EMPLOYMENT TRIBUNALS

Claimant: Mrs A Okpalugo

Respondent: Salford Royal NHS Foundation Trust

Heard at: Manchester **On:** 25-29 June 2018

Before: Employment Judge Franey
Mrs AA Roscoe
Mr S Stott

REPRESENTATION:

Claimant: Ms L Santamera, Counsel
Respondent: Mr J Boyd, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of direct race discrimination fails and is dismissed.

2. The complaint of unfair dismissal fails and is dismissed.

3. The complaint of breach of contract in relation to notice pay fails and is dismissed.

4. The complaint in respect of a failure to pay holiday pay fails and is dismissed.

REASONS

Introduction

1. These proceedings began with a claim form presented on 8 September 2017. The claimant complained of unfair dismissal and of race discrimination in relation to her employment as an Occupational Health ("OH") nurse between September 2014 and 12 May 2017. The claim form alleged that she had been systematically bullied and harassed by her manager, Mrs Pamphlett-Jones, that her grievance in February 2017 had not been handled properly, and that she had been wrongly suspended on false charges, resulting in her resignation. There were also complaints in relation to notice pay and holiday pay.

2. By a response form filed on 10 October 2017 the respondent defended the proceedings on their merits. It set out its position on the various allegations made by the claimant and denied that there had been any fundamental breach of contract which justified resignation. The allegations of race discrimination were also denied.

3. The complaints and issues were clarified at a preliminary hearing before Employment Judge Ryan on 7 November 2017. Eight matters were identified which were said to amount to instances of less favourable treatment because of race and/or to fundamental breaches of contract resulting in resignation. Permission was given for the respondent to amend its response form and the case listed for a five day hearing.

4. The amended response form of 11 December 2017 made clear that the respondent did not seek to argue that there was a potentially fair reason for dismissal if dismissal was established.

5. On 5 June 2018 the claimant applied for the hearing to be postponed because of the availability of a witness. We dealt with that matter at the start of our hearing (see below).

The Issues

6. Based on the identification of the issues in the Case Management Order of Employment Judge Ryan, the issues to be determined by the Tribunal were agreed to be as follows:

Direct race discrimination – section 13 Equality Act 2010

1. Are the facts such that the Tribunal could conclude that in any of the following respects the respondent treated the claimant less favourably because of race than the respondent treated the actual comparators, Mrs Pamphlett-Jones and Deborah Settle, or in the alternative a hypothetical comparator:

(1) Placing the claimant under pressure to undergo repeated induction/competency assessments;

(2) Failing to appraise the claimant;

(3) Undertaking systematic attacks on the claimant's sickness absence and leave record;

(4) Failing to provide the claimant with appropriate access to a programme of continuing professional development;

(5) Mishandling a grievance that the claimant submitted;

(6) Demoting the claimant by failing to include her in the Trust's Unit Plan;

(7) Unreasonably commencing a disciplinary investigation in respect of the claimant's behaviour;

(8) Failing to give or allow the claimant protected placement time; and

(9) If dismissal is established, by dismissing the claimant?

2. If so, can the respondent nevertheless show that there was no breach of section 13?

3. In so far as any of these matters occurred more than three months prior to the presentation of the claim form, allowing for the effect of early conciliation, can the claimant show that they formed part of an act extending over a period ending within three months of presentation?

"Constructive" Unfair Dismissal – Part X Employment Rights Act 1996

4. Can the claimant establish that her resignation should be construed as a dismissal under section 95(1)(c) in that:

(a) The respondent committed a fundamental breach of the implied term of trust and confidence through one or more of the matters set out in paragraph 1(1)-(8) above?

(b) That breach was a reason for the claimant's resignation; and

(c) The claimant had not lost the right to resign by affirming the claimant whether through delay or otherwise?

Evidence

7. The parties had agreed a bundle of documents in two volumes which exceeded 600 pages. There were some anomalies in the index which we identified and addressed on the first day. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

8. The claimant gave evidence herself. She also relied on a written statement from her former manager, Benita Murinda (see below). A written statement had been prepared by a former colleague, Beverley Golding, but Ms Santamera chose not to rely on that evidence as it was not relevant.

9. The respondent called four witnesses in person. Maxine Pamphlett-Jones was the Assistant Director of Nursing Services who managed the OH Department in which the claimant worked. Elaine Hobson was the Band 7 Clinical Lead in the OH

Department from September 2015. John Dobson was the Assistant Human Resources ("HR") Director who dealt with some capability matters and had some involvement in the claimant's grievance, and Clare Nott was the HR Business Partner involved in the claimant's grievance.

Postponement Application

10. Prior to the hearing the claimant had applied through her representative for the hearing to be postponed, saying that her witness, Benita Murinda, was not available for the hearing. She had been traced and a statement obtained from her only in May 2018, and she was abroad on a pre-booked trip to Zimbabwe at the time of the hearing, not returning until late October 2018. Employment Judge Porter had directed that the application to postpone the hearing be addressed at the outset of our hearing. To enable us to deal with it we read the witness statements of the claimant and Mrs Murinda, the witness statement of Mrs Pamphlett-Jones, and the claim form, response form and further particulars from both sides which appeared between pages 1 and 43 of the bundle. We also had oral submissions from both advocates.

11. Ms Santamera based her application primarily on the absence of Mrs Murinda. She said that Mrs Murinda's statement contradicted most of what the respondent said regarding induction and competencies. Mrs Murinda had taken the claimant through the relevant competencies and these had been signed off before the arrival of Mrs Pamphlett-Jones. As well as factual evidence her evidence would assist the Tribunal assess the credibility of the other witnesses. In addition, there were discrepancies in the numbering of the bundle. From the index some pages appeared to have been misnumbered and it was not yet clear to Miss Santamera that all the relevant documents were in the bundle.

12. Mr Boyd resisted the application to postpone. He said that there were some issues with the index to the bundle but these could be easily rectified and a revised index supplied. The bundle had been structured in a way that reflected the fact that the claimant provided appendices with her grievance and with her subsequent further particulars. All the material documents were available in the bundle. As for Mrs Murinda, he submitted that her evidence was insufficiently relevant to justify postponing the hearing. Her evidence went to only one of the eight substantive allegations, and the competency exercise in question occurred after Mrs Murinda had left the department. Mrs Murinda was not able to say what evidence was available on the personnel files when they were considered by Mrs Pamphlett-Jones and Miss Hobson. This was a five-day hearing involving allegations of race discrimination against the respondent's managers. Postponement would mean significant delay to the end of 2018 or beyond, and it was not proportionate to postpone the hearing so long for evidence that on the face of it appeared of limited relevance. There was no objection to the Tribunal considering Mrs Murinda's statement as a written document and attaching whatever weight was considered appropriate.

13. Having heard those submissions the Tribunal deliberated in chambers before confirming our decision that the application to postpone was refused. The problems with the bundle appeared to be minor problems with the index and Ms Santamera

could be allowed the remainder of the first day to become familiar with it. As for Mrs Murinda's evidence, it was of limited relevance to only one of the eight substantive allegations. Much of her evidence was not disputed. The claimant had plainly had an induction prior to Mrs Pamphlett-Jones taking over the department. The important dispute between the parties appeared to be whether there was a requirement for a further induction or whether it was a competency audit using induction forms for convenience. Mrs Murinda could not help on that issue. Nor could she assist on the key issue of whether this exercise was directed at the claimant alone or included other employees of different races. Although we were conscious that taking her statement as written evidence only would mean that the claimant was the only witness in person on her side, the overriding objective required us to avoid delay so far as compatible with the proper consideration of the issues. We were satisfied that the first allegation of race discrimination and breach of contract could properly be determined without adjourning the hearing for at least six months to enable Mrs Murinda to give evidence. A delay of that kind would be disproportionate and unfair to the respondent's witnesses who had allegations of race discrimination brought against them. A fair hearing was possible without further delay.

Relevant Legal Principles

Direct Race Discrimination – Equality Act 2010

14. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

15. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

16. For these purposes a "dismissal" can include what is commonly termed a "constructive dismissal" (see below) – section 39(7) of the Act.

Direct Discrimination

17. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

> **"(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".**

18. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

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

19. It is well established that where the treatment of which the claimant complains is not overtly or intrinsically because of race, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

20. The burden of proof provision appears in section 136 and provides as follows:

> **"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

21. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ held that "could conclude", in the context of the burden of proof provisions, meant that a reasonable Tribunal could properly conclude from all the evidence before it, including the evidence adduced by the complainant in support of the allegations, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not generally without more sufficient to amount to a prima facie case of unlawful discrimination. Accordingly, unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.** It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race would have been treated reasonably.

22. Whether the burden of proof has shifted is in general terms to be assessed once all the evidence from both parties has been considered and evaluated. In some cases, however, the Tribunal may be able to make a positive finding about the reason why a particular action is taken which enables the Tribunal to dispense with formally considering the two stages.

23. Finally, the time limit for Equality Act claims appears in section 123.

<u>Unfair Dismissal – Part X Employment Rights Act 1996</u>

24. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

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

25. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**.

The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only 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.

26. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation 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."**

27. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

28. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

29. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

30. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is**

> **inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

31. In **Blackburn v Aldi Stores Ltd [2013] ICR D37** the EAT considered how a breach of trust and confidence might arise in the way a grievance is handled. After quoting the **Malik** test, the EAT said in paragraph 25:

> **"In our judgment failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether in any particular case it does so is a matter for the Tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to or contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the Tribunal's task is to assess what occurred against the Malik test."**

32. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. These principles were recently reaffirmed by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

33. In this case it was conceded by the respondent that if the claimant established that she had been dismissed, the dismissal was unfair.

Relevant Findings of Fact

34. This section of our reasons sets out the broad chronology of events to put our decision into context. Any disputes of primary fact which were central to the issues will be addressed and resolved in the discussion and conclusions section. For

convenience we will refer to the eight core allegations in paragraph 1 of the List of Issues as "**allegation 1"** etc.

Background

35. The claimant is black. She was born in Nigeria and after qualifying as a nurse there she moved to Britain in her early thirties. She holds dual Nigerian and British nationality. She is registered with the Nursing and Midwifery Council ("NMC").

36. In the summer of 2014 she worked on an agency basis in the OH department of the respondent, an NHS Trust with about 7000 employees. That department provides OH services to the respondent's staff, and to some external bodies via contractual arrangements. The claimant was managed by Benita Murinda, a Band 7 specialist OH nurse. Mrs Murinda was the acting manager of the department at the time. She gave the claimant an induction.

37. With effect from 23 September 2014 the claimant was taken on as a permanent member of staff in a Band 5 post as a Health and Wellbeing Nurse. The statement of the main terms of her employment appeared at pages 52-60. The claimant worked part time over two or three days each week. An injury prevented her starting properly in the department until December 2014.

38. Upon starting on a permanent basis she was given a second induction by Mrs Murinda. The same induction process was given to her white British colleague Deborah Settle, who joined as an OH nurse at around the same time.

39. There was no record of any issues with the claimant's work whilst Mrs Murinda was her line manager. Mrs Murinda regarded her as competent. All the necessary competencies were demonstrated over a period of time.

40. Miss Murinda went off sick in the summer of 2015 and only returned to work for a two week period before she left the respondent. Before she went off she had approved funding and one day a fortnight of study leave so the claimant could undertake a two year BA Degree in OH medicine at the University of South Wales.

July 2015 Mrs Pamphlett-Jones Appointed

41. In July 2015 the Assistant Director of Nursing Services, Maxine Pamphlett-Jones, was asked by senior management to take over as manager of the OH department. The aim was for the department to achieve the Faculty of Occupational Medicine accreditation standard known as "SEQOHS" ("Safe Effective Quality Occupational Health Service"). Revised SEQOHS standards had been issued in April 2015 (pages 641-643). Senior managers told her that the OH department had not been well managed in the past.

42. Although a senior nurse, Mrs Pamphlett-Jones was not an OH specialist. After taking up the post she signed the paperwork authorising the funding previously agreed by Mrs Murinda for the claimant's degree course, even though she had reservations about whether funding should have been granted. A Band 5 nurse did not require such a degree. Her understanding was that staff had to have been employed for at least 12 months when they applied for funding in that situation.

Later at the request of her own managers she agreed to start the same degree course herself at a different university.

43. Upon appointment Mrs Pamphlett-Jones became the claimant's line manager. She familiarised herself with the OH department staff (about eight people) and was told by some that they did not feel they had received proper training. She also formed the view that there had been a relatively high level of stress related absence prior to her appointment.

44. Upon reviewing personnel files she realised that there were very few records containing details of the level of qualifications and competence held by the clinical members of the department. Such records would be needed if the SEQOHS qualification was to be obtained. Records of that kind would also help the nurses gain revalidation with the NMC every three years.

45. Mrs Pamphlett-Jones therefore decided to recruit Elaine Hobson as a Band 7 clinical lead nurse in the OH department. She was an OH specialist with a degree in OH medicine and many years of experience. A primary part of her role was to ensure that members of the team had the required competencies. Miss Hobson started in post in September 2015 on an agency basis and was appointed a permanent member of staff in December 2015.

<u>January 2016 Appraisal – Allegation 2</u>

46. Members of staff were meant to have an end of year appraisal meeting. The claimant was due for a meeting in late 2015, about a year after she started as a permanent member of staff. A meeting with Mrs Pamphlett-Jones was arranged for 4 November 2015 (page 341) but did not take place. The claimant chased up her appraisal by email of 2 December 2015 (page 61). There was an appraisal meeting between the claimant and Mrs Pamphlett-Jones in January 2016. The document appeared at pages 156-167 with an amended version at pages 168-179. An alleged failure to appraise the claimant formed the basis of **allegation 2** and we will return to it in our conclusions.

<u>Audit of Competencies – Allegation 1</u>

47. In the meantime Miss Hobson undertook an audit of the competencies of various members of the department. She met the claimant about this in late December 2015 or early January 2016. The basis of **allegation 1** was that Miss Hobson told the claimant that she would have to undergo an induction process (for the third time), and that this was changed to a competency procedure later on when the claimant repeatedly challenged the need for a further induction. In contrast the respondent's case was that it was never an induction: that the claimant misunderstood the position and that it was always a competency audit, done for the claimant and for other members of staff. We will return to that core issue in our conclusions.

48. What was clear, however, is that when the claimant queried the process with Miss Hobson, Miss Hobson gave her a copy of her own departmental induction pack (pages 182-206). This had Elaine Hobson's details in it but it also contained at pages 192-203 a list of competencies expected of an OH nurse in the department. The

claimant maintained that she was shown an induction pack because in truth it was a third induction; Miss Hobson maintained that it was simply a convenient way of showing the claimant what competencies would be considered.

49. There appeared in volume 2 of our bundle competency audit results for other members of staff. They included white members of staff. At pages 480-496 appeared the records for Deborah Settle. The majority of her competencies were signed off on 25 February 2016. A note that date with the signature of Deborah Settle appeared at page 496 recording the views that Miss Hobson formed from observing her clinics. The claimant doubted the veracity of these documents because in November 2016 she spoke to Miss Settle outside work and (claimant witness statement paragraph 20) "Miss Settle indicated clearly that she had not been asked to undertake any induction or core competency". That fuelled the claimant's perception that she was being treated differently from her colleagues. We will return to that in our conclusions.

<u>February – March 2016</u>

50. The emails showed some concerns about some aspects of the claimant's work developing in early 2016. On 8 February 2016 Miss Hobson emailed Mrs Pamphlett-Jones to say that a member of the admin staff had identified that the claimant had not followed procedures properly. On 2 March 2016 (page 320) a colleague emailed Miss Hobson to say that the claimant had failed to give follow up appointments to a patient.

51. As well as looking at competencies, there were monthly audits of clinical notes undertaken for all staff by Miss Hobson. On 8 March Miss Hobson emailed the claimant with the results of an audit for January and February 2016. She said:

> **"Please find your audit result, unfortunately you have not met criteria, the names of the patient I have looked at and dates are on the adult form. You are not updating the immunisation section or writing in the clinical notes. I will arrange for you to sit with me for an hour to show you this."**

52. The two of them met to discuss the matter on 9 March 2016. A handwritten record appeared at page 633. It recorded the claimant saying that she had been updating records as instructed by Mrs Murinda, and that she had not been shown by Miss Hobson or Mrs Pamphlett-Jones the new way they wanted matters to be updated. The audit email had come as a huge surprise.

53. On 16 March 2016 (page 322) Miss Hobson emailed Mrs Pamphlett-Jones (sending a copy to the claimant) expressing concern about the claimant doing an audio clinic the following week. Although she had been trained, she had not been supervised doing a clinic or had her competencies signed. Different arrangements had to be made.

<u>May – July 2016</u>

54. In late April 2016 (page 323-324) the claimant requested three weeks of annual leave in May for urgent family reasons. Mrs Pamphlett-Jones said she was unable to accommodate the request beyond the first week as she and Miss Hobson were off and six weeks' notice was required before a clinic could be cancelled. On

12 May the claimant emailed to apologise for the short notice and to express her appreciation of the grant of one week.

55. In May the audit results were better. Miss Hobson emailed the claimant to say well done, and Mrs Pamphlett-Jones said the same (page 634).

56. On 21 June 2016 Miss Hobson emailed the claimant and others to say that the Patient Group-led Directives ("PGDs") were ready and that all members of staff needed to read them and then sign them (page 312). She asked for it to be done over the next four weeks. The PGDs were a key part of the way the department ran and it was important that it could be demonstrated that all staff were familiar with them. Miss Hobson had to email the claimant and some other members of staff on 24 August to remind them to read the PGDs and sign them (page 314). The claimant eventually signed them in January 2017 after a further reminder (paragraph 78 below).

29 July 2016 Competency Meeting

57. In late July 2016 the claimant had still not had her competencies signed off by Miss Hobson. The other members of staff had been through theirs on various dates between January and April 2016 (pages 434-626). Miss Hobson emailed her on 22 July (page 62a) arranging for them to meet on 29 July. A copy of the competencies was attached.

58. On 29 July the two of them went through the competencies taken from the induction paperwork and a number were signed by Miss Hobson as met (pages 325-336). A number of competencies were not applicable. Some the claimant had been unable to meet due to a national shortage of vaccine (page 328). On pages 327 and 329 the competencies regarding exposure prone procedures ("EPP") were left blank. It was Miss Hobson's case that the claimant had not been able to explain what EPP was and therefore these competencies could not be ticked off. About three pages of competencies had been discussed in the meeting; a further seven pages or so remained to be addressed. It was agreed that there would be a further meeting.

59. That further meeting did not take place. Miss Hobson said it was because the claimant refused to discuss competencies with her because she was intending to put a grievance in. The claimant denied this and said that the meeting never took place because of clashes in meeting dates. In any event it was clear that Miss Hobson and the claimant did not complete the exercise of going through the competencies on the induction form. As a result there was no evaluation completed by Miss Hobson.

August – October 2016 Absence Issue – Allegation 3

60. In August 2016 an issue arose about the claimant's absence record. This formed **allegation 3** and we will return to it in our conclusions.

61. Under the procedure for managing short-term sickness absence (pages 356-363) formal action was triggered by either three absences or a total of eight days due to sickness in a 12 month period. The claimant had hit this trigger point and Mrs Pamphlett-Jones made a referral for OH advice on 31 August 2016 (pages 63-66).

62. The claimant was on leave at the time and the report from OH was produced on 27 September 2016 (pages 67-68). It recorded that the claimant disputed the level of absences contained in the management referral. A couple of days which were carer's leave or on which she had not been due to work had wrongly been recorded on the sick leave form, and on two days she disputed she had been off sick. However, even with those matters excluded she still met the trigger point. The OH report concluded that she was fit for work and that no further absences were anticipated.

63. The claimant met Mrs Pamphlett-Jones and Mr Bowman of HR at a sickness absence management meeting on 31 October 2016. No notes were kept of this meeting but after it Mrs Pamphlett-Jones sent a note to the Head of HR which appeared at page 355. The note recorded her concern at some of the accusations made by the claimant during the meeting. The claimant challenged the accuracy of the sickness information and asked whether she was being treated differently because of her nationality. Mrs Pamphlett-Jones recorded an earlier allegation by the claimant that she was only being audited because of the colour of her skin. These were serious allegations of racism and she wanted them to be recorded. She asked that any further meetings with the claimant be conducted in the presence of a third person.

64. In cross examination the claimant denied that this note was accurate and said she had not made the statements in question. She denied the allegation of Mrs Pamphlett-Jones that during the meeting she was visibly angry, shouting and would not sit down. She pointed out that in subsequent correspondence (page 77) Mrs Pamphlett-Jones recorded that there had been an agreement that each of them would go away and check their diaries and absence records for when the meeting reconvened.

Funding for Degree Course Year Two – Allegation 4

65. In addition on 31 October Mrs Pamphlett-Jones informed the claimant that funding for the second year of her degree course would not be decided until the sickness absence issue had been resolved.

66. At a meeting on 15 November 2016 it was agreed that the claimant would have the same study leave arrangement for the second year of her degree, although she was not required to attend university in Wales until January 2017. Mrs Pamphlett-Jones signed the Learning Agreement at pages 69-73, which recorded that the course was "essential" rather than "desirable". However, whether she would be funded for the second year of her course had still not been decided. This formed the basis of **allegation 4** and we will return to it in our conclusions. Related to it was **allegation 8** about the failure to arrange placements and we will return to that issue too.

November – December 2016

67. An invitation to the reconvened sickness absence meeting was issued on 17 November (page 75) for a meeting on 24 November, but the claimant was on holiday at the time.

68. On 14 December an invitation was issued for a meeting on 21 December (page 77). This meeting was cancelled because the claimant was being interviewed by fraud investigators looking into a matter involving a different NHS Trust. Mr Hobson was present at the interview.

69. There was an exchange of emails on 19 and 20 December at pages 78-79. On 19 December 2016 the claimant emailed Mrs Pamphlett-Jones about sponsorship of her degree course. The claimant's email said that the decision not to approve sponsorship was related to concerns about the sickness absence issue. The claimant wanted to appeal.

70. In her reply of 20 December Mrs Pamphlett-Jones said:

> **"To confirm to you what I said was that until the sickness absence meeting had taken place I was not in a position to authorise and this had been discussed with David Hargreaves. We originally met on 31/10/16 when the meeting had to be terminated. I have tried to rearrange so we could move forward and unfortunately you have been unable to attend. At your request the meeting arranged for tomorrow has been cancelled therefore we will not be in a position to rearrange until the New Year."**

71. Around the same time Miss Hobson emailed Mrs Pamphlett-Jones to record difficulties she was having in managing the claimant ("Tonia"). Her email appeared at pages 318-319. She said:

> **"Since I started as the Band 7 last year I have found Tonia very difficult to manage. She arrives late and leaves clients waiting in the waiting room, at times she has not rang to say she has been running late. She also denies any sickness. I asked Tonia when I took the Band 7 role that we meet to complete her competencies, this went on for months. Tonia basically refused. I had to show her that other members of staff have had theirs completed before she would accept that this was part of our professional practice and to ensure that a person can actually do their role. This is also important for SEQOHS that all staff are signed off with their competencies.**
>
> **As part of SEQOHS and standards are maintained I audit staff's work once a month, everybody is audited even myself. When I audited Tonia's work she had not met the criteria as she had not done any written notes after vaccinating a patient. Her attitude was very unprofessional towards me, and accused me of treating her different. I explained that all staff had their work audited and explained why. I then had to explain to a qualified nurse the importance of recordkeeping and clinical notes. I explained that the expectation was that when a patient had been vaccinated that she must document [**that**] in the clinical notes. Tonia explained that Rivka had told she didn't need to do this. I explained to Tonia that Rivka is not a clinically trained person and that we need to write in the clinical notes and that moving forward this is to be done. Tonia does now write in the clinical notes."**

72. Miss Hobson went on to say that she felt the claimant would twist every conversation, she had had to arrange for other people to be present when she spoke to the claimant, and she did not want to manage the claimant any longer.

<u>January 2017</u>

73. On 4 January 2017 the invitation to the sickness absence management meeting was reissued (page 80). The meeting was to be on 13 January.

74. The claimant and Miss Hobson had a meeting booked the same day to go through the remaining competencies. On 4 January Miss Hobson sent the claimant an email (page 311) reminding her of that, and saying that she had been asking since October 2015 for the claimant to read and sign the PGDs. The email said the claimant was the only person who had not read and signed them. The claimant returned the signed copies the next day (page 313).

75. On 8 January the claimant responded to the letter inviting her to the sickness absence meeting of 13 January. Her letter appeared at page 81. She said she struggled to understand the opening statement of the letter and sought an explanation as English was her third language. That referred to the fact that the letter required her "to attend and to reconvene a capability hearing". The letter also told her that one outcome may be a first formal notification under the procedure, and she suggested that a determination had already been made. She asked if Mr Montford could accompany her.

76. Mr Bowman of HR responded on 10 January (page 654). He said he would arrange for Mr Dobson to attend the meeting in his place. Mr Montford could not attend as he was neither a trade union representative nor a fellow employee.

77. On 11 January Mrs Pamphlett-Jones emailed the claimant asking her to book an appointment for her appraisal as soon as possible (page 82).

78. On 12 January the claimant wrote to Mr Bowman expressing shock at his letter and the refusal to allow Mr Montford to accompany her. She said a formal grievance would be lodged in the middle of the following week. She said the meeting should not go ahead.

13 January 2017 Sickness Absence Meeting

79. Mr Dobson responded on 13 January at page 84. He gave the claimant the details for how to submit a grievance. He said that the hearing would go ahead in any event. He emphasised that a first notification was only a possible outcome. It was the responsibility of the claimant to arrange representation; Mr Montford would not be permitted to represent her.

80. The claimant sent Mr Dobson an email ten minutes before the meeting was due to take place (pages 85-85a). She said she was totally dissatisfied with how matters had been handled and had a sense of foreboding. She thought the process should be suspended until her grievance had been addressed. She would attend if he insisted but was in no frame of mind to deal with the meeting.

81. Mr Dobson had already left his office by the time his email arrived, so she provided him with a copy at the meeting. Mr Dobson and Mrs Pamphlett-Jones said in their witness statements that at the meeting the claimant stared into the distance and refused to speak. At one point she got down on her knees in a praying position. The claimant accepted that she did not speak in the meeting and did not engage with it, but denied having knelt down as if to pray. In any event it was clear that the meeting made no substantive progress. It was subsequently rearranged for 2pm on 3 February 2017 (pages 86a-87).

Unit Plan – Allegation 6

82. It was in early 2017 that the Unit Plan for the next 13 months was produced. It broke the forthcoming year down into periods of a month or two months and identified different tasks that would be undertaken by named members of staff. The claimant was not mentioned on the Unit Plan. This formed **allegation 6** and we will return to it in our conclusions.

83. On 15 January 2017 Mrs Pamphlett-Jones emailed the claimant again asking her to arrange her appraisal review.

84. In the meantime the competency meeting with Miss Hobson was still outstanding. The meeting on 13 January had been cancelled because of its clash with the sickness absence meeting. On 20 January the claimant told Miss Hobson that she would not proceed with the competencies until the grievance was concluded. Miss Hobson's email on 27 January (page 89) said that no grievance had yet been received and therefore the competency meeting was scheduled for 3 February. If the claimant failed to comply Miss Hobson would take further action.

3 February 2017 Grievance

85. At just after 12 noon on 3 February 2017 the claimant lodged her grievance by email at page 89a. She followed it up with an email at just after 2.00pm saying she was not ready to take part in the sickness meeting. She asked for the grievance process to conclude before sickness absence procedures were taken forward. She did not attend the competencies meeting with Miss Hobson either.

86. The grievance itself appeared at pages 91-101. It made the following points:

(a) After an initial induction as an agency worker, she had received a detailed and effective induction in her first eight weeks of work in the OH department in late 2014, yet she had been required by Miss Hobson to undertake a third induction;

(b) Mrs Pamphlett-Jones had not given any explanation for this, particularly given that there had been no concerns about the claimant's work following her initial inductions;

(c) Mrs Pamphlett-Jones had never appraised the claimant since she became the line manager, and the claimant had not received much support;

(d) There had been no review of objectives set in February 2016;

(e) On 31 October 2016 Mrs Pamphlett-Jones suggested that the sponsorship of the degree course could be suspended;

(f) Mrs Pamphlett-Jones had not allowed the claimant to shadow senior staff or undertake placements as required by the degree course;

(g) The competency exercise was raised "out of the blue" when there were discussions about the third induction, and was aimed at the claimant;

(h) The claimant had been subjected to a "barrage of accusations" relating to sickness absence and false accusations had been made in the OH referral form – Mrs Pamphlett-Jones was using sickness procedures to get the claimant into trouble;

(i) Mr Montford had not been allowed to represent the claimant at the sickness absence meeting;

(j) At the meeting on 13 January 2017 Mr Dobson had threatened the claimant when she went silent in the meeting.

87. The grievance ended by asking for the competency assessment exercise to be discontinued and for the claimant to be appraised as soon as possible. She wanted another line manager in place of Mrs Pamphlett-Jones.

88. The grievance was accompanied by 17 exhibits which appeared in our bundle at pages 231-273. They included many of the documents to which we have already referred, together with training course certificates and some medical information.

February 2017

89. On 6 February 2017 the grievance was acknowledged by Mr Renshaw (page 102). His letter said arrangements for an attendance meeting would be put on hold until after the grievance hearing.

90. That same day Mrs Pamphlett-Jones sent the claimant an appointment for an appraisal meeting on 24 February (page 103).

91. There were further issues about the claimant's work in early February 2017. On 8 February Miss Hobson emailed Mrs Pamphlett-Jones about the claimant not having done a follow up for a patient on 2 February (page 321).

92. On 23 February the claimant responded to the appraisal appointment asking for it to be on hold pending the outcome of her grievance (pages 104-105).

Grievance Correspondence

93. On 2 March 2017 Mr Dobson invited the claimant to a grievance hearing at stage 2 of the procedure. His letter appeared at page 107. The meeting was arranged for 22 March. It made clear that the grievance panel would be Karen Coverley, the Divisional Director of Nursing for Surgery and Neurosciences, and Clare Nott from HR. It also said that the management response would be presented by Mrs Pamphlett-Jones and Mr Bowman. The letter made clear that the claimant's statement of grievance and supporting documentation had been sent to the panel and Mrs Pamphlett-Jones.

94. On 2 March there was another instance of the claimant not making a follow up appointment with a patient (page 320).

95. Mr Dobson's letter of 2 March was signed on behalf of Paul Renshaw, the Director of Organisational Development. The claimant wrote to Mr Renshaw on 15 March. She said she was writing to him because she had had misgivings in the past about Mr Dobson. She confirmed she would attend and asked if she could be represented by Mr Montford. Clare Nott responded on 20 March at page 108a. She said that Mr Montford could not represent the claimant because he was neither a union representative nor a workplace colleague.

Management Response to Grievance

96. In the meantime Mrs Pamphlett-Jones had been preparing a response to the claimant's grievance. That document appeared at pages 395-307. There were ten sets of documents appended to it. In broad terms Mrs Pamphlett-Jones said that there was no record in the department of the claimant having completed the competencies, nor any evidence of her having completed an eight week unit induction, that all staff personnel records had been reviewed and that all staff were being taken through the competencies. She said that there had been concerns about the claimant's work, and that the claimant had been supported with study time and an arrangement for her to work in the Health Surveillance programme. The claimant had never requested a placement. The reasons for suspending and potentially withdrawing support for her course included the following:

(a) The claimant had refused to give details of her university tutor and mentor;

(b) The claimant was refusing to complete her basic competencies with Miss Hobson;

(c) The claimant had not asked for any shadowing experience;

(d) There were concerns about her attendance and conduct at work;

(e) The claimant would not confirm her attendance days at university in advance. She had failed to give the required six weeks' notice to cancel clinics.

97. Mrs Pamphlett-Jones went on to say that the claimant had shown a complete disregard for the Trust's objectives, values and training methods, and that she had refused to meet for the mid year and end of year review. Her absence management had been dealt with in accordance with the Trust's procedure. She had made disparaging comments about other members of staff, and was aggressive and hostile. Mrs Pamphlett-Jones said that neither she nor Miss Hobson wanted to have a conversation with the claimant alone. If the competencies were not completed the Trust should consider whether the claimant should be allowed to complete her clinical duties.

98. This response was sent to the claimant by Mr Bowman on 21 March (page 109).

22 March 2017

99. At just after midnight on the day of the grievance meeting the claimant sent an email at pages 110-112 saying that she was withdrawing from the process. She said there were going to be four individuals in the grievance hearing, and the decision to prevent Mr Montford accompanying her made her alarmed. There was no need for so many people, particularly when HR were not providing anyone to support her. She was concerned about the involvement of Mr Bowman. She sought the involvement of an independent HR consultant. These allegations about the grievance formed part of **allegation 5** and we will return to them in our conclusions.

100. Having seen the email Clare Nott rang the claimant and discussed with her the options on how to proceed. They included dealing with her written statement in her absence, having separate hearings of her case and the management response, or just talking matters through. The claimant did not take up any of those options. Clare Nott confirmed this in an email to Mr Renshaw at 2.09pm on 22 March (pages 112a-112b).

April 2017

101. In the days after the meeting Mr Renshaw and Clare Nott told the claimant that they would write to her to confirm how to proceed (pages 112c & d). On 2 April the claimant asked for an update (page 113). Clare Nott responded by a letter of 6 April at pages 114-115. She recorded the events of 22 March. She addressed each of the reasons given by the claimant for withdrawing. The claimant was offered further time to arrange an appropriate representative, and/or a hearing with just Mrs Coverley and herself. She was asked to provide further details of her allegations about a conflict of interest and a possible data protection breach. Alternatively she could discuss matters with an HR colleague who had not previously been involved. The grievance would be treated as withdrawn if the claimant did not respond by 20 April.

102. The claimant responded to Clare Nott on 20 April 2017. Her email appeared at page 119 attaching a letter of 18 April at pages 120-123. She said that her letter did not indicate that she was withdrawing her grievance: she wanted an independent HR consultant to deal with it instead of a Trust-run process. She reiterated the points she had made and explained her concerns about Mr Dobson and the arrangements for the hearing. She also pointed out that a lot of time had elapsed. The effect of this letter was that the grievance was to be progressed.

103. On 6 April Mrs Pamphlett-Jones sent the claimant another appointment for an appraisal meeting on 28 April.

26 April 2017

104. In the meantime the claimant had made an application for flexible working. This reflected the fact that in the absence of funding she was not allowed any study leave for her course but had decided to try and complete it using her own time. The timetable for her university attendance (page 630) was discussed with Mrs Pamphlett-Jones on 7 April 2017. Mrs Pamphlett-Jones confirmed the agreement for the flexible working request by a letter of 18 April at page 118.

105. On 26 April 2017 the claimant spoke to Mrs Pamphlett-Jones regarding the dates for her university attendance. There was a great deal of dispute about what happened. We will return to it in our conclusions. At this stage it is sufficient to note that Mrs Pamphlett-Jones prepared a statement of what happened (page 123) which said that the claimant had shouted at her, accused her of being a liar and had been abusive and aggressive, including banging on the door five times. A colleague, Kath Briody, did a statement at page 124 which said that the claimant was shouting and verbally aggressive; Helen Brookfield prepared a statement at page 125 which confirmed that she heard the claimant shouting at Mrs Pamphlett-Jones in a disrespectful tone, and Leanne Kennedy prepared a statement at page 126 which confirmed that she heard the claimant raising her voice and that the claimant slammed a door.

106. On 28 April 2017 the claimant wrote to Mrs Pamphlett-Jones (page 128) saying that her appraisal should be delayed until the grievance had been resolved.

Suspension – Allegation 7

107. On 2 May 2017 Mrs Pamphlett-Jones informed the claimant by telephone that she was suspended. This was confirmed in a suspension letter of 3 May at pages 129-130. The letter said that she was suspended because of her "behaviour at work last week". There would be an investigation. This formed **allegation 7** and we will return to it in our conclusions.

108. The claimant saw her doctor that day and was certified unfit for work due to a tension headache and work related stress (pages 131-132).

Resignation 12 May 2017

109. On 12 May 2017 the claimant resigned by a letter at pages 133-136. She said:

> **"This has become necessary on account of the fact that ever since I launched my formal grievance 97 days ago nothing has been done about it and the atmosphere in work is becoming more and more toxic by the day. The Trust's failure to deal with my formal grievance is also bringing intolerable pressure to bear upon me.**
>
> **I launched a formal grievance on 3 February 2017 and cited, among other things, unfounded allegations being levelled against me by Miss Pamphlett-Jones. The accusations have not stopped and she is becoming more and more audacious in her efforts in that direction."**

110. The claimant provided more detail in the remainder of the letter. She mentioned the following matters:

(a) The induction/competency issue;

(b) Baseless accusations about annual leave and sickness absence;

(c) A refusal to appraise her;

(d) The arrangements for the grievance hearing;

(e) The management response to the grievance prepared by Mrs Pamphlett-Jones;

(f) The failure to convene a further grievance meeting;

(g) The recent allegation of misconduct which was "pure fabrication".

111. The letter concluded as follows:

> **"It could be seen from the aforesaid that the formal grievance, which has legal backing, and could have been used to resolve this matter internally has been misapplied and also not been taken seriously. HR or the appointed panel members also failed to conduct any investigation into it for 46 days, before 22 March, and even now 97 days afterwards, nothing has been done about it. Attempts are also being made to deal with the issues raised in the grievance in a piecemeal fashion by the person whose actions and omissions brought about the issues, which would not engender any comprehensive or durable solutions. The same person has also suspended me, based upon trumped up charges, and is also the person leading and conducting the investigation thereof. The Trust is not doing anything in the face of this worrying situation. The atmosphere in work has become so toxic, to the extent that my health has been adversely affected. I have been signed off sick a couple of times recently, due to the situation in work. Against this backdrop, I am left with no other option than to resign from my position in the Trust within immediate effect."**

After Resignation

112. The HR Director, Mr Hargreaves, responded on 24 May 2017. His letter appeared at pages 137-138. He said that the Trust would consider whether the grievance could be brought to a conclusion despite the resignation. The terms of reference for the disciplinary investigation and the appropriate investigation officer had not been determined, but that matter would not be pursued. Mrs Pamphlett-Jones had been required to consider suspension in her role as line manager. The investigation would not have been undertaken by Mrs Pamphlett-Jones.

113. The response to the grievance from Karen Coverley came by a letter of 25 July 2017 at pages 139a-139c. It said that a number of other employees had been required to undertake the competency assessment, that there had been an appraisal but the claimant had refused to attend mid year and end of year meetings, that the Unit Plan did not describe the role of the entire team, that sickness absence trigger points had been met and the procedure managed in accordance with the policies, and that there were significant concerns about whether the degree course should be supported any further. Miss Coverley also dealt with the involvement of Mr Dobson in the grievance, the format of the hearing and the delay, and rejected the allegation that Mrs Pamphlett-Jones had attempted to destroy the claimant's career.

Submissions

114. Helpfully each advocate supplied a written submission at the conclusion of the evidence. The Tribunal read these documents before hearing oral submissions. Reference should be made to the written documents for full details of the position taken by each party. What follows is a broad summary.

Respondent's Submission

115. After reviewing the legal framework in his written submission Mr Boyd addressed each of the eight allegations which were said to form the basis of the constructive dismissal complaint. He denied that any of them amounted to a breach of contract, let alone a repudiatory breach.

116. The rationale for the competency assessments was plain; the complaint that there had been no appraisal was misconceived, and the "systematic attacks" on the absence record amounted to nothing more than the claimant triggering the process by the level of her absence. The real issue over the CPD course was the refusal to provide funding until the sickness absence matter had been completed, but it was the claimant's failure to engage with that procedure which prevented a decision being made. As for the grievance, although it had taken longer than the speedy resolution envisaged by the policy, there were reasons for that. The respondent had adhered to its own policy and the criticisms of the grievance procedure made by the claimant did not take her anywhere. Her exclusion from the Unit Plan had been explained by the fact she had not put any projects forward, and the suspension and disciplinary investigation was entirely warranted by her behaviour on 26 April 2017.

117. In his oral submission Mr Boyd expanded on some of these points. He addressed us on credibility and suggested that we should prefer the evidence of the respondent's witnesses where there was a conflict. He relied on the way in which the claimant answered questions, even allowing for the artificial environment of a Tribunal hearing and that English was not her first language, as well as the implausibility of some of her accounts of what had happened. He suggested she refused to make concessions even where the evidence that she was wrong was plain.

118. As to the race case, he submitted there was nothing whatsoever to shift the burden of proof. There was ample evidence that other members of staff had been treated in the same way as the claimant in relation to a number of matters, not least the competency assessment. He suggested that evidence that Claudette Lovell, who was black, had undergone the competency assessment had prompted the claimant to change her case in the middle of her evidence to rely on her Nigerian nationality and ethnic origin. There was no evidence as to the nationality of Claudette Lovell but in any event no basis for thinking that the respondent's witnesses knew that the claimant was Nigerian or that it had any impact on how they dealt with matters. He invited us to dismiss all the complaints on their merits.

Claimant's Submission

119. In her submission Ms Santamera concentrated on the constructive dismissal complaint. She suggested that the last straw was the failure properly to investigate the grievance, contrasted with the speed with which the suspension and disciplinary matter was to be investigated. She relied on the ACAS Code of Practice and accompanying Guide in relation to submissions about delay and the way the grievance was dealt with. Mr Dobson had already formed an unfavourable view of the claimant from the fraud interview on 21 December 2016 and it was for this reason that he involved himself in the grievance. Further, the terms of the formal grievance of 3 February 2017 were such that it was a breach of trust and confidence

not to ensure the claimant had no further managerial contact with Mrs Pamphlett-Jones, and also a breach to fail to ensure that the claimant had a meeting quickly without Mrs Pamphlett-Jones being present at which her grievance could be discussed. Instead the respondent set up an adversarial process which was wholly inappropriate and which contributed to the fundamental breach of contract. There was also a failure to arrange a new date after the claimant withdrew from the meeting on 22 March. Allowing Mrs Pamphlett-Jones to prepare the management response to the grievance and providing that to the claimant was also part of the breach of the trust and confidence.

120. More broadly Ms Santamera submitted that Mrs Pamphlett-Jones had taken against the claimant because of her resistance to the competency assessment, and that her resentment to the claimant had been a driving factor in her efforts thereafter to undermine her at each step. She relied on the dispute over whether the claimant had provided a copy of her university timetable which triggered the incident on 26 April 2017 and suggested that if there were really grounds for suspension the claimant would have been suspended immediately rather than five days later. She submitted that the written statements from witnesses who were not called should not be given much if any weight.

121. The handling of the sickness absence issue was also a breach of trust and confidence. The sickness record should not have contained details of absence for other reasons, and Mrs Pamphlett-Jones had automatically referred the claimant to Occupational Health without considering her discretion whether to do so. Further, there were two dates on her records which were incorrect and the records had been subsequently falsified. This was all further evidence of the campaign against the claimant. So too was the reference in the Occupational Health referral to the claimant going on sick leave when refused annual leave. That had not been substantiated.

122. The same attitude towards the claimant was evident from the efforts to arrange sickness absence meetings on dates that she knew the claimant would not be available, and in reneging on the funding agreement having signed it on 15 November 2016. So too had she gone back on the flexible working agreement in April 2017.

123. As to race discrimination, Ms Santamera did not abandon the case based on the claimant being black but suggested that the main issue now was that the claimant was Nigerian. She said that Claudette Lovell was Jamaican and that Mrs Pamphlett-Jones knew that the claimant was Nigerian from her holiday plans in November 2016. Although Ms Lovell had not been identified as a comparator at the case management stage, she had been promoted to Band 6 and the claimant had been required to “hot desk” whilst Ms Lovell took over the claimant's desk. The Tribunal was invited to look at matters in the round in order to infer that there had been direct race discrimination in this case.

124. Ms Santamera also relied on the decision of the Court of Appeal in **Salford Royal NHS Foundation Trust v Roldan [2010] EWCA Civ 522** to show that the importance of proper investigation was well known to this respondent.

125. We had insufficient time to conclude deliberations and give oral judgment at the end of submissions, so the Tribunal's judgment was reserved.

Discussion and Conclusions

126. The first matter the Tribunal addressed was the holiday pay complaint. There was no evidence offered by the claimant about this at all. It did not feature in any of the questions put to the respondent's witnesses by Ms Santamera. Nor was it addressed in oral submissions. That claim was dismissed.

127. The Tribunal then considered the complaint of constructive dismissal and the race discrimination complaint. We decided that the appropriate way to proceed was to address each of the eight core allegations in turn, making factual findings where necessary, assessing whether the matter was individually capable of being a breach of trust and confidence and deciding whether it represented less favourable treatment because of race. However, it would also be necessary for the Tribunal to step back at the conclusion of that process to see whether those matters taken together might amount to a breach of trust and confidence, or might taken together support an inference that any of the treatment constituted direct race discrimination.

128. We reminded ourselves of the legal framework summarised above. For constructive dismissal the **Malik** test requires that there be no reasonable cause for the actions of management and that the conduct must be serious enough, when viewed objectively, to be calculated or likely to destroy or seriously damage trust and confidence.

129. For race discrimination the claimant is required only to prove facts from which a finding of less favourable treatment because of race could be made before the burden falls on the respondent to show that there was no contravention. The Tribunal must consider the mental processes, conscious or subconscious, of the decision makers to see whether race (or nationality) had any material influence. The claimant's case was initially based on her being black, but at the start of her evidence on the third day of the hearing she explained that she believed her Nigerian nationality had also been a factor. It had emerged in evidence the previous day that one of the other nurses who had undergone a competency assessment, Claudette Lovell, was black. The point about nationality had not appeared in the claim form or her witness statement, and evidence about the nationality of any comparators was not available. Nevertheless we took it into account in evaluating the race discrimination complaints.

130. For convenience each of the eight primary allegations will be reproduced before we explain our conclusions on it.

(1) Placing the claimant under pressure to undergo repeated induction/competency assessments.

131. The claim form made clear that it was the claimant's case that she was initially pressure to undertake another induction, but when she pointed out she had already undergone two inductions the process was turned into a competency procedure, and Mrs Pamphlett-Jones attempted to deceive her by indicating that all other employees were undergoing the same process.

132. The Tribunal accepted the evidence that the need to review competencies of staff was driven at least in part by the aim of achieving SEQOHS accreditation. It was also clear that Mrs Pamphlett-Jones had been informed that the department had been poorly led in the past, and we accepted her evidence that the personnel files did not contain the evidence of competencies that she and Ms Hobson expected. Although Mrs Murinda had taken the claimant and others through competencies and, in her words, had "signed off" on them, there was no evidence before the Tribunal that the records had been properly retained in the appropriate place. In those circumstances the decision to undertake a review of competencies across the department to ensure that it was properly evidenced was entirely reasonable and appropriate.

133. It was clear, however, that the claimant formed the view almost immediately that she was being asked to undertake a third induction. That may have been a consequence of the decision to utilise the induction paperwork as a means of undertaking the competency assessment. The respondent can be criticised for that decision. Although the induction paperwork contained the competencies required of nurses in that department, it would have been easy for those competencies to have been extracted and put in a different document which made clear that it was not an induction process. Even though that was explained to staff at a team meeting, the claimant accepted that she was not present at every team meeting. It was clear to us that she misunderstood the position and genuinely believed that this was a third induction. When it was explained to her that in fact it was a competency assessment she was suspicious of that explanation and for that reason believed that the respondent had changed its position. We concluded unanimously that this was never an induction process: even though the induction pack was used as a convenient source of the required competencies, this was a process of reviewing the competencies undertaken in relation to all members of the department, not simply the claimant.

134. The claimant's perception that she was singled out was fuelled by a conversation she had with Deborah Settle in November 2016. They had joined the department around the same time and both been inducted by Mrs Murinda. We noted that in her witness statement (paragraph 20) the claimant said that her discussion with Ms Settle was about "any induction or core competency". In her oral evidence to our hearing the claimant twice said that she had asked Ms Settle about "induction" before clarifying in response to a question from the Tribunal that she meant "competency". We noted that the respondent had produced documents in relation to Ms Settle at pages 480-496. Ms Settle was not called as a witness in this case. Putting these matters together, we concluded that the claimant had asked Ms Settle whether she had undergone another induction, and Ms Settle answered in the negative because she had understood that the process at the start of 2016 had not been an induction but rather an assessment of her competency.

135. Accordingly we rejected the contention of the claimant that she was the only person required to go through the competency review process. All the OH nurses were required to undergo that process. She was the only person who saw it as an induction but that was not objectively the case, despite the inappropriate use of the induction documentation by the respondent.

136. For that reason we also rejected the contention that the respondent had sought to deceive the claimant by telling her that others were going through the same process. That was true: they were. The documents appeared in our bundle from pages 434-626.

137. Part of this allegation was that the claimant was put under pressure to complete the competency process. The other members of staff had all completed the review of their competencies by April 2016. The claimant did not have her meeting with Ms Hobson until 29 July 2016. That meeting went well, and a number of competencies were signed off. There was a few that the claimant had not been able to answer, and a significant number which had not been discussed because time ran out. It was common ground that there was to be a further meeting about a week later and that it did not take place, although the claimant and Ms Hobson did not agree as to why that was. It was a matter of record, however, that the meeting had still not taken place when a meeting on 13 January 2017 was arranged (page 311). There was no evidence in the documentation produced to our hearing of Ms Hobson chasing the claimant to meet regarding competencies in the second half of 2016, but it was the claimant's own case (witness statement paragraph 20) that she was under pressure to do that in this period.

138. By the time a date was arranged in January 2017, however, matters had moved on in terms of the claimant's view about how management were treating her. The competence meeting on 13 January did not take place because of the sickness absence meeting the same day, and the meeting rearranged for 3 February 2017 did not take place because the claimant submitted her grievance that morning and declined to attend. However, the Tribunal was satisfied that it was entirely proper for Ms Hobson to put some pressure on the claimant to complete the competency assessment. It was part of the process which would lead to an application for SEQOHS accreditation. It was also in the interests of the department and the claimant that there be a proper record that she was competent in all the areas required of an OH nurse at Band 5. The claimant’s suggestion that there was something improper in Ms Hobson seeking to conclude this matter (as she had done for the other nurses earlier in the year) was misconceived.

139. Putting those matters together the Tribunal concluded unanimously that there was no breach of trust and confidence in this allegation. It was a proper and appropriate management action for which there was reasonable cause. The claimant's reluctance to engage with it was due to her misapprehension that it was a third induction. Although the respondent can be criticised for not making it abundantly clear to the claimant that it was not an induction process, perhaps by avoiding the use of the induction pack as a means to undertake the exercise, that is a minor failing and not one which elevates this matter to a breach of trust and confidence.

140. Nor was there any evidence from which the Tribunal could reasonably conclude that the decision to put the claimant through the competency assessment was because of her race, nationality or ethnic origins. All employees in the unit were put through the same assessment. The fact that it became a source of contention between the claimant and her manager was a consequence of other factors, not least being the claimant's mistaken resistance to the process because she thought it

was yet another induction. The same was done for the other nurses whatever their race or nationality. The race discrimination complaint on this point failed.

(2) Failing to appraise the claimant.

141. The claimant's case in her claim form was that she had not been appraised by Mrs Pamphlett-Jones for one year six months, when in the same period all other employees had been appraised twice. In her further particulars (page 29) she said she had not been appraised by the time she lodged her grievance in February 2017, and that efforts to arrange an appraisal meeting were only made thereafter.

142. This allegation was untrue. There was an unsuccessful attempt to arrange an appraisal meeting in November 2015 (page 341). There was an appraisal meeting in January 2016 which resulted in the completion of the “My Contribution Review” form at pages 168-179.

143. The mid year review was due to take place in the summer of 2016, and the end of year review in early 2017. On 11 January 2017 Mrs Pamphlett-Jones emailed the claimant asking her to book a meeting as soon as possible (page 82). It was not correct that efforts were only made after the claimant lodged her grievance, although they did continue after that happened.

144. Two further criticisms were made by the claimant during our hearing. The first was that there had been no rating of her contribution at the meeting in January 2016. The form did not contain any rating. It recorded that it was the first review and that no objections had been set in the previous year therefore performance could not be rated. This might be viewed as a failure by the manager to give some feedback on how the claimant had been performing. However, it was a minor matter and not something which would breach trust and confidence. It should also be borne in mind that the claimant had started properly in the department only in December 2014, and therefore this was the first appraisal meeting approximately 12 months into her service.

145. The second criticism was that the objectives set and discussions held in January were not followed through later in the year. Page 169 recorded the personal goals of the claimant being to engage in case management and referrals, and to undertake health surveillance. Health surveillance was arranged in July 2016, working with Ms Settle who later gave some good feedback about the claimant in November 2016 (page 257). As for case management and referrals, that was work at Band 6 level. Experience of it would help to equip the claimant for promotion. However, throughout the period covered by the forthcoming year the claimant had not completed the competence assessment with Ms Hobson, and therefore there was reasonable cause for the respondent to consider that placing her in Band 6 work was not appropriate until her competence at Band 5 had been properly established.

146. Possibly related to that was the suggestion that there was no mid year review in July 2016. The part of the document which related to a mid year review (page 173) had been completed by the claimant. However, Mrs Pamphlett-Jones recorded in her response to the grievance (page 303) that no mid year review had taken place. We concluded that it did not occur, although there was no record of either party seeking

to arrange it at the time. By August 2016 the relationship was becoming even more strained because of what the claimant saw as the inappropriate OH referral.

147. Putting these matters together we concluded that there was no breach of trust and confidence in the way the appraisal was dealt with. Although Mrs Pamphlett-Jones can be criticised for not having given some rating of performance in January 2016, and for having failed to ensure that there was a mid year review, these were relatively minor failings. The core allegation that there was no appraisal at all for 18 months was simply not correct.

148. The claimant confirmed in her oral evidence that she did not rely on this allegation as one of race discrimination.

(3) Undertaking systematic attacks on the claimant's sickness absence and leave record.

149. Considering the claim form and the further particulars it appeared to the Tribunal that there were seven distinct criticisms made within this allegation.

Mixed Records

150. The first criticism was that Mrs Pamphlett-Jones mixed her sickness records by recording sick leave and other kinds of leave (e.g. carer's leave) on the same form (page 66). Ms Santamera suggested in submissions that this was a breach of the Information Commissioner's Code of Practice on Employment. Although it was not best practice to keep a record of carer's leave on a form which was headed "sickness record", the Tribunal was satisfied this was a minor criticism. The key point was that the days of carer's leave were distinguished on the form from days of sickness absence and therefore not erroneously taken into account in assessing whether the trigger point for sickness absence management measures had been reached.

Inaccurate Records

151. The second criticism was that the record was factually incorrect because there were two dates on which the claimant had not been on sick leave. A revised version of the absence form appeared at page 345. A day of sick leave on 17 June had been changed to 15 June. There was some debate in our hearing about whether the claimant had been off sick on the two dates which she maintained were wrong, and the Tribunal had sight of some copies of an electronic record. It appeared inconclusive. The salient point, however, was that when the claimant became aware of what she considered to be the errors she raised them, and Mrs Pamphlett-Jones was prepared to look at them. They were discussed at the sickness absence management meeting on 31 October 2016, and the subsequent letters reconvening the meeting from 14 December onwards (page 77) made clear that the matter had not been closed: both sides were going to go away and look at their records and resolve the matter when they reconvened. Importantly, even if those absences were properly to be discounted, the claimant had still met the trigger point of three absences in the previous 12 months. This error or discrepancy was a minor matter.

OH Referral

152. The third criticism was that Mrs Pamphlett-Jones had referred the claimant to OH without giving any proper consideration to her discretion about whether that was the right thing to do. The capability procedure at page 358 recorded that three absences in a 12 month period "may be regarded as unsatisfactory and should be considered by the manager at a formal hearing with the employee". The policy also made clear on the same page that a referral to OH would be appropriate if an underlying medical condition was suspected as the reason for frequent short-term absence. We noted that the terms of the referral made reference to the claimant being persistently late, and that she tended to become unwell at times when annual leave had been declined, matters which put the claimant in a negative light. We will deal with that point in the next paragraph. Even so, we concluded that a referral to Occupational Health and the decision to pursue sickness absence management procedures was a decision which Mrs Pamphlett-Jones was reasonably entitled to make. The purpose of an OH referral can be to see whether there is any underlying problem, which indeed was one of the questions opposed in the referral at page 64. Although it would have been equally reasonable to have decided not to refer the claimant at this stage, it fell within the ambit of the management discretion to do so.

Comment About Annual Leave

153. The fourth criticism was the reference on the Occupational Health referral to the claimant becoming unwell when annual leave was being declined. That point was first raised by Mrs Pamphlett-Jones when the claimant returned from annual leave in early September 2016, having had a road traffic accident a couple of days before her leave was due to start. The claimant was understandably aggrieved by this. On the evidence in our hearing it was not a view which could be justified. However, it was apparent that there was already some negative perception on the part of Mrs Pamphlett-Jones in relation to the claimant relating to an application for leave made in April 2016 (pages 323-324). She made a request for three weeks' annual leave at short notice because of some urgent family needs (her husband was scheduled for an operation), and the response from Mrs Pamphlett-Jones was in relatively curt terms allowing her one week only. The comment about annual leave should not have been included on the Occupational Health referral form for the claimant as it was not justified by the evidence available. However, inclusion of a negative or unsupported comment in an OH referral is in itself a relatively minor matter, and there was no further pursuit of that issue. It did not feature in the OH reports which ensued. Viewed in isolation it did not breach trust and confidence.

Absence Management Procedure

154. The fifth criticism was that the sickness absence management procedure was pursued at all. That was essentially a reflection of the fact that Mrs Pamphlett-Jones decided to proceed once the trigger point was met, and to that extent we dealt with it above. The OH referral was a precursor to a formal absence management meeting.

Predetermined Sanction

155. The sixth criticism was that the sanction had been predetermined. This was based upon the wording in the invitation letters for the meetings, namely that Mrs

Pamphlett-Jones would decide on the appropriate action which "may be…a first formal notification". We rejected that criticism. It was appropriate for the letter to spell out what the consequence of the meeting could be. The claimant was wrong to see this as any form of predetermination.

Degree Course Funding

156. The seventh and final criticism was that the sickness absence management procedure was used as a means of withdrawing funding for the degree course. That overlapped with allegation 4 and we will deal with it below.

Allegation 3 Overall

157. Putting these matters together the Tribunal concluded that the handling of the sickness absence issue did not in itself amount to a breach of trust and confidence. The use of the same form to record carer's leave and sickness leave, the failure to ensure that the sickness absence record was entirely accurate, and the inclusion of detrimental matters in the OH referral form were all matters about which the claimant could properly feel aggrieved, but viewed objectively they were not enough in themselves to destroy trust and confidence. However, this matter was capable of contributing to such a breach and we will return to it in due course.

158. As for the race discrimination complaint in relation to this matter in isolation, the Tribunal had no evidence about how Mrs Pamphlett-Jones would have dealt with a white or non- Nigerian nurse with the same absence record. There was no evidence of any less favourable treatment, let alone any evidence that race was a reason in how she dealt with it. Viewed in isolation this allegation did not amount to race discrimination.

> **(4) Failing to provide the claimant with appropriate access to a programme of continuing professional development.**
>
> **(8) Failing to give or allow the claimant protected placement time.**

159. It was convenient to deal with these two allegations together because they represented matters that were linked.

160. In her claim form the claimant complained about Mrs Pamphlett-Jones stopping the funding for year two of her course and denying her the related protected placement programme. She pointed out that Mrs Pamphlett-Jones had placement time herself as she was doing the same degree course. In her further particulars the claimant made clear that Mrs Pamphlett-Jones had cited sickness absence issues as a reason to decline to authorise sponsorship of the programme for year two.

161. We rejected Ms Santamera's contention that paragraph 11 of Mrs Pamphlett-Jones' witness statement was misleading. It made clear that the arrangements had been agreed and that she honoured them. That was not inconsistent with the fact that she signed the documentation for year one funding, because that documentation came to be signed after Mrs Murinda had gone on sick leave. We accepted that Mrs Pamphlett-Jones signed that documentation despite some reservations about whether an appropriate agreement had been reached. It did not commit her to funding year two come what may.

162. As for year two funding, the first mention that there might be an issue with it was at the sickness absence management meeting on 31 October 2016. The claimant subsequently recorded in her grievance that this issue had been raised. It was also the subject of an exchange of emails on 19 and 20 December 2016 at pages 78 and 79. There Mrs Pamphlett-Jones explained that until the sickness absence meeting had taken place she was not in a position to authorise funding. The learning agreement in respect of study leave had been signed on 15 November 2016, including the box indicating that it was an essential requirement (page 70). The claimant argued that there was no good reason for refusing funding, that the form showed that Mrs Pamphlett-Jones recognised that it was an essential requirement, and therefore that this amounted to a breach of trust and confidence.

163. We noted that although the email in December only mentioned the sickness absence management reason, in her management response to the grievance in March 2017 (page 300) Mrs Pamphlett-Jones gave a number of other reasons for not confirming support. They included the fact that the claimant had still not completed her basic competencies, as well as concerns about attendance at work. Whatever the merits of the other factors mentioned there, we were satisfied that those two reasons alone were reasonable cause for Mrs Pamphlett-Jones to withhold authorisation of the funding for year two. There was reasonable cause for management to be concerned that an employee in the sickness absence management procedure was seeking funding for further absence from her work for academic study. The degree course was not essential for a Band 5 role; the box on the funding form had been ticked in error. This was not in isolation a breach of trust and confidence.

164. As to placements, there was no record of the claimant requesting any specific placement and being denied it. It was arranged for her to spend time in Health Surveillance between July and September 2016, as agreed at the appraisal meeting in January 2016. Mrs Pamphlett-Jones said in her response to the grievance (page 300) that it was for the claimant to arrange to discuss such matters with her tutor, and in paragraph 42 of her witness statement she indicated that it was not until October 2016 that the claimant raised the fact she had not received any placement time. Mrs Pamphlett-Jones took the view that it was for her to arrange that and request permission. We were satisfied that there was no breach of trust and confidence here. There was a concern about whether the claimant was competent in her Band 5 role resulting from the fact that she had still not had her competencies assessed by Ms Hobson even in late 2016. In those circumstances, and given the absence of any specific request that was refused, the fact that the claimant did not undertake any such placements did not amount to a breach of trust and confidence.

165. In relation to race discrimination, there was no evidence of a white or non-Nigerian member of staff being in the same position, save for Mrs Pamphlett-Jones herself. However, we accepted the evidence that Mrs Pamphlett-Jones was required to undertake the degree course by her managers, and, despite the fact that the "essential" box was ticked on page 70, that was not the case for the claimant. We therefore rejected the contention that this was a comparison between two situations which were the same. There was no evidence from which we could conclude that the failure to prove funding for year two of the course, and the fact the claimant did not

have any placements beyond a period in health surveillance, were because of race, nationality or ethnic origins. The allegation of race discrimination failed.

(6) Demoting the claimant by failing to include her in the Trust's Unit Plan.

166. It was convenient next to deal with issue number 6 because issues 5 and 7 were about a later period. This concerned the Unit Plan produced in early 2017 (pages 267-270) which made mention of a number of projects with identified members of staff, but did not mention the claimant. The claimant's case was that this amounted to a demotion, and that she was excluded from the Unit Plan because of race.

167. The evidence of the respondent was that those who appeared in the Unit Plan were those who had come forward with projects in which they wanted to be involved. We accepted that evidence. There was nothing to counter it. The reason the claimant was not included was because she had not proposed any projects. Her exclusion from the Unit Plan did not amount to a breach of trust and confidence. Had she come forward with anything it could have been included. The claimant was wrong to see this as a form of demotion. It had nothing to do with her status in the department as she remained in her post as a Band 5 nurse.

168. Further, there was no evidence to support the contention this was in any sense influenced by race or nationality. The race discrimination complaint failed.

(5) Mishandling a grievance that the claimant submitted.

169. The complaint made by the claimant about the handling of her grievance had five different elements.

<u>People Involved</u>

170. The first element was the involvement of two people that she did not want to be involved: Mr Dobson and Mr Bowman.

171. In relation to Mr Dobson, the claimant wrote on 12 January 2017 to Mr Bowman saying that she was going to lodge a formal grievance in the following week and that she wanted her capability meeting on 13 January to be cancelled. Mr Dobson was due to be at that meeting and he responded to the claimant's letter by telling her to direct any formal grievance to him but making clear the meeting would go ahead. When the claimant did lodge her grievance on 3 February she said (paragraph 40 on page 100) that she did not want Mr Dobson to review her grievance because he had forced her into taking part in the meeting on 13 January and issued a threat to her when she went silent. Despite that it was Mr Dobson who wrote to her on 2 March (on behalf of Mr Renshaw) at page 107 confirming arrangements for the grievance hearing on 22 March. However, we noted that Mr Dobson had only an administrative role in this grievance: he was neither on the grievance panel nor an HR adviser involved in the hearing itself. Although it would have been reasonable for someone else to have dealt with the administrative arrangements for the grievance given what the claimant said, the fact he was involved in that limited capacity did not breach trust and confidence.

172. In relation to Mr Bowman, the claimant also said in her grievance of 3 February that she wanted the case to be reviewed by someone more senior to him. That indeed was the position: the grievance panel was composed of Karen Coverley and Clare Nott, both senior to Mr Bowman. His role was to provide HR support to Mrs Pamphlett-Jones. This too was not a significant breach of fairness which could destroy or seriously damage trust and confidence.

HR Support for Managers Only

173. The second element was that HR was supporting Mrs Coverley and Mrs Pamphlett-Jones, meaning that there would be four people at the meeting, but no HR support was afforded to the claimant.

174. We noted that the grievance procedure made provision for there to be an HR representative on the panel deciding the grievance, and did not expressly mention HR support for the manager responding to the grievance. Equally it gave the person bringing the grievance the right to be accompanied by a union representative or colleague and did not give any such right to the manager who was the subject of the grievance.

175. Given that Mrs Pamphlet-Jones was having to respond to serious allegations about the way she had managed the claimant, the provision of support through the HR department was not an unreasonable step, not least because it represented the standard approach to grievances for the respondent. We appreciated, of course, that from the claimant's perspective this was a daunting position to be in, especially where she was not a union member and there was no workplace colleague willing to accompany her. It was understandable that she thought that she was facing four people, although in reality the contentious issues were between herself and Mrs Pamphlett-Jones, not herself and the panel. However, despite these understandable concerns on the part of the claimant we did not consider that the arrangements made for HR support breached trust and confidence.

Delay

176. The third element was the length of time the procedure took. The grievance procedure itself said (page 416) that all grievances shall be dealt with as speedily as possible. It was recognised that the availability of management and representatives might affect how quickly the grievance could be addressed, but all parties were expected to cooperate to ensure there were no unnecessary delays. Ms Santamera also relied on the ACAS Code of Practice which says that meetings should be arranged promptly and without unreasonable delay. The ACAS Guide also indicates that meetings should occur within five days.

177. We rejected Ms Santamera’s submission that the grievance should be regarded as having been lodged by the claimant in her letter of 12 January 2017. Although that letter had the heading “formal grievance” it was plainly notification that a formal grievance would follow. The claimant did not term that letter her grievance in her claim form or further particulars. The grievance began with her formal grievance of 3 February 2017.

178. That was acknowledged on 6 February (page 102) and there was then a delay until 2 March before Mr Dobson wrote to the claimant to invite her to a stage two grievance hearing on 22 March (page 107). In that period arrangements were made for there to be HR support for Mrs Pamphlett-Jones, and the identity of the grievance panel and their availability was taken into account. When she received that letter the claimant did not respond protesting at the length of time it was taking. Instead at page 108 she expressed misgivings about Mr Dobson and confirmed her attendance. She also asked to be represented by Mr Montford. There was no complaint about delay then.

179. That meeting did not go ahead because the claimant emailed at shortly before 1.00am (pages 110-112) expressing a number of concerns and saying that she was withdrawing from the Trust run process and wanted an independent HR consultant involved.

180. That email was acknowledged by Mr Renshaw and Mrs Nott (pages 112c-112d) by the end of March. The claimant wrote on 2 April asking for an update (page 113). She did not request a further hearing date. She wanted to know when the matter would be resolved. Mrs Nott wrote on 6 April addressing the concerns the claimant had raised and offering assurances and different options for how the matter might proceed. She asked the claimant to reply by 20 April.

181. The claimant's reply came on the last day of that period (page 119). She enclosed a letter dated 18 April in which she sought to make it clear that she was not withdrawing the grievance itself. She simply wanted it dealt with independently. Her letter ran to three pages and raised a number of different concerns. She pointed out that a good deal of time had elapsed since she launched her grievance on 3 February.

182. That letter was acknowledged seven days later by Mrs Nott (page 127), saying that she would be in touch with a grievance hearing date and an appropriate format. However, there had been no further progress when the claimant resigned on 12 May.

183. Although the respondent's own policy and the ACAS material encourages matters to be dealt with as speedily as possible, each grievance depends on its own circumstances. This was a detailed grievance which raised a significant number of issues. It was directed at the claimant's line manager and therefore had to go straight to stage two. There were four different diaries to be coordinated before the claimant could be informed of the date upon which the grievance would be heard. The claimant declined to attend that meeting and raised some further serious issues in the letter in which she withdrew from that process. Her request for an independent HR person to deal with her grievance was an unusual one which had to be considered carefully. The fact that two or three weeks elapsed between different developments reflected the serious nature of the matters being raised and the senior level at which the grievance was being addressed. We noted the comments made by the EAT in **Blackburn v Aldi Stores** (see paragraph 31 above). This was not a case where the respondent was ignoring the grievance or simply refusing to deal with it. It was being taken seriously. In those circumstances the Tribunal concluded

that this grievance was not dealt with in an unreasonable manner in relation to the time it took. The timescale did not in itself cause any breach of trust and confidence.

Mr Montford

184. The fourth element was in the refusal of the respondent to allow the claimant to be represented by Mr Montford. In taking this line the Trust adhered to its own policy and to the legal rights of the claimant under the Employment Relations Act 1999. Although it might have been reasonable to have allowed the claimant to be accompanied by someone else, it cannot be said that the failure to depart from policy was unreasonable. This was not a case where there was any need for a reasonable adjustment for medical reasons to allow an employee to be accompanied by a person beyond the categories covered by the policy or the law.

Adversarial Procedure

185. The fifth and final element was about the nature of the procedure. Ms Santamera articulated that what the claimant needed was for a one-to-one meeting to discuss her grievance before it was then investigated, including at that stage the involvement of Mrs Pamphlett-Jones. Simply passing the grievance to Mrs Pamphlett-Jones so she could prepare a management response, and then convening an adversarial hearing, was said to be a "recipe for a showdown."

186. The Tribunal could see considerable force in that submission. It would have been preferable had there been an approach to the grievance in line with that Ms Santamera advocated. The claimant had not used the standard form appended to the grievance procedure which asked her to specify what resolution she wanted. It would have been more sensitive for management to have had an initial meeting with the claimant to discuss that with her and to explain that there would be an investigation of the allegations she was making which would inevitably involve Mrs Pamphlett-Jones. At the conclusion of that investigation a further meeting with the claimant to put to her the points which had been identified would also have been an appropriate way to proceed. Instead, by virtue of entering the process at stage two of the procedure the claimant was drawn into what appeared to be an adversarial hearing where parties had the opportunity to call witnesses and to cross examine witnesses for the other side, and where the decision of the panel was to be announced. This was a quasi-judicial process which the claimant understandably found daunting, particularly when her chosen representative would not be allowed to be with her.

187. However, the test for the Tribunal is not whether management dealt with matters in the best way possible, but rather whether the way in which they did deal with matters breached the **Malik** test. This was plainly a grievance not capable of informal resolution. The claimant's own case was that the relationship with Mrs Pamphlett-Jones had become toxic and unworkable. It was appropriate to treat it as a grievance at stage two as it was brought against her own line manager. In that sense the decision of management to follow their own procedure and to deal with the matter as a set of allegations suitable for determination in a quasi-judicial manner was a decision for which there was reasonable and proper cause. It did not in itself show any intention not to honour the contract and could not be viewed as a breach

of trust and confidence, even though it was less palatable for the claimant than a more sensitive approach would have been.

188. It should also be noted that when the claimant made her objections to the procedure clear, she was given a range of different options by Mrs Nott in her letter of 6 April 2017 at pages 114-115. Those options included having more time to arrange an appropriate representative, arranging a hearing just with Mrs Coverley and Mrs Nott, or proceedings by way of written submissions. The claimant in response reiterated her desire for the matter to be dealt with entirely externally, but had resigned before management could respond to this point.

Grievance Overall

189. In relation to the grievance overall, therefore, the Tribunal concluded that the handling of the grievance did not amount to conduct likely to breach trust and confidence when viewed objectively. Although it could have been handled more speedily and more sensitively, those were not failings which showed that the respondent did not intend to take the grievance seriously. The **Roldan** case did not take the claimant any further; that was an unfair dismissal decision about the extent of investigation required where there were serious allegations of misconduct. It had no bearing on whether the handling of a grievance met the **Malik** test.

190. Further, we were satisfied there was no evidence from which we could infer that the matter was handled in this way because of race, whether colour, nationality or ethnic origins. We had no evidence that suggested that a white or non-Nigerian employee raising a comparable grievance would have been treated in any other way. Indeed, we were satisfied that the Trust would have dealt with matters in exactly the same way for a white or non-Nigerian employee given its adherence to the procedure set out in its policy.

(7) Unreasonably commencing a disciplinary investigation in respect of the claimant's behaviour.

191. The final allegation in time related to the suspension of the claimant on 2 May 2017 following the incident on 26 April and the fact that this matter was to be investigated. The claimant was concerned by the contrast between what she saw as the lack of investigation of her grievance and the willingness to investigate the disciplinary allegation. She also made it plain that she regarded the allegations on which she was suspended as “trumped up” and false.

192. The Tribunal had some concerns about how this matter was dealt with by the respondent. We noted that although it was part of the respondent’s case to our hearing that the claimant had behaved in an inappropriate way in a number of earlier meetings, there was no record of the claimant having been warned about her behaviour. Concerns had been expressed behind her back, such as in Mrs Pamphlett-Jones’ note of the meeting on 31 October at page 355, and the suggestion by Elaine Hobson in her email of 15 December 2016 at page 318 that she found the claimant intimidating.

193. Further, there was a delay in deciding to suspend her. The incident happened on Wednesday morning and the claimant was not suspended until the following

Tuesday. Although Mrs Pamphlett-Jones needed to take advice from HR before suspending, it was unclear why that could not have been done by a telephone call the same day. There was some force in Ms Santamera's contention that this was inconsistent with the respondent's case about how badly the claimant behaved on 26 April 2017.

194. Despite these concerns, however, we concluded on the balance of probabilities that the description of the claimant's behaviour found in the notes at pages 123-126 was broadly accurate. We noted that the evidence about it came not solely from Mrs Pamphlett-Jones but from three other members of staff. Those statements were broadly consistent, although some details varied. They all indicated that the claimant had been raising her voice or shouting, and that she engaged in an aggressive manner of communication. We noted also that the claimant was under intense pressure at this stage. She had lodged her formal grievance in early February but was still being expected to deal with Mrs Pamphlett-Jones (despite a request in her grievance for different arrangements) and was being pressed to attend an appraisal meeting. They had had to meet over a flexible working request. Although the claimant understood that had been granted, she was now being asked to provide a copy of the university timetable which she believed she had already given to Mrs Pamphlett-Jones. In those circumstances there was a reason why the claimant might become angry and lose her temper. Putting these matters together we found as a fact that she had behaved in an aggressive manner on 26 April 2017 by shouting and being verbally aggressive towards Mrs Pamphlett-Jones, and had called her a liar.

195. Even despite the reservations expressed in paragraphs 192 and 193 above, however, the Tribunal concluded that there was reasonable cause for suspending the claimant following this incident. It was clear that the working relationship between the claimant and Mrs Pamphlett-Jones could not be allowed to continue without risk of a further incident of this kind. The delay in suspending the claimant was regrettable but suspension is not a step to be undertaken lightly. Whether the conduct in question warranted a disciplinary sanction was something to be considered in the investigation process, during which the claimant would have the opportunity to put her side of the case. As it transpired there was no investigation of this matter because the claimant resigned before that could proceed. Viewed in isolation, therefore, the decision to suspend the claimant did not amount to a breach of trust and confidence.

196. Nor in isolation was there any evidence that it amounted to race discrimination. There was no evidence before the Tribunal of a white employee or an employee who was not Nigerian behaving in a comparable way yet not facing suspension.

Allegations 1-8: Cumulative Effect

197. Having considered each allegation in isolation the Tribunal looked at matters cumulatively.

Race Discrimination

198. We first considered whether the whole sequence of events could provide support for the claimant's case that she had been less favourably treated because she is black or because she is Nigerian. Even viewed cumulatively the facts of this case provided no support for that allegation. The comparators identified by the claimant (Deborah Settle and Maxine Pamphlett-Jones) were either treated in the same way as the claimant (Deborah Settle underwent the competency audit too) or were not in a comparable position (Mrs Pamphlett-Jones was required to attend her degree course and arranged her placements herself).

199. Further, it was apparent that the real issue in this case was not one of race but rather the difference of opinion about the nature of the exercise which began in earlier 2016. The claimant saw it (wrongly) as a third induction, which she regarded as wholly unnecessary. She became intransigent and refused to cooperate. In contrast management saw it as an audit of competencies in the department for good reason, using the induction pack as a convenient tool, and saw the claimant as a person unreasonably refusing to cooperate in establishing the competencies so that they were recorded for future reference and the SEQOHS application.

200. That impasse worsened over time, and even though the claimant had a constructive meeting regarding competencies Elaine Hobson on 29 July 2016, the working relationship between herself and Mrs Pamphlett-Jones was seriously soured by the issue over annual leave and absence in August 2016 onwards. It deteriorated further when the sickness absence procedures meant that funding for year two of her degree course was not granted, and deteriorated yet further when the claimant was put under pressure to attend the reconvened sickness absence meeting and in early 2017 to attend the competence meeting with Ms Hobson. Her grievance was still pending when matters came to a head on 26 April 2017: the claimant behaved in an aggressive manner and was suspended, then resigned. None of this related to the claimant's race or nationality. The Tribunal unanimously dismissed the complaint of direct race discrimination.

201. Because there was no race discrimination it was not necessary for us to address the question of time limits.

Constructive Dismissal

202. Turning to the constructive unfair dismissal complaint, the Tribunal reviewed the whole sequence of events to see whether cumulatively there had been a breach of trust and confidence.

203. We rejected Ms Santamera's argument that the respondent should never have sought SEQOHS accreditation, it being too ambitious. To do so was a reasonable decision, even though it took much longer than had been anticipated.

204. Nevertheless, we noted that the respondent could be criticised for using the induction pack for the competency review rather than preparing bespoke documentation, and thereby not making it absolutely clear to the claimant that it was not a third induction. There was also a failure to evaluate her performance prior to January 2016 even without previous objectives, and the claimant was not chased up

to attend the half year review. There were some discrepancies and errors in the sickness record kept by Mrs Pamphlett-Jones and an unnecessary negative flavour in the OH referral which she made in August 2016. When the grievance was lodged it was not addressed as sensitively as it might have been: the procedure was adversarial and the claimant's request to be managed by a different person was ignored. Finally, although the claimant's behaviour on 26 April 2017 warranted suspension, she had not previously been counselled about her behaviour and there was a delay before the suspension was communicated to her.

205. We considered whether these matters taken together amounted to conduct which when viewed objectively showed that the respondent no longer intended to honour the contract of employment. We reminded ourselves that this is a high bar for a claimant to overcome (see **Frenkel Topping Limited v King** in paragraph 30 above). Taking account of the industrial experience of the Tribunal we concluded that there was no breach of trust and confidence. These were all legitimate criticisms of the respondent and the claimant was entitled to feel aggrieved by them. However, the **Malik** test is not a counsel of perfection and these failings fell some way short of amounting to a breach of trust and confidence. Nor could the “last straw” argument help the claimant: suspension and the instigation of a disciplinary investigation over the incident on 26 April 2017 was entirely proper and could not convert earlier failings into a fundamental breach.

206. It followed, therefore, that the claimant's resignation could not be construed as a dismissal. The unfair dismissal complaint failed and was dismissed.

Notice Pay

207. In the absence of a dismissal, the notice pay claim also failed and was dismissed.

Employment Judge Franey

13 July 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

19th July 2018
FOR THE TRIBUNAL OFFICE