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EMPLOYMENT TRIBUNALS

Claimant		*Respondent*
Ms A Mansaray	**AND**	**Central and North West London NHS Foundation Trust**

PRELIMINARY HEARING

HELD AT: **London Central** **ON:** 17, 18, 19, 22, 24 & 25 July 2019

BEFORE: Employment Judge Glennie
Members: Mr D Schofield
Mr J Carroll

Representation:

For Claimant: In person
For Respondent: Ms G Rezaie, of Counsel

REASONS

1. By her claim to the Tribunal the Claimant, Ms Mansaray, made the following complaints:

(1) For a redundancy payment
(2) Unfair constructive dismissal
(3) Race discrimination
(4) Sex discrimination or harassment related to sex

By its response the Respondent, the Central and North West London NHS Foundation Trust, resisted those complaints. The Tribunal is unanimous in the reasons that follow.

The Issues

2. The specific allegations made by the Claimant were set out by Employment Judge Hodgson at a preliminary hearing on 15 April 2019. The list that Judge Hodgson set out (at page 59 of the bundle) was subsequently

amended (at page 63) so we will set these out again as amended, in the following terms:

(1) A redundancy payment.

(2) Unfair constructive dismissal. The claim form states "the consultation was predetermined and pointless base on the issues raised above. I lost all faith, trust and confidence in the CNWL which led me to constructively resign with immediate effect on 15 October 2018". This is the clearest statement of the reason for resignation contained in the claim form. It is Ms Mansaray's case that the Respondent breached her contract and in particular that it breached six policies being the following: change management policy; the sickness absence policy; the appeal policy; and the deployment procedure. She was unable to identify any specific final straw leading to her resignation, and none appeared to be set out in the claim form.

(3) There is a claim of race discrimination, there are three allegations relied on being as follows: constructive dismissal; not appointing the Claimant to the position of Band 7 Associate HR Business Partner; and not giving the Claimant the opportunity to apply to the Band 5 medical Staffing Advisor role.

(4) In addition, there are claims of either direct sex discrimination, or in the alternative harassment related to sex. They are as follows:

(i) By Mr Redmond using the term "affected staff" in his letter of 23 August 2017.
(ii) By holding a first consultation meeting in the absence of the Claimant on 20 August 2017.

Evidence and Findings of Fact

3. The Tribunal heard evidence from the following witnesses:

(1) The Claimant.
(2) Mr Hardev Virdee, Chief Finance Officer for the Respondent.
(3) Mr Nigel Redmond, currently Director of HR but at the time of the events with which we are concerned, the Associate Director.

There were also documents before us produced by the Claimant indicating that other potential witnesses would not be attending for various reasons. There was an agreed bundle of documents and page numbers that follow in these reasons refer to that bundle.

4. The Claimant is a CIPD qualified HR professional. She began employment with the Respondent as a Band 5 HR Advisor in May 2005. By mid 2017 she was working as a Band 6 Senior HR Advisor, Band 6 being a higher grade than Band 5.

5. At this point the Respondent's HR function was set a 10% cost reduction target. An HR survey was carried out and the results of this led Mr Redmond to consider making changes within that function. He proposed merging the Employee Relations (ER) and business partnering teams. He obtained the necessary agreement of his divisional directors and on 23 August 2017 caused to be distributed a staff consultation paper at pages 173-181. The proposals included that of deleting the existing posts within the ER team, including therefore the Claimant's post, and creating ten new Associate HR Business Partner roles (AHRBP) at Band 7. The document stated that the Respondent would endeavour to avoid compulsory redundancies. In the event of redundancy or no suitable alternative employment being available, the employee concerned would be entitled to a redundancy payment. In the event of a downgrade within the restructure then pay protection for two years would apply.

6. All of this reflected aspects of the Respondent's Change Management Policy, which was the subject of a collective agreement with the union UNISON. Some relevant extracts from that policy are as follows. At pages 92-93 there is a provision defining the terms redeployment, redundancy, ringfencing, slotting in and staff at risk, and on page 93, suitable alternative employment. We highlight at this stage "slotting in" which is defined in the follow terms: "……the process by which staff at risk are confirmed into a post in a new staffing or management structure which is similar to their current post and where that individual is the only contender for that post. Slotting in may occur where a post is in the same band as the individual's current post or where it remains substantially the same (70%) with regard to job content, responsibility, grade, status and requirements for skills, knowledge and experience".

7. Suitable alternative employment is defined in the following terms: "A post may be considered as suitable alternative employment if it is broadly comparabl**e** to their previous role in grading, duties and status. A post one Band below will be considered suitable alternative and pay protection will be applied in line with the Trust's pay protection policy."

8. On page 94 there was provision about consultation, stating that there would be a meeting with all staff affected by the organisational change to announce the proposed change and explain the consultation process, and then there would be individual meetings with each member of staff affected. On page 96 there was an explanation of the stages in the process for filling posts in a new structure. Stage one was stated to take place amongst the staff that are affected by the change, posts in the new structure being filled either by slotting in or by ring fencing. Stage two then reflected a wider competition for any post that remained after that. Finally, on page 98 there is the following provision about appeals, complaints and joint agreements: "Appeals against the selection criteria for redundancy or the decision to dismiss an employee by reason of redundancy will be heard in accordance with the Trust's appeals procedure. The decision of the appeal panel will be final and there will be no further opportunity for recourse to the grievance procedure."

9. The first group consultation meeting was held on 29 August 2017 and there are minutes of that at page 247. The meeting involved nine attendees apart from Mr Redmond and a note taker. It is agreed that of these nine, three were, like the Claimant, working mothers. That detail is relevant because the Claimant's case is that she was unable to attend that meeting as she had a school aged child and they were on holiday, it being the school holidays at the time. The Claimant says that holding the meeting on that date was an act of harassment relating to sex or an act of direct discrimination because of sex.

10. A second group consultation meeting was held on 13 September 2013 when seven employees attended, including the Claimant, none of whom had attended the first meeting. Mr Redmond's evidence was that the two meetings covered much the same ground. The Tribunal found that essentially this was indeed the case. Inevitably there would have been some differences, but the two meetings were intended to cover the same matters and the minutes of the second one at page 251 showed that the contents were very similar.

11. In cross-examination the Claimant accepted that her attendance at this meeting provided her with the necessary information regarding the proposed restructure, although she said that she did not at that time have any minutes of the first meeting and so had no direct knowledge of what had taken place there. The Tribunal found that there was no disadvantage to the Claimant in attending the second rather than the first meeting. She did not attend the first meeting because she was on leave. The second meeting fulfilled the same function as the first for those who had been unable to attend. No further steps were taken regarding the consultation or the restructure until both meetings had taken place.

12. There then followed a collective response to the proposal from the Band 5 and Band 6 staff members presented via the UNISON Branch Chair Mr Ward. The consultation closed on 25 September 2017, although there followed after that date a management response to the collective proposal and a further collective response to that.

13. The next event directly involving the Claimant was an interview for one of the ten AHRBP roles. This interview was ring fenced within the change management policy. There were to be ten Band 7 roles: the four existing Band 6 Senior HR Advisors, one of whom was the Claimant, were given ring fenced interviews. The numbers involved meant that any of the four who achieved the benchmark score of 45 out 75 would then be appointed to one of the Band 7 posts.

14. The interviews were conducted by a panel of four, being three HRBPs who would in due course be managing the AHRBPs, plus Mr Redmond. Of the four interviewees, two, including the Claimant were black and/or minority ethnic origin (BAME) women, and two were white British women. The latter two both scored more than 45 and were appointed to Band 7 posts. The

Claimant scored 32 and her BAME colleague scored 40.5, so neither was appointed.

15. The Claimant further stated in her evidence that her BAME colleague was successful in a Band 7 interview for another NHS Trust the very next day. That in itself did not seem to the Tribunal to be ultimately of very great significance. We do not know the precise nature of that other role, what that Trust's benchmark score was, or what questions or exercises were set. Individuals' performances at interview can vary from one day to another and one panel will not necessarily exercise its judgement in the same way as a different panel. The Tribunal noted that the colleague concerned had got rather closer than the Claimant had to the Respondent's own benchmark score.

16. Sixteen external candidates were then interviewed for the eight remaining posts. Of these six were appointed, having reached or exceeded the score of 45. The statistics were that two out of four white candidates and four out of twelve BAME candidates were successful at this stage. So, overall four out of fourteen BAME candidates were successful, i.e. roughly 29% and four out of six white candidates were successful, i.e. roughly 67%.

17. Like the appeal panel to whom we will refer later, the Tribunal considered that these statistics gave reason to examine the process for these appointments. We noted that the number of individuals involved was relatively small and that therefore seemingly large variations in percentage terms were more likely to occur. The Claimant's case was to the effect that she found it impossible to believe that she had scored as poorly as the Respondent said she did in the interviews, and that the statistics showed or suggested some form of bias against BAME candidates.

18. One point that should be mentioned is that there were no summary sheets for the exercise and that as a general rule these would have been produced. The Claimant showed us examples of the summary sheets that would be used, but the Tribunal did not find this to be of any real significance since we had all the information about the candidates' scores that would have been summarised in those sheets.

19. That said, the Claimant made no complaint about the questions that were asked, the scoring system or the cut-off point that was adopted. The Tribunal found no evidence that, as the Claimant suggested, Mr Redmond had an agenda to remove the BAME members of staff. As we have said, four BAME applicants were appointed. The fact that they were external applicants and the Claimant was an internal applicant seems to be of no significance so far as a complaint of race discrimination is concerned. Mr Redmond slotted the Claimant into a Band 5 role within the new structure, as will be explained later in these reasons. The Claimant did not regard that role as suitable, but Mr Redmond's doing so was, we found, not consistent with a wish to remove the Claimant from the organisation. Mr Redmond was one of four individuals on the panel. There was no evidence to support the suggestion that he had influenced the other members of the panel in some way. Furthermore, the

Tribunal considered it unlikely in any event that three HR professionals would be open to being influenced in the sort of way that was suggested.

20. Then in a letter of 8 November 2017 to Mr Ward of UNISON, Mr Redmond referred to the Band 7 exercise, among other things. Referring to the internal candidates, including the Claimant Mr Redmond wrote this at page 268: "we therefore proceeded to recruit externally at Band 7 having first assessed those four staff at Band 6 to determine suitability or otherwise for the new roles. Two were assessed as able to take up the Band 7 roles and two were assessed as not capable even with a formal trial period and the provision of training and support during this trial".

21. The Claimant was offended by that observation and evidently read it as suggesting that she was not capable of ever doing the Band 7 job. The letter does not actually say that, what it says is that the Claimant would not be able to get up to speed with the Band 7 role on the basis the Respondent required, i.e. within the four week trial period that was applicable. It is perhaps unfortunate the words "not capable" were used and it is evidently those that caused some offence to the Claimant, but read more closely the letter does not say that the Claimant (or her colleague for that matter) were not capable of ever doing a Band 7 job.

22. Also on 8 November 2017 at page 269, Mr Redmond wrote to the Claimant informing her that a Band 5 post as a recruitment team leader had been identified and that she would be slotted into this post. In summary, that letter said that the ring-fenced vacancies had all been dealt with; that this role was one Band below the Claimant's current grade and the pay protection policy would therefore apply for two years; and that the Claimant's new Line Manager would be a Ms Oliver.

23. In connection with this slotting-in process, Mr Redmond's evidence was that he did not approach the matter arithmetically in terms of assessing whether there was 70% similarity as set out in the Change Management Policy. The fact that he did not do that in an arithmetical way did not ultimately cause the Tribunal any concern as these are really matters of judgement. Mr Redmond's evidence was that he considered whether the role was sufficiently similar to amount to something appropriate for slotting-in. We are satisfied that he did indeed do that, and that it was not necessary to carry out a strictly arithmetical exercise, if such a thing is really possible.

24. The Tribunal finds that this was not, as the Claimant suggested, an unqualified administrative role. Looking at the job description, it involved matters of HR or ER expertise. We do find, however, that it amounted to a formal demotion. The position was one Band lower than the Claimant's existing role and, whereas in the Band 6 role CIPD membership was required, in the Band 5 role this was desirable and not a requirement.

25. Then on 9 November 2017 at page 271 Mr Ward sent a collective grievance on behalf of the Band 5 and 6 employees, including the Claimant. The grounds for this were set out at page 272. Then at page 275 the

Claimant, still on 9 November, replied to Mr Redmond regarding the Band 5 role. She said that she did not regard this as a suitable alternative, particularly given that she had not previously worked in recruitment. She said that she had not been provided with a job description and she did not consider this as a suitable alternative role. Mr Redmond replied on the same day stating that he believed that the role was suitable within the terms of the Change Management Policy.

26. It is evident that at this stage the Director of HR at the time, Ms McVey, had some discussion with Mr Jumnoodoo of UNISON. The latter had evidently come away with the impression that slotting into the new roles would be deferred pending further discussion, but on 16 November at page 229 Ms McVey sent an email to all concerned stating that this was not the case, and that evidently there had been a misunderstanding. Ms McVey also said that it was very unlikely that there would be any change to the proposed restructure.

27. Mr Redmond then proposed a meeting at 2pm on 17 November. The Claimant sent an email at page 277 at just after 5pm on 16 November to Ms McVey, copied to Mr Redmond, on behalf of the Band 5 and Band 6 employees. This said that they collectively found the proposal to move into the proposed roles to be bullying, victimisation, discriminatory and outside of the Trust's Change Management Policy. It said that the proposed roles were administrative or support roles which would have a negative impact on the individual's skills and career progression.

28. The Claimant went on to say that they would like to be considered for other suitable alternatives during the 8-12 week redeployment period in line with the redeployment process. She then set out the process that applied where a staff member was formally declared at risk of redundancy. That in turn refers to the Redeployment Process set out at page 160. That process is said to apply: "……..to staff who following organisational change and post consultation are not appointed to posts in a new structure or where a unit or service is closing; there are no posts to be appointed to".

29. The Tribunal finds that the redeployment process was not applicable in the circumstances. It would apply if the situation arose where staff had not been appointed to posts in a new structure; but here the Band 6 employees were all being appointed to new posts, albeit ones that they did not consider to be suitable. Also at page 277 Mr Redmond sent an email saying that he still believed that it would be better for everyone to meet at 2pm to discuss the concerns. He said that he understood that Mr Jumnoodoo was available, but if he was not he would meet with another representative. He said this "I do need to stress though that no one is at risk as a result of this change process precisely because we have held posts across the HR directorate in line with the change management policy".

30. Then Mr Ward intervened and later on that morning said that neither he nor Mr Jumnoodoo was free in the afternoon and asked for a reschedule until the following Wednesday lunchtime, to which Mr Redmond agreed. In the event that meeting did not go ahead because the Claimant was absent sick.

31. Pausing there, the Tribunal does not consider that there was anything wrong with Mr Redmond's proposal to proceed in this way. He agreed to postpone the meeting in the first instance so as to enable a union representative to attend and then in the event did not proceed with the meeting because the Claimant was off sick.

32. The Claimant commenced sickness absence on 17 November 2017 and in the event did not return to work after that date.

33. On 24 November 2017 at page 285 the Claimant was formally notified of the Band 5 role in similar terms to those sent previously. Then on 30 November 2017 commencing at page 286, a collective grievance on behalf of four employees, including the Claimant, was sent by UNISON to the Chief Executive of the Trust. That raised all the matters that were the subject of debate and complaint up to that date, and it named the subject of the grievance as Mr Redmond. At page 291 the grievance said this: "We would also query Mr Redmond's role in this change management process as not being impartial. We believe that it is inappropriate for him to be managing both the redeployment and the consultation process and his presence on the selection panel and assessments for the Band 7 roles is also inappropriate. "We believe that Mr Redmond is playing fast and loose with the Trust policy in order to suit his own ends and push through his own agenda and in doing so is treating us differently to other employees within the Trust".

34. There was then reference to bullying, victimisation, discrimination and harassment leading to the four complainants being unwell and off sick. Then the grievance said this "we have lost faith in the management process and management's ability to treat us fairly and to follow Trust policies and procedures, therefore we would request that our case be considered for submission to ACAS with a view to consider the case going to an Employment Tribunal".

35. There was also on the same date raised by or on behalf the Claimant an individual grievance, also against Mr Redmond. That is at page 310 and again this raised effectively all the matters that had been complained about at that point. In the grievance the Claimant also complained that Mr Redmond had not followed the change management policy and she said that once she had challenged him on this she had been subjected to bullying, harassment, victimisation and discrimination. She said that Mr Redmond's behaviour towards her had been discriminatory based on sex and race.

36. On 21 December 2017 at page 337 the four employees were informed by an email from Ms McVey that all of their grievances would be considered under the appeal process arising under the Change Management Policy. The Respondent relied on the provision in the grievance policy at page 69 which reads as follows: "It [that is the grievance policy] excludes issues more appropriately covered by other policies such as disciplinary, capabilities, sickness absence, redeployment, redundancy, dignity at work (bullying and harassment) whistle blowing, special leave, flexible working or job evaluation.

These policies contain their own agreed procedures so once any of these policies have been evoked the use of the grievance procedure will not be allowed." Then the email referred to the appeals provision in the Change Management Policy at page 98.

37. The Tribunal concluded that it was not correct to adopt the appeals policy, as the Respondent did. Essentially the Claimant and the other employees who were raising the collective grievance with her were all going further than complaining about a slotting in decision, which might have been regarded as a decision made under the Change Management Policy and therefore correctly the subject of an appeal. In both of the grievances the employees concerned were complaining of bullying, harassment and discrimination. We find that they could realistically expect grievances of that nature to be dealt with as a grievance or grievances under the grievance process. The grievance process would involve investigation, a grievance hearing and then the right of appeal. Under the appeal process, as its name implies, the matter goes straight to an appeal against what is regarded as a decision under the Change Management Policy.

38. Then on 10 January 2018 at page 355 it was confirmed by Mr McDonald, (although the evidence was that the decision had been made by Ms McVey in consultation with the CEO) that the matter would indeed be dealt with under the appeal process.

39. On a different point, Mr Redmond's evidence was that also in January 2018 one of the four employees, who we will identify as Ms CC, and who was also off sick at the time, contacted the Respondent and said that she would be able to return to work. It was not challenged that this had occurred. At the time that this evidence was given, the Tribunal ensured that this was indeed the case, and that the Claimant was not challenging Mr Redmond's evidence on this point. The Tribunal accepts Mr Redmond's evidence about this and we find that CC did indeed contact someone and say that she would be able to return to work.

40. That matter will become relevant again later, but returning to the procedural points, on 19 February 2018 at pages 374 to 376 all four of the affected employees wrote asking for the hearing to take place under the grievance policy rather than as an appeal. That was signed by all four of them and copied to their union representatives. This was followed up on 12 March 2018 at page 382 by a letter from the union representatives Mr Jumnoodoo and Mr Ward, also saying that the use of the appeal process was inappropriate and that there ought to be a grievance hearing. The letter said this: "The request for a grievance hearing is considered by UNISON to be reasonable and it is very disappointing that a response has not been received, consequently our members will not be attending the appeals hearing due to be held on 22 March until these issues have been addressed".

41. The letter also said on its second page at 383 that, given the extended period that the members had been on sick leave, it was reasonable practice for them to be referred to occupational health to assess their fitness to attend

any hearing. This was evidently a separate point from the one about what sort of hearing there should be in the first instance.

42. We return now to matters concerning Ms CC. On 21 March 2018 at page 384 there is an email from CC to her three other colleagues, including the Claimant, who were off sick and in a similar position to one another, saying that she had had an offer of redeployment into a Band 5 role in medical staffing. It is evident that this offer had been communicated to her by an intermediary, as she said that someone had contacted her about the job role, she did not apply for it. CC then took up the Band 5 role and withdrew her support for the collective grievance. She returned to work in that role, leaving the three employees including the Claimant continuing with the collective and any individual grievances.

43. The Tribunal finds that the Respondent had done nothing wrong in relation to this transaction with CC. The reason why she was approached with the offer of a Band 5 position that had become available and the other three were not, on Mr Redmond's evidence (which we accept) is that CC had indicated that she was able to come back to work. The other three had not indicated that, and they were still off sick. We find that it was reasonable in those circumstances to communicate with CC to see whether she would take up the Band 5 role, which in the event she did.

44. The appeal hearing then took place on 6 April 2018. The Claimant and the other two remaining employees did not attend and the hearing proceeded, conducted essentially by Mr Virdee, in their absence. The Tribunal finds that the primary reason why they did not attend was because of the dispute about what sort of hearing should take place. The Claimant also made the point that the hearing should not have proceeded without an occupational health referral. That is perhaps academic because it is evident that even if there had been such a referral the Claimant and her colleagues would not have attended because of the nature of the hearing.

45. The other point we make about this particular aspect is that the Claimant relied on the sickness absence policy at page 122 as requiring that there should be a reference to occupational health. The relevant extract at clause 2.3 provides that "No decision should be made on an employee's future employment under this policy without first consulting the occupational health service." It might or might not have been good practice to have had an occupational health referral before any hearing the Claimant might have attended. However, we found that this particular policy was not applicable in the circumstances because this refers to a decision being made under the sickness absence management policy. That was not what was happening in the appeal hearing. The former policy relates, as its name suggests to the management of either frequent short-term absences or long-term absence, and is a standalone policy. What was happening at the appeal hearing was something different from that.

46. We have also asked ourselves whether it was appropriate in more general terms for Mr Virdee to proceed in the absence of the Claimant. We

found that, given the decision to proceed under the appeal policy, which was not his decision, it was inevitable that if the Claimant did not attend that the matter would proceed in her absence. The decision to do so really added nothing, we found, to the original decision to use the appeal process rather than the grievance policy.

47. We found that Mr Virdee conducted the matter properly given that the fact that he was required to operate under the appeal process. He said, and we accept, that the decision was essentially made by him. Although there was a panel, the other two members were really sounding boards for him, and he was responsible for the ultimate decision.

48. That decision was contained in the appeal outcome letter of 18 April 2018 at pages 398-401. This summarised what had taken place at the meeting, and there are two particular points that the Tribunal will highlight. One is the point that we have already mentioned, which was that the appeal panel accepted that the statistics for the Band 7 role raised a question that ought to be examined, and they set out the figures that we have already given.

49. The letter says that the panel examined the process carefully. Mr Virdee in his evidence explained that this meant that they asked Mr Redmond to go through how the scoring was carried out and how the scoring records were filled in, and to explain generally how the process worked. We accept that this is what occurred at the meeting. The letter concluded that the panel had been satisfied that the appointments were made appropriately.

50. Secondly, the letter made four recommendations for the future. It did so against the background of finding that there had been an offer of suitable alternative employment in the form of the Band 5 roles that had been proposed to the three complainants. The four recommendations were as follows:

(1) The equality impact assessment should be completed earlier in the consultation process. The point here is that these assessments under the policy itself could be completed at the end of the consultation process. The appeal panel suggested that it made more sense that they should be completed earlier on before a final decision was made. For what it is worth, the Tribunal agrees with that. The significance of the equality impact assessment would be much greater if it could be allowed for in the course of the consultation process rather than if it simply announced what the impact had been after it had happened.

(2) Consideration should be given to how to improve communication with people on sick leave.

(3) The HR survey should be completed so that the quality of the new service could be assessed.

(4) The Change Management Policy terminology and wording should be reviewed to clarify the "at risk" situation. Again, the Tribunal comments that it agrees with that particular point. It is evident that there was scope for confusion in that it was not always apparent, when the expression "at risk" was being used, whether this meant at risk of redundancy or at risk of redeployment, and further clarity would have been helpful.

51. On 15 May 2018 at page 404 the Claimant was sent a letter informing her that her period on full sick pay was ending or had ended on 15 May and would be followed by six months at half pay, which would cease on 14 November 2018.

52. Then, other than the Claimant sending in her fit notes which continued to certify her as unfit for work because of work related stress, there was no further contact by either side with each other after this appeal. Mr Virdee's evidence was that thereafter he ceased to have any involvement with the matter and Mr Redmond's evidence was that at this point Ms Oliver was the Claimant's manager, and that any communication that might have taken place would presumably have been between the Claimant and Ms Oliver.

53. The next event that we were told about was on 5 October 2018 and it is evidenced by a document at page 423. This was an email from recruitment consultants to the Claimant confirming that they would have the right to represent her for the role of interim Senior ER Advisor at the Imperial College Healthcare NHS Trust. These recruiters were therefore putting forward the Claimant to an alternative employer.

54. At page 425 on 10 October 2018 there was an email from the recruitment consultants expressing congratulations to the Claimant as she had evidently been successful in obtaining that role, and on 15 October 2018 at page 465 the Claimant sent a letter to the Respondent resigning from her position. This was addressed to Ms Oliver and read as follows:

"Hope you are well, please accept this as my formal resignation from CNWL Foundation NHS Trust with immediate effect. I will post my mobile telephone, locker key and badge to you, I would like to take this opportunity to thank you very much for all your support, wishing you all the best, kind regards".

The Claimant began her role with the new Trust on 18 October 2018.

<u>The Applicable Law and the Tribunal's Conclusions</u>

55. The Tribunal returned to the amended list of allegations. In the event we addressed the issues in the reverse order to the way in which they appear in that list, and we turned first to the complaints under the Equality Act.

56. Section 13(1) of the Act makes the following provision about direct discrimination:

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

57. In relation to harassment, section 26 provides as follows:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic ,and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) The perception of B;

(b) The other circumstances of the case;

(c) *Whether it is reasonable for the conduct to have that effect.*

58. The burden of proof is provided for in s.136 in the following terms:

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

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

59. In the well-known cases of **Igen v Wong** and **Madarassy v Nomura** the Court of Appeal gave guidance under the previous burden of proof provisions in the earlier anti-discrimination legislation. The test remains applicable under the Equality Act. Essentially, the Court of Appeal said that there would be two stages. A|t the first stage the Tribunal would consider whether the evidence was such that it could properly find that discrimination had occurred in the absence of an explanation from the Respondent. In **Madarassy** the Court of Appeal emphasised that this must be a conclusion that the Tribunal could properly reach. It would not be sufficient for a Claimant to show no more than a difference in protected characteristic and a difference in treatment as compared to another person. There would have to be something more for the conclusion the discrimination had occurred to be properly founded. That something more might not of itself be very significant, but there had to be something.

60. The Tribunal first considered the complaints of direct sex discrimination and/or harassment related to sex. The Tribunal found that it was not less

favourable treatment of the Claimant to refer to her and others in correspondence by the term "affected staff". This is a neutral expression which appears in the change management policy, among other places. In the Tribunal's experience, it is an expression that is frequently used in situations such as that which arose in the present case. The Tribunal found that it carried no derogatory or unfavourable connotation and therefore does not amount to less favourable treatment of the Claimant.

61. Even assuming that use of this expression could amount to unwanted conduct (which the Tribunal doubted), there was nothing that could properly form the basis of a finding that its use was related to the Claimant's sex (nor, for the purposes of the direct discrimination complaint, that its use was because of the Claimant's sex). It is a gender-neutral expression and one, as the Tribunal has said, that involves no negative connotation. There was equally no basis for a finding that the term was used with the purpose of harassing the Claimant, as the Respondent would have no reason to believe that it would do so.

62. For essentially the same reasons, whatever the Claimant's perception was of the effect of the use of this expression, the Tribunal found that it could not reasonably have the effect of violating her dignity or creating a harassing environment for. Viewed reasonably, it is an inoffensive expression.

63. The other allegation of sex discrimination or harassment related to sex was that regarding the first consultation meeting. The Tribunal has found nothing wrong with the way in which this was dealt with. This did not amount to less favourable treatment of the Claimant. Furthermore, there was nothing that could properly form the basis of a finding that the Respondent approached the meetings as it did because of the Claimant's sex, or that this was related to the Claimant's sex. The position is that there were two meetings with the same subject matter because not everyone concerned could attend on the first date. There was no disadvantage in attending the second, rather than the first.

64. The Tribunal found that the arrangements for the meetings were not made with the purpose of harassing the Claimant, as there would be no reason to believe that they would have that effect. Whatever the Claimant's perception of the effect of those arrangements, it was not reasonable for them to have the effect of harassing her: there was no disadvantage in there being two meetings rather than one.

65. The complaints of direct discrimination because of sex, or harassment related to sex, therefore failed.

66. The Tribunal then turned to the three allegations of direct race discrimination. The first is not appointing the Claimant to the Band 7 role, the second not offering the Claimant the opportunity to apply for the Band 5 role offered to CC, and the third the constructive dismissal, by which we understand the events said to amount to breaches of contract leading to the complaint of constructive dismissal.

67. In relation to the first allegation, the Tribunal considered that the statistics could amount to the "something more" under the first stage of the **Madarassy**. However, for the reasons that we have given, we have accepted the Respondent's explanation that the results reflected the performance of the individual candidates. The Respondent has therefore proved that it did not discriminate against the Claimant in this respect.

68. In relation to the second allegation, there is nothing beyond the difference in protected characteristic to form the basis of a finding of discrimination. Furthermore, CC's circumstances were different from the Claimant's, as the former had said that she was able to return to work and the Claimant had not said that.

69. If, contrary to our primary finding, the burden is on the Respondent to prove that it did not discriminate against the Claimant in this respect then we find that it has proved this. We find that the reason for the difference in treatment was that CC had said that she was able to return to work but the Claimant had not said that. The Respondent has shown that this was the totality of the reason for the difference in treatment, and that it did not discriminate against the Claimant.

70. With regard to the third allegation, the events relied on as breaches of contract relate to the selection and use of policies and procedures as explained in the list of issues. The Tribunal could find nothing that could be a proper basis for a finding that the Claimant's race was relevant to the decisions made. On the contrary, until CC (a white woman) returned to work in about March 2018 and withdrew her support for the collective grievance, she had been treated in the same way procedurally as the Claimant. This included the decision to deploy the appeals procedure as opposed to the grievance procedure in relation to the collective grievance. Thereafter, as we have said, Mr Virdee's decision to proceed in the way that he did was effectively a consequence of the earlier decision to operate the appeals policy, and there is nothing to suggest that the Claimant's race was a factor influencing the way in which Mr Virdee proceeded.

71. Alternatively, if the burden has passed to the Respondent to prove that it did not discriminate against the Claimant in its decisions as to the use of policies and procedures, the Tribunal has accepted its explanation that it acted as it did because it genuinely considered that the appeals policy was the more appropriate policy to use. The Respondent has therefore proved that in this regard it did not discriminate against the Claimant.

72. This then leads to consideration of the complaint of constructive unfair dismissal. The essential legal principles governing a constructive dismissal may be summarised as follows:

> (1) There must be a breach of contract by the employer which is sufficiently serious for the employee to be entitled to regard herself as having been dismissed.
>
> (2) The employee must resign in response to that breach

(3) The employee must not have affirmed the contract before resigning

74. The Claimant relies on breaches of the various policies that have been listed as the breaches of contract. The Tribunal has found that there was what could be regarded as a breach of the grievance policy in that the Respondent used the appeal policy in preference to the grievance policy when, as we have found, the latter was in fact applicable. In the other respects raised by the Claimant we found that the other policies, for example the redeployment and the sickness management policies, were not applicable in the particular circumstances. We agreed with the appeal panel that the use of the term "at risk" in the change management policy was confusing in that it was not clear whether or when it was referring to redundancy or redeployment. We did not, however, find that there was any breach of that policy.

75. So, did the refusal to operate the grievance policy in respect of the collective grievance and the Claimant's individual grievance amount to a breach of contract, and to one that was sufficiently serious to form the basis of a complaint of constructive dismissal?

76. The Tribunal's conclusion on the question of affirmation means that it is not strictly necessary for us to decide this present point. We have, however, done so. We have concluded that operating the appeals policy was such a breach, whether seen as a breach of the grievance policy if that should be regarded as contractual, or alternatively of the implied term of trust and confidence between employer and employee. That term, in summary, provides that the employer shall not without reasonable cause act in a way that is calculated or likely to destroy or significantly damage the relationship of trust and confidence between employer and employee.

77. As we have already observed, whatever the merits of the collective and individual grievances may have been, they went beyond challenging the outcomes of the restructure. They raised allegations of discrimination, bullying and harassment. We found that an employee, in particular one who was supported by her union on the point, who was told that grievances of this nature would not be considered under the grievance policy, would be likely to lose trust and confidence in the employer who took that view. Indeed, it was said even before that point was reached at page 291 in the extract that we have quoted from the grievance of 30 November 2017 that the four employees collectively had lost trust and confidence in the employer. We found that the Claimant lost trust and confidence in the Respondent, and we found that treating the grievance as something rising under the appeals policy was a breach that contributed to that.

78. A significant period of time, however, passed from then until the Claimant's resignation. On that point Ms Rezaie for the Respondent made two submissions. One was that by the time the Claimant resigned, her resignation was not in fact in response to the breach but was because her entitlement to half pay was shortly to expire, and because she had found another job.

79. The Tribunal found that these were no doubt significant factors, at least as regards the timing of the Claimant's decision, but that they did not mean that the breach ceased to be relevant. In this connection, we referred to the words of Elias J in the Employment Appeal Tribunal in **Abbey Cars (West Horndon) Limited v Ford [2008] UKEAT 047207** in the following terms:

"The crucial question is whether the repudiatory breach played a part in the dismissal and even if the employee leaves for a whole host of reasons he or she can claim constructive dismissal if the repudiatory breach is one of the factors relied upon".

In other words, the question is not whether the repudiatory breach was the effective cause of the resignation but was it an effective cause of the resignation.

80. The Claimant's evidence was that when she resigned the complaints that she had about the process were still a factor, at least, in her decision to resign. We accept her evidence on that point and we find that this was indeed still a factor and so was still an effective cause.

81. That then leads to the final question, as to whether or not the Claimant had affirmed the contract before she resigned. In this connection we reminded ourselves of the Employment Appeal Tribunal's decision in **W E Cox Toner (International) Limited v Crook [1981] ICR 823.** The facts were particular to that case, but in summary there was a period of six months where there was correspondence passing between the Claimant and his employer in which he was being threatened with dismissal and was being accused of gross dereliction of duty. At the end of the six months it was apparent that the employer was not going to withdraw the allegations: the Claimant remained in employment for a further month and then resigned. He claimed constructive unfair dismissal and the Employment Tribunal upheld his claim. The Employment Appeal Tribunal considered that the Employment Tribunal had misdirected itself and said that, although mere delay by itself did not constitute an affirmation of the contract, if the delay went on for too long it could be very persuasive evidence of an affirmation. The EAT said that the Tribunal should have taken account of the fact that throughout the seven month period the Claimant had continued to work and to be paid under the contract, and added that, even if it were arguable that he was working under protest for six months, the delay for a further month after the company had finally made its intentions clear was fatal to the Claimant's claim that he had not affirmed the contract.

82. In the present case the Claimant stated that she had lost trust and confidence in the Respondent on 30 November 2017. There was then a period of ten months before she resigned. During that time, she was in receipt of sick pay throughout. The more significant period, it seemed to the Tribunal, was perhaps that which followed the appeal outcome letter on 18 April 2018. Although it might be said that the particular breach of contract that we have identified took place rather earlier when the decision was made that the appeal process should apply, assuming matters in the Claimant's favour, 18 April could be taken as the date of the breach.

83. There was then a period of nearly six months before the Claimant resigned. During that time, she received sick pay and did so without protest.

84. We reminded ourselves that affirmation is a fact sensitive issue. The Claimant's evidence was that she was not in a fit state to resign earlier than she did, but there was no medical evidence to that effect. Up to the date of the appeal hearing the Claimant had been able to correspond with the Respondent, with her union representative, and with her free colleagues. At some point, presumably after the appeal hearing, (we say presumably because it is not clear when the Claimant has given scarcely any evidence about her efforts to find another job) the Claimant had become able to seek and obtain alternative employment, and she did so before resigning. During this time, the Claimant was still accepting sick pay from the Respondent. In these circumstances we find that the substantial delay from the date of the breach of contract to the Claimant's resignation is evidence that she had affirmed the contract. We find that there was an affirmation and that the complaint of constructive dismissal therefore fails.

85. There remains the complaint for a redundancy payment. That is bound to fail as the effect of our finding on the constructive dismissal is that the Claimant was not dismissed, and the statutory complaint for a redundancy payment depends on there being a dismissal.

86. We would add that, had we found that the Claimant was constructively dismissed, we would none the less have found that she was not able to make a complaint for a redundancy payment, as we find that the Band 5 role that she was offered amounted to suitable alternative employment for the reasons that we have given an for the reasons relied upon by the Respondent. In particular, this offer of alternative employment, including a trial period, fell within the terms of the collective agreement which was the change management policy.

87. The Tribunal has therefore decided that all of the complaints are unsuccessful.

Employment Judge Glennie

Dated: 15th Nov 2019

Judgment and Reasons sent to the parties on:

18/11/2019

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For the Tribunal Office