EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Zenzo Silape	**v**	Cambridge University Hospitals NHS Foundation Trust

Heard at: Bury St Edmunds **On**: 19, 20, 21, 24, 25, 26 September 2018

Before: Employment Judge M Warren

Members: Ms L Daniels and Mr R Thompson

Appearances
For the Claimant: In person
For the Respondent: Mr Brittenden, Counsel

JUDGMENT having been sent to the parties on 26 September 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided.

REASONS

Background

1. Ms Silape issued these proceedings on 27 July 2015, initially claiming unfair dismissal, age discrimination, race discrimination and disability discrimination.

2. Further and better particulars were provided in a document dated 19 November 2015.

3. At a preliminary hearing on 8 January 2016, the complaint of age discrimination was dismissed upon withdrawal.

4. At an open preliminary hearing on 21 April 2016, before Employment Judge Laidler, Ms Silape's claims of discrimination were struck out as being out of time and as having no reasonable prospects of success. Ms Silape appealed that Judgment and was partially successful; the strike out

of a number of the complaints of race discrimination was undisturbed, but the strike out of two particular claims of race discrimination which had been in time, was set aside. The EAT also set aside the strike out of Ms Silape's complaint of disability discrimination.

5. The matter came before me at a preliminary hearing on 29 March 2018, at which I was concerned to identify the issues in the case and make appropriate case management orders, so that it may be prepared for a final hearing. I was presented with a draft list of issues which we discussed. As a result of those discussions, the respondent, Ms Silape and I agreed on appropriate amendments to the respondent's draft list of issues so that it may accurately reflect Ms Silape's case.

6. I set the matter down for this hearing and made appropriate case management orders which have, so far as we are aware, been complied with.

Issues

7. I set out, by cut and pasting, the agreed list of issues below.

8. I have annotated the list of issues in bold with amendments that were agreed with the parties during the course of this hearing.

9. Prior to the hearing commencing, the respondent had conceded that Ms Silape was at all material times a disabled person as defined in the Equality Act 2010.

1 Claimant's claims

1.1 The Claimant brings complaints of:

*1.1.1 constructive unfair dismissal under section 95(1)(c) of the Employment Rights Act 1998 ("**ERA**");*

*1.1.2 direct race discrimination pursuant to sections 13 and 39 Equality Act 2010 ("**EqA**"); and*

1.1.3 direct disability discrimination pursuant to sections 13 and 39 EqA.

2 Constructive unfair dismissal claim

2.1 The Respondent denies that it dismissed the Claimant and avers that the Claimant resigned voluntarily with effect from 6 May 2015.

2.2 The Claimant alleges that the Respondent breached the implied term of mutual trust and confidence in the Claimant's contract of employment. The Respondent denies that there was any breach of the implied term of mutual trust and confidence, as alleged or at all.

2.3 The Respondent is also alleged to have breached the implied term that requires an employer to provide a safe place of work. The Respondent denies that there was any breach of this implied term, as alleged or at all.

*2.4 Did the Respondent fundamentally breach the implied terms identified in paragraphs 2.2 and 2.3 above so as to entitle her to resign? The following matters are alleged by the Claimant in paragraphs 56 to 69 of the document attached to the Claim Form ("**Details of Claim**"):*

2.4.1 The Respondent failed to adequately and in a timely fashion investigate the issues raised by the Claimant under the Dignity at Work Policy.

2.4.2 In the grievance appeal, the Respondent failed to address or take into account:

(i) staff shortages;

(ii) in respect of the incident on 11 December 2013 (not 11 February 2013 as suggested in paragraph 58 of the Details of Claim), that when the Claimant and a colleague were seen laughing (see paragraph 18 of the Details of Claim) Senior Sister Hutt targeted the Claimant and not her colleague;

(iii) in respect of the incident on 3 February 2014 (see paragraph 28 of the Details of Claim), the manner in which the Claimant says that Senior Sister Hutt spoke to her; and

*(iv) in respect of the incident on 5 February 2014 (see paragraph 29 of the Details of Claim), **[Delete - that Senior Sister Hutt had cancelled the Claimant's 'Breakaway" training and the manner in which she did so]. The manner in which Senior Sister Hutt responded to the Claimant not attending the Breakaway training.***

2.4.3 That when the Claimant raised matters informally the Respondent did not investigate them.

*2.4.4 That when the Claimant approached and spoke to a Consultant with regards to her problems, **[Delete - she was disciplined for doing so] it was identified as a discplinary issue by Sarah Randal.***

*2.4.5 The Respondent knew that the Claimant was suffering from stress from 24 April 2012, but did not carry out a risk assessment until **[Delete -12 February 2015] May 2014**.*

2.4.6 The Respondent took too long to deal with the Claimant's grievance.

2.4.7 The Respondent indicated an intention to consider dismissing the Claimant by reason of her ill health, which had been caused by events in the workplace.

2.4.8 The Respondent failed to uphold the Claimant's grievance and condoned the actions of Senior Sister Hutt by proceeding with disciplinary action against the Claimant.

2.4.9 Senior Nurse Sally Walters suggested to the Claimant during a grievance investigatory meeting that she should retire. The Claimant cannot recall the date of this meeting but says that the suggestion is recorded in the minutes.

2.5 If so, did the Claimant resign in response to the breaches identified at paragraphs 2.4.1 to 2.4.9 above?

2.6 If so, did the Claimant resign sufficiently promptly or should the Claimant be regarded as having waived or affirmed the breaches identified at paragraphs 2.4.1 to 2.4.9 above?

3 <u>Direct Race Discrimination Claims</u>

3.1 The Claimant alleges the following less favourable treatment:

3.1.1 That when the Claimant was off sick (which was from 30 May 2014 to 6 May 2015), the Claimant was:

(i) banned from entering ward G6;

(ii) banned from entering any other department at the Respondent's hospital; and

(iii) banned from accessing the Respondent's computers.

*The Claimant says other staff were not similarly banned when off sick (see paragraphs 5.7 – 5.7.3 of the Claimant's response to the Respondent's request for further and better particulars ("**F&BPS**"));*

3.1.2 That the Respondent did not deal with the Claimant's grievance against Senior Sister Hutt (which was not upheld) fairly on the basis that:

(i) the only staff interviewed were those who were in support of Senior Sister Hutt;

(ii) the Claimant was never afforded a chance to call witnesses and therefore the investigation was flawed. The Claimant says she highlighted this during the Grievance Appeal Hearing but the Appeal Hearing Panel still upheld the conclusions of the investigation;

(iii) the Claimant's request for an independent investigation was refused;

(iv) the Respondent upheld Senior Sister Hutt's grievance against the Claimant;

(v) following the Respondent's decision to uphold Senior Sister Hutt's grievance, the Claimant was to face a Disciplinary Hearing and was to be sanctioned with a Final Written Warning; and

(vi) the Claimant's request for access to the duty roster to enable her to identify staff she could call as witnesses to the Disciplinary Hearing was denied,

(see paragraphs 5.8.1 – 5.8.5 of the Claimant's F&BPS).

3.1.3 That the matters the Claimant alleges caused her to resign and that she alleges amount to constructive dismissal (listed in paragraphs

2.4.1 to 2.4.9 above), amount to dismissal contrary to section 39(2)(c) EqA. As stated in the Preliminary Hearing Summary sent to the parties on 14 April 2018, insofar as any of the same could be said to be the same allegations as those which have been struck out for being out of time, the Employment Tribunal would not have jurisdiction.

3.2 Did the Respondent, because of the Claimant's Black African origin, treat the Claimant less favourably than it treated others, or would treat others, not of the Claimant's Black African origin by reason of the matters set out in paragraph 3.1.1?

3.3 Did the Respondent, because of the Claimant's Black African origin, treat the Claimant less favourably than it treated Senior Sister Hutt, who is not of the Claimant's Black African origin, by reason of the matters set out in paragraph 3.1.2 above?

3.4 Did the Respondent, because of the Claimant's Black African origin, treat the Claimant less favourably than it treated others, or would treat others, not of the Claimant's Black African origin by reason of the matters referred to in paragraph 3.1.3?

4 <u>Direct Disability Discrimination Claims</u>

<u>Disability</u>

4.1 Was the Claimant a disabled person at the relevant time within the provisions of the EqA?

4.1.1 The Claimant relies upon a mental impairment, namely depression.

4.1.2 The Claimant alleges that she was diagnosed with depression in June 2014.

4.1.3 The Claimant alleges that the mental impairment relied upon had a substantial adverse effect on her ability to carry out normal day to day activities, as set out in the Impact Statement the Claimant submitted to the Employment Tribunal on 19 November 2015.

4.2 Did the Respondent know, or ought reasonably to have known, of the Claimant's alleged disability?

Disability discrimination claim

4.3 The Claimant alleges the following less favourable treatment:

4.3.1 That on 1 April 2015 the Respondent told the Claimant that the Respondent would proceed to consider whether to terminate the Claimant's employment on the grounds of capability due to ill health, despite the Occupational Health doctor indicating that "it is likely to be a 3 to 6 month period for [the Claimant's] health to recover sufficiently to consider a return to alternative work" and that there was room for recovery with a view to an alternative placement (see paragraphs 6.3 – 6.3.2 of the Claimant's F&BPs).

4.4 Did the Respondent, because of the Claimant's disability, treat the Claimant less favourably than it treated Sarah Whitby (Staff Nurse), Naomi Okoe (Junior Sister) and Rowena (Junior Sister on Ward G3), as set out in paragraph 4.3.1 above?

5 Remedy

5.1 If successful, what compensation should the Employment Tribunal award to the Claimant, to include consideration of entitlement to an award for injury to feelings in respect of any unlawful discrimination as is found to have occurred?

5.2 Should any compensation as is awarded to the Claimant be reduced to reflect:

5.2.1 Polkey principles;

5.2.2 sections 122 and 123 of the ERA;

5.2.3 any failure to take reasonable steps to mitigate her loss on the Claimant's part;

5.2.4 that the Employment Tribunal considers it would be just and equitable to do so?

5.3 The Claimant is also claiming to have suffered personal injury.

Evidence

10. Ms Silape did not call any witnesses other than herself. She prepared a witness statement of 101 paragraphs, neatly and succinctly setting out her case in chronological order.

11. For the respondents, we had six witness statements:

    11.1 Ms Liz Hughes, Divisional Head of Workforce;

    11.2 Ms Sarah Randall, Matron;

    11.3 Ms Charlotte Mills, Divisional Head of Workforce;

    11.4 Mr David Wherrett, Director of Workforce;

    11.5 Ms Holly Sutherland, Divisional Head of Nursing;

    11.6 Ms Zsuzsa Meszaros-Knight, Divisional Head of Workforce.

12. We heard evidence from each of the witnesses except Ms Meszaros-Knight, who for personal reasons was unable to attend the hearing. Whilst we read her witness statement, we treated its content with circumspection and attributed to her evidence such weight as we thought appropriate, having regard to the fact that she was not here to have her evidence tested under oath.

13. We had before us a paginated and indexed bundle of documents running to page number 819.

14. On the first day of the hearing, we read the witness statements and read or looked at in our discretion, the documents referred to in the witness statements. We made sure that we did read all the documents set out for us in what was an agreed reading list, save that we did not read from beginning to end, the respondent's Dignity at Work policy.

15. I emphasised to the parties that they must not assume that we have read and taken on board everything that is relevant in the documents and that they must make sure that they take us to what they regard as important passages during their evidence, or cross examination.

Matters of Practice

16. The tribunal were anxious to say to the respondent's representatives that we did find it exasperating at times that the bundle was not assembled in chronological order. There are three reasons why a bundle in chronological order assists. The first is that it helps the tribunal get to grips with a complex matrix of facts quickly at the beginning of the case; secondly, during the course of the case it helps everybody find a document that they are looking for quickly; thirdly and importantly, when you have a self-representing claimant, it assists the claimant in finding documents and preparing the case.

The Law

17. I explained to the parties that I have prepared a detailed explanation of the law that will appear in any written reasons I might be required to produce. I gave a laymen's explanation as appears below.
18. Constructive Dismissal: very simply, this is where an employee has been treated so badly by the employer that she is entitled to resign and claim unfair dismissal because the employment relationship has been destroyed.

19. Direct Discrimination: is where somebody is treated badly and less favourably than somebody else would have been treated had that other person not shared the claimant's characteristics.

20. So, in this case we have two claims of direct discrimination, one based on race, one based on disability.

21. Direct discrimination would be where the claimant, because she is black African, or because she is disabled, is treated badly by her employer and worse than a person in exactly the same situation as she was in, would have been treated had that person not been black African, or was not disabled.

22. In a discrimination case, it is for the claimant to prove facts from which we could conclude that there was discrimination and if she does that, we then look to the respondent to prove to us that discrimination was not behind what happened.

23. My detailed lawyer's explanation of the relevant law, appears in the paragraphs below.

24. The right not to be unfairly dismissed is provided for at section 94 of the Employment Rights Act 1996, (ERA).

25. Section 95 defines the circumstances in which a person is dismissed as including where:

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

26. That is what we call constructive dismissal. The seminal explanation of when those circumstances arise was given by Lord Denning in Western Excavating(ECC) Ltd v Sharpe 1978 ICR 221:

> *" If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so,*

> *then he terminates the contract by reason of the employers conduct. He is constructively dismissed."*

27. The Tribunals function in looking for a breach of contract is to look at the employer's conduct as a whole and determine whether it is such that the employee cannot be expected to put up with it, (see Browne – Wilkinson J in Woods v W M Car Services (Peterborough) ltd [1981] IRLR 347).

28. A fundamental breach of any contractual term might give rise to a claim of constructive dismissal, but a contractual term frequently relied upon in cases such as this is that which is usually described as the implied term of mutual trust and confidence.

29. The leading authority on this implied term is the House of Lords decision in Mahmud & Malik v BCCI [1997] IRLR 462 where Lord Steyn adopted the definition which originated in Woods v W M Car Services (Peterborough) Ltd namely, that an employer shall not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

30. The test is objective, from Lord Steyn in the same case:

> *"The motives of the employer cannot be determinative or even relevant…..If conduct objectively considered is likely to destroy or seriously damage the relationship between employer and employee, a breach of the implied obligation may arise."*

31. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

32. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act can not be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

33. There is also implied in every contract of employment, obligations to deal with Grievances timeously and reasonably, (see WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516) and to provide a safe system of work.

Discrimination

34. The relevant law is set out in the Equality Act 2010.

35. Section 39(2)(d) proscribes an employer from discriminating against an employee by subjecting the employee to a detriment.

36. Race and disability are amongst the protected characteristics identified at s.4.

37. Race is defined at s.9 and includes colour, nationality, ethnic and national origins.

38. The Respondent accepts that Ms Silape was at the material time a disabled person as defined in the Equality Act.

Direct Discrimination

39. Ms Silape says that she was directly discriminated against because of her race and disability. Direct discrimination is defined at s.13(1):

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

40. Section 23 provides that in making comparisons under section 13, there must be no material difference between the circumstances of the Claimant and the comparator. The comparator may be an actual person identified as being in the same circumstances as the claimant, but not having her protected characteristic, or it may be a hypothetical comparator, constructed by the Tribunal for the purpose of the comparison exercise. The employee must show that he/she has been treated less favourably than that real comparator was treated or the hypothetical comparator would have been treated.

41. How does one determine whether any particular less favourable treatment was, "because of" a protected characteristic? Under the previous legislation, the term used to proscribe direct discrimination was, "on the ground of" the particular protected characteristic. In the Court of Appeal, Lord Justice Underhill confirmed in Onu v Akwiwu and Taiwo v Olaigbe [2014]IRLR 448 at paragraph 40 that there was no difference in meaning between, "because of" and "on the grounds of".

42. As Lord Justice Underhill explained in Onu v Akwiwu and Taiwo v Olaigbe, what constitutes the grounds or reason for treatment will vary depending on the type of case. He referred to the paradigm case in which a rule or criterion that is inherently based on the protected characteristic is applied. There are other cases, not involving the application of discriminatory criterion, where the protected characteristic has operated in the discriminator's mind in leading him to act in the manner complained of. The leading authority on the latter is Nagarajan v London Regional Transport [1999] IRLR 572 and in particular, the speech of Lord Nicholls of Birkenhead, (I quote from paragraphs 13 and 17):

> *"…in every case it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator…*
>
> *I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn."*

43. The protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of, but it must be an effective cause. Lord Nicholls in Nagarajan referred to it being suffice if it was a, "significant influence":

> *"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."*

44. Detriment was defined in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285; the Tribunal has to find that by reason of the act or acts complained of, a reasonable worker would or might take the view that he or she had been disadvantaged in the circumstances in which he or she had thereafter to work.

Burden of Proof

45. Section 136 deals with the burden of proof:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if (A) shows that (A) did not contravene the provision.

46. The Appeal Courts guidance under the previous discrimination legislation continues to be applicable in the context of the wording as to the burden of proof that appears in the Equality Act 2010. That guidance was set out in Igen Limited v Wong and others [2005[IRLR 258. That case sets out a series of steps which we have carefully observed in the consideration of this case and we will set them out-

46.1 It is for the Claimant 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.

46.2 If the Claimant does not prove such facts, she will fail.

46.3 It is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit discrimination even to themselves.

46.4 The outcome, at this stage, of the analysis by the Tribunal will, therefore, depend upon what inferences it is proper to draw from the primary facts found by the Tribunal.

46.5 At this stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an unlawful act of discrimination. At this stage the Tribunal is looking at the primary facts proved by the Claimant to see what inferences of secondary fact could be drawn from them.

46.6 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.

46.7 These inferences can include, in appropriate cases, any inferences that are just and equitable to draw from evasive or equivocal replies to questionnaires.

46.8 Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and if so to take it into account. This means that inferences may also be drawn from any failure to follow a Code of Practice.

46.9 Where the Claimant has proved facts from which conclusions could be drawn, that the Respondent has treated the Claimant less

favourably on the prohibited grounds, then the burden of proof moves to the Respondent.

46.10 It is then for the Respondent to prove that it has not committed the act.

46.11 To discharge that burden of proof it is necessary for the Respondent to prove, on the balance of probabilities, that the prohibited ground in no sense whatsoever influenced the treatment of the Claimant, (remembering that the test now is whether the conduct in question was, "because of" the prohibited ground – see Onu v Akwiwu referred to above).

46.12 The above point requires the Tribunal to assess not merely whether the Respondent has provided 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 the prohibited ground was not a ground for the treatment in question.

46.13 Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, the 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.

47. This does not mean that we should only consider the Claimant's evidence at the first stage; Madarassy v Nomura International plc [2007] IRLR 246 CA is authority for the proposition that a Tribunal may consider all the evidence at the first stage in order to make findings of primary fact and assess whether there is a *prima facie* case; there is a difference between factual evidence and explanation. That case also confirms that a mere difference in treatment is not enough.

48. In Commissioner of Police of the Metropolis v Denby UKEAT/0314/16 Kerr J said, (quoting Lord Nicholls in Shamoon) that sometimes the reason for the treatment is intertwined with whether the Claimant was treated less favourably than a comparator such that, *"the decision on the reason why issue will also provide the answer to the less favourable treatment issue".*

Cast List

49. Jenny Abel, Senior Clinical Nurse;

Rachael Coyme, Divisional Lead Nurse;

Adrian Down, Employee Relations Manager;

Tony Durcan, accompanied the claimant to the grievance appeal hearing;

Lisa England, Employee Relations Manager,

Kathryn Hardaker, RCN Representative;

Monique Hodges, Senior Employee Relations Manager;

Liz Huges, Divisional Head of Workforce;

Louise Hutt (nee Huwson), Senior Sister;

Adrian Ing, RCN Representative;

Kirsty Jones, Senior Clinical Nurse / Matron Ward G6;

Zsuzsa Meszaros-Knight, Divisional Head of Workforce Division E;

Charlotte Mills, Divisional Head of Workforce Division D;

Ciara Moore, Associate Director of Operations;

Steve Ney, RCN Representative;

Malwina Paulus, HR Advisor;

Sarah Randall, Matron;

Madeleine Seeluy, Senior Clinical Nurse;

Holly Sutherland, Divisional Head Nurse / Director of Operations;

Sally Walters, Divisional Lead Nurse;

David Wherrett, Director of Workforce.

Findings of Fact

50. The respondent operates two NHS hospitals on the same site, Addenbrooke's and the Rosie Hospital. The latter provides maternity care. It employs 8,700 people. It is divided into clinical departments called 'Divisions'. Each division has a Head of Workforce, ie a Head of HR, supported by an Employment Relations Manager and an Employment Relations Case Worker. Heads of Workforce report to an Associate Workforce Director, whom in turn reports to a Workforce Executive Director.

51. There are a number of policies to which we have been referred.

52. The first is the Managing Employee Attendance policy, which is at page 147C. We were not taken to anything in particular in this policy, but Ms

Sutherland referred to it as Ms Silape had in the early stages been managed under this policy.

53. The next is the Managing Long Term Sickness policy; the policy agreed with the Unions begins at page 154. It is a policy said at page 156 to provide general guidance. Page 157 item 4.3 reads:

> "*Occupational Health Assessments are to be used with discretion and as a means of seeking to advise us on the best way to support an employee's health and well-being and return to work. Line managers must note that that an OH assessment must always have been completed prior to a referral to the final hearing of this procedure"*

54. As to disability, at 4.4 provision is made for the Trust to consider the provision of additional assistance under this policy where a person is disabled.

55. At 4.6, reference is made to stress risk assessments, which should be considered where work conditions might be contributing to long term health problems.

56. At 5.32 and 5.33, reference is made to consideration of re-employment when a person is absent on long term illness and reference is made to the requirement to consider redeployment, in particular in a situation where a person is disabled.

57. The final stage of the procedure is referred to at 5.4, page 164:

> *"If no return to work dates can be established despite a series of formal meetings over a period of time, where all interventions have proved unsuccessful to date, redeployment is not feasible and there is no foreseeable indication of a return to work, it may be necessary to move to a final review hearing to consider discontinuation of employment on grounds of incapability.*
>
> *The final review hearing should take place before the employee has been off sick for 12 months."*

58. At 5.4.2, by reference to the final review meeting, it is made clear that before a decision to dismiss is made, the person dealing with the matter will first consider whether all possible considerations be given for a return to work with or without adjustments, that every effort has been made to accommodate an employee with a disability and that redeployment has been considered. Possible outcomes of this final review are a longer adjournment, the obtaining of further information, further consideration of redeployment or dismissal.

59. Another policy referred to in this case has been the Dignity at Work policy, which begins at page 213. This is a policy which, as the title suggests,

deals with the employees right to be treated with dignity in the workplace and not to be subjected to harassment, bullying and victimisation.

60. One provision within the policy which Ms Silape has referred to a number of times, is under item 7, Guiding Principles at the top of page 219:

> *"The Trust will reserve the right to pursue the issue formally in the interests of its employees and to honor its legal duties under employment health and safety legislation even though the complainant may not wish to pursue the matter formally themselves, or withdraws his / her complaint."*

61. The policy anticipates, to begin with, an informal approach, then an informal approach through a third party, as at page 222, followed by initiating a formal allegation, page 223. Then the policy anticipates that once a formal allegation has been raised, there will be an initial response in the form of a meeting with the complainant followed by an appropriate and formal investigation. Following an informal investigation, page 226, it is anticipated the possible outcomes are either that no formal action is considered appropriate, or the individual investigating may consider that some form of management action is required, or, as the policy then states at 11.3.3:

> *"If the investigating officer thinks that there has been a breach of discipline of a minor nature they have authority to issue a verbal warning without recourse to a formal disciplinary hearing. But if that officer thinks that there has been a breach of discipline that warrants action beyond a verbal warning, a disciplinary hearing is to be convened.*

62. If an employee is dissatisfied with the outcome of a Dignity at Work complaint, then item 12 of the policy at page 228, says the next stage is to raise a grievance.

63. The grievance procedure is at page 150, where the procedure sets out the process to be adopted to raise a grievance, or as is the case here, to effectively appeal against the outcome of the Dignity at Work complaint if one is dissatisfied with it.

64. There is then an appeals procedure, which is at page 248F. What we have had in this case is, as we will see, a Dignity at Work complaint, the outcome of which Ms Silape was not happy with, so she then raised a grievance, (which one might describe as an appeal against the Dignity at Work complaint outcome) followed by an appeal against the outcome of the grievance.

65. Ms Silape describes herself as black African and is a qualified nurse. Her employment with the respondents commenced on 31 January 2000. She was employed as a Band 5 nurse. She has worked throughout primarily on a ward providing care to elderly patients. On 22 March 2004, she was

promoted to Band 6. Latterly, she has been managed by a Ms Hutt. There had been no issues with her employment before 2012.

66. In March 2012, Ms Silape was asked to move to another ward. She has been much vexed by this request throughout the remaining time of her employment with the respondent and during this case. She was asked to move by two people, the Senior Ward Sisters, Ms Hutt and a Ms Kerry Piccaver. Ms Silape complains that pressure was put on her to move, which caused her stress, anxiety, sleepless nights and palpitations.

67. Ms Silape was seen by occupational health, who provided a report on 18 May 2012, page 266. This says that she does not have any underlying health conditions. It does say that the workplace has contributed to symptoms of palpitations and sleep disturbance, explaining that she feels under pressure to move which has caused her anxiety. No additional help nor treatment was recommended. Having seen this report, the decision was made not to move Ms Silape.

68. In July 2012, the respondent introduced a new method of appraisal and a performance evaluation tool referred to as a PET. An appraisal of Ms Silape was conducted by Ms Hutt on 5 September 2012, this is at page 268. We note therein it is recorded that Ms Silape has written that she felt demoralised and she did not feel supported by senior staff. Ms Silape further wrote a file note about what had been said to her in the appraisal, page 272, dated 5 September 2012. She wrote that Ms Hutt had said the other Band 6 nurses had gone to her stating that they were finding it difficult to work with Ms Silape, that criticism had been made of her not acknowledging or making entries in the Band 6 communications book and that she had looked through it and highlighted that other people were not commenting either. She also records that she had said to Ms Hutt that she would like to discuss with the Band 6s these matters so that they can air their concerns with her.

69. Ms Silape explains in her witness statement that she started to feel ostracised from this point onwards.

70. During September 2012, Ms Hutt also carried out a performance review PET, we were never referred to a copy of that document.

71. Ms Hutt was on maternity leave from November 2012 to October 2013. Whilst Ms Hutt was on maternity leave, Ms Silape was managed by Ms Gemma Coteman.

72. In December 2012, because Ms Hutt was on maternity leave, Ms Abel asked Ms Silape to discuss the PET with her. At the time, Ms Silape declined because it was the end of her shift and she had been busy. That discussion then subsequently took place sometime later, on 12 March 2013. There is a written record of this at page 274, which records that at the time of the PET scores in September, Ms Silape had appeared jaded and demoralised. This had, it was said, affected her ability

to communicate effectively with the team, it appeared that she was unable to identify barriers to communication and therefore amend her communication style accordingly. It is recorded that colleagues had reported that Ms Silape's communication style was sometimes rude and confrontational. However, Ms Abel wrote that she believed that this may have been misinterpreted.

73. It is also recorded that Ms Silape had been heard to say that she was unwilling to challenge the team's practice around her because she could not be bothered and felt unsupported in doing so. The author also states that since September when the PET was scored, she had seen a significant improvement in Ms Silape's communications.

74. Nevertheless, Ms Silape did not like what had been said at this review and so we see at page 280, a document entitled, 'PET Outcome, Employee Right of Review' form. On this, Ms Silape has had the opportunity of setting out her dissatisfaction with the PET review, which she regarded as inaccurate. She states that she had no problems working with Ms Hutt prior to her maternity leave, but said she would challenge her if she felt that things were not right. She said she had asked for a copy of the PET report for her records, but this had not been provided. She then refers to having seen the results of the PET evaluation on 29 March, indicating that there were performance gaps and she said she was of the opinion that she performs to the required standards. She writes that if she was as bad as was suggested, it would have been drawn to her attention a long time previously. She states that she does not believe the PET evaluation had been done objectively and that her performance levels were not as indicated.

75. On 29 April 2013, an HR advisor Alison Pooley, met with Ms Silape to discuss the PET review. She provided a written outcome to those discussions, page 282, dated 15 May 2013. She records her findings as including Ms Silape had agreed that she had been feeling demoralised and that there were issues with her communications. She notes that her communication had been said to have improved since September and that Gemma Coteman had told her that her communications had improved. The author Ms Pooley, believes that the assessment was fair and accurate at the time. She records that Ms Abel acknowledges that the way she gave feedback to Ms Silape had not been as recommended by the respondent, but that her approach had been in good faith and she had tried to focus on positive improvement, rather dwelling on the performance concerns at the time. Ms Pooley's conclusion is that the PET review was not inaccurate but that the way the feedback had been given, was not the way the respondent would have wanted.

76. Ms Silape was not satisfied with this and so she wrote a long document setting out points that she thought Ms Pooley had missed, at page 286. This was subsequently dealt with by Ms Abel in a meeting on 5 June 2013, page 289. Here Ms Abel sets out, for example, that she felt that Ms Silape's attitude appeared to have changed, that she had become

defensive and that she recalls several occasions when she had to raise with Ms Silape, concerns about her behavior and had witnessed a comment from her that she, *"could not be bothered".* She records that Ms Silape had raised with her that everything seemed to begin, so far as she was concerned, with the time when she was asked to move wards and she felt demoralised. The explanation given to her for wanting her to move was because she was the most experienced Band 6 and they needed someone with her experience to support the ward in question.

77. There was a further appraisal, this time conducted by Ms Coteman, on 3 July 2013. A written record of this begins at page 295. It includes a scoring system, on page 298. Ms Silape was dissatisfied with the score of 3 that she received in this assessment. The description as to what is appropriate for a score 3 reads as follows:

> *"Has been able to demonstrate aspects of the dimension in some but not all situations, known factors outside of the individual's control account for this level of performance."*

The score below that, score 2, reads:

> *"Has been able to demonstrate aspects of the dimension in some but not all situations, some improvement is required."*

The score above that, score 4, reads:

> *"Has been able to effectively demonstrate all aspects of the dimension in line with expectations."*

78. The difference between a score of 2 and a score of 3, appears to be that there are known factors accounting for the level of performance.

79. Ms Silape was away from work with stress on 8 and 9 July 2013.

80. Ms Silape had issues with Ms Coteman and she raised a Dignity at Work complaint on 25 July 2013, page 315, in which she challenges a series of criticisms of her which had been made by Ms Coteman. They are not directly relevant to these proceedings and we will not go through them all. Ms Silape was responding to them in this document because she felt that the criticisms were unjustified.

81. It would seem that Ms Silape wrote an email of complaint on 12 November 2013, we were not taken to it in the bundle, but it seems that Monique Hodges, a Senior HR manager, held a facilitated meeting between Ms Silape, Ms Hutt and Ms Coteman, that is at page 348.

82. On 11 December 2013, at a one-to-one, Ms Coteman says that Ms Hutt complained that she had seen Ms Silape laughing with another, a Health Care Assistant, (HCA) and that she thought they were laughing at her. In the list of issues, Ms Silape complains that the respondent did not take into

account in considering her subsequent appeal, that Ms Hutt targeted her and not the other person she was laughing with.

83. Ms Silape also complained to the respondents that on 3 February 2014, Ms Hutt had shouted at her not to change anything on the allocation board whilst she was looking at it and then challenged her about whether she had helped her various colleagues, as some staff had complained that she had not. She also complained that Ms Hutt told Ms Silape that someone had complained that she had not assisted them in changing a patient. In the list of issues, Ms Silape complains the respondent did not take into account the way Ms Hutt spoke to her.

84. On 5 February 2014, Ms Silape was scheduled to attend 'breakaway' training. Because she had done it previously she had decided not to go. She had not acted on that before the day and had not changed the rota to show that she was not going to do the course. The training would not have lasted the whole day and so for the balance of the day, she had been scheduled to do administrative work. Therefore, when she turned up at work unexpectedly, Ms Hutt told her to go and work on another ward which needed more cover. Ms Silape did not like that as she was scheduled to do administrative work and a disagreement ensued.

85. In the list of issues, Ms Silape complains that the respondent did not take into account the manner Ms Silape says Ms Hutt spoke to her. After this incident, Ms Silape contacted and spoke to Monique Hodges, who arranged to meet her on 12 February 2014. She also spoke to a Monika Jacott, to express that she felt bullied and harassed by Ms Hutt.

86. On 12 February 2014, Ms Silape had a meeting with Monique Hodges and her union representative, in which they discussed the matters that Ms Silape had raised. The trade union representative suggested that Ms Silape be placed on a Performance Improvement Plan, (PIP). We were not referred to any note of this meeting.

87. In the meantime, on 25 March 2014, Ms Silape was given a verbal warning and placed on stage 1 of the performance procedure. A letter confirming this is at page 387. The reason for the warning, in short, was that keys to a patient's own drug box had gone missing. An individual had said that they had given them to Ms Silape. Ms Silape had said that she did not have them. A search ensued and then subsequently, it was discovered that Ms Silape did in fact have them, or had them. Precise details do not matter, the important point is that for an issue of that ilk, she had been issued with a verbal warning.

88. After the incident on 5 February 2014, Ms Silape had two days off work and the respondent referred her to occupational health, who saw her on 11 March 2014 and provided a report dated 11 April 2014, page 398. This report refers to Ms Silape suffering an acute stress reaction and an episode of anxiety. She is recorded as having been provided with a stress leaflet and a recommendation is made that the Senior Clinical Nurse,

Ms Jones, conducts an individual stress risk assessment. That risk assessment was carried out on 15 May 2014, see pages 411-419.

89. Ms Hutt and Ms Silape had a conversation on 16 May 2016, in which Ms Silape complains, Ms Hutt accused her of having poor communication with her. Ms Silape does not refer to this in her witness statement and we were not referred to any document in relation to this, but Ms Silape does refer to it in her ET1 at paragraph 36 and it later becomes the expressed cause of a dignity at work complaint.

90. On 27 May 2014, Ms Hutt raised a grievance against Ms Silape, page 743. When I say grievance, of course what I really mean is complaint under the Dignity at Work policy. Here, Ms Hutt says that she returned from maternity leave and has since experienced behaviour from Ms Silape that has left her feeling intimidated and undermined. She refers to Ms Silape refusing to sign one-to-one notes, to feeling that she meets with resistance from Ms Silape whenever she tries to provide her with constructive feedback. She refers to Ms Silape trying to analyse who had reported mistakes to Ms Hutt about her. She gives a specific example in relation to an event on 17 January 2014, when Ms Silape was challenged about not completing a patient's documentation as reported by another member of staff. Ms Silape's approach to that had been to try and establish the identity of that member of staff, so that she could go and speak to him, not to acknowledge his concerns but to tell him to report any such concerns directly to her first, rather than going to Ms Hutt. Ms Hutt refers to the recent performance improvement plan, recommended as an outcome of disciplinary action. She refers to Ms Silape's behavior and attitude towards her as having deteriorated to a point where other staff were noticing it and she gives a number of names of individuals who she says have witnessed Ms Silape speaking to her in a derogatory manner, leaving her feeling undermined and intimidated. She also alleges that one other member of staff is away on long term sick due to stress caused by Ms Silape. Ms Hutt complains that Ms Silape has spoken of her feelings towards Ms Hutt openly to others and in particular, to a ward consultant to whom she had said, she did not feel supported by Ms Hutt. Ms Hutt complains that being called a bully and being told she is unsupportive is affecting her, in and out of work and feels that this all arises out of Ms Hutt challenging Ms Silape over her performance, which she is entitled to do. She says that she now dreads going into work when Ms Silape is on shift, because of the way she talks to her and belittles her. In conclusion, she suggests that Ms Silape should be moved to another area.

91. On 30 May 2014, Ms Silape commenced a period of long term sickness, from which she never returned to work. The first fit note is at page 421 and it refers to stress and depression due to bullying at work.

92. At this point, as we understand it, Ms Silape did not know about Ms Hutt's complaint.

93. Ms Holly Sutherland was asked to manage Ms Silape's absence, as there were grievances by and against Ms Silape's manager and Ms Sutherland was independent of the entire process.

94. On 7 July 2014, there was a managing attendance stage 1 meeting. What was discussed is confirmed in a letter dated 14 July 2014, which is at page 424. Here, Ms Sutherland speaks of being keen to explore factors which may have contributed towards her sickness absence, hearing from Ms Silape that it was seen to be a combination of many factors including being asked to move wards, an unfair PET and an unfair appraisal. She records Ms Silape as saying she did not find her one-to-ones with Ms Hutt productive, she felt blamed for things that she had not done and she made reference to the recent incident when she was asked to move to another ward, when as far as she was concerned, she was booked to do administrative time. Ms Sutherland records that she asked Ms Silape whether she wished to take her complaint forward and the HR advisor present explained the Dignity at Work process.

95. It was at this point Ms Silape was informed by Ms Sutherland of two complaints which had been made against her by other employees. One of which, of course, is that about which we have heard, the complaint from Ms Hutt.

96. Ms Silape and Ms Sutherland discussed that perhaps on her return to work, she might be moved to another ward and that this was something that would have to be taken up with Occupational Health, to whom she proposed to refer Ms Silape.

97. Occupational Health provide a report dated 5 August 2014, which is at page 428. This refers to Ms Silape as suffering stress due to a strained relationship with her line manager. It refers to current symptoms of stress related illness, anxiety and depression, that there is evidence that the workplace is contributing to her illness, which is the only source of her current stress. The Occupational Health doctor suggests that Ms Silape is unlikely to be able to return to work until the investigations into her behaviours is completed, but she is fit to attend meetings. The doctor advises a graded return to work in due course, with supportive line management and perhaps an alternative working environment. Also, that it is likely that Ms Silape meets the definition of a disabled person in the Equality Act 2010, although recognising the question is ultimately, a legal one. Finally, it is suggested that redeployment may be preferable.

98. On 7 August 2014, Ms Silape raised her Dignity at Work complaint, which appears in the bundle beginning at page 432. In summary, she complains of the incident where she says that she was shouted at by Ms Hutt with regard to the rota. She complains of an incident when she is said not to have communicated properly with regard to something called PTL meetings. She complains of being criticised for going behind Ms Hutt's back when speaking to Ms Jones regarding performance issues of other staff. She complains about annual appraisals. She complains about being

singled out in 2012 to move wards, about the PET review, about the negative one-to-ones and about the incident on 5 February 2014. She complains about there being no enquiry as to why she had felt bullied. She complains that no investigation was picked up once the stress risk assessment was carried out. She complains about the unfairness of being placed on the Performance Improvement Plan and the criticism with regard to the patient's own drugs key. She says that she feels under constant surveillance. She complains of the respondent not formally investigating her earlier complaints, even though they were informal.

99. The respondent's received a further Occupation Health report dated 29 August 2014, (page 442) which confirms Ms Silape's symptoms had not improved, she remains unfit to work but she is fit to attend meetings. It is anticipated it will be a further four to six weeks before she will be well enough to consider returning to work and that will depend upon progress with regard to both her treatment and how quickly the work complaints can be addressed and resolved.

100. On 18 September 2014, Ms Silape attended a meeting to investigate her Dignity at Work complaint, conducted by Ms Walters and Ms Meszaros-Knight. Ms Silape was accompanied by her trade union representative and RCN officer, Mr Ing. There is no note of this meeting, but its outcome is confirmed in a letter from Ms Walters dated 26 September 2014, at page 448, in which she gives her response to each point raised by Ms Silape. We will return to that in our conclusions.

101. One complaint that Ms Silape makes that appears in the list of issues, is that during this meeting Ms Walters suggested to her that she should retire. It is certainly the case, we can see, that retirement was discussed. Ms Walters and Ms Meszaros-Knight acknowledge that, at page 593. This is their written submission to the ultimate appeal to the board, to which we will come shortly. The note records:

> *"Zenzo, who was emotional and said she would find it difficult to work on any of the wards as she would feel like people were constantly watching her. It is* Zsuzsa's *recollection that Zenzo said this didn't fit in with her retirement plans, so asked her what she planned to do in her retirement and she said, Women's Health. Zsuzsa suggested that Zenzo might utilize her time by looking into this."*

102. We were also referred to an email Ms Silape wrote to her trade union representative on 25 September 2014, (page 463) where she challenges him for twice raising retirement with her and suggests to him that he should be focusing on her main issue, bullying and harassment.

103. A further Occupational Health report was obtained, dated 2 October 2014, (page 460). This refers to Ms Silape attending counselling, but until there has been some resolution to the complaints, the symptoms are expected to continue. She is not well enough to return to work, but when she is, the

advisor suggests that redeployment should be considered, but that at present it would be premature to consider redeployment options as Ms Silape was not well enough to return to work.

104. Ms Silape's appeal, or grievance, against the Dignity at Work complaint outcome is provided in a letter dated 13 October 2014, (page 472). She complains that she did not think the investigation fully addressed her concerns. She says her main concern is the failure to address the incidents of bullying, harassment, victimization and discrimination that she raised in February. She goes on to set out where she thinks the investigators have failed her.

105. Also on 13 October, as it happens, Ms Sutherland was informed by Ms Kirsty Jones, the Senior Ward Nurse on ward 6, that Ms Silape was coming on to the ward and accessing the respondent's computers, submitting incident reports dating back to 2012. Ms Randall also informed Ms Sutherland that Ms Silape was arriving on the ward unannounced and staff were finding that difficult. Ms Sutherland therefore sent a letter, dated 28 October 2014, which is at page 477. Ms Silape complains that this is an act of race discrimination and so I will quote it,

> *"I have been informed that you have been regularly visiting Ward G6 unannounced. In view of your current health situation, I am writing to request that you do not visit G6 or any other ward or department at Addenbrooke's Hospital without prior arrangement with Kirsty Jones, Senior Clinical Nurse. I would also request that you submit your GP fit notes by post to Kirsty.*
>
> *I am also aware that you have been using the RNIS to retrospectively enter alleged incidents. In view of the fact that you are currently off sick, you should not be accessing or using any hospital systems, including the RNIS and would therefore request that you cease doing so until you return to work."*

106. On 28 October 2014, Ms Silape was invited to a meeting to consider her grievance, or her appeal against her Dignity at Work complaint, on 14 November 2014, (page 588). She could not make it and so the meeting was rearranged for 26 November 2014. There are no documents recording what was said at that meeting.

107. On 3 November 2014, Ms Sarah Randall provided an outcome to Ms Hutt's grievance against Ms Silape. The letter is at page 478, addressed to Ms Silape. Here it says that there is evidence that Ms Hutt was intimidated by Ms Silape, as she often spoke to her in a derogatory manner and that therefore, her Dignity at Work complaint was upheld. Ms Randall goes on to say that there has been a breach of discipline, potentially warranting action beyond a verbal warning and that she was therefore recommending that this matter be considered at a full disciplinary hearing. The report itself is at page 737. There is no need to go through that in any detail at this stage.

108. On 5 November 2014, there was a further Occupation Health report, (page 481) in which the advisor refers to Ms Silape having received the feedback to her Dignity at Work complaint, which has not been upheld and that she is appealing against that decision. It is said to still be a stressful time and the uncertainty is causing ongoing stress. She remains unfit to return to work, but fit to attend meetings.

109. On 26 November 2014, there was a meeting to consider Ms Silape's grievance against the Dignity at Work complaint outcome. This was heard by Ms Charlotte Mills and Ms Ciara Moore. They met again on 1 December 2014, at which Ms Moore provided an outcome. There are no notes of either meeting, but the outcome was confirmed in a letter dated 2 December 2014, (at page 595). The grievance, or otherwise appeal, is not upheld.

110. On 1 December 2014, there is a further Occupational Health report, (page 487). There are said to be continuing symptoms. Reference is made now to the need for a disciplinary hearing. Work issues need to be resolved before there can be any consideration for a return to work. Ms Silape is said to be fit to attend a disciplinary hearing, so long as she is supported by a union representative. She is also said to be fit to attend any sickness review meeting. As for the prognosis, the advising Occupational Health consultant says that she expects Ms Silape will remain unfit to return to work for at least the next two months and when she is able to return to work, they should be looking for redeployment options.

111. On 22 December 2014, Ms Silape appealed against the outcome of her grievance against the outcome of the Dignity at Work complaint, (page 497). This appeal was to be dealt with by the respondent's board. She sets out at the outset; the primary point is that she does not believe that the respondent had taken adequate measures to support her when she was experiencing stress, the matters complained of had not been investigated in a timely manner and the issues had not been addressed.

112. On 14 January 2014, Mr Adrian Down wrote to Ms Silape to warn her that she was going to be called to a disciplinary hearing on 4 February 2015, formal notice would follow but he was writing to give her a heads up.

113. Two days later on 16 January 2015, Ms Rachael Coyme wrote, (page 511) to summons Ms Silape to that disciplinary hearing. The allegation was as follows:

> *"Your behaviour towards Louise Hutt, Senior Sister Ward G6, your line manager, made her feel undermined, intimidated and uncomfortable and you have been disrespectful towards her and you belittled her. It is alleged that you had spoken to Louise in a derogatory manner and challenged her decisions inappropriately and your behaviour towards her was therefore disrespectful and it undermined Louise as the Senior Sister of the ward."*

The letter refers to enclosing a copy of the investigatory report and associated documents. Ms Silape was informed that one possible outcome of the disciplinary hearing is a final written warning.

114. Also on 16 January 2016, Ms Silape wrote to Mr Down to ask for more information, (page 524). In due course, she received an automated response, saying that Mr Down had left the respondent's employment. She therefore subsequently contacted Ms Hughes. Ms Hughes' reply is dated 27 January 2015, (page 520). She says that she will postpone the disciplinary hearing and that she is looking into the matter. Subsequently, Ms Hughes asked Ms Randall and Mr England to carry out a supplementary investigation, so as to provide the claimant with more information on the allegations against her.

115. In the meantime, there was a further Occupational Health review, on 22 January 2015, (page 514). This refers to Ms Silape being referred for CBT therapy, although it was uncertain when she would start. There is a recommendation of early access to psychological treatment, which may be beneficial. Suggestion is made that some thought be given to providing her with private psychological treatment. She is said to remain fit to attend meetings and that the time frame of her return to work will depend upon the time required to resolve her grievance and the further psychological treatment.

116. Ms Sutherland then conducted an absence review meeting with Ms Silape on 23 January 2015. There are no notes of this, but what was said is summarised in Ms Sutherland's letter of 26 January 2015, (page 518). Ms Silape had been accompanied by an RCN representative, Ms Hardaker. There is an important passage in this letter, in which Ms Sutherland refers to Ms Silape saying that she could not see herself returning to work clinically, as she did not feel she would be safe looking after patients. She said she was experiencing low levels of concentration, she felt she would not be safe on the ward, or looking after patients because of this. Other roles were then discussed and she said to Ms Sutherland that she was exploring that with Occupational Health, albeit that redeployment had not been mentioned in the latest report. Ms Silape said she felt she had skills that could be used that would not involve working clinically and mentioned manual handling training. There was a discussion about whether Ms Silape would take a Band 5, rather than Band 6 role. Ms Silape was reluctant about that, but did not exclude it. They agreed to review the matter further in due course.

117. Ms Silape had raised with Ms Sutherland some questions about the disciplinary hearing and it was recommended she discuss those with her union representative. They also discussed, and Ms Sutherland explained, why Ms Sutherland had sent the letter regarding her access to the ward and to the IT systems.

118. What was discussed was also summarised in an email to Ms Silape from her trade union representative, whom we note is the Regional Officer, at page 516-517. This puts a slightly different emphasis on the points discussed, but broadly speaking they are the same. Ms Sutherland accepted that it was an accurate record.

119. Ms Sutherland wrote to Occupational Health for advice, because redeployment had been discussed. This is dated 23 January 2014, (page 515). The possibility of redeployment into a non-clinical role is raised and the Occupation Health advisor is asked to advise.

120. A further report was provided on 18 February 2015, (page 536). Following a further meeting with the claimant on 10 February 2015, the symptoms were said not to have improved. The advisor confirms they had discussed redeployment into an alternative area, but at the time her symptoms were thought such that it was not appropriate to consider alternative work. It was anticipated that it would be likely to be three to six months before Ms Silape's health recovers sufficiently to consider a return to alternative work. During that time, she would be in receipt of psychological treatment and there would need to be a conclusion to the work situation. It was confirmed that she is not fit to work at that time, but she is fit to attend meetings. The advisor's opinion is that it is premature to consider redeployment.

121. There was a further absence review meeting with Ms Sutherland on 25 February 2015. What was discussed was summarised in a letter dated 3 March 2015, (page 545). This includes discussion about the Occupational Health advisor's view that it was premature to discuss redeployment and that Ms Silape's return to work would be no sooner than a three to six month period. Ms Sutherland here expresses concerns that Ms Silape had been absent since 31 May 2014 and it appeared that it may be some time before she is able to return to work. She warns Ms Silape that if there continues to be a lack of, what she calls, "definition" regarding her return to work, "status", she may have to refer her to the next stage in the process, which may be consideration of discontinuance of her employment. There is to be a further meeting with Occupational Health on 23 March 2015.

122. In the meantime, on 16 March 2015, Ms Silape's appeal against the outcome of the grievance against the outcome of the Dignity at Work complaint, was heard by members of the respondent's Trust board. For reference, the management's case is in the bundle starting at page 548, we do not propose to go through it. The constitution of the board hearing the appeal includes Dr David Wherrett, Director of Workforce, (from who we heard evidence) a Mr Tom Bennett, Director of Operations and a Dr Andy Richards, a non-executive Director.

123. On 19 March 2015, a supplementary report was produced with regard to Ms Hutt's Dignity at Work complaint against Ms Silape, at page 727, we do not propose to go through that at this stage.

124. On 27 March 2015, the outcome was provided in respect of Ms Silape's appeal, (page 724). We will discuss that further in our conclusions.

125. A further Occupational Health report was provided on 1 April 2015, (page 768). This refers to ongoing significant symptoms, to Ms Silape remaining unfit to return to work and that it is currently unclear when she may be fit to return to work, as there needs to be a conclusion to the work processes followed by further psychological treatment. Ms Silape is said to remain unfit to work and there is no clear time frame when she will be able to return to a substantive post. It is recommended that when she is able to return, it is to alternative employment. But at present, she is not fit to consider redeployment options.

126. Also on 1 April 2015, Ms Sutherland conducted a further sickness absence review with Ms Silape. She obviously did not have the Occupational Health report of 1 April, but Ms Silape had it with her and handed it over to Ms Sutherland to read. What was discussed at this meeting was summarised in a letter dated 8 April 2015, (page 771). Ms Sutherland referred to the Occupational Health Advisor's advice that Ms Silape remains unfit to return to a substantive post, it is anticipated to be three to six months before she will recover sufficiently to consider a return to any alternative employment and that it would be premature to consider redeployment at that time. They discussed whether Ms Silape simply needed an outcome to the processes, or to precis, a favourable outcome, before she would start her course of recovery and be able to return to work. Ms Silape's response was that she was unsure. Ms Sutherland concludes that as there is no foreseeable return to work, she has no option but to refer the situation forward for consideration of discontinuance of employment on the grounds of incapability due to ill health, as she puts it.

127. In a subsequent email of 13 April 2015, Ms Silape confirmed that really, before a return to work could be contemplated, she would need a favourable outcome to her grievance, so that she could be reassured that she had been treated fairly.

128. There was a further Occupational Health review on 21 April 2015, the outcome of which is confirmed in a letter dated 5 May 2015, (at page 784). This again refers to ongoing symptoms, refers to the advisor having received a psychiatrist's report, reiterates it is premature to consider redeployment and that Ms Silape remains unfit to return to work.

129. On 29 April 2015, Ms Silape had received a summons to a disciplinary hearing, (page 775). The charges are as noted above and a possible outcome is said to be a final written warning.

130. Then on 6 May 2015, Ms Silape resigned her employment, page 787. Her resignation letter reads as follows,

> *"I am submitting my resignation with immediate effect on grounds of breach of contract. The proceedings over the past three years and lack of support which resulted in me suffering depression culminating in the most recent events including my Grievance appeal to yourself has left me with no confidence and trust in the system.*
>
> *I am left in a position where I have to leave the organisation as I definitely feel I cannot depend on anyone to genuinely support me in the work place and feel very vulnerable."*

Conclusions

Race Discrimination

131. Ms Silape's race discrimination complaints are of direct discrimination.

132. Her first allegation is at 3.1.1 of the List of Issues, which is that whilst she was off sick, she was banned from entering Ward G6, banned from entering any other department and banned from accessing the respondent's computers. This allegation relates to the letter from Ms Sutherland dated 28 October 2014, at page 477. Ms Silape was not, *"banned"* from Ward G6, or the Hospital. She was asked not to visit without prior arrangement. She was banned from using the respondent's IT systems. Ms Silape said that other staff, absent from work due to ill health, were not subject to the same restrictions but no specific examples were given.

133. The circumstances of the ban were that Ms Sutherland understood that Ms Silape's visits to the ward were making people uncomfortable and Ms Silape was said to be filing retrospective incident reports. There is nothing that Ms Silape was able to point to that suggested that the reasons for these restrictions were her race. A hypothetical comparator would have been a white senior nurse, off work on long term sick, in the same circumstances, behaving in exactly the same way as Ms Silape. Such a person would have been treated in the same way.

134. A tribunal could not, on the facts proven by Ms Silape, properly conclude, absent an explanation from the respondent, that race was Ms Sutherland's conscious or subconscious motive. The burden of proof does not shift to the respondent and the claim in this respect therefore fails.

135. The second allegation of race discrimination in the list of issues, at 3.1.2, is that the respondent did not deal with her grievance against Ms Hutt fairly on six basis. In order to analyse these allegations properly, we have to look at them in the context of both the investigation into Ms Hutt's and Ms Silape's Dignity at Work complaints. We deal with each allegation in turn.

    i. In respect of the Hutt complaint, the investigators Ms Randall and Ms England, interviewed those who had been named by

Ms Hutt. The premise that only those who had supported Ms Hutt were interviewed is incorrect, in that the consultant who did not support Ms Hutt was interviewed. Ms Silape could have, with the assistance of her trade union representation, which she had at all times, put forward the names of people she wished to be interviewed who may have supported her. Ms Silape says that she could not do that because she had asked for a copy of the rota at the relevant times, so that she could work out who was working at the time of the allegations. But we do not accept that. She would have known who, amongst her colleagues, up to eight staff working on the ward at any one time, would have been likely to support her and could have put their names forward. In the context of Ms Silape's own complaint, investigated by two different people from those who investigated Ms Hutt's complaint, Ms Walters and Ms Meszaros-Knight, we identified that in respect of the complaint, (1.1 of the grievance) about Ms Hutt shouting at her over whether she made a mistake with the staff rota, they could have asked Ms Silape for the names of any potential witnesses and did not appear to do so. In respect of the complaint, (1.2) about Ms Hutt raising her voice in connection with a discussion about something called a PTL meeting, the investigators noted, (page 450) that members of staff had asked Ms Hutt if she was all right, but they do not appear to have followed up and enquired who those staff were, with a view to speaking to them. Apart from those two instances, the investigators appear to have interviewed those it was appropriate to interview.

ii. That Ms Silape was not afforded the opportunity to call witnesses: as we have explained above, we do not accept that Ms Silape did not have the opportunity to call witnesses in respect of Ms Hutt's complaint. In respect of the proposed disciplinary hearing, she was expressly told of her right to call witnesses. She resigned before the disciplinary hearing took place. Both in respect of the Hutt investigation and the investigation into her own complaint, Ms Silape was advised and assisted throughout by union representation and was aware of her right to call witnesses. In respect of her own complaint, one would have expected her to name potential witnesses to the matters she was complaining about.

iii. That Ms Silape's request for an independent investigation was refused: we were not taken to any request for an *"independent investigation"*. We are only aware of Ms Silape asking Mr Wherrett at the final appeal to direct a reinvestigation into matters raised in her Dignity at Work complaint, which he declined to do. We did not see that

there was any need for an independent investigation into either Ms Hutt's nor Ms Silape's complaints.

iv. It is correct to say that the respondent upheld Ms Hutt's complaint, or grievance.

v. It is also correct to say that Ms Hutt's complaint or grievance, having been upheld, Ms Silape was to face a disciplinary hearing. It is not correct to say that she was to be sanctioned with a final written warning. There was no predetermined outcome. A possible outcome was a final written warning.

vi. We were not taken to any evidence that Ms Silape was denied access to the rota.

136. In so far as these allegations are made out, there is nothing in the evidence that suggests that the motive of the decision makers, conscious or subconscious, was Ms Silape's race. Ms Silape relies upon the fact that Ms Hutt is white and she is black African. However, that is not enough, mere difference in treatment is not enough, there must be something more to suggest that race is the motive. A white nurse in the same circumstances as Ms Silape, facing a complaint against her and advancing her own complaint, would have been treated in the same way. There is nothing in the facts, as we have found them, from which we could properly conclude, absent an explanation from the respondent, that Ms Silape's race was the reason for any of the treatment of which she complains and which we have upheld.

137. The burden of proof does not shift to the respondent and the claim in this respect therefore fails.

138. In respect of the Claimant's allegation at 3.1.3 of the list of issues, that the matters upon which she relies as causing her to resign and claim constructive dismissal, amounted to direct race discrimination, see below for our analysis of those allegations. In so far as the allegations are made out, nothing suggests that the motive behind the actors was race. For the same reasons as set out above, we find that race played no part in the motives, conscious or subconscious, of those concerned. The burden of proof does not shift and the race claim in this respect, also fails.

Disability discrimination

139. The respondent has conceded that Ms Silape was a disabled person as defined in the Equality Act 2010, at the material time.

140. The first point to make is that Ms Silape's complaint is of direct discrimination. That is that Ms Sutherland's motives for referring Ms Silape to the next stage of the Managing Long Term Absence policy, was that Ms Silape was disabled. Ms Silape's claim has not been that the respondent

failed to make reasonable adjustments and it has not been that her actions amounted to unfavourable treatment for a disability related reason. Had it been either of those, the respondent may have had a more difficult case to answer.

141. The legal basis of Ms Silape's disability discrimination claim was identified before EJ Laidler. She struck out the disability claim. Ms Silape appealed successfully. However, before the EAT, her case was argued on the basis that it was of direct discrimination and should not have been struck out, not that it had been incorrectly labelled. The strike out was overturned on the basis that it was a case of direct disability discrimination. It has never been suggested that the legal basis of her claim was anything other than direct discrimination.

142. Ms Silape named three comparators. The first is a Staff Nurse Sarah Whitby. She is a Band 5 nurse, who was ill with psychiatric disorders, absent from work for nearly a year, she wanted ill-health retirement and was supported in that by Occupational Health, there was no prospect of a return to work, nor of redeployment and she was dismissed on ill-health grounds. Her circumstances are quite different from that of Ms Silape who did not want ill-health retirement, who was absent a full year, for whom there was a possibility of redeployment, there was a possibility of recovery and whose employment had not in fact been terminated on ill-health grounds.

143. The second comparator is Junior Sister Naomi Okoe. She was a Band 6 nurse who had undergone a double knee replacement. She had been absent from work for ten months. She had tried to go back to work and found that she could not manage. There was no prospect of redeployment and she was then dismissed on grounds of ill-health. Her circumstances are different from that of Ms Silape. Nurse Okoe's physical impairment prevented her working in nursing ever again and her employment ended whereas, Ms Silape's was not.

144. Thirdly, there is Junior Sister Roweena Manaog, she was a Band 5 nurse and maybe still is a Band 5 nurse. She was absent through ill-health for 106 days and keen to return to her substantive role, whereas Ms Silape was not. But on Occupational Health recommendations, she was moved to an alternative role and her employment was not terminated. She is in different circumstances from Ms Silape in that her absence was considerably shorter and Occupational Health had made the recommendation for the move at the time, which was carried out.

145. Therefore, none of these three individuals are appropriate actual comparators as required by the law. The circumstances of each of them are materially different.

146. We considered the comparators as background information to assist us in constructing the hypothetical comparator. Another nurse with the same period of absence who was not disabled, or who had a different disability to

Ms Silape, for whom the same or similar recommendations were being made by Occupational Health. Such a person would, in our judgment, have been treated in the same way by Ms Sutherland. There is nothing on the facts that we have found from which we could properly conclude, that the reason, (conscious or subconscious) Ms Silape was referred to the next stage of the procedure for consideration of dismissal, was that she was disabled. It is clear that the reason for the onward referral was that the policy stipulated that such referral should be made before a period of 12 months had passed.

147. The burden of proof does not shift to the respondent and the claimant's claims in this respect fail.

Constructive unfair dismissal

The Allegations

148. We consider each of the allegations first.

148.1 Ms Silape complains that the respondent failed to adequately investigate her Dignity at Work complaint. We agree with her in three respects.

148.1.1 Firstly, they could have enquired of Ms Silape for the names of any potential witnesses to the shouting incident, as referred to above;

148.1.2 They could have sought out and spoken to those who may have asked Ms Hutt if she was all right after the discussion about the PTL meeting referred to above;

148.1.3 In respect of item 3.1 of Ms Silape's complaint, that the respondent had not investigated her grievances regarding Ms Hutt, when she had raised them informally and with regard to following the risk assessment, the response given by Ms Walters does not give Ms Silape an answer, an explanation, as to why it did not do so. The respondent would have saved itself a whole lot of trouble and would have helped Ms Silape, if they had at this point explained to her that the wording of the policy was that they are not obliged, (as opposed to, "required") to investigate matters raised informally and that hers was not a case where they thought it appropriate to exercise their discretion under the policy to do so.

148.2 Ms Silape complains that the respondent did not investigate her concerns in a timely fashion. In respect of her concerns raised on 5 February 2014, Ms Hodges met with her on 12 February 2014. In respect of the Dignity at Work complaint, that was

lodged on 7 August, a meeting was arranged for 21 August but Ms Silape's representative could not make that date, the meeting was rearranged for 18 September and an outcome provided on 26 September 2014. Ms Silape's initial appeal, or grievance, is dated 13 October 2014, a meeting was offered for her on 14 November, but she could not make that and it was therefore rearranged for 26 November, the outcome was dated 2 December 2014. Ms Silape's appeal to the board is dated 22 December 2014, the hearing was held on 16 March 2015 and an outcome was provided in a letter dated 27 March 2015. It is not unusual for appeal hearings involving multiple senior people to take longer to arrange, because of the need to co-ordinate the diaries, as was the case here. The respondent cannot in our view, be reasonably criticised for the time scales we have set out.

148.3 Ms Silape complains that the respondent did not address, or take into account, four matters in the grievance appeal, (that is the appeal before Mr Wherrett). We will deal with each in turn:

148.3.1 Staff shortages were not raised in the Dignity at Work complaint. Ms Walters and Ms Meszaros-Knight make this point in their report to the appeal, page 594. Ms Silape's reference to staff shortages was not ignored; it was not regarded as an appropriate matter to be considered on appeal.

148.3.2 In respect of the laughing incident, 11 December 2013, that Ms Hutt targeted Ms Silape and not the other person. It is not at all clear that the laughing incident formed part of Ms Silape's Dignity at Work complaint. She says it was referred to in a document attached to the complaint, but it is not possible to know what was attached. She did refer to the incident in her appeal, page 498, but it was to Mr Wherrett and his colleagues, a new matter. In the outcome at page 725, Mr Wherrett explains why the panel took the view that it was not appropriate to reopen the investigation. In any event, we can understand why it might be that having seen Ms Silape and the HCA laughing and thinking that it might have been at her expense, Ms Hutt would have felt it appropriate to raise the matter with the senior of the two, that is Ms Silape.

148.3.3 In respect of the incident on 3 February 2014, when Ms Hutt was said to have shouted at Ms Silape not to touch the board, again we cannot see that this has clearly been referred to in the original Dignity at Work complaint, but it is referred to in the final appeal, see page 499. As observed above, Mr Wherrett explains in

his outcome why the panel did not consider it appropriate to reopen the investigation.

148.3.4 As for the manner in which Ms Hutt spoke to Ms Silape on 5 February 2014, after she had refused to go to another ward when she had chosen not to attend the Breakaway training, this is referred to in the original Dignity at Work complaint, (page 434, item 2.4). Ms Silape made express reference to this in her appeal document, at page 500. Mr Wherrett explained though, as we have seen, that the panel did not consider it appropriate to reinvestigate matters.

148.3.5 In summary, it is correct for Ms Silape to say that in the appeal outcome these matters were not addressed. However, the respondent had reasonable and proper cause for not doing so, as the appeal was a review and not a rehearing.

148.4 Ms Silape complains that the respondent did not investigate matters when she raised them informally. Firstly, a reminder about the wording of the relevant provision in the policy. It refers to the respondent having the right to investigate matters that have been raised informally, even if the complainant does not wish to make a formal complaint, or wants the matter investigated, or wants to withdraw the complaint. There is no obligation on the respondent to do so, which is how Ms Silape seems to have regarded the provision. It is a common and appropriate provision to cover the situation where an employee raises a serious matter, such as for example, sexual harassment or racial abuse, which the respondent must investigate and must not ignore, because of its wider responsibilities. That said, it might also be said that investigating matters informally might nip in the bud a clash of personality situation. But, it is not a fair criticism of the respondent to complain that they did not investigate the matters raised informally by Ms Silape. They were not under an obligation to do so and they did not ignore her informal complaints, as explained in the outcome letter at points 2.4, 2.5 and 2.6.

148.5 Ms Silape complains that her having spoken to a consultant about her problems, that was identified as a disciplinary issue by Ms Randall. It is correct to say that Ms Silape saying to the consultant that she felt unsupported by Ms Hutt, was part of why Ms Hutt said she felt undermined and the investigation found that Ms Silape had spoken to the consultant, (page 733 and 740). It was itself not identified as a disciplinary issue, but it was seen as part of a pattern of behaviour that the respondent identified as undermining Ms Hutt. We can understand why that view was taken. The consultant was someone senior, of a particularly

significant status, with whom senior nurses must have a good working relationship. One can understand why Ms Hutt might have felt undermined by Ms Silape speaking to the consultant, who had no line management responsibilities for her, in the way that she apparently did. The respondent had reasonable and proper cause for taking the view that it did.

148.6 This issue, as amended during the hearing, is that the respondent knew Ms Silape was suffering from stress on 24 April 2014 and did not carry out a risk assessment until May 2014. The facts are that in an Occupational Health report of 11 April 2014, a recommendation was made that a stress risk assessment be carried out and one was carried out on 15 May 2014. We do not think the respondent can be fairly criticised for that timescale.

148.7 Ms Silape complains that the respondent took too long to deal with her grievance. We have dealt with this above. The whole process, including two appeals, took eight months, which is not an inordinate amount of time. Further, an element of the delay, about six weeks, was down to the unavailability of Ms Silape or her union representative. The respondent cannot reasonably be criticised for the time the process had taken.

148.8 Ms Silape says the respondent indicated an intention to consider dismissing her by reason of ill health, which had been caused by events in the workplace. That is so, it did.

148.9 Ms Silape complains that the respondent failed to uphold her grievance and condoned the actions of Ms Hutt. It is correct to say that the respondent did not uphold her grievance. The use of the word, “condoned” in respect of Ms Hutt’s actions, suggests that the respondent has approved of something that was wrong. That is not so. It is correct to say that the respondent proceeded to disciplinary action against Ms Silape. It had reasonable and proper cause to do so, based upon the investigations of Ms Randall and Ms England.

148.10 Ms Silape says that Ms Walters suggested to her during an investigatory meeting, that she should retire. This is a reference that to the Dignity at Work complaint investigation meeting on 18 September 2014. Retirement was certainly discussed, as we have seen, Ms Walters and Ms Meszaros-Knight acknowledged this, referring to that discussion in their statement to the appeal, page 593. We did not hear evidence from Ms Walters, even though there was plainly an allegation against her. We find that in the discussion, Ms Walters probably did say something that has been interpreted by Ms Silape as a suggestion that she should retire.

Conclusions on the Case for Constructive Dismissal

149. In our discussion about the allegations relied on as amounting to a breach of the implied term to maintain mutual trust and confidence, we have criticised the respondent in that it failed in three respects to adequately investigate the Dignity at Work complaint. We have also upheld the allegations that the respondent referred Ms Silape for consideration of dismissal in respect of her absence, did not uphold her grievance yet did uphold Ms Hutt's grievance, did proceed with the disciplinary action on that basis and Ms Walters did suggest retirement. There was reasonable and proper cause for the respondent's actions in each respect. These are not matters which in our judgment, either individually or collectively, amount to conduct calculated or likely to undermine mutual trust and confidence. They are not matters which destroy the employment relationship. The respondent dealt with the grievance timeously and did not fail in its obligation to provide a safe system of work. The claim of unfair dismissal therefore also fails.

_____
Employment Judge M Warren

Date: ……8 November 2018……..

Sent to the parties on: .....

.....
For the Tribunal Office