EMPLOYMENT TRIBUNALS

Claimant: **Miss N Fofanah**

1st Respondent ("R1"): NHS Professionals Limited
2nd Respondent ("R2"): Coventry and Warwickshire Partnership NHS Trust

Heard at: **Birmingham**

On: **18, 20-22, 25-29 November 2019**

Before: **Employment Judge Flood**
Mr Virdee
Mr Machon

Representation
Claimant: In person
R1: Ms Gould (Counsel)
R2: Mr Crow (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaints against R1 of unfair dismissal (contrary to section 94 Employment Rights Act 1996 ("ERA"), direct race discrimination and victimisation (contrary to ss 13 and 27 of the Equality Act 2010 ("EQA")) are not well founded and are dismissed.
2. The complaints against R2 of direct race discrimination ("s 13 EQA") are not well founded and are dismissed.

REASONS

The Complaints and preliminary matters

1. By claim forms presented on 20 May 2018 and 6 June 2018, the claimant brought complaints of unfair dismissal, direct race discrimination and victimisation against R1 and of direct race discrimination against R2.

2. At a preliminary hearing held on 19 December 2018 before Employment Judge

Anstis, the issues were identified and recorded in a case management order which is shown at pages 98-99 of the agreed bundle of documents produced for the hearing ("Bundle").

3. At the outset of the hearing we discussed the issues identified by Employment Judge Anstis with the parties. Subject to the application to amend her claim (which we deal with below), the parties agreed that these were the relevant issues. We accordingly produced a document headed "List of Issues – Ms N Fofanah v NHS Professionals Limited and Coventry and Warwickshire Partnership NHS Trust" ("List of Issues"). Together with the parties, we have referred to the List of Issues which is also set out below, throughout the hearing.

4. We also had before us the Bundle; a Neutral Chronology; a Chronology produced by R1; a Cast List; an Opening Note produced by R1 dated 17 November 2019 and an Opening produced by R2 dated 15 November 2019.

Application for Witness Orders

5. On the first morning of the hearing the claimant made an application for the Tribunal to order the attendance of six witnesses that she said were relevant to the issues to be determined in her claim. All were identified in the Cast List, namely: "H" Warnatilike, the registered nurse employed by R2 who was the bleep holder for the Spencer Ward on the night of 16 October 2017; Dr Hassan, the On-Call Doctor on duty and covering the Spencer Ward on the night of 16 October 2017; Laura Sale, the Ward Manager of Spencer Ward at the time, employed by R2; Maria Doyle the CCC Manager, employed by R1; Naomi Fletcher; HR Business Partner employed by R2 and Christina Edwards the manager at R1 who heard the claimant's grievance. The claimant had previously made requests in the proceedings for witness statements from some of these witnesses (the bleep holder and Dr Hassan). She contended that justice would not be done if such witnesses did not provide evidence. She said that the evidence of the bleep holder and Dr Hassan was crucial to determining what took place on the night of 16 October 2017. The other witnesses' names appeared in documents she received during disclosure and played a part in the process, so the claimant felt that they had to come and attend to explain their actions.

6. The application for witness orders was resisted by both respondents. R1 pointed out that neither the bleep holder and Dr Hassan, could produce any relevant evidence as to whether the matters complained of in the List of Issues amounted to race discrimination, as neither were decision makers in any of the alleged acts of discrimination. It was also noted that Dr Hassan was not employed by either respondent. With regards to Ms Doyle, Ms Fletcher and Ms Edwards neither were involved in any acts of decision making that is the subject of the claim, it was said. R2 also states that except for Ms Sale none of the individuals named have any relevant evidence to give as they were not decision makers. It was acknowledged that Ms Sale, had some supervisory involvement in the decision to make the complaint that led to the claimant's exclusion. However, as the respondent had called Elizabeth Stephens (nee Davies) to deal with this matter in evidence as she was the nurse who had actually made the initial complaint, R2 contends that Ms Sale is not necessary.

7. Having considered the parties submissions, we decided that it would not be in the interests of justice to grant the witness orders. We considered rule 32 and rule 2 of First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (amended and reissued on 22 January 2018) ("the ET Rules") and we set out our reasons below, as they apply to each witness or witnesses requested:

7.1. The bleep holder and Dr Hassan

Both individuals were present on the night of the incident in question, so we can understand the claimant's frustration that evidence has not been garnered from them, as from her perspective, they would seem to be highly important witnesses of fact. However, ultimately, neither was involved in making the decisions that form the subject of the claimant's discrimination or victimisation complaints against either R1 or R2. Neither made the complaint against the claimant, nor made the decision to exclude her from working. Neither was involved in carrying out the investigation, disciplinary and appeal process. Therefore, their evidence could have no relevance as to whether any of the matters complained of amount to less favourable treatment on the grounds of race or detrimental treatment on the grounds of having done a protected act. Neither person was employed by the claimant's employer, R1, so again they would be unable to shed any light on whether the decision to dismiss was fair under section 98 ERA. It was not in the interests of justice or the overriding objective to make an order to require attendance to give evidence under rule 32 of the ET Rules.

7.2. Maria Doyle

Ms Doyle was responsible for the bleep holder team at R2. However, she was not involved in any of the decisions which form the subject matter of any of the complaints. The claimant does not mention Ms Doyle in her witness statement and no allegation at all appears to have been made against her. We do not see the relevance of any evidence that she could give in these proceedings and it was therefore not in the interests of justice or the overriding objective to require her attendance as a witness.

7.3. Naomi Fletcher

Ms Fletcher was a HR Business Partner at R2 at the relevant time. She had some involvement in matters relating to the initial investigation by JH into the incident on 16 October 2017 and the decision to continue to exclude the claimant from working at R2. She is a party to, or copied in on, several emails in the Bundle. However from the evidence that has already been referred to, her role was peripheral at best and she was not the ultimate decision maker. She was involved in the escalation of the request made by R1 for information from R2 in November 2017 and was generally involved in forwarding e mails to and from Denise Stevens at R1 to Sue Smith, Associate Director at R2 in late March/early April 2018. There is no suggestion anywhere that she took decisions on these matters. Her evidence would be of very limited relevance. Both Jane Hewitt and Mrs Smith who played the active role and took the decisions now complained are witnesses. It was not in the interests of justice or the overriding objective for a witness order to be made.

7.4. Christina Edwards

Ms Edwards was the manager at R2 who was allocated to hear the grievance raised by the claimant on 5 December 2017. Although Ms Edwards considered the issue of whether any of the actions taken in respect to the claimant up until this time were racially motivated, her evidence would not assist the Tribunal in determining whether this was indeed the case or not. No complaint is made in the claim that the decision to turn down the grievance was racially motivated. Therefore the motivations of Ms Edwards and how she made the decision on the grievance are again of limited relevance the issues in dispute. It was not in the interests of justice or the overriding objective to require her attendance as a witness.

7.5. Laura Sale

Ms Sale was Ward Manager of the Spencer Ward at R2 and the line manager of Mrs Stephens (nee Davies) at the relevant time. As Ms Sale instructed her to make a complaint on 17 October 2017, the claimant contended that Ms Sale's evidence was highly relevant and important. We can see that there is some relevance here to the issues in question. Nevertheless, she was not the individual who made the complaint. Ms Sale was acting in a supervisory capacity only in discussing the matter and requesting that a complaint was made. She was not ultimately responsible for the decision taken to file a complaint, so she is not the most relevant witness as regards whether or not this decision was racially motivated. Ms Sales will not ultimately be able to assist in providing evidence of the intention of ED. Mrs Stephens herself had provided a witness statement and was attending to give evidence and be cross examined. It was not in the interests of justice or the overriding objective for an order to be made requiring her attendance.

Amendment Application

8. At the outset of the hearing, Ms Gould and Mr Crow, raised the fact that the claimant had addressed matters in her witness statements which did not appear in the List of Issues. Ms Gould, referred us to the authority of Chandhok v Tirkey UKEAT/0190/14/KN in her opening contending that the claims should be decided as per the claimant's ET1s rather than being expanded by the claimant's evidence.

9. Mr Crow highlighted that the claimant addressed in her witness statement a complaint she made to R2 on 10 April 2018 (shown at page 606 of the Bundle), which she says was ignored. These matters have not been addressed by any of R2's witnesses. It was submitted that the claimant should not be permitted to expand her claim to deal with such matters (which did not appear in either of her claim forms) again relying on the Tirkey decision referred to above. When asked for her representations on the point the claimant confirmed that she was making an application to amend her claim to add another complaint of direct race discrimination against both respondents in respect of their failures to respond to her complaint (in R2's case by her letter of 10 April 2018 and in R1's case by an alleged failure to respond to an earlier e mail complaint). These applications to amend were resisted by both respondents. Mr Crow contended

that this matter post-dated both allegations of direct race discrimination made against R2 and amounted to a wholly new allegation which would enlarge the complaint substantially and require the evidence of new witnesses and potentially a new disclosure exercise. It was contended that on the first day of a 9 day hearing it was simply too late to grant this amendment. R1 also resisted this application on a similar basis.

10. The general case management power in Rule 29 of the ET Rules together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments. In the case of Selkent Bus Co Limited v Moore [1996] ICR 836, the Employment Appeal Tribunal gave useful guidance, namely:

> *(4) Whenever a discretion to grant an amendment is invoked the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
>
> *(a) The Nature of the Amendment*
> *Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*
> *(b)The Applicability of Time Limits*
> *If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.*
> *(c) The Timing and The Manner of the Application*
> *An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision."*

11. This position is also summarised in the Presidential Guidance issued under the provisions of Rule 7 of the ET Rules.

12. We considered the factors identified by Selkent before addressing the balance of prejudice and hardship. We set out the analysis below:

    12.1. Nature of the amendment

    The amendment requested here is a substantial one more in the nature of "entirely new factual allegations which change the basis of the existing claim" as identified in the Selkent case above. It was not in the List of Issues and did not appear in either of the claimant's ET1s.

    12.2. Applicability of time limits

    The amendment requested which is about an incident dating from 10 April 2018 appears, on its face, to be out of time. No reason has been provided as to why an amendment was not sought earlier.

    12.3. Timing and manner of the application

    The application to amend is being made on the first day of a hearing set to last 9 days. On any basis this is very late to be making this application and this may affect the timing of hearing the claim.

    12.4. Balance of prejudice

    Putting these factors together we concluded that the balance of prejudice and hardship favoured refusing the amendment. This complaint was raised substantially after the primary limitation period and very late in the proceedings. The respondents would be prejudiced in addressing this new factual complaint as to do so would require additional work that would be burdensome and could delay hearing the rest of the claim. The claimant has other complaints in play. She has had opportunity to set out what her claim is and make any applications to amend at a much earlier stage in the case. The relative prejudice to the claimant if the application is not granted would be relatively small whereas the disadvantage to the respondents if it were and the effect on the proceedings could be significant. For the above reasons, the application to amend is refused.

13. Both respondents in any event agreed to a request to provide the claimant with voluntary disclosure of what they say are clear responses to the complaints in question in any event. These were produced to the claimant and the Tribunal on the second day of the hearing. No further applications were made in respect of these matters.

14. During Tribunal questions to the claimant at the conclusion of cross examination, the claimant was asked about a paragraph in her witness statement which had not been addressed in cross examination, namely where she says at paragraph 50 that she was "*aware from my working at the Spencer Ward that there was a lock of clinical practice issues by nurses and agency staff continue to work and have not been suspended. Therefore the actions of the first and the second respondent including Elizabeth was discriminatory I have been treated less favourably than a white British nurse employee or a white British agency staff in the same situation*." Before the claimant

responded to this question, both respondents objected to the question given that the claimant had not provided any specific details of comparators relied upon in this context. Both respondents contended that if the claimant were to provide named comparators and refer to specific incidents in her response to this question, then it was likely to be necessary for them to apply for an adjournment of the hearing as further evidence would be required. Both respondents were also concerned once again that the scope of the claimant's claim was being expanded.

15. The Tribunal adjourned to consider the position and on resumption of the hearing, Employment Judge Flood explained to the claimant what the issue was and the respondent's concern was that the she may now be raising a different case to that raised previously and which did not appear in the List of Issues. The claimant confirmed that she had not referred to any specific named examples of such individuals and incidents in her claim form and there was no document in the Bundle (e.g. written grievance or such like) where she had made such a comparison before. I explained that there may be an issue around the credibility of such evidence and what weight the Tribunal could place on it, if any specific examples were given today that had not been raised before. In any event the claimant confirmed that the comment here in her witness statement was in relation to a complaint which she intended to pursue with the respondent after the conclusion of these proceedings, not the issues currently in dispute between the parties. No specific names or descriptions of incidents were mentioned. In light of that response, both respondents confirmed that no further applications would be made, and the hearing continued.

The Issues

Time limits / limitation issues

16. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the EQA and 111(2)(a) & (b) of the ERA? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

17. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 January 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

EQA, section 13: direct discrimination because of race

18. Has the respondent subjected the claimant to the following treatment:

18.1. The complaint raised by Lizzie Davies on 17 October 2017. (For which R2 is said to be liable, and which was said to have led to her suspension from work.)

18.2. That she was not interviewed by Jane Hewitt after submitting her statement on 19 October 2017. (For which R1 is said to be liable.)

18.3. That she was barred from working for both R1 and R2 – in the case of R1 up to 5 April 2018, and in the case of R2 indefinitely. (For which each respondent is said to be liable for the barring carried out by them.)

18.4. That the contents of the letter of 5 June 2018 did not accurately reflect the contents of the meeting of 24 May 2018. (For which R1 is said to be liable.

19. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on Mrs E Stephens (nee Davies) as an individual who had previously done the same or similar things as the claimant which is said to have led to her suspension from work (in respect of 18.1 and a hypothetical white comparator in respect of this and all other allegations.

20. If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

Equality Act, section 27: victimisation

21. It is accepted that the claimant did a protected act in her grievance of 5 December 2017.

22. Did the R1 subject the claimant to any detriments as follows:

22.1. Being put through a disciplinary hearing on 21 March 2018

23. If so, was this because the claimant did a protected act and/or because R1 believed the claimant had done, or might do, a protected act?

Unfair dismissal

24. Was the claimant dismissed by R1 on 17 October 2017?

25. Was the claimant continuously employed by R1 for less than two years and therefore not entitled to bring a claim for unfair dismissal?

26. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the ERA? R1 asserts that it was a reason relating to the claimant's conduct/some other substantial reason.

27. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did R1 in all respects act within the so-called 'band of reasonable responses'?

Findings of Fact

28. The claimant attended to give evidence. Miss D Lee ("DL") (R1 Head of Human Resources at the relevant time); Ms A Corriette ("AC") (R1 HR Advisor at the relevant time); Ms J Hewitt ("JH") (R1 Nurse Lead) and Ms M Oyinlade ("MO"), (R1 National Human Resources Manager) gave evidence on behalf of R1. Mrs E Stephens nee Davies ("ED") (R2 Deputy Ward Manager, Spencer (now called Swanswell) Ward) and Mrs S Smith ("SS") (R2 Associate Director of Operations for Safety, Quality and Professional Practice) gave evidence on behalf of R2. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1 and the ET3 together with relevant numbered documents referred to below that were pointed out to us in the Bundle. Some additional documents were produced by both parties during the hearing which we accepted and added to the Bundle.

29. In order to determine the issues set out above, it was not necessary to make detailed findings on all the matters heard in evidence. Much of the evidence and questioning centered on what did or did not happen on the night of 16 October 2017. Although this was the catalyst for the events following, it is not necessary or appropriate for us to determine exactly what took place. We have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background. These findings may be relevant to drawing inferences and conclusions. We made the following findings of fact:

29.1. R1 is an employment business which provides nurses, doctors and other health care professionals on a short-term temporary basis ("flexible workers") to NHS Trust organisations (all of whom are clients of R1). R1 is a limited company which is wholly owned by the Department of Health and Social Care. R1 has over 100,000 professionals registered with it including nurses, doctors and other healthcare professionals. It is the biggest provider of bank staff to the NHS. The majority of those who work for R1 are flexible workers and often they are also substantively employed, full or part time by an NHS trust and carry out additional work through R1 on an occasional basis. There is no obligation on R1 to offer assignments to flexible workers and there is no obligation of flexible workers to accept any such assignments.

29.2. The claimant is 44 years old and a black woman of African national origin and British nationality. She is a registered mental health nurse who qualified in 1999 and has 20 years' experience working in various settings within the sphere of mental health. No disciplinary action has ever been taken against her. At all times the claimant has been registered to work with R1 as a flexible worker and she remains registered.

29.3. R2 is an NHS Trust which provides a wider range of mental health and learning disabilities services. It provides community services for people in Coventry and inpatient, community and day clinics as well as specialist services to a population of roughly 850,000 in Coventry and Warwickshire. It employs over 4,000 staff. The Caludon Centre is a unit operated by R2

and the Spencer (now called Swanswell) Ward is within the Caludon Centre. It is a 16 bedded acute ward (with inpatient assessment) for female patients with complex difficulties. It is a dynamic unit enabling recovery within a safe, caring and locked environment. R2 engages flexible workers through R1 (and other agency workers) to work on its various sites and is reliant on such workers to fulfil staffing requirements. Flexible workers engaged by R1 are an integral part of the safe and effective running of R2 services. Flexible workers engaged via R1 are not directly employed by R2.

29.4. On every shift worked at the Spencer Ward, as well as the staff working directly on the ward, there was also a bleep holder on duty covering this and other wards on the Caludon Centre. This was a more senior nurse (usually Band 6) who would be the first port of call for nursing staff working on the ward if they needed advice or assistance or if a doctor needed to be called. There is a rota in place for bleep holders and there is always a bleep holder on duty 24 hours a day.

Claimant's contractual provisions and R1 policies

29.5. The claimant was registered as a flexible worker by R1 in June 2006. We were shown a contract of engagement at page 129 to 140 of the Bundle which had the claimant's signature at page 140. R1 says this is the contract signed by the claimant at the time she started to work for R1. The claimant acknowledged that she had signed the last page of this document and had signed a contract of engagement with R1 around this time. She did not accept that what was at pages 129-139 was the contract she signed. We find that this document was the one signed by the claimant which she worked to. The claimant's signature appeared on the last page of this document; it had the claimant's address at the relevant time on the first page of the document and it had a date stamp showing the date of receipt (presumably by R1) on page 129. The claimant contended that a previous employment with the Bassetlaw Trust (where she was directly employed) transferred to R1. This was not backed up with any other evidence.

29.6. The claimant contends that she had some form of overarching contract of employment with "the NHS" throughout the time from 2006 onwards when she was working with R1 and before that when she worked at the Bassetlaw trust. She relies on the fact that she was a member of an NHS Pension scheme and this was the same pension scheme she was a member of throughout her career. R1's position is that flexible workers are not employees of R1 other than when they are working on a specific assignment. It further says that it is the intention of the parties that, outside any period when a flexible worker is on assignment, there is no contract of employment between the parties. Accordingly, it says, continuity of service is from the start of any single assignment and employment is continuous only for the duration of that assignment. We deal with these matters in our conclusions below.

29.7. We were referred to various provisions in the claimant's contract of engagement, specifically:

"This document sets out your terms of engagement as an NHS

Professionals flexible worker and forms the terms of your contract of employment with NHS Professionals for the period of any Assignment. It is the intention of NHS Professionals and you that outside any agreed Assignment, there is no contract between the parties."

"(F) Date continuous employment commenced:

From the start of any single Assignment worked, employment is continuous only for the duration of that Assignment, subject to any breaks occurring."

"A minimum of one Assignment must be undertaken in each period of 12 months."

"As a flexible worker with NHS Professionals you may be offered an Assignment or series of Assignments. NHS Professionals acknowledges that you wish to retain the choice whether or not to accept any Assignment offered to you, and you acknowledge that NHS Professionals is not obliged to offer any Assignment of work to you.

NHS Professionals will be your employer during and only for the period of any Assignment offered to you by NHS Professionals and accepted by you."

"You will be required to comply with the applicable local policies of each Trust you work with."

"Your continuous employment with NHS Professionals as a flexible worker commences on the date identified at (F) and ends with the completion of each continuous Assignment. Any gap of 1 week or more between or during Assignments will not count for the purposes of continuous employment as provided for under the Employment Rights Act 1996 as amended from time to time.

Any previous employment with NHS Professionals or with any other employer will not count as continuous services for the purposes of this contract of engagement."

"During the period of any Assignment, NHS Professionals has the power to suspend you from working on any particular Assignment pending any disciplinary investigation/hearing…"

"During any period of suspension under this contract, NHS Professionals may exclude you from its or any Trust's location and cease to offer you assignments under this contract of engagement but may require you to be available to provide assistance with any disciplinary investigation."

"During a period of suspension, you will be paid for the length of the booked assignment only for the period of suspension if this is shorter than the Assignment booking."

"If you are employed in an area of work which requires membership of a professional body in order to practice it is a condition subsequent of this contract of engagement for you to maintain membership of such

professional body. It is always your responsibility to comply with the relevant bodies' code of practice as laid down from time to time."

"From time to time variations in your terms and conditions of engagement will be notified to you or otherwise incorporated in documents to which you have access."

29.8. In around April 2013 R1 updated its contractual documents for flexible workers, changing from the contract of engagement, which the claimant signed, to a Flexible Worker Registration Document, the current version of which is shown at pages 355-367. This was sent out to all registered R1 flexible workers at the time including the claimant. Many employees signed and returned the new registration document as requested. The claimant did not accept that she received this document, which she described as a "*blanket document*". We accepted the evidence of MO that this contract was issued to all flexible workers in 2013. As the claimant was registered at that time as a flexible worker, we find this document was sent to her but also accept that this was not signed by the claimant and returned to R1. There is no record of any complaint being received from the claimant about these new contractual terms and conditions. In light of this, we find that the claimant was at all relevant times and is now registered with R1 pursuant to these terms and conditions.

29.9. We were taken to provisions in this registration document (which in any event were broadly similar to the terms of the contract of engagement above), in particular at page 358:

"Subject to s 210 of the Employment Rights Act 1996, continuous employment shall be ***from the start of any single Assignment worked and employment is continuous only for the duration of that Assignment"***

At page 359

"NHS Professionals Limited will be your employer during and only for the period of any Assignment offered to you by NHS Professionals Limited and accepted by you."

"Once the Assignment is over you are not obliged to undertake any further Assignments nor is NHS Professionals limited obliged to offer you any. On completion of any Assignment you will no longer be an employee of NHS Professionals Limited."

"An "Assignment" means an individual shift during which you are engaged by NHS Professionals Limited on behalf of a trust to carry out work."

"A "Series of Assignments" means the situation where Individual Assignments are booked for a consecutive period for the same trust client, where no more than a maximum of 72 hours break elapse between each Individual Assignment."

At page 360

"*For the avoidance of doubt under this registration document, you are only an employee of NHS Professionals Limited for the period you actually work on an Assignment. If you have booked a Series of Assignments but have not completed that Series you will not be an employee for the duration of the Series that you have not worked."*

At page 363

18. Suspension from Assignment

18.1 During any Assignment, NHS Professionals Limited has the power to suspend you from working the Assignment and any subsequent Assignments which have been booked for you, as a result of any complaint received about you or concern about your practice pending any disciplinary or grievance investigation/hearing.

29.10. At page 368, we were shown a copy of the R1 Code of Behaviour for flexible workers. The claimant confirmed this applied to her when she was carrying out Assignments. She also confirmed that the disciplinary policy at page 801 to 807 also applied to her, albeit she said it was out of date, dating from 2014. We were specifically referred to page 802:

"4. Investigation

Following written notification of an alleged breach of disciplinary standards or a complaint, NHS Professionals will decided on the category and level of misconduct and consider whether the issues can be resolved informally, or requires investigation on the grounds that it is potential misconduct or gross misconduct. The flexible worker will be notified of the investigation and the nature of the allegation or complaint against them as soon as possible, and of the outcome when the investigation has been concluded.

Depending on the circumstances of the case, the flexible worker may be requested to attend an investigatory interview. In the event that an investigatory meeting is required, NHS Professionals will write to the worker with details of the allegation, the date of and other arrangements for the meeting. Where upon completion of an investigation, there are reasonable grounds to believe that a flexible worker has committed a breach of discipline, the matter will proceed to a disciplinary hearing."

29.11. The claimant referred during her evidence to there being a policy which required R1 to interview any flexible worker as part of an investigation into a gross misconduct offence. She was not able to identify any written policy confirming this in the Bundle but was insistent that it must exist. We have concluded that there was no such policy requiring an interview, this is particularly so, given the provisions (at paragraph 29.10 above) in the actual written disciplinary policy which states that a flexible worker may be requested to attend an investigatory interview. It does not seem plausible and we were shown no evidence of another policy existing that said something different.

Arrangements for working

29.12. The claimant arranged to work particular assignments through R1's online booking system. She booked her own shifts and it was entirely up to her what shifts she wished to work. The claimant said the very reason she was a flexible worker for R1 was that she wanted the flexibility this gave her to choose her own working arrangements. The claimant sometimes discussed in advance what shifts she would undertake with employees of the Trusts she was working in, including staff at R2. She did not have any discussions with employees of R1 about what shifts she would agree to carry out in the future. The claimant did not have a line manager at R1. No appraisals were carried out on an annual basis or otherwise. Her duties whilst working were managed by those employees of the Trust who were responsible for staffing on the wards she worked on. The claimant described a "break the glass rule" with the Trust which operated when a flexible worker engaged by R1 attended to work on a ward at a Trust for the first time. This was that the flexible worker must inform the Nurse in charge that this is the first shift on the ward and that then the flexible worker should be given an induction. On or around July 2016 the claimant first worked on the Spencer Ward and was given induction training by R2. There was an induction folder held on each ward which set out specific policies and requirements.

The NMC Code

29.13. At various points during the hearing we were referred to the NMC Code and various sections were discussed. We note that the Nursing and Midwifery Council (NMC) is the UK regulator for the professions of nursing and midwifery. It maintains a register of all nurses eligible to practice in the UK and sets standards for their education, training and conduct. The Code of Conduct for Professional Standards of practice and behaviour was shown at pages 550-569. The NMC Standards for Medicine management is shown at pages 439-549. The claimant accepted that both Codes were applicable to her in her work as a nurse and we note that these were also applicable to all the other nurses in R1 and R2 including those we heard from during the hearing, being ED, JH and SS.

R2 Policies

29.14. We were also referred by the parties to the various policies in place at R2. There was much discussion of MMG 3 and MMG 11. MMG3 (pages 704 to 706 of the Bundle) is the procedure for verbal prescriptions/orders (remote prescribing). MMG 11 is at pages 849 to 864 (the correct version of this policy was provided by R2 at the outset of the hearing, a later version of the same policy having been sent in error during the disclosure process). The claimant contended that she had never been trained on these local policies, having only seen them for the first time during the Tribunal disclosure process. We accept that the claimant was not familiar with the content of either of these policies. The claimant was required to comply with all such policies pursuant to her contract of engagement/terms of registration (see paragraphs 29.7 and 29.9 above). There was no written policy in place dealing with the duties of a bleep holder or how nursing staff interacted with the bleep holder. The duties of a bleep holder would be covered in individual

job descriptions (as their roles varied in terms of duties and responsibilities). There were no different written policies pertaining to night shifts as opposed to day shifts.

29.15. The claimant also contended that there were local polices or common practices on the Spencer Ward but that these policies were not in writing. In particular, she said that there was a common practice in place on Spencer Ward about how nursing staff on night shifts interacted with the bleep holder on duty. The claimant says that she was always expected to effectively communicate and seek the required support of the bleep holder ensuring the care of patients was not being compromised. She also suggested that the bleep holder was responsible for prioritising the work that needed to be referred to the on-call doctor and that the bleep holder had the authority to instruct nursing staff to administer medication. This was not accepted by the respondent's witnesses, ED and SS, who vehemently denied any suggestion that any instruction by the bleep holder to administer medication could override rules on administering medication set out in written Trust policies (such as MMG3 and MMG11) or requirements of the NMC Code. We do not need to determine whether such a common practice existed in order to decide the issues before this Tribunal. However whatever practices were operated by different staff on the ground in the Spencer Ward, all nursing staff were still bound by and required to follow the provisions of the NMC Code and the provisions of MMG3 and MMG 11 applied to all nursing staff on the Spencer Ward, both employees of R2 and flexible workers on assignment from R1.

Complaints process at R1

29.16. We also had sight of the Complaints and Incidents Handling Standard Operating Procedures ("CIHSOP") which applied at R1, a copy of which was shown at pages 779 to 800. R1 operates an online Complaints Incident Management System ("CIMS") which provides a framework for dealing with addresses the complaints that it receives from various stakeholders. There are various stages which are described in the written policy and which were illustrated in the way that the initial complaint against the claimant was progressed. The complaint is initiated by the completion of a complaints form on the NHS Professionals Website. This goes on to the CIMS and is firstly assessed and triaged according to seriousness by a complaints administrator. This is done by reference to a Risk Ranking Matrix which was shown at page 796 and 797. The relevant provision of the CIHSOP dealing with risk ranking is shown at page 791.

29.17. The complaint is then sent to HR and the case investigation teams to investigate. AC, JH and MO all gave evidence that if a complaint against a flexible worker is risk ranked at 12 or above, then R1's practice is to exclude the flexible worker pending investigation relying on clause 13 of the flexible workers registration agreement (paragraph 29.9 above). SS also confirmed that this was her understanding. This was not contained in the CIHSOP, albeit that there was reference to exclusions and how they are carried out in the CIHSOP at page 789. We accept that exclusion of the flexible worker did take place in all instances of complaints that were risk ranked 12 or above. There is consistency of evidence from various witnesses on this

point, both of R1 and R2 and the documents referred to above this.

29.18. The complaint is investigated by one of the investigation team (who is a clinically qualified person) and they are supported by HR in this process. The investigating officer/nurse lead works off a standard working document which has a terms of reference and framework for recording the complaint and how it is progressed. CIMS also has the facility to add notes of phone conversations that take place. Once an investigation has been carried out then the investigating clinician makes a recommendation as to whether the matter will be referred to what is known as management investigation ("MI"). This is a recommendation as to whether disciplinary action will be commenced. This is checked by HR but the ultimate decision as to whether to refer to a disciplinary hearing is made by the investigating clinician (usually the Nurse Lead). A disciplinary process is then commenced, and a hearing held accordingly. There are standard letters supporting this process which are used to communicate with both the complainant and the subject of the complaint. There is also an escalation procedure which can be used if R1 is having difficulties obtaining information required for an investigation from the relevant trust. This is set out in the CIHSOP at pages 792-793. The process for investigating clinical complaints of Risk Rank 12 or above is set out in the CIHSOP at page 798-800.

<u>The claimant's working patterns from 2015-2017</u>

29.19. In the two years prior to October 2017, the claimant worked many times for R1, and we were shown a schedule of assignments completed at pages 141-276. She also worked a significant number of shifts for R1 on R2's wards. The most recent gaps between assignments worked by the claimant for R1 during this period were shown at paragraph 18 of MO's statement, which dates were not challenged by the claimant. These dates could also be ascertained by looking at the schedule of assignments. The claimant carried out other work as a nurse for different NHS trusts during these times when she was not working for R1. She worked directly for the Derbyshire NHS Trust for a period of approximately 16 months from February 2015 until July 2016 (shifts worked for R1 before and after this gap are at page 252). At page 254, there was a further period between 26 August 2016 and 10 September 2016 when the claimant was not working. Other than the 1 day holiday noted on 10 September, she was not paid during the rest of this period. We were further referred to another period from 15 December 2016 until 21 March 2017 when the claimant was not working for R1. She was abroad not working during this time and again other than 15 December 2016 when she was taking paid leave, she was not paid during this period.

29.20. The claimant worked at the Spencer Ward at R2 from 21 March 2017 until she was excluded on 17 October 2017. She worked approximately 60 hours per week over six night shifts of 12 hours each. Her role was Nurse in charge of the ward during night shifts. Two other members of staff employed by R2 were on shift with her and these were usually health care support workers ("HCSWs"). It is accepted and acknowledged by all that the claimant's role on the Spencer Ward was important and could be difficult and challenging.

Incident on 16 October 2017

29.21. Although this is a matter of understandable importance to the claimant, it is not the function of this Tribunal to determine precisely what happened this evening or what the implication of this are in terms of the claimant's ability as a nurse. We have heard the claimant's account and the position of both respondents. We have seen the documentation relating to this including the document which contained the notes of Dr Hassan. It a very contentious issue but ultimately it is not a relevant factual issue we need to resolve in order to determine the claimant's claims for unfair dismissal, discrimination or victimisation. Many of the facts are not in dispute. We make findings of those that are here only in respect of the matters that are relevant to the issues before the Tribunal.

29.22. The claimant was working on night shift which started on 16 October 2017 at 7.10 p.m. She had been made aware on the last night shift that a patient was being admitted during the day (Patient X). She was the sole nurse in charge on shift with two health care support workers, Shivinder Gill and Judith Hewitt. At her handover she was informed about Patient X and that she had been increasingly unsettled during the day and was volatile. She was informed that the patient was to be given "as required" PRN medication. There had been no permanent staff of R2 on the Spencer Ward during 16 October 2017 (as there had been a staff away day) and the ward was staffed with flexible and agency workers. Patient X became increasingly agitated during the evening. The claimant contacted the bleep holder on duty (H Warnatilke) at 21.20 hours. The bleep holder then tried to contact the Doctor on Call, Dr Hassan between 21.25 and 21.30 and a message was conveyed that a prescription for Zopiclone was required for a patient on Spencer Ward. The claimant then says she was instructed by the bleep holder to give the Zopiclone to Patient X (this is not admitted by R2). The claimant also now contends that Dr Hassan had given verbal authority to the bleep holder to administer the Zopiclone (again this is disputed by R1 and R2).

29.23. The claimant administered a 7.5 mg dose of Zopiclone to Patient X at 22.00 hours. There was no written prescription for that medication at that time and the claimant had not spoken to Dr Hassan herself when giving the medication. Dr Hassan attended the ward at 00.50 hours. Patient X was asleep. Dr Hassan entered the dose of Zopiclone that had been given to Patient X by the claimant on Patient X's medication chart for the period (page 431) but did not sign it. Patient X did not come to any harm as a result of the administering of the Zopiclone.

29.24. The claimant submitted an incident form after Dr Hassan had left but before the end of her shift. This was shown at page 278a and b. The claimant submitted this because she felt that there had been an undue delay in the attendance of the doctor.

29.25. The claimant finished her shift at 7.10 am and she attended a handover with the day staff on the Spencer Ward. This included ED. She explained what happened with Patient X on the shift during the handover. ED could not remember exactly what was discussed during this handover but recalls that

the claimant told her she had struggled to get hold of the doctor and that she had given a dose of Zopiclone to Patient X without a prescription. The claimant says she gave a copy of the incident form to ED. ED cannot recall this taking place or having seen the incident form. ED confirmed that at that time she did not have access to view incident forms raised by other members of staff on the online portal. No concern was raised with the claimant by ED or any other member of staff during the handover about the incident with Patient X. The claimant then left the Spencer Ward and went home to sleep.

Complaint made by ED on 17 October 2017

29.26. During the morning, the ward manager of Spencer Ward, Laura Sale, received a complaint about the claimant from Dr Hassan by e mail. We did not see a copy of this e mail but accept that an e mail was received. Ms Sale and ED discussed this during the morning. ED did not see a copy of the email from Dr Hassan. ED was instructed by Ms Sale to fill out an incident form online in respect of the matter which she duly did on the morning of 17 October 2017. ED confirmed that she did not discuss the matter with Dr Hassan, the bleep holder or with either of the HCSWs on duty the previous night before completing her complaint form. We were shown a copy of this complaint ED completed at 277 to 278 and we were referred to this many times during the evidence.

29.27. This is an online feedback form with the description completed as "NHSP Formal Complaint" with the complaint details being:

"*Agency nurse gave zopiclone to a patient without it being prescribed and then insisted that the night duty doctor prescribe it after it had been given.*
Patients MDT has been informed
Phone call made to NHSP to inform and to request that this staff member do not work on the ward."

29.28. In her witness statement, ED stated that "*the only reason I completed the report was because she told me that she had given medication to a patient that had not been prescribed*". When asked about this in cross examination she said this was indeed the case and she also said that she completed the form because she had been asked to do so by her line manager, Ms Sale. She gave evidence that her concerns at the time of raising the complaint was that the claimant had informed her that she had administered medicine without it being prescribed, and in her view, this is not something that any nurse would do. She said she felt it was a highly unsafe practice and had potentially dangerous consequences, although she acknowledged that in this case no harm did come to the patient. She confirmed that Patient X was seen by the MDP and that the patient's medication chart shown at page 432 shows that the claimant was prescribed Zopiclone on 18 October 2017 and this was administered to her on 5 subsequent occasions. ED could not recall whether Ms Sale had asked her to add the instruction that the claimant should not work on the ward. ED did not speak to Shvinder Gill the healthcare worker on duty before completing the report. ED denied vehemently that submitting this complaint was because of the claimant's race.

29.29. We found that ED was a straightforward witness although she did have problems recalling the precise detail of the events of the morning in question. We are aware that this was some time ago and note that ED has been absent from work on maternity leave for some months and her recollection of work matters may have been affected by this delay and period of absence.

29.30. The claimant contends that the reason that the form was completed was racially motivated. She said that ED had "fabricated" the complaint and that she was motivated by factors such as professional jealousy, mental instability etc. She therefore strongly contends that the complaint was submitted by ED against the claimant because she is black and described ED as "racist", "bitter" and "full of hate" towards her. We found that the claimant's belief that this was the case was genuine and firmly held, although she was not able to articulate why she had reached the conclusion that ED had a racist motive for making the report. The claimant and ED appeared to have a good working relationship and ED had done her revalidation as a nurse previously. The claimant made some assertions whilst giving evidence that ED had made 15 complaints against BAME nurses on the Spencer Ward. This did not appear in her claim form or her witness statement. Mr Crow objected to the claimant raising such matters at this late stage in the hearing. In any event the claimant did not adduce any further information relating to these allegations saying that these were matters she would be pursuing separately to her claim in the Tribunal. We have therefore not attached any weight to this allegation.

29.31. The claimant stated in cross examination that the incident was not a serious matter because she did not accept that the medication had not been prescribed. The claimant's view was that the complaint should not have been made without seeking the input of anyone involved and the issue was "catastrophised" by raising a complaint, even though the patient had come to no harm. She contended that she did exactly what her induction training had instructed her to do and acted in Patient X's best interests. We understood the claimant's frustration that a complaint had been made that had such serious consequences on her. We accepted that the claimant was trying to act in what she genuinely thought were the patient's best interests, but were surprised that the claimant did not appear to acknowledge R2's view that administering any prescribed medication without having a written prescription was potentially a serious matter.

Exclusion of the claimant from working shifts on 17 October 2017

29.32. Once the complaint was submitted on to R1s complaints management system, it was in accordance with the process described at paragraph 29.16 above automatically sent to the complaints administration team within R1. Hemal Patel was the complaints administrator that dealt with this complaint. We did not hear any evidence from Hemal Patel but the documentation shows, and we accept, that and it was at this point allocated as a Risk Ranked (RR)12 complaint by Hemal Patel in accordance with the matrix which was shown at pages 796-797. Once this was done, the complaint was forwarded by Hemal Patel to the FWHR e mail address and the Nurse Lead

(Jane Hewitt) for further action at 10.42 on 17 October 2017. The email showing all of this is at p277.

29.33. HR advisors at R1 have a rota for picking up complaints. On the day in question, AC was the HR advisor on duty and picked up the e mail. She did not know the claimant when the complaint was received. Upon receipt of the email, AC said she applied the exclusion from working shifts automatically. She did not recall whether she discussed this action with anyone before she did it. She said the reason the exclusion was applied was because it had been risk ranked 12 and because there was a note on the complaint form requesting that the flexible worker did not work on the ward. AC said it was standard procedure for a flexible worker to be excluded in these circumstances until an "*investigation had been undertaken or the Trust/nurse lead investigating the case had requested for the exclusion to be lifted.*" We found that the evidence given by AC about her actions was reliable and straightforward and we have accepted it entirely.

29.34. AC sent a letter confirming this to the claimant by e mail on 17 October 2017 at 11.47 and a copy of this letter is shown at pages 279 to 280. This was a standard letter which AC adapted to send to the claimant and confirmed the following:

"*NHS Professionals can confirm that NHS Professionals will no longer offer you assignments at any of its Client Trusts as of 17 October 2017."*

and:

"Allegation
The Trust has submitted the following allegations;

- *Clinical Practice*

Investigation Process
A Nurse Lead will carry out a full investigation into the allegation.

The investigation is not disciplinary action however it is used to facilitate an investigation into the allegation/complaint by the Trust."

The letter advised the claimant that the Nurse Lead leading her investigation was JH and went on to say:

- "*The Nurse Lead will contact you in relation to the allegation.*
- *You will be required to make yourself available to meet with the assigned Nurse Lead investigating the allegation."*

and finally said:

"*Once the investigation has been completed, a decision will be made in regards to the above allegation, if further action needs to be taken, this may involve a formal disciplinary process, in line with the NHS Professionals disciplinary procedure outline in the Disciplinary Procedure for Flexible Worker."*

29.35. Although it was not directly put to AC by the claimant that she took this action because of the claimant's race, the claimant gave evidence that she thought AC made the decision to exclude her because she assumed something about the claimant's race. She said that this reflected a prevalent negative attitude within the NHS about black nurses and that she was being scapegoated. She concluded this because AC simply believed what was notified to her by ED and did not question the instruction or contact the claimant for an explanation. She also points out that AC did not speak to the Spencer Ward Manager or carry out any investigation before taking this action.

29.36. The claimant's contention is that the letter sent on 17 October 2017 by AC was the act of dismissal by R1. She says that her previous view that the dismissal took effect on 4 April 2018 when she was notified of the disciplinary outcome was because this is when she found out the reasons. However, she was clear during the hearing that she believed she had been dismissed on 17 October 2017.

The Investigation

29.37. JH was the Nurse Lead at R1 who was tasked with investigating the complaint following on from the email from Hemal Patel sent at 10.42 on 17 October 2017 being received by her. JH has been a registered nurse for 40 years and her role in R1 is to investigate complaints against R1 flexible workers and provide a liaison service with the Trusts that R1 provides workers to. She has dealt with many complaints for R1 made against flexible workers of all backgrounds. She did not know the claimant before investigating this complaint and met her for the first time at the disciplinary hearing on 21 March 2018. Upon receipt of this e mail JH first entered details of the complaint on the CIMS. She telephoned ED on 17 October 2017 and the note of the conversation, recorded on CIMS is at page 829. JH said that it was normal practice for her to contact the FW who was the subject of the complaint by telephone but before she could do this, she received an e mail from the claimant at 13.42 (shown at page 281). In this e mail the claimant introduced herself to JH and confirming that she preferred communicating via e mail and asking for the reasons for her exclusion. She also stated that she would be *"claiming back all my earnings lost from today's date to what I could have earned whilst I am being put out of work*". The claimant sent a similar e mail to AC that day (page 282). JH sent a statement request form to the claimant at 15.02 that day (page 283) together with some guidelines for completing a statement (page 412) and a template for a statement for the claimant to complete.

29.38. The claimant completed the statement between 17 and 19 October and a copy of the statement she prepared was at page 414-418. The claimant confirmed in cross examination that she did not leave anything out from this statement and put everything in she wanted to do. She said she recorded it as she recalled the events. There were some telephone conversations between the claimant and JH on 19 October 2017 (pages 829 and 830) when the claimant asked JH whether she would be paid for shifts she was not able to work. JH then told her that she would not be paid as per the

terms and conditions. The claimant was unhappy about this and became upset and angry during the telephone calls.

29.39. The main complaint the claimant raises in relation to the investigation carried out by JH is that she did not interview her face to face. The claimant says that following the exclusion letter received from AC she had an expectation that this would be taking place and that the policy says that it is a requirement that she had to be interviewed where there was a potential gross misconduct offence. She was not able to point to anything in the policy documents in the Bundle which stated that this was a requirement. She stated that it was required by the ACAS procedures. She did not point to any specific paragraph in the ACAS Code just stating that not being interviewed meant that R1 had not followed the correct disciplinary policies and procedures.

29.40. JH admitted in evidence that she could see why the claimant might have thought that from the wording of the standard letter referred to above from AC, but that this was not what was intended and as far as she was concerned there was still no requirement or need to interview. JH referred to a copy of the disciplinary policy at Page 802 which states that the FW "*may*" be interviewed. We accepted JH's evidence was that whether an interview was held or not depending on the circumstances and it was not standard practice to carry out a face to face interview. Most of the work of the investigations team is carried out by e mail and telephone. This was due to the number of flexible workers, the number of complaints received and the fact that flexible workers are located throughout the country. JH said that once she had received the claimant's statement, she did not think it necessary to hold a face to face meeting because her statement was detailed and explained her version of events clearly.

29.41. JH got in contact with ED by e mail to ask her for further information about the complaint (e mail at 284a). This asked for copies of witness statements/evidence to support the allegations and that these should be provided by 24 October 2017. No response was received so Mala Patel sent a further e mail to ED on 27 October chasing for a response (also page 284a). No response was received so the matter was escalated in accordance with the escalation procedure contained in the CIHSOP (paragraph 29.18 above) and a letter was sent on 15 November 2017 to the Chief Nurse Tracey Wrench from Karen Barrraclough requiring the production of information. ED was challenged about not responding to these e mails more promptly and she admitted that she did not respond in a timely manner. It was unfortunate that there was a delay at this stage as the claimant was awaiting the outcome of the investigation and this was hindered by the delay in providing information from R2.

29.42. The evidence was in fact sent on 10 November 2019 to a general e mail address but had not been able to be opened. This contained the document at pages 420-423 which appears to be the notes that were added by Dr Hassan to the patients online medical notes. The claimant alleged that this document was falsified by ED and had not been produced by Dr Hassan at all. She referred to the document being unconfirmed and stated that it just contained cut and paste details from her own statement with comments

responding to each matter. We conclude that this was an extract from Patient X's online notes showing the entries made by the claimant on the night of the 16 October and morning of 17 October the response of Dr Hassan to the points made. Although the notes were unconfirmed, we do not find that this document was fabricated by ED or anyone else.

29.43. JH spoke further to ED on 24 November at 10.20 and an e mail sent by JH to ED at 10.24 confirming what was discussed was shown at page 296. The notes of the call itself are shown at page 830 and they are consistent with the e mail. These communications confirmed the view of ED provided to JH that it was not possible to administer medications without obtaining either verbal or written authorisation from a Doctor and that it was not common practice anywhere in the Trust to administer medications that have not been prescribed. She sent a further e mail to ED at 11.08 asking whether it was possible to get the statement signed and dated by Dr Hassan.

Decision to proceed to a disciplinary hearing

29.44. JH gave clear evidence that she decided on 24 November 2017 that she would be recommending that the matter proceeded to a disciplinary hearing. She e mailed a letter to ED at 10.37 which is the e mail and letter shown at page 297 and 298. This letter stated that JH had carried out an investigation and that the case "*is subject to further review by NHS professionals Flexible Worker Human Resources Department"*. JH e mailed the claimant on 24 November at 12.07 (e mail shown at page 301) attaching a letter which is shown at page 302. This letter stated as follows:

"*The allegations have been addressed and I can now inform you of the findings:*

- *To determine whether you administered Zopiclone to a patient without it being prescribed*
- *To determine whether you insisted that the Doctor prescribed it after it had been given*

Based on the evidence submitted the case will be referred for further review to NHS Professionals Flexible Worker Human Resources Department."

29.45. Unfortunately, it appears that the claimant did not receive or access this e mail on 24 November 2017 (although the e mail to which it was sent appears to be the correct one). JH then emailed Mala Patel asked for the matter to be logged on CIMS "*as this case is proceeding to MI*". We were therefore satisfied and accepted the evidence of JH that she had made the decision to proceed to a disciplinary hearing on 24 November 2017 as this is supported by the contemporaneous documents we have seen.

29.46. It is unfortunate that between 17 October and 24 November 2017, the claimant was left not knowing what was happening and how the investigations were progressing. She e mailed to check on progress on 3 November and was told that JH was awaiting information on the Trust. However, the delay in receiving the information requested inevitably delayed the investigation and left the claimant in an very uncertain position.

We are very cognisant of the fact that during this period and thereafter, as a flexible worker, the claimant was not being paid as she was not undertaking shifts. This was clearly a difficult and stressful time for the claimant.

Claimant's grievance of 5 December 2017 – the Protected Act

29.47. The claimant's grievance was sent to AC on 10.32 on 5 December 2017 (shown at page 299) and this was a protected act stating within it that she had "*been unfairly treated because of my colour*".

29.48. Also on 5 December 2017 at 14.33, JH sent her completed MI report to AC for review. The email is shown at page 298a and the report itself at page 298B to E. This report sets out the summary of the investigation carried out by JH. It ran through the events of the incident in question, largely as set out in the claimant in her written statement. It then also sets out the comments made by Dr Hassan and by ED regarding her view on what Trust policy was and in response to the suggestion of common practice made by the claimant. It then went on to mention NMC Standards for Medicine Management and the NMC Code. It set out its conclusion as follows:

"*It is concluded that NF prescribed and administered Zopiclone 7.5mg to a patient. NF does not hold an Independent and Supplementary Nurse Prescriber qualification and has such should only administer medicines prescribed by a Doctor or other Legal Prescriber.*

Recommendations

From the evidence made available during the investigation, I believe sufficient evidence exists and a hearing should be convened to consider whether any formal action is necessary in relation to disciplinary code GM8.

Jane Hewitt
Nurse Lead
November 2017"

29.49. JH received an e mail from the claimant on 15 December 2017 asking for an update and confirming that she had raised a formal grievance and that she was intending to lodge an ET complaint. JH replied the same day and informed the claimant that she had sent an e mail on 24 November and that she was was waiting for HR to confirm whether the claimant's case would proceed to a hearing. It is then that the claimant informs JH that she did not receive her e mail of 24 November and that she is unhappy with the allegations made against her.

29.50. Having sent her report to AC for HR review, and not received a response, JH chased AC on 15 December 2017 and the email is at page 307. JH stated that the claimant was "*not happy and is also waiting for a response to a grievance she says she has submitted*". AC raised some queries about the investigation carried out by JH and confirms that the claimant had "*raised a grievance that Christina is investigating. We would need to let Christina finish her investigation into the grievance before the investigation*

can be completed" (emails at p 305 and 306). JH responds to the queries raised on 9 January 2018, in particular, whether it was possible to get a signed statement from Dr Hassan and she states that she "*will ask Elizabeth again if she can get the doctor to sign it*". AC confirms on 9 January that once matters have been clarified that she will arrange the hearing. A statement was not signed by Dr Hassan.

Disciplinary hearing held on 21 March 2018

29.51. The disciplinary hearing was chaired by MO and she was accompanied by Denise Stevens (R1 Clinical Governance Nurse Manager) ("DS"). The claimant was accompanied by her union representative, David Kirwan. JH attended to present the management case. Two witnesses dialled in to give evidence, Judith Hewitt who was one of the HCSWs on duty on 16 October and ED. Various matters were raised by the claimant and her union representative during this hearing and the claimant had prepared a detailed representation document in advance which we were taken through (pages 579 to 581). ED referred to the rule that a prescription had to be in writing and mentioned the trust policy on medication (MMG3). ED checked what this policy said during the hearing and read out the relevant section which stated that "*remote prescribing (verbal orders) should only be used in emergency situations/urgent cases where it is impossible for the prescriber to attend in person to the patient*". ED provided a copy of this policy by e mail to AC as the meeting was still going on. During the meeting, the claimant raised the point that she had administered the Zopiclone on the instruction of the Bleep holder, which MO felt had not been mentioned before and was important. In light of these two matters, MO decided that further investigations were required before the disciplinary panel made their decision. The hearing was therefore adjourned.

Further investigations

29.52. The further investigations were carried out by DS and the e mail summarising the investigations she carried out is at page 588. This e mail is relied on heavily by the claimant as the e mail that effectively backs up her version of events that she did have the authority to administer the medication on the night. DS said in this e mail that she has spoken to "*the bleep holder at Coventry and Warwickshire Partnership Trust*" and that "*the name of the bleep holder that I spoke to was Henry Agbogunleye. Affectionately known as "H"*. She said that she had asked "*what process A RN would use if they required medication for a distressed patient*" and was told that "*All RN have to contact the bleep holder so the duty doctor is not inundated with requests from the ward. The bleep holder is a senior nurse who will help the duty doctor to prioritise the types of situations that the duty Doctor is bleeped for*". DS also said "*I checked with A RN on Beechwood ward as a peer – she stated that all issues have to go through the bleep holder including a distressed patient even if you wanted drugs or not and then as any situation escalates the bleep holder can get the doctor. A request for a drug that was not prescribed would definitely be something the bleep holder would give you permission to give or not. (I didn't catch her name)"*.

29.53. After these two conversations had taken place, MO discussed with DS what the outcome of the disciplinary hearing would be. Having considered the allegations and the evidence, MO and DS reached the decision that the claimant had followed the instructions of the bleep holder at the Trust when administering the medication without prescription, as they felt that the conversations that DS had with the two members of staff at R2 corroborated the claimant's account. MO was challenged by Mr Crow during the hearing as to whether this was a valid decision but ultimately this is not something the Tribunal is concerned with for this claim. Before finalising the outcome letter, MO and DS decided to get in touch with R2 so that they understood the decision. MO said she was hopeful that R2 would allow the claimant to return to work with them, given R1's decision.

Discussions/communications on claimant's exclusion from R2

29.54. DS got in touch with Naomi Fletcher from R2 (who was the allocated R1 liaison staff member) on 23 March 2018 (page 589). DS provides some more information about the matter on 27 March 2018 (page 592). Ms Fletcher then forwarded this email with a summary of the case including the original complaint details to SS and a request that to SS to "*Please give me your thought on this?*" on 28 March 2018 (page 591).

29.55. SS was R2's Associate Director of Operations for Safety, Quality and Professional Practice at the time and prior to this was a Lead Nurse involved in investigating complaints. She is a registered mental health nurse. Her role was to look at professional practice issues and to give a strategic overview and to provide guidance to others in the organisation on all safety and governance matters. She is also involved in the reviewing and overseeing of Trust policies, although MMG3 and MMG 11 were put together by R2's Drugs and Therapeutic Committee and not her. SS did not know the claimant personally at the relevant time and did not even know the claimant's name or identity. She just had the CIMS number allocated to the matter. SS first became aware of the complaint involving the claimant on 7 November, when she was copied into an e mail as part of the escalation process described at paragraph 27.41 above (page 313). She spoke to the Matron responsible for the ward, Rebecca Nash and asked her to request that ED provide the information requested. She did not get involved further at this time.

29.56. SS provided an initial response to Ms Fletcher's e mail on at page 595 as follows:

"*Hi Naomi*

This has implications for both Nurses in my view, can I ask which Policy they are referring to and do we know who the night Bleep holder was as well.

I will discuss with Janet and reflect a bit more when see policy and come back if that's ok."

This was then forwarded on to DF on 3 April. It is clear to us from this

exchange of e mails that SS was the ultimate decision make on this point and Ms Fletcher was acting as the liaison between the two only forwarding on the request from DS and the decisions from SS and consistent with contemporaneous e mails.

29.57. SS decision on the matter is shown at page 594 and SS gave evidence on how she reached this decision and we found her account of the decision-making process was reliable. She discussed the matter first with Janet Kenworthy-Harvey, one of R2's Lead Nurses who reported to SS and was responsible for in-patient nursing services. She concluded that:

"*Doctors are not authorised to pass a verbal prescription authorisation instruction to the bleep holder to then authorise the staff member to give the medication, the instructions should come direct from the doctor prescribing*" and that she "*was not satisfied that safe practice has been followed during the incident and also how it had come about in the first place, as Zopiclone is not a medication used in an emergency. I was concerned about the practice that had been adopted by the Flexible Worker and I was therefore not willing to allow her to return to undertaking shifts at the Trust.*"

29.58. SS did not see a copy of the Incident Form completed by the claimant that night. She did not speak to ED, Ms Sale or anyone else on Spencer Ward about the matter. She did not speak to Dr Hassan or the bleep holder on duty and was not aware that Dr Hassan had provided a statement. She did not see the e mail at page 588 from DS to MO. She did not ask Ms Fletcher for further evidence from R1.

29.59. SS sent an e mail to Ms Fletcher (copied to Ms Kenworthy Jones and Winsom Rowbotham (who was the General Manager of R2's Clinical Co-ordination Centre responsible for the bleep holders at the relevant time) on 4 April 2018 confirming her decision which is shown at page 594. She concluded:

"In addition for the Nurse who gave this medicine Zopiclone it is not a medicine that you given in an emergency situation. I therefore disagree that there is no case to answer for the registered nurse.

At no point in the policy does it state the remit of the Bleep holder in this situation and the practice of the Bleep holder prioritising the Medical work load was stopped a long time ago.

We will pick our own internal issues up with the Bleep holder, but I don't feel we should support taking this nurse back."

SS confirmed that she was referring to MMG3 when she mentioned "policy" in this email. She also explained that the reference to an emergency in her e mail was that this was not an emergency situation where it might justify the administration of medicine without a prescription where a patient was in a life-threatening situation. Therefore she concluded that it was not within the professional gift of the nurse administering the medicine to have done this without a prescription being in place. SS did not know whether any sanction was put in place for the bleep holder in question as a result of her

referral to Ms Rowbotham above. She assumed that as she had not heard further from anyone on this, that there had been a decision that there was no case to answer for the bleep holder. We found this a little surprising given her initial conclusions (paragraphs 29.56 above) but ultimately did not hear any evidence on this and we accept that this was not a relevant matter for this Tribunal considering this claim.

Disciplinary Outcome

29.60. DF informed MO of the decision of R2 not to permit the claimant to return to work in R2 on 4 April 2018. MO then prepared the outcome letter which is shown at p 669. The outcome was that R1 had concluded that the claimant followed the instruction of the bleep holder to administer the Zopiclone and accepted that this was common practice on the Ward. MO concluded that the claimant's "*account of events above was corroborated by the bleep holder following further investigations conducted after the disciplinary hearing*". However, the decision was that this was still a breach of Trust Policy which details that a verbal conversation must take place between the prescriber and the nurse administering the medication. This was found to supersede any other instruction and therefore MO concluded there was a case to answer. The letter went on to say:

"It is therefore our recommendation that when you attend any Wards in future the carry out assignments, that you please ensure you familiarise yourself with local Trust Policies.
No further action will be taken in relation to this matter and the exclusion preventing you from booking assignments via NHS Professionals has now been lifted. Please note however that Coventry and Warwickshire NHS Trust have not agreed for you to return to work their Trust, therefore you will not be able to return to work at the Trust. As mentioned above, you are able to pick up shifts at any other NHS Professionals Client Trusts with immediate effect should you wish to. We now consider this matter closed."

Claimant's Appeal

29.61. The claimant appealed against the decision on 13 April 2018 (p 680-684). She raised a number of matters in her letter specifically claiming that there had not been adequate investigation, the relevant witnesses did not attend the disciplinary meeting and that the final disciplinary decision was made on the basis of a different matter than the original exclusion, namely the breach of MMG 11. She also complains about the length of time the process took. She sought loss of earnings and complaint of discrimination. She also appealed wanting to know the basis of the decision of R2 to continue her exclusion.

29.62. The appeal hearing took place on May 2018 and was chaired by DL and had another panel member Isabel Gaylard, who was a Nurse lead at R1. The notes of the appeal were shown at p 737 and we read these in their entirety. Following the appeal hearing DL decided to follow up on some matters that had arisen during the hearing. She checked out the position on the employee assistance program and whether this had been offered to at the claimant. She also checked with AC whether the MMG3 policy had been

provided to the claimant at the disciplinary hearing. DL also checked whether JH had tried to contact the bleep holder during the investigation. She also reviewed the disciplinary and grievance packs. She then discussed all of this with Ms Gaylard and the decision of the appeal was not to uphold the claimant's appeal. The letter from DL confirming this outcome on 5 June 2018 is at p732-734.

29.63. The claimant is now complaining that this outcome letter of 5 June 2018 written by DL did not accurately reflect the contents of the meeting held on 24 May 2018. The claimant did not articulate what exactly it was that was in this letter that did not reflect the discussions at the meeting. Her e mail to DL complaining about the outcome is at 742. This makes a number of generalised complaints and also make specific reference to a paragraph in the outcome letter where DL states *"I was pleased to hear that you had undertaken some shifts and note from your records that you are using NHSP booking platform to access shift at both Worcestershire Health and Care NHS Trust and Mid Yorkshire Hospital NHS Trust".* The claimant contended that this showed "sarcasm", but we accepted the explanation of DL that this was not intended. DL confirmed that the appeal decision to uphold was not a foregone conclusion and that she gave each matter raised full and due consideration. She said that there was nothing in the documentation that led her to believe that there was any race discrimination or that the claimant had been treated differently because of her race. She confirmed that she did not contact anyone in R2 during the appeal consideration.

Claimant's further complaint against R2

29.64. The claimant made a complaint to R2 on 10 April 2018 regarding the decision of R2 not to allow her to return to work in R2 (p605-610). The claimant was not permitted to add this complaint to her existing claim (see paragraph 12 above). However, we note that R2's solicitors informed the claimant on 20 December 2018 that the matter would not be substantively responded to in light of the ongoing matter before the Tribunal (page 126M).

The Relevant Law

Unfair dismissal complaints

30. The relevant sections of the ERA we considered were as follows:

94. The right
(1) An employee has the right not to be unfairly dismissed by his employer.

108 Qualifying period of employment.
(1) Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

111 Complaints to employment tribunal

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
(2) Subject to the following provisions of this section, an employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—
(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

210 Introductory
.. (4) Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.
(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

212 Weeks counting in computing period
(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

31. The relevant authorities we considered were as follows:

Carmichael v National Power plc [1999] ICR 1226, [2000] IRLR 43, HL, - "there was no obligation on the company to provide casual work or on the applicants to undertake it and that there was therefore an absence of the irreducible minimum of mutual obligation necessary to create a contract of service."

Autoclenz v Belcher [2009] EWCA Civ 1046 – "the focus of the enquiry must be to discover the actual legal obligations of the parties. All the relevant evidence must be examined, including: the written term itself, read in the context of the whole agreement; how the parties conduct themselves in practice; and their expectations of each other."

Hellyer Brothers Ltd [1987] IRLR 232, [1987] ICR 526, CA - In order to create a contract of service there must be mutual legally binding obligations on each side. Although it may be open to [a].. Tribunal properly to infer from the parties' conduct (notwithstanding the absence of any evidence as to any express agreement of this nature) the existence of a continuing overriding arrangement which governed the whole of their relationship and itself amounted to a contract of employment, a global contract cannot be brought into existence simply by counting the heads of a series of individual contracts which may have subsisted during its alleged currency. There has to be present the necessary element of continuing mutual contractual obligations.

Clark v Oxfordshire Health Authority [1998] IRLR 125, CA - a bank nurse was not an employee, even though she had been engaged by only one Authority over a period of three years (with only 14 weeks off); the lack of mutuality (no obligation on the employer to offer work and none on the individual to take it) was held to be fatal

Bodha (Vishnudut) v Hampshire Area Health Authority [1982] ICR 200 - the power to disapply the statutory time limit is very restricted. The statutory test is one of practicability. It is not satisfied just because it was reasonable not to do what could be done the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint.

Walls Meat v Khan 1979 ICR 52 – There has to be some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time. "It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights — or ignorance of the time limit — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

Section 33(3) of the Limitation Act 1980 (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

British Coal Corporation v Keeble [1997] IRLR 336, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] IRLR 220).

Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA - there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640 - the "such other period as the employment tribunal thinks just and equitable" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent".

Direct discrimination and victimisation complaints (ss 13 and 27 EQA)

32. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics
The following characteristics are protected characteristics: …
…race;"

13 Direct discrimination
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

27 Victimisation
(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."

123 Time limits
(1) [Subject to [sections 140A and 140B],] 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.

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

33. The relevant authorities which we have considered are as follows:

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.
The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?*'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Bahl v Law Society [2003] IRLR 640 – "where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based on no more than the fact that others sometimes discriminate unlawfully against minority groups."

Submissions

34. The claimant took the Tribunal through each of the issues identified in the List of Issues and set out her submissions on each point:

    34.1. On time limits, she refers to page 279 and 280 and states that when she was sent the exclusion letter on 17 October, it was the start of a process which was ongoing and which she was obliged to follow. She then took us through the chronology setting out the steps taken at various points pointing to pages 281, 282, 574 (286A), 299, 300, 300A, 301, 302, 302A, 302B, 378

amongst other documents which we read again. She made the point that she only found out information which led her to conclude that the reasons for the treatment she suffered was race related long after the decisions themselves. She refers to having received the grievance outcome on 9 January that she started to understand what was taking place. She believes that this was only provided to her on this day because she had phoned various employees of R1 that day and was very insistent to know what was happening. She says the decision to halt the disciplinary process to allow her grievance to progress caused significant delay and it was only when she received the disciplinary hearing pack in March that she understood the basis for the allegations made against her. She therefore contends that she brought her claims within the time limits specified, and as soon as she received the disciplinary outcome letter on 6 April 2018, she acted quickly in contacting ACAS and subsequently issuing her claim.

34.2. She claims that she did have continuous service with the NHS and had worked continuously with various NHS organisations throughout her career. She says she should be able to bring her unfair dismissal complaint.

34.3. She alleges that the allegation made by ED was malicious and intended to cause harm and criticizes JH for accepting this version of events which the claimant says was fabricated as she says it did not make any sense. She contends that the messages she has received from both respondents about the allegations have been inconsistent and have changed throughout the process e.g. she was only told on 21 March 2018 that there was a new allegation that she had breached MMG 3 and MMG11. She says that all the allegations against her are racially motivated and that bad nurses remain working for the respondents, whilst good nurses like her are preventing from working. She also contends that there was no basis for the making of the decisions complained about as it is based on hearsay without any investigation at all and cannot be justified. She points to the lack of any witnesses of the actual incident in question called by R2 and asks inference to be drawn as to why R2 did not call such witnesses.

34.4. She insists that she has not provided medication without a prescription in this case but simply followed the process that she was inducted to do. She contended that safety and the interests of Patient X and the other patients was her primary priority. She submits that the way she had been treated was clearly discriminatory. She says nobody at R1 listened to her complaints, no thorough investigation was carried out at any stage and no decisions were ever validated with evidence but based on pure hearsay. All this leads the claimant to conclude that the reason for her treatment must be her race. She points out that the impact on her and her family has been significant as she was barred from working (and earning) for 6 months and now has to travel a long distance to work as R2 is off limits for her to work in. She also complains that she received no psychological support during the process and has been put through the stress and pain of a disciplinary process but is convinced that she has done nothing wrong.

35. Ms Gould for R1 produced a closing note and made oral submissions. In summary:

35.1. On the unfair dismissal complaint, she submits that the claimant was only an employee of R1 when she was on assignment - in between assignments, there was no mutuality of obligation and no contract of employment in existence. She says this is reflected not only in the contractual documents but also in the reality of how the situation operated in practice (see Autoclenz case above). There was no exchange of mutual promises of future performance which would give rise to a continuous "global" or "umbrella" contract of employment, she says but merely discussions as to whether work would be undertaken in the future. Ms Gould produced several first instance Employment Tribunal decisions (which she accepts are not binding) involving R1 on this issue which she says support her position. She says that the significant breaks in the claimant's employment mean that there was not continuous employment for the required two-year period.

35.2. Ms Gould also submits that the claimant has not been dismissed from any employment with R1 - her registration document continued, and the claimant continues to book assignments. She contends the claimant's exclusion on 17 October 2017 was an exercise by R1 of contractual rights it had under the registration agreement and not a dismissal. She further contends that even if the claimant had enough continuous service and had been dismissed, then her complaint of unfair dismissal should be dismissed as having been presented out of time. She says it was reasonably practicable for the complaint to have been presented in the specified time period and was not presented within a reasonable time thereafter in any event. Finally, Ms Gould submitted that if she is wrong on all these accounts, there was a fair reason for any dismissal being conduct/some other substantial reason given the genuine and serious concerns and the potential impact on patient safety it had.

35.3. On the direct race discrimination and victimisation complaints made against R1, Ms Gould submits that the claimant has not established in any respect that what she complains about was because of her race or because she had done a protected act. She contends that the claimant has not produced enough prima facie evidence to transfer the burden of proof to the R1 to explain the decisions were not related to race/having done a protected act. She further submits that in respect of allegations made against JH and AC that these have been brought out of time and it would not be just and equitable for the claimant to be permitted to bring such complaints. She points out that the claimant knew on 17 October 2017 she had been excluded from work and alleged on 5 December 2017 that this was an act of race discrimination. She also knew by 15 December 2017 that the matter was to be progressed to a disciplinary action without JH having interviewed her. She also knew on 15 December 2017 that she would be disciplined having raised a grievance on 5 December 2017. Therefore, sufficient facts were known by the claimant in order to have submitted these complaints in time by 9 January 2018. Given that the claimant had the support of her trade union representative; that no good reason has been given for the delay; the length of time since the events in question and the clear prejudice to the respondents, she submits it would not be just and equitable for the complaints to be permitted to be brought out of time.

36. Mr Crow also produced a written skeleton argument and supplemented this with oral submissions as follows:

    36.1. He says the raising of the complaint by ED on 17 October was so obviously a consequence of the claimant's actions on 16 October in administering Zopiclone in the absence of a prescription that there is no basis for a finding of less favourable treatment. He suggests that ED's reasons for making the report were that she was obliged to by the NMC Code and R2 policy and because she was instructed to do so by her line manager. He submits that any hypothetical comparator would have been treated in exactly the same way and the claimant has produced no evidence to support her reliance on ED as a named comparator.

    36.2. As to the exclusion from working in R2, the exclusion on 17 October 2017 was a decision of R1 but in any event was a standing instruction issued in all instances of complaint against all FWs irrespective of race and so cannot be less favourable treatment. With respect to the decision of SS not to lift the exclusion he firstly contends that SS who was the decision maker, did not know of the claimant's race at the time so race cannot have been a conscious or subconscious motivation. He contends that the claimant has only shown unfavourable treatment and at best, a difference in status and a difference in treatment. He says that no prima facie case for discrimination has been shown as it was clearly a decision made on an assessment that the claimant had undertaken unsafe practice having administered a drug with no written prescription. He suggests that the evidence entirely supports SS's genuine and reasonable decision not to offer the claimant further shifts. In so far as R2 reached a different conclusion on this issue after the disciplinary hearing, Mr Crow suggests that the findings R1 relied upon were unsupported by the evidence before the disciplinary panel. In any event he contends that the decisions were in no way tainted by race and points to contra indicators such as previous shifts being offered, a diverse workforce, previous support of ED in revalidating the claimant as a nurse and personal support during the disciplinary hearing. He contends that nothing that happened to the claimant was because of her race and therefore the claim against R2 should be dismissed.

Conclusions

37. The issues between the parties which fell to be determined by the Tribunal were set out above. We have approached some of the issues in a different order but set out each of our conclusions below:

<u>Unfair dismissal claim</u>

38. Was the claimant continuously employed by the respondent for less than two years and therefore not entitled to bring a claim for unfair dismissal?

    38.1. We refer to our finding of fact at paragraph 29.1 above that there was no obligation on R1 to offer assignments to flexible workers and no obligation on flexible workers to accept such assignments. We conclude that there was no overarching or umbrella contract of employment in place between

the claimant and either R1 or any other organisation within the NHS when she was not carrying out assignments. The fact that the claimant was a member of NHS Pension schemes throughout her time working as a nurse does not shed any light on this issue and we did not see any documentary evidence on this in any event. We do not accept that the claimant's original employment with the Bassetlaw trust transferred and was continued with R1 as she alleges. There is simply no evidence to support this contention. She has been registered as a flexible worker with R1 since 2006, but we conclude that there was insufficient mutuality of obligation outside any period when she was carrying out a specific assignment to amount to an employment contract with R1 being in place between assignments. This is supported by the express terms of the registration contract (both the earlier version signed by the claimant and the version updated in 2013 (see paragraphs 29.7 and 29.9 above) and the reality of how the arrangements worked in practice (see paragraph 9.12 above). There were no exchanges of mutual promises of future performance between the claimant and R1 over and above the agreement to carry out each individual assignment as it was booked (see the Hellyer Brothers case above). The claimant was free to arrange her work to suit her needs and she specifically chose to be a flexible worker with R1 because she wanted that flexibility.

38.2. Once an assignment was offered and accepted and the claimant started to carry out work, then there was at this point a contract of employment in place. This started on the first day of each assignment and ended on the last day of an assignment (see paragraphs 29.7 and 29.9 above). The claimant worked regularly for R1 but there were many periods of time when she was not performing assignments for R1 but was working elsewhere. This was something she was absolutely entitled to do and did do on many occasions (see paragraphs 29.19 and 29.20).

38.3. The relevant period that preceded the claimant's exclusion on 17 October 2017 is the assignment with R1 on the Spencer Ward which started on 21 March 2017. Immediately prior to this, the claimant had not worked for R1 (at the Spencer Ward or on any other site) since 14 December 2016 (see 29.19 above). This was a three-month period when she was therefore not employed by R1. Applying section 210 and 212 ERA (as above), the claimant did not have the period of service required under section 108 ERA, namely two years. She was continuously employed for a period of just under 7 months as at the date of her exclusion so therefore does not have the qualifying period of service in order to bring a claim of unfair dismissal.

39. Was the claimant dismissed by the first respondent on 17 October 2017?

39.1. Given our conclusions above, it is not necessary to decide whether what happened to the claimant on 17 October 2017 amounted to a dismissal in law. However, for completeness we have considered this. On 17 October 2017 when the exclusion takes place, the claimant is not technically on assignment with R1 so in accordance with the terms and conditions and our conclusions above, she is not employed by R1 at this point. There is insufficient mutuality of obligation for a contract of employment to be in place.

39.2. In addition, looking at the words used in the exclusion letter itself (see paragraph 29.34 above) which states that R1

"*will no longer offer you assignments at any of its client trust as of October 2017*",

we conclude that no words of dismissal are used at all. This is not a clear and unequivocal communication that the claimant is no longer to be employed. Her assignment had already come to an end and R1 is informing her here that for the foreseeable future, she will no longer be offered further assignments. This is not a dismissal from any employment. Accordingly, even if the claimant had the requisite period of continuous employment, as there is no dismissal, there can be no unfair dismissal.

40. Were all of the claimant's complaints presented within the time limits set out in sections 111(2)(a) & (b) of the ERA?

40.1. As this has been recorded in the List of Issues, although noww not determinative of the complaint, we have also considered whether the unfair dismissal complaint was brought within the primary time period and if not, whether it was not reasonably practicable for a complaint to be presented within the primary time limit. We noted that given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 January 2018 is potentially out of time, so that the tribunal may not have jurisdiction. The claimant alleged she was dismissed on 17 October 2017. This is on its face presented outside the 3 month time limit set out in section 111 ERA. The claimant effectively has the burden of proof in showing that it was not reasonably practicable for her claim to have been presented in time. She has not been able to do this. The claimant said she believed she had been dismissed on this date (paragraph 29.36 above) and this is supported by the e mail she sends to JH that day (paragraph 29.37 above). She had the support of her NMC union representative (see paragraph 29.5 above). It is acknowledged that the claimant was pursuing internal processes throughout and that there were some delays to the investigation process. The claimant's grievance and the decision of the respondent to halt the disciplinary process to allow the grievance and appeal to be resolved also lengthened the internal processes.

40.2. However, none of these delays were sufficient to show that it was not reasonably practicable for her claim to be submitted. There was still nothing preventing the claimant from from making her claims. We cannot go so far as to say it was not reasonably practicable for the claimant to have commenced early conciliation and issued her claim in time. None of the reasons provided by the claimant as to why the claim was not brought in the primary time limit meet the test of being some impediment, which reasonably prevents or interferes with the ability of the claimant to present in time (see Walls Meat v Khan above). The jurisdiction of the Employment Tribunal is strictly defined by legislation and can only hear claims that satisfy all the legal tests for such claims to be brought including time limits. We not therefore need to consider the second arm of the test as to whether the claim was presented within such further time period as was reasonable.

41. We acknowledge that the effect on the claimant of the notification of exclusion on 17 October 2017 was very significant. The claimant was at the time working regularly with R1. Her exclusion meant that her main source of income was removed. We can understand and appreciate how devastating this was for the claimant. However, without enough continuity of employment or indeed a dismissal in law having taken place, and as the claim has been presented out of time this Tribunal does not have the jurisdiction to determine her complaint. All of that means that it is not necessary for us to determine what the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the ERA, nor whether any such dismissal fair or unfair in accordance with ERA section 98(4).

42. The claim against R1 for unfair dismissal is therefore dismissed.

EQA, section 13: direct discrimination because of race

43. It is clear to us from the claimant's evidence at the Tribunal hearing that she holds a genuine and strong belief that she has been discriminated against because of her race. For us to reach the conclusion that the claimant has been subjected to such discrimination, there must be evidence, although it is of course possible that evidence could be inferences drawn from relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough.

44. In order to decide the complaints of direct race discrimination, we had to determine whether the particular respondent subjected the claimant to the treatment complained of (which is set out at paragraphs (i) to (iv) of the List of Issues and paragraphs 18.1-18.4 above) and then go on to decide whether any of this was "less favourable treatment", (i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances) and whether this was because of the claimant's race or because of race more generally.

45. We first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of race. The next stage was to consider whether the respondent in question had proved that the treatment was in no sense whatsoever because of race. We also had to determine whether the allegations against R1 at paragraphs 18.2 and 18.3 above and against R2 at 18.1 were presented within the time limits set out in 123(1)(a) & (b) of the EQA and whether time should be extended on a "just and equitable" basis. We have considered first the substance of the complaints, before returning to the issue of time limits and whether we have jurisdiction to consider the complaints. We set out below our conclusions on these matters for each allegation listed in the List of Issues above with reference to each paragraph number whether the allegation is listed:

<u>Paragraph 18.1- The complaint raised by Lizzie Davies on 17 October 2017. (For which R2 is said to be liable.)</u>

46. It is not in dispute that ED made a complaint against the claimant on 17 October 2017 (see paragraphs 29.26 and 29.27 above). We conclude that the claimant

has not shown a prima facie case that this was discrimination, nor indeed provided any credible evidence that she had been treated less favourably on grounds of her race by this complaint being made. We conclude this for the following reasons:

46.1. ED made the complaint as a direct consequence of the claimant telling her that medication had been administered without a prescription in place and LS telling ED to complain (having received an e mail from Dr Hassan). The explanation of ED as to why the complaint was made (paragraph 29.28) was clear, convincing and eminently plausible.

46.2. There is no evidence to suggest that any other nurse in the same situation who was not black would not have had a complaint made against her. ED had been instructed by her line manager to make a complaint (paragraph 29.26). She had professional duties as a nurse under the NMC Code and R2's MMG 19 Policy (paragraph 29.13). This is the case regardless of the colour of the nurse in question. It was noted in the List of Issues that the claimant intended to rely on ED as an actual comparator, but no evidence has been called to support a suggestion that ED was an appropriate comparator.

46.3. The claimant herself has suggested that other factors were involved in ED's decision to report including professional jealousy (paragraph 29.30 above).

46.4. ED and the claimant had a good working relationship and ED had revalidated the claimant as a nurse (paragraph 29.30 above). There is nothing which suggests that ED was racist, bitter or full of hate towards the claimant. The evidence suggests the contrary.

46.5. We did not draw any adverse inferences from the fact that ED did not speak to Dr Hassan, the bleep holder or the healthcare workers on duty before making the complaint. The claimant herself had told ED what had happened, and it was largely based on the claimant's own account (and the e mail from Dr Hassan) that the complaint was made.

47. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the complaint was because of race, we do not find that this shifts the burden of proof to explain the reason for the treatment. It is clear from the bare facts found above what the reason for the complaint was. Even if the burden had shifted it, R2 has clearly discharged that burden. We conclude that the complaint made by ED on 17 October 2017 was not because of the claimant's race or race more generally. This allegation of direct race discrimination against R2 does not succeed.

Paragraph 18.2 - That she was not interviewed by Jane Hewitt after submitting her statement on 19 October 2017. (For which R1 is said to be liable.)

48. JH did not interview the claimant after she submitted her statement on 19 October 2017 (paragraphs 29.38–29.40 above). We have concluded that the claimant has not shown a prima facie case of discrimination which would shift the burden of proof because:

48.1. There is no requirement in any of R1's policies for an individual who is being investigated to be interviewed face to face. The disciplinary policy states that a flexible worker "may" be interviewed (paragraph 29.40). Whilst we can understand why the claimant might have thought this would happen having received the exclusion letter on 17 October 2017 (paragraph 29.34 above), a face to face interview was not in fact a requirement.

48.2. JH very rarely holds face to face interviews because of number of complaints she deals with and the fact that flexible workers are based throughout the country (paragraph 29.40 above).

48.3. The claimant had provided a detailed and thorough statement already and confirmed herself that she had not left anything out of this (paragraph 29.38). JH already had a detailed version of events from the claimant's perspective.

49. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that decision not to interview was because of race, we do not find that this shifts the burden of proof to explain the reason for the treatment. It is clear from the bare facts found above why JH decided not to interview the claimant. Even if the burden had shifted, R2 has clearly discharged that burden. We conclude that JH's decision not to interview the claimant was not because of the claimant's race or race more generally. This allegation of race discrimination against R1 does not succeed.

<u>Paragraph 18.3 - That she was barred from working for both for both R1 and R2 – in the case of the R1 up to 5 April 2018, and in the case of R2 indefinitely. (For which each respondent is said to be liable for the barring carried out by them.)</u>

50. We firstly considered the decision of R1 decision to exclude the claimant from working further shifts which was made and communicated to her on 17 October 2017. We firstly conclude that this was a combined decision of Hema Patel who allocated the RR12 (paragraph 29.32) and AC who having seen the RR12 and the instruction of the trust implemented the exclusion on 17 October (paragraph 29.32). We have concluded that the claimant has not shown a prima facie case of discrimination which would shift the burden of proof because:

50.1. We were satisfied that Hema Patel followed the matrix at page 796-7 of the Bundle and allocated the RR12 rating based on this. We did not hear from Hema Patel but are satisfied by the documentary evidence provided which we refer to at paragraph 29.32 above.

50.2. We were also satisfied that AC decided to exclude the claimant from further shifts because of her understanding that this was automatic and that there was an instruction in the body of the complaint by the trust. (paragraph 29.33).

50.3. R1's other witnesses and SS supported the contention that all flexible workers with a complaint of RR12 and above made against them were excluded (paragraphs 29.17 and 29.34 above).

50.4. The allegation that the treatment was motivated by race was never put to AC in cross examination. Although Hema Patel was not a witness, it does not appear to have been an allegation anywhere to date that this decision to allocate RR12 was because of race.

50.5. We are unable to draw inferences that the exclusion by AC was racially motivated because AC did not speak to the claimant or carry out any further investigation before exclusion. This was an automatic decision related to the risk ranking and Trust instruction.

51. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that decision of AC to exclude was because of race, we do not find that this shifts the burden of proof to explain the reason for the treatment. It is clear why JH applied the exclusion, having seen the complaint from R2 and applied the standard policy. Even if the burden had shifted, R1 has clearly discharged that burden. We conclude that the decision of AC (and Hemal Patel if this was alleged) on behalf of R1 to exclude the claimant from further shifts on 17 October 2017 was not because of the claimant's race or race more generally. This allegation of race discrimination against R1 fails.

52. We then considered whether R2's decision to exclude the claimant from working at R2 was less favourable treatment because of race. We firstly looked at the instruction of ED made on the complaint form submitted on 17 October 2017 that the claimant should not work on the Spencer Ward. It is not clear if this is a factual allegation actually levelled at R2, but we have considered it nonetheless. For the same reasons set out at paragraph 46 above, we conclude that the claimant has not shown a prima facie case that this was discrimination, nor indeed provided any credible evidence that she had been treated less favourably on grounds of her race. The burden of proof therefore does not pass to R2. Even if the burden had shifted, R1 has clearly discharged that burden for the same reasons. We conclude that the decision of ED to exclude the claimant from further shifts at R2 on 17 October 2017 (if this was alleged) was not because of the claimant's race or race more generally. This allegation of race discrimination against R2 fails.

53. We then considered the decision of R2 not to lift the exclusion from working at R2 on 4 April 2018. We have already found that this was a decision of SS at R2 (paragraph 29.56 above). We conclude that the claimant has not shown a prima facie case that this was discrimination, nor indeed provided any credible evidence that she had been treated less favourably on grounds of her race by SS because:

53.1. SS did not know the name or identity of the claimant when she decided not to lift the exclusion so the decision cannot have been influenced by the claimant's race (paragraph 29.55 above).

53.2. We found SS's explanation that she made the decision because she was not satisfied that safe practice had been followed entirely convincing and consistent with contemporaneous documents (paragraph 29.56 and 29.59 above).

53.3. We were not able to draw inferences that the decision of SS was tainted by race because she did not discuss the matter with any of the staff at the Spencer Ward, Dr Hassan, the bleep holder or DF before making her decision. The claimant feels that SS made this decision without carrying out a sufficient investigation and therefore contends it is not valid. It is not part of this claim for the Tribunal to make findings and conclusions on the adequacy of investigations or whether they were reasonable or not. It is only if this might shed any light on the reasons for the treatment and the motivation of SS. We do not conclude that there is any direct relevance here.

53.4. SS was employed to consider issues of safety and governance at R2 and it is clear from our findings of fact (paragraph 29.57) that this was the primary driver for her decision making in this matter.

54. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that decision not to lift the exclusion was because of race, we do not find that this shifts the burden of proof to explain the reason for the treatment. Even if the burden had shifted, R2 has clearly discharged that burden for the reasons set out above. The decision of SS on 4 April 2018 not to lift the exclusion from working at R2 was not because of the claimant's race or race more generally. This allegation of race discrimination against R2 fails.

<u>18.4 That the contents of the letter of 5 June 2018 did not accurately reflect the contents of the meeting of 24 May 2018. (For which the R1 is said to be liable).</u>

55. We then considered the final allegation that the letter written by DL providing the claimant with an outcome to her appeal did not accurately reflect the discussions at the meeting on 24 May 2018 and this is because of the claimant's race. It is not clear precisely what this allegation relates to. In any event, we conclude that the claimant has not proved facts from which we could conclude that the appeal outcome letter and how it was written was because of her race. There is no evidence from which we could reach such a conclusion. We conclude this because:

55.1. DL gave all the matters raised by the claimant on appeal due consideration. The claimant did not agree with the conclusions reached but we conclude that her points were considered in reaching such conclusions.

55.2. The notes of the hearing at page 737 and the appeal outcome letter and page 732-734 were detailed and appeared to be an accurate reflection of what was discussed.

55.3. The allegation that DL had been racially motivated in the way she prepared the appeal outcome was never put to DL.

56. Even if the burden had passed to R1, we would have been satisfied with explanation that the way she prepared her appeal outcome letter was in no sense whatsoever due to race. This allegation of race discrimination against R1 also fails.

57. Accordingly, all the claimant's complaints of unlawful discrimination because of race made against both R1 and R2 under section 13 EQA all fail. We accept in general terms Ms Gould's submission that the claimant's case is akin to the issue raised in the Madarassy case that the claimant has only been able to point to her race and subjective complaints about her treatment, but has not been able to show any causation.

58. Although none of the claimant's complaints have been held to be successful, we have also considered the issue of limitation as this was identified on the List of Issues. The claimant presented her claim on 20 May 2018. The early conciliation period was 15-17 May 2018. Given these dates, any complaint about something that happened before 9 January 2018 is potentially out of time. Allegations 18.4 as against R1 and 18.3 as against R2 were therefore, presented in time. Allegations against R1 at 18.2 and 18.3 and against R2 at 18.1 were therefore presented out of time unless they formed part of a continuing act ending with an act of discrimination presented in time. Since we have not found any of the complaints to be well founded on their merits, these cannot form part of a continuing act of discrimination with any later acts.

59. The Tribunal, therefore, would only have had jurisdiction to consider allegations 18.2 and 18.3 and against R1 and allegation 18.1 against R2 if it is just and equitable to do so in all the circumstances. Considering the relevant law above, in particular, British Coal Corporation v Keeble and Robertson v Bexley Community Care above, we conclude that it would not have been just and equitable to extend time in any event. Although the Tribunal has a wider discretion in discrimination cases than in other cases where reasonable practicability is the test, it should consider all relevant factors and that there is no presumption that time should be extended. We particularly note that the claimant first alleged that she had been discriminated against on 5 December 2017. She was supported by her union during her grievance and disciplinary process who should have ensured that any complaints were presented in time. There does not appear to be any good reason for the delay in bringing such complaints. These particular complaints these, had they been successful on their merits, would have been dismissed for having been presented out of time.

Equality Act, section 27: victimisation

60. The claimant also complains of victimisation. It is accepted that the claimant did a protected act in her grievance of 5 December 2017. The claimant then alleged that R1 subjected her to the detriment of being put through a disciplinary hearing on 21 March 2018 and that this was because the claimant did a protected act. We have already made a finding of fact that the decision to put the claimant through a disciplinary hearing was made by JH on 24 November 2017 (paragraphs 29.44 and 29.45 above). The claimant raised her grievance on 5 December 2017, over a week later. As this decision was made before the claimant raised her grievance, it cannot have been because of the protected act. JH did not have any knowledge of the protected act before she decided to progress the claimant's matter to a disciplinary hearing.

61. The provisions on the two-stage burden of proof set out at Section 136 EQA apply equally in victimisation cases. Once a claimant establishes a prima facie case of victimisation, the burden of proof shifts to the respondent to show that

the contravention did not occur. To discharge the burden of proof, there must be cogent evidence that the treatment was in “no sense whatsoever” because of the protected act. Given our findings and conclusions above, then the claimant has not proved facts from which we could conclude that the decision to commence disciplinary proceedings was because of the protected act (indeed it cannot have been on our findings). The burden of proof does not shift to the respondent and accordingly there is no need for us to examine of the burden of proof provisions further. The claimant’s complaint of victimisation against R1 must fail.

Employment Judge Flood

Date: 12 December 2019