find that is simply not correct that he did not address it at all because Ms Mujuru accepts he spoke to her about it.
112. We note the version of BWCH's grievance policy that was originally in the bundle [574] was issued in December 2022 and post dated these events. We asked for the version applicable at the time to be added. That was done. It dated from October 2020 [752].
113. BWCH's grievance policy provided that grievances could be raised verbally or in writing but should be dealt with informally if possible [759 §9.1.2]. It continued:-



“9.1.4 Upon receipt of the concerns, the manager should arrange a meeting with the individual at the earliest possible opportunity to consider and discuss the options available to resolve the problem. A written summary of the concern and the agreed resolution should be sent to the employee within 7 calendar days of the meeting. A copy should also be retained on the employee’s personal file.

[There was no section 9.1.5]

9.1.6 Depending on the nature of the grievance it may be appropriate for a facilitated meeting to be convened to support informal resolution. It may be appropriate for a line manager, an independent manager or an inclusive practitioner to facilitate the discussion. The purpose of the facilitated meeting is to discuss the grievance in an open and constructive manner and find resolution. For more guidance on this, please contact a Human Resources Practitioner.

9.2 Stage 2 – Formal Grievance Meeting

9.2.1 Where it has not been possible to resolve the grievance at Stage 1, the employee may submit a formal grievance using the Formal Grievance Report Form (Appendix 1). This must clearly state the nature of the grievance, the outcome being sought and why the informal stage was deemed unsuccessful. [typo omitted]

9.2.2 The formal grievance should be submitted to the employee’s line manager. Where the line manager has been significantly involved in the informal process it may be necessary to submit the grievance to the next level of management or a suitable independent manager. On receipt of the grievance the Manager should contact their Human Resources Practitioner for further guidance

9.2.3 The manager in receipt of a grievance should write to the employee acknowledging receipt of this within 7 calendar days of receipt. This letter should also set out the next steps in the process and invite the employee to a formal meeting to discuss this further within 21 calendar days.

9.2.4 The employee has the right to be accompanied at the meeting by an accredited Professional/Trade Union representative or workplace colleague and must make every effort to attend the meeting. A HR representative may also be in attendance to support this meeting.



9.2.5 The purpose of the meeting is to allow the individual to explain their grievance and how they believe this should be resolved. If there is any documentation to support the grievance, copies of this”

114. The policy made clear that allegations of bullying and harassment, should be dealt with under the Dignity at Work policy [756 §3.2].
115. Mr St Louis did not record those matters in writing to Ms Mujuru and nor did he make a contemporaneous note of the conversation. The next best record we have of his account is an email he sent to HR on 29 March 2022 [295].
116. Mr St Louis told us he didn't think the grievance even met the grievance threshold. If so, he did not explain why he headed his initial response “Grievance” and if it did meet the threshold he should have told her that, so she could appeal.
117. He told us that despite his view Ms Mujuru's complaint was raised for the reasons at (105) given the complaint from other colleagues he decided to speak to Miss White. He explained that the reason he wished to speak to Miss White was that whilst nothing had highlighted egregious or terrible behaviour similar scenarios were identified by others and thus that suggested there was something that needed to be addressed.
118. Mr St Louis, Miss White and Mr Patel all told us Mr St Louis spoke to Miss White on 20 January and he gave her high level feedback, that is to say, general advice.
119. Ms Mujuru queries if the meeting was held on 20 January between Mr St Louis, Miss White and Mr Patel [LM/25 & 26] because
 - 119.1. Mr Patel did not appear to be aware of her complaint on 11 February
 - 119.2. if Mr Patel had been present he would not have needed to have asked the questions and
 - 119.3. if the meeting had gone ahead why had Mr Patel (or for that matter Mr St Louis) not responded to her email and provided her with the outcome of that meeting as BWCH's grievance policy dictated.
120. For the reasons we give at (124) we find that meeting occurred and that Mr Patel was present because he shared an office with Mr St Louis and he took over Mr St Louis' role, shortly thereafter.
121. Here the grievance was acknowledged the next working day after it was lodged and based on Ms Mujuru's own account there was no dispute they met to clarify the grievance and Ms Mujuru's preferred way of managing the grievance the following day (6 January i.e. within 48 hours). There is a dispute over what was said (see (108 & 109) above).
122. Having headed his response “grievance” and met with her within the required time frames, irrespective whether he felt she had agreed it could be dealt informally or not, Mr St Louis should have sent an outcome to Ms Mujuru within 7 working days and retained a copy on her personal file. That would have



potentially avoided the dispute over what was agreed. By failing to do so he did not comply with good practice and failed to follow BWCH's own procedures.

123. Mr St Louis should have also carried out an investigation before making the comments he did. We explored at length with him why he did so. He told us that based on the examples he gave, he knew what Ms Mujuru had said was blatantly wrong, that this was the third time in the 6 months or so she had been in post, that she had complained about a manager (that ignores the incident concerning YY because that predated Ms Mujuru taking up her post) and as a result he came to the conclusion that Ms Mujuru was not coping and seeking to deflect that/blame others (see (102 to 105)).
124. Despite the failure to follow BWCH's own policy, good practice, and to investigate before reaching conclusions, we prefer Mr St Louis' account of the discussion with Ms Mujuru on 6 January 2022, her evidence has not been tested and for the reasons we give at (60) we place little weight on her account. We find that Mr Patel and Miss White support Mr St Louis' account that that was his understanding of what was agreed, as their evidence of the meeting on 20 January supports. Likewise the response of Mr Patel when he addressed her complaint that Mr St Louis had failed to deal with the initial complaint (see our findings starting at (140)).
125. Again, Ms Mujuru drew racial inferences from Mr St Louis' failure when we find there were none that could be reasonably drawn. She was treated in the same way as Ms Saunders, a fellow complainant and thus an actual comparator whose circumstances were materially the same as Ms Mujuru, other than she was white. We find Ms Mujuru was not treated less favourably than Ms Saunders.
126. For those reasons we decline to draw adverse inferences against Mr St Louis in that regard.
127. As Ms Mujuru was a manager she should have been familiar with BWCH's grievance policy in any event. That is even more so give she was raising a complaint. That provided that if she was unhappy her grievance had not been addressed properly or at all by Mr St Louis she could have appealed that to a higher level manager. She did not. Instead she raised it with HR and then to Mr Patel (see our findings starting at (140)).
128. Before we turn to the next complaint we need to record that on 18 January following Ms White's return from annual leave Miss White met with Ms Mujuru. Miss White emailed Ms Mujuru that afternoon [216] to record what had been discussed:-

"... following the appointment of an Office Manager in Radiology some concerns have been identified with regards to the Recruitment process that was followed. I have spoken to colleagues involved in this process to help me understand the outcome. Whilst you and I have discussed this briefly, I would like to take the opportunity to discuss this in more detail. The purpose of this meeting is to understand any future support



that may be required, and to discuss how the team and service move forward.

The meeting will take place at 2pm on Thursday 20th January 2022, on the Ground floor of Lavender House.

Amanda Robertson, People Consultant, will also be in attendance to discuss the Trust's Recruitment and Selection Policy and also to offer support and guidance on due process. This will be an informal meeting, however should you wish to be accompanied by a colleague or representative, then please could you confirm who that will be by 5pm on Wednesday 19th January 2022."

129. In a letter of 17:43 that day Miss White sought HR advice stating amongst other matters *"I spoke to Lydia this afternoon. Lydia has requested that we put in writing what she has done wrong and why she has been 'summoned to a meeting.'*" [186]
130. Ms Mujuru responded the following day [215] asking for clarification of the specific issues in relation to the recruitment process that Ms White wished to discuss and that she did not feel able to attend the meeting until she had been made aware of those concerns.
131. Miss White responded the following day, 20 January [215] repeating that it was an informal meeting to explore the recruitment process, did not give any additional details, but indicated that the meeting was rescheduled for 26 January.
132. We found above at (124) that 20 January was also the day Miss White met with Mr St Louis and Mr Patel.
133. Ms Mujuru responded on 23 January [214] not to Miss White, but to Ms Ruth Wall (BWCH's Head of Equality, Diversity and Inclusion). In addition to other points, she raised questions as to whom the concerns were raised by, and what right did Miss White have to be calling meeting in relation to a recruitment exercise when Miss White was not part of the panel given Miss Noonan had informed her that she respected her decision and did not have any concerns to raise. Ms Mujuru indicated to Ms wall that she did not wish to attend that meeting with Miss White as she did not understand the *"motive"* behind it and asked Ms Ward to look into the issue.
134. There followed an exchange between Mr Wall and Ms Mujuru in which Ms Mujuru repeated amongst other matters her point querying the basis for Miss White calling her to a meeting to discuss process she had not been involved in and that she did not wish to attend the meeting. Ms Wall addressed that in her response to Ms Mujuru of 24 January [213], *"A manager can meet with a staff member if she has concerns about something. In this instance it looks more formal as HR have been introduced."* As we say above as a manager herself Ms Mujuru knew or ought to have known that both points were so.



135. The exchange between continued with Ms Ward assisting Ms Mujuru to draft a response to Miss White. That was sent on at 17:18 on 25 January [217-218]. It stated that Ms Mujuru did not feel able to attend. Miss White responded the next day (26 January) stating *“I am sorry that you have felt unable to attend this rescheduled informal meeting. As we have not been able to meet I will be seeking support from HR with regards to next steps. I will update you as soon as I am able.”*
136. On 4 February Miss White forwarded to Ms Mujuru a letter by hand [222] inviting Ms Mujuru to a meeting on 17 February to discuss the recruitment to the post of Office Manager. In doing so she pointed out that she had offered Ms Mujuru two opportunities to attend on 19 and 26 January and *“To date you have refused to attend”*. She stated she had invited HR to support the process as that might be a difficult conversation. Miss White went on to explain that requesting Ms Mujuru to attend the meeting was a reasonable management request and should she decide to refuse without a clear reason this might be considered a failure to follow a management instruction. She encouraged Ms Mujuru to attend and pointed out that Ms Mujuru could have a work colleague present provided that it was not the appointee to the Office Manager post or anyone else involved in the recruitment process. If she wished to be accompanied, Miss White asked Ms Mujuru to let her know who will be attending, by 5pm on Tuesday 15 February.
137. It is unclear when that letter was handed to her but at 10:06 that day (4 February) Ms Mujuru emailed Amanda Robertson of HR attaching the email from Ms Saunders of 3 January stating she had raised and forwarded that to Mr St Louis, that she had had a brief discussion with him, he had said he was going to investigate it but had not got back to them. She went on to ask for that to be investigated saying *“I could not directly deal with Emma’s concerns as I also had raised my own concerns regarding the Operational Managers’ conduct.”*
138. She told us [LM/24] that she was referred to Mr Patel by HR and so she texted and emailed him on 11 February 2022. We find that is not correct. She WhatsApp’d Mr Patel on 10 February 2022 [253] stating:-
- “We have raised concerns regarding senior management’s conduct and behaviour, and we have never had these resolved or received any feedback. We have not seen any change either. We don’t feel valued and respected. We are made to feel like we don’t belong. This is against trust values. We need change please.”*
139. Mr Patel told [JP/8] us that message came out of the blue because she had not spoken to him about any concerns before then. We accept that was so, Ms Mujuru does not suggest otherwise.
140. Given the lack of detail in her WhatsApp message of 10 February as to what it related to Mr Patel told us he replied on 11 February asking her via WhatsApp to share the details of the concerns she had raised. She responded stating that it would be easier for her to forward the email trails and she did so by sending a series of email trails [223-226, 227-231, 232- 234, 235 – 238, 239 – 241, 242 -



244 248 – 250, 251 - 252]. Mr Patel states that he had not seen those emails before she forwarded them to him. He went on to say:-

“10. I spoke informally to Mr St Louis in the office after receiving the Claimant’s emails, when based in the same location together the following week, where he advised these emails were what the previous complaint had been based upon - there are no notes of this conversation. I also spoke to Ms White in person within the same week, to advise that these emails had been shared and that there was no new information which had not already been shared - there are no notes of this conversation as it was informal.

11. As discussed further below, I received a phone call from the Claimant on 18 February 2022 and then followed up via email on 1 March 2022 [275-276]. Within my email, I stated that the Claimant’s concerns were already being looked into and the outcome and actions would be discussed upon her return to work. A meeting was then held on 29 April 2022, ...”

141. We return to the 29 April meeting starting at (146).
142. After the exchanges on Thursday 10 & Friday 11 February, Ms Mujuru took a day’s special leave on Monday 14 February 2022 followed by a period of sick leave starting on 15 February 2022. She returned to work on 2 April on a phased return.
143. For completeness as to her absences thereafter Ms Mujuru had a day’s special leave on Thursday 5 May 2022, was absent from Monday 16 May 2022 to Thursday 09 June 2022 inclusive had a further day’s special leave on Tuesday 12 July 2022 and was absent from Monday 01 August 2022 to Tuesday 13 September 2022 inclusive.
144. We now turn to the next complaint chronologically.

On 11 February 2022 Jitesh Patel failed to deal with Ms Mujuru’s complaint [CUD 3 of 9 (2.1.1.3) & V3 of 7 (6.2.3)]

145. Mr Patel’s email of 1 March is informative. Having apologised for Ms Mujuru not finding their discussion supportive and having dealt with issues concerning her absence he went on to day this:-

“... ”

To manage the concerns you have raised I would appreciate your views and thoughts on how you would like to communicate with Claire and myself going forward, as it would be helpful to have a meeting before your return on 7th March. This would be to go through a Stress Risk Assessment, which will allow us to identify and provide any



appropriate supportive measures which can be implemented to minimise the risk to your health and wellbeing.

I am currently looking into the specific points you raised and the details you have shared of previous events:

- to breakdown the events*
- understand the impact*
- determine the appropriate response and/or action to resolve*
- establish a collaborative action plan for all associated*

The outcome and actions of which will be discussed in detail upon your return to work in association with our HR team representative.

...”

146. Due to Ms Mujuru’s absence and the phased return that followed it, the meeting scheduled for 7 March was postponed until 29 April. We find that what Mr Patel was proposing by holding that meeting was the very type of facilitated meeting anticipated by §9.1.6 of BWCH’s grievance policy (see (113)).

147. One of the outcomes of the meeting on 29 April was an agreement that a formal mediation would be arranged [334-335]. That took a considerable period to arrange not least because we were told an internal mediator could not be sourced. An external mediator was eventually sourced and late in the evening of 27 June Mr Patel wrote to Ms Mujuru thus:-

“As discussed and agreed by all parties during our meeting on Friday 29th April, a mediator has been arranged to facilitate a session between yourself and Claire.

This session will be scheduled upon your return to work after Monday 4th July - guidance is attached for you to review.

The Mediation team from CMP will be in contact to arrange discussion times for a one-to-one conversation with the mediator, followed by a joint session facilitated by the mediator.”

148. What that did not make clear was that we were told that prior to the mediation itself the mediator had asked for various things to be done. We were told those steps were to be discussed at a meeting following Ms Mujuru’s return to work (prior to the mediation). Neither that meeting nor the mediation ultimately took place due to Ms Mujuru giving notice of resignation on 28 June 2022.

149. Other actions to be taken forward from the 29 April meeting [335] were to provide support for Ms Mujuru, that everyone was to be told of the need for professionalism, there would be a review of the service by Mr Patel (the meeting



notes reference pressures on workload [334]) and a letter being set to Ms Mujuru on all her concerns, the actions taken and the mediation would be held to address any remaining issues. As to the support to be provided one of the matters in BWCH's mind by 26 April was that a stress risk assessment for Ms Mujuru should be carried out on a date to be confirmed after 2 May [326].

150. We find that whilst that process was not addressed within the time limits the grievance policy set out, Mr Patel did write to her to acknowledge and set out how he proposed to deal with Ms Mujuru's grievance. That was not within the timeframe set by §9.1.4 of the grievance policy. However, we find it should have been clear to her from his letter of 1 March and the meeting of 29 April that he was doing so. Nor could it be said she did not agree with the way he proposed to address it because at the meeting on 29 April she agreed to it. Our findings at (152) support that view.
151. Mr Patel's ultimately recorded his version of events in a letter dated 15 September 2022. Whilst there were various versions of this in the bundle he told that at [483] was the final one.
152. At [LM/56(c)] Ms Mujuru complains that the mediation meeting between Ms Mujuru and Miss White was not arranged in good time. Ms Mujuru did not appear to contest what Mr Patel recorded in his email of 27 June (see (147)) that she had agreed to engage in the mediation. Had she disputed that she agreed to the mediation be held she would the process being adopted not about the delay in that being arranged. We find she had. We return to the delay starting at (267) and events following Ms Mujuru's phased return at (169) but now turn to address two complaints that are alleged to have occurred in the interim.

Between January 2022 and February 2022 Claire White repeatedly tried to investigate Ms Mujuru (with HR present) about a recruitment process that she had been involved in, but which did not concern Claire White at all. [CUD 4 of 9 (2.1.1.4) & V4 of 7 (6.2.4)]

153. We address the issue concerning the recruitment exercise at (75 to 83 and 128 to 137) above.
154. We found that contrary to what Ms Mujuru told us that that issue arose from an original concern raised by Miss Noonan, contrary to Ms Mujuru's assertion that it did not concern Miss White as she was not a member of the panel, that it was entirely right and proper for Miss White to investigate those matters as Ms Mujuru's line manager, that Miss White repeatedly tried to meet with Ms Mujuru to investigate the issue but the reason she did not was Ms Mujuru's failure to attend the meetings until she had been provided with the information she sought. We find that Miss White's investigation had found a prima facie basis to suggest Ms Mujuru had not followed BWCH's process. We find Miss White had reasonable grounds to act as she did. Further, albeit placing this in terms of a different legal test, we find that Miss White held a genuine belief based on reasonable grounds to support those findings grounds following that initial investigation.



155. Arguably, the advice from BWCH's HR team to Miss White was incorrect, if a conclusion had been reached that there were prima facie grounds for misconduct any further interview should have been treated as a disciplinary one and the right to be accompanied and to know the charges against her relayed to Ms Mujuru. Given that was done on instruction from HR any failure was principally one on the part of HR and not that of Miss White.
156. That aside this was not an act of victimisation because the initial invitations to interview predated the date of the protected act (Ms Mujuru's complaint).
157. We find given a complaint had been made about Miss White by Ms Mujuru Miss White/BWCH had reasonable and proper cause to have someone from HR present as a witness given the conversation was likely to be a difficult one as demonstrated by the view Ms Mujuru had expressed that it was no concern of Miss White and her reluctance to attend. That was not just a view Ms Mujuru subsequently expressed at the meeting on 29 April (see (174)) but one she held at the time (see (161)).
158. As to the constructive unfair dismissal issue we find that Miss White was not conducting herself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee and she had reasonable and proper cause for acting as she did.
159. For the same reasons we find viewed objectively that was not an act of detriment for a victimisation complaint.

Mr Patel made an untrue accusation on or around 18 February 2022 that Ms Mujuru had declined to attend meetings to discuss the discrimination complaint she had raised with him on 11 February 2022. [CUD 8 of 9 (2.1.1.8) & V6 of 7 (6.2.6)]

160. On 18 February 2022, Mr Patel called Ms Mujuru by telephone. He made no note of that call. He told us [JP/13] that she informed him that she was not going to be in work for some time because she was sick stating the reason why was due to Ms White's conduct and that she was struggling to work with Ms White. He told us he suggested Ms Mujuru should attend a meeting with Miss White so they could discuss the issues in person as that could help address some of the issues, including the recruitment issue which Ms White was looking to understand further.
161. He stated it appeared that Ms Mujuru was unhappy that HR were going to attend the meeting she had been invited to, to discuss the recruitment situation. There followed a discussion as to the reason for HR's involvement.
162. Following that meeting on 21 February Ms Mujuru emailed him. Amongst other points she made she said this [264]:-

"... to my dismay, during our telephone conversation, you indicated that I have not been cooperative and had not agreed to attend meetings to resolve this. There was never any meeting invite regarding the



concerns I raised in my original email to Dom. You assumed I was off sick merely due to the meeting Claire had asked me to attend. I feel you were not actively listening. Your focus was more on Claire's meeting with me and you seemed to dwell more on that than my concerns, which I felt was biased. I highlighted to you that the issues we were discussing were 2 separate issues, however, you did not seem interested to hear me out but rather hammered on Claire's meeting which I have not attended to date. I informed you that I had asked Claire questions regarding the meeting she is summoning me to and that Claire had not responded to those questions which I felt would have better prepared me for the meeting. I also questioned why Claire's meeting was being prioritised when I, Taylor and Emma had raised concerns first regarding her conduct, which still have not been dealt with, but again you kept asking how else you can support me if I am not engaging.

Dom and you have ignored my concerns and other staff's concerns that were raised regarding Claire's conduct. I am getting the impression that you are interested only in the meeting Claire has requested with me. I feel like I am being victimised for raising concerns. ..."

163. At this point we remind ourselves that Miss White first raised the issue regarding the recruitment on 18 November long before we can trace any record of Ms Mujuru raising her concerns.
164. As we stated above (128 to 136) Ms Mujuru did not attend the meetings arranged to discuss the recruitment issue on 20 & 26 January such that Miss White had had to take the step of writing to Ms Mujuru to explain the significance of that and how it would potentially be addressed in her letter of 4 February 2022 [222]. Nor did Ms Mujuru attend the meeting arranged for 17 February 2022 (as she commenced a period of sick leave on 15 February 2022).
165. We find the accusation was not untrue and Ms Mujuru had declined to attend those meetings. Viewed objectively that was not an act of detriment upon which a victimisation complaint could be based and nor could it form part of a course conduct to support a constructive unfair dismissal complaint.
166. We find that whilst Ms Mujuru had raised a complaint about how she was being treated by Miss White, Mr Patel's comment related to her non-attendance at the investigation meetings relating to the recruitment process.
167. As to the link to race/her grievance we find Ms Mujuru was conflating two separate issues; that she had refused to attend meetings with Miss White, and her discrimination complaint about Miss White, and linked the two. Ms Mujuru addresses this issue at [LM/31 onwards]. She does not tell us what words were used such that she said they were linked to her race. The issues concerning



discrimination she refers to relate to Miss White's conduct whereas the complaints about Mr Patel related to:-

- 167.1. His call of 18 February being to check when she would be back at work and why she had cancelled the meeting regarding the recruitment process rather than to check how she was and to provide support.
 - 167.2. During that call his focus was her being uncooperative and not agreeing to attend those meetings rather than the concerns about Miss White's conduct (something Mr Patel and Mr St Louis had both done), which she felt was biased and unfair and the concerns about Miss White had been swept under the carpet.
168. Whilst there was a connection in time to her complaint to Mr Patel (it had been made a week earlier) by that point Ms Mujuru was off work and that had meant the meeting scheduled for 17 February (the day before Mr Patel called) to be postponed. We find that postponement was why he raised the issue and that would have been addressed whether she had raised her grievance.

Events following Ms Mujuru's phased return in April 2022

169. We heard Ms Mujuru was planning to get married in December 2022 and to honeymoon in Australia. On 20 April 2022 she emailed Miss White [330]:-

"Many thanks for your email. In June I am going out of the country, I am happy to take annual leave from 20th June to 1st of July. (20th June to 27th June - 6 days from the previous financial year).

For my well being, I will book other annual leave days to be taken between July and December.

We have set dates for my traditional marriage in December and unfortunately, I am unable to cancel these dates, therefore I will take those days as unpaid time off."

170. Miss White's response was dated 25 April [329 – 330]:-

"Hi Lydia,

Thank you for your email this morning requesting an email response rather than a discussion.

I am happy to approve 20th June – 1st July, assuming Emma has not been approved leave. Please pop the days from this years allowance on ESR, I am aware of the carry over for the other days.

With regards to December, as with annual leave any unpaid please must also be approved. The impact on the service of my approving annual leave for this period also apply to your taking unpaid leave, so I am unable to approve this.



I have attached the annual leave policy and would draw your attention to points 5.11.1 , 5.11.2 and 5.11.6. You have stated in the attached email that you are aware of the consequences of taking this leave, and for this reason I would like if we could resolve this request through discussion.

If you wish to discuss this in person at any time, then please let me know.”

171. Miss Mujuru’s replied later that morning:-

“Many thanks for your email. As previously mentioned, I am very much aware of the consequences. I do not wish to discuss this as it is distressing. I will be taking the days as unpaid annual leave and I am happy for any disciplinary action to be taken against me.”

172. As can be seen from that exchange Ms Mujuru’s email of 20 April was in no sense a request for leave but more a statement that she would not be at work on the dates concerned. That was not the way any employee should converse with her manager. It embodied a lack of respect. That forms the very basis of Ms Mujuru’s complaints (being belittled and undermined) about Miss White. Her reply to Miss White reinforces that. In contrast Miss White’s response was moderate and conciliatory. The context here as we have seen is that Ms Mujuru had previously taken extended leave in December 2021. That had been approved as a one off.

173. Those emails embody in our view the wider lack of respect and unwillingness to engage that Ms Mujuru demonstrated to her manager, Miss White. As we will see in the subsequent meeting a week or so later, on 29 April a request was put in neutral terms i.e. that both treat each other with courtesy and respect. We find that should have been principally directed towards Ms Mujuru as it was she was at fault and not Miss White. We turn to that meeting next.

On 29 April 2022 – Mr Patel made an alleged untrue accusation when she made a request to him that she wanted someone to accompany her to a 1-2-1 meeting with Claire White. He stated that no one was needed to accompany her to such a meeting, and made the untrue accusation that she had previously met with Claire White for 1-2-1 meetings unaccompanied [CUD 7 of 9 (2.1.1.7) & V 5 of 7 (6.2.5)]

174. The meeting on 29 April was arranged so that it was held only after Ms Mujuru’s phased return had ended [333]. Mr Patel attended with Miss Morris of HR, Miss Wall, Ms Mujuru and Miss White. We had a had a written note of the meeting before us [334/335] that was taken by Miss Morris. Miss Morris’ note records that Miss Morris having suggested “Mediation?” Ms Mujuru stated that she was happy to meet with Miss Wite and other staff she was not happy to meet with Miss White on her own. Mr Patel having pointed out that to provide the service the two of them need to be able to interact, then asked Ms Mujuru if she was able to work in that way. Ms Mujuru responded stating that she just wanted to avoid meeting



with Miss White in person. Ms Ward indicated that everyone needed to remain professional before stating if it was a work or management issue, Ms Mujuru would not feel comfortable dealing with Miss White. Ms Mujuru suggested that if it was to do with something like performance then Mr Patel could be invited to deal with it.

175. The point in her statement where Ms Mujuru addresses this is as follows

“54. In the outcome summary, Jitesh stated that

“Furthermore, you stated that as a result you were no longer willing to be in a one-to-one meeting situation with Claire in order to avoid conflict”

Jitesh was aware I was not meeting with Claire without other people present. Claire had invited me for a meeting after I questioned how she was managing Health Harmony. I went to Jitesh and informed him that I could not attend and he should have made Claire aware of this so we could have another person in that meeting. Jitesh immediately accused me of having several meetings with Claire just the two of us and that he was busy. He said he was about to get into a meeting and just turned towards the computer. I was deeply hurt and by the time I walked out, I was in tears. I went straight to the Clinical Lead, Amy. Explained the situation and she asked me if I wanted her to talk to Claire and let her know that I could not attend the meeting. Amy also commented that due to the problems I had raised regarding the management of the Health Harmonie outsourcing contract, the meeting needed to involve a number of people to reach a resolution. Amy went to inform Claire. Claire seemed not to be aware that she could not have meetings with me without the presence of other staff members as she kept trying to meet with me. Jitesh should have made sure to liaise with Claire to let her know we could not meet just the two of us until our issue was resolved.”

176. Whilst that does not refer to the date Mr Patel is alleged to have done what is alleged Ms Mujuru appears to allege in both her statement and the meeting note she should not have been expected to meet with Miss White without other staff present.

177. Ms Mujuru does not explain why she was happy to interact with Mr Patel but not Miss White, when she alleges both discriminated against her.

178. Mr Patel told us that:-

“15 ... I appreciated that the Claimant might not want to meet one to one with Ms White, but that they still needed to interact about day-to-



day tasks so they needed to work out how they would work in the same environment. I did not tell the Claimant that she needed to have one-to-one meetings with Ms White but that they needed to be able to talk to each other to deal with issues around the department. I recall that the Claimant said that she was happy to do this as long as there were no one-to-one meetings. In hindsight it was not clear which types of meetings the Claimant would not attend in person with Ms White, as day to day operational issues needed to be discussed without arranging meetings to ensure the safety of patients. Without these meetings the waiting times for patients, people management issues in the department and day-to-day operational challenges would not be resolved and could have an impact on the delivery of care to patients.”

179. Orally Mr Patel explained to us that he could see that Ms Mujuru felt uncomfortable to talk to Miss White about certain issues but they needed to be able to interact on a day-to-day basis both as colleagues and professionally and it was appropriate for them to meet one-to-one. He also accepted that for significant meetings that it would be appropriate for a companion to be present. He explained to us that significant meetings might for instance be to discuss the recruitment exercise, or in relation to managing attendance.
180. We were taken to an example on 14 July [397] (after Ms Mujuru had resigned and long after the meeting on 29 April) where Miss White had emailed Ms Mujuru asking issues concerning invoicing purchase orders and ordering processes outside of supply chain where Ms Mujuru responded “*I will come to your office*”. Miss White told us her office was little more than a “cupboard” and thus cited that as an example of where, despite the proximity, Ms Mujuru thus had no issue with meeting with Ms White 1-2-1 by that point. We note however that that request to meet was to discuss matters concerning handover following her resignation and in the run-up to Ms Mujuru’s departure.
181. Given Ms Mujuru taken issue with the fact that someone from HR was intended to be present when Miss White had sought to arrange a meeting to discuss the recruitment issue on several occasions in January we find it was clear that Miss White had wanted someone present as a witness (and/or to give HR advice) where it was envisaged difficult conversations needed to play take place.
182. Mr Patel accepted that that was also appropriate from Ms Mujuru’s perspective. What he did not accept, was that Ms Mujuru could choose if she was prepared to meet Miss White to discuss normal day-to-day business between a line manager and her report.
183. Considering the concerns Mr St Louis and Mr Patel had as the basis/motivation for Ms Mujuru making her complaint and notwithstanding that the mediation between the two was yet to take place at this point to have imposed such a restriction would have made the two of them working together impossible. Whilst Ms Mujuru’s compliant referenced discrimination she had agreed to mediate, that



being so both parties should still have been able to maintain a professional working relationship pending the mediation taking place.

184. Given the lack of clarity over what Ms Mujuru alleged was said, the fact that she has not attended to be cross examined so that those matters could be clarified and when they occurred, and the impracticality of what she was suggesting, we prefer Mr Patel's version of events and we find that the words alleged were not used.
185. For that reason she was not subjected to detrimental conduct and her victimisation complaint fails. Further we find Ms Patel had reasonable and proper cause for saying what we find he did say.

13 June 2022 Claire White and Jitesh Patel forced Ms Mujuru to change her working hours from those she had agreed with a previous manager, knowing it would cause difficulties for Ms Mujuru because of her school, university and care commitments. [CUD 9 of 9 (2.1.1.9), D 3 of 3 (4.2.3), H 3 of 3 (5.1.3) & V 7 of 7 (6.2.7)]

186. We find Ms Mujuru and Ms Saunders were both working 8am — 4pm which meant that the department did not have any management cover from 4pm — 5pm (when it closed). We find based on what we were told the 4pm — 5pm period was often the busiest time of the day and therefore this was an issue that needed resolving; amongst other matters a senior member of staff needed to be present at that time to convey difficult messages to patients who had been waiting for a scan that the scan would not be taking place that day. That that was not something that more junior staff could or should be expected to do.
187. Miss White corrected an issue that the panel identified at the start of the hearing in relation to the chronological sequencing of her account in relation to these matters. That aside it was apparent on the face of her original witness statement that she had placed matters in the wrong order as the supporting documents in the bundle demonstrated. She corrected this and we place no less weight on her account as a result.
188. We find that the need for cover was first addressed at a meeting on 25 April 2022. The meeting invitation [336] identified that in addition to Miss White and Mr Patel, Ms Mujuru and Ms Saunders were intended to be present.
189. Both Miss White and Mr Patel told us that they merely canvassed with Ms Mujuru and Ms Saunders the need for the Department to be covered between 4 - 5 pm, it was suggested to Ms Mujuru and Ms Saunders without specifying which, that one option was for one of them to work from 8 – 4 and another from 9 – 5. Both Miss White and Mr Patel told us that Miss Mujuru and Ms Saunders were invited to put forward alternatives but in no sense were Ms Mujuru or Ms Saunders being told how that would be achieved.
190. The following day (26 April) Miss White followed that up by an email [361] where she emphasised as part of a wider discussion about the work pressures on both Ms Mujuru and Ms Saunders. That email recorded that the only requirements



were that (1) cover be provided between 8 AM and 5 PM and (2) that the lunches of Miss Saunders and Ms Mujuru be scheduled at different times (although there could be flexibility as to the rostering of these subject to that caveat).

191. We accept the evidence of Miss White and Mr Patel because it is supported by that email. We find that rather than matters being presented as a fate accomplished Miss White and Mr Patel were merely starting a discussion and inviting suggestions.
192. One of the matters that claimant raises within her witness statement is that Miss White and others were given the option of not working every other Friday. Miss White told us that that is because she had made a flexible working request pursuant to BWCH's policy [648], as had other staff, that request was accepted by management and the non-working day each fortnight was diarised and as a result could be viewed by all.
193. Whilst the flexible working policy was not in the original bundle that omission was subsequently remedied. That aside we find it was clear from Miss White's email that there was a flexible working policy and there are countless further references to it BWCH's procedures within the bundle.
194. Ms Mujuru suggests that she was being discriminated against because she was not given that option. We find that she had been directed to BWCH's flexible working policy in Miss White's email of 26 April and thus at least by then she should have been aware of it. We would have course have expected her as a manager of other staff to have been aware of it in any event from the outset of her role.
195. We find having stepped back having reached our findings, that this is a further example where this Mujuru drew conclusions that she was being discriminated against where there was simply no basis for this and had she correctly appraised herself of the BWCH's policies she would not have made such an assertion.
196. Returning to the cover issue, no responses were received from Ms Mujuru and Ms Saunders so Miss White organised a further meeting on 9 May [336]. We find that no proposals ensued from that meeting either so yet a further meeting was arranged for 6 June [343]. In the invitation for that meeting Miss White said this:-

"I am putting this meeting back in as when we met on the 9th May you had not yet come to a proposal. You advised me you would get back to me, I am sorry if I overlooked anything, but I don't believe this has yet been agreed.

We had two issues after 4pm yesterday in which team members needed supervision and/or support, which again supports the need to provide [sic.] management supervision in line with the service opening hours.

Happy to discuss in advance of this if needed."



197. That contemporaneous document supports the accounts of BWCH's witnesses of the need for the cover that we refer to at (186).
198. It appears from an email from Miss White dated Friday 10 June 2022 [360] to both Ms Saunders and Ms Mujuru that Miss White had spoken to Ms Saunders who had told her that she and Ms Mujuru had come to an agreement about the cover issue but that she did not want to confirm to Miss White what that was in Ms Mujuru's absence. Miss White therefore sent that email asking Ms Mujuru to confirm. Ms Mujuru responded to Miss White's email on Monday 13 June 2022 stating that Ms Saunders would work 8am-4pm and she would work 9am-5pm [360].
199. Ms Mujuru suggested [LM/44] before us that as a single parent pursuing a master's degree and having agreed with a former manager that her working hours would be 8 AM – 4 PM that these acts were to frustrate her, push her to resign and were racial discrimination.
200. We find there was a need for the department to be covered. Whilst both Ms Mujuru and Ms Saunders had raised complaints we accept that the reason they were asked to come up with a proposal for covering the department was because of that business need and not because of their complaints.
201. As to detrimental treatment the wording of the email from Miss White of 26 April made clear that BWCH was canvassing suggestions from Miss Saunders and Miss Mujuru as to how the need to cover could be fulfilled. We find based on the evidence that we heard from BWCH's witnesses, which we accept, that this was not an order that Ms Mujuru would undertake hours A to B and Ms Saunders hours X and Y but instead delegated to Mesdames Mujuru and Saunders the best way to solve the problem. We find in no sense was that forced. Further the suggestion how the hours would be split between them came Miss Saunders and Miss Mujuru who had agreed between themselves the hours they would respectively work. We find, viewed objectively, that asking the two of them to come up with a proposal was neither less favourable nor detrimental treatment.
202. We also heard Ms Mujuru was undertaking considerable levels of overtime each month some of which was during the evenings and some during that 4 - 5 PM slot. Ms Mujuru has not shown how that would be personally detrimental for her. For those reasons her victimisation complaint fails.
203. Whilst Ms Mujuru states that she felt threatened she does not elaborate upon the manner, tone or words used. We find she has not demonstrated how the manner in that in which that was done created the prescribed circumstances such that it could constitute harassment. That complaint also fails.
204. Yet again Ms Mujuru draws an inference of discrimination where she was treated the same as Ms Saunders, who did not have the same racial characteristics as her. Despite that Ms Mujuru sought to draw inferences of a racial motivation behind her treatment. That does her no credit. Her direct discrimination complaint fails for those reasons.



205. We find BWCH had reasonable and proper cause for acting as they did and again that complaint cannot form the basis for a constructive unfair dismissal complaint.

March 2022 to resignation – Miss White used to take white members of staff who were junior to Ms Mujuru to departmental meetings held on Thursday mornings, instead of taking Ms Mujuru who ought to have been taken to those meetings given her role [CUD 6 of 9 (2.1.1.6), D 2 of 3 (4.2.2) & H 2 of 3 (5.1.2)]

206. We have seen in the additional bundle a recurring invite [747] showing that the meetings this issue references were organised by BWCH's Ante Natal team, not Miss White, Mr St Louis or Mr Patel. The invitation was a long standing one and predated the appointment of Ms Mujuru, Miss White and Mr Patel to their posts. We find that invitation shows that Ms Mujuru was aware of those meetings and invited to attend should she wish to. BWCH's witnesses told us that whilst Ms Mujuru did not attend every meeting she did so on an irregular basis. That reinforces our view of her awareness of them.

207. BWCH's witnesses also told us that on occasion other individuals would be invited to the meetings where for example there were specific matters on the agenda that those individuals could input into or where they had specialist knowledge that needed to be imparted.

208. We do not accept that this allegation occurred as alleged. That aside we find BWCH had reasonable and proper cause for acting as it did; only relevant staff were invited and of them some like Ms Mujuru could opt to attend if the circumstances required or permitted it, and that appeared to us to be wholly consistent with the needs of the hospital. This complaint thus cannot form a basis for a constructive unfair dismissal claim.

209. Ms Mujuru's assertion that Ms White invited colleagues to attend leads us to conclude Ms Mujuru was not in a materially similar position to those comparators; she could opt whether to attend and did not need to be specifically invited, they could not. Their race thus played no material part in that question.

210. Insofar as Ms Mujuru sought to advance this argument on a wider basis she failed to provide details when, how and who by she was excluded from attending meetings, who the others who were invited were. That being so she has failed to demonstrate what was done such that could constitute harassment.

211. That further reinforces our concerns about her account and given her perception of the ante natal meetings her perception of events generally.

Miss White constantly raised performance concerns about Ms Mujuru without providing any details of what those performance concerns were (this was happening from 18 November 2021 to the date of Ms Mujuru's resignation). [CUD 5 of 9 (2.1.1.5), D 1 of 3 (4.2.1) & H 1 of 3 (5.1.1)]

212. We do not propose to address all the matters Ms Mujuru raised, not least because it was difficult to identify what she classed as performance concerns



given her acceptance she was not formally performance managed. Looking at some of these we find as follows:-

Pulling Ms Mujuru up over the failure to wear a mask

213. With regards to the wearing of masks Ms Mujuru suggests she was “challenged” with regards to these and other personal protective equipment. She described Ms White doing this as petty [LM/39], that and other members of staff were not treated in the same way, that she felt belittled and undervalued [LM/1.3], diminished and unworthy [LM/33] and intimidated undermined and belittled [LM/page 38 of 48]. Again, Ms Mujuru does not say what precisely was said or done, and for the most part, when, those “challenges” were conveyed to her.
214. There are references to the issue of mask wearing in the bundle and the negative impact that had on Ms Mujuru’s well being. A case in point is the email of 26 January 2022 from Miss White [647 and 706 – 707]:-

“Thank you for speaking me today about your health challenges and mask wearing. I am sorry to hear that you are finding the masks to have a negative impact on your wellbeing. I have consulted with Infection Control this morning and they have confirmed that there are no exemptions for health conditions recognised within the staffing team. As such, on days you feel unable to wear the mask for health reasons you will need to locate an office for lone working. The seminar room is often free, and I will be happy to vacate my desk should you require it.

***As a leadership team we must also ensure that all staff are adhering to this policy.** I will issue this guidance to Emma and I would appreciate if you would reinforce this message as her line manager.*

The latest Trust policy is here for your perusal. If you would like to discuss this again in person, I would be happy to do so.”

[Our emphasis]

215. We find that is a supportive email from a manager. Contrary to what Ms Mujuru suggests the section **we emphasise** from that extract makes clear that that policy was applied to all and that it not only applied to Ms Mujuru but that she was required to enforce that policy.
216. The last example when the issue was raised by Miss White that we can trace was on 20 April 2022. That concerned both Ms Saunders and Ms Mujuru [CW/43(a)]. That was followed up by email [706] :-

“Can I please remind you of this guidance following our conversation this morning when I observed you walking around the department with no mask on. A face covering should be worn at all times once you enter the hospital unless you are eating or drinking. If you are walking round the department or sat in the



office with Emma, you must wear a mask. The offer for you to use my office at times is still open should this support you with your health.”.

217. We take judicial notice that even now in some healthcare facilities masks are required. Absent the context of what was said or done, by whom and most importantly in this context, when, there is simply insufficient evidence to support Ms Mujuru’s assertion that this constituted harassment.
218. Further, absent that information we find BWCH had reasonable and proper cause for acting as it did; Miss White was merely following guidance.
219. Those matters being so Ms Mujuru has also failed to show she was being treated less favourably than others who were not of her race.

Fail to follow the access policy re “gynae” lists

220. On 7 February 2022 Ms White met with Ms Mujuru and Ms Saunders about the allocation of appointments and deleting referrals. This arose after Ms Mujuru and Ms Saunders had told her they allocated appointments to newer referrals to avoid them breaching waiting time targets, rather than to the longest waiters.
221. The allocation of appointments to newer referrals in that way was a failure to follow the BWCH’s Access Policy [665 - 705] and manipulated the reporting for national performance in BWCH’s favour. Miss White followed that meeting up by email [664].
222. We find BWCH had reasonable and proper cause for acting as it did; Miss White was merely requesting the access policy was followed. Further, she treated Ms Mujuru and Miss Saunders in the same way and thus Ms Mujuru has again failed to show she was being treated less favourably than others who were not of her race.
223. Absent the words used or way they were conveyed again there is insufficient evidence to support Ms Mujuru’s assertion that this constituted harassment.

The scans issue

224. On 2 May Ms Mujuru emailed Miss White with data concerning “Gynae Capacity Utilisation and Waiting lists” for the 4-weeks between 02/05/22 and 27/05/22 [490 to 491 and 708 to 709]. On 3 May Miss White thanked her for the data and said she looked forward to discussing that at a gynae workshop “on Thursday”. She continued (the reference to “HH” is to the outsourced scan provider):-

“ ...

Unfortunately, moving the HH patients into the on hold folder means that they no longer appear on the reports that are utilised to manage the HH relationship. This includes the cross referencing of referrals, making the appointments, managing the return of reports, and managing the DNAs/rejections. It is vital that before changing any



process that you speak to those involved and understand all steps in that process for any impact of changes. Following the concerns you raised on Friday, I confirmed that we could meet this week so that I could go through the end to end processes with you for HH, I would have expected this discussion to take place prior to changing anything.

I will speak with PACS and see if there is a way to add them to the reports I have built before looking to move them back into the waiting list, as I do see the benefit of separating them in in scheduler. We just need to do that without impacting the processes in place.

... [490 and 708]"

225. What transpired had happened is that Ms Mujuru had unilaterally changed where the records of outsourced scan were held over a weekend. There appears to be no dispute that occurred given what Ms Mujuru said in an email we will turn to at (227) and in her witness statement [LM/48].

226. Ms White indicated in her witness statement those actions:-

"42 (c) ... invalidated all reports in place to manage the gynae waiting list (clinical/access risk) - this action was completed by the Claimant without discussion with the team or with change of process authorisation. It would be expected practice that before any change in process is actioned that a discussion would take place with various team members to assess the impact of any change. I attempted to meet with the Claimant on several occasions to discuss this outsourcing process and concerns the Claimant had raised. However, the Claimant refused to meet with me [694 — 696, 697 - 701]."

227. Late in the evening that day (3 May) Mr Patel sent to Ms Mujuru the following email under the subject "4 Week Gynae Capacity Utilisation and Waiting list Data for BWH and HH" [490]:-

"I have to reiterate the need to consult with the wider team before changing or adjusting processes, as the impact of these changes are further than you have recognised.

This has disrupted a collection of automated reporting tools which I have built to manage the wider reporting requirements for divisional reporting purposes.

We will discuss this further on Thursday, as this cannot happen again in the future."

228. Ms Mujuru says this of Mr Patel's email [LM/48]:-



“Jitesh sent an intimidating email, after Claire had accused me of messing up the reporting system.

...

Jitesh was quick to send me an intimidating and harsh email stating that I had not followed the process and that I should have sought senior management approval. Jitesh and Claire accused me of having interfered with the way they were reporting data.”

[Our emphasis]

229. The principal point Mr Patel made was that Ms Mujuru should not have done what she did without speaking to her managers and gaining their approval. It is not disputed that she did so. She would not necessarily have known of the reporting tools they were using.
230. Mr Patel made his views clear. He did so in stark terms. He was entitled to do so. We find he did so because of the repeated theme on Ms Mujuru’s part to do things without consulting/in direct contravention of instructions and he needed to be blunt to try to make her listen. Instead of taking his point on board and reflecting on what she had done, she sought to deflect that back to him. We find that too was a repeated theme on her part.
231. Further, and contrary to what Ms Mujuru said she had been accused of doing, what was being complained of was her disrupting the “*collection of automated reporting tools*” not “*the way they were reporting the data*”. By moving the data unilaterally that would affect the links to data collection tools. That was no doubt a relatively straight forward matter to fix but would take time and effort. The issue is that this was a theme and Ms Mujuru was not taking on board that she was not an autonomous entity and she was accountable to her managers.
232. On 19 September Ms Mujuru emailed Mr Patel to say [489]:-

“Back in May, I moved HH orders into the on-hold folder and you and Claire cited that I had disrupted the generation of reports. I offered to move those back the following day and Claire told me to leave it as it was. On checking with PACS and Informatics, I was informed that it would not impact the generation of any reports.

...

It is my understanding that you and Claire asked one of the managers if appointments could still be made from the on-holder folder, which means both you and Claire had no idea at the time how the system works and jumped to the conclusion that I had changed the process. Prior to sending me the email, you did not speak to me to find out how it would work.



To clear the air, can you enlighten me on what I did wrong that had a huge impact on either the services, patients' safety or the generation of reports?"

233. That response in our judgment not only demonstrates that was still in the mind of Ms Mujuru some 4 months later (despite us not being able to find any trace of her raising it in the interim) but her failure to appreciate how her actions could impact on others or the need to discuss changes with her managers before unilaterally undertaking those changes.
234. BWCH's witnesses repeatedly told us that Ms Mujuru did not accept that as a member of a team she was accountable for her actions and they were subject to scrutiny by her managers. Given her responses to both this incident and that to the recruitment issue being raised (see our **emphasis** in the quote at (72)) we find that was a theme.
235. For those reasons again we find BWCH had reasonable and proper cause for acting in that way. Any colleague in the situation would have been treated in the same way. A message was being conveyed and that needed to be done. The purpose of the message was in no way connected to Ms Mujuru's race or to harass her. Irrespective of Ms Mujuru's view in the context of Ms Mujuru's failure to appreciate the effects of her actions, or that she was subject to scrutiny and accountable for them viewed objectively the words used could not be perceived as harassment.

Other instances

236. On 28 June Ms Mujuru resigned giving 3 months notice effective from Friday 1 July 2022 [374]. BWCH acknowledged that on 30 June [378] identifying that her 12 weeks contractual notice would expire on Friday 23 September 2022 and it was on that date the parties treated her employment as ending.
237. Miss White identified at [CW/43(a) & (b)] two further instances where she had asked Ms Mujuru to do something within her role where that Ms Mujuru appeared to perceive this as criticism and emailed back defensively. Both occurred after Ms Mujuru had resigned and thus played no part in her decision to do so. We address them briefly for completeness and what they showed as the relationship between Miss White and Ms Mujuru by that time.

Cancelling clinical requests

238. Following Ms Mujuru making an error in cancelling a scan Miss White told us that on 14 July 2022 she asked Ms Mujuru to draft a Standard Operating Procedure for cancelling clinical requests and asked her to liaise with Miss Noonan about this [401]. Ms Mujuru responded [400 to 401]:-

"This was an error and I take full responsibility. I know the protocol, there is no need for me to liaise with Annette or yourself and I am aware of how this is achieved through the MOD. Considering that you are querying my capabilities, I do not feel comfortable drafting an SOP



as this seems contradictory. All your emails are insinuating that I do not know what I am doing. The whole time I have worked here, how many of these mistakes have been picked up.

I am getting very uncomfortable working with you as you continuously undermine me. Yesterday you sent emails of work which should have been picked up by yourself or Jitesh or sent to Emma during my absence. All you are doing is apportioning blame. I want to serve my notice in peace.”

239. Miss White responded [400]:-

“I am sorry if you feel this email was a comment on your capability, that was not my intention. The incident yesterday highlighted a gap in our departmental process which had the potential to impact patient care. It is standard good practice to raise a datix and work towards closing that gap. I will arrange for someone else to draft the SOP if you feel it inappropriate for you to do so.”

240. Despite that Ms Mujuru having accepted Miss White felt it highlighted a gap and was an error, felt it appropriate to reference there was no developmental need on her part and she was aware of the protocol before going on to repeat her assertion that Miss White was *“constantly undermining me from the day you started working with me and this has continued to affect my well-being and mental health.”*

241. Given Ms Mujuru accepted there was an error and that Miss White felt a gap had been highlighted that needed to be filled by the provision of an SOP we find Ms Mujuru personalised the issue and viewed it as a capability issue when on our reading of the email no such suggestion was made.

Patient Advice and Liaison Service (PALS) Query

242. On 13 July Miss White asked Ms Mujuru if a query from PALS dated 29 June had been responded to [722]. Miss White told us she kept oversight of these and the email sent at that time suggests there were three remaining open. Ms Mujuru’s response was to say that “I was on Annual Leave” [722]. That did not address the issue namely if it had been addressed in the two weeks thereafter.

243. Miss White responded later that day [721]

“I appreciate you were on leave the day it was sent, but it has remained outstanding since. Please can I ask that you regularly review outstanding PALS relating to the admin team and resolve them. If you are unsure how to review what is outstanding via Datix I can show you, or if you require any other support, please ask.”



244. Ms Mujuru's response was a curt one to her manager and not commensurate with the request made at the meeting on 29 April that everyone behave professionally [721]:-

"You were copied in this email, I was not aware that I also have to come and pick up pals when I return to work from annual leave.

I do not require any support. I have been doing pals and datix before you were in post."

Generally

245. The last two matters we refer to under "Other instances" both demonstrate that by the time of her resignation at least, Ms Mujuru perceived the slightest issue from Miss White as criticism. We find that however extended back right to the start of their working relationship and their discussion on 18 November 2021 (see (72)) and continued thereafter including when she perceived the invitation of 18 January to a fact finding meeting was her being "summoned" (see (129)).
246. What is extraordinary about the conversation on 18 November is whilst that was only the second day they had worked together and without Miss White having raised the recruitment issue on Miss White's account which we accept, Ms Mujuru became upset and shouted 'I am sick of being undermined'.
247. From the evidence before us we find no performance management process (formal or informal) was commenced against Ms Mujuru. Whilst there was an investigation ongoing in relation to the recruitment process, it had not been forwarded to a decision maker for a decision on whether there was a prima facie case to undertake a misconduct or other process. To reinforce that point Miss White had been told by HR that she had to speak to Ms Mujuru before her fact finding exercise could be completed. That never happened.
248. Ms Mujuru has not shown that Miss White "constantly" raised performance concerns and repeatedly failed to provide details as to precisely what was said or done, and when to support her assertions. In each case we found BWCH had reasonable and proper cause for raising the issue concerned.
249. Indeed Ms Mujuru accepted as much [LM/12]
- "... If all these managers had a problem with me or my performance, why did they not take disciplinary action instead of emailing each other behind my back?" and [LM/51] "... I have not seen any email to that effect, and neither was I summoned to a meeting to discuss any poor performance. ..."*
250. That aside Ms Mujuru perceiving matters as performance concerns reinforces our thinking elsewhere about the way she wrongly perceived matters, and contrary to what BWCH's witnesses indicated rather than as they suggested



“being like Teflon” Ms Mujuru was unduly sensitive to any criticism, challenge or what she perceived as racism.

Other matters

251. Again we do not propose to address every matter that arose but instead focus on what the principal ones.

As to the allegation “Emma, Pearl and Taylor who were all white were told by Claire to report to Claire” [LM/34]

252. Ms Mujuru does not say when that was or the context such that it undermines any basis for Miss White to have reasonable and proper cause as her and their line manager to request that.

Office blinds

253. One further matter arose concerning the blinds in the office in which Ms Mujuru and Ms Saunders sat. The office was behind the radiology department reception area. Ms White told us that despite her office being sited at the back of department, administrators, midwives and doctors were going to her with queries when they should have been directed to Ms Mujuru or Ms Saunders. When she queried why, she was told the blinds to Ms Mujuru and Ms Saunder’s office were shut, the door closed and “do not disturb” was on the door.

254. Both Mr Patel and Miss White told us that multiple conversations were had with Ms Mujuru and Ms Saunders about their visibility and having an open door.

255. Mr Patel told us that those discussions were repeatedly not acknowledged nor acted upon and given the issues raised by staff as to accessibility, one evening he decided to remove the blinds to the office in which Ms Mujuru and Ms Saunders sat.

256. He accepted before us that at least as a matter of courtesy, he should have consulted with them or at least told them what he was going to do, but did not.

257. Given that related to both Ms Mujuru and Ms Saunders we find it was not based on race nor given both had raised grievances, their grievances. Instead we find it was out of frustration at the continued visibility issue and what he considered was their unreasonable failure to act upon what were in our judgment were reasonable management instructions.

OUR FURTHER FINDINGS AND CONCLUSIONS

258. Having looked at matters in the round we stepped back and formed a view on the evidence generally of the witnesses and if there were matters from which we could draw inferences of discrimination.

259. We address the latter below.

260. As to the former we have explained at points how Ms Mujuru appeared to believe she was entitled to act without consulting with colleagues (e.g. the scans issue)



or that she was not responsible to her line managers for her actions and thus was not entitled to be scrutinised (e.g. the recruitment of Ms Saunders). The attitude she displayed to her line managers, was frankly extraordinary (e.g. her responses to Miss White regarding the request for holiday leave). Further we find she deliberately ignored what we find was a management instruction from Mr St Louis when appointing Ms Saunders to post.

261. We have set out at several points (123, 230, 274 & 283) where Ms Mujuru sought to deflect back from concerns raised about her by making or pursuing complaints about others. Her perception of events such as the way she portrays Miss White being granted flexible working when she was not (when Ms Mujuru had not applied for it) and how she perceived some of her complaints as race discrimination when she was treated in the same way as white colleagues, is concerning.
262. We have identified how she essentially refused to engage in the investigation into the recruitment of Ms Saunders and how there was a breakdown of her working relationship with Miss White such that in Miss White's words made any conversation or request difficult. Ms Mujuru made her own views plain at the meeting of 29 April (making it clear she wanted to avoid meeting Miss White in person (see (174))).
263. Ms Mujuru's account of the recruitment was in direct conflict with that of Miss Noonan, who like BWCH's other witnesses, we regarded as a genuine, honest and credible. BWCH's witnesses accepted where they may have made errors and we gave their evidence weight because of that (see (61 & 187)). In contrast Ms Mujuru's evidence was both internally (that is with her own account) and externally (i.e. with the accounts of others/documents) inconsistent. As a result we gave Ms Mujuru's evidence little weight where unsupported elsewhere (see (61 & 124)).

Unfair Dismissal

264. Dismissal is a single act that takes place on the date on which the employee's contract terminates. It was agreed in the statements of case that Ms Mujuru's employment terminated on 23 September 2022. Time runs in such cases from the effective date of termination. The constructive unfair dismissal complaint is thus in time.
265. BWCH's issue with timing in this respect is that all the acts that Ms Mujuru relies upon to base her constructive unfair dismissal claim were either some time before or in some cases after Ms Mujuru's resignation (see (236 to 244) although those after are not specifically referred to in the list of issues)).
266. In the case of those after her resignation is obvious they could not have influenced her decision at the time she resigned. As to those identified in the list of issues we found:-
 - 266.1. Act 1 occurred but not as alleged; the comments made by Mr St Louis were true, Ms Mujuru had complained about her managers as stated. We



find he did address them with Miss White on the basis it was not just Ms Mujuru who was raising the issues. That aside he should have addressed that differently in two respects.

266.1.1. His response suggested either prejudgment or that a view was in the process of being formed.

266.1.2. From the perspectives of the complainants, Miss White herself and the employer, he should have investigated the complaints (rather than agreeing how he would approach matters with Ms Mujuru and then speaking to Miss White).

Whilst we found his concern about Ms Mujuru raising the issues she did was genuine and that concern clearly needed to be addressed with her, that should have been done after he had investigated.

266.2. As to act 2 we found Mr St Louis did address Ms Mujuru's complaint although he did not confirm the outcome in writing as BWCH's procedures dictated.

266.3. Concerning act 3 Mr Patel addressed Ms Mujuru's complaint concerning Mr St Louis not addressing her earlier complaint as set out in his letter of 1 March.

266.4. As to Act 4, Miss White investigating the recruitment process, this did concern Miss White and it was entirely right she should investigate this. Whilst Ms Mujuru did not agree with Miss White doing so, Miss White had reasonable and proper cause to do so. That being so, this issue cannot properly be the basis for a constructive unfair dismissal complaint. The last point that we can trace when Miss White sought to action this was the invitation to the fact finding meeting of 4 February that was to take place on 17 February.

266.5. With regards to Act 5 we found none of the matters Ms Mujuru raised had become a formal or informal performance (or other) process. Ms Mujuru did not show these were constant and failed to provide relevant details as to precisely what was said or done, and when to support her assertion. In each case we found BWCH had reasonable and proper cause for raising the issue concerned. The last of these that we can place a precise date to and that occurred prior to resignation, was the scans issue on 3 May.

266.6. As to act 6 Ms Mujuru had a recurring invitation to attend those meetings independent of being invited by Miss White. An invitation was neither required nor appropriate. The allegation did not occur as alleged.

266.7. Act 7 did not occur as alleged.

266.8. Regarding Act 8 Ms Mujuru had declined to attend the meetings referred to relating to Act 4. They were not about her discrimination complaints. She conflated the two issues. The allegation did not occur as alleged.



- 266.9. We found Ms Mujuru was not forced to change her working hours as alleged in Act 9. BWCH sought suggestions from her and Ms Saunders and reasonable and proper cause to do so.
267. The last of the incidents we found occurred in some form or other prior to her resignation that we can place a date on was on 3 May – the scans issue. That was two months before her resignation of 29 June.
268. BWCH suggests that whilst there were several factors that caused her to resign when she did, the three principal ones that it suggests influenced it were:-
- 268.1. that a stage 1 absence management meeting would have been held on her return
- 268.2. The investigation of the recruitment exercise was still outstanding and
- 268.3. Ms Mujuru had made clear she was going to be absent in December despite her request for leave having been refused (see our findings starting at (169)).
269. While all those matters may have impact on **why** she decided to resign they do not shed further light on **when** she did so.
270. Ms Mujuru suggests (see (152)) that the mediation meeting between Ms Mujuru and Miss White was not arranged in good time. We find that was due to unavailability of an internal mediator and other factors such as Ms Mujuru's absence initially delaying the meeting that ultimately took place on 29 April. She does not suggest that directly led to her resignation, it was not one of the issues she relies upon as part of her constructive unfair dismissal claim. That aside prior to her resignation she had been back at work since 9 June (see (143)) and do far as we can trace had made no complaint about the mediation being delayed in that time or that it specifically was a factor in her resignation.
271. In contrast we find that Ms Mujuru resigned when she did because late in the evening of 27 June she had been emailed to say that on her return to work that the mediation would be going ahead and the preliminary steps requested by the mediator would be taken on her return to work to facilitate that (see our findings starting at (147)). In essence we find she did not want to engage in the mediation any longer. We come to that view notwithstanding what we found was her agreement on 29 April to attend the mediation (see our findings starting at (174)). We reach that view because of the proximity between the email of 27 June and her resignation the following day, Ms Mujuru's view expressed at various points that she did not want to have to deal with Miss White, the way Ms Mujuru refused to engage with and her interactions with Miss White (e.g. the holiday request) and Ms Mujuru's failure to provide the trigger for her resignation, that is to say what we consider to be an adequate explanation why she resigned when she did.
272. We find Ms Mujuru resigned because, as demonstrated in her emails and witness statement, she had been subjected to scrutiny by Miss White, took this personally and thereafter refused to engage with Miss White as she was obliged to. We find



she sought to deflect away from this by not only raising grievances herself coordinating the grievances of others. We reach that latter view because we find that it is more likely than not given the proximity of the complaints of 3 January and that they were lodged on a bank holiday that they were coordinated (see (104)).

273. Ms Mujuru repeatedly referred to being belittled and undermined in her witness statement yet failed to either set out examples of what was said or done, by whom and when that she relied upon or when she did we found what was done were reasonable management steps. Indeed Ms Mujuru failed to appreciate in the examples she gave that what she was complaining of was the very way she was behaving to her managers.

274. It is useful to remind ourselves that in every contract a term is implied that :-

"... employers³⁸ will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Courtaulds Northern textiles Ltd. v. Andrew (1979) I.R.L.R. 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."³⁹

275. Any breach of that term will amount to a fundamental breach because the very essence of the breach is that it is calculated or likely to destroy or seriously damage the employment relationship. That is what is termed a *repudiatory breach*.

276. When assessing an employee's claim to have been constructively dismissed:-

"55. ... In the normal case, ... it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation ?

(2) Has he or she affirmed the contract since that act ?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract ?

³⁸ and employees

³⁹ Woods v W.M. Car Services (Peterborough) Ltd. (1981) ICR 670 per Browne-Wilkinson J



(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)^[6] breach of the Malik term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

(5) Did the employee resign in response (or partly in response) to that breach ?”⁴⁰

277. Of the acts that did occur the most recent was on 3 May 2022. If there had been breaches by then (we find there were none) they were waived by her continuing in employment and were out of time. We found the subsequent events alleged did not occur as alleged and in any event we find they were innocuous, and collectively did not reach the threshold to be a claim for constructive dismissal.
278. In any event we found the reason she resigned when she did was the impending mediation process (despite her having previously agreed to engage in that) and not the earlier acts alleged.
279. Where we found elements of the acts relied upon had occurred we find those acts were done to either resolve or address issues within the working relationship of Ms Mujuru and Miss White (rather than destroy it) and/or Ms Mujuru's behaviour. We found that BWCH had reasonable and proper cause for acting as it did. Those acts were innocuous and did not amount to a repudiatory breach.

The discrimination complaints

280. As to the victimisation complaints:-

- 280.1. as to act 1 we accept that having complained about a manager Mr St Louis should have investigated before he made the comments he did. We found that was not in any sense because of the protected act, the grievance (or for that matter on racial grounds). We found he acted in that way did so because he saw a pattern of behaviour on Ms Mujuru's part, concluded she was attempting to deflect from the recruitment issue and felt he should raise that with her. As we say, that did not detract from him raising the issues raised by Ms Mujuru and her colleagues with Miss White which we found he did.
- 280.2. acts 2, 3, 5, 6 & 7 did not occur as alleged and fail.
- 280.3. act 4 commenced prior to Ms Mujuru's grievance. BWCH continued the fact finding exercise regarding the recruitment issue notwithstanding the grievance because the recruitment issue needed to be investigated. That was in no sense because of the grievance (or for that matter her race). What is more, we found the raising of the grievance by Ms Mujuru was a

⁴⁰ [Kaur v Leeds Teaching Hospitals NHS Trust](#) [2018] EWCA Civ 978, [2018] IRLR 833 per Underhill LJ



deliberate attempt by her to deflect away from the issue under investigation.

281. As to the harassment and direct discrimination complaints as we state above Ms Mujuru identifies as Black British ([CMO/46] & [LM/38]):-

281.1. As to act 1 (not argued as victimisation) we address this at (266.5) above. We found Ms Mujuru had been told not to appoint without a second interview by Mr St Louis on 16 November 2021 and even at that point was aware of his concerns about the recruitment process. She carried on regardless. Those acts were in no sense connected to her race but because they needed to be addressed with her due to repeated themes concerning her failure to accept instructions and scrutiny. Nor did Ms Mujuru show the way those matters were raised crossed the threshold for the *proscribed consequences* for harassment (see (44 & 45)); Ms Mujuru did not relay in sufficient detail what was said or done and when to pass the threshold for such a complaint.

281.2. Regarding act 2 (not argued as victimisation) that did not occur as alleged (in any event the reason Ms Mujuru was not invited to attend those meetings was because Ms Mujuru was the recipient of a regular optional invitation and she attended them as she saw fit) and fails

281.3. We found act 3 (victimisation complaint 7) did not occur as alleged and fails.

Time - Equality Act 2010

282. We found the period over which the conduct extended expired on 3 May 2022. Whilst early conciliation commenced on 14 October 2022 (and the claim was commenced within one month of conciliation concluding) Ms Mujuru's claim, as argued, was lodged out of time.

283. Where dismissal is argued as an act of discrimination the EAT has held that the act of discrimination takes place when the notice expires (here 23 September 2022), not when it is given ⁴¹.

284. Whilst dismissal was not expressly argued as an act of discrimination here we address it as such none the less. We found that Ms Mujuru was not entitled to treated herself as constructively dismissed; the reason she resigned when she did was, a mediator having been found, that a mediation was to ensue and contrary to her earlier agreement to do so she did not wish to engage in that.

285. In [*De Lacey v Wechsels Ltd*](#)⁴² the EAT held that the fact that the last straw was not itself discriminatory did not automatically mean that the constructive dismissal was not discriminatory and the ET had erred in law in failing to consider whether the constructive dismissal was such. Therefore, the ET should have considered:-

⁴¹ *Lupetti v Wrens Old House Ltd* 1984 ICR 348, EAT

⁴² [2021] UKEAT/38/20



- 285.1. If the two earlier matters relied on were acts of discrimination and,
285.2. if so, whether they sufficiently influenced the constructive dismissal to mean that the constructive dismissal itself amounted to sex discrimination.

If the constructive dismissal was such, then the claim for discrimination would be in time, even though the events that rendered the constructive dismissal discriminatory were themselves outside the primary limitation period.

286. We found the conduct relied on did not occur as alleged. In any event we found the conduct that preceded the resignation did not materially influence Ms Mujuru's resignation. The reason she resigned when she did is that which we set out at (278).
287. Those matters being so the discrimination claim was lodged out of time.
288. We therefore considered if we should exercise our discretion to extend time. The burden is on Ms Mujuru to show why we should do so. In undertaking that exercise we must consider all the circumstances principal amongst which is the prejudice to the parties and the explanation for any delay.
289. Ms Mujuru has not provided any explanation, having checked she was in work between 10 June and 31 July (save for a day's special leave on 12 July) and was thus not sick. She told us in her claim form she commenced a new role on 1 November 2022 [6]. In our judgment there is clear prejudice to BWCH by that delay, Ms Mujuru has advanced matters which from the documents before us that Ms Mujuru neither suggests she raised with BWCH at the time nor where there is evidence that she did so. The cogency of evidence that we hear on those matters is therefore substantially reduced given BWCH's inability to investigate them timeously. Some two years have now passed. The prejudice that gives rise to is substantial.
290. We have therefore elected not to exercise our discretion to extend time

Employment Judge Perry

Dated: 9 October 2024

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