EMPLOYMENT TRIBUNALS

Claimant Mr. Khan

Respondent West London NHS Trust

v

Heard at: Watford **On**: 17 – 19, 22 - 24 July 2019
Before: Employment Judge Heal
Ms. S Goldthorpe
Mr S. Bury

Appearances

For the Claimant: Mr J. Latinwo, legal assistant.
For the Respondent: Mr. D. Patel, counsel

Judgment was given orally with reasons on 24 July 2019 and sent to the parties on 19 August 2019. The claimant requested written reasons on 6 August 2019 and accordingly written reasons are now given.

REASONS

1. By a claim form presented on 25 February 2018 the claimant made complaints of constructive unfair dismissal, automatically unfair dismissal because of public interest disclosures and direct discrimination because of race and/or religion.

2. We have had the benefit of an agreed bundle in two volumes running to 941 pages. During the course of the hearing Mr Latinwo produced an additional document entitled 'Freedom to speak up: raising concerns (whistleblowing) policy for the NHS April 2016'. We admitted that document in evidence by consent.

3. We have heard oral evidence from the following witnesses in this order:

The claimant, Tariq Kahn,
Professor Sally Glen, non-executive director and Speak Up Guardian;
Ms Ade Omamo-Rashed, Team Manager of the Hounslow Recovery Team,
Ms Sarah-Jane Rexon, Team Manager of the Ealing Crisis Assessment and Treatment Team;
Ms Annette Saunders, Band 6 Crisis Nurse Practitioner.

4. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement and then the witness was cross examined and re-examined in the usual way.

5. By consent we also read evidence from these witnesses on behalf of the claimant:

Linda Curtis
Lisa Marie Doherty
Rajinder Johal
Gulnaz Gulzar and
Carlene Kelly

6. Part way through day two of the hearing, the respondent told us that Ms Mangan was unable to appear in person due to unexpected circumstances. Mr Latinwo agreed that we could admit her evidence on paper as well.

7. We accepted all that evidence on paper, subject to the weight that was appropriate to give it, given that we had not heard the witnesses questioned or their evidence tested in cross examination.

8. At the outset, Mr Latinwo made an application for specific disclosure of an anonymous letter written about Sarah Rexon complaining about her standards of care and skill set. The claimant says that this was 'buried' in the determination for promotion and goes to the root of the preferential treatment he alleges. The respondent told us, through counsel, that it has looked for the document but does not have it. Whatever records the respondent has in relation to that document have been deleted.

9. We cannot order disclosure of a document that does not exist. We rely upon what Mr Patel of counsel has told us and we make no order.

10. At the outset of the hearing we were also supplied with a chronology, a cast list and a reading list. In due course, both parties supplied us with written submissions and also provided copies of a number of authorities.

11. With the help of both representatives we set a timetable for the hearing of evidence and submissions to enable us to complete everything that we had to do within the six days for which this case was listed. We told the representatives that the timetable was set on the assumption that witnesses would give direct answers to direct questions and that if they became troubled that they were not going to complete that cross examination in the time available because of the way witnesses were answering questions, then they should raise those concerns and we would find ways of dealing with the problem. In the event we were able to complete the cross examination largely within the timetable set.

12. However, on the fourth day of the hearing, Monday 22 July, the claimant's representative told us that he had not ready to make submissions that day and asked to be allowed to do so on the fifth day of the hearing. We declined that

application because as the claimant's representative knew, we had timetabled submissions to be made on the fourth day. Moreover, on the Friday the respondent's representative had checked with us in the presence of the claimant's representative that we expected submissions to be made on the Monday. The claimant's representative had had the weekend in which to prepare his submissions and we told him therefore that we expected him to make submissions on Monday.

13. We told the claimant's representative that although we expected him to take the time to put his case properly nonetheless if he used his time efficiently in cross examination then we would be able to give him more time to prepare his submissions and we would not start to hear submissions until 3 pm. In fact, the claimant's representative had from 12.30 to 3 pm to prepare his submissions. At 3 pm neither the claimant nor his representative was present at the tribunal. The claimant had gone home because he was unwell, and the claimant's representative subsequently appeared at 3:30pm. He told us that he was late because of delays at a print shop.

14. Accordingly, we told him that we were going to rise nonetheless at 5.00pm and that we did not consider it fair to shorten the time the respondent had available to make its submissions. Therefore, the claimant's representative had between 4.30 and 5 o'clock to make his submissions. He accepted that this was fair.

15. During submissions the respondent applied to amend the name of the respondent in these proceedings as set out above. The claimant consented to that amendment and we have permitted it.

The Issues

16. The issues were identified by the parties with EJ Clarke Q.C. at a preliminary hearing on 13 September 2018.

17. After discussion with the parties at the outset of this hearing and reference to the claimant's further particulars, the issues were further clarified as follows. We retain the numbering of the original list:

5.1 Given the date the claim form was presented, any complaint about something which happened before 20 November 2017 is potentially out of time, such that the tribunal may not have jurisdiction to deal with it.

5.2 Did any act or omission about which the claimant complains in relation to his complaint of race and/or religious discrimination occur wholly before 20 November 2017? The Tribunal will have to decide whether the various matters relied upon as constituting direct discrimination amount to 'conduct extending over a period'.

5.3 In so far as the claim is found to be presented in whole or in part outside primary limitation period, is it just and equitable extended time presentation of the complaint as regards that matter or matters?

Automatic Constructive Unfair Dismissal

5.4 The claimant relies upon s. 103A of the Employment Rights Act 1996. The qualifying disclosure on which he relies concerns his informing the respondent about a Mental Health Nurse was seeing a patient outside working hours and was giving that patient medication of a kind which had previously been prescribed to that patient but which the nurse was obtaining from stock and/or returns without an appropriate prescription.

5.5 Did the claimant make a disclosure of that information in one or more of the following circumstances:

5.5.1 By an incident report in approximately November 2016 to his then manager and clinical governance.

5.5.2 In a report to the respondents 'Speak Up Guardian' (Sally Glenn) in about May 2017.

5.5.3 In an internal safeguarding report sent to the Safeguarding Lead (Parminder Sahota) on about 19 July 2007.

5.6 Did that information, in the claimant's reasonable belief, tend to show:

5.6.1 That a criminal offence had been committed (by the provision of medication without prescription).

5.6.2 That a legal obligation had been and was likely to be broken in the future, the obligation being the duty of care owed by the Mental Health Nurse to the patient.

5.6.3 That the health of that patient had been endangered and was likely to be endangered in the future.

5.7 Was that disclosure made in the public interest?

5.8 Was the making of that disclosure of the reason or the principal reason for the claimant's dismissal?

Constructive unfair dismissal

5.8 Did the respondent commit a fundamental breach of the implied term as to 'trust and confidence' by subjecting the claimant to the following:

5.8.1 Failing to address the claimant's grievance in a timely manner.

5.8.2 failing properly to deal with the reports referred to above.

5.8.3 by being favourable treatment to Sarah-Jane Rexon as compared to that given to the claimant.

5.9 the claimant is to give particulars of the favourable treatment allegedly given to Miss Rexon upon which he wishes to rely, which particulars will also set out the basis on which he says that that treatment was more favourable treatment compared to treatment (which he will identify) given to him.

[At the outset of the full hearing, after discussion, the claimant's representative selected the following issues from the claimant's further particulars as the more favourable treatment given to Miss Rexon, using the document at page 55C of our bundle:

'10. In a meeting to decide team leadership SJR was shown preferential treatment by AOR given role as Acting Manager ending advertisement for post and appointment. This was in effect an extension of the close counsel and de facto driver status given to SJR by AOR. SJR had considerably less experience than myself.

The preferential treatment was not isolated to this meeting. For example SJR was allowed to work from home.

Further, in a meeting in January 2017 to decide which agency staff would be provided notice, AOR sided with SJR once we had both provided reasoning keep certain staff. I had asked 'G' was retained and not 'L' given her greater experience and versatile skill set. ET was undecided while SJR asked for L to be retained. AOR backed SJR and then later within a few days, by way of double entrendre, said to me 'I trust your judgement.'

AOR asked both myself and SJR at the telephone calls received on behalf of the team by the service user support line. I advocated that the position remain so the team did not receive an influx of calls that they were not equipped to handle. Once again, AOR sided with SJR and agreed for the course to be taken by the team and not the service user support line which was being brought into the SPA management line.

AOR asked SJR to attend more meetings with her or on her behalf than other band 7s. SJR was also provided opportunity to take part in investigations and complaints than other band 7s thus allowing her to improve her skill set and be provided an unfair competitive advantage over her peers.

By virtue of close counsel with AOR, SJR was provided key information that other Band 7 nurses were not. Key example of this was the disclosure relating to client X once both AOR and RS met with this client and her family. Only once I was informed of this key information by SJR was it that I raised safeguarding concerns via official means. This incident is highly pertinent to the whistleblowing component of my claim.]

5.10 If so, did the claimant resign in response to that fundamental breach of contract?

5.11 Did the claimant waive the beach and/or affirm the contract?

Unfair dismissal

5.12 If it is found that the claimant was dismissed constructively, but that this was not an automatically unfair constructive dismissal, was that dismissal for a potentially fair reason within the meaning of section 98(2) of the Employment Rights Act 1996?

5.13 In all of the circumstances did the respondent act fairly in treating that reason as a sufficient reason for the dismissal?

5.14 If the claimant was unfairly dismissed, should any compensation awarded to him be reduced by reason of:

5.14.1 His contributory fault?
5.14.2 That he would have been dismissed in any event – Polkey v AE Dayton Services [1987].

Direct Discrimination because of race and/or religion, Equality Act s.13

5.15 Did the respondent subject the claimant to the following treatment:

a. *In about late May 2016, during a meeting of key persons preparing for a team merger and taking place at Cherrington House, did Ade Omomo-Rashed humiliate the claimant by saying, after he used the term 'chaos' to describe the workload of the team, that she did not like the term 'chaos' being used.*

b. *On 26 July 2016 Ms Omomo-Rashed repaying to the claimant a recorded telephone rotation between the claimant and Alisha Powell, white female lead nurse, and asking him to justify the content of his part of the conversation.*

c. *Ms Omomo-Rashed being aggressive and hostile towards the claimant on both of the above occasions.*

d. *Annette Saunders saying to the claimant on several occasions prior to July 2016 that he 'needed a periscope to help with his personal care'. (At the outset of the full hearing, the claimant said he would not rely on this issue, but later he re-instated it.)*

e. *Ms Saunders saying to the claimant on several occasions prior to July 2016 that he was a 'terrorist'.*

f. *Ms Omomo-Rashed failing to take any action in respect of Ms Saunders comments referred to above.*

g. *Ignoring the claimant's complaints in May 2017 to the respondent's Speak Up Guardian, Sally Glenn.*

h. *Ms Omomo-Rashed appointing Sarah Rexon (who the claimant alleges was less experienced than him) to succeed her.*

i. Ms Rexon and Amanda Jones telling the claimant in September 2017 that they were 'disappointed' at what the claimant had said about the level of contact between Band 6 Nurses and their clients.

j. Failing to provide the claimant with what he describes as a 'level playing field' in applying for the post of Band 8A Acting Manager. In this regard the claimant considers that it was Ms Omomo-Rashed who failed.

k. Failing to give the claimant an Exit Interview.

l. Denying the claimant a Bank Profile at Grade 7. This was an act of Ms Omomo-Rashed in February 2017 following a request from the claimant.

m. Failing to give the claimant full information about patients when others were provided with that information. (It emerged in discussion at the outset of the hearing that there was only one patient, X, and 'others' meant Sarah Rexon.)

The claimant alleges that this last failure (in m above) occurred on a number of occasions in respect of which he will be ordered to give full particulars, identifying the patient in question, what information was given to others (and when) and what information was not given to him.

5.16 Was that treatment 'less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The claimant relies upon the following comparators:

5.17.1 Sarah-Jane Rexon.
5.17.2 A hypothetical comparator.

The claimant will be ordered to particularise how he relies upon Sarah-Jane Rexon as a comparator. This will require him to identify the circumstances which he alleges are materially similar to circumstances in which he was treated differently.

If he was subject to less favourable treatment was this because of his race and/or religion?

Facts.

18. We have made findings of fact on the balance of probability.

19. The claimant is a Muslim and of South Asian origin. He began his employment with the respondent on 20 September 2010 as a Health Care Assistant. He was a newly qualified band 5 mental health nurse.

20. In February 2013 the claimant became a band 6 nurse and a band 7 nurse in the summer of 2015.

21. While the claimant and Annette Saunders were both band 6 nurses and therefore at the same level of seniority, they worked together and enjoyed a relaxed and joking working relationship. They were good friends and were recognised as a 'comedy duo'.

22. It is not possible to be certain of the dates or the exact period during which the following events took place. However, they must have taken place during that period of good friendship and before the nature of the relationship between the claimant and Ms Saunders shifted when the claimant became a band 7 nurse and began to supervise Ms Saunders in the summer of 2015.

23. We accept Ms Saunders' evidence that as Christmas approached, she made a joke to the claimant that if she drew his name in the 'Secret Santa' gift exchange, she would buy him a selfie stick to help with his personal hygiene. She made this joke on a number of occasions. This was an implied reference to the claimant's tendency to drink a lot of sugary drinks and the effect of that tendency on his size.

24. We set this in the context of the claimant buying Ms Saunders a book in the Secret Santa gift exchange entitled 'How to be a Complete Bitch.' He often referred to Ms Saunders as 'Hyacinth Bucket.'

25. On a single occasion the claimant and Ms Saunders were discussing a patient of African origin. The claimant described the patient as 'primitive'. Ms Saunders was taken aback by this word which she assumed was connected to the patient's own race. She considered it unfair. Without thinking and because of the extreme nature of the expression she retorted,

'*You think like a terrorist*.'

26. In response the claimant roared with laughter.

27. We found Ms Saunders a careful and credible witness. However, on the balance of probability we consider it more likely than not that on the spur of that particular moment she made a connection between the claimant's religion together with his South Asian origin, and terrorism. We accept that the claimant laughed in response however that does not mean that at the time he was not hurt.

28. We accept Ms Saunders' evidence that this was only a single incident. Despite the claimant's evidence to the contrary, on balance, we consider that if he was repeatedly described as a terrorist, he would not have accepted it or other members of staff overhearing it would have raised concerns.

29. The claimant says that he told Kirt Hunte about these two matters and that Ms Omomo-Rashed should have taken action about them. Ms Omomo-Rashed says that she did not know about them and Mr Hunte did not tell her. We have not heard from Kirt Hunte. We accept that Ms Omoma-Rashed did not know about either incident which pre-dated her time with the team.

30. When the claimant became a band 7 nurse and became Annette Saunders' supervisor, their relationship changed as he became more critical of her. Their relationship became more formal and they stopped joking together. After a period of time during which they tried to make their relationship work, Ms Saunders requested a change of supervisor which, after the involvement of the interim manager Kirt Hunte, she was granted.

31. In April 2016 Ms Omomo-Rashed joined the team to replace Kirt Hunte.

32. All members of staff in the claimant's team were allowed to work from home. The claimant accepted in cross examination that Ms Omomo-Rashed who became his line manager never denied him the opportunity to work from home. Ms Rexon was not given any special treatment in this respect.

33. Although there was a three-month period in which both Mr Hunte and Ms Omomo-Rashed co-managed the team. During that three-month period the claimant was line managed by Mr Hunte. There were changes being made to the structure and process of ECATT during this time.

34. It was in this context that a meeting took place in April or May 2016 at which Ms Omomo-Rashed was present. Also present were Sonya Clinch, the claimant, Kirt Hunte, Ms Rexon, and other band 7 nurses.

35. We accept that Sarah Rexon was present at the meeting and we accept her account of it. It was a highly emotive meeting and quite difficult for those involved because the team at the time felt quite 'uncontained'. They had experienced some deaths and as a team were relating some emotive matter to their team managers.

36. At one point while the claimant was speaking, he used the word 'chaos' to describe the difficulties. Ms Omomo-Rashed replied that he should be mindful of using that language given the forum that they were in. She said that they were there to identify solutions for moving forward.

37. The claimant experienced that as a 'put down' and felt humiliated. However, it came across to Ms Rexon that Ms Omomo-Rashed had intended only to control the emotion in the room. Ms Omomo-Rashed herself was trying to diffuse the tense atmosphere. No-one intervened about this remark.

38. No-one, including the claimant, said anything to Ms Omomo-Rashed afterwards. On the balance of probability Ms Omomo-Rashed was not aggressive or hostile at this meeting. The claimant himself described her as being 'assertive' not shouting. Her own manager was present, she was new to the team, and Ms Omomo-Rashed was trying to keep everything positive in a period of significant change. Had she been aggressive or hostile we consider her own manager or others would have spoken to her afterwards.

39. On 25 July 2016 a merger was completed between the respondent's red and blue teams.

40. During the weeks before 26 July 2016, the claimant was involved in the care of a new mother who had a psychotic episode. Concerns came to the attention of Sonya Clinch, head of Access and Urgent Care. She sought a recording of a telephone call made by the claimant during that incident. She was concerned about the claimant's manner during the call and about some of the decisions he made in handling the incident.

41. Therefore, she asked Mr Hunte and Ms Omomo-Rashed to play the recording to the claimant and to ask what learning he took from it. She asked for the same exercise to be carried out with the claimant's colleague Alicia. Alicia is of a different race and religion to the claimant.

42. Mr Hunte therefore set up a meeting with the claimant. The claimant was not warned in advance what the meeting was about. Ms Omomo-Rashed was present as the incoming manager. She and Mr Hunte asked the claimant to listen to the recording. They waited while he did so and then they asked him to reflect upon what he had heard. No further action, disciplinary or otherwise, was taken in relation to the recording. This is consistent with the evidence of the respondent's witnesses that this was a learning, not a disciplinary exercise.

43. However, the claimant felt that he was being 'policed' by this action. He says that Ms Omomo-Rashed was aggressive and hostile in this meeting. On the balance of probability, we find that she was not. Mr Hunte was present: we do not think it likely that she would have been aggressive or hostile before him. The tenor of the meeting in accordance with Ms Clinch's email was one of learning, not aggression.

44. A few days after that meeting, the claimant told Ms Omomo-Rashed that he felt unsupported and bullied by her in that meeting. They discussed matters and Ms Omomo-Rashed came away with the impression that they had resolved their differences.

45. In about October 2016 the claimant took a break from work. He came back feeling much better. At a supervision dated 4 November 2016, however the claimant told Ms Omomo-Rashed that he was not enjoying being at work. He discussed with Ms Omomo-Rashed ongoing issues about Ms Saunders' attitude to him. He thought that Ms Saunders was not responding to his requests to complete process, despite reminders. Ms Omomo-Rashed counselled the claimant on how to manage Ms Saunders.

46. By an incident form dated 7 December 2016 the claimant reported to the respondent that a registered mental nurse, namely Ms Saunders, had visited a patient - who we will call X - at the patient's home outside of Ms Saunders' working hours. (This is issue 5.5.1.)

47. Ms Saunders admitted visiting the patient out of working hours. The respondent's management told Ms Saunders not to visit patients out of working hours and that clients' care must be planned by the multidisciplinary team. At the claimant's instigation the team planned X's discharge. The matter was regarded as 'dealt with.'

48. The claimant was notified of the action taken in relation to Ms Saunders. A form IR1 (a view of an incident report) was sent back to the claimant as 'originator' on 12 December 2016.

49. At a meeting on 13 December 2016 between the claimant, Ms Saunders and Ms Omomo-Rashed, it became clear that there was a breakdown in communication between the claimant and Ms Saunders. They agreed that Ms Saunders could be allocated a new supervisor. There was discussion about the need for mediation.

50. By an email on 16 December 2016 the claimant contacted Prof Glen to raise concerns about a consultant psychiatrist whose frequent short-term absences from work were increasing the work pressures on other members of the team. Prof Glen is the 'Speak Up Guardian'. She is not a safeguarding officer. She is a non-executive director of the respondent who works for three days per month in that role. As Speak Up Guardian she is available to be contacted by members of staff who have concerns. She is an additional channel for staff to use as a contact if they have concerns. Her role is to signpost, to be consulted initially and to advise. She does not investigate concerns.

51. On this occasion, she spoke to the executive director for the local services who sat on the board with her. The Executive Director agreed to speak to the consultant's line manager. Prof Glen went back to the claimant and told him what she had done. She then heard nothing else about the problem. Prof Glen therefore concluded that the matter was closed.

52. In January 2017 Ms Omomo-Rashed had to make a decision about which of two agency staff members should be retained. The matter was discussed at a meeting between Ms Omomo-Rashed, the claimant, Ms Rexon and Mr Turkson. The claimant wished to retain Ms G because she had more experience. Ms Rexon wished to retain Ms L. Ms Omomo-Rashed agreed with the claimant and accordingly gave Ms L four weeks' notice. However, by email dated 16 February 2017 Ms G gave in her resignation and therefore Ms Omomo-Rashed contacted Ms L to request her to remain in post.

53. At about this time an issue arose about a possible change to the system of fielding telephone calls from clients. Hitherto a Single Point of Access ('SPA') had fielded the calls on behalf of the team. A suggestion arose from a Mr

Adams, the SPA team manager that the team should take its own telephone calls because it was not workable for his SPA team to continue to take the calls. The SPA did not take calls for the other two teams. The matter was discussed at a meeting. The claimant took the view that the system should not be changed without the team being provided with pagers. He thought that the matter should be resolved at a higher level because it involved a change to an established system. Ms Rexon took the view that it seemed like a reasonable request for the team to field its own calls.

54. Ms Omomo-Rashed discussed the matter with Mr Adams and looked at the IT situation. In the end she took a management decision together with Mr Adams that ECATT would field its own calls. This was not a matter of her taking sides with either the claimant or Ms Rexon: she made a manager's judgment together with another manager in the circumstances.

55. On the balance of probability, we accept that in about February 2017 the claimant asked Ms Omomo-Rashed to provide a 'band 7 bank profile' for him. This would have been a matter of ticking a box on a web page dialogue form. It was uncontentious. It appears that the claimant had ticked this box for Ms Rexon and Mr Turkson. The claimant does not appear to have pursued this matter with Ms Omano-Rashed and she has no recollection of it. It is rare that a band 7 nurse will perform bank work. We think this was a minor matter that the claimant mentioned briefly, which slipped Miss Omomo-Rashed's mind and which he did not pursue.

56. In about January or February 2017 the claimant began – privately - to make preparations to leave the team.

57. By email dated 18 April 2017 the claimant asked Prof Glen if he could raise a concern and asked when a good time would be to call her. Prof Glen asked the trust secretary Ms Perry to offer the claimant a suitable time to speak over the telephone. When the claimant did not respond, Prof Glen sent a further email suggesting times to speak.

58. By email dated 25 April 2017 the claimant responded saying that he had been very busy the previous week. He said that he would email further on Wednesday morning and then call in the afternoon. In an email dated 26 April 2017 he said that he would call in a few minutes but did not do so.

59. In that email, the claimant raised concerns about a 'member of staff' who had seen a client outside of working hours. The client documentation was not up to date he said and there was little if any supervision about the care provided. The member of staff was not engaging in her own supervision. The claimant said that he had raised safeguarding with his own manager who had said that the matter would not be proceeded with before the manager had met with the member of staff. The client had been involved with the team for far longer than would normally be permitted.

60. By further email dated 10 May the claimant reiterated his concerns. He added that the psychologist had been unable to contact the client directly and was only able to arrange meetings when facilitated by the member of staff.

61. The claimant then provided Prof Glen with the patient numbers to identify about whom he had concerns. Ms Glen forwarded the email and patient numbers to Helen Mangan - Deputy Director of Local Services - who in turn passed them on to Sonya Clinch, Head of Access and Urgent Care. On her return from annual leave, Ms Clinch reviewed the patient notes and records and said that she could not see from the numbers provided what the issue was in respect of each patient's care. She asked Prof Glen to ask the claimant to forward any specific issues so that she could look at each patient's notes and records.

62. Accordingly, Prof Glen spoke to the claimant on 9 June asking him to clarify the issues in relation to each patient. However, the claimant did not return to Prof Glen with the details requested. Therefore, Prof Glen could not pursue the matter further.

63. We have found Prof Glen a wholly reliable witness. We accept her evidence that the claimant did not tell her that Ms Saunders was giving patient X medication of a kind which had been previously prescribed to the patient, but which Ms Saunders was obtaining from stock and/or returns without an appropriate prescription

64. Meanwhile in response to concerns raised by the claimant, Ms Omomo-Rashed held a lengthy and careful meeting with Ms Saunders about two client –related cases. She discussed the issues in detail with Ms Saunders, identified an outcome and plan and then asked Ms Saunders' supervisor to book an urgent supervision with Ms Saunders with her, the following week.

65. At a supervision on 21 April 2017 the claimant and Ms Omomo-Rashed discussed their professional relationship. The claimant said that he had no trust in Ms Omomo-Rashed's leadership. He said this came about initially because she asked what he meant by the use of the word 'chaos' in a meeting in April/May 2016. He told her that he felt bullied by her at that time. He said too that the SPA telephone call incident also made him feel bullied.

66. Matters were further discussed between the claimant and Ms Omomo - Rashed in email correspondence on 2 and 3 May 2017. The claimant did not mention discrimination at this point because at this stage he did not feel that the chaos incident or the recording incident were matters of discriminatory treatment.

67. In a further email dated 8 May 2017 Ms Omomo-Rashed wrote to the claimant taking a conciliatory tone. Amongst other things, she said that she should not have told him to be mindful of using the word chaos. She said that she was trying to contain the situation, but she could see from his point of view that she

came across as shutting him down. About the SPA phone call, she said that it was clear that he had not felt supported and she wished that they had discussed the matter in depth earlier.

68. She said that she had genuinely thought that they had managed to resolve their differences. She thanked the claimant for agreeing to a referral to mediation in relation to Annette Saunders.

69. On 23 May 2017 a review meeting took place about patient X. The treating doctor, Reshad Sufraz, was present as well as X and X's father. Subsequently Ms Omomo-Rashed and Sarah Rexon joined the meeting. The claimant was not available for the meeting. As a result, Ms Rexon received information which was not given to the claimant. Ms Rexon told the claimant subsequently about this meeting.

70. On or about 17 July 2017 the claimant submitted a safeguarding concern form to the respondent. The claimant said that his concern related primarily to the nurse/client relationship involving one female registered mental nurse. He said that the client was often seen by the nurse outside the overview of the multidisciplinary team. This would take place outside working hours. Medication was provided not via the pharmacy but by envelopes containing strips. He said that from a band 7 colleague he understood that the client had disclosed that she would be visited by the nurse outside of working hours, unannounced and even late at night. The client would be contacted by text. When the client's benefits claim was not resolved/completed it was said that the nurse posted cash through the client's letterbox. The client felt 'groomed'. The client had stated that she was kept from the remainder of the ECATT team.

71. A meeting took place at the end of July about who should take over from Ms Omomo-Rashed to act up in her position after she left and before a new manager was recruited into a seconded post.

72. The claimant set up the meeting and he attended together with Ms Rexon, Ms Johal and Ms Omomo-Rashed. Mr Turkson was on leave but had communicated that he was willing to act up only if the role was divided equally between the three team members. The claimant said that he did not think it was safe for three people to act up. Ms Rexon did not mind about this. The claimant said that the only way he would be willing to take the role would be if he had a phone call from Sonia Clinch every day to provide support. Ms Omomo-Rashed replied that if he took the role it would be for him to escalate his concerns and there would not be a daily phone call.

73. At some point during the meeting Ms Omomo-Rashed sighed. On the balance of probability, we accept that she sighed and did not 'kiss her teeth.' In the context of the long meeting we think it is more likely that Ms Omomo-Rashed felt a momentary weariness and gave expression to it than that she engaged in what to her would have been a very substantial insult. Ms Rexon also gave

clear evidence to us that Ms Omomo-Rashed sighed. We have found Ms Rexon a clear, and clearheaded witness who is willing to admit mistakes and matters against her own best interests and we feel able to rely on her evidence.

74. The claimant was angry with Ms Omomo-Rashed because she sighed, and she apologised saying that it had been a long meeting.

75. After the meeting Ms Omomo-Rashed approached the claimant to ask if he would reconsider about the acting up role. He refused and therefore Ms Omomo-Rashed arranged for Ms Rexon who take that role.

76. We find that insofar as Ms Rexon had attended more meetings than the claimant while they were working at the same level, this was because she was highly proactive in her approach to her work. During her training she had absorbed the message that if she wanted opportunities it was for her to seek them out. Ms Omomo-Rashed allowed her team access to her diary and Ms Rexon took advantage of that to select meetings to attend. When she mentioned meetings to the claimant, he tended to take the view that he would not go to a meeting if it finished after his working hours. As a result, Ms Rexon attended several meetings with regards to her operational responsibilities within the team which claimant did not attend.

77. By email dated 25 July 2017 Sonia Clinch offered to meet the claimant at 3.30pm on 3 August. She said that she was aware about the issue in relation to the medication being given in an envelope was in particular reference to the nurse referred to in the safeguarding alert. Therefore, she said it would be good to be clear what were the issues that the claimant felt had not been addressed and also about the evidence to support this.

78. By email dated 2 August 2017 the claimant replied,

'*Thank you Sonya,*

I raised concerns via the appropriate channels and thus I am satisfied that I have completed my duties.

I have not stated that the issues have not been addressed.'

79. By email dated two August Ms Clinch replied,

'*I agree with you that the issues have been addressed by the appropriate channels.*

The meeting was to ensure the above and listen to any further concerns you may have.

I would like to assure you that completion of your duties was not in question.

As you have clarified there are no outstanding issues I'm happy for this to conclude. Please be assured that I have updated Sarah and also Service Manager, Amanda Jones of the issues raised and both are happy to meet with you if you feel there is anything else that needs to be raised.'

80. On 8 August 2017 the claimant sent an application to Amanda Jones for the Band 8A Secondment position.

81. By email dated 9 August, Ms Jones replied to the claimant that she was delighted to invite him to interview. She asked him to let her know of any times he would be unable to attend interview due to leave from 29 August to 8 September.

82. By email dated 14 August 2017 Ms Jones invited the claimant to interview on 31 August at 4 pm.

83. By email dated 31 August 2017 at 11:38 the claimant told Sarah Rexon and Amanda Jones that he would not be attending the interview on that day. He had been offered a post in a different Trust and had accepted it. Therefore, he said he would be providing notice to end his employment with the respondent which he anticipated would conclude on 27 October.

84. On 4 September 2017 the team discussed their working practices. The claimant continued to maintain the position that working in split teams had been a more preferable option. The merger of the two teams had taken place more than a year before. Ms Rexon said to him that she was disappointed that the suggestion of reverting to split teams was always the first option.

85. The claimant raised this again with her by email and she responded on the same day on 4 September. We note the very careful tenor and wording of Ms Rexon's email and conclude that as a manager she was taking care to maintain a positive approach within the team towards the new method of working. We find that she said that she was disappointed with the claimant in these precise circumstances and she said she was disappointed because she was disappointed. We consider that she would have used that expression to any member of staff who over a year after a change had been made, was still expressing the desire to revert back to previous working practices.

86. By letter dated 21 September 2017 the claimant gave notice of his resignation. He said:

'*Dear Sarah,*

I write following on from last month's email and your request in response.

As you know, I have been offered a post in a different Trust and accepted this. Accordingly, I have provided notice to end employment with WLMHT.

I understand my notice period is 8 weeks and so my last day with WLMHT would be 27 October. I have not arranged a start date with my new employer. I have asked that I am able to negotiate end and start dates (should need arise due to employment

checks), thank you for the flexibility that has been offered for this. I await now just for my DBS check to be completed.

I would like to continue with planned annual leave. My last working day as such would be 12 October.

Of course I would like to take this opportunity to provide warm feedback to the team that has provided me with so many positives last few years. I will naturally miss the team and clients.

Warm regards,

Tariq Kahn.'

87. By email dated 8 October 2017 Ms Rexon sent the claimant an exit interview form. Her message ended with a smiley face. He replied approximately half an hour later returning the form. His email said: 'attached'. And then there was a smiley face.

88. In his form, the claimant says that he is leaving because of the working environment. He says that his motivation level at work was unsatisfactory. He says that equal opportunities were seldom promoted. Although he says that relationships with other staff were good, he is critical of his immediate manager who he says never explained his job properly, never showed recognition for work well done, never gave help/advice when needed, never let him know how she viewed his performance, never listened to suggestions/criticism and never dealt promptly with problems.

89. He added, 'please note this is a reflection of the past 18 months of my experience with the trust. Events during this period of time have led to my decision to leave.'

90. We note that the claimant was managed by three different immediate managers but during the majority of the relevant period he was managed by Ms Omomo-Rashed.

91. The claimant took his annual leave before his contract expired and therefore his last actual working day with the respondent was 12 October 2007. On that day he met with Sarah Rexon.

92. The respondent accepts that the claimant should have been given one week's notice of an exit interview (we have not been shown the relevant policy). Ms Rexon at this point was acting up in an unfamiliar role. She was dealing with high levels of sick absence in her team and was recruiting to substantive positions. She admits making a mistake in failing to give the claimant one week's notice of an exit interview however she says that this arose because of the difficult circumstances in which she was working. We accept this evidence.

93. In her own mind, Ms Rexon intended the final meeting on 12 October to be an exit interview. In the meeting however the claimant told her that he would be sending a formal complaint about not providing him with an exit interview. She apologised to him, but he refused to continue with the meeting because he had not been formally invited exit interview.

94. Although she had given other exit interviews in other roles, she did not intentionally deny Mr Khan his exit interview.

95. The claimant did not say to her that in fact he wished to remain in post. Had he wished to discuss that matter and raised it with her she would have discussed it with him.

96. The claimant gave evidence that Mr Turkson and Ms Saunders were also retained in employment after they had resigned, however Ms Rexon was not cross-examined about this and we make no findings about it.

97. By email dated 18 October 2017 the claimant submitted a complaint about bullying and whistleblowing. In the list of issues in this case, he identifies the failure to address his grievance in a timely manner as a breach of contract which caused him to resign so as to claim constructive unfair dismissal. If this is the grievance he refers to, we note that he submitted this complaint after he resigned and therefore whether or not it was dealt with properly or in a timely manner it cannot have been the reason for his resignation. Therefore, we do not make further findings of fact about it.

98. The cut off point for the claimant's discrimination claims is 20 November 2017. Although the claimant's witness statement was silent on the issue of why he did not present his claims earlier, in supplementary questions in chief, he told us that he did not submit his claim earlier because,

'*I was ostracised at work. I found it very very difficult. I was in great fear that if I put in something like this I would not been able to continue with my employment. I have a duty to my patients. I could not leave abruptly. I felt that if I just left it would prove detrimental: a future employer would have found out*'.

Later in cross examination the claimant said: '*I can ride above things like being called a terrorist and develop a good working relationship like I did with other employees*.'

Concise statement of the law

99. So far as is relevant section 95 of the 1996 Act provides:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a) …

(b) …

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

100. To succeed in establishing a claim under section 95(1)(c) a claimant must show that the employer is guilty of a fundamental or repudiatory breach of the contract of employment. Behaviour that is merely unreasonable is not enough. The test is not one of whether the employer was acting outside the range of reasonable responses, but the question is whether, considered objectively, there was a breach of a fundamental term of the employment by the employer.

101. Although unreasonableness on the part of the employer is not enough an employee may rely upon the "implied term of trust and confidence". Properly stated the term implied is "*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."*

102. The duty not to undermine trust and confidence is capable of applying to a series of acts which individually might not themselves be breaches of contract.

103. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the tribunal to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. The question is, does the cumulative series of acts, taken together, amount to a breach of the implied term?

104. The employee must leave in response to the breach of contract, which may mean the tribunal deciding whether it was *an* effective (but not necessarily the sole or *the* effective) cause of the resignation. Accordingly, if an employee leaves both in order to commence new employment and in response to a repudiatory breach, the existence of the concurrent reasons will not prevent a constructive dismissal arising. What is necessary is that the employee resigned in response, *at least in part*, to the fundamental breach by the employer. Elias P (as he then was) in Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07 commented that 'the crucial question is whether the repudiatory breach played a part in the dismissal', going on to observe that even if the employee leaves for 'a whole host of reasons', he or she can claim that he or she has been constructively dismissed if the repudiatory breach is one of the factors relied upon.

105. There is *no* legal requirement that the departing employee must tell the employer of the reason for leaving, however.

106. A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends.

107. The fact that a dismissal is constructive (within sub-section (2)(*c*)) does not of itself mean that it will be held to have been unfair (though in practice that will often be the case); we must still go on to consider fairness in the normal way: in this case however unfairness is conceded if dismissal is proved.

Discrimination

108. We have reminded ourselves in particular of the principles set out in the annex to the Court of Appeal's judgment in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] IRLR 258.

109. It is the claimant who must establish his case to an initial level. Once he does so, the burden transfers to the respondent to prove, on the balance of probabilities, *no discrimination whatsoever*. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing a claimant which it would be very difficult to overcome if he had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race or religion. What then, is that initial level that the claimant must prove?

110. In answering that we remind ourselves that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves.

111. We have to make findings of primary fact on the balance of probability on the basis of the evidence we have heard. From those findings, the focus of our analysis must at all times be the question whether we can *properly and fairly* infer unlawful discrimination.

112. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the *'same, or not materially different'* as those of the claimant.

113. Facts adduced by way of explanations do not come into whether the first stage is met. The claimant, however, must prove the facts on which he or she places reliance for the drawing of the inference of discrimination, actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the respondent employer, he or she must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place, not just that this might have been so. Simply

showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof.

114. If unreasonable conduct therefore occurs alongside other indications (such as under-representation of a particular group in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a tribunal should find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. However, if there is no rational reason proffered for the unreasonable treatment of the claimant, that may be sufficient to give rise to an inference of discrimination.

115. It was pointed out by Lord Nicholls in *Shamoon v Chief Constable of the RUC* [2003] ICR 337 (at paragraphs 7–12) that sometimes it will not be possible to decide whether there is less favourable treatment without deciding *'the reason why'*. This is particularly likely to be so where a hypothetical comparator is being used. It will only be possible to decide that a hypothetical comparator would have been treated differently once it is known what the reason for the treatment of the complainant was. If the complainant was treated as he was because of the relevant protected characteristic, then it is likely that a hypothetical comparator without that protected characteristic would have been treated differently. That conclusion can only be reached however once the basis for the treatment of the claimant has been established.

116. Some cases arise (See Martin v Devonshire's Solicitors [2011] ICR 352 EAT paragraphs 38 - 39) in which there is no room for doubt as to the employer's motivation: if we are in a position to make positive findings on the evidence one way or the other, the burden of proof does not come into play.

Extension of time.

117. There is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion. The onus is on the claimant to persuade a tribunal that it is just and equitable to extend time, *'the exercise of discretion is the exception rather than the rule*' (*Robertson v Bexley Community Centre [2003] EWCA Civ 576*, at para 25). There is no principle of law however which dictates how generously or sparingly the power to enlarge time is to be exercised

118. The discretion to grant an extension of time under the 'just and equitable' formula is as wide as the discretion under section 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions (*British Coal Corporation v Keeble, [1997] IRLR 336, at paragraph 8*). Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

(*a*) the length of and reasons for the delay;

(*b*) the extent to which the cogency of the evidence is likely to be affected by the delay;

(*c*) the extent to which the party sued had co-operated with any requests for information;

(*d*) the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and

(*e*) the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

119. This is not a checklist to be followed slavishly by a tribunal but is very useful guidance for us.

Analysis

120. We analyse this matter using the framework of the list of issues; however, we have taken the discrimination claims first.

Discrimination.

121. Did the respondent subject the claimant to the following treatment?

5.15.a.

The claimant felt humiliated by this incident. Ms Omamo-Rashed was trying to diffuse a tense atmosphere. This is the 'reason why' she acted as she did. We have accepted that as a fact. There is no discrimination.

5.15.b

Ms Omamo-Rashed played the recording to the claimant because she had been asked to do so by Sonya Clinch. This was her 'reason why'. Sonya Clinch had asked her to do this because she was concerned about the claimant's manner and decisions. This is Ms Clinch's 'reason why'. Ms Omamo-Rashed did not ask the claimant to justify his actions: she did ask him what learning he took from it. She did so because she had been asked to do so by Sonya Clinch. There is no discrimination.

5.15 c.

Our findings of fact deal with this: Ms Omamo-Rashed was not aggressive or hostile, so the claimant has not proved the facts of his primary case.

5.15.d

On our findings of fact Ms Saunders referred not to a periscope but a selfie stick. Nothing turns on this detail. Ms Saunders did say this on several occasions. She did so because she and the claimant had a long-term humorous relationship. She would have made this joke to anyone of the claimant's build and with whom she had a relaxed working relationship. No hypothetical comparator would have been treated more favourably. Given the 'reason why', there is no discrimination.

5.15 e.

We have found that this took place once. The claimant says he was called a terrorist. Ms Saunders says, and we have found that she said he was thinking like a terrorist. We think in the circumstances this is a distinction without a real difference. We have found that Ms Saunders would not have said this to someone not of the claimant's race or religion. We do not think the burden of proof is relevant here, following *Martin*: the word itself used in a modern setting is specifically used of those of claimant's race and religion. We think that in the climate of the modern world any reasonable employee of the claimant's race or religion would consider this to be to his detriment, especially considering all the associations that attach to the word. However, the incident is considerably out of time. We deal with time below.

5.15. f

Ms Omamo-Rashed did not take action because she did not know of the incidents. We have accepted the 'reason why' and there is no discrimination.

5.15.g

The respondent did not ignore the claimant's complaints to Prof Glen. Prof Glen chased the claimant four times to speak. She asked for further information. The claimant did not give it. Prof Glen was reasonable in not pursuing the matter further. More to the point, she would have taken the same decision in the circumstances, whatever the race or religion of the person making the complaints. All the claimant's emails were responded to. So, the claimant has failed to prove the primary facts of his claim in this respect.

5.15 h

Ms Omomo-Rashed did not appoint Ms Rexon to succeed her. The claimant could have taken this role but refused it. Ms Rexon was offered the role in the circumstance of his refusal. The claimant has failed to prove the primary facts of his case.

5.15 i

Our findings of fact deal with this. It was Ms Rexon who used the word, 'disappointed.' Ms Rexon said that she was disappointed because she was disappointed and would have said the same to any member of staff who disappointed her by refusing to move on more than a year after a change. We have accepted Ms Rexon's 'reason why' on the facts. There is no discrimination.

5.15 j

The claimant applied for the band 8A acting manager's role. He was invited to interview and withdrew before the interview. So far as the claimant went with the process, the playing field was level – he was invited to interview - but he chose to take the application no further. He has failed to prove the primary facts of this part of his case.

5.15 k

Ms Rexon did fail to give claimant an exit interview. This was a mistake made due to the fact that she was dealing with high levels of sick absence and was recruiting to substantive positions, as we have found. Ms Rexon would have been likely to make the same mistake about anyone leaving at that time because she was working in difficult circumstances. This is the reason why she acted as she did. There is no discrimination.

5.15 l.

We have found that claimant did on balance request a band 7 bank profile. He never chased it up. There is no evidence from which we could conclude that Ms Omomo-Rashed would have treated anyone else differently in this respect, still less that she would have treated anyone of a different race or religion differently. In any event this part of the claim is substantially out of time and we would not extend time for the reasons we give below.

51.5 m.

This issue turned out to be one piece of information about X. The claimant did not receive this information because he was not present at a meeting and Ms Rexon was.

122. Therefore, apart from the terrorist remark the discrimination claims all fail.

Time

123. We have taken into account the factors set out in *British Coal Corporation v Keeble.*

124. We have looked at the length of, and the reasons for the delay in relation to the 'terrorist' remark. It is hard to tell the precise length of the delay because on the evidence, the incident could have happened in 2015, although it also could have been 2016. The claimant contacted ACAS on 19 February 2018 and the claim was presented on 25 February 2018.

125. If the claimant reported the matter to Mr Hunte, it would have been reported in the second quarter of 2016. (Mr Hunte left the team at the end of July 2016). So, the delay from then is at least 18 months.

126. We consider that at the time the event took place the claimant made a conscious decision to put the matter behind him. As he said to us, he could ride above such things. Indeed, he did not mention it in his complaint to the respondent in October 2017.

127. The cogency of the evidence has not been greatly affected: Ms Saunders admitted it, although she admits to slightly different words.

128. The claimant has not acted promptly: he knew the facts when they took place. He knew the import of the words used at the time. He has not told us about steps taken

to seek legal help about the incident. He appears to have taken a different approach by 'riding above it.'

129. We have looked at the balance of prejudice. If we don't extend time the claimant will lose a claim of discrimination and if we do, the respondent will be liable for a claim of discrimination. For what it is worth to him, the claimant does have our findings of fact set out above.

130. In this unusual situation the cogency of the evidence and the balance of hardship are not the factors that weigh against extending time. What does weigh against it is that Parliament has intended claims of discrimination to be brought promptly. The claimant has not done that. He has continued in his employment without making any formal complaint to anyone. He has, instead, worked through the situation and risen above it. That is a valid choice: we do not criticise it. However, it is a choice. The claimant has added this matter to a claim brought only after he resigned. We do not consider that had he raised this matter while at work, it would have jeopardised his employment: the respondent knew a great deal about his difficult relationship with Ms Saunders as it later developed. That knowledge does not seem to have jeopardised the claimant's employment. On the contrary, the evidence before us shows that the respondent has systems in place which show that it takes employee's concerns seriously. The claimant was ready and able to tell his managers about other difficulties. Given the very lengthy delay we do not consider that the claim has been made within such period as is just and equitable.

131. In relation to the Band 7 profile complaint, this is academic, however that matter too is some 9 months out of time. Mrs Omomo Rashed could not recall it. It is a minor matter. The passage of time has affected the cogency of the evidence and it would not be just and equitable to extend time.

Public interest disclosure

132. To succeed in a complaint of dismissal because of public interest disclosure based on an alleged constructive dismissal, the claimant has first to show that the respondent did act in fundamental breach of contract. So, we look at first at the acts said to amount to a breach of contract, using the numbering in the list of issues.

5.8.1

133. This allegation is puzzling. The claimant gave no evidence about a grievance. There is no grievance in the bundles. He did make a formal complaint after he resigned, but if this is the grievance it is after his resignation, so can have had no effect on the claimant's decision to resign and is irrelevant.

134. If the 'grievance' is the matters raised with Prof Glen (although those were not grievances) as the claimant's written submissions appear to suggest, then any delays that took place were with reasonable and proper cause as we have set out in our findings of fact.

5.8.2

135. The respondent dealt with the report of 7 December 2016 by 12 December 2016. This was dealt with properly and in a timely manner.

136. The report to Sally Glen show that Prof Glen did deal with the report properly and in a timely manner as our findings of fact show. The matter petered out because the claimant did not return to Prof Glen with information as requested. This was not the respondent's failure.

137. The 19 July 2017 report was closed on 20 July 2017 on the basis that the medication had been appropriately prescribed, no crime had occurred, there had been no family complaint and measures had been put in place to support the staff member. The claimant himself confirmed on the 2 August 2017 that he had *not* said that the issues had *not* been addressed. We find that the respondent did deal with this in a timely manner.

5.8.3

138. Ms Rexon was not given more favourable treatment as alleged by the claimant.

138.1 Ms Omomo-Rashed actively encouraged the claimant to take the acting up role but he refused. It was in that circumstance that Ms Rexon was appointed.

138.2 All employees were allowed to work from home, including the claimant, as he accepted.

138.3 Ms Omomo-Rashed agreed with the claimant about which agency staff member should be retained, but in the end that person left so that the other member of agency staff had to be retained.

138.4 Ms Omomo-Rashed exercised judgment in making a manager's decision in consultation with a management colleague about the calls on the service user support line. She had reasonable and proper cause to do so in that the SPA team manager had requested the change because his team was not finding the existing arrangement workable. Ms Omomo-Rashed was not giving Ms Rexon more favourable treatment.

138.5 Ms Rexon attended more meetings than the claimant because she actively sought out opportunities and the claimant was less active in doing so.

138.6 Ms Rexon acquired information about X which the claimant did not receive because she was present at the relevant meeting. This was not favourable treatment of her.

139. Therefore, the respondent was not in fundamental or any breach of contract. We therefore take the claim of dismissal because of public interest disclosure no further.

140. Accordingly, the complaints of unfair dismissal and discrimination are all dismissed.

141. It remains only for us to repeat our thanks to both parties of their good-natured conduct of this hearing.

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Employment Judge Heal

Date: 27.9.2019

Sent to the parties on: 2.10.2019

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For the Tribunal Office