EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Bonney**

Respondent: **(1) Medway NHS Foundation Trust**

(2) Mr D McLaren

Heard at: **London South Employment Tribunal**

On: **1 November 2022**

Before: Employment Judge Dyal, Mrs S Dengate and Mr S Townsend

Representation:

Claimant: Mrs Beckles, Non-Legal Representative

Respondent: Miss Patterson, Counsel

RESERVED JUDGMENT

1. The complaint of constructive wrongful dismissal succeeds as against the First Respondent.

2. All other complaints fail and are dismissed.

CASE MANAGEMENT ORDER

3. The parties shall liaise to seek to agree remedy. The shall update the tribunal in that regard within 4 weeks of this judgment being sent to the parties. If they are unable to agree remedy a remedy hearing will be listed.

REASONS

Introduction

The issues

1. The heads of claim are as follows:

   1.1. Constructive unfair dismissal.
   1.2. Constructive wrongful dismissal.
   1.3. A claim for a statutory redundancy payment.
   1.4. Direct race discrimination.
   1.5. Harassment related to race.

2. The issues were identified at a PH on 16 February 2022. These are appended hereto. At the outset of the hearing it was agreed that those remained the issue but with the following clarifications:

   2.1. The constructive dismissal was said to be not only unfair and wrongful but also an act of race discrimination/race harassment.
   2.2. The matters that comprised the complaints of race discrimination and harassment were relied upon as part of the particulars of breach of contract for the purposes of establishing a constructive dismissal. Those matters were said to amount to a breach of the implied term whether or not there was a racial dimension to them. In other words, even if they did not have a racial dimension they were said to be calculated or likely to seriously damage trust and confidence and to be without reasonable and proper cause.
   2.3. The complaint at paragraph 35.5.3 was an evidential point and was withdrawn as an allegation in its own right.

3. In the course of the hearing the Claimant made clear that the only people whom she alleged had treated her less favourably because of race/subjected her to unwanted conduct related to race were Mr McLaren and Mr Cairney.

The hearing

4. *Documents before the tribunal*:

   4.1. Bundle running to 592 pages;
   4.2. Particulars of claim (omitted in error from the bundle);
   4.3. Witness statement bundle as updated;
   4.4. Respondent's opening note, case-law on continuity, note on NHS reckonable service and chronology of the grievance process.

5. *Witnesses the tribunal heard from*:

   5.1. The Claimant.
   5.2. Ms Claire Hughes, formerly Head of Nursing for the Unplanned and Integrated Care Directorate.
   5.3. Mr Kevin Cairney, formerly Director of Operations for Unplanned and Integrated Care.

5.4. Mr Douglas McLaren, formerly General Manager for Acute and Emergency Medicine.
5.5. Mr Harvey McEnroe, formerly Chief Operating Officer.
5.6. Mr Jack Tabner, formerly Executive Director of Transformation and Digital
5.7. Ms Kelly Ratcliffe, formerly Service Manager.
5.8. Ms Gurjit Mahil, formerly Deputy Chief Executive (by video-link - she was suffering from Covid-19).

6. All of the above witnesses gave oral evidence and were cross-examined. At the close of the evidence the parties made oral submissions which we considered carefully.

Findings of fact

The parties

7. The First Respondent is an NHS Trust (hereafter 'the Respondent'). It operates Medway Maritime Hospital in Gillingham. At the relevant times it was struggling:

   7.1. the Respondent was in special measures between 2013 and 2017;
   7.2. even after leaving special measures the respondent was in 'SOF4', Single Oversight Framework, grade 4. That is the highest form of external scrutiny.

8. The Second Respondent, Mr McLaren (hereafter referred to by his name) was an employee of the Respondent. At the material times he was General Manager for Acute and Emergency Medicine and in that capacity the Claimant's line manager.

9. The Claimant is a professional who has spent most of her career in NHS employment. Her NHS employment prior to joining the Respondent was:

   9.1. Locality Cancer Screening/Prevention Facilitator with Barts Health NHS Trust from April 2009 to June 2015 and Service Improvement Facilitator from July 2015 to October 2016.
   9.2. Quality Improvement Manager, NHS England, from October 2016 to the commencement of her employment with the Respondent.

10. In the circumstances set out below the Claimant's employment with the Respondent began on 15 April 2019.

Recruitment and commencement of employment

11. In late 2018 the Unplanned and Integrated Care Directorate was recruiting to two Service Manager roles. One to the Acute Medicine programme and the other to the Emergency Medicine Programme. Previously there had been a single Service Manager for both roles. The Claimant applied. She was interviewed by Ms Korron Spence, Deputy Chief Operating Officer for the Unplanned and Integrated Care Directorate and Ms Claire Hughes, Head of Nursing in the same directorate, in late 2018.

12. Ms Hughes thought the Claimant was a brilliant candidate. Ms Spence was concerned she would not be able to cope with the pace of working in Emergency Medicine. Mr Cairney was consulted and he thought the Claimant was not suitable for the role in Emergency Medicine because she had not worked in that field before. They resolved to offer the Claimant the role of Service Manager, Acute Medicine.

13. At around the same time, Ms Kelly Ratcliffe successfully applied for Service Manager, Unplanned and Integrated Care, Elderly/Frailty (this is also known as Therapies and Older Persons or 'TOPs'). Ms Ratcliffe was an existing employee. Hitherto she was Assistant Service Manager in Speciality Medicine. She commenced working as Service Manager to TOPs in around December 2018.

14. The Claimant believes, based on what she was told, that Ms Ratcliffe was the Service Manager for Acute Medicine prior to becoming the Service Manager for TOPS. However, we have heard Ms Ratcliffe's employment history directly from her and we prefer her evidence. She is in the better position to know what roles she has undertaken and when. She was not in Acute Medicine prior to working in TOPs and she first came to work in Acute Medicine after the Claimant's sick-leave began in September 2019.

15. On 20 December 2018, the Claimant was verbally offered the role of Service Manager Elderly/Frailty Care (now Therapies and Older Persons programme) over the telephone. There was no contemporaneous explanation given as to why she was offered that role. She received a written conditional offer on that date. The written offer was ambiguous in that it identified the role as *Service Manager Elderly/Frailty & ED Urgent Care*. That describes two different roles.

16. On 11 January 2019, the Claimant was sent a contract of employment. This stated the role as Service Manager, Unplanned and Integrated Care, Elderly Medicine (the TOPs role).

17. The Claimant commenced work on 15 April 2019 with some general induction. On 16 April 2019, Ms Spence told her that she would be working in the Urgent and Emergency Care group rather than Therapies and Older Persons. Later that day Ms Spence told the Claimant that in fact her role would be Service Manager for Acute Medicine.

18. The confusing and chaotic approach to the Claimant's role reflected wider chaos within the Respondent at that time:

    18.1. The Respondent was operating in an at least partly dysfunctional state and was in various respects in some disarray;
    18.2. There was no General Manager in post for Acute Medicine. The General Manager would normally be the line manager of the Service Manager;
    18.3. Ms Spence herself was under great pressure in her role and was picking up the line management of the Service Manager in addition a very wide range of other duties.

19. Although the reason for the chaotic and confusing approach to the Claimant's role is not easy to decipher on balance we infer and find that it resulted from a combination of innocent administrative error, miscommunication, overwork and general chaos:

    19.1. The Claimant did not apply and was not interviewed for the role in TOPs. It is thus doubtful that it was properly intended to offer her this role.
    19.2. The Respondent was recruiting to that role roughly contemporaneously with the Claimant's application. It seems likely that the Claimant was initially told she was recruited to TOPs in a mix up.
    19.3. Likewise, it seems likely that there was a simple error when on 16 April 2019 the Claimant was initially told she would be in the Emergency Department. The panel that had considered her application had been of the view that she was better suited to Acute Medicine.

20. The Claimant's oral evidence to the tribunal, which we accept, is that as at April 2019, she was entirely relaxed about which Service Manager role she undertook. She was just excited to be serving the NHS as Service Manager in whatever part of the hospital she was asked to. In fact, she was actually pleased to be working in Acute Medicine rather than TOPs. It would expose her more to some of the great pressures the NHS faces and having experience of those pressures was a beneficial to career development.

21. Later on, when the Claimant was asked to move to TOPs in September 2019 (see below) in a swap with Ms Ratcliffe, she felt some resentment that she had been placed in Acute Medicine in the first place. The Claimant felt it unfair that she had been placed in that role when Ms Ratcliffe did not want it, only for Ms Ratcliffe to be parachuted back into it. However, that resentment about being placed in Acute Medicine in the first place was premised upon a mistaken belief: in fact Ms Ratcliffe had not been the Acute Medicine Service Manager prior to September 2019.

22. On 17 May 20219, Ms Spence left the Respondent's employment and Mr Kevin Cairney, Director of Operations for Unplanned and Integrated Care took over the Claimant's line management.

23. On 27 August 2019, Mr McLaren was appointed to the role of General Manager for Urgent and Emergency Care, thus becoming the Claimant's direct line manager.

24. Until September 2019 the Claimant had very good, friendly relations with each of Ms Ratcliffe, Mr Cairney and Mr McLaren. Ms Ratcliffe had been a sort of 'buddy'. The Claimant had worked with Mr McLaren on the Same Day Emergency Care Project and enjoyed the experience.

Claimant's performance

25. The Claimant was new to service management and new to operational work. The working environment was a very difficult one with problems of leadership,

resourcing, morale and more. There was no General Manager at the outset of her employment so the Claimant was not properly supported or line managed.

26. The Claimant's own view is that she was performing well in her role without any particular issues and she does not accept that she ever told her managers that she was struggling.

27. The Respondent's evidence about the Claimant's performance is very mixed and is not easy to make sense of:

    27.1. Ms Hughes worked closely with the Claimant because operational issues have a massive impact on nursing. Her evidence was broadly that she started to become concerned about the Claimant's performance in the summer of 2019. She recalls the Claimant becoming elusive, ceasing to discuss matters with her and ceasing to seek day to day help. Having had an excellent working relationship with the Claimant her sense was that the claimant was struggling and this elusiveness was indicative of it. Ms Hughes could not recollect any particular issue in respect of the Claimant and the rota. However, her evidence was that the rota was inherently problematic at the hospital and not fit for purpose. In other words there were problems with it but not problems related to the Claimant.

    27.2. Mr Cairney's oral evidence to the tribunal was that the Claimant was performing well in respect of some aspects of her role. This included her being visible, present and available. However, his evidence was that she was struggling with managing the rota. It was his evidence that he had received information to this effect from multiple sources among the clinicians. It was also his evidence that the Claimant had told him that she was struggling.

    27.3. Mr Cairney's evidence during the internal grievance process (see below) was to similar effect but with some nuances. He said this:

        > *Some of the Consultants had some concerns about her command over rotas (as expected given the above) but Rosemary would come to me if she had any major concerns. In essence, she performed as well as I had expected her...* [emphasis added]

    His evidence was also that the Claimant had been taking extended periods of time away from work on account of a family member's illness. He said that this had not been annual or carer's leave but instead an agreement he had reached with the Claimant.

    27.4. Mr McLaren's oral evidence was that he thought the Claimant was having difficulty with the rota. In his evidence to the tribunal he was at pains to draw a distinction between the Claimant struggling with the rota and the Claimant having a performance issue. A performance issue implied some culpability on the Claimant's part and his evidence was that he had not worked with her long enough to be able to say that the struggle with the rota reflected a performance issue on her part. He also said he was

concerned about the Claimant asking to take time out from the workplace. She had started asking to work at home to get administrative work done. In those pre-Covid times working from home was unusual and the request to do this was an indicator to him that the Claimant was struggling. It was also his evidence that the Claimant had told him that she was struggling.

27.5. In the grievance investigation Mr McLaren's evidence was along similar lines and can be summarised as follows:

27.5.1. During the Same Day Emergency Care project the Claimant often did not deliver work to deadlines;
27.5.2. In the two weeks leading to the meeting on 10 September (described below) the Claimant had told him that she was struggling;
27.5.3. In terms of performance in the Service Manager role the only significant matter he commented on was the rota. His evidence was that the Claimant had been late with the rota so emergency steps had been needed to fill gaps. Further, she had produced was a comprehensive template for the rota but one that was not actually populated with any data. At that point she had already missed the deadline.

28. Standing back from all the evidence and weighing it we find as follows:

28.1. The Claimant was not underperforming in any meaningful sense in any aspect of her role;
28.2. However, there were problems with the rota. These arose in part from a lack of experience on the Claimant's side, but that was only a part of the story. The rota was an inherently difficult task that would have been problematic for anyone. The Claimant's performance in relation to the rota was in keeping with her level of experience and the level of training and support she had received to date.
28.3. Concerns about the Claimant and the rota were expressed to Mr Cairney by some clinicians.
28.4. The Claimant discussed how she was getting on in her role with both Mr Cairney and Mr McLaren before 10 September 2019. She did not use the word 'struggling' *but* she did make plain that she was finding it difficult (which it was). The Claimant had a conversation with Mr Cairney in which she indicated that she saw herself in a role in Transformation in the future.
28.5. By the summer of 2019, the Claimant was absent from the workplace much more than she had been in the early stages of her employment. This was in part for personal reasons and in part to try and stay on top of the job. The managers found this disconcerting.

Meetings of 10 - 12 September 2018

29. On 10 September 2018, the Claimant had a one to one meeting with Mr McLaren. There was no advance indication that any performance concern would be raised at the meeting.

30. During the meeting Mr McLaren said that he had a difficult issue to raise. He outlined various major challenges that were imminently coming and which would, we accept, have made life in Acute Medicine significantly more difficult especially for operational staff. These challenges included the winter pressures, imminent scrutiny from NHS England and a CQC inspection in December 2019. He said that he did not consider the Claimant to be operationally strong enough to cope and that as a new line manager he was concerned about his ability to support her. He proposed that the Claimant swap roles with Ms Radcliffe. He gave the Claimant two days to consider the proposal.

31. We accept that this matter was put to the Claimant as a proposal rather than an instruction to move, but it was a proposal that came with a strong indication that it was what Mr McLaren thought should happen. It also plainly carried with it a message that Mr McLaren thought the Claimant was not up to the coming challenges.

32. The Claimant was stunned and extremely upset. She pressed Mr McLaren to explain to her in what respect she had failed to deliver. He was reluctant to give any example but ultimately gave the example of the rota. She found this odd because in the course of the meeting he had praised her for how she had dealt with one particular rota issue.

33. Mr Cairney and Mr McLaren had spoken in advance of this meeting and agreed that the proposal to swap the Claimant with Ms Ratcliffe would be put to the Claimant.

34. On 11 September 2019, the Claimant spoke to Mr Cairney. He apologised to her and said in effect that Mr McLaren had not conveyed the intended sentiment correctly. He said that Rebecca Long, the General Manager in TOPs would be happy to manage the Claimant. He also said that it was just a proposal and that the Claimant did not have to move to TOPs if she assured him she was up for the challenge of staying in acute medicine.

35. On 12 September 2019, the Claimant had a meeting with Mr McEnroe, Chief Operating Officer. This was a scheduled mentoring meeting. We prefer the Claimant's account of this meeting. Generally she was a very impressive witness who gave direct, succinct answers to questions. Her answers were candid whether helpful to her case or not. This meeting was a very important moment in her life and we are satisfied she remembers it well. For Mr McEnroe on the other hand this meeting was simply one of the approximately 15 he tended to have per day and it was not a significant event personally or professionally for him (not a criticism). We think the Claimant's recollection is much the more reliable. It is also in key parts deeply corroborated by the correspondence that follows the meeting.

36. The meeting went very well. Mr McEnroe was very impressed with the Claimant and her professional background. He said he was keen to support employees with a BAME background.

37. The Claimant reported the recent developments in her employment. Mr McEnroe said that he did not think moving the Claimant as proposed was a good idea

because TOPs was also underperforming and had poor leadership. He told the Claimant that he thought her skills were an excellent fit for the Delivery Unit which was a new initiative in the Transformation Team. In essence it brought together people from different parts of the business to deliver key projects. The Claimant sensed that Mr Cairney had spoken to Mr McEnroe and told him about her interest in working in Transformation. We find that this is indeed what had happened. Mr Cairney had told Mr McEnroe of the Claimant's interest in Transformation (this is not a criticism).

38. A central dispute in the case is whether or not Mr McEnroe offered the Claimant a role in the Delivery Unit at this meeting or whether he simply indicated it was a potentially good fit for her and something she may wish to explore with others.

39. We find as a fact that Mr McEnroe did offer the Claimant a role in the Delivery Unit at this meeting. Further, we accept that Claimant's evidence that she asked about budget at this meeting and Mr McEnroe told her that the existing budget for her would move with her and it was then a matter for her old department to deal with that.

40. We take on board the Respondent's points that the detailed particulars of the role were not agreed, there was no job description or recruitment process nor other matters of that sort. And we take on board that the Delivery Unit ultimately did not come to much. However, there is overwhelming evidence in the contemporaneous documents to which we refer below nonetheless that the Claimant was offered a role in the Delivery Unit and that offer was made by Mr McEnroe in this meeting.

41. On 13 September 2019 the Claimant emailed Mr McEnroe as follows:

> Harvey, I would like to thank you for meeting with me yesterday, I'm most grateful. I was very inspired and pleased that I have a leader I respect and look up to and thank you for reinforcing the values that I believe in. Furthermore, although I have enjoyed working in an operational role, I have had time to reflect and I am very pleased to take up your offer to work in Transformation , thank you for this opportunity, I'm again very grateful.

42. There was no response from Mr McEnroe to this email. He does not now recollect receiving it. In his oral evidence he accepted that if he had received this email and noted that it referred to accepting an offer that had not been made he would have corrected it. We find that Mr McEnroe did receive this email. It was correctly addressed to both him and his PA. He did not correct what was said because there was nothing to correct. He had made an offer. It was then for others (Mr Cairney and Mr Tabner) to take forward the Claimant's acceptance.

43. A little later that day, the Claimant emailed Mr Cairney telling him about the meeting with Mr McEnroe and that she had accepted a role in the Delivery Unit. Tellingly, Mr Cairney replied:

> Spoke to Harvey yesterday and congratulations. You will continue to do well in this role and work closely with us. Delivery unit is exciting.
>
> Okay, no problem I will speak with Doug and Jack and get the ball rolling on transfer dates and so forth.

44. The Claimant was then put in touch with Mr Tabner, Executive Director of Transformation. The Delivery Unit was part of Transformation but was run by both Mr Tabner and Mr McEnroe. It was new initiative that they were extremely keen on.

45. On 16 September 2019 the Claimant emailed Mr McEnroe asking if the role in the Delivery Unit could be offered as Band 8a. She did not receive a response.

46. On 17 September 2019, the Claimant emailed Mr Tabner stating "…*I look forward to joining your team soon*". Mr Tabner responded "*Looking forward to it to!*" and arranged to meet the Claimant that afternoon. They met, they got on well and agreed the Claimant would join the Delivery Unit.

47. On 18 September 2019, the Claimant emailed Mr Tabner stating:

> It was a pleasure meeting with you yesterday and I do look forward to joining your team. I would be grateful if you kindly send me any reading materials / brief or background information on the project we will be working in Planned care.

48. Mr Tabner responded on the same day stating:

> "*Welcome aboard – copied are all the folks who can on-board you into the Delivery Unit! We are working under the assumption that you will start from next week. There will be a full kick-off then*."

49. Mr Tabner gave the Claimant a reading list to prepare her for her new role. One of the people copied was Ms Longley, Head of Project Management Office, Transformation Team. She then emailed the Claimant stating *"Wifi is available here and I'm assuming you are bringing a laptop with you?… welcome aboard and looking forward to working with you."*

50. On 18 September, Ms Ratcliffe came to the Claimant's department and spoke openly about becoming the new Service Manager for Acute Medicine. She did this in front of other members of staff. Ms Ratcliffe has no recollection of this matter, however, the Claimant does and we prefer her evidence. We also accept that there were a number of occasions around this time when Ms Ratcliffe came to the department and spoke openly in this way.

51. On 18 September 2019 the Claimant emailed her existing team in Acute Medicine. It was a very positive email to say goodbye upon her transfer to the Delivery Unit. She said "*You all really made me feel part of the Acute and ED Team, and have all supported me in my role of which I'm forever grateful, it's a shame it's come to a short end. I will miss you all very much*".

52. The Claimant asked Mr McLaren to also send an email to the team explaining her leaving and who the replacement would be. On 19 September 2019, Mr McLaren did this. He sent an email to the whole care group (the distribution list for the email occupies two and half pages of the bundle) that dealt with a number of matters and said this in relation to the Claimant:

We will also be having a change in service management for Acute Care. The current service manager, Rosemary who joined the Trust in April has been offered an opportunity in the Transformation Team as it changes its approach to work as a 'Delivery Unit'. From the 30th September, Kelly Ratcliffe from the TOP Care Group will be our new Service Manager for Acute Care. I'd like to thank Rosemary for her hard work to date and wish her well in her new role.

Delivery Unit job unravels

53. On 23 September 2019, the Claimant had a chance encounter with Ayesha Feroz, HR Partner. She told that Claimant that she was surprised to learn that she was moving to the Transformation Team and that her doing so would leave a hole in TOPs operations management and that it did not make sense. She asked the Claimant to explain the history. The Claimant did so and Ms Feroz said that such decisions should not happen without HR involvement. She passed the information on to Ms Nyawade, Deputy Director of HR. The Claimant met Ms Nyawade later that day.

54. Ms Nyawade was surprised and disappointed when the Claimant explained the history to her and said she would look into the matter. She told the Claimant that she could not be transferred to Transformation without due procedure being followed. She said it was not unusual for managers to attempt this type of move without HR involvement and that it happened too often.

55. On 27 September 2019, the Claimant spoke to Ms Nyawade who told her that the role in Transformation did not exist and that there were no recruitment plans for the Transformation Team.

56. Mr Cairney's oral evidence was that Mr McEnroe and Mr Tabner worked "off-policy" with "grey" transactions to get things done. We find that essentially something like that happened here. An offer of a role was made and it was accepted. This done in the informal way described above. However, when it came to HR's attention the plug was pulled.

57. The Claimant was signed off work with stress and anxiety on 1 October 2019. She remained unwell and on sick leave until her resignation.

Grievance

58. On 14 October 2019, the Claimant raised a formal grievance. She complained about the above events and the complaint included an allegation of race discrimination.

59. The grievance was initially, with the Claimant's consent, dealt with informally. On 24 October 2019, the Claimant and her representative met Ms Nyawade to discuss her grievance. The broad plan was to have facilitated conversations / mediation between the Claimant and her managers.

60. In November and December 2019 the Claimant met with Ms Nyawade several times. In the course of doing so she said she no longer wanted to deal with the grievance informally and asked to discuss exit options.

61. Alongside the grievance process, the absence management process commenced.

62. On 2 January 2020, the Claimant sent Ms Nyawade a letter indicating that she did not want to return to any role, did not want to pursue a formal grievance but wanted to leave the Respondent's employment with a settlement. Ms Nyawade responded swiftly stating that the Respondent would have to deal with the Claimant's grievance formally and declining to offer any settlement that went beyond the Claimant's contractual entitlement.

63. There was then a delay of a couple of weeks whilst the Respondent searched for an independent manager to hear the grievance. Mr Mullane, Head of Corporate and Legal, was appointed. Ms Nyawade left the trust's employment shortly thereafter.

64. In February 2020, the first wave of Covid-19 hit the Respondent and huge amounts of its resources were thereafter devoted to dealing with that crisis.

65. On 28 February 2020 the Claimant had grievance investigation meeting with Mr Mullane.

66. On 3 March 2020, the Claimant sent a statement in support of her grievance. She also sent a list of names of people whom she wanted interviewed. Not one of the people on the list were interviewed, not even Ms Hughes who obviously had relevant evidence to give about the Claimant's performance.

67. In March and April 2020, Messrs Tabner, McEnroe, McLaren and Cairney and Ms Ratcliffe gave evidence to the grievance investigator. It is relevant to draw attention to a few parts of their evidence.

68. On 24 March 2020, Mr Tabner produced a statement for the grievance investigation. It took the form of answering written questions that had been put to him. He said this:

> *I had an early discussion with Rosemary about her experience and interests and both she and I were excited by a potential secondment into what we were then setting up: a 'Delivery Unit' – a blended team of transformation team project leads and high performing operational staff to support our work on Elective performance improvement (BEST Access).*
>
> *No formal offer was made and this was an early conversation. I then had no further contact with Rosemary.*

69. This evidence was simply not right. As set out above, it was not just an "early conversation" with "no further contact". In truth, it is just obvious from

correspondence that Mr Tabner and the Claimant had agreed that she would commence in a role in the Delivery Unit, that if HR had not intervened she would have done so in very short order, that Mr Tabner welcomed the Claimant to his team and that he put her in touch with the relevant people to, in his own words, "on-board" her.

70. Mr Tabner also said there was "*no vacancy on establishment*" but that there was a budget "*within establishment*". In response to the question *"What arrangements did you make to receive Rosemary in the team?"* he answered *"none at this early stage*". Again, this was simply untrue. He had given the Claimant a reading list, welcomed her to the team and made steps for her to be on-boarded. In response to a question about why the arrangement did not proceed he said "*I learned she was no longer interested in the proposal".* This is not the reason why the job never came to fruition. It was HR's intervention that prevented it. The Claimant was very keen on the job.

71. Also on 24 March 2020, Mr McEnroe also produced a statement for the grievance investigation. He denied offering the Claimant a role in the meeting on 12 September 2020 and said this: *"I did not offer a formal role change but did offer to discuss RB as a possible candidate for the Delivery Unit….Possible future roles were discussed at this meeting, in response to RB asking about possible alternative roles. Transformation roles were discussed at this time."* He stated that he had received the Claimant email in which she said she was accepting his offer and that *"I asked that this was picked up by Jack and Kevin in arranging the possible transfer".*

72. As set out above, in reality the meeting went a lot further than this and Mr McEnroe did make the Claimant a job offer in the meeting of 12 September 2020.

73. On 17 April 2020, Ms Ratcliffe was interviewed for the grievance investigation. Her evidence was that she had been asked to work in Acute Medicine to cover the Claimant's sickness absence. That is an incomplete explanation. Although in the event the Claimant was on sick-leave, the Claimant's sick-leave is not the reason why Ms Ratcliffe was initially asked to work in Acute Medicine. That is abundantly clear from the documentation, including Mr McLaren's email of 18 September 2019 to the care group explaining that and why Ms Ratcliffe would be assuming the Acute Medicine role. The Claimant did not commence sick-leave until12 days after that.

74. It is also relevant to consider what Mr Cairney and Mr McLaren said about the Claimant's performance as the grievance investigation report goes on to make a strong and adverse findings about this.

75. On 29 March 2020, Mr Cairney gave a statement to the grievance investigation: In relation to the Claimant's performance he said this:

> *Some of the Consultants had some concerns about her command over rotas (as expected given the above) but Rosemary would come to me if she had any major concerns. In essence, she performed as well as I had expected her to* [emphasis added] *but I felt the support package via TOP would have been*

to her advantage. My underlying concern was that as winter was approaching, transformation team was depleted and the care group operational structure was evolving, was that she would be lost and possibly at risk of performance management.

76. Mr Cairney further said this: 325

The pace of TOP I felt was the right level to sustain development but also support her personal life. I was aware that a close relative to Rosemary was suffering from breast cancer which was requiring extended periods of 'time away' from work (this was not A/L or C/L and instead it was an agreement between Rosemary and I). I figured that all of the above and this situation would be resolved by retaining her, taking her away from fast-paced Acute Medicine, placing her in a slower paced, more developmental position with a much more stable team and concurrently give her more time with her family.

77. On 24 April 2020, Mr McLaren produced a witness statement for the grievance investigation. In terms of performance in the Service Manager role the only significant matter he dealt with was the rota. His evidence was that the Claimant had been late with the rota so emergency steps had been needed to fill gaps. Further, that when past the deadline the work she had produced was a comprehensive template but one that was not actually populated

78. On 20 May 2020, the Claimant was told that Mr Mullane was no longer handling the investigation. He had not produced a report before withdrawing. He withdrew to focus on the response to the Covid crisis. Further, the commissioning manager left the Respondent's employment. Ms White, Director of Nursing, Quality and Professional Standards was appointed as the new commissioning manager.

79. Mr Sheath, Trust Solicitor, was appointed to complete the grievance investigation report. He did so on 15 July 2020 although the report was not sent to the Claimant until the grievance outcome was given much later.

80. The grievance report partially upheld the grievance. In essence it found that there had been poor procedural compliance. It rejected the complaints of discrimination. A couple of points are important to note in particular.

81. The report's conclusions, fairly read, find or assume that there was indeed significant under-performance on the Claimant's part and/or that she had a lack of suitability for her role. There was no proper basis for that finding/assumption based on the evidence gathered in the investigation.

82. The report also said this:

As a result of the apparent miscommunication and misunderstandings, RB's expectations of transferring to a post, which did not exist, were unduly raised. Having been shocked and upset by the unexpected criticism of her performance and then offered a move to TOP, RB saw an opportunity of resolving her difficulties by a possible move to Transformation where she had

previously worked, only to find her hopes dashed because no permanent post actually existed.

83. This was absolutely not a case of a misunderstanding or a miscommunication. The Claimant *was* offered a role by Mr McEnroe and did agree with Mr Tabner that she would take the role in the Delivery Unit. There was no misspeaking, there was no miscommunication, there was no misunderstanding. This happened and it is exactly what was intended by those two very senior executives. There is no room for doubt here: the contemporaneous correspondence says what it says. The role in the Delivery Unit was withdrawn simply because HR found out about it and pulled the plug.

84. On 15 September 2020, the grievance outcome was given by Ms White. She enclosed the investigation report which was the Claimant's first sight of it. Ms White said this:

> This grievance is partially upheld in relation to the management and process of your under - performance/suitability for Acute Medicine and proposed transfer to TOP as discussed at the meeting on 10 September 2019 and then a possible transfer to Transformation at meetings on 12 September. As a result of this treatment, I apologise on behalf of the Trust for the lack of proper process in dealing with your under- performance/suitability and proposed transfer/secondment by senior managers without proper consultation or involvement of HR.

85. Ms White's conclusion is, to say the least, surprising in what it upholds. It finds/assumes there was under performance or lack of suitability for the role in Acute Medicine. What is upheld is simply that these capability problems were not managed correctly. Again, there was no proper basis to conclude that the Clamant had been under-performing nor that there was any real issue about her suitability for her role. Moreover, the issue about transferring to the Transformation was nothing really to do with under-performance. The Claimant was not offered the role in Transformation because she was underperforming. She was offered it because Mr McEnroe thought she had exciting skills in public health that made her ideal for such a role. The issue, then, was that the Claimant had been offered a role, accepted it, and then it had been ripped away.

86. Ms White rejected the complaints of discrimination. She made numerous recommendations.

87. The Claimant appealed the grievance outcome on 29 September 2020. The appeal was assigned to Ms Gurjit Mahil, Deputy chief Executive. The grievance appeal hearing took place on 12 November 2020. The grievance appeal outcome was given on 27 November 2020.

88. Ms Mahil's key conclusions are worth setting out in full:

1) The investigation report did not go far enough to explain the issues that you have been seeking answers to, for example why you were placed in Acute Medicine instead of Therapies and Older Persons when joining.

2) There is a lack of evidence that your probation period was managed appropriately in line with the Trust procedure and the reply from Kevin Cairney, that records of one to one meetings held were lost, is unacceptable.

3) It is, at best, unclear whether there were any performance concerns that warranted management intervention and if there were, whether those concerns were low, medium or high risk.

4) The investigation gathered evidence from Kevin and Doug and these are primary sources as part of the line management chain. Although more could have been done to either corroborate or conflict with the information Kevin and Doug provided by seeking evidence from other colleagues such as the Head of Nursing, it is clear from the report that their evidence is questionable and this is reflected in the decision you received in that your grievance was partially substantiated and you received an apology on behalf of the Trust.

5) The investigation did not reconcile contradictory information between Jack Tabner's statement that no offer of employment was made and his email to you on 18 September 2019, advising that he was looking forward to you joining his team. It is clear to me from the exchange that you would have been under the impression that some sort of formal arrangement was being discussed and the Trust did not communicate with you effectively on this topic.

6) On reviewing whether the statement from Harvey McEnroe should have been included in the report I have found that this appears to have been omitted from the papers sent to you in error. Harvey McEnroe did provide an electronic statement as part of the investigation and I have included a copy here for completeness.

7) I have ascertained that Kevin and Doug are compliant and up to date with the Trust's mandatory training on Equality and Diversity issues and have also looked at other cases as you asked me to, which has identified a comparator in Unplanned and Integrated Care, with very similar circumstances to your own case. The handling of the case by the Unplanned and Integrated Care management team is comparative to your own, however the colleague concerned is not a BAME employee. I therefore agree that the way you have been treated has fallen short, which has had a negative effect on your wellbeing, however as per the investigation findings, this does not appear to be founded in any racial prejudice or discrimination.

8) You have recognised in your appeal letter that Doug's decision making may have been a knee-jerk reaction to close scrutiny from external sources and rightly note that this does not remove the responsibility to treat people fairly. For the reasons outlined in this letter I am of the view, based on all of the materials, that Doug's decisions without evidence or explanation of any serious underperformance were the result of poor managerial judgement and decision making.

89. The reference in point 7, is to Mr Gosden. The parties do not agree what the words used here mean. The Claimant's interpretation is that there is an

admission that Mr Gosden was treated differently to her. On this point of interpretation we agree with the Respondent. Point 7 is saying that Mr Gosden was treated in essentially the same way as the Claimant. The word 'comparative' is used where the word 'comparable' would have been better - but the intended meaning is clear. Further, this interpretation was corroborated by Ms Mahil's oral evidence where she explained that she thought Mr Gosden was treated in the same way as the Claimant.

90. On 22 December 2020, the Claimant resigned with immediate effect. 413- 418.

Mr Gosden

91. The evidence in relation to Mr Gosden is in parts confused and confusing. However, doing our best we find a follows:

    91.1. Mr Gosden's employment as a Service Manager for the Emergency Department commenced shortly after the Claimant's;
    91.2. There were concerns about Mr Gosden's performance and those concerns were much more significant and serious than any concerns in relation to the Claimant.
    91.3. Mr Gosden was formally performance managed under the capability policy with a performance development plan that was set by Mr McLaren. It is not very clear when this was. Mr McLaren thought it was in 2020, that is the most direct evidence we have and we so find.
    91.4. Mr Gosden was ultimately moved to a different role because he was not considered competent. The move was to Corporate Services. Ms Mahil said this was in December 2019, however, that cannot be right, and must have been later. We infer it must have followed the performance development plan.

92. In term of training, we have seen the Claimant's training record and Mr Gosden's. If the comparison is limited to the period of time when the Claimant was actually in the workplace, there are no material differences. Naturally, after the Claimant went on sick-leave Mr Gosden continued to have training periodically in the usual way, whereas the Clamant did not because she was on sick-leave.

93. The Claimant's evidence was that Mr Gosden told her that he had been offered management training. There is no specificity about this. Mr McLaren's evidence was that Mr Gosden was not offered any management training courses, that he did not ask for any and that there was no budget for the same. On this point we prefer Mr McLaren's evidence, as it was the clearer, more definite and more cogent. His evidence, which we also accept, is that the Claimant did not ask for management training.

94. Mr Gosden had an Assistant Service Manager, whereas the Claimant did not. However, this reflected an established norm. The Emergency Department was the most difficult and changeable of all and historically there had always been an Assistant Service Manager there. That was not true in Acute Medicine. However, when the Claimant asked Mr McLaren for an assistant in August and September 2019. Mr McLaren was agreeable in principle and asked her to produce a

business case in support which dealt with funding. The Claimant did not produce the business case but that matter was in any event overtaken by events as we have described.

Racial diversity

95. There was not very much racial diversity in the management grades at the Respondent:

95.1. There were a total of 8 Service Managers at the relevant times, of which all were white save for the Claimant and one other who was of Asian background;
95.2. All four general managers were white;
95.3. Most of the executive managers where white.
95.4. Ms Mahil's evidence was that she had dealt with a significant number of grievances in which the employee complained of race discrimination. Generally the detail of the grievances are not in evidence. However, it is in evidence, and we accept, that she upheld a complaint of race discrimination by management level employee who was employed in the Corporate Directorate.

Law

Direct discrimination

96. Section 13 Equality Act 2010 is headed "Direct discrimination". So far as relevant it 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 others."*

97. Section 23 (1) provides*:*

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

98. The phrase 'because of' has been the subject of a significant amount of case-law. In ***Page v NHS,*** Underhill LJ said this:

> *29. There is a good deal of case-law about the effect of the term "because" (and the terminology of the pre-2010 legislation, which referred to "grounds" or "reason" but which connotes the same test). What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the "mental processes" that caused them to act. The line of cases begins with the speech of Lord Nicholls in Nagarajan v London Regional Transport [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in R (E) v Governing Body of the JFS ("the Jewish Free School case") [2009] UKSC 15, [2010] 2 AC 728. The cases make it clear that although the relevant mental processes are sometimes*

referred to as what "motivates" the putative discriminator they do not include their "motive", which it has been clear since James v Eastleigh Borough Council [1990] UKHL 6, [1990] 2 AC 751, is an irrelevant consideration: I say a little more about those terms at paras. 69-70 of my judgment in the magistracy appeal, and I need not repeat it here.

99. In ***Page v Lord Chancellor*** [2021] ICR 912, Underhill LJ said this:

69. … is indeed well established that, as he puts it, "a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation": the locus classicus is the decision of the House of Lords in James v Eastleigh Borough Council [1990] ICR 554; [1990] 2 AC 751 . But the case law also makes clear that in this context "motivation" may be used in a different sense from "motive" and connotes the relevant "mental processes of the alleged discriminator" (Nagarajan v London Regional Transport [1999] ICR 877 , 884F). I need only refer to two cases:

(1) The first is, again, Martin v Devonshires Solicitors [2011] ICR 352 . There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At para 35 I said:
"It was well established long before the decision in the JFS case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in Nagarajan v London Regional Transport [1999] ICR 877 , 884F)—one of which may be relevant in considering the 'grounds' of, or reason for, an allegedly discriminatory act, and the other of which is not." I then quoted paras 61–64 from the judgment of Baroness Hale of Richmond JSC in the Jewish Free School case and continued, at para 36: "The distinction is real, but it has proved difficult to find an unambiguous way of expressing it … At one point in Nagarajan v London Regional Transport [1999] ICR 877 , 885E–F, Lord Nicholls described the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation'. We adopted that term in Amnesty International v Ahmed [2009] ICR 1450 , explicitly contrasting it with 'motive': see para 35. Lord Clarke uses it in the same sense in his judgment in the JFS case [2010] 2 AC 728, paras 137–138 and 145 . But we note that Lord Kerr uses 'motivation' as synonymous with 'motive'—see para 113—and Lord Mance uses it in what may be a different sense again at the end of para 78. It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved—though we must confess that we still find it useful and will continue to employ it in this judgment …"
(2) The second case is Reynolds v CLFIS (UK) Ltd [2015] ICR 1010 . At para 11 of my judgment I said:
"As regards direct discrimination, it is now well established that a person may be less favourably treated 'on the grounds of' a protected characteristic either if the act complained of is inherently discriminatory (e g the imposition of an age limit) or if the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of

Birkenhead in Nagarajan v London Regional Transport [1999] ICR 877 , which was endorsed by the majority in the Supreme Court in R (E) v Governing Body of JFS [2010] 2 AC 728 . Terminology can be tricky in this area. At p 885E Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between 'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same."

70. As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses, but the passages quoted are sufficient to show that the distinction is well known to employment lawyers, and I am quite sure that when Choudhury J (President) used the term "motivation" he did not mean "motive".

100. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

101. The circumstances in which it is unlawful to discriminate against an employee are, so far as relevant, set out in s.39 Equality Act 2010. In that regard something will constitute a 'detriment' where a reasonable person would or might take the view that the act or omission in question gave rise to some disadvantage (see ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, §31-35 per Lord Hope). There is an objective element to this test. For a matter to be a detriment it must be something which a person might reasonably regard as detrimental.

102. In assessing the 'reason why' it is the decision maker's mental processes that are in issue. That is so even if the decision maker has unknowingly received and been influenced by tainted information ***(CLFIS (UK) Ltd v Reynolds*** [2015] ICR 1010).

103. Section 26 EQA 2010 provides:

(1) A *person (A) harasses another (B) if –*
(a) A engages in unwanted conduct related to a relevant characteristic, and
(b) the conduct has the purpose or effect of –
(i) violating B's dignity, or –
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B [for short we will refer to this as a "proscribed environment"].
…
(4) In deciding whether conduct has the purpose or effect referred to in subsection
(1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

104. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."

105. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

15…*A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."*

22…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of

hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"

106. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

107. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristics is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

108. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

109. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.

[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the

Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

The burden of proof and inferences

110. The burden of proof provisions are contained in s.136(1)-(3) EqA:

(1) This section applies to any proceedings relating to a contravention of this Act.
(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.

111. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

112. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

113. The operation of the burden of proof was helpfully summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> *'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude*

that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.
57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"

(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

114. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

115. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

116. It is not permissible to infer discrimination simply from unreasonable treatment. However, it can be permissible to infer discrimination from the failure to explain unreasonable treatment (***Bahl v The Law Society*** [2004] IRLR 799).

Constructive dismissal

117. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".

118. It is an implied term of the contract of employment that: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (***Malik v BCCI*** [1997] IRLR 462).

119. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

120. The core issue to determine when considering a constructive dismissal claim was summarised by the Court of Appeal in ***Tullett Prebon Plc v BGC Brokers LP*** [2013] IRLR 420 as follows:

> *19. … The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693 , at page 698F, per Lord Denning MR, who added: "The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).*
>
> *20. In other words, it is a highly context-specific question…the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

121. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25].

122. In ***Amnesty International v Ahmed*** [2009] IRLR 884, Underhill J gave importance guidance on the relationship between discrimination and constructive dismissal:

> *…The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be*

so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in Malik*. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see* Chief Constable of Avon & Somerset Constabulary v Dolan *(UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and* Shaw v CCL Ltd *[2008] IRLR 284, per Judge McMullen QC at paragraph 18.*

123. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465.

124. In ***LB Waltham Forest v Omilaju*** [2005] IRLR 35, the CA guided that, the final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. The mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

125. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause' or the predominant cause or similar. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

126. **In *Mari v Reuters Ltd (UKEAT/0539/13),*** HHJ Richardson said this in relation to sick pay and affirmation:

49. … The significance to be afforded to the acceptance of sick pay will depend on the circumstances, which may vary infinitely. At one extreme an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay amounted to or contributed to affirmation of the contract. At the other extreme an employee may continue to claim and accept sick pay when better or virtually better and when seeking to exercise other contractual rights. What can safely be said is that an innocent employee faced with a repudiatory breach is not to be taken to have affirmed the contract merely by continuing to draw sick pay for a limited period while protesting about the position: this follows from Cox Toner, which I have already quoted, for a sick employee can hardly be in any worse position than an employee who continues to work for a limited period."

127. In ***Chindove v William Morrisons Supermarket PLC*** UKEAT/0043/14/BA, Langstaff P said this in relation to affirmation:

24. Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the principles or the name of Western Excavating Ltd v Sharp [1978] 1 QB 761 CA. At page 769 C-D Lord Denning MR, having explained

the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it "altogether abandons and refuses to perform the contract", using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this: "Moreover, he [the employee] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121 , deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force.

128. In ***Kaur and Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal suggested the following approach:

128.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
128.2. Has he or she affirmed the contract since that act?
128.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
128.4. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?
128.5. Did the employee resign in response (or partly in response) to that breach?

Unfair dismissal

129. The right to complain of unfair dismissal contrary is subject to s.108 ERA. That section provides as follows:

> *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 [F1two years] ending with the effective date of termination.*
>
> *(2)If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words [F1"two years"] there were substituted the words " one month ".*
>
> *(3)Subsection (1) does not apply if— [list of matters – none of which apply in this case].*
>
> *(4)Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliation.]*
>
> *(5)Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or is connected with, the employee's membership of a reserve force (as defined in section 374 of the Armed Forces Act 2006)*

130. Continuous employment for these purposes is described and defined in Part XIV, Chapter 1 Continuous Employment ERA. For brevity we do not set the whole chapter out though we direct ourselves in accordance with it. Crucially, section 218 ERA provides as follows:

> *218 Change of employer.*
>
> *(1)Subject to the provisions of this section, this Chapter relates only to employment by the one employer. […]*

8)If a person employed in relevant employment by a health service employer is taken into relevant employment by another such employer, his period of employment at the time of the change of employer counts as a period of employment with the second employer and the change does not break the continuity of the period of employment.

(9)For the purposes of subsection (8) employment is relevant employment if it is employment of a description—

(a)in which persons are engaged while undergoing professional training which involves their being employed successively by a number of different health service employers, and

(b)which is specified in an order made by the Secretary of State.

(10)The following are health service employers for the purposes of subsections (8) and (9) […]

131. Redundancy is defined at s.139 ERA:

139 Redundancy.

(1)For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
(a)the fact that his employer has ceased or intends to cease—
(i)to carry on the business for the purposes of which the employee was employed by him, or
(ii)to carry on that business in the place where the employee was so employed, or
(b)the fact that the requirements of that business—
(i)for employees to carry out work of a particular kind, or
(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.

132. Section 155 ERA provides:

155 Qualifying period of employment.

An employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years ending with the relevant date.

Discussion and conclusions

Redundancy and unfair dismissal

133. The only basis upon which the Claimant says that she has 2 years continuous employment is that her contract of employment said this:

> For the purposes of the Employment Rights Act 1996, normally only employment within the Medway NHS Foundation Trust may count as continuous employment.

134. Mrs Beckles submits that since the contract qualifies what is said with the words 'normally' it is arguable that in the Claimant's case her past NHS employment was continuous.

135. Continuity of employment is a statutory concept in this context. The Claimant's employment with other NHS employers is not continuous with her employment with the Respondent for statutory purposes. That is because, among other things, it was not relevant employment for the purpose of s.218(8) ERA: it was not employment of a description *"in which persons are engaged while undergoing professional training which involves their being employed successively by a number of different health service employers"*. We have set out in our findings of fact what her past employment was, and none of her employment was of this sort.

136. The Claimant does not have qualifying service to claim unfair dismissal (as required by s.108 ERA) nor to claim a statutory redundancy payment (as required by s.155 ERA).

137. We note that there is a contractual concept of 'reckonable service' in the NHS. That is another matter that is totally distinct from continuity for statutory purposes. We have not (yet) been addressed on reckonable service and it may/may not be relevant to remedy.

138. Further, so far as the redundancy payment claim is concerned another difficulty is that there is no basis whatsoever to suggest that the reason for the dismissal was or was in any part redundancy. There was no redundancy situation and nothing that happened had anything to do with redundancy.

Allegations at 35.4 and 35.5 of the list of issues

139. The Claimant relies upon the matters set out at paragraphs 35.4 and 35.5 as, respectively, direct race discrimination and harassment related to race. She also relies upon those matters as part of her particulars of breach of contract for the purposes of founding the claim of constructive dismissal and does so whether or not there was a racial element to the treatment/conduct complained of. The allegations therefor need to be considered from more than one perspective.

35.4.1 The decision by the Respondents to move the Claimant from the Therapies and Older Persons team to Urgent and Emergency Care (A&E) and replace her with Kelly Ratcliffe, a comparator; this was in around April 2019 and the Claimant relies on Kelly Ratcliffe as an actual comparator (she also relies on a hypothetical comparator)

140. At the outset of her employment, as set out above, the Claimant was indeed initially told she would work in TOPS, then in Emergency Medicine and then in Acute Medicine, all by 16 April 2019. However, this did not involve replacing Kelly Ratcliffe. Contrary to the Claimant's belief, Ms Ratcliffe had not worked as Service Manager in Emergency Medicine nor Acute Medicine at this time.

141. The Claimant's race had nothing whatsoever to do with the changes to the role she was asked to perform at the outset of her employment. The reason for this treatment was an unimpressive one, but not a discriminatory one. In short, the Respondent was in a state of chaos and partial dysfunction which result in mistakes and confusion in the role that the Claimant was told she was appointed to and asked to perform.

142. Further, neither Mr McLaren nor Mr Cairney had any involvement in assigning the Claimant her role at this stage of the chronology and they are they only people whom the Claimant seeks to impugn as discriminators.

143. Further, there was no detriment within the meaning of s.39 EqA. At that time, the Claimant was actually happy to work anywhere in the hospital as a Service Manager and particularly happy to work in Acute Medicine. She later developed a sense of grievance about being appointed to Acute Medicine in April 2019 when, in September 2019, the swap with Ms Ratcliffe was proposed. In essence the Claimant's sense of grievance was that Ms Ratcliffe was getting to pick and chose her role while the Claimant was bounced around by Ms Ratcliffe's choices. However, that was an unjustified sense of grievance because it was based on a misapprehension that Ms Ratcliffe had previously worked in Acute Medicine and had chosen to leave it for TOPs only to then seek a return to Acute Medicine.

144. The Claimant was not treated less favourably than Ms Ratcliffe. The suggestion that she was is based on the misconception that Ms Ratcliffe had been in, but then left, the acute medicine role because she found it stressful.

145. From the perspective of the implied term, in our view this was not conduct that was objectively speaking, calculated or likely to seriously damage or undermine trust and confidence. It was conduct that was confusing and disorganised, but nothing significantly more than that. A key difference between changing the Claimant's role at this stage of the chronology and what comes late in the chronology is at this stage there was no implication that the changes to the role reflected any shortcoming on the Claimant's part.

35.4.2 The decision by the Respondents to move the Claimant from the Acute Medicine and Ambulatory Care Group to the Therapies and Older Persons team and replace her with Kelly Ratcliffe; this was in around September 2019 and the Claimant relies on Kelly Ratcliffe as an actual comparator and/or a hypothetical comparator

146. There was a decision to this effect although it was not a final decision: it remained open to the Claimant to stay where she was if she did not want to move to TOPs. However, there was certainly significant pressure to move because Mr McLaren made clear it was what he thought should happen and said that he did

not think the Claimant was operationally strong enough for the coming challenges in Acute Medicine. Likewise Mr Cairney told the Claimant she could remain in Acute Medicine if she was prepared to confirm she was 'up for the challenge' of what awaited Acute Medicine.

147. We ultimately have reached the view that the reason for this treatment was, in essence, that the Respondent was not confident that the Claimant could handle the coming pressures in Acute Medicine and that this lack of confidence was unrelated to race.

148. Identifying the reason for this treatment is the single most difficult issue in the case. Before reaching our conclusion, we stood back from the primary facts and asked ourselves what inferences could be drawn and in particular whether any inferences of race discrimination could be drawn. We reminded ourselves that race discrimination exists, that where it does it is often hidden, that we should not expect any direct evidence of it, that it can be subtle and is often sub-conscious. (For the avoidance of doubt this is the approach that we took in respect of all of the discrimination/harassment complaints but in all other cases identifying the reason for the treatment was straightforward).

149. We thought that the following matters were particularly important in the analysis:

149.1. There only a limited basis for any concern about the Claimant's ability to cope with the coming pressures on acute medicine deriving from her performance itself.
149.2. It is odd that neither Ms Hughes nor Mr McLaren seems to have given much/any thought to whether Kelly Ratcliffe would be any better than the Claimant in Acute Medicine with the coming pressures. Mr McLaren's evidence was that he did not know Ms Ratcliffe or anything about her ability. Ms Hughes did know her but did not give the matter thought.
149.3. Mr McEnroe told the Claimant that moving to TOPs did not make much sense as the leadership was weak there too.
149.4. The treatment of the Claimant in respect of the Delivery Unit role.
149.5. As below there were numerous shortcomings in the grievance procedure.
149.6. Ms Radcliffe is white; the Claimant is black.
149.7. There is not much racial diversity in the management grades in the hospital.

150. However, we ultimately decided that it would not be right to infer that the Claimant's race was any part of the reason for the treatment. In that regard we thought the following matters were particularly significant:

150.1. We do accept that Mr McLaren had concerns about the Claimant's conduct of the rota and that those concerns were rooted in his observations of her work. This included an occasion on which she was past the deadline and presented a template that was of high quality but was not actually populated with data.
150.2. We also accept that some clinicians had reported concern about the rota to Mr Cairney and that this weighed on him.
150.3. The Claimant had little operational experience and had had very limited support to date, meaning that her operational skills had not been developed by the organisation to the extent that they should have been.
150.4. The Claimant had made plain to Mr Cairney and Mr McLaren she was finding the role difficult.
150.5. The Claimant had been taking time out from the workplace and had personal issues ongoing.
150.6. TOPs was paced more slowly than Acute Medicine and it was a better environment within which to build operational skills.
150.7. Even if there were wider leadership problems in TOPs, there is no evidence that there would have been any reason to anticipate any difficulty with Ms Long managing the Claimant.
150.8. Remaining in Acute Medicine was a genuine option for the Claimant, albeit clearly not the one her managers preferred.
150.9. Although the Claimant was treated poorly in respect of the Delivery Unit role that treatment was by Mr McEnroe and Mr Tabner. It is not alleged, nor would it be plausible to allege, that this treatment was because of race. Mr McEnroe and Mr Tabner were trying to help the Claimant (and the Respondent) albeit that they over-promised and under-achieved in that regard.
150.10. The shortcomings in the grievance process are poor but they are not - nor are they even alleged - to be because of race.

151. We thus ultimately we find as a fact that the reason for the treatment was that the Respondent was not confident that the Claimant could handle the coming pressures in Acute Medicine.

152. We do not accept that Ms Ratcliffe is an appropriate actual or evidential comparator here. Her circumstances are materially different to the Claimant's. There is no evidence of any lack of confidence in her ability to handle the coming pressures in Acute Medicine. She was also operationally more experienced than the Claimant having worked in operational roles previously including as an Assistant Service Manager.

153. Although Mr Gosden is not identified in the list of issues as a comparator in relation to this issue, in the hearing comparison was made with him. We do not accept that the Claimant was treated less favourably than Mr Gosden. Her primary point is that when there were concerns with Mr Gosden he was offered

structured support whereas she was simply required to move roles. However, in our view what happened was that Mr Gosden was put on a formal performance development plan. In our view that was a significantly more heavy handed form of management intervention and one that implied a level of criticism of Mr Gosden that was far higher than was visited on the Claimant. Being placed on a performance development plan is a serious matter and one that in theory, and in practice, can have serious repercussions for the employee's employment and reputation. In this case, it did genuinely remain open to the Claimant to remain in her role in Acute Medicine and to so without being place on a performance development plan. We therefore do not accept that she was treated less favourably than Mr Gosden. Even if she was, however, the reason for the treatment was no in any part race.

154. We are satisfied that a hypothetical comparator, someone in the Claimant's position who was white, would have been treated in the same way as her.

155. Considering the matter now from the perspective of the implied term of trust and confidence, we find that:

155.1. This was a matter that was likely, objectively speaking, to seriously damage trust and confidence. The way in which it was handled meant that it came as a bolt from the blue. The language used, to the effect that Mr McLaren did not think the Claimant was operationally strong enough, was bound to be extremely upsetting for the Claimant especially as she totally unprepared for it. It basically implied that the Claimant was not competent to do her own job.

155.2. There was no reasonable and proper cause for this conduct. There was very thin basis for what was proposed and to simply put the proposal to the Claimant at that stage, giving her two days to think on it, was unnecessary. There were a wide variety of preceding steps to take before having reasonable and proper cause to bluntly state that the Claimant was not operationally competent and before leaning on her to move roles. For example, offering informal support and/or mentoring and/or training.

35.4.3 The decision by the Respondents to provide a structured development plan and managerial training courses to a comparator, Tim Gosden, who joined the Respondent in a similar role to the Claimant shortly after the Claimant commenced her role with the Respondent but denied the Claimant the same opportunity despite her requests; this was in around May/June 2019 and thereafter and the Claimant relies on Tim Gosden as an actual comparator and/or a hypothetical comparator.

156. The structured development plan that Mr Gosden was put on, was a formal performance development plan under the capability policy. The Claimant was not put on such a plan. This was not less favourable treatment of the Claimant; quite the reverse. Their circumstances were materially different to each other: Mr Gosden's performance was of sufficient concern to Mr McLaren to be put on the performance development plan; the Claimant's was not. The reason for the difference of treatment was nothing to do with race it was simply a difference in

performance.

157. Mr Gosden was not offered managerial training courses, the Claimant is mistaken in that regard. There is no material difference between the Claimant's training record and Mr Gosden in respect of the period of time before the Claimant's sick-leave. Thereafter Mr Gosden continued to received training, the Claimant did not, but the only reason for that, was that she was on sick-leave and he was not.

158. Contrary to this allegation, the Claimant did not request either a structured development plan or managerial training course.

159. The Claimant was not treated less favourably than Mr Gosden nor less favourably than a hypothetical white comparator would have been. Race was no part of the reason for the treatment.

160. None of the matters identified here were calculated or likely to undermine trust and confidence.

35.4.4 The acceptance by the Respondent during the grievance appeal process that the Claimant had been treated differently to a comparator which had a negative effect on her wellbeing but continued to deny that the acts constituted discrimination; this was in around late November / December 2020 and the Claimant relies on a hypothetical comparator;

161. This allegation fails on its facts. The appeal outcome in fact found that the Claimant had been treated the same as not differently to her comparator.

162. The appeal outcome did deny that there had been any discrimination. However, that was because that was Ms Mahil's considered view. She was entitled to that view and, crucially, no part of the reason why she formed that view was race. She formed the view on the evidence.

163. None of the matters identified here were calculated or likely to undermine trust and confidence. Further Ms Mahil had reasonable and proper cause for her views: it is plain that she carried out her part of the grievance process with care. Her outcome letter is generally thoughtful and well balanced. It is critical of the Respondent in several place where she considers that criticism is due.

5.5.1 Following the offer by the Respondent to the Claimant of the role in Transformation, and the Claimant's acceptance of the same, Kelly Ratcliffe, a comparator, visited the Claimant in the Acute Medicine department and informed her that she would be replacing her as Service Manager. The Claimant had no prior knowledge of this; this was in around September 2019;

164. This incident was not in any way related to race as the Claimant accepted at the hearing and in any event as we find.

165. In our view this was a benign incident. Perhaps Ms Ratcliffe could have been more discreet but ultimately there was nothing here that could objectively

reasonably create a proscribed environment nor violate the Claimant's dignity.

166. This was not a matter that could undermine trust and confidence or even contribute to a breach of the implied term.

35.5.2 The Respondent then wrote to the Claimant's colleagues to inform them that Kelly Ratcliffe would be replacing the Claimant as Service Manager in Acute Medicine; this was in around September 2019;

167. This did happen. It was unrelated to race as the Claimant accepted at the hearing. The email was actually written at the Claimant's request. The content of the email is informative, to the point and totally unobjectionable. There was nothing here that could objectively reasonably create a proscribed environment nor violate the Claimant's dignity.

168. This was not a matter that could undermine trust and confidence or contribute to a breach of that term. There was also reasonable and proper cause for it: the Claimant's request the email be sent and the Claimant was due to be moving roles shortly so some management level communication to the team was needed about this.

35.5.3 The Claimant subsequently wrote to her colleagues in the Acute Medicine department to say goodbye and to thank them for their support, only doing so because she had been told she would be transferring to a role in Transformation; this was in around September 2019

169. This was withdrawn as a complaint at the outset of the hearing.

35.5.4 The Respondent then alleged that the Claimant had not been offered a job in Transformation and/or withdrew an offer to work in Transformation; this was in around September 2019.

170. The job offer, which the Claimant had accepted, was indeed withdrawn. It was withdrawn because the offer had been made outside of the Respondent's proper procedures and protocols and HR had discovered it.

171. This had nothing to do with race at all – as the Claimant accepted.

172. It is important not to take an overly literal or pedantic approach to the wording of this issue. The issue is that the Claimant was offered, and accepted a job that then was withdrawn by the employer, because the offer had been made on an improper basis (with the Claimant an entirely innocent party). This was conduct that was likely to seriously damage trust and confidence and for which there was not reasonable and proper cause.

173. The job offer was made by two of the Respondent's most senior executives. There was no reason for the Claimant to doubt it and she accepted it. It was exactly the opportunity she wanted and came to her rescue at what was an extremely difficult time following the conversation with Mr McLaren on 10 September. The offer was thus of the utmost importance to the Claimant. There was a series of

correspondence that made plain she was about to start in her new job. She said goodbye to her old team. Her successor was introduced to her old team. She made arrangements to start in her new team. All of this was then suddenly ripped away from her. Objectively speaking, this was conduct that was likely to seriously undermine trust and confidence.

174. At best it might be said that there was reasonable and proper cause to renege on the role in the Delivery Unit because due process had not been followed in making the offer. However, there certainly was not reasonable and proper cause to agree a new role with the Claimant in all the circumstances we have described, without being able to actually follow through with it. Whilst it is plain that Mr McEnroe and Mr Tabner were genuinely trying to assist both the Claimant and the organisation by placing her into a role they thought would be beneficial all around, they should not a have agreed this with the Claimant if in fact they could not make it happen and/or without involving HR if that was the organisational requirement. There was no reasonable and proper cause for this treatment.

Conclusions on race discrimination and harassment

175. For the reasons given the complaints of race discrimination and harassment must fail. Further, although as set out below, the Claimant was constructively dismissed the dismissal was not tainted by race discrimination nor harassment related to race in any way.

Constructive dismissal

176. The Respondent was in repudiatory breach of the Claimant's contract of employment. There were several breaches of the implied term of trust and confidence.

176.1. The matters discussed under *35.4.2* (even though there was no race discrimination element).
176.2. The matters discussed under issue *35.5.4* (even though there was no race harassment element)
176.3. The manner in which the Claimant's grievance was dealt with to which we now turn.

177. In their evidence to the grievance investigator, Mr Tabner and Mr McEnroe gave evidence which was of great importance but that was simply factually untrue:

177.1. Mr Tabner said that "*No formal offer was made and this was an early conversation. I then had no further contact with Rosemary."* Mr Tabner also said: "*What arrangements did you make to receive Rosemary in the team?"* he answered *"none at this early stage."* This evidence was simply untrue and there is documented correspondence in which makes plain that it was agreed the Claimant would be working in the Delivery Unit and steps were taken to on board her. But for HR intervention she would indeed have commenced working in the Delivery Unit very shortly.
177.2. Mr McEnroe said: *"I did not offer a formal role change but did offer to discuss RB as a possible candidate for the Delivery Unit….Possible future*

roles were discussed at this meeting, in response to RB asking about possible alternative roles. Transformation roles were discussed at this time." This account is not right. Mr McEnroe offered the Claimant a role in the Delivery Unit in the meeting of 12 September 2019. He then confirmed this when he spoke with Mr Cairney as Mr Cairney's contemporaneous email indicates.

178. There was no reasonable and proper cause for giving the above version of events. It is not what happened and the events in question were at that point in time relatively temporally proximate – they dated back around 6 months. There was also a paper trail that could have assisted Mr Tabner/Mr McEnroe to refresh their memories had they chosen to look into the emails they themselves had sent and/or received in respect of the matters the grievance investigator was asking them about.

179. The Clamant was not sent the grievance investigation report until September 2020 when she was sent the grievance outcome. That was thus her first knowledge of the evidence that had been given.

180. The grievance investigation report and grievance outcome also contained further breaches of the implied term of trust and confidence.

180.1. As set out above they purported that the Claimant had a performance problem. They did this on the basis of the thinnest evidence and without a proper investigation. Ms Hughes, for instance, had not been investigated.

180.2. The grievance outcome letter said it partially substantiated the grievance but what was said to be substantiated was, in essence, that the performance concerns about the Claimant had not been well managed.

180.3. The grievance outcome letter purported that the debacle with the Delivery Unit job was based on a misunderstanding/miscommunication. That was in the face of truly overwhelming written, contemporaneous evidence that this was not a misunderstanding or miscommunication at all. But rather a case of two senior executives agreeing a new role with the Claimant and then HR pulling the plug on it upon finding out. There was no attempt made to reconcile the written contemporaneous evidence with the conflicting witness evidence of Mr Tabner and Mr McEnroe.

181. Those matters were very serious and individually, and certainly together, were of a sort that were objectively likely to seriously damage or destroy trust and confidence. There was no reasonable and proper cause for them. No finding that the Claimant had a capability problem was open on the evidence and certainly not without a proper investigation. Likewise the thesis that the Delivery Unit issues were a miscommunication/misunderstanding was not open on the evidence, at least not without a proper attempt to reconcile the witness evidence with the documentary evidence.

182. The appeal outcome is of a different order and it is in the main a high quality piece of work that demonstrates thought, care and balance. However, it does

include one significant point that is not innocuous, nor trivial and though not of itself a breach of contract does contribute something to the existing breaches. It said this:

> 3) It is, at best, unclear whether there were any performance concerns that warranted management intervention and if there were, whether those concerns were low, medium or high risk.
>
> 4) The investigation gathered evidence from Kevin and Doug and these are primary sources as part of the line management chain. Although more could have been done to either corroborate or conflict with the information Kevin and Doug provided by seeking evidence from other colleagues such as the Head of Nursing, it is clear from the report that their evidence is questionable and this is reflected in the decision you received in that your grievance was partially substantiated and you received an apology on behalf of the Trust.

183. We generally agree with and endorse what is said here, but there is one significant problem. It is said that the questionable evidence of Mr McLaren and Mr Cairney was reflected in the grievance outcome being partially substantiated. That is not right in an important respect. The grievance outcome in fact accepted/adopted the evidence that there was a performance concern and one that warranted a management intervention.

184. Although this is academic, for completeness we note that it is also our view that:

184.1. There was an express variation to the Claimant's contract of employment by the agreement that her role would change to one in the Delivery Unit. We do not accept that there was no meeting of minds (as Miss Patterson put it). The detail of the role was not finalised but it did not need to be: the broad nature of the role was clear. The funding for the role was discussed (her existing funding would follow her). The role was thus to be at band 7 and at the same pay. It would be based in the hospital. The Respondent would remain the Claimant's employer. That is sufficient for there to have been a variation to the contract. The Claimant did then angle for a higher grading but did not get anywhere with that. That is an immaterial detail. There was no suggestion that this was a mere secondment but even if was there was still an agreement that the Claimant's role would change albeit in that case only temporarily.

184.2. There was then a breach of that term when the Delivery Unit job was withdrawn. That breach which was, because of the circumstances surrounding it that we have described already, repudiatory.

Resignation and alleged affirmation

185. We are satisfied that the Claimant resigned in response to the above breaches and that the grievance appeal outcome was, factually, the final straw that caused her to resign. The grievance appeal outcome was also in law apt to be a final straw for the reasons set out above and that is so notwithstanding that it was generally a high quality piece of work.

186. In any event, we do not accept that the Claimant affirmed the contract prior to her resignation.

187. It is true, that the Claimant had made her mind up that she would not return to work by January 2020 and that she did not resign until December 2020. Miss Patterson submits that the Claimant affirmed the contract by delaying so long. She further submits that, given that the Claimant had made her mind up in January that she was going to leave, the Claimant cannot rely on any matter that occurred thereafter.

188. We do not accept that analysis. It is true that the Claimant resolved not to return to work by January 2020 and told the Respondent the same. She remained absent from work and continued to pursue a formal grievance complaining of the treatment she received. She was thus constantly protesting the treatment she had received and indicating that she did not accept the breaches. We have not been addressed on whether the Claimant was receiving sick-pay but given that this was NHS employment we assume she was. All the same, in all the circumstances in our view she consistently gave a strong message that she did not accept the breaches and we do not think she affirmed the contract by conduct or otherwise.

189. In any event, after January 2020 there were further repudiatory breaches of contract. We do not accept Miss Patterson's submission that they are irrelevant. Although it is true that the Claimant had already decided she was going to leave by January 2020, those further repudiatory breaches thereafter that we have identified became *additional* reasons for her (a) wanting to resign and (b) then resigning. They are not irrelevant at all.

190. In any event, the later repudiatory breaches came to the Claimant's knowledge in September 2020 when the grievance investigation report and outcome were sent to her. There was then only a relatively short period of around three months until her resignation. During that time she remained off sick and was busy appealing the grievance. There certainly was not any affirmation of the contract between September and December 2020.

191. Finally, there was in any event a final straw very proximately to the resignation. Namely the grievance appeal outcome.

192. All in all, the Claimant was constructively dismissed.

_____

Employment Judge Dyal

Date 07.11.2022

APPENDIX: LIST OF ISSUES AS AGREED AT PRELIMINARY HEARING

The Complaints

35. The Claimant makes the following complaints:

35.1 Constructive unfair dismissal;

35.2 Breach of contract / wrongful dismissal;

35.3 A claim for a statutory redundancy payment;

35.4 Direct race discrimination about the following:

35.4.1 The decision by the Respondents to move the Claimant from the Therapies and Older Persons team to Urgent and Emergency Care (A&E) and replace her with Kelly Ratcliffe, a comparator; this was in around April 2019 and the Claimant relies on Kelly Ratcliffe as an actual comparator and/or a hypothetical comparator;

35.4.2 The decision by the Respondents to move the Claimant from the Acute Medicine and Ambulatory Care Group to the Therapies and Older Persons team and replace her with Kelly Ratcliffe; this was in around September 2019 and the Claimant relies on Kelly Ratcliffe as an actual comparator and/or a hypothetical comparator;

35.4.3 The decision by the Respondents to provide a structured development plan and managerial training courses to a comparator, Tim Gosden, who joined the Respondent in a similar role to the Claimant shortly after the Claimant commenced her role with the Respondent but denied the Claimant the same opportunity despite her requests; this was in around May/June 2019 and thereafter and the Claimant relies on Tim Gosden as an actual comparator and/or a hypothetical comparator;

35.4.4 The acceptance by the Respondent during the grievance appeal process that the Claimant had been treated differently to a comparator which had a negative effect on her wellbeing but continued to

deny that the acts constituted discrimination; this was in around late November / December 2020 and the Claimant relies on a hypothetical comparator;

35.5 Harassment related to race about the following:

35.5.1 Following the offer by the Respondent to the Claimant of the role in Transformation, and the Claimant's acceptance of the same, Kelly Ratcliffe, a comparator, visited the Claimant in the Acute Medicine department and informed her that she would be replacing her as Service Manager. The Claimant had no prior knowledge of this; this was in around September 2019;

35.5.2 The Respondent then wrote to the Claimant's colleagues to inform them that Kelly Ratcliffe would be replacing the Claimant as Service Manager in Acute Medicine; this was in around September 2019;

35.5.3 The Claimant subsequently wrote to her colleagues in the Acute Medicine department to say goodbye and to thank them for their support, only doing so because she had been told she would be transferring to a role in Transformation; this was in around September 2019;

35.5.4 The Respondent then alleged that the Claimant had not been offered a job in Transformation and/or withdrew an offer to work in Transformation; this was in around September 2019.

36. The Claimant confirmed that these were her only claims.

The Issues

37. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Were some or all of the direct discrimination and/or harassment complaints made outside the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months

(plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

The Respondents accept that the other claims, ie for unfair dismissal, wrongful dismissal and statutory redundancy payment, were presented in time.

2. Unfair dismissal

2.1 Does the Claimant have sufficient continuity of employment to bring this claim? The Claimant says she has continuous NHS employment from 2009.

2.2 Was the Claimant constructively dismissed?

2.2.1 The Claimant relies on:

2.2.1.1 the acts or omissions said to constitute direct race

discrimination and/or harassment related to race as outlined above;

2.2.1.2 breach of contract in that there was an accepted offer that

she move to the Transformation team;

2.2.1.3 in so far as not already covered by the above, the

Respondents' failure to deal properly with her grievance;

2.2.2 Did the Respondent(s) breach the implied term of trust and confidence? The Tribunal will need to decide:

2.2.2.1 whether the Respondent(s) behaved in a way that was

calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Second Respondent; and

2.2.2.2 if so, whether it had reasonable and proper cause for

doing so.

2.2.3 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.2.4 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that she chose to keep the contract alive even after the breach.

2.3 If the Claimant was dismissed, what was the reason or principal reason

for dismissal?

2.4 Was it a potentially fair reason? The Respondents indicated at the Preliminary Hearing that they are likely to rely on some other substantial reason such as to justify dismissal, but this will be confirmed in their Re- amended Particulars of Response.

2.5 Did the Second Respondent act reasonably in all the circumstances in

treating it as a sufficient reason to dismiss the Claimant?

3. Wrongful dismissal / Notice pay

3.1 Was the Claimant constructively dismissed?

3.2 If so, what was the Claimant's notice period? The Claimant says it was

3 months.

3.3 Was the Claimant paid for that notice period?

3.4 If not, was the Second Respondent entitled to dismiss without notice?

4. Redundancy payment

4.1 Does the Claimant have sufficient continuity of employment to bring this claim? The Claimant says she has continuous NHS employment from 2009.

4.2 Was the Claimant constructively dismissed?

4.3 If so, has the Second Respondent proved that the dismissal was for a reason other than redundancy (as defined in section 139 of the Employment Rights Act 1996.

5. Direct race discrimination (Equality Act 2010 section 13)

5.1 The Claimant relies on Black African as her race for these purposes.

5.2 Did the Respondent(s) do the things set out in paragraph 35.4 above?

5.3 Was that less favourable treatment than the treatment of the comparators named in paragraph 35.4 above or a hypothetical comparator?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

5.4 If so, was it because of race?

6. Harassment related to race (Equality Act 2010 section 26)

6.1 Did the Respondent(s) do the things set out in paragraph 35.5 above?

6.2 If so, was that unwanted conduct?

6.3 Did it relate to race?

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

6.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect.

7. Remedy

7.1 The Tribunal notes that the parties have raised the question of whether there should be an increase or decrease in any compensation award to reflect failure to comply with the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures apply.

EMPLOYMENT TRIBUNALS

Claimant: **Mrs R Bonney**

Respondent: **(1) Medway NHS Foundation Trust**

(2) Mr D McLaren

Heard at: **London South Employment Tribunal**

On: **1 November 2022**

Before: Employment Judge Dyal, Mrs S Dengate and Mr S Townsend

Representation:

Claimant: Mrs Beckles, Non-Legal Representative

Respondent: Miss Patterson, Counsel

RESERVED JUDGMENT

1. The complaint of constructive wrongful dismissal succeeds as against the First Respondent.

2. All other complaints fail and are dismissed.

CASE MANAGEMENT ORDER

3. The parties shall liaise to seek to agree remedy. The shall update the tribunal in that regard within 4 weeks of this judgment being sent to the parties. If they are unable to agree remedy a remedy hearing will be listed.

REASONS

Introduction

The issues

1. The heads of claim are as follows:

   1.1. Constructive unfair dismissal.
   1.2. Constructive wrongful dismissal.
   1.3. A claim for a statutory redundancy payment.
   1.4. Direct race discrimination.
   1.5. Harassment related to race.

2. The issues were identified at a PH on 16 February 2022. These are appended hereto. At the outset of the hearing it was agreed that those remained the issue but with the following clarifications:

   2.1. The constructive dismissal was said to be not only unfair and wrongful but also an act of race discrimination/race harassment.
   2.2. The matters that comprised the complaints of race discrimination and harassment were relied upon as part of the particulars of breach of contract for the purposes of establishing a constructive dismissal. Those matters were said to amount to a breach of the implied term whether or not there was a racial dimension to them. In other words, even if they did not have a racial dimension they were said to be calculated or likely to seriously damage trust and confidence and to be without reasonable and proper cause.
   2.3. The complaint at paragraph 35.5.3 was an evidential point and was withdrawn as an allegation in its own right.

3. In the course of the hearing the Claimant made clear that the only people whom she alleged had treated her less favourably because of race/subjected her to unwanted conduct related to race were Mr McLaren and Mr Cairney.

The hearing

4. *Documents before the tribunal*:

   4.1. Bundle running to 592 pages;
   4.2. Particulars of claim (omitted in error from the bundle);
   4.3. Witness statement bundle as updated;
   4.4. Respondent's opening note, case-law on continuity, note on NHS reckonable service and chronology of the grievance process.

5. *Witnesses the tribunal heard from*:

   5.1. The Claimant.
   5.2. Ms Claire Hughes, formerly Head of Nursing for the Unplanned and Integrated Care Directorate.
   5.3. Mr Kevin Cairney, formerly Director of Operations for Unplanned and Integrated Care.

5.4. Mr Douglas McLaren, formerly General Manager for Acute and Emergency Medicine.
5.5. Mr Harvey McEnroe, formerly Chief Operating Officer.
5.6. Mr Jack Tabner, formerly Executive Director of Transformation and Digital
5.7. Ms Kelly Ratcliffe, formerly Service Manager.
5.8. Ms Gurjit Mahil, formerly Deputy Chief Executive (by video-link - she was suffering from Covid-19).

6. All of the above witnesses gave oral evidence and were cross-examined. At the close of the evidence the parties made oral submissions which we considered carefully.

Findings of fact

The parties

7. The First Respondent is an NHS Trust (hereafter 'the Respondent'). It operates Medway Maritime Hospital in Gillingham. At the relevant times it was struggling:

   7.1. the Respondent was in special measures between 2013 and 2017;
   7.2. even after leaving special measures the respondent was in 'SOF4', Single Oversight Framework, grade 4. That is the highest form of external scrutiny.

8. The Second Respondent, Mr McLaren (hereafter referred to by his name) was an employee of the Respondent. At the material times he was General Manager for Acute and Emergency Medicine and in that capacity the Claimant's line manager.

9. The Claimant is a professional who has spent most of her career in NHS employment. Her NHS employment prior to joining the Respondent was:

   9.1. Locality Cancer Screening/Prevention Facilitator with Barts Health NHS Trust from April 2009 to June 2015 and Service Improvement Facilitator from July 2015 to October 2016.
   9.2. Quality Improvement Manager, NHS England, from October 2016 to the commencement of her employment with the Respondent.

10. In the circumstances set out below the Claimant's employment with the Respondent began on 15 April 2019.

Recruitment and commencement of employment

11. In late 2018 the Unplanned and Integrated Care Directorate was recruiting to two Service Manager roles. One to the Acute Medicine programme and the other to the Emergency Medicine Programme. Previously there had been a single Service Manager for both roles. The Claimant applied. She was interviewed by Ms Korron Spence, Deputy Chief Operating Officer for the Unplanned and Integrated Care Directorate and Ms Claire Hughes, Head of Nursing in the same directorate, in late 2018.

12. Ms Hughes thought the Claimant was a brilliant candidate. Ms Spence was concerned she would not be able to cope with the pace of working in Emergency Medicine. Mr Cairney was consulted and he thought the Claimant was not suitable for the role in Emergency Medicine because she had not worked in that field before. They resolved to offer the Claimant the role of Service Manager, Acute Medicine.

13. At around the same time, Ms Kelly Ratcliffe successfully applied for Service Manager, Unplanned and Integrated Care, Elderly/Frailty (this is also known as Therapies and Older Persons or 'TOPs'). Ms Ratcliffe was an existing employee. Hitherto she was Assistant Service Manager in Speciality Medicine. She commenced working as Service Manager to TOPs in around December 2018.

14. The Claimant believes, based on what she was told, that Ms Ratcliffe was the Service Manager for Acute Medicine prior to becoming the Service Manager for TOPS. However, we have heard Ms Ratcliffe's employment history directly from her and we prefer her evidence. She is in the better position to know what roles she has undertaken and when. She was not in Acute Medicine prior to working in TOPs and she first came to work in Acute Medicine after the Claimant's sick-leave began in September 2019.

15. On 20 December 2018, the Claimant was verbally offered the role of Service Manager Elderly/Frailty Care (now Therapies and Older Persons programme) over the telephone. There was no contemporaneous explanation given as to why she was offered that role. She received a written conditional offer on that date. The written offer was ambiguous in that it identified the role as *Service Manager Elderly/Frailty & ED Urgent Care*. That describes two different roles.

16. On 11 January 2019, the Claimant was sent a contract of employment. This stated the role as Service Manager, Unplanned and Integrated Care, Elderly Medicine (the TOPs role).

17. The Claimant commenced work on 15 April 2019 with some general induction. On 16 April 2019, Ms Spence told her that she would be working in the Urgent and Emergency Care group rather than Therapies and Older Persons. Later that day Ms Spence told the Claimant that in fact her role would be Service Manager for Acute Medicine.

18. The confusing and chaotic approach to the Claimant's role reflected wider chaos within the Respondent at that time:

    18.1. The Respondent was operating in an at least partly dysfunctional state and was in various respects in some disarray;
    18.2. There was no General Manager in post for Acute Medicine. The General Manager would normally be the line manager of the Service Manager;
    18.3. Ms Spence herself was under great pressure in her role and was picking up the line management of the Service Manager in addition a very wide range of other duties.

19. Although the reason for the chaotic and confusing approach to the Claimant's role is not easy to decipher on balance we infer and find that it resulted from a combination of innocent administrative error, miscommunication, overwork and general chaos:

    19.1. The Claimant did not apply and was not interviewed for the role in TOPs. It is thus doubtful that it was properly intended to offer her this role.
    19.2. The Respondent was recruiting to that role roughly contemporaneously with the Claimant's application. It seems likely that the Claimant was initially told she was recruited to TOPs in a mix up.
    19.3. Likewise, it seems likely that there was a simple error when on 16 April 2019 the Claimant was initially told she would be in the Emergency Department. The panel that had considered her application had been of the view that she was better suited to Acute Medicine.

20. The Claimant's oral evidence to the tribunal, which we accept, is that as at April 2019, she was entirely relaxed about which Service Manager role she undertook. She was just excited to be serving the NHS as Service Manager in whatever part of the hospital she was asked to. In fact, she was actually pleased to be working in Acute Medicine rather than TOPs. It would expose her more to some of the great pressures the NHS faces and having experience of those pressures was a beneficial to career development.

21. Later on, when the Claimant was asked to move to TOPs in September 2019 (see below) in a swap with Ms Ratcliffe, she felt some resentment that she had been placed in Acute Medicine in the first place. The Claimant felt it unfair that she had been placed in that role when Ms Ratcliffe did not want it, only for Ms Ratcliffe to be parachuted back into it. However, that resentment about being placed in Acute Medicine in the first place was premised upon a mistaken belief: in fact Ms Ratcliffe had not been the Acute Medicine Service Manager prior to September 2019.

22. On 17 May 20219, Ms Spence left the Respondent's employment and Mr Kevin Cairney, Director of Operations for Unplanned and Integrated Care took over the Claimant's line management.

23. On 27 August 2019, Mr McLaren was appointed to the role of General Manager for Urgent and Emergency Care, thus becoming the Claimant's direct line manager.

24. Until September 2019 the Claimant had very good, friendly relations with each of Ms Ratcliffe, Mr Cairney and Mr McLaren. Ms Ratcliffe had been a sort of 'buddy'. The Claimant had worked with Mr McLaren on the Same Day Emergency Care Project and enjoyed the experience.

Claimant's performance

25. The Claimant was new to service management and new to operational work. The working environment was a very difficult one with problems of leadership,

resourcing, morale and more. There was no General Manager at the outset of her employment so the Claimant was not properly supported or line managed.

26. The Claimant's own view is that she was performing well in her role without any particular issues and she does not accept that she ever told her managers that she was struggling.

27. The Respondent's evidence about the Claimant's performance is very mixed and is not easy to make sense of:

    27.1. Ms Hughes worked closely with the Claimant because operational issues have a massive impact on nursing. Her evidence was broadly that she started to become concerned about the Claimant's performance in the summer of 2019. She recalls the Claimant becoming elusive, ceasing to discuss matters with her and ceasing to seek day to day help. Having had an excellent working relationship with the Claimant her sense was that the claimant was struggling and this elusiveness was indicative of it. Ms Hughes could not recollect any particular issue in respect of the Claimant and the rota. However, her evidence was that the rota was inherently problematic at the hospital and not fit for purpose. In other words there were problems with it but not problems related to the Claimant.

    27.2. Mr Cairney's oral evidence to the tribunal was that the Claimant was performing well in respect of some aspects of her role. This included her being visible, present and available. However, his evidence was that she was struggling with managing the rota. It was his evidence that he had received information to this effect from multiple sources among the clinicians. It was also his evidence that the Claimant had told him that she was struggling.

    27.3. Mr Cairney's evidence during the internal grievance process (see below) was to similar effect but with some nuances. He said this:

        > *Some of the Consultants had some concerns about her command over rotas (as expected given the above) but Rosemary would come to me if she had any major concerns. In essence, she performed as well as I had expected her...* [emphasis added]

    His evidence was also that the Claimant had been taking extended periods of time away from work on account of a family member's illness. He said that this had not been annual or carer's leave but instead an agreement he had reached with the Claimant.

    27.4. Mr McLaren's oral evidence was that he thought the Claimant was having difficulty with the rota. In his evidence to the tribunal he was at pains to draw a distinction between the Claimant struggling with the rota and the Claimant having a performance issue. A performance issue implied some culpability on the Claimant's part and his evidence was that he had not worked with her long enough to be able to say that the struggle with the rota reflected a performance issue on her part. He also said he was

concerned about the Claimant asking to take time out from the workplace. She had started asking to work at home to get administrative work done. In those pre-Covid times working from home was unusual and the request to do this was an indicator to him that the Claimant was struggling. It was also his evidence that the Claimant had told him that she was struggling.

27.5. In the grievance investigation Mr McLaren's evidence was along similar lines and can be summarised as follows:

27.5.1. During the Same Day Emergency Care project the Claimant often did not deliver work to deadlines;
27.5.2. In the two weeks leading to the meeting on 10 September (described below) the Claimant had told him that she was struggling;
27.5.3. In terms of performance in the Service Manager role the only significant matter he commented on was the rota. His evidence was that the Claimant had been late with the rota so emergency steps had been needed to fill gaps. Further, she had produced was a comprehensive template for the rota but one that was not actually populated with any data. At that point she had already missed the deadline.

28. Standing back from all the evidence and weighing it we find as follows:

28.1. The Claimant was not underperforming in any meaningful sense in any aspect of her role;
28.2. However, there were problems with the rota. These arose in part from a lack of experience on the Claimant's side, but that was only a part of the story. The rota was an inherently difficult task that would have been problematic for anyone. The Claimant's performance in relation to the rota was in keeping with her level of experience and the level of training and support she had received to date.
28.3. Concerns about the Claimant and the rota were expressed to Mr Cairney by some clinicians.
28.4. The Claimant discussed how she was getting on in her role with both Mr Cairney and Mr McLaren before 10 September 2019. She did not use the word 'struggling' *but* she did make plain that she was finding it difficult (which it was). The Claimant had a conversation with Mr Cairney in which she indicated that she saw herself in a role in Transformation in the future.
28.5. By the summer of 2019, the Claimant was absent from the workplace much more than she had been in the early stages of her employment. This was in part for personal reasons and in part to try and stay on top of the job. The managers found this disconcerting.

Meetings of 10 - 12 September 2018

29. On 10 September 2018, the Claimant had a one to one meeting with Mr McLaren. There was no advance indication that any performance concern would be raised at the meeting.

30. During the meeting Mr McLaren said that he had a difficult issue to raise. He outlined various major challenges that were imminently coming and which would, we accept, have made life in Acute Medicine significantly more difficult especially for operational staff. These challenges included the winter pressures, imminent scrutiny from NHS England and a CQC inspection in December 2019. He said that he did not consider the Claimant to be operationally strong enough to cope and that as a new line manager he was concerned about his ability to support her. He proposed that the Claimant swap roles with Ms Radcliffe. He gave the Claimant two days to consider the proposal.

31. We accept that this matter was put to the Claimant as a proposal rather than an instruction to move, but it was a proposal that came with a strong indication that it was what Mr McLaren thought should happen. It also plainly carried with it a message that Mr McLaren thought the Claimant was not up to the coming challenges.

32. The Claimant was stunned and extremely upset. She pressed Mr McLaren to explain to her in what respect she had failed to deliver. He was reluctant to give any example but ultimately gave the example of the rota. She found this odd because in the course of the meeting he had praised her for how she had dealt with one particular rota issue.

33. Mr Cairney and Mr McLaren had spoken in advance of this meeting and agreed that the proposal to swap the Claimant with Ms Ratcliffe would be put to the Claimant.

34. On 11 September 2019, the Claimant spoke to Mr Cairney. He apologised to her and said in effect that Mr McLaren had not conveyed the intended sentiment correctly. He said that Rebecca Long, the General Manager in TOPs would be happy to manage the Claimant. He also said that it was just a proposal and that the Claimant did not have to move to TOPs if she assured him she was up for the challenge of staying in acute medicine.

35. On 12 September 2019, the Claimant had a meeting with Mr McEnroe, Chief Operating Officer. This was a scheduled mentoring meeting. We prefer the Claimant's account of this meeting. Generally she was a very impressive witness who gave direct, succinct answers to questions. Her answers were candid whether helpful to her case or not. This meeting was a very important moment in her life and we are satisfied she remembers it well. For Mr McEnroe on the other hand this meeting was simply one of the approximately 15 he tended to have per day and it was not a significant event personally or professionally for him (not a criticism). We think the Claimant's recollection is much the more reliable. It is also in key parts deeply corroborated by the correspondence that follows the meeting.

36. The meeting went very well. Mr McEnroe was very impressed with the Claimant and her professional background. He said he was keen to support employees with a BAME background.

37. The Claimant reported the recent developments in her employment. Mr McEnroe said that he did not think moving the Claimant as proposed was a good idea

because TOPs was also underperforming and had poor leadership. He told the Claimant that he thought her skills were an excellent fit for the Delivery Unit which was a new initiative in the Transformation Team. In essence it brought together people from different parts of the business to deliver key projects. The Claimant sensed that Mr Cairney had spoken to Mr McEnroe and told him about her interest in working in Transformation. We find that this is indeed what had happened. Mr Cairney had told Mr McEnroe of the Claimant's interest in Transformation (this is not a criticism).

38. A central dispute in the case is whether or not Mr McEnroe offered the Claimant a role in the Delivery Unit at this meeting or whether he simply indicated it was a potentially good fit for her and something she may wish to explore with others.

39. We find as a fact that Mr McEnroe did offer the Claimant a role in the Delivery Unit at this meeting. Further, we accept that Claimant's evidence that she asked about budget at this meeting and Mr McEnroe told her that the existing budget for her would move with her and it was then a matter for her old department to deal with that.

40. We take on board the Respondent's points that the detailed particulars of the role were not agreed, there was no job description or recruitment process nor other matters of that sort. And we take on board that the Delivery Unit ultimately did not come to much. However, there is overwhelming evidence in the contemporaneous documents to which we refer below nonetheless that the Claimant was offered a role in the Delivery Unit and that offer was made by Mr McEnroe in this meeting.

41. On 13 September 2019 the Claimant emailed Mr McEnroe as follows:

> Harvey, I would like to thank you for meeting with me yesterday, I'm most grateful. I was very inspired and pleased that I have a leader I respect and look up to and thank you for reinforcing the values that I believe in. Furthermore, although I have enjoyed working in an operational role, I have had time to reflect and I am very pleased to take up your offer to work in Transformation , thank you for this opportunity, I'm again very grateful.

42. There was no response from Mr McEnroe to this email. He does not now recollect receiving it. In his oral evidence he accepted that if he had received this email and noted that it referred to accepting an offer that had not been made he would have corrected it. We find that Mr McEnroe did receive this email. It was correctly addressed to both him and his PA. He did not correct what was said because there was nothing to correct. He had made an offer. It was then for others (Mr Cairney and Mr Tabner) to take forward the Claimant's acceptance.

43. A little later that day, the Claimant emailed Mr Cairney telling him about the meeting with Mr McEnroe and that she had accepted a role in the Delivery Unit. Tellingly, Mr Cairney replied:

> Spoke to Harvey yesterday and congratulations. You will continue to do well in this role and work closely with us. Delivery unit is exciting.
>
> Okay, no problem I will speak with Doug and Jack and get the ball rolling on transfer dates and so forth.

44. The Claimant was then put in touch with Mr Tabner, Executive Director of Transformation. The Delivery Unit was part of Transformation but was run by both Mr Tabner and Mr McEnroe. It was new initiative that they were extremely keen on.

45. On 16 September 2019 the Claimant emailed Mr McEnroe asking if the role in the Delivery Unit could be offered as Band 8a. She did not receive a response.

46. On 17 September 2019, the Claimant emailed Mr Tabner stating "…*I look forward to joining your team soon*". Mr Tabner responded "*Looking forward to it to!*" and arranged to meet the Claimant that afternoon. They met, they got on well and agreed the Claimant would join the Delivery Unit.

47. On 18 September 2019, the Claimant emailed Mr Tabner stating:

> It was a pleasure meeting with you yesterday and I do look forward to joining your team. I would be grateful if you kindly send me any reading materials / brief or background information on the project we will be working in Planned care.

48. Mr Tabner responded on the same day stating:

> "*Welcome aboard – copied are all the folks who can on-board you into the Delivery Unit! We are working under the assumption that you will start from next week. There will be a full kick-off then*."

49. Mr Tabner gave the Claimant a reading list to prepare her for her new role. One of the people copied was Ms Longley, Head of Project Management Office, Transformation Team. She then emailed the Claimant stating *"Wifi is available here and I'm assuming you are bringing a laptop with you?… welcome aboard and looking forward to working with you."*

50. On 18 September, Ms Ratcliffe came to the Claimant's department and spoke openly about becoming the new Service Manager for Acute Medicine. She did this in front of other members of staff. Ms Ratcliffe has no recollection of this matter, however, the Claimant does and we prefer her evidence. We also accept that there were a number of occasions around this time when Ms Ratcliffe came to the department and spoke openly in this way.

51. On 18 September 2019 the Claimant emailed her existing team in Acute Medicine. It was a very positive email to say goodbye upon her transfer to the Delivery Unit. She said "*You all really made me feel part of the Acute and ED Team, and have all supported me in my role of which I'm forever grateful, it's a shame it's come to a short end. I will miss you all very much*".

52. The Claimant asked Mr McLaren to also send an email to the team explaining her leaving and who the replacement would be. On 19 September 2019, Mr McLaren did this. He sent an email to the whole care group (the distribution list for the email occupies two and half pages of the bundle) that dealt with a number of matters and said this in relation to the Claimant:

We will also be having a change in service management for Acute Care. The current service manager, Rosemary who joined the Trust in April has been offered an opportunity in the Transformation Team as it changes its approach to work as a 'Delivery Unit'. From the 30th September, Kelly Ratcliffe from the TOP Care Group will be our new Service Manager for Acute Care. I'd like to thank Rosemary for her hard work to date and wish her well in her new role.

Delivery Unit job unravels

53. On 23 September 2019, the Claimant had a chance encounter with Ayesha Feroz, HR Partner. She told that Claimant that she was surprised to learn that she was moving to the Transformation Team and that her doing so would leave a hole in TOPs operations management and that it did not make sense. She asked the Claimant to explain the history. The Claimant did so and Ms Feroz said that such decisions should not happen without HR involvement. She passed the information on to Ms Nyawade, Deputy Director of HR. The Claimant met Ms Nyawade later that day.

54. Ms Nyawade was surprised and disappointed when the Claimant explained the history to her and said she would look into the matter. She told the Claimant that she could not be transferred to Transformation without due procedure being followed. She said it was not unusual for managers to attempt this type of move without HR involvement and that it happened too often.

55. On 27 September 2019, the Claimant spoke to Ms Nyawade who told her that the role in Transformation did not exist and that there were no recruitment plans for the Transformation Team.

56. Mr Cairney's oral evidence was that Mr McEnroe and Mr Tabner worked "off-policy" with "grey" transactions to get things done. We find that essentially something like that happened here. An offer of a role was made and it was accepted. This done in the informal way described above. However, when it came to HR's attention the plug was pulled.

57. The Claimant was signed off work with stress and anxiety on 1 October 2019. She remained unwell and on sick leave until her resignation.

Grievance

58. On 14 October 2019, the Claimant raised a formal grievance. She complained about the above events and the complaint included an allegation of race discrimination.

59. The grievance was initially, with the Claimant's consent, dealt with informally. On 24 October 2019, the Claimant and her representative met Ms Nyawade to discuss her grievance. The broad plan was to have facilitated conversations / mediation between the Claimant and her managers.

60. In November and December 2019 the Claimant met with Ms Nyawade several times. In the course of doing so she said she no longer wanted to deal with the grievance informally and asked to discuss exit options.

61. Alongside the grievance process, the absence management process commenced.

62. On 2 January 2020, the Claimant sent Ms Nyawade a letter indicating that she did not want to return to any role, did not want to pursue a formal grievance but wanted to leave the Respondent's employment with a settlement. Ms Nyawade responded swiftly stating that the Respondent would have to deal with the Claimant's grievance formally and declining to offer any settlement that went beyond the Claimant's contractual entitlement.

63. There was then a delay of a couple of weeks whilst the Respondent searched for an independent manager to hear the grievance. Mr Mullane, Head of Corporate and Legal, was appointed. Ms Nyawade left the trust's employment shortly thereafter.

64. In February 2020, the first wave of Covid-19 hit the Respondent and huge amounts of its resources were thereafter devoted to dealing with that crisis.

65. On 28 February 2020 the Claimant had grievance investigation meeting with Mr Mullane.

66. On 3 March 2020, the Claimant sent a statement in support of her grievance. She also sent a list of names of people whom she wanted interviewed. Not one of the people on the list were interviewed, not even Ms Hughes who obviously had relevant evidence to give about the Claimant's performance.

67. In March and April 2020, Messrs Tabner, McEnroe, McLaren and Cairney and Ms Ratcliffe gave evidence to the grievance investigator. It is relevant to draw attention to a few parts of their evidence.

68. On 24 March 2020, Mr Tabner produced a statement for the grievance investigation. It took the form of answering written questions that had been put to him. He said this:

> *I had an early discussion with Rosemary about her experience and interests and both she and I were excited by a potential secondment into what we were then setting up: a 'Delivery Unit' – a blended team of transformation team project leads and high performing operational staff to support our work on Elective performance improvement (BEST Access).*
>
> *No formal offer was made and this was an early conversation. I then had no further contact with Rosemary.*

69. This evidence was simply not right. As set out above, it was not just an "early conversation" with "no further contact". In truth, it is just obvious from

correspondence that Mr Tabner and the Claimant had agreed that she would commence in a role in the Delivery Unit, that if HR had not intervened she would have done so in very short order, that Mr Tabner welcomed the Claimant to his team and that he put her in touch with the relevant people to, in his own words, "on-board" her.

70. Mr Tabner also said there was "*no vacancy on establishment*" but that there was a budget "*within establishment*". In response to the question *"What arrangements did you make to receive Rosemary in the team?"* he answered *"none at this early stage*". Again, this was simply untrue. He had given the Claimant a reading list, welcomed her to the team and made steps for her to be on-boarded. In response to a question about why the arrangement did not proceed he said "*I learned she was no longer interested in the proposal".* This is not the reason why the job never came to fruition. It was HR's intervention that prevented it. The Claimant was very keen on the job.

71. Also on 24 March 2020, Mr McEnroe also produced a statement for the grievance investigation. He denied offering the Claimant a role in the meeting on 12 September 2020 and said this: *"I did not offer a formal role change but did offer to discuss RB as a possible candidate for the Delivery Unit….Possible future roles were discussed at this meeting, in response to RB asking about possible alternative roles. Transformation roles were discussed at this time."* He stated that he had received the Claimant email in which she said she was accepting his offer and that *"I asked that this was picked up by Jack and Kevin in arranging the possible transfer".*

72. As set out above, in reality the meeting went a lot further than this and Mr McEnroe did make the Claimant a job offer in the meeting of 12 September 2020.

73. On 17 April 2020, Ms Ratcliffe was interviewed for the grievance investigation. Her evidence was that she had been asked to work in Acute Medicine to cover the Claimant's sickness absence. That is an incomplete explanation. Although in the event the Claimant was on sick-leave, the Claimant's sick-leave is not the reason why Ms Ratcliffe was initially asked to work in Acute Medicine. That is abundantly clear from the documentation, including Mr McLaren's email of 18 September 2019 to the care group explaining that and why Ms Ratcliffe would be assuming the Acute Medicine role. The Claimant did not commence sick-leave until12 days after that.

74. It is also relevant to consider what Mr Cairney and Mr McLaren said about the Claimant's performance as the grievance investigation report goes on to make a strong and adverse findings about this.

75. On 29 March 2020, Mr Cairney gave a statement to the grievance investigation: In relation to the Claimant's performance he said this:

> *Some of the Consultants had some concerns about her command over rotas (as expected given the above) but Rosemary would come to me if she had any major concerns. In essence, she performed as well as I had expected her to* [emphasis added] *but I felt the support package via TOP would have been*

to her advantage. My underlying concern was that as winter was approaching, transformation team was depleted and the care group operational structure was evolving, was that she would be lost and possibly at risk of performance management.

76. Mr Cairney further said this: 325

The pace of TOP I felt was the right level to sustain development but also support her personal life. I was aware that a close relative to Rosemary was suffering from breast cancer which was requiring extended periods of 'time away' from work (this was not A/L or C/L and instead it was an agreement between Rosemary and I). I figured that all of the above and this situation would be resolved by retaining her, taking her away from fast-paced Acute Medicine, placing her in a slower paced, more developmental position with a much more stable team and concurrently give her more time with her family.

77. On 24 April 2020, Mr McLaren produced a witness statement for the grievance investigation. In terms of performance in the Service Manager role the only significant matter he dealt with was the rota. His evidence was that the Claimant had been late with the rota so emergency steps had been needed to fill gaps. Further, that when past the deadline the work she had produced was a comprehensive template but one that was not actually populated

78. On 20 May 2020, the Claimant was told that Mr Mullane was no longer handling the investigation. He had not produced a report before withdrawing. He withdrew to focus on the response to the Covid crisis. Further, the commissioning manager left the Respondent's employment. Ms White, Director of Nursing, Quality and Professional Standards was appointed as the new commissioning manager.

79. Mr Sheath, Trust Solicitor, was appointed to complete the grievance investigation report. He did so on 15 July 2020 although the report was not sent to the Claimant until the grievance outcome was given much later.

80. The grievance report partially upheld the grievance. In essence it found that there had been poor procedural compliance. It rejected the complaints of discrimination. A couple of points are important to note in particular.

81. The report's conclusions, fairly read, find or assume that there was indeed significant under-performance on the Claimant's part and/or that she had a lack of suitability for her role. There was no proper basis for that finding/assumption based on the evidence gathered in the investigation.

82. The report also said this:

As a result of the apparent miscommunication and misunderstandings, RB's expectations of transferring to a post, which did not exist, were unduly raised. Having been shocked and upset by the unexpected criticism of her performance and then offered a move to TOP, RB saw an opportunity of resolving her difficulties by a possible move to Transformation where she had

previously worked, only to find her hopes dashed because no permanent post actually existed.

83. This was absolutely not a case of a misunderstanding or a miscommunication. The Claimant *was* offered a role by Mr McEnroe and did agree with Mr Tabner that she would take the role in the Delivery Unit. There was no misspeaking, there was no miscommunication, there was no misunderstanding. This happened and it is exactly what was intended by those two very senior executives. There is no room for doubt here: the contemporaneous correspondence says what it says. The role in the Delivery Unit was withdrawn simply because HR found out about it and pulled the plug.

84. On 15 September 2020, the grievance outcome was given by Ms White. She enclosed the investigation report which was the Claimant's first sight of it. Ms White said this:

> This grievance is partially upheld in relation to the management and process of your under - performance/suitability for Acute Medicine and proposed transfer to TOP as discussed at the meeting on 10 September 2019 and then a possible transfer to Transformation at meetings on 12 September. As a result of this treatment, I apologise on behalf of the Trust for the lack of proper process in dealing with your under- performance/suitability and proposed transfer/secondment by senior managers without proper consultation or involvement of HR.

85. Ms White's conclusion is, to say the least, surprising in what it upholds. It finds/assumes there was under performance or lack of suitability for the role in Acute Medicine. What is upheld is simply that these capability problems were not managed correctly. Again, there was no proper basis to conclude that the Clamant had been under-performing nor that there was any real issue about her suitability for her role. Moreover, the issue about transferring to the Transformation was nothing really to do with under-performance. The Claimant was not offered the role in Transformation because she was underperforming. She was offered it because Mr McEnroe thought she had exciting skills in public health that made her ideal for such a role. The issue, then, was that the Claimant had been offered a role, accepted it, and then it had been ripped away.

86. Ms White rejected the complaints of discrimination. She made numerous recommendations.

87. The Claimant appealed the grievance outcome on 29 September 2020. The appeal was assigned to Ms Gurjit Mahil, Deputy chief Executive. The grievance appeal hearing took place on 12 November 2020. The grievance appeal outcome was given on 27 November 2020.

88. Ms Mahil's key conclusions are worth setting out in full:

1) The investigation report did not go far enough to explain the issues that you have been seeking answers to, for example why you were placed in Acute Medicine instead of Therapies and Older Persons when joining.

2) There is a lack of evidence that your probation period was managed appropriately in line with the Trust procedure and the reply from Kevin Cairney, that records of one to one meetings held were lost, is unacceptable.

3) It is, at best, unclear whether there were any performance concerns that warranted management intervention and if there were, whether those concerns were low, medium or high risk.

4) The investigation gathered evidence from Kevin and Doug and these are primary sources as part of the line management chain. Although more could have been done to either corroborate or conflict with the information Kevin and Doug provided by seeking evidence from other colleagues such as the Head of Nursing, it is clear from the report that their evidence is questionable and this is reflected in the decision you received in that your grievance was partially substantiated and you received an apology on behalf of the Trust.

5) The investigation did not reconcile contradictory information between Jack Tabner's statement that no offer of employment was made and his email to you on 18 September 2019, advising that he was looking forward to you joining his team. It is clear to me from the exchange that you would have been under the impression that some sort of formal arrangement was being discussed and the Trust did not communicate with you effectively on this topic.

6) On reviewing whether the statement from Harvey McEnroe should have been included in the report I have found that this appears to have been omitted from the papers sent to you in error. Harvey McEnroe did provide an electronic statement as part of the investigation and I have included a copy here for completeness.

7) I have ascertained that Kevin and Doug are compliant and up to date with the Trust's mandatory training on Equality and Diversity issues and have also looked at other cases as you asked me to, which has identified a comparator in Unplanned and Integrated Care, with very similar circumstances to your own case. The handling of the case by the Unplanned and Integrated Care management team is comparative to your own, however the colleague concerned is not a BAME employee. I therefore agree that the way you have been treated has fallen short, which has had a negative effect on your wellbeing, however as per the investigation findings, this does not appear to be founded in any racial prejudice or discrimination.

8) You have recognised in your appeal letter that Doug's decision making may have been a knee-jerk reaction to close scrutiny from external sources and rightly note that this does not remove the responsibility to treat people fairly. For the reasons outlined in this letter I am of the view, based on all of the materials, that Doug's decisions without evidence or explanation of any serious underperformance were the result of poor managerial judgement and decision making.

89. The reference in point 7, is to Mr Gosden. The parties do not agree what the words used here mean. The Claimant's interpretation is that there is an

admission that Mr Gosden was treated differently to her. On this point of interpretation we agree with the Respondent. Point 7 is saying that Mr Gosden was treated in essentially the same way as the Claimant. The word 'comparative' is used where the word 'comparable' would have been better - but the intended meaning is clear. Further, this interpretation was corroborated by Ms Mahil's oral evidence where she explained that she thought Mr Gosden was treated in the same way as the Claimant.

90. On 22 December 2020, the Claimant resigned with immediate effect. 413- 418.

Mr Gosden

91. The evidence in relation to Mr Gosden is in parts confused and confusing. However, doing our best we find a follows:

    91.1. Mr Gosden's employment as a Service Manager for the Emergency Department commenced shortly after the Claimant's;
    91.2. There were concerns about Mr Gosden's performance and those concerns were much more significant and serious than any concerns in relation to the Claimant.
    91.3. Mr Gosden was formally performance managed under the capability policy with a performance development plan that was set by Mr McLaren. It is not very clear when this was. Mr McLaren thought it was in 2020, that is the most direct evidence we have and we so find.
    91.4. Mr Gosden was ultimately moved to a different role because he was not considered competent. The move was to Corporate Services. Ms Mahil said this was in December 2019, however, that cannot be right, and must have been later. We infer it must have followed the performance development plan.

92. In term of training, we have seen the Claimant's training record and Mr Gosden's. If the comparison is limited to the period of time when the Claimant was actually in the workplace, there are no material differences. Naturally, after the Claimant went on sick-leave Mr Gosden continued to have training periodically in the usual way, whereas the Clamant did not because she was on sick-leave.

93. The Claimant's evidence was that Mr Gosden told her that he had been offered management training. There is no specificity about this. Mr McLaren's evidence was that Mr Gosden was not offered any management training courses, that he did not ask for any and that there was no budget for the same. On this point we prefer Mr McLaren's evidence, as it was the clearer, more definite and more cogent. His evidence, which we also accept, is that the Claimant did not ask for management training.

94. Mr Gosden had an Assistant Service Manager, whereas the Claimant did not. However, this reflected an established norm. The Emergency Department was the most difficult and changeable of all and historically there had always been an Assistant Service Manager there. That was not true in Acute Medicine. However, when the Claimant asked Mr McLaren for an assistant in August and September 2019. Mr McLaren was agreeable in principle and asked her to produce a

business case in support which dealt with funding. The Claimant did not produce the business case but that matter was in any event overtaken by events as we have described.

Racial diversity

95. There was not very much racial diversity in the management grades at the Respondent:

95.1. There were a total of 8 Service Managers at the relevant times, of which all were white save for the Claimant and one other who was of Asian background;
95.2. All four general managers were white;
95.3. Most of the executive managers where white.
95.4. Ms Mahil's evidence was that she had dealt with a significant number of grievances in which the employee complained of race discrimination. Generally the detail of the grievances are not in evidence. However, it is in evidence, and we accept, that she upheld a complaint of race discrimination by management level employee who was employed in the Corporate Directorate.

Law

Direct discrimination

96. Section 13 Equality Act 2010 is headed "Direct discrimination". So far as relevant it 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 others."*

97. Section 23 (1) provides*:*

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

98. The phrase 'because of' has been the subject of a significant amount of case-law. In ***Page v NHS,*** Underhill LJ said this:

> *29. There is a good deal of case-law about the effect of the term "because" (and the terminology of the pre-2010 legislation, which referred to "grounds" or "reason" but which connotes the same test). What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the "mental processes" that caused them to act. The line of cases begins with the speech of Lord Nicholls in Nagarajan v London Regional Transport [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in R (E) v Governing Body of the JFS ("the Jewish Free School case") [2009] UKSC 15, [2010] 2 AC 728. The cases make it clear that although the relevant mental processes are sometimes*

referred to as what "motivates" the putative discriminator they do not include their "motive", which it has been clear since James v Eastleigh Borough Council [1990] UKHL 6, [1990] 2 AC 751, is an irrelevant consideration: I say a little more about those terms at paras. 69-70 of my judgment in the magistracy appeal, and I need not repeat it here.

99. In ***Page v Lord Chancellor*** [2021] ICR 912, Underhill LJ said this:

69. … is indeed well established that, as he puts it, "a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation": the locus classicus is the decision of the House of Lords in James v Eastleigh Borough Council [1990] ICR 554; [1990] 2 AC 751 . But the case law also makes clear that in this context "motivation" may be used in a different sense from "motive" and connotes the relevant "mental processes of the alleged discriminator" (Nagarajan v London Regional Transport [1999] ICR 877 , 884F). I need only refer to two cases:

(1) The first is, again, Martin v Devonshires Solicitors [2011] ICR 352 . There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At para 35 I said:
"It was well established long before the decision in the JFS case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in Nagarajan v London Regional Transport [1999] ICR 877 , 884F)—one of which may be relevant in considering the 'grounds' of, or reason for, an allegedly discriminatory act, and the other of which is not." I then quoted paras 61–64 from the judgment of Baroness Hale of Richmond JSC in the Jewish Free School case and continued, at para 36: "The distinction is real, but it has proved difficult to find an unambiguous way of expressing it … At one point in Nagarajan v London Regional Transport [1999] ICR 877 , 885E–F, Lord Nicholls described the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation'. We adopted that term in Amnesty International v Ahmed [2009] ICR 1450 , explicitly contrasting it with 'motive': see para 35. Lord Clarke uses it in the same sense in his judgment in the JFS case [2010] 2 AC 728, paras 137–138 and 145 . But we note that Lord Kerr uses 'motivation' as synonymous with 'motive'—see para 113—and Lord Mance uses it in what may be a different sense again at the end of para 78. It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved—though we must confess that we still find it useful and will continue to employ it in this judgment …"
(2) The second case is Reynolds v CLFIS (UK) Ltd [2015] ICR 1010 . At para 11 of my judgment I said:
"As regards direct discrimination, it is now well established that a person may be less favourably treated 'on the grounds of' a protected characteristic either if the act complained of is inherently discriminatory (e g the imposition of an age limit) or if the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of

Birkenhead in Nagarajan v London Regional Transport [1999] ICR 877 , which was endorsed by the majority in the Supreme Court in R (E) v Governing Body of JFS [2010] 2 AC 728 . Terminology can be tricky in this area. At p 885E Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between 'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same."

70. As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses, but the passages quoted are sufficient to show that the distinction is well known to employment lawyers, and I am quite sure that when Choudhury J (President) used the term "motivation" he did not mean "motive".

100. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

101. The circumstances in which it is unlawful to discriminate against an employee are, so far as relevant, set out in s.39 Equality Act 2010. In that regard something will constitute a 'detriment' where a reasonable person would or might take the view that the act or omission in question gave rise to some disadvantage (see ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, §31-35 per Lord Hope). There is an objective element to this test. For a matter to be a detriment it must be something which a person might reasonably regard as detrimental.

102. In assessing the 'reason why' it is the decision maker's mental processes that are in issue. That is so even if the decision maker has unknowingly received and been influenced by tainted information ***(CLFIS (UK) Ltd v Reynolds*** [2015] ICR 1010).

103. Section 26 EQA 2010 provides:

(1) A *person (A) harasses another (B) if –*
(a) A engages in unwanted conduct related to a relevant characteristic, and
(b) the conduct has the purpose or effect of –
(i) violating B's dignity, or –
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B [for short we will refer to this as a "proscribed environment"].
…
(4) In deciding whether conduct has the purpose or effect referred to in subsection
(1)(b), each of the following must be taken into account –
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

104. In ***Weeks v Newham College of Further Education*** UKEAT/0630/11/ZT, Langstaff J said this at [21]:

"An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant."

105. In ***Richmond Pharmacology v Dhaliwal*** [2009] IRLR 336 (at ¶15), Underhill J (as he was) said:

15…*A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard….Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt."*

22…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of

hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…"

106. A finding that it is not objectively reasonable to regard the conduct as harassing is fatal to a complaint of harassment. That point may not be crystal clear on the face of s.26 Equality Act 2010 but see the *obita dicta* of Underhill LJ in ***Pemberton v Inwood*** [2018] IRLR 557 at [88] and the ratio of ***Ahmed v The Cardinal Hume Academies***, unreported EAT Appeal No. UKEAT/0196/18/RN in which Choudhury J held that ***Pemberton*** indeed correctly stated the law [39].

107. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristics is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in ***Hartley v Foreign and Commonwealth Office Services*** UKEAT/0033/15/LA at [24-2].)

108. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (***Unite the Union v Nailard*** [2018] IRLR 730 at [80]).

109. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** [2020] IRLR 495 HHJ Auerbach gave further guidance:

[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.

[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.

[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the

Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.

The burden of proof and inferences

110. The burden of proof provisions are contained in s.136(1)-(3) EqA:

(1) This section applies to any proceedings relating to a contravention of this Act.
(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.

111. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

112. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

113. The operation of the burden of proof was helpfully summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> *'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude*

that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.
57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"

(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

114. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'*

115. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

116. It is not permissible to infer discrimination simply from unreasonable treatment. However, it can be permissible to infer discrimination from the failure to explain unreasonable treatment (***Bahl v The Law Society*** [2004] IRLR 799).

Constructive dismissal

117. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".

118. It is an implied term of the contract of employment that: *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee"* (***Malik v BCCI*** [1997] IRLR 462).

119. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

120. The core issue to determine when considering a constructive dismissal claim was summarised by the Court of Appeal in ***Tullett Prebon Plc v BGC Brokers LP*** [2013] IRLR 420 as follows:

> *19. … The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693 , at page 698F, per Lord Denning MR, who added: "The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).*
>
> *20. In other words, it is a highly context-specific question…the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

121. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25].

122. In ***Amnesty International v Ahmed*** [2009] IRLR 884, Underhill J gave importance guidance on the relationship between discrimination and constructive dismissal:

> *…The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be*

so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in Malik*. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see* Chief Constable of Avon & Somerset Constabulary v Dolan *(UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and* Shaw v CCL Ltd *[2008] IRLR 284, per Judge McMullen QC at paragraph 18.*

123. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465.

124. In ***LB Waltham Forest v Omilaju*** [2005] IRLR 35, the CA guided that, the final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. The mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

125. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause' or the predominant cause or similar. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

126. **In *Mari v Reuters Ltd (UKEAT/0539/13),*** HHJ Richardson said this in relation to sick pay and affirmation:

49. … The significance to be afforded to the acceptance of sick pay will depend on the circumstances, which may vary infinitely. At one extreme an employee may be so seriously ill that it would be unjust and unrealistic to hold that acceptance of sick pay amounted to or contributed to affirmation of the contract. At the other extreme an employee may continue to claim and accept sick pay when better or virtually better and when seeking to exercise other contractual rights. What can safely be said is that an innocent employee faced with a repudiatory breach is not to be taken to have affirmed the contract merely by continuing to draw sick pay for a limited period while protesting about the position: this follows from Cox Toner, which I have already quoted, for a sick employee can hardly be in any worse position than an employee who continues to work for a limited period."

127. In ***Chindove v William Morrisons Supermarket PLC*** UKEAT/0043/14/BA, Langstaff P said this in relation to affirmation:

24. Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the principles or the name of Western Excavating Ltd v Sharp [1978] 1 QB 761 CA. At page 769 C-D Lord Denning MR, having explained

the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it "altogether abandons and refuses to perform the contract", using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this: "Moreover, he [the employee] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.

26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121 , deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force.

128. In ***Kaur and Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal suggested the following approach:

128.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
128.2. Has he or she affirmed the contract since that act?
128.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
128.4. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?
128.5. Did the employee resign in response (or partly in response) to that breach?

Unfair dismissal

129. The right to complain of unfair dismissal contrary is subject to s.108 ERA. That section provides as follows:

> *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 [F1two years] ending with the effective date of termination.*
>
> *(2)If an employee is dismissed by reason of any such requirement or recommendation as is referred to in section 64(2), subsection (1) has effect in relation to that dismissal as if for the words [F1"two years"] there were substituted the words " one month ".*
>
> *(3)Subsection (1) does not apply if— [list of matters – none of which apply in this case].*
>
> *(4)Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or relates to, the employee's political opinions or affiliation.]*
>
> *(5)Subsection (1) does not apply if the reason (or, if more than one, the principal reason) for the dismissal is, or is connected with, the employee's membership of a reserve force (as defined in section 374 of the Armed Forces Act 2006)*

130. Continuous employment for these purposes is described and defined in Part XIV, Chapter 1 Continuous Employment ERA. For brevity we do not set the whole chapter out though we direct ourselves in accordance with it. Crucially, section 218 ERA provides as follows:

> *218 Change of employer.*
>
> *(1)Subject to the provisions of this section, this Chapter relates only to employment by the one employer. […]*

8)If a person employed in relevant employment by a health service employer is taken into relevant employment by another such employer, his period of employment at the time of the change of employer counts as a period of employment with the second employer and the change does not break the continuity of the period of employment.

(9)For the purposes of subsection (8) employment is relevant employment if it is employment of a description—

(a)in which persons are engaged while undergoing professional training which involves their being employed successively by a number of different health service employers, and

(b)which is specified in an order made by the Secretary of State.

(10)The following are health service employers for the purposes of subsections (8) and (9) […]

131. Redundancy is defined at s.139 ERA:

139 Redundancy.

(1)For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
(a)the fact that his employer has ceased or intends to cease—
(i)to carry on the business for the purposes of which the employee was employed by him, or
(ii)to carry on that business in the place where the employee was so employed, or
(b)the fact that the requirements of that business—
(i)for employees to carry out work of a particular kind, or
(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.

132. Section 155 ERA provides:

155 Qualifying period of employment.

An employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years ending with the relevant date.

Discussion and conclusions

Redundancy and unfair dismissal

133. The only basis upon which the Claimant says that she has 2 years continuous employment is that her contract of employment said this:

> For the purposes of the Employment Rights Act 1996, normally only employment within the Medway NHS Foundation Trust may count as continuous employment.

134. Mrs Beckles submits that since the contract qualifies what is said with the words 'normally' it is arguable that in the Claimant's case her past NHS employment was continuous.

135. Continuity of employment is a statutory concept in this context. The Claimant's employment with other NHS employers is not continuous with her employment with the Respondent for statutory purposes. That is because, among other things, it was not relevant employment for the purpose of s.218(8) ERA: it was not employment of a description *"in which persons are engaged while undergoing professional training which involves their being employed successively by a number of different health service employers"*. We have set out in our findings of fact what her past employment was, and none of her employment was of this sort.

136. The Claimant does not have qualifying service to claim unfair dismissal (as required by s.108 ERA) nor to claim a statutory redundancy payment (as required by s.155 ERA).

137. We note that there is a contractual concept of 'reckonable service' in the NHS. That is another matter that is totally distinct from continuity for statutory purposes. We have not (yet) been addressed on reckonable service and it may/may not be relevant to remedy.

138. Further, so far as the redundancy payment claim is concerned another difficulty is that there is no basis whatsoever to suggest that the reason for the dismissal was or was in any part redundancy. There was no redundancy situation and nothing that happened had anything to do with redundancy.

Allegations at 35.4 and 35.5 of the list of issues

139. The Claimant relies upon the matters set out at paragraphs 35.4 and 35.5 as, respectively, direct race discrimination and harassment related to race. She also relies upon those matters as part of her particulars of breach of contract for the purposes of founding the claim of constructive dismissal and does so whether or not there was a racial element to the treatment/conduct complained of. The allegations therefor need to be considered from more than one perspective.

35.4.1 The decision by the Respondents to move the Claimant from the Therapies and Older Persons team to Urgent and Emergency Care (A&E) and replace her with Kelly Ratcliffe, a comparator; this was in around April 2019 and the Claimant relies on Kelly Ratcliffe as an actual comparator (she also relies on a hypothetical comparator)

140. At the outset of her employment, as set out above, the Claimant was indeed initially told she would work in TOPS, then in Emergency Medicine and then in Acute Medicine, all by 16 April 2019. However, this did not involve replacing Kelly Ratcliffe. Contrary to the Claimant's belief, Ms Ratcliffe had not worked as Service Manager in Emergency Medicine nor Acute Medicine at this time.

141. The Claimant's race had nothing whatsoever to do with the changes to the role she was asked to perform at the outset of her employment. The reason for this treatment was an unimpressive one, but not a discriminatory one. In short, the Respondent was in a state of chaos and partial dysfunction which result in mistakes and confusion in the role that the Claimant was told she was appointed to and asked to perform.

142. Further, neither Mr McLaren nor Mr Cairney had any involvement in assigning the Claimant her role at this stage of the chronology and they are they only people whom the Claimant seeks to impugn as discriminators.

143. Further, there was no detriment within the meaning of s.39 EqA. At that time, the Claimant was actually happy to work anywhere in the hospital as a Service Manager and particularly happy to work in Acute Medicine. She later developed a sense of grievance about being appointed to Acute Medicine in April 2019 when, in September 2019, the swap with Ms Ratcliffe was proposed. In essence the Claimant's sense of grievance was that Ms Ratcliffe was getting to pick and chose her role while the Claimant was bounced around by Ms Ratcliffe's choices. However, that was an unjustified sense of grievance because it was based on a misapprehension that Ms Ratcliffe had previously worked in Acute Medicine and had chosen to leave it for TOPs only to then seek a return to Acute Medicine.

144. The Claimant was not treated less favourably than Ms Ratcliffe. The suggestion that she was is based on the misconception that Ms Ratcliffe had been in, but then left, the acute medicine role because she found it stressful.

145. From the perspective of the implied term, in our view this was not conduct that was objectively speaking, calculated or likely to seriously damage or undermine trust and confidence. It was conduct that was confusing and disorganised, but nothing significantly more than that. A key difference between changing the Claimant's role at this stage of the chronology and what comes late in the chronology is at this stage there was no implication that the changes to the role reflected any shortcoming on the Claimant's part.

35.4.2 The decision by the Respondents to move the Claimant from the Acute Medicine and Ambulatory Care Group to the Therapies and Older Persons team and replace her with Kelly Ratcliffe; this was in around September 2019 and the Claimant relies on Kelly Ratcliffe as an actual comparator and/or a hypothetical comparator

146. There was a decision to this effect although it was not a final decision: it remained open to the Claimant to stay where she was if she did not want to move to TOPs. However, there was certainly significant pressure to move because Mr McLaren made clear it was what he thought should happen and said that he did

not think the Claimant was operationally strong enough for the coming challenges in Acute Medicine. Likewise Mr Cairney told the Claimant she could remain in Acute Medicine if she was prepared to confirm she was 'up for the challenge' of what awaited Acute Medicine.

147. We ultimately have reached the view that the reason for this treatment was, in essence, that the Respondent was not confident that the Claimant could handle the coming pressures in Acute Medicine and that this lack of confidence was unrelated to race.

148. Identifying the reason for this treatment is the single most difficult issue in the case. Before reaching our conclusion, we stood back from the primary facts and asked ourselves what inferences could be drawn and in particular whether any inferences of race discrimination could be drawn. We reminded ourselves that race discrimination exists, that where it does it is often hidden, that we should not expect any direct evidence of it, that it can be subtle and is often sub-conscious. (For the avoidance of doubt this is the approach that we took in respect of all of the discrimination/harassment complaints but in all other cases identifying the reason for the treatment was straightforward).

149. We thought that the following matters were particularly important in the analysis:

149.1. There only a limited basis for any concern about the Claimant's ability to cope with the coming pressures on acute medicine deriving from her performance itself.
149.2. It is odd that neither Ms Hughes nor Mr McLaren seems to have given much/any thought to whether Kelly Ratcliffe would be any better than the Claimant in Acute Medicine with the coming pressures. Mr McLaren's evidence was that he did not know Ms Ratcliffe or anything about her ability. Ms Hughes did know her but did not give the matter thought.
149.3. Mr McEnroe told the Claimant that moving to TOPs did not make much sense as the leadership was weak there too.
149.4. The treatment of the Claimant in respect of the Delivery Unit role.
149.5. As below there were numerous shortcomings in the grievance procedure.
149.6. Ms Radcliffe is white; the Claimant is black.
149.7. There is not much racial diversity in the management grades in the hospital.

150. However, we ultimately decided that it would not be right to infer that the Claimant's race was any part of the reason for the treatment. In that regard we thought the following matters were particularly significant:

150.1. We do accept that Mr McLaren had concerns about the Claimant's conduct of the rota and that those concerns were rooted in his observations of her work. This included an occasion on which she was past the deadline and presented a template that was of high quality but was not actually populated with data.
150.2. We also accept that some clinicians had reported concern about the rota to Mr Cairney and that this weighed on him.
150.3. The Claimant had little operational experience and had had very limited support to date, meaning that her operational skills had not been developed by the organisation to the extent that they should have been.
150.4. The Claimant had made plain to Mr Cairney and Mr McLaren she was finding the role difficult.
150.5. The Claimant had been taking time out from the workplace and had personal issues ongoing.
150.6. TOPs was paced more slowly than Acute Medicine and it was a better environment within which to build operational skills.
150.7. Even if there were wider leadership problems in TOPs, there is no evidence that there would have been any reason to anticipate any difficulty with Ms Long managing the Claimant.
150.8. Remaining in Acute Medicine was a genuine option for the Claimant, albeit clearly not the one her managers preferred.
150.9. Although the Claimant was treated poorly in respect of the Delivery Unit role that treatment was by Mr McEnroe and Mr Tabner. It is not alleged, nor would it be plausible to allege, that this treatment was because of race. Mr McEnroe and Mr Tabner were trying to help the Claimant (and the Respondent) albeit that they over-promised and under-achieved in that regard.
150.10. The shortcomings in the grievance process are poor but they are not - nor are they even alleged - to be because of race.

151. We thus ultimately we find as a fact that the reason for the treatment was that the Respondent was not confident that the Claimant could handle the coming pressures in Acute Medicine.

152. We do not accept that Ms Ratcliffe is an appropriate actual or evidential comparator here. Her circumstances are materially different to the Claimant's. There is no evidence of any lack of confidence in her ability to handle the coming pressures in Acute Medicine. She was also operationally more experienced than the Claimant having worked in operational roles previously including as an Assistant Service Manager.

153. Although Mr Gosden is not identified in the list of issues as a comparator in relation to this issue, in the hearing comparison was made with him. We do not accept that the Claimant was treated less favourably than Mr Gosden. Her primary point is that when there were concerns with Mr Gosden he was offered

structured support whereas she was simply required to move roles. However, in our view what happened was that Mr Gosden was put on a formal performance development plan. In our view that was a significantly more heavy handed form of management intervention and one that implied a level of criticism of Mr Gosden that was far higher than was visited on the Claimant. Being placed on a performance development plan is a serious matter and one that in theory, and in practice, can have serious repercussions for the employee's employment and reputation. In this case, it did genuinely remain open to the Claimant to remain in her role in Acute Medicine and to so without being place on a performance development plan. We therefore do not accept that she was treated less favourably than Mr Gosden. Even if she was, however, the reason for the treatment was no in any part race.

154. We are satisfied that a hypothetical comparator, someone in the Claimant's position who was white, would have been treated in the same way as her.

155. Considering the matter now from the perspective of the implied term of trust and confidence, we find that:

155.1. This was a matter that was likely, objectively speaking, to seriously damage trust and confidence. The way in which it was handled meant that it came as a bolt from the blue. The language used, to the effect that Mr McLaren did not think the Claimant was operationally strong enough, was bound to be extremely upsetting for the Claimant especially as she totally unprepared for it. It basically implied that the Claimant was not competent to do her own job.

155.2. There was no reasonable and proper cause for this conduct. There was very thin basis for what was proposed and to simply put the proposal to the Claimant at that stage, giving her two days to think on it, was unnecessary. There were a wide variety of preceding steps to take before having reasonable and proper cause to bluntly state that the Claimant was not operationally competent and before leaning on her to move roles. For example, offering informal support and/or mentoring and/or training.

35.4.3 The decision by the Respondents to provide a structured development plan and managerial training courses to a comparator, Tim Gosden, who joined the Respondent in a similar role to the Claimant shortly after the Claimant commenced her role with the Respondent but denied the Claimant the same opportunity despite her requests; this was in around May/June 2019 and thereafter and the Claimant relies on Tim Gosden as an actual comparator and/or a hypothetical comparator.

156. The structured development plan that Mr Gosden was put on, was a formal performance development plan under the capability policy. The Claimant was not put on such a plan. This was not less favourable treatment of the Claimant; quite the reverse. Their circumstances were materially different to each other: Mr Gosden's performance was of sufficient concern to Mr McLaren to be put on the performance development plan; the Claimant's was not. The reason for the difference of treatment was nothing to do with race it was simply a difference in

performance.

157. Mr Gosden was not offered managerial training courses, the Claimant is mistaken in that regard. There is no material difference between the Claimant's training record and Mr Gosden in respect of the period of time before the Claimant's sick-leave. Thereafter Mr Gosden continued to received training, the Claimant did not, but the only reason for that, was that she was on sick-leave and he was not.

158. Contrary to this allegation, the Claimant did not request either a structured development plan or managerial training course.

159. The Claimant was not treated less favourably than Mr Gosden nor less favourably than a hypothetical white comparator would have been. Race was no part of the reason for the treatment.

160. None of the matters identified here were calculated or likely to undermine trust and confidence.

35.4.4 The acceptance by the Respondent during the grievance appeal process that the Claimant had been treated differently to a comparator which had a negative effect on her wellbeing but continued to deny that the acts constituted discrimination; this was in around late November / December 2020 and the Claimant relies on a hypothetical comparator;

161. This allegation fails on its facts. The appeal outcome in fact found that the Claimant had been treated the same as not differently to her comparator.

162. The appeal outcome did deny that there had been any discrimination. However, that was because that was Ms Mahil's considered view. She was entitled to that view and, crucially, no part of the reason why she formed that view was race. She formed the view on the evidence.

163. None of the matters identified here were calculated or likely to undermine trust and confidence. Further Ms Mahil had reasonable and proper cause for her views: it is plain that she carried out her part of the grievance process with care. Her outcome letter is generally thoughtful and well balanced. It is critical of the Respondent in several place where she considers that criticism is due.

5.5.1 Following the offer by the Respondent to the Claimant of the role in Transformation, and the Claimant's acceptance of the same, Kelly Ratcliffe, a comparator, visited the Claimant in the Acute Medicine department and informed her that she would be replacing her as Service Manager. The Claimant had no prior knowledge of this; this was in around September 2019;

164. This incident was not in any way related to race as the Claimant accepted at the hearing and in any event as we find.

165. In our view this was a benign incident. Perhaps Ms Ratcliffe could have been more discreet but ultimately there was nothing here that could objectively

reasonably create a proscribed environment nor violate the Claimant's dignity.

166. This was not a matter that could undermine trust and confidence or even contribute to a breach of the implied term.

35.5.2 The Respondent then wrote to the Claimant's colleagues to inform them that Kelly Ratcliffe would be replacing the Claimant as Service Manager in Acute Medicine; this was in around September 2019;

167. This did happen. It was unrelated to race as the Claimant accepted at the hearing. The email was actually written at the Claimant's request. The content of the email is informative, to the point and totally unobjectionable. There was nothing here that could objectively reasonably create a proscribed environment nor violate the Claimant's dignity.

168. This was not a matter that could undermine trust and confidence or contribute to a breach of that term. There was also reasonable and proper cause for it: the Claimant's request the email be sent and the Claimant was due to be moving roles shortly so some management level communication to the team was needed about this.

35.5.3 The Claimant subsequently wrote to her colleagues in the Acute Medicine department to say goodbye and to thank them for their support, only doing so because she had been told she would be transferring to a role in Transformation; this was in around September 2019

169. This was withdrawn as a complaint at the outset of the hearing.

35.5.4 The Respondent then alleged that the Claimant had not been offered a job in Transformation and/or withdrew an offer to work in Transformation; this was in around September 2019.

170. The job offer, which the Claimant had accepted, was indeed withdrawn. It was withdrawn because the offer had been made outside of the Respondent's proper procedures and protocols and HR had discovered it.

171. This had nothing to do with race at all – as the Claimant accepted.

172. It is important not to take an overly literal or pedantic approach to the wording of this issue. The issue is that the Claimant was offered, and accepted a job that then was withdrawn by the employer, because the offer had been made on an improper basis (with the Claimant an entirely innocent party). This was conduct that was likely to seriously damage trust and confidence and for which there was not reasonable and proper cause.

173. The job offer was made by two of the Respondent's most senior executives. There was no reason for the Claimant to doubt it and she accepted it. It was exactly the opportunity she wanted and came to her rescue at what was an extremely difficult time following the conversation with Mr McLaren on 10 September. The offer was thus of the utmost importance to the Claimant. There was a series of

correspondence that made plain she was about to start in her new job. She said goodbye to her old team. Her successor was introduced to her old team. She made arrangements to start in her new team. All of this was then suddenly ripped away from her. Objectively speaking, this was conduct that was likely to seriously undermine trust and confidence.

174. At best it might be said that there was reasonable and proper cause to renege on the role in the Delivery Unit because due process had not been followed in making the offer. However, there certainly was not reasonable and proper cause to agree a new role with the Claimant in all the circumstances we have described, without being able to actually follow through with it. Whilst it is plain that Mr McEnroe and Mr Tabner were genuinely trying to assist both the Claimant and the organisation by placing her into a role they thought would be beneficial all around, they should not a have agreed this with the Claimant if in fact they could not make it happen and/or without involving HR if that was the organisational requirement. There was no reasonable and proper cause for this treatment.

Conclusions on race discrimination and harassment

175. For the reasons given the complaints of race discrimination and harassment must fail. Further, although as set out below, the Claimant was constructively dismissed the dismissal was not tainted by race discrimination nor harassment related to race in any way.

Constructive dismissal

176. The Respondent was in repudiatory breach of the Claimant's contract of employment. There were several breaches of the implied term of trust and confidence.

176.1. The matters discussed under *35.4.2* (even though there was no race discrimination element).
176.2. The matters discussed under issue *35.5.4* (even though there was no race harassment element)
176.3. The manner in which the Claimant's grievance was dealt with to which we now turn.

177. In their evidence to the grievance investigator, Mr Tabner and Mr McEnroe gave evidence which was of great importance but that was simply factually untrue:

177.1. Mr Tabner said that "*No formal offer was made and this was an early conversation. I then had no further contact with Rosemary."* Mr Tabner also said: "*What arrangements did you make to receive Rosemary in the team?"* he answered *"none at this early stage."* This evidence was simply untrue and there is documented correspondence in which makes plain that it was agreed the Claimant would be working in the Delivery Unit and steps were taken to on board her. But for HR intervention she would indeed have commenced working in the Delivery Unit very shortly.
177.2. Mr McEnroe said: *"I did not offer a formal role change but did offer to discuss RB as a possible candidate for the Delivery Unit….Possible future*

roles were discussed at this meeting, in response to RB asking about possible alternative roles. Transformation roles were discussed at this time." This account is not right. Mr McEnroe offered the Claimant a role in the Delivery Unit in the meeting of 12 September 2019. He then confirmed this when he spoke with Mr Cairney as Mr Cairney's contemporaneous email indicates.

178. There was no reasonable and proper cause for giving the above version of events. It is not what happened and the events in question were at that point in time relatively temporally proximate – they dated back around 6 months. There was also a paper trail that could have assisted Mr Tabner/Mr McEnroe to refresh their memories had they chosen to look into the emails they themselves had sent and/or received in respect of the matters the grievance investigator was asking them about.

179. The Clamant was not sent the grievance investigation report until September 2020 when she was sent the grievance outcome. That was thus her first knowledge of the evidence that had been given.

180. The grievance investigation report and grievance outcome also contained further breaches of the implied term of trust and confidence.

180.1. As set out above they purported that the Claimant had a performance problem. They did this on the basis of the thinnest evidence and without a proper investigation. Ms Hughes, for instance, had not been investigated.

180.2. The grievance outcome letter said it partially substantiated the grievance but what was said to be substantiated was, in essence, that the performance concerns about the Claimant had not been well managed.

180.3. The grievance outcome letter purported that the debacle with the Delivery Unit job was based on a misunderstanding/miscommunication. That was in the face of truly overwhelming written, contemporaneous evidence that this was not a misunderstanding or miscommunication at all. But rather a case of two senior executives agreeing a new role with the Claimant and then HR pulling the plug on it upon finding out. There was no attempt made to reconcile the written contemporaneous evidence with the conflicting witness evidence of Mr Tabner and Mr McEnroe.

181. Those matters were very serious and individually, and certainly together, were of a sort that were objectively likely to seriously damage or destroy trust and confidence. There was no reasonable and proper cause for them. No finding that the Claimant had a capability problem was open on the evidence and certainly not without a proper investigation. Likewise the thesis that the Delivery Unit issues were a miscommunication/misunderstanding was not open on the evidence, at least not without a proper attempt to reconcile the witness evidence with the documentary evidence.

182. The appeal outcome is of a different order and it is in the main a high quality piece of work that demonstrates thought, care and balance. However, it does

include one significant point that is not innocuous, nor trivial and though not of itself a breach of contract does contribute something to the existing breaches. It said this:

> 3) It is, at best, unclear whether there were any performance concerns that warranted management intervention and if there were, whether those concerns were low, medium or high risk.
>
> 4) The investigation gathered evidence from Kevin and Doug and these are primary sources as part of the line management chain. Although more could have been done to either corroborate or conflict with the information Kevin and Doug provided by seeking evidence from other colleagues such as the Head of Nursing, it is clear from the report that their evidence is questionable and this is reflected in the decision you received in that your grievance was partially substantiated and you received an apology on behalf of the Trust.

183. We generally agree with and endorse what is said here, but there is one significant problem. It is said that the questionable evidence of Mr McLaren and Mr Cairney was reflected in the grievance outcome being partially substantiated. That is not right in an important respect. The grievance outcome in fact accepted/adopted the evidence that there was a performance concern and one that warranted a management intervention.

184. Although this is academic, for completeness we note that it is also our view that:

184.1. There was an express variation to the Claimant's contract of employment by the agreement that her role would change to one in the Delivery Unit. We do not accept that there was no meeting of minds (as Miss Patterson put it). The detail of the role was not finalised but it did not need to be: the broad nature of the role was clear. The funding for the role was discussed (her existing funding would follow her). The role was thus to be at band 7 and at the same pay. It would be based in the hospital. The Respondent would remain the Claimant's employer. That is sufficient for there to have been a variation to the contract. The Claimant did then angle for a higher grading but did not get anywhere with that. That is an immaterial detail. There was no suggestion that this was a mere secondment but even if was there was still an agreement that the Claimant's role would change albeit in that case only temporarily.

184.2. There was then a breach of that term when the Delivery Unit job was withdrawn. That breach which was, because of the circumstances surrounding it that we have described already, repudiatory.

Resignation and alleged affirmation

185. We are satisfied that the Claimant resigned in response to the above breaches and that the grievance appeal outcome was, factually, the final straw that caused her to resign. The grievance appeal outcome was also in law apt to be a final straw for the reasons set out above and that is so notwithstanding that it was generally a high quality piece of work.

186. In any event, we do not accept that the Claimant affirmed the contract prior to her resignation.

187. It is true, that the Claimant had made her mind up that she would not return to work by January 2020 and that she did not resign until December 2020. Miss Patterson submits that the Claimant affirmed the contract by delaying so long. She further submits that, given that the Claimant had made her mind up in January that she was going to leave, the Claimant cannot rely on any matter that occurred thereafter.

188. We do not accept that analysis. It is true that the Claimant resolved not to return to work by January 2020 and told the Respondent the same. She remained absent from work and continued to pursue a formal grievance complaining of the treatment she received. She was thus constantly protesting the treatment she had received and indicating that she did not accept the breaches. We have not been addressed on whether the Claimant was receiving sick-pay but given that this was NHS employment we assume she was. All the same, in all the circumstances in our view she consistently gave a strong message that she did not accept the breaches and we do not think she affirmed the contract by conduct or otherwise.

189. In any event, after January 2020 there were further repudiatory breaches of contract. We do not accept Miss Patterson's submission that they are irrelevant. Although it is true that the Claimant had already decided she was going to leave by January 2020, those further repudiatory breaches thereafter that we have identified became *additional* reasons for her (a) wanting to resign and (b) then resigning. They are not irrelevant at all.

190. In any event, the later repudiatory breaches came to the Claimant's knowledge in September 2020 when the grievance investigation report and outcome were sent to her. There was then only a relatively short period of around three months until her resignation. During that time she remained off sick and was busy appealing the grievance. There certainly was not any affirmation of the contract between September and December 2020.

191. Finally, there was in any event a final straw very proximately to the resignation. Namely the grievance appeal outcome.

192. All in all, the Claimant was constructively dismissed.

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Employment Judge Dyal

Date 07.11.2022

APPENDIX: LIST OF ISSUES AS AGREED AT PRELIMINARY HEARING

The Complaints

35. The Claimant makes the following complaints:

35.1 Constructive unfair dismissal;

35.2 Breach of contract / wrongful dismissal;

35.3 A claim for a statutory redundancy payment;

35.4 Direct race discrimination about the following:

35.4.1 The decision by the Respondents to move the Claimant from the Therapies and Older Persons team to Urgent and Emergency Care (A&E) and replace her with Kelly Ratcliffe, a comparator; this was in around April 2019 and the Claimant relies on Kelly Ratcliffe as an actual comparator and/or a hypothetical comparator;

35.4.2 The decision by the Respondents to move the Claimant from the Acute Medicine and Ambulatory Care Group to the Therapies and Older Persons team and replace her with Kelly Ratcliffe; this was in around September 2019 and the Claimant relies on Kelly Ratcliffe as an actual comparator and/or a hypothetical comparator;

35.4.3 The decision by the Respondents to provide a structured development plan and managerial training courses to a comparator, Tim Gosden, who joined the Respondent in a similar role to the Claimant shortly after the Claimant commenced her role with the Respondent but denied the Claimant the same opportunity despite her requests; this was in around May/June 2019 and thereafter and the Claimant relies on Tim Gosden as an actual comparator and/or a hypothetical comparator;

35.4.4 The acceptance by the Respondent during the grievance appeal process that the Claimant had been treated differently to a comparator which had a negative effect on her wellbeing but continued to

deny that the acts constituted discrimination; this was in around late November / December 2020 and the Claimant relies on a hypothetical comparator;

35.5 Harassment related to race about the following:

35.5.1 Following the offer by the Respondent to the Claimant of the role in Transformation, and the Claimant's acceptance of the same, Kelly Ratcliffe, a comparator, visited the Claimant in the Acute Medicine department and informed her that she would be replacing her as Service Manager. The Claimant had no prior knowledge of this; this was in around September 2019;

35.5.2 The Respondent then wrote to the Claimant's colleagues to inform them that Kelly Ratcliffe would be replacing the Claimant as Service Manager in Acute Medicine; this was in around September 2019;

35.5.3 The Claimant subsequently wrote to her colleagues in the Acute Medicine department to say goodbye and to thank them for their support, only doing so because she had been told she would be transferring to a role in Transformation; this was in around September 2019;

35.5.4 The Respondent then alleged that the Claimant had not been offered a job in Transformation and/or withdrew an offer to work in Transformation; this was in around September 2019.

36. The Claimant confirmed that these were her only claims.

The Issues

37. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Were some or all of the direct discrimination and/or harassment complaints made outside the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months

(plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

The Respondents accept that the other claims, ie for unfair dismissal, wrongful dismissal and statutory redundancy payment, were presented in time.

2. Unfair dismissal

2.1 Does the Claimant have sufficient continuity of employment to bring this claim? The Claimant says she has continuous NHS employment from 2009.

2.2 Was the Claimant constructively dismissed?

2.2.1 The Claimant relies on:

2.2.1.1 the acts or omissions said to constitute direct race

discrimination and/or harassment related to race as outlined above;

2.2.1.2 breach of contract in that there was an accepted offer that

she move to the Transformation team;

2.2.1.3 in so far as not already covered by the above, the

Respondents' failure to deal properly with her grievance;

2.2.2 Did the Respondent(s) breach the implied term of trust and confidence? The Tribunal will need to decide:

2.2.2.1 whether the Respondent(s) behaved in a way that was

calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Second Respondent; and

2.2.2.2 if so, whether it had reasonable and proper cause for

doing so.

2.2.3 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.2.4 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that she chose to keep the contract alive even after the breach.

2.3 If the Claimant was dismissed, what was the reason or principal reason

for dismissal?

2.4 Was it a potentially fair reason? The Respondents indicated at the Preliminary Hearing that they are likely to rely on some other substantial reason such as to justify dismissal, but this will be confirmed in their Re- amended Particulars of Response.

2.5 Did the Second Respondent act reasonably in all the circumstances in

treating it as a sufficient reason to dismiss the Claimant?

3. Wrongful dismissal / Notice pay

3.1 Was the Claimant constructively dismissed?

3.2 If so, what was the Claimant's notice period? The Claimant says it was

3 months.

3.3 Was the Claimant paid for that notice period?

3.4 If not, was the Second Respondent entitled to dismiss without notice?

4. Redundancy payment

4.1 Does the Claimant have sufficient continuity of employment to bring this claim? The Claimant says she has continuous NHS employment from 2009.

4.2 Was the Claimant constructively dismissed?

4.3 If so, has the Second Respondent proved that the dismissal was for a reason other than redundancy (as defined in section 139 of the Employment Rights Act 1996.

5. Direct race discrimination (Equality Act 2010 section 13)

5.1 The Claimant relies on Black African as her race for these purposes.

5.2 Did the Respondent(s) do the things set out in paragraph 35.4 above?

5.3 Was that less favourable treatment than the treatment of the comparators named in paragraph 35.4 above or a hypothetical comparator?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

5.4 If so, was it because of race?

6. Harassment related to race (Equality Act 2010 section 26)

6.1 Did the Respondent(s) do the things set out in paragraph 35.5 above?

6.2 If so, was that unwanted conduct?

6.3 Did it relate to race?

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

6.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have had that effect.

7. Remedy

7.1 The Tribunal notes that the parties have raised the question of whether there should be an increase or decrease in any compensation award to reflect failure to comply with the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures apply.