EMPLOYMENT TRIBUNALS

Claimant: **Ms W Mwiko**

Respondent: **Doncaster & Bassetlaw Hospitals NHS Foundation Trust**

HELD AT: **Sheffield** **ON: 29 and 30 April 2019 and 1 and 2 May 2019**

BEFORE: Employment Judge Little
Mr A J Senior
Dr P C Langman

REPRESENTATION:

Claimant: **Mr D Welch of Counsel (instructed by Divinefield Solicitors)**
Respondent: **Mr J Boyd of Counsel (instructed by DAC Beachcroft LLP)**

JUDGMENT having been sent to the parties on 9 May 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are given at the request of the claimant. The request was made on 3 June 2019 which was outside the 14 day period within such requests should be made (Rule 62(3) of the Tribunal's Rules of Procedure). On enquiry as to the reasons for the delay the claimant's solicitors said that they had been unaware the Tribunal had issued the Judgment because it had apparently arrived in their e mail "spam" box. Although this does not seem to be a particularly good reason, the Tribunal are prepared to extend time under Rule 5.

2. **The complaints**

In a claim form presented to the Tribunal on 30 May 2018 the claimant brought the following complaints:-

- Direct race discrimination.
- Harassment related to race.
- Wrongful dismissal.

3. **The issues**

The issues had been defined at a preliminary hearing for case management conducted by Employment Judge Rostant on 5 November 2018. At that hearing the claimant had been permitted to amend her claim by adding to the existing discrimination complaints and by adding the wrongful dismissal complaint. A request to add various other complaints was refused by the Judge.

4. **Documents**

The parties had agreed a two volume trial bundle running to some 763 pages. In addition on the first day of the hearing the claimant brought a further selection of documents which we had been prepared to consider. In the event however we were only referred to one of those documents which was a statement from a Matthew Pidgeon which was given to the nursing and midwifery council. That was in respect of a process which took place subsequent to the claimant's dismissal.

We also noted that there had been some confusion as to whether medical records which are at pages 705 to 763 in volume 2 had been provided to the claimant's solicitor before they had appeared in that bundle. We considered that it was neither appropriate nor efficient to determine that dispute. Instead time was allowed to the claimant's counsel to consider those documents before the relevant respondent witness (Marie Hardacre) gave evidence.

5. **Evidence**

The claimant gave evidence and a Miss J Stockhill attended in response to a witness order which the claimant had obtained from the Tribunal.

The respondent's evidence was given by Marie Hardacre, the investigating officer; Katherine Carville, the dismissing officer and Moira Hardy, the appeal officer.

6. **Overview**

Mrs Mwiko's claim is essentially about her dismissal which she contended was the result of racially motivated conspiracy. The respondent's case was that the claimant had been dismissed because of gross misconduct concerning the administration of medication and her behaviour towards patients, their relatives and the claimant's colleagues.

7. **The Tribunal's findings of fact**

7.1. The claimant's first period of employment with the respondent commenced on 16 February 2004. She worked within the endoscopy unit for some 10 years.

7.2. On 4 January 2016 the claimant moved work locations so that she was now at the Gresley Unit (Kingfisher) which was for the care of the elderly.

7.3. On 20 June 2016 the claimant moved to ward 25 – the emergency care ward.

7.4. On 26 September 2016 the claimant attended a disciplinary hearing before Cindy Storer, head of nursing in respect of charges of making an error with regard to an intravenous biotic IVA and attempting to give a drink to a patient who was recumbent.

7.5. On 4 October 2016 the claimant had a meeting with Deborah Forbes the ward manager for ward 25. That was in respect of some other concerns about the claimant. Following that meeting Ms Forbes wrote to the claimant on 8 October 2016 and a copy of that letter is at pages 291 to 292. It was noted that some concerns had been raised initially from patients, relatives and staff regarding the claimant's communications, care and compassion. It had sometimes been difficult to understand what the claimant was saying and that on two separate occasions the claimant had walked away from relatives when they had been trained to speak to her. There was also an incident with regard to a patient who had learning disabilities. That patient had become extremely upset when the claimant inserted a cannula.

7.6. The outcome letter in respect of the disciplinary hearing (which was about different matters to those referred to in the paragraph above) was Ms Storer's letter of 24 October 2016 (pages 288 to 299). It had been alleged that the claimant had forced a patient (A) to take prescribed medications when he had refused to do so and that she had poured a drink into the mouth of another patient (B) when that patient was not alert enough to take fluids. It was also alleged that the claimant had treated a chart incorrectly and that whilst attempting to undertake a procedure had used the same needle twice on a patient. Ms Storer felt that these allegations were not proven but wrote as follows:

"I decided that all four allegations were not proven. However this investigation has highlighted some concerns. She had similar concerns to be raised in your future employment. This could lead to a different outcome or alternative course of action. I will be seeking a suitable course or e-learning for you to study in relation to patient documentation as this is an essential part of excellent and safe patient care. … I also encouraged you to make attempts to encourage your own self-awareness".

7.7. On 29 October 2016 Sister Cliff-Taylor had a conversation with the claimant about certain concerns. The sister sent an email to the claimant on the same date about those matters (pages 294 to 295). The matters of concern were the claimant's attitude towards staff; the claimant giving incorrect information to colleagues; requesting a healthcare assistant to undertake work that she was not trained to do and administering an antibiotic to a patient which was no longer prescribed. Sister Cliff-Taylor noted that the claimant had refused to write a reflective statement about those matters.

7.8. On 18 January 2017 Marie Hardacre wrote to the claimant (pages 217 to 218) inviting her to an investigatory meeting on 2 February 2017. The allegations followed on from 29 October conversation and were described

as “concerns around communication and intravenous drug administration error”.

7.9. In the meantime a further complaint was received about the claimant from the family of a patient who we have referred to as VK. The family had requested that the claimant did not care for their mother in future and in an email from Sister Cliff-Taylor to Deborah Forbes on 12 January 2017 (page 297) the complaint was described to be in relation to the claimant’s poor attitude; attempts to feed VK whilst she was unable to swallow; a request for soluble medications not acted on and an uncaring approach. The complaint was further documented in a note at page 298 as including lack of care and understanding being shown to the patient, the patient’s room being dirty with blood stained bedding not being changed and that staff attitude had on occasions been uncaring.

7.10. The investigation meeting on 2 February 2017 was conducted by Matron Marie Hardacre and notes of that meeting appear at pages 230 to 235. By now the claimant had written a reflection although Ms Hardacre observed that it didn’t seem like a reflection. It was more as though the claimant was blaming everyone else. Matron Hardacre did however acknowledge that she felt that the claimant had reflected during the course of the investigation meeting. In terms of communication the claimant said that she thought it was because she was African. Sometimes she didn’t say please but she did not realise she was loud. Matron Hardacre went on to say that what was in the reflection about the drug error had reassured her but she went on to inform the claimant that she needed to adjust how she communicated and worked with patients and their relatives in order to build up a rapport.

7.11. The claimant’s evidence to us was that she understood following this meeting that no further steps would be taken about those matters. However she acknowledges that she did not receive for instance a letter to confirm that to be so. Marie Hardacre’s evidence (paragraph 17 of her witness statement) was that after this meeting she was not satisfied with the claimant’s responses and felt she was not treating the matter seriously. Ms Hardacre was aware that there had been concerns about communications previously and following the meeting she was considering what further action should be taken and whether the matter should proceed to a hearing. However that consideration was overtaken by events in March 2017.

7.12. On 1 March 2017 a complaint was raised that the claimant had slapped a patient (X) during an attempt to make the patient drink and take an inhaler.

7.13. On the following day, 2 March 2017 there was an incident involving another patient (Y) where it was believed that the claimant may have prematurely discharged a diabetic patient.

7.14. On 3 March 2017 Matron Hardacre considered whether the Claimant should be suspended. She was of the view that because of the seriousness of the X and Y incidents the claimant needed to be under direct supervision during the investigation period which would follow. Rather than suspend the claimant a decision was taken that the claimant

would be moved to ward 24 where it was hoped that that supervision could be provided.

7.15. On the same day Matron Hardacre had a meeting with the relatives of patient X. A note of that meeting is at pages 311 to 312. On a visit to their grandmother they had found her unresponsive and on reporting that to the claimant said that the claimant had then shaken the shoulders of their grandmother and slapped her around the face on more than one occasion with increasing firmness. The family had to intervene but they were told by the claimant that that was how patients were roused in the hospital. The family members described the claimant's communication as being arrogant, rude and abrupt. They also complained that the claimant had tried to give their grandmother a drink from a spouted cup whilst she was laid too low in the bed. They were concerned that she would choke. They also said that the claimant had attempted to administer an inhaler again during the period when their grandmother was laid down and had shouted at her "just suck it". The family expressed the view that they did not want the claimant to be anywhere near their grandmother again.

7.16. On 8 March 2017 the claimant began work on ward 24 undertaking non-registered nursing duties. Matron Hardacre advised the claimant that she should remove her blue staff nurse lapels to avoid confusion, for instance requests from colleagues that she undertake registered nursing duties. However, subsequently, on the same day, Sister North from ward 24 informed Matron Hardacre that the nature of the work on the ward meant that it was difficult to supervise the claimant. As a result a meeting took place at approximately 4pm that day between the claimant and Matron Hardacre when the latter explained that she felt ward 24 was not suitable because it was too busy to permit adequate supervision of the claimant. In those circumstances the claimant was offered three alternative positions and opted for surgical out-patients – in effect acting as a chaperone. A note of that meeting is at page 256. So again this would be no registered nurse duties.

7.17. On 24 April 2017 an investigation meeting took place with the claimant and that was conducted by Matron Hardacre. It was in respect of the patient X and patient Y incidents. Notes of that meeting appear at pages 319 to 322. The claimant was accompanied by her pastor. Ms Hardacre explained that usually companions were limited to union representatives or work colleagues but because this was an investigatory meeting rather than a hearing the respondent was content for the pastor to remain although he could not answer questions for the claimant. The claimant was asked about patient Y and the concern had been that the claimant had apparently arranged for an elderly diabetic patient to be discharged from hospital to his home despite there being no care package in place. His immediate family would have been on holiday at the date of discharge. It transpired that the claimant when attempting to book transport for the patient later in the week (when the relatives would be available to care for him) had in fact rung the wrong hospital number – the one which dealt with transport on that particular day. A statement had been obtained from the ambulance crew who transported the patient home. They had been concerned and so had telephoned the patient's daughter who was

unaware of the discharge. It was noted that the patient's care plan had indicated that he would remain in hospital until a care package consisting of carers visiting four times a day could be initiated. The planned discharge date had been the Sunday 5 March 2017. During the course of the investigation meeting the claimant sought to suggest that it was the discharge lounge who had organised the discharge and that she thought that the ambulance crew might just be taking the patient to another ward. The claimant was asked whether it had crossed her mind that a mistake might be happening. The claimant replied that she was too busy. Ms Hardacre noted in the minutes that the claimant offered no remorse or apology and had failed to acknowledge how serious the incident could have been. The meeting then went on to discuss the allegations which patient X's relatives had made. The claimant said that the family had seemed difficult and she believed that the family had not cared for the patient properly at home because she was unkempt. The claimant denied that she had slapped a patient hard and suggested that she had merely been tapping the patient's cheeks. The claimant believed that the family were prejudiced towards her.

7.18. Matron Hardacre prepared a management report which is dated 15 May 2017 and is at pages 273 to 285 – followed by various appendices. Ms Hardacre noted (page 284) that during the investigatory meeting on 24 April the claimant's response had not given the investigating team confidence that she acknowledged any areas that on reflection she could have done differently. The claimant described herself as a highly skilled person who gave professional judgment. Matron Hardacre concluded that the claimant had failed to comply with medicines management policy by not completing the correct patient checks before administering an IV drug (this being the incident on 16 September 2016 which had been overtaken by over events). The report went on to say that the investigation team did not have confidence that the claimant acknowledged her drug administration error or that she had learnt from the error to prevent a recurrence. Reference was made to the comments in the letter which Cindy Storer had written to the claimant on 24 October 2016 (page 288). The team believed that the claimant had demonstrated repeated patterns of behaviour, poor attitude and inadequate communication with colleagues, patients and relatives. The claimant had denied any accountability or responsibility for the unsafe discharge of patient Y and had never apologised. The claimant's recurrent attitude and uncaring behaviours did not give the investigating officer confidence in the claimant's abilities to reflect and learn from any incidents. With regard to patient Y the investigation team found that the family had no reason to make up the allegation. The similarities to the previous issues were alarming and therefore the allegations were taken very seriously. Whilst it was plausible that the claimant had been attempting to rouse patient X the manner of doing so was inappropriate.

7.19. By a letter dated 23 June 2017 the claimant was invited to a disciplinary hearing. That letter was written by Kate Carville head of nursing and quality who was to conduct the disciplinary hearing. There were 10 allegations in respect of the IVA patient and patients X and Y. The

claimant was warned that these were serious issues and the result could be the claimant's dismissal.

7.20. The disciplinary hearing took place on 20 July 2017 and we were told lasted half a day. The notes of the meeting are at pages 366 to 374. The claimant was represented by Trish Brand a senior RCM representative. Ms Brand presented a written statement of case (pages 356 to 365). In this report the claimant suggested that the respondent had CCTV on the ward which could be checked with regard to the patient X incident. In fact, perhaps unsurprisingly, the respondent does not have CCTV on its wards. It was pointed out that the respondent had not obtained a statement from Joan Stockhill who was the healthcare assistant in the room with the claimant during the patient X incident. The claimant also alleged that subsequently X's family had apologised for their behaviour and that this had been reported to the claimant by a Dr Malik.

7.21. The disciplinary hearing was adjourned so that there could be further investigation.

7.22. The reconvened hearing did not take place until December 2017 but in the meantime, on 27 August 2017 the claimant had taken "flexible retirement". This is a scheme operated by the NHS whereby an employee can access some pension benefits upon termination of employment but on the basis that the employee can return to employment albeit with a break in continuity. It was in those circumstances that the claimant began fresh employment with the respondent on 11 September 2017 as a registered nurse working part-time.

7.23. On 13 November 2017 Matron Hardacre prepared an additional report (pages 413 to 416) followed by appendices. Various other individuals had been interviewed including Joanne Stockwell (pages 419 to 420). Ms Stockwell was able to give information about the patient Y matter as well as the patient X matter. In relation to patient Y she reported that transport had come up and asked the claimant if there was anyone at home or any carers for this patient and was there a key safe so they could gain access. The claimant had replied that she was unsure. On transport (the ambulance crew) asking again Ms Stockwell reported that the claimant had said it was not her problem. In relation to the patient X matter Ms Stockwell had not seen the claimant roughly handling this patient. All she had seen was the claimant gently stroking the patient's face. She said that X's family were quite stroppy. Nothing was ever right or good enough.

7.24. At the reconvened disciplinary hearing on 7 December 2017 Ms Carville decided to in effect re-start the hearing. We were told that the hearing took all day. Again the claimant was represented by Ms Brand. Minutes of the meeting are at pages 433 to 469. In summing up at the end of that meeting Ms Brand said that in relation to the drug error the claimant accepted that she had made an error but there was poor practice on that ward and it was her first drug error. With regard to the premature discharge of patient Y there was some discrepancy with the facts but the claimant again had acknowledged at the hearing that it was her responsibility and that the patient shouldn't have left the ward. But the claimant nevertheless contended that a Sister Taylor (presumably Cliff-Taylor) was partially to blame. With regard to patient X, Ms Stockhill's

evidence had been the claimant was simply rubbing that patient's face and there were no other independent witnesses. The claimant had denied slapping the patient. The claimant accepted that communication could have been better. However the RCN suggested that the claimant had not been sufficiently supported. There had been the option to place the claimant on a supportive plan and that could have presented subsequent situations. The claimant added that she was just sorry for everything. Ms Carville took time to consider her decision.

7.25. That decision was conveyed to the claimant at an outcome meeting on 12 January 2018. The decision was that the claimant was to be dismissed. The dismissal letter was read out to her. That letter appears at pages 487 to 495. All 10 allegations were found to be proven. Ms Carville explained that after the disciplinary hearing she had reviewed the management report and considered the evidence which had been presented to her. It was clear that following the claimant's removal from a band 5 role she had reflected on the issues raised. However during the hearing Ms Carville felt that the claimant had again failed to see how her communication skills, attitudes towards staff and patients and her behaviour to others had caused the incidents and complaints. Ms Carville's main concern was that despite a previous hearing and three meetings with senior nurses who raised concerns about her behaviour the claimant had still treated a vulnerable patient (X) in the same manner and had not supported the relatives effectively. She had also allowed a very vulnerable patient (Y) who she was responsible for to leave the ward three days before his carers were due to start. The claimant's dismissive attitude towards her professional colleagues (the ambulance team) allowed them to remove him from the ward and the claimant's explanation to Ms Carville at the hearing was not reflective of any practice within the Trust. Ms Carville noted that during the hearing the claimant said that she had been very stressed at the time of these incidents and unable to perform her role due to personal issues although the claimant had acknowledged that whilst she had not been given leave her hours had been reduced and her ward manager had been supportive. The claimant had not required the support from occupational health when it had been offered and said that she preferred to receive support from her church and pastor. Ms Carville concluded that the claimant had been supported by the ward team as much as was possible having regard to the information which the claimant was prepared to share. Ms Carville noted that during the hearing the claimant had made reference to herself being a victim of things that happened on her shifts and that "circumstances found me". That worried Ms Carville because even though the claimant had told her that she had reflected on those incidents. It was clear that these comments demonstrated a complete lack of reflection on the circumstances that occurred. All 10 allegations related to the claimant's conduct and in view of their seriousness those issues represented conduct which was unacceptable in an employee of the Trust. Accordingly there was no alternative but to conclude that the claimant had been guilty of gross misconduct and should therefore be dismissed with immediate effect.

7.26. On 30 January 2018 Ms Brand wrote to the chief executive of the respondent trust appealing against the dismissal. The grounds for appeal were that during the disciplinary hearing reference had been made to an earlier disciplinary in 2016 which had not been upheld. It was contended that no reference or account should have been given to this. In relation to the IVA error the appeal letter noted that the claimant admitted her error but there were what were described as discrepancies with regard to the allegation that the claimant had not provided a reflective piece of work. In relation to the patient X incident it was pointed out that the claimant had always denied slapping the patient or feeding her whilst she was lying down and giving her the inhaler while she was lying down. Reference was made to Ms Stockhill's evidence. Reference was also made to the claimant having been informed by Dr Malik that the family had apologised to him. Reference was made to the claimant having gone through a very difficult time emotionally at home at the material time which included the sudden death of her son and a deterioration in her relationship with her husband financial difficulties.

7.27. The appeal hearing took place on 31 May 2018 before Moira Hardy director of Nursing Midwifery and Allied Health Professionals. Ms Hardy was accompanied by Karen Barnard, director of People and Organisational Development. The minutes of the appeal hearing are at pages 629 to 644.

7.28. The appeal was not upheld and that outcome is contained in Ms Hardy's letter to the claimant of 8 June 2018 (pages 658 to 662). Ms Hardy took the view that there were a number of areas where the claimant had not complied with the NMC code of conduct. It was the unanimous decision of the panel that the decision taken by the disciplinary panel to dismiss for gross misconduct had been the correct outcome.

8. The parties' submissions

8.1. <u>The claimant's submissions</u>

Mr Welch had prepared written submissions and he addressed us orally. He contended that the claimant had been correct when she said that Dr Malik had received apologies from the relatives of X with regard to their behaviour. This was a reference to a note in the bundle at page 238 where a doctor giving his name and role as Saeed – CT2 noted that the family had asked to see a doctor and the granddaughter was not happy. The note goes on to record "offered apologies – accepted". The claimant contended that that was the family apologising to the hospital rather than the doctor apologising on behalf of the hospital to the family. We should also add that we have a note from a different doctor at page 246 again in relation to a conversation with the relatives of patient X which includes "I have apologised for the above and will escalate it to her (the claimant's) team/managers". The claimant considered that it was significant that the respondent had not produced written evidence of any complaint from the relatives. Invited us to infer that such a failure was because the records did not support the respondent's versions of events. It was contended that the moving of the claimant from ward 25 to ward 24 and then to surgical out-patients was a "knee jerk ill thought action which caused upset/distress and feelings of intimidation in the claimant". It was

also contended that as a result the claimant was working as a healthcare assistant and had been literally stripped of her status because she had been told she could not wear the uniform of a nurse.

Returning to the apology issue it was contended that the respondent when investigating the matter had not made sufficient effort to contact the correct Dr Malik.

It was submitted that Ms Carville had made her mind up about the allegations before the disciplinary hearing. That was because of an email of 2 October 2017 (page 405) where Ms Carville had made reference to "this is a strong dismissal case".

It was contended that the ivy drug error and associated reflection issues had already been dealt with because of Matron Hardacre's comments during the course of a meeting to the effect that what the claimant had said about reflection had reassured her. Mr Welch described the respondent's decision to allow the claimant to take early retirement and then return to work despite the extant disciplinary matters as being a decision which defied logic. Why would this be done if there was a negative view of the claimant.

It was contended that the sanction of dismissal was disproportionate. Mr Welch was critical that Ms Carville had "drafted the charges" and then gone on to decide whether they were proved. It was alleged that Matron Hardacre had consistently ignored any version of the facts which the claimant had asserted "preferring the evidence of white witnesses". Mr Welch went on to allege that Ms Stockhill had said that her own witness statement for the proceedings had been drafted at Matron Hardacre. We should add that that was not the evidence we heard from Ms Stockhill.

8.2. <u>Respondent's submissions</u>

Mr Boyd noted that although it was the claimant's case that there had been an active conspiracy between various decision makers including Matron Hardacre and Ms Carville and various HR advisors. That case had not been put to any of the respondent's witnesses until it was raised by the Employment Judge. Such an allegation was at the highest level of seriousness and one which should not be made lightly. Mr Boyd went on to suggest that the fact that the allegation had been made was reflective of the apparent lack of proper thought on the part of the claimant and/or her advisors when making such potentially career ending allegations.

In terms of the alleged apology by X's family, Mr Boyd contended that there was no evidence to support the fact of such an apology. The apology was the other way round.

In terms of the claimant's move to a supervised role it was noted that in cross-examination the claimant had accepted that the allegations in respect of patients X and Y were sufficient to justify suspension let alone supervised duties. The claimant had never been told however that she was working as a healthcare assistant. Mr Boyd then went on to address

us in relation to the claimant's allegation that she had suffered an underpayment.

With regard to the dismissal case the claimant's case was in relation to sanction only. She contended that if she had been white a sanction short of dismissal would have been arrived at. However there was no evidence to support that contention.

9. **The Tribunal's conclusions**

9.1. General comments

The less favourable treatment of which the claimant complains in respect of her direct discrimination complaint is the same matter which she contends was unwanted conduct related to her race – the unlawful harassment complaint.

In relation to the direct discrimination complaint the claimant relies upon a hypothetical comparator.

As we have noted, the most significant treatment complained about is the claimant's dismissal. However the claimant also complains about various matters which she says flowed from the incident with patient X, including the investigation process. As was noted when summarising Mr Boyd's submissions, the claimant alleges that there was a racially motivated conspiracy to dismiss her. The three respondent witnesses from whom we have heard and various other individuals are alleged to be in that conspiracy.

Although in this hearing we have been asked to focus on the patient X and patient Y issues, it should be borne in mind that overall there were 10 allegations against the claimant being considered during the disciplinary process. Of those two were directly related to patient Y and three to patient X.

Our conclusions below follow the order of the matters set out as issues in Employment Judge Rostant's order.

9.2. The alleged apology

As we have noted, the claimant contends that the relatives of patient X apologised to a doctor for their criticism of the claimant's care of their grandmother. The claimant says that Matron Hardacre failed to convey that apology to the claimant. The claimant relies on the entry written by a doctor in X's clinical notes at page 246. We find that this clearly shows that the doctor was apologising *to* the relatives on behalf of the Trust, rather than the doctor receiving an apology from the relatives. The same applies in connection with apparently a different doctor and different conversation at page 238. We find that the "offered apologies" was the doctor offering the apologies and the acceptance of those apologies was from the relatives, rather than the other way round. The Tribunal have not heard from the doctor, assumed to be a Dr Malik, but we have seen an email from him at page 18 in the bundle. There he disagrees with the content of a draft witness statement which it seems, without any input from him, the claimant's solicitors had drafted. We note that the doctor, Dr Malik Saeed describes the solicitor's actions as "really inappropriate

that they submitted a statement which I have not even written or signed nor I have authorised them to submit on my behalf".

We also found it very unlikely that the relatives would have apologised bearing in mind the way they expressed themselves when they were interviewed by Ms Hardacre (see page 311). It is also to be noted that they subsequently voluntarily participated with regard to the referral of the claimant to the NMC.

We find on the balance of probabilities that there was no apology (from the relatives) and so no less favourable treatment or unwanted conduct by the respondent. There was no apology to pass on.

9.3. Moving the claimant to ward 24 and then again to surgical out-patients

It is common ground that these moves took place. The context was the two serious incidents with patient X on 1 March 2017 and then with patient Y on 2 March 2017. We find that the two moves, in quick succession, represented nothing more than the respondent putting into effect its disciplinary policy as at paragraph 4.3.1 of that policy (which can be found at page 142 in the bundle). This provides:

"Suspension from duty must only take place should there be no other option that would ensure the safety of patients and employees, protect the integrity of the investigation and ensure the alleged offence does not take place again. Some examples of alternatives to suspension that must be considered are working under restricted duties, in an alternative environment, working from home where appropriate or on non-clinical duties".

We accept that the claimant being moved was less favourable treatment because it would have been more favourable for an employee to continue to do their normal work. However the claimant has not put before the Tribunal any evidence from which we could conclude that the treatment was because of race. In any event it was not as less favourable as suspension would have been, although the claimant now seeks to suggest that that would have been preferable.

We find that it is clear that the first move was an attempt to provide suitable alternative work on restricted duties and that the second move was a second attempt at that once it was realised that the claimant could not be adequately supervised on ward 24, according to the sister of that ward, because it was too busy.

9.4. The claimant allegedly being told that she would be working as a healthcare assistant

In evidence the claimant accepted that no-one had told her that she was to work as a healthcare assistant. Naturally the claimant was for a period of time working in an atypical role but that was, in our judgment, a necessary consequence of the justified application of the respondent's disciplinary policy. The claimant was not demoted. Her pay was protected. Whilst it was less favourable treatment and unwanted conduct there is no suggestion that this was because of the claimant's race.

9.5. Allegedly requiring the claimant to wear a healthcare assistant's uniform

This allegation falls away on the claimant's concession when answering a question from the Tribunal that she was never required to do this. There has been a debate about the claimant being requested to remove the blue epaulettes from her white nurses uniform or the suggestion that she should wear scrubs. However it is clear that the rationale for this was that so it would be clear that the claimant was not to be asked to do or be expected to do the duties of a registered nurse during the quaisi suspension period.

9.6. <u>The alleged underpayment on the claimant's move from ward 25 to the alternative employment</u>

We have noted the content of Debbie Forbes' email of 8 May 2017 at page 268. The claimant had made a complaint that day that she had not been paid her salary and she alleged that she was owed money for the period when she worked on Kingfisher. Ms Forbes' response is to confirm that she had contacted payroll as soon as she was aware of the issue. Subsequently, on 10 May 2017 Ms Forbes sent an email to the claimant (page 270) apologising that the payment had not yet reached the claimant and explaining that she had contacted payroll who had assured her that the wages had been paid the preceding day. She went on to say that the monies had been sent previously but they had "bounced back for some reason". In respect of any monies due from Kingfisher the claimant was advised to contact the ward manager or matron for that area. Ms Forbes apologised for the inconvenience.

We find that the primary and probably sole cause of the underpayment was Ms Forbes' error of inputting the description unpaid leave rather than paid leave in respect of the relevant period. Clearly not being paid is less favourable treatment but again the claimant has not put before us any evidence to shift the initial burden of proof on her – that is to show that the reason could have been her race. Instead we find that the reason was a genuine error for which Ms Forbes apologised and the underpayment was duly rectified.

9.7. <u>The allegation that there was "construction of an unwarranted disciplinary case" in respect of the patient X and patient Y incidents</u>

The Tribunal find it impossible to categorise what the respondent believed had been major shortcomings in the claimant's practice as "unwarranted". We also fail to see what was "constructed". It is common ground that the relatives of patient X had complained. It is also common ground that the claimant had discharged patient Y dangerously.

The claimant has not put any evidence before the Tribunal to support the proposition that if these incidents had involved a white nurse or one of a non-African origin that the respondent would have done anything other than investigate and invoke its disciplinary policy in precisely the same way as occurred in the claimant's case.

9.8. Historical matters

Primarily this is the IVA incident on 16 September 2016. We do not accept the claimant's contention that this matter had been concluded at the 2 February 2017 meeting between the claimant and Matron Hardacre. The reference we have noted about reassurance on the claimant's reflection (see page 233) could not sensibly have been understood to mean that a line had been drawn under that issue. That comment also has to be read in conjunction with the reservations about the reflection which Ms Hardacre had expressed (see page 231). There was no outcome letter with regard to the IVA issue. We find that Cindy Storer's letter of 24 October 2016 (page 288) was not dealing with the IVA issue, but rather the four other issues which are specified in that letter and which had been found non-proven in a separate disciplinary exercise. It follows that we find it was perfectly proper for the respondent to include the IVA issue and its related reflection or lack of issue as two of the 10 allegations against the claimant which were dealt with at the July/December 2017 disciplinary hearing.

9.9. The dismissal

Obviously dismissal is less favourable treatment. The claimant says the sanction was too harsh. She also says that if she had been white or of non-African origin she would have received a final written warning rather than being dismissed. Again we find this proposition to be wholly unsupported by the type of evidence which is necessary to shift the burden of proof to the respondent.

Despite numerous references by the claimant's Counsel to "fairness" we are not dealing with an unfair dismissal case. Further we should add that delay is not listed as one of the issues for our consideration. That is not to say that if we had been considering an unfair dismissal case we would have found unfairness.

We also find the claimant's contention that she was the victim of a conspiracy against her to be wholly implausible and without merit. It is a bare and we might add, reckless assertion unsupported by any evidence. For these reasons we find that the direct discrimination complaint and the harassment complaints fail.

9.10. Wrongful dismissal

The issue here is whether in our judgment the claimant had committed gross misconduct. If not it would have been a breach of contract for the respondent to dismiss summarily. Whilst the decision is ours, that decision must obviously be informed by the opinion of the senior healthcare professionals from whom we have heard. On the material

before us we are satisfied that there was gross misconduct in that the claimant fell well short of the standards of care that were reasonably to be expected of her. Accordingly it was not a breach of contract for the respondent to dismiss the claimant summarily.

Employment Judge Little

24th July 2019