EMPLOYMENT TRIBUNALS

Claimant: Ms L Chirindo

Respondent: University College London Hospital NHS Foundation Trust

Heard at: London Central **On:** 18, 19, 20, 21 & 22 July 2022

Before: Employment Judge H Grewal
Mr P de Chaumont-Rambert & Mr I McLaughlin

Representation

Claimant: In person

Respondent: Ms I Egan, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is not well-founded;

2. The complaints of having been subjected to a detriment because the Claimant had raised health and safety concerns under section 44(1) of the Employment Rights Act 1996 are not well-founded;

3 The complaint of disability discrimination is not well-founded,

4 The Tribunal does not have jurisdiction to consider complaints of race discrimination about the suspension of the Claimant on 29 October 2018 and the letter of 20 November 2018;

5 All other complaints of race discrimination are not well-founded.

REASONS

1 In a claim form presented on 28 August 2019 the Claimant complained of constructive unfair dismissal, race and disability discrimination and having been subjected to detriments for having raised health and safety concerns. Early Conciliation ("EC") commended on 31 July 2019 and the EC certificate was granted on 31 August 2019.

The Issues

2 The issues to be determined were discussed, clarified and agreed at a preliminary hearing on 13 July 2020 and were as follows.

Unfair Dismissal

2.1 Whether the Respondent breached the implied term of trust and confidence or the duty to provide a safe working environment by doing any of the following:

(a) Making the allegations giving rise to the Claimant's suspension;
(b) Suspending the Claimant;
(c) Sending the Claimant a letter accusing her of fraud and then stating that that was clerical error;
(d) Sending a letter saying that the Claimant racially abused other people;
(e) Failing to keep in touch with the Claimant every two weeks, contrary to the suspension letter;
(f) Delaying sending the letter confirming the Claimant's suspension for four weeks;
(g) Delaying inviting the Claimant to an investigatory interview;
(h) Refusing to consider the Claimant's grievance submitted on 7 February 2019;
(i) Sending the Claimant a letter on 2 July 2019 inviting her to a disciplinary outcome, when the Claimant had never attended a disciplinary hearing but had only attended an investigatory meeting;
(j) Failing to respond to the Claimant's letter questioning that the meeting was to be a disciplinary meeting under the Respondent's disciplinary procedure.

2.2 Whether the Claimant was entitled to resign in response to that breach;

2.3 Whether the Claimant resigned in response to that breach;

2.4 Whether the Claimant affirmed the contract by failing to act between 2 and 22 July;

2.5 If the Claimant was dismissed, what was the reason for the dismissal? The Respondent contends that it was some other substantial reason of a kind such as to justify dismissal. The Claimant says that it was because in circumstances of danger which she reasonably believed to serious and imminent she left (or proposed to leave) or refuse to return to her place of work or took (or proposed to take appropriate steps to protect herself from the danger (section 100(1)(d) and (e) Employment Rights Act 1996).

2.6 If it was the former, whether the dismissal was fair.

Disability Discrimination

2.7 It was not in dispute that the Claimant was disabled at the material time by reason of her osteoarthritis. Whether the Respondent treated the Claimant unfavourably by initially only paying her basic pay during her suspension;

2.8 If it did, whether it did so because of the adjustment to her work rota during her suspension;

2.9 If so, whether the adjustment to the work rota was something arising in consequence of her disability;

2.10 If the answer to all the above is in the affirmative, whether the treatment was a proportionate means of achieving a legitimate aim.

Race Discrimination

2.11 The Claimant describes herself as black. Whether the Respondent did any of the following acts and, if it did, whether they amounted to direct race discrimination:

(a) Failed to follow its own disciplinary policy following an incident at work on 26 October 2018;
(b) Suspended the Claimant on 26 October 2018;
(c) Sent an investigation letter to the Claimant on 21 November 2018; and
(d) Sent the Claimant an improvement notice without inviting her to a hearing.

Jurisdiction

2.12 Whether the Tribunal has jurisdiction to consider complaints of race and disability discrimination in respect of any acts or omissions that occurred before 30 April 2019.

Health and safety detriments

2.13 Whether the Claimant complained about the Respondent repeatedly moving her into different zones and the Respondent being short-staffed and the effect that this was having on her health;

2.14 If she did, whether that came within section 44(1)(d) or (e) of the Employment Rights Act 1996;

2.15 if it did, whether the Respondent subjected her to the following detriments on the grounds that she had done those acts:

(a) Suspending the Claimant;
(b) Reducing her pay as a result.

The Law

3 Section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996") provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled

to terminate it without notice by reason of the employer's conduct.

4 An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once (**Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27,** per Lord Denning).

5 There is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract – **Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347**, **Lewis v Motorworld Garages Ltd [1985] IRLR 465** and **Malik v BCCI [1997] IRLR 462**. The trust-destroying conduct need not be directed at the particular employee. If conduct objectively considered is likely to cause damage to the relationship between employer and employee, a breach of the implied term may arise – **Malik v BCCI**.

6 Where the alleged breach of the implied term of trust and confidence constitutes a series of acts the essential ingredient of the final act is that it must be an act in the series the cumulative effect of which is to amount to a breach. Although the final act may not be blameworthy or unreasonable it has to contribute something to the breach even if relatively insignificant. As a result, if the final act does not contribute or add anything to the earlier series of acts it is not necessary to examine the earlier history – **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** and **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833**.

7 Section 100(1) ERA 1996 provides,

> "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –*
> *…*
>
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert , he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
> *(e) in circumstances of danger which the employee reasonably believed to be serious or imminent he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."*

8 Subsections (d) and (e) of section 44(1) ERA 1996 have been repealed and replaced by section 44(1A) which provides,

> "*A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer on the ground that –*
> *(a) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been*

expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work, or
(e) in circumstances of danger which the worker reasonably believed to be serious or imminent he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger."

9 Section 15 of the Equality Act 2010 provides,

"*(1) A person (A) discriminates against a disabled person (B) if –*
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection(1) does not apply if A shows that A did not know, and could not reasonably have been expected to know that B had the disability."

10 Section 13(1) of the Equality Act 2010 provides,

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat other."*

Race is a protected characteristic. On a comparison for the purposes of section 13, there must be no material difference between the circumstances relating to each case (section 23(1) Equality Act 2010).

11 Section 136 (2) and (3) of the Equality Act 2010 provides that if there are facts from which the Tribunal could decide in the in the absence of any other explanation that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred, unless A shows that A did not contrive the provision. We have had regard to the guidance given in **Igen v Wong [2005] IRLR 258** on applying this section.

12 Section 123(1) of the Equality Act 2010 provides,

"*Subject to section 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 considers just and equitable."

Section 140B provides for extension of time in order to facilitate Early Conciliation. The effect of that in this case is that complaints about any acts that took place before 30 April 2019 will not have been presented within the primary time limit period. Conduct extending over a period is to treated as done at the end of that period – section 123(3)(a).

The Evidence

13 The Claimant gave evidence in support of her claim. The following witnesses gave evidence on behalf of the Respondent (their positions given in brackets are the positions that they held at the material time) – Lisa Sadler (Ward Manager), Rabina Tindale (Deputy Chief Nurse), Toni-Dee Downer (HR Business Partner), Danielle Thornton (Interim Head of Workforce for the Medicine Board) and Mandy Brennan (HR Business Partner). The documentary evidence in the case comprised about 1300 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of fact

14 The Claimant commenced employment with the Respondent on 7 April 2014 as a Band 3 (Senior) Nursing Assistant at the Heart Hospital. She describes herself as black.

15 Following closure of the Heart Hospital, the Claimant moved on 5 May 2015 to the Acute Medical Unit ("AMU") in the Emergency Services Division. Lisa Sadler was the Ward Manager of AMU.

16 The Acute Medical Unit had 56 beds and its primary role was to provide rapid definitive assessment, investigation and treatment for patients admitted urgently or as an emergency from the Emergency Department. It worked in close association with the Trust's Emergency Department and Operations Centre, and admitted patients with a range of acute medical problems 24 hours a day, seven days a week. Patients stayed on AMU for up to 48 hours. The ward was divided in to four distinct zones – yellow, green, blue and red. The yellow and green zones were generally those with the sickest patients. The patients on these zones were generally under cardiac monitoring and they required nurses with specific skills and abilities. On any given shift there were thirteen nurses and at least four healthcare assistants on duty, distributed through the four zones. The workload on the ward was unpredictable and at times it was a very busy ward.

17 The shifts on AMU were either day shifts or night shifts and were 12.5 hours long. The rotas were prepared every six weeks by Band 7 nurses via the electronic auto-rostering systems. Certain instructions in respect of rostering could be programmed in to the electronic rostering, but others could not. In addition to the rotas, the Band 7 nurses allocated staff to specific zones for their shifts. The zone allocation was done on the shift prior to the one to be worked and was determined based on the presentation and needs of the patients that were on the ward and the skills of the staff that were on the rota on that shift. at times it was a very busy ward. In early 2016 the Claimant complained about being moved to different zones from one shift to the next. She felt that she was being singled out. Ms Sadler spoke to her and explained to her that she was not being singled out and other were also moved in the same way and why that was necessary

18 In a draft appraisal dated 25 October 2015, in a section about what could be improved, the Claimant commented,

> "*Long conversations on mobile phone in the staff room should not be allowed and I think we should have a notice from Management re: this. You cannot*

enjoy your break in the staffroom at present re: this issue."

19 In November 2016 a Band 4 Nursing Assistant who had been working a night shift with the Claimant complained in an email to Ms Sadler and Josephine Bloxham, who was the Claimant's line manager, about the Claimant. She said that she had tried to help by doing something and that the Claimant had started to shout at her and that her tone of voice had been quite aggressive. She said that a patient had witnessed this and had said to her later that she had been quite taken aback by the Claimant's reaction to her. Ms Sadler spoke to the Claimant about the matter and then set out in an email the content of their discussion. She suggested that the Claimant might benefit from training in effective communication and team working and suggested certain courses that the Respondent ran. The Claimant responded that she would be happy if Ms Sadler could book some training for her.

20 On 10 February 2017 the daughter of a patient complained to Ms Sadler about the way the Claimant had spoken to her when she had tried to tell her what another patient was saying. Ms Sadler spoke to the Claimant about it.

21 The Claimant was absent sick with knee pain from 29 March to 5 April 2017. When she returned to work on 7 April she gave Ms Sadler a medical certificate from her doctor. The certificate said that she might be fit for work taking into account into account the advice given, which was that if it was available she would benefit from a phased return to work and an altered shift pattern. Ms Sadler intended to discuss that in more detail with the Claimant but the discussion did not take place as the Claimant was working night shifts and Ms Sadler was then on annual leave.

22 On 23 April 2017 the Claimant sent Ms Sadler a memorandum. She said that she had "*been in agony with knee pain"* for some months and had now been diagnosed as having osteoarthritis of the knees which had caused some damage to her knee joint. She said that she suffered more pain after working on long day shifts. On 19 April she had worked a long day shift in the Blue Zone and had been the only Nursing Assistant in the zone throughout the day. She had suffered much pain after that shift that she could not move her leg the next day. She said that she was not able to work two long day shifts in a row and asked, if it was possible, to work more nights and less day shifts.

23 Ms Sadler replied on 24 April 2017 and said that as the Claimant was seeking a change in her shift patterns, she would refer her to the Occupational Health Service and seek their advice before she made her decision. The Claimant was not required to work pending the receipt of that advice.

24 On 26 April 2017 Deputy Sister S Wilson referred the Claimant to Occupational Health ("OH"). The OH report was provided on 22 May 2017. The advice was that the Claimant's condition was long standing and likely to continue for the foreseeable future. Her opinion was that the Claimant was fit to return on amended duties ("specialing") and amended hours (restriction to one long day only). "Specialing" generally means looking after a particular patient. She recommended that a long day shift should be followed by a day off or a night shift.

25 It was agreed that the Claimant would work only six long day shifts per rota (i.e. one a week) and the rest of her shifts would be night shifts. The Claimant was able to request in advance the shifts that she wanted to work. On two or three occasions

between June 2017 and January 2018, she was put on a rota with eight long day shifts rather than six day shifts. When that happened she raised it with Ms Sadler who rectified it.

26 In February 2018 Sister Debian Bond, who was responsible for doing the rota at the time, sought OH's advice as to whether the Claimant needed to continue working only six day shifts per rota or she could revert back to the rotational shift pattern. She queried why the Claimant preferred to work night shifts as research had shown that night shifts exacerbated long-term conditions. The OH advice on 27 April 2018 was that in view of the Claimant's ongoing symptoms, she should continue to work no more than six long days per rota. Following receipt of that Ms Bond informed all the Sisters and Charge Nurses on the ward that the Claimant should continue to do six long days per rota (not two days in a row) and the rest of the rota to be night shifts.

27 On 12 June 2018 Ms Sadler spoke to the Claimant about a complaint made by an agency nurse who had worked a night shift with her. He said that he had found her to be rude and abrupt and was upset by the way that she had spoken to him. The Claimant denied that she had been rude but said that she had told him that he was doing things incorrectly. The Claimant said that there was a group of staff at AMU who were deliberately trying to make trouble for her by dishonestly reporting her behaviour to Ms Sadler. Ms Sadler asked her why they should want to do that. The Claimant responded that it was because she felt that she had a duty to tell people when they were not doing something correctly and they did not like it because she was junior to them. Ms Sadler said that they had had that conversation before and the issue was not what she told people but the way in which she did it. She said that many staff found her approach to be rude.

28 The Respondent has an electronic incident reporting system (Datix). On 21 October 2018 (Sunday) at 8.50 a.m. a Bank nurse, B Asamoah, reported an incident that took place at 23.30 the previous night. The incident was categorised as being one of racial abuse. Ms Asamoah provided the following details of the incident,

> "*On my team break in the staff room on a night duty, I rang home to check how things are and a nursing assistant came in and started shouting at me, saying I'm not supposed to speak on the phone as not allowed. I said just calling home and won't be long, still she was shouting on top of her voice at me whilst on the phone, she used words like black people are so primitive, not educated and she's educated but won't consider to become a nurse."*

She named two people who had been witnesses to the incident – a nurse called Trinidad Gulapa and a staff nurse called Natalie Salt. The report was automatically forwarded within seconds to a large number of people, including Ms Sadler (as the ward manager of AMU) and Katherine Siddorn, the Deputy Ward Sister. The incident has been recorded in a large number of letters as having taken place on 21 October, but the correct date is 20 October 2018.

29 Ms Sadler was not working on 21 October and, although she received a notification, she was unable to access the incident report until she attended work the next day. At 13.11 she sent messages on Datix to Ms Asamoah and Ms Gulapa and asked them for the name of the member of staff so that she could investigate the incident. Later that day Ms Salt spoke to Ms Sadler about the incident and told her that the Claimant was the member of staff involved in it.

30 On 23 October Debbian Bond asked the Claimant for a statement about the incident. The Claimant provided a statement that evening. She accepted that there had been an incident in the staff room at 11.30 on the night of 20 October. She said that Ms Asamoah had been sitting the table, where people sat to eat, talking on her mobile phone (with her headphones on) in a foreign language. The Claimant had told her that speaking on the mobile phone for long periods in the staff room was not allowed and she should go outside. Ms Asamoah had informed the person to whom she was speaking that a nursing assistant was telling her what she was allowed to do. The Claimant then explained to others in the room why using mobile phones in the staff room was not allowed. Ms Asamoah had shouted at her to shut up and the Claimant had told her not to shout at her. When Ms Asamoah was leaving she had said to the Claimant that she should not tell her what to do, she was just a Nursing Assistant. The Claimant said that she was being rude about her role and judging her and referred to that as "*primitive way of thinking."* The rest of the Claimant's statement seemed to accept that there had been an argument between the two of them but she maintained that it had been instigated by Ms Asamoah. She said things like, "*If you're rude to me, how I choose to respond back to you is my choice and you have no control over it because you would have provoked me", "Beatrice made her choice to willingly enter into an argument with me and then was unhappy with the outcome"* and "*If you can't stand the heat then get out of the kitchen."*

31 On 24 October Natalie Salt sent to Ms Sadler and others an email about the incident. She said that the agency nurse had been eating at the table and speaking on her phone (hands free) in a language that was not English. She said that the Claimant had started telling everyone in the staff room that there was a policy about speaking different languages on the phone in the staff room and that it was not allowed. She said that it was usually the black staff who did it. Ms Salter said that the discussion had become heated as the Claimant kept telling the nurse that it was rude not to speak English and the nurse was getting upset. She said that the Claimant had then gone on to call the nurse "primitive" and uneducated, and had said that she could tell that English was not her first language and "people like her" did not understand. She said that the nurse had tried to leave the room and the Claimant had continued to mock her and to use the term "primitive".

32 On the same day Ms Sadler asked Ms Gulapa for a statement. Ms Gulapa sent her an email on 26 October at 6.48 a.m. She said that she could not recall the incident fully. She said that Ms Asamoah was on the phone talking to someone and the Claimant looked irritated. When Ms Asamoah finished, she said that the Claimant had no right to speak to her like that. There was then an exchange of words between them and the Claimant had suddenly said, and she quoted the words, "*You black people are primates".* Ms Asamoah was upset and got up to leave and told the Claimant that she should learn how to speak to people. The Claimant also told Ms Asamoah not to speak so close to her because her saliva might get into her food.

33 On 26 October Ms Sadler had a scheduled meeting with Rebecca Morton (Senior Matron) and Chris Bishop (HR Business Partner) to review HR issues. She told them about the incident involving the Claimant and sought their advice. Ms Mortimer invited Rabina Tindale (Deputy Chief Nurse) to the meeting to seek her view. Ms Sadler told Ms Tindale about the Datix incident report and the statements that she had gathered. MsTindale and Mr Bishop went through the Respondent's suspension checklist and recorded their comments on the checklist document. The document

referred to a Datix report and recorded that the allegation was serious and involved racist remarks and verbal aggression. It was recorded that alternative duties were not an option as the concerns were behavioural concerns. Ms Tindale was concerned that if the Claimant remained at work there might be further incidents of racial abuse and that that might impact on the willingness of Bank and agency nurses to work on the ward. It was also recorded that if the Claimant remained at work intimidation of witnesses was possible. It was agreed that the Claimant should be suspended while the matter was investigated.

34 On 29 October Ms Tindale and Mr Bishop met with the Claimant to inform her that she was being suspended and the reasons for it. Ms Sadler also attended the meeting. Ms Tindale explained to the Claimant that the Respondent had been made aware of an allegation that she had verbally abused a Bank nurse during a shift on 20 October 2018 and that, given the seriousness of the allegation, they had decided to suspend her pending an investigation. It was made clear to her that suspension did not amount to a disciplinary sanction and that there would be an investigation to determine the next steps.

35 The suspension was confirmed in a letter from Mr Bishop dated 4 November 2018. The letter repeated the points that had been made verbally. It also stated that during the suspension the Claimant was not entitled to undertake any work at the Respondent, and that that included Bank shifts. It also stated that during suspension she would remain on full pay, including any allowances that she would normally have received. As the Claimant worked mainly night shifts and received unsocial hours allowances for that, those sums should have been included in her suspension pay. Unfortunately, Payroll was not made aware of that and the Claimant only received her basic pay during her suspension.

36 The Respondent's Disciplinary Policy and procedure provides that suspension is appropriate in alleged cases of misconduct where there is either a need to protect patients or colleagues pending a full investigation of an allegation of gross misconduct or the presence of someone is likely to hinder an investigation and there is no workable alternative to suspension. Examples of gross misconduct include verbal or physical assault, harassment or bullying and unlawful discrimination. The Policy also provides that suspension will be for the minimum time necessary and that it is on normal pay, i.e. the pay the person would have received if he or she had been at work based on a 12 week reference period (excluding bank shifts).

37 On 1 November Ms Sadler submitted the details of the case to Employee Relations ("ER") in order for them to investigate the matter. She said in her email that she had tried to attach to it the incident report and the statement from the Claimant but she was not sure if she had succeeded in doing that. Roopa Kotak, ER Manager, was appointed to investigate the case. On 7 November she informed Ms Sadler that she had received the Claimant's statement and asked her to provide any other statements that she had. It appears that Ms Kotak did not receive the Datix report. She was provided with an extract of what Ms Asamoah had said in the report and the emails from the two witnesses.

38 On 19 November Mr Bishop wrote to the Claimant saying that, as the Claimant had been informed in her suspension letter, her suspension had been reviewed and it had been decided to continue it for a further two weeks. He repeated again the allegation that had led to her suspension – verbal abuse against a Bank nurse when

on shift. He informed the Claimant that an investigation manager had been appointed and that the investigation was under way.

39 On 20 November 2018 Ms Kotak sent letters to Beatrice Asamoah, Trinidad Gulapa and Natalie Salt telling them that she had been appointed to investigate the allegation of misconduct against the Claimant and asking them to provide witness statements. She set out specific matters which she wanted them to address in their statements.

40 On the same day Ms Kotak also wrote to the Claimant. In the opening paragraph of her letter she said that she was undertaking an investigation into her alleged conduct of fraud. She then set out the specifics of the allegation which were that on 21 October 2018 she had behaved inappropriately towards Beatrice Asamoah by making a number of derogatory comments to her and by behaving in an aggressive way towards her. It should have been clear to anyone reading that letter and what had been said in the suspension and the suspension review letters that the reference to fraud was an error. Ms Kotak asked the Claimant to provide a statement and set out the particular questions that she wanted her to address in that statement. She sent the Claimant a copy of the disciplinary procedure and informed her that she would make recommendations based on her findings of her investigation. She warned the Claimant that if the allegations were found to be proved, they could constitute gross misconduct and could lead to her dismissal.

41 On 23 November Natalie Salt responded to the questions asked by Ms Kotak.

42 The Claimant responded on 2 December 2018. Her response comprised 26 typed pages. She thought that there were three allegations against her – one of fraud and two relating to her conduct towards Beatrice Asamoah. The Claimant essentially gave the same account as she had in her earlier statement – she had politely told Ms Asamoah that talking on the mobile for a long time was not allowed in the staff room, Ms Asamoah had ignored her and continued talking and had said on the phone that a nursing was telling her that she could not talk on the phone, the Claimant had then explained to others in the room why speaking on the mobile phone in the staff room was not allowed and Ms Asamoah had shouted at her and told her to shut up because she was loud, and that when she was about to leave she had told the Claimant that she should not tell her what to do as she was "*just a Nursing Assistant."* The Claimant said that she had not said "*black people are primitive and uneducated."* She said that Bank and agency nurses though that Healthcare Assistants knew nothing and looked down on them and continued,

> "*That's what I call primitive (Ancient) thinking. Judging a book by its cover. It's her primitive way of thinking I commented about only, nothing else."*

She denied that she had said to Ms Asamoah that one could tell that English was not her first language and that the Claimant knew that she would not understand because "*people like her"* would not understand. She said,

> "*I said to her "Please do not put words in my mouth. It's not my fault that you don't understand English maybe because it's not your first language. I never said what you're saying."*

The Claimant also set out a large number of historical matters which she said was

relevant background and she wanted taken into account. She concluded by saying that she wanted to submit a counter complaint/grievance against Ms Sadler and asked to be moved permanently from AMU ward.

43 On 5 December Ms Tindale informed the Claimant that she had reviewed her suspension and extended it for a further two weeks.

44 Ms Kotak did not receive a statement from Ms Gulapa and she chased her up for it on 24 December. Her email was copied to Ms Sadler. Ms Sadler informed her on the same day that Ms Gulapa had been on compassionate leave for two weeks as her mother had been taken seriously ill abroad. She said that she did not know when she would return.

45 Ms Kotak was due to leave the Respondent on 21 January 2019 and Toni-Dee Downer was appointed interim ER Manager on 18 December 2018. Towards the end of December Ms Kotak handed over to Ms Dee-Downer the investigation into the Claimant.

46 On 2 January 2019 Ms Downer wrote to the Claimant to inform her that she had taken over the investigation. She said that she had noticed that Ms Kotak's letter of 20 November to her had said that there was to be an investigation into her alleged conduct of fraud. She said that that a clerical error and was incorrect. On the same day she wrote another letter to the Claimant about her desire to submit a counter complaint/grievance against Ms Sadler. She suggested that they should meet to discuss how to progress it. She enclosed a copy of the Respondent's Employee Led Complaints Policy and Procedure and said that the Respondent encouraged staff to initially try to resolve their complaints informally and asked the Claimant whether she had tried to do that.

47 The Respondent's Employee-Led complaints Policy and Procedure provides,

> "*Employees are encouraged to raise complaints as soon as possible after the incident(s) involved and should do so within three months of the last incident or event complained of so that complaints are investigated in a timely fashion. This also ensures that individuals who are the subject of a complaint are made aware of this in a timely manner and that any action taken by the employer to resolve issues is taken in a reasonable timescale.*
>
> *Complaints outside the three month timeframe could result in a resolution being less effective. Therefore if a complaint is received more than three months after the date of the last incident, UCLH may elect for the matter not to be investigated. In such circumstances, informal resolution would be recommended."*

48 On 4 January Ms Downer asked Ms Sadler whether Ms Gulapa had returned from leave yet and, if not, whether there was an expected date of return. Ms Sadler said that she had not and that she would leave a message for Ms Gulapa. On 1 February Ms Sadler informed Ms Downer that Ms Gulapa was unable to say when she would be returning and that she might be taking a career break abroad. In light of that Ms Downer decided to proceed with the investigation without a further statement from Ms Gulapa. Ms Asamoah never responded to Ms Kotak's letter of 20 November 2018. Ms Downer did not have the Datix incident report but she had an extract of Ms

Asamoah's statement.

49 On 15 January 2019 the Claimant wrote to Ms Downer to complain about the delay in notifying her of the gross clerical error in respect of the allegation of fraud. She said that it was unjustifiable, unfair and direct discrimination. Ms Downer responded on 25 January that she had reviewed the Claimant's complaint and she was satisfied that it had not been a deliberate action and had been due to a clerical error.

49 On 15 January the Claimant also responded to Ms Downer's question in relation to her complaint against Ms Sadler. She said that she had tried to resolve all the issues informally but with no success. Ms Downer responded on 25 January 2019. She said that under the Respondent's policy the complaint should be raised as soon as possible and within three months of the last incident. As the Claimant's complaints seemed to go back to 2015, she thought that it would be helpful to meet to clarify the complaints and to see what fell within the parameters of the policy. She invited the Claimant to meet with her on 7 February 2019 to discuss her complaint. The meeting was then postponed to 21 February 2019. On 6 February Ms Downer suggested to the Claimant that they could discuss both the allegation against her and her complaint at the meeting on 21 February. The Claimant agreed to that. On 12 February the Claimant sent Ms Downer a twelve page document entitled "Formal employee-led complaint submission".

50 Ms Downer met with the Claimant on 21 February 2019. The Claimant was accompanied by her trade union representative. The greater part of the conversation was about the allegations that had been made against the Claimant. The Claimant referred to previous issues with agency staff which she had raised with her manager. She also spoke about financial problems and not being able to work Bank shifts. She did not complain about the way her suspension pay had been calculated.

51 On 4 March 2019 Ms Downer interviewed Ms Sadler as part of her investigation.

52 On 7 March 2019 the Claimant sent Ms Downer a formal grievance against Ms Sadler and Sister Katherine Siddorn. She said that ever since OH had recommended that she should work reduced day shifts she had suffered continuous workplace harassment and intimidation which had culminated in unfounded malicious allegations of misconduct which had led to her suspension. On 15 March Ms Downer acknowledged receipt of the complaint and said that it would be reviewed. On 26 March she wrote to the Claimant. She said that as the Claimant's complaints were about incidents that had occurred more than three months before she submitted her complaint they could not be investigated under the Respondent's procedure. They would be considered as mitigation in relation to the disciplinary investigation.

53 Between January and the end of April 2019 the Claimant did not receive any letters about the review of her suspension. From February onwards Ms Downer raised the issue several times with Mr Bishop. On 30 April Ms Tindale sent the Claimant a letter that her suspension had been extended as the investigation was continuing. A similar letter was sent on 23 May 2019.

54 On 1 June 2019 the Claimant sent Ms Tindale a seven page typed letter in which she complained about a number of things. She said that the Respondent's Disciplinary Policy had not been followed in relation to her suspension and that the

Employee-Led Complaints policy was not being followed. There was one line in the letter about her salary having been reduced by about £250-350 per month as she was not receiving some of the allowances that she would normally receive when attending work.

55 Ms Tindale responded on 14 June 2019. She said that she was seeking further information from the Employee Relations team and would be able to respond by 28 June 2019.

56 On 17 June the Claimant's RCN representative, Ms Knowles, sent Ms Tindale an email seeking an update on the disciplinary investigation and to follow up on the Claimant's grievance submitted on 7 March 2019.

57 On 18 June Ms Tindale wrote to the Claimant that her suspension had been extended by a further two weeks.

58 Ms Downer completed her investigation report on 21 June 2019, nearly eight months after the Claimant was suspended. The report comprised 7.5 typed pages. There were about 150 pages in exhibits, most of them were documents generated by the Claimant. Ms Downer had been investigating a single incident. She interviewed only the Claimant and Ms Sadler. The interviews were concluded by 4 March 2019. We accept that Ms Downer had a heavy workload at the time due to various reasons, but the delay in investigating this simple matter is not acceptable. Having considered the statements available and what she had been told by the Claimant and Ms Salter she concluded that there was not sufficient evidence to proceed to a formal disciplinary hearing. In respect of the allegation that the Claimant had made a number of derogatory remarks to Ms Asamoah, she concluded that there was insufficient evidence to support the allegation – there was no explicit recollection or collaboration of the Claimant's use of or reference to "black people", the word "primitive" had been used but the Claimant had said that it had been used in a different context and there had been difficulties in getting further clarification from two of the three witnesses, including Ms Asamoah. In respect of the allegation that the Claimant's behaviour towards Ms Asumaoah had been aggressive, she concluded that it was likely that the Claimant's voice had been raised although it might not have been intentional, and that she had been standing and might have moved her arms around. In respect of this allegation, Ms Downer recommended that an informal Improvement Notice should be issued to clarify the expectations of acceptable behaviour and enable a monitoring period of six months.

59 The Respondent's Disciplinary Policy and Procedure provides,

> "*The Investigating Manager will submit their report to the Commissioning Manager and recommend whether or not there is a case to answer. If there is a case to answer, the Investigating Manager will recommend whether informal action should be taken or whether the matter should be considered at a forma disciplinary hearing."*

60 On 2 July 2019 Ms Tindale wrote to the Claimant inviting her to a meeting on 8 July to discuss the outcome of the disciplinary investigation. She referred to the fact that a letter had been sent on 2 January correcting the reason for the investigation. She said that the investigating manager, Ms Downer, would also be present and advised the Claimant of her right to be accompanied.

61 On 3 July the Claimant sent Ms Tindale a letter that the meeting would have to be rescheduled as her RCN representative, Ms Knowles, could not attend on 8 July. She said that she had not received the letter correcting the error until 14 January 2019 and she could not believe that "*no one ever bothered to rectify this gross negligence clerical error from 21.11/2018 up to 14/01/2019."* The Claimant then ascertained the dates when Ms Knowles was available and provided them to the Respondent. On 12 July Ms Downer suggested three alternative dates in August to the Claimant. The Claimant responded that she would forward those dates to her RCN representative and asked Ms Downer to provide her with a copy of her investigation findings so that she could prepare for the meeting. It would appear that there was no response to that email.

62 On 22 July the Claimant sent an email to Ms Tindale, which was copied to Ms Downer. She attached to it a document called "Constructive Dismissal Document". The document comprised 24 typed pages. On the covering sheet it stated "End of employment contract date: 22nd July 2019". The rest of it was a letter addressed to Ms Tindale. The Claimant said that she was resigning from her position with immediate effect. She said,

> "*I feel that I am left with no choice but to resign in light of my recent experiences regarding how you carried out a discriminatory disproportionate defamatory workplace harassment disciplinary investigations procedure against me as your employee; the workplace discriminatory power harassment way you are managing my Suspension from Duty as an organisation and the final trigger which made me write this resignation letter was your letter dated Tuesday 2nd July 2019 in reply to my complaint letter dated 01st June 2019 regarding Review of Suspension from Duty templates letters. I found your reply letter regarding my health complaint hostile. It was offending and intimidating and I felt harassed."*

She said later that the letter of 2 July 2019 had breached the "*implied duty of trust and confidence contractual term"* between the Respondent and her.

63 Ms Downer responded on the same day. She copied her response to Ms Tindale and Ms Knowles, the Claimant's RCN representative. She said that Ms Tindale was on annual leave. She encouraged the Claimant to select a date from the ones that had been sent to her on 12 July for a discussion between Ms Tindale and her with the Claimant and her RCN representative. She urged the Claimant to reconsider her resignation with immediate effect and not to make any decision until they had had the opportunity to discuss the outcome of the investigation and the points that the Claimant had raised in her letters. She said that if the dates suggested were not suitable she would seek alternative dates as they wanted to explore every opportunity to work towards resolution.

64 Ms Knowles responded on the same day that she could not attend on any of the dates given and suggested alternative dates. On 2 August Ms Downer proposed three possible dates. She did not hear from Ms Knowles and chased her up on 14 August. On 19 August Ms Knowles said that she was about to contact the Claimant with the dates and sought clarification that the purpose of the meeting was to discuss the outcome of the investigation and not the Claimant's resignation. Ms Downer responded that it was to discuss the outcome of the investigation and the concerns

raised about the review of the suspension and to afford the Claimant an opportunity to make an informed decision about whether she wished to proceed with her resignation. On 22 August Ms Knowles informed Ms Downer that the Claimant would not attend the meeting and did not want to rescind her resignation. She said that she had told the Claimant that the outcome of the investigation was that there was no case to answer.

65 On 28 August 2019 Ms Tindale wrote to the Claimant confirming the outcome of the investigation and sent her the investigation report. Having set out in detail the conclusions of the investigation on the two allegations, she said that there was no case to answer and the matter would not proceed to a disciplinary hearing. She said that the report had recommended that the manager should consider issuing an informal Improvement Notice. She offered the Claimant a further meeting to discuss the outcome of the investigation, her concerns about the contents of her letter or the investigation report and her resignation. She apologised for the length of time it had taken to complete the investigation and offered the Claimant ten working days to consider their offer to meet and to reconsider her resignation. If they did not receive any further communication by 11 September 2019, they would process and confirm her resignation.

66 On 7 September 2019 the Claimant sent a response to the outcome letter and the investigation report. It comprised 23 typed pages.

67 On 26 September 2019 Ms Tindale wrote to the Claimant to confirm that her resignation of 22 July 2019 had been processed.

68 In the Claimant's claim form to the Tribunal, presented on 28 September 2019, she said that while she was suspended her salary had been reduced by £250-£350 a month and she had not received the night and weekend allowances that she normally received when she was working. The Respondent received the claim in November 2019. Danielle Thornton, HR Business Partner, looked into this and discovered that the Claimant had not been paid her full enhancements. The Respondent's payroll department normally calculates a suspended employee's pay by working out the average pay for the preceding twelve weeks. When an employee is suspended the manager or HR record on the Electronic Staff Record that the person has been suspended with pay or with no pay. There is no option on ESR to record that the pay includes enhancements. In order to ensure that the person receives the enhancements, that information has to be provided to someone who then contacts SBS, the payroll provider, to ask them to calculate the 12 weekly average of that individual, including the enhancements. When the Claimant was suspended, that additional information was not provided to the right person.

69 Ms Thornton asked her colleague Mandy Brennan to resolve it. On 5 December 2019 the Claimant was paid £3,141.61 for the unsocial hours payments lost between 29 October 2021 and 22 July 2019. Ms Brennan explained the breakdown of the payments in a letter dated 23 December 2019 The Claimant was still unclear and, following a Tribunal order, on 17 March 2021 Ms Brennan provided a further breakdown and attached to it the Claimant's payslips for the relevant period.

Conclusions

Disability discrimination

70 It was not in dispute that the Claimant was disabled during her suspension from 29 October 2018 until her employment terminated on 22 July 2019 and that, although she was suspended on full pay, she was not paid the correct amount during that period. That clearly amounts to unfavourable treatment. The issue for us to determine was whether that was because of something arising in consequence of her disability. The Claimant was working more unsocial hours (night shifts) because of her disability. However, the failure to take into account the unsocial hours that she worked when calculating her suspension pay had nothing to do with her disability. She was not paid the extra amount for that because the suspending manager or relevant HR person failed to tell the relevant person in payroll that she worked unsocial hours and that her suspension pay would have to be calculated on that basis. It was an administrative oversight/error; it was not deliberate. She was not paid less because of something arising in consequence of her disability.

Race Discrimination

71 It was not in dispute that the Claimant is black and that she was suspended on 26 or 29 October and was informed in a letter dated 20 November that the Respondent was going to carry out an investigation under its Disciplinary Procedure into her conduct. The Respondent took those actions because Ms Asamoah had made reported an incident of racial abuse at work by the Claimant and her account had, to varying degrees, been confirmed by the two witnesses, Ms Salt and Ms Gulapa, and to an extent by the Claimant herself. It was not, as the Claimant claimed, a case of the Respondent believing Natalie Salt and not believing her. The Respondent recognised that a serious allegation had been made, there was supporting evidence and that it needed to be investigated. The Respondent followed its Disciplinary Procedure in considering whether suspension was necessary pending the conclusion of the investigation and filled out the suspension checklist. It concluded that, due to the nature of the allegation, it was necessary for the reasons set out at paragraph 33 (above). There was no evidence before us that the Respondent had treated a white member of staff differently in similar circumstances. There was no actual comparator. There was no evidence before us from which we could infer that, had the Claimant not been black, the Respondent would not have suspended her and started a disciplinary investigation. The Claimant has failed to stablish a prima facie case of race discrimination in respect of these matters.

72 Furthermore, any complaint about the suspension and the instigation of the disciplinary investigation should have been presented at the latest by 20 February 2019. The complaint is six mounts out of time. The Claimant has not put forward any explanation as to why it was not presented earlier. The Claimant had access to advice and support from the RCN from at least 21 February 2019. We do not consider it just and equitable to consider those complaints. We concluded that we did not have jurisdiction to consider those complaints. If we are wrong in that conclusion, we would have decided that the complaints were not well-founded for the reasons given at paragraph 71(above).

73 The Claimant also complained that the Respondent failed to follow its disciplinary policy following the incident on 26 October 2018. The Respondent followed the policy in suspending the Claimant and starting the investigation. We accept that there was a failure to follow the policy in that the Claimant was paid less than her normal pay. We have found that this was due to an administrative oversight/error. There is no

obligation in the policy to review suspension every two weeks but the Respondent had said in its letters to the Claimant that it would do so. There was a failure to do so between January and the end of April 2021. Ms Downer raised the matter several times in order to get it rectified. However, prior to and after that period the suspension was reviewed regularly. There was no evidence before us from which we could infer that these things happened because the Claimant was black or, to put it in another way, that if the Claimant had not been black these administrative errors would not have occurred. Such administrative errors are not uncommon in large public sector organisations where there are considerable demands on limited resources.

74 The Respondent did not send the Claimant an Improvement Notice without inviting her to a hearing. The letter of 28 August and the Investigation report attached to it both said that Ms Downer had recommended that the Claimant should be issued with an Improvement Notice. It was for hr manager to decide whether to follow that recommendation. The Claimant was given several opportunities to attend a meeting to discuss the outcome of the investigation. One of the matters that would have been discussed would have been that recommendation. The Claimant chose not to attend any meetings to discuss the investigation outcome. She was never issued with an Improvement Notice. That complaint is not made out.

Health and Safety Detriments

75 The Claimant had complained in 2016 about being moved to different zones because she had felt that she was being singled out. Her primary complaints relating to her knee from April 2017 had been about working long day shifts. The Claimant could not have reasonably believed that she was ever in circumstances of serious and imminent danger by being moved to a different zone. The Claimant's complaints about being moved to different zones did not fall within section 44(1)(d) and (e) ERA 1996.

76 In any event, the Claimant was not suspended because she had complained about being moved to different zones. She was suspended because an allegation of racial abuse had been made against her and the Respondent had decided that she could not remain at work while that allegation was being investigated (see paragraphs 33 and 71 above). The reduction in pay was the result of an administrative error/oversight. The Claimant's pay was not reduced because she had made complaints about being moved to different zones.

Unfair Dismissal

77 The Claimant's case in respect of the matters that led to her suspension was that the Respondent had fabricated the Datix report after the event to justify her suspension and that it had maliciously made the allegations against her. There was no evidence to support the Claimant's assertion that the Datix report was a fabrication. It was accepted by the Claimant that there had been an altercation between her as Ms Asamoah in the staff room on the evening of 20 October 2018. The persons identified as having witnessed the incident confirmed that and supported the statement given by Ms Asamoah. The Datix report was referred to in the suspension checklist on 26 October 2018 and Ms Sadler tried to attach it to her email to ER on 1 November 2018. It clearly existed at the time. In light of the serious allegation made, the Respondent acted reasonably and appropriately in investing the

matter and suspending the Claimant pending the conclusion of the investigation.

78 The Respondent did not state either in the suspension letter or the letter of 20 November 2018 that the Claimant had racially abused other people. It gave details of the allegations that had been made which they were investigating. It was perfectly fair and reasonable for the Claimant to be informed of the allegations that had led to her suspension and a disciplinary investigation. Ms Kotak did say in the letter of 20 November that she was undertaking an allegation into the Claimant's alleged conduct of fraud. For the reasons given at paragraph 40 (above) it should have been clear to anyone reading that letter that the reference to an allegation of fraud was a clerical error. We found that it was an error and as soon as Ms Downer noticed it, she corrected it on 2 January 2019.

79 The Respondent did not delay in sending the suspension letter to the Claimant. It was sent within a week of the suspension. Between January and 30 April 2019 the Respondent did not review the Claimant's suspension every two weeks. There was no requirement under the Respondent's disciplinary policy to do so. The Respondent was, however, regularly in touch with the Claimant during that period. On 2 January 2019 Ms Downer wrote to the Claimant to correct the error about the allegation of fraud and invited the Claimant to a meeting to discuss the complaint she wished to make against Ms Sadler. On 25 January Ms Downer responded to the Claimant's complaint of 15 January about the delay in correcting the error. On 25 January Ms Downer invited the Claimant to a meeting on 7 February to discuss her complaints against Ms Sadler. She provided the Claimant with the Respondent's Employee Led Complaints Policy and Procedure. On 21 February Ms Downer held a meeting with the Claimant to discuss the allegations against her and her complaints. On 15 and 26 March Ms Downer responded to the Claimant's formal grievance document of 7 March 2019.

80 There was a delay in inviting the Claimant to an investigatory interview. The interview took place on 21 February 2019. However, prior to that on 20 November 2018 the Respondent had asked the Claimant in writing to provide a statement and to respond to certain questions. The Claimant had done so on 2 December 2018. The delay in the interview was partly attributable to the change in the person investigating the matter, attempts being made to get witness statements from the relevant witnesses and the very long documents submitted by the Claimant.

81 The Respondent did not refuse to consider the Claimant's grievance submitted on 7 February 2019. The Claimant was invited to a meeting to discuss it. It was discussed, albeit briefly, at the meeting on 21 February 2019. On 26 March Ms Downer told the Claimant that as her complaints were about matters that had happened more than three months before she raised her grievance, they would not be investigated, That was in accordance with the Respondent's procedure. She did, say, however, that they would be considered as mitigation in the disciplinary investigation.

82 It has always been the Claimant's case that the letter of 2 July 2019 was the final act or the last straw that caused her to resign. Contrary to what the Claimant claims, the letter of 2 July 2019 did not invite her to a disciplinary outcome when she had never attended a disciplinary hearing. The letter invited her to a meeting to discuss the outcome of the disciplinary investigation, i.e. whether the mater should proceed to a formal disciplinary hearing or not. There was no evidence that the Claimant sent

any letter questioning the fact that it was going to be a disciplinary meeting. There was no evidence to indicate that that was what the Claimant believed at the time. The Claimant made no reference to that in her letter of 3 July or in her resignation letter of 22 July 2019. Furthermore, the Claimant was represented by RCN at the time, and if she was uncertain about the purpose of the meeting, they would have told her what it was. It is difficult to see what it was in the letter of 2 July that would have made the Claimant resign. In any event, the Claimant did not resign immediately in response to that letter. She told the Respondent on 3 and 12 July 2019 that she was liaising with her RCN representative to see when she could attend the meeting with her. It was not entirely clear why she resigned ten days later.

83 Out of all the matters relied on by the Claimant to constitute a breach of the implied term of trust and confidence, we have found that there had erroneously been a reference to fraud in the letter of 20 November which had been corrected on 2 January 2019, there had been a delay in holding an investigatory interview with her and for a period of about four months there had not been two weekly reviews of her suspension. Having regard to the circumstances in which those occurred (see paragraphs 78-80 above) we concluded that they did not amount to a breach of the implied term of trust and confidence. The Respondent had not conducted itself in a manner, which objectively considered, was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. In any event, the last of those acts had occurred on 29 April 2019. The Claimant did not resign until 22 July 2019. Even if they had amounted to a breach, the letter of 2 July 2019, which the Claimant relied upon as being the final act, did not contribute anything to those earlier matters.

84 We have found other failings in the process. The investigation took a very long time and the Claimant was not paid the correct amount of suspension pay. The latter arose out of an administrative error of which the Respondent was unaware. The Claimant first referred to it very briefly (one line) in a very long letter dealing with a large number of things. It was clearly not uppermost in the Claimant's mind. She has not relied upon it as being a fundamental breach of her contract of employment. She did not say in her resignation letter that she was resigning because of that.

85 We concluded that the Respondent did not breach the implied term of trust and confidence by doing any of the acts of which the Claimant complained (set out at paragraph 2.1 above). The Claimant was not constructively dismissed. Her complaint of unfair dismissal must, therefore, fail.

Employment Judge - Grewal

Date: 31/10/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

31/10/2022.....

FOR THE TRIBUNAL OFFICE