Case Number: 3335620/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms E Dupre	v	Luton and Dunstable University Hospital

Heard at: Watford

On: 2-4, 7-8 and (in private) 9 September 2020

Before: Employment Judge Hyams

Members: Mr I Bone
Ms I Sood

Representation:

For the claimant: Mr P Tomison, of counsel
For the respondent: Mr M Uberoi, of counsel

RESERVED UNANIMOUS LIABILITY JUDGMENT

1. The claimant's claim of detrimental treatment within the meaning of section 47B of the Employment Rights Act 1996 fails and is dismissed.

2. The claimant's claim of direct race discrimination, contrary to sections 13 and 39 of the Equality Act 2010, fails and is dismissed.

3. The claimant's claim of harassment, contrary to sections 26 and 39 of the Equality Act 2010, fails and is dismissed.

4. The claimant's claim of victimisation, contrary to sections 27 and 39 of the EqA 2010, is dismissed on its withdrawal by the claimant.

REASONS

Introduction: the claim, the parties, and the issues

The claim

1 In these proceedings, the claimant claimed that she had been discriminated against directly because of her race, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA 2010"), harassed within the meaning section 26 of that Act (the protected characteristic for the purposes of that claim being the claimant's race), victimised within the meaning of section 27 of that Act, and treated detrimentally for making a protected disclosure (commonly referred to as "whistleblowing"), i.e. that she had made a disclosure within the meaning of section 43A of the Employment Rights Act 1996 ("ERA 1996"), and had been treated detrimentally within the meaning of section 47B of that Act for making that disclosure.

The parties

2 The claimant (who is Black Caribbean, born in St Lucia) was at the time of the events to which the claim relates, and remains, employed by the respondent as a Healthcare Assistant ("HCA"), working on a ward catering for patients who have had orthopaedic surgery. The respondent is the statutory corporation which is responsible for the hospital named as the respondent to these proceedings. According to the claimant's contract of employment (to which we return below), it is "The Luton and Dunstable University Hospital NHS Foundation Trust".

The issues

3 There was a preliminary hearing before Employment Judge J Lewis on 12 August 2019, after which the issues were stated in the record of that hearing at pages 32-38 of the hearing bundle. (Any reference below to a page is, unless stated otherwise, to a page of that bundle). After the start of the hearing before us, and after a discussion with the parties about the issues, Mr Tomison very helpfully on behalf of the claimant told us that the issues were now further refined. We record them as being in the following form (the terms of which we agreed with Mr Tomison and Mr Uberoi after we had heard the evidence and before they made their final submissions to us).

Harassment

3.1 Did Ms Paige Tindale-Wignall on 10 August 2018 engage in unwanted conduct related to the claimant's race which was either done for the purpose, or had the effect (taking into account the content of section 26(4) of the EqA 2010), of violating the claimant's dignity, or creating an

intimidating, hostile, degrading, humiliating or offensive environment for her, by

3.1.1 not treating the claimant's reports of race discrimination by a patient during that morning in the form of abusive racial language seriously; and/or

3.1.2 telling the claimant that the race discrimination to which she was subjected that morning by that patient was the "norm" "back in the day" and that the claimant should be more understanding about racial insults from older people; and/or

3.1.3 in front of staff and patients arguing with the claimant and attempting to justify the racist language used by the patient?

3.2 Did the respondent, through Mr Scudder and Ms Burke, fail to investigate the claimant's allegation of race discrimination made in the Datix report at page 209 in accordance with the respondent's Policy for Adverse Incident Reporting and Investigation of Incidents (at page 163)?

3.3 If so was that to any extent unwanted conduct related to the claimant's race?

3.4 If it was, was it done for the purpose or did it have the effect (applying section 26(4) of the EqA 2010) of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

3.5 Did Ms Moffatt say to the claimant that maybe Ms Tindale-Wignall did not mean what she had said in "that kind of way"?

3.6 If so was that to any extent unwanted conduct related to the claimant's race?

3.7 If so, did Ms Moffat do that for the purpose or did it have the effect (applying section 26(4) of the EqA 2010) of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

<u>Direct race discrimination</u>

3.8 Was the claimant treated by the respondent less favourably than the respondent treats or would have treated others to any extent because of the claimant's race by:

3.8.1 Mr Scudder failing to deal with the claimant's Datix report at page 209 in accordance with the respondent's Policy for Adverse Incident Reporting and Investigation of Incidents (at page 163); and/or

3.8.2 continuing to roster the claimant to work with Ms Tindale-Wignall after the latter had returned to work in September 2018 "despite the claimant objecting and fearing for her safety"; and/or

3.8.3 on or around 13 or 14 November 2018 rostering the claimant to work with Ms Tindale-Wignall; and/or

3.8.4 Ms Tindale-Wignall shouting at the claimant on 13 or 14 November 2018 in front of staff and patients; and/or

3.8.5 changing the claimant's shift patterns in December 2018 without her consent; and/or

3.8.6 causing the claimant on 28 December 2018 to work elsewhere than on the ward on which she usually worked, i.e. Ward 23; and/or

3.8.7 causing the claimant to lose out on night shift enhancements by reducing the number of night shifts worked by the claimant in December 2018?

Whistleblowing detriment

3.9 It being agreed by the respondent that the claimant disclosed information within the meaning of section 43A and 43B(1) of the ERA 1996 on 11 August 2018 about the alleged conduct of Ms P Tindale-Wignall on 10 August 2018, did the claimant have a reasonable belief that

3.9.1 the disclosure was made in the public interest and/or

3.9.2 Ms Tindale-Wignall had either (a) committed the offence of assault and/or battery, or (b) endangered the patient's health or safety?

3.10 If the answer to the question stated in paragraph 3.9 above is "yes", was the claimant treated detrimentally on or around 13 November 2018 by Ms Tindale-Wignall shouting at the claimant in front of staff and patients?

3.11 If the answer to that question is "yes", was that a detrimental act done on the ground that the claimant had made the disclosure referred to in paragraph 3.9 above?

4 The claim of victimisation was not pressed. It was specifically withdrawn by Mr Tomison on 3 September 2020, as were the claims of alleged detriments

referred to in paragraphs 7.1-7.6, and 7.8-7.11 in the case management summary at pages 33-34.

5 By the time that closing submissions were made, the claimant relied on hypothetical comparators only.

The evidence which we heard

6 We heard oral evidence from the claimant on her own behalf and, on behalf of the respondent, from the following witnesses:

6.1 Mr John Scudder, who is a Registered Nurse and whose post is that of Matron in the respondent's Emergency Department;

6.2 Ms Fiona Woods, who is employed as a Healthcare Assistant on Ward 23;

6.3 Ms Syeda Wyatt, who is a Registered Nurse and is employed by the respondent as "designated Adults Nurse on the Adult Safeguarding Team";

6.4 Ms Carmel Synan-Jones, who is a Registered Nurse and is employed by the respondent as its Deputy Chief Nurse;

6.5 Ms Tindale-Wignall, who is a Registered Staff Nurse employed by the respondent and who worked on Ward 23 during the events to which this claim relates and who was in the circumstances we describe below the allocated Nurse in Charge for most of the night shifts that she worked there;

6.6 Ms Sandra Horn, who is a Registered Nurse and was at the material time the respondent's Gynaecology Lead Nurse;

6.7 Ms Johanna Burke, who is a Registered Nurse and who was at the material time employed by the respondent as a Sister, working as the manager of Ward 23, and the respondent's designated Safeguarding of Vulnerable Adults ("SOVA") nurse; and

6.8 Ms Tracey Moffatt, who is a Registered Nurse, employed by the respondent as a Matron.

7 We were referred to, and read, documents in the 422-page hearing bundle put before us, and several other documents that were added to that bundle during the hearing.

8 Having heard that evidence and read those documents, and having considered the parties' very helpful written and oral submissions, we made the following findings of fact.

Our findings of fact

9 The claimant was employed by the respondent as a "Healthcare Assistant" as from 1 February 2016 onwards. There was a copy of her contract of employment and its appendices at pages 43-60. Clause 14 was on page 46 and was in these terms:

> "**DISPUTES PROCEDURE**
>
> The person to whom you should apply if you have a grievance relating to your employment is your immediate manager. You may be asked to provide details of the grievance in writing. The 'Trust Grievance Policy' can be found on the Trust intranet."

10 The claimant worked on Ward 23, which was described by Ms Tindale-Wignall in the following terms in paragraph 7 of her witness statement, which we accepted:

> "Ward 23 is a Trauma and Orthopaedic ward comprising of 30 male and female beds. It is currently devised of four main bays and six side rooms. It mainly accommodates patients with fractured neck of femurs. The majority of patients are elderly, and are often confused, either chronically due to illness such as Alzheimer's or acutely due to infection or postoperative delirium. Consequently the ward often needed extra staff during the day and overnight to ensure the safety of patients and a member of staff would be allocated to a specific patient or bay that shift. However, due to staffing issues, it was common to only have four registered nurses and three healthcare assistants on a night shift."

11 A "fractured neck of femur" is a broken hip, which it is obvious can be extremely painful. We were told that the intensity of the pain felt by patients varied, however.

12 It was the claimant's evidence that she did not speak to Ms Tindale-Wignall more than minimally before 10 August 2018, and that there was no friction between them before that day. The following evidence pointed the other way.

12.1 Paragraph 4 of Ms Tindale-Wignall's witness statement was in the following terms:

> "My relationship with the Claimant had been fraught for some time prior to the incident leading to the Claimant's grievance and claim in the Employment Tribunal. Both myself and other colleagues had felt and highlighted the Claimant had not been performing to the expected standard and I had discussed this with her. The issues around her performance had absolutely nothing to do with her race.

> On several occasions I had to educate the Claimant regarding basic catheter care and documenting; a task the Claimant should be competent in performing. In addition, there were several instances where patient vital signs were not completed and when observations had been completed, deteriorating patients were not escalated appropriately. I believe the Claimant has falsely documented that patient care was completed, resulting in patients not receiving personal care over the night. As Nurse in Charge, it was highlighted to me that the Claimant would not communicate where she was when on shift and was often unable to find for long periods of time. However, the Claimant did not appear to take feedback into consideration resulting in the atmosphere on the ward becoming uncomfortable for a while. However, after a period of time we were getting along better in speaking terms."

However, Ms Tindale-Wignall accepted in cross-examination that no formal action had been taken against the claimant as a result of the concerns which she (Ms Tindale-Wignall) described in that passage.

12.2 At page 256, Ms Aliza Mercado, a Staff Nurse on Ward 23, is recorded to have said to Ms Moffatt, in the course of the latter's investigation to which we refer further below (all of the things recorded below to have been said to Ms Moffatt were said in the course of that investigation), in answer to the question "How was the relationship between [the claimant and Ms Tindale-Wignall?":

> "Strained."

12.3 In addition, on the same page, Ms Mercado was recorded to have said:

> "I was doing drugs ED asked me whether I saw what PTW had done? ED seemed very happy that it had happened. PTW had said to ED to not take B12's comments seriously but had then hit the same patient."

12.4 At page 311, there was this record of what was said by Mr Ric Rosales, who was employed by the respondent as a HCA on Ward 23, to Ms Horn on 16 January 2019 in the course of the grievance investigation to which we refer further below (all of the things recorded below to have been said to Ms Horn were said in the course of that investigation):

> "SH: Are you aware of any previous problems with Paige and Ernessa's relationship?
>
> RR: I have heard Ernessa refuse to work with Paige before.
>
> SH: Is that before the August incident?

RR: Yes, it was before then, but I don't know why."

12.5 At page 317, Ms Burke was recorded to have said to Ms Horn on 16 January 2019 in answer to the question "Are you aware of any previous relationship problems between Paige and Ernessa?"

> "I wasn't aware that there was a problem, but I know that Paige had challenged Ernessa before about her work ethics as she didn't feel that she was doing what was being asked of her."

12.6 At page 322, Ms Mercado was recorded to have said to Ms Horn on 17 January 2019 in answer to the question "Are you aware of any previous problems with Paige and Ernessa's relationship?":

> "I don't think they get on very well together, but I am unsure why."

12.7 At page 327 there was a record of Ms Tindale-Wignall saying to Ms Horn in answer to the question "What was your relationship like with Ernessa prior to the incident?"

> "It has always been rocky. When I started, I worked a lot of night shifts and so did Ernessa and I didn't think that she was performing as she should have been, so I called her out on it and gave her examples as to why certain practices were wrong/unsafe. We had a rocky start but then we did get on for a while. A lot of people feel the same and that she doesn't always perform very well. It isn't that she is being picked on because of her race; people have an issue because of her performance. When she is questioned about something work related, then she gives attitude; she doesn't take it very well. She talks about her race a lot at work and says things like 'in my culture we do this', which is fine, but I just want to get on with work and get the job done; we don't have time to stand around talking about anything unless we are on a break."

12.8 The claimant's own witness statement contained in paragraph 11 this passage, the content of which was denied by Ms Tindale-Wignall, and which was not evidenced in any contemporaneous documentation (the claimant having accepted that she made no complaint about it at the time):

> "The same staff nurse, Paige Tindale-Wignall, had made similar remarks to me a year earlier, which I did not take further. A patient told me to go away because I was brown and dirty. Paige Tindale-Wignall witnessed it. In response she rolled her eyes and said 'O[l]d people.' She brushed it off and ignored it."

13 We record here that Ms Tindale-Wignall was alone in saying that the claimant was (as Ms Tindale-Wignall put it in the exchange recorded at the bottom of page 325) "an advocate for her race" before 10 August 2018. However, Ms Woods is recorded at page 331, in the notes of an interview with Ms Horn of 28 January 2019 at pages 329-332, to have said that the claimant had said (evidently subsequently) on many occasions that Ms Tindale-Wignall was racist. There was this exchange at the top of page 331:

> "FW: Ernessa has had a lot of conversations with me about Paige Tindale-Wignall which have made me uncomfortable. I wasn't there at the time of the incident that Ernessa has accused Paige of so I can't comment on that. Ernessa has told me many times that a patient called her racist names and she told Paige about it but Paige said the comments were made because the patient had dementia, and Ernessa wasn't happy about this. Ernessa recently said to me that she would keep going with the DATIX's until Paige gets fired.
>
> KM: You said that Ernessa has told you many times about Paige being racist; how often would you say this is discussed?
>
> FW: Ernessa says something about it every time I see her on the ward; even when I say I don't want to talk about it."

14 Ms Woods' witness statement was about that specific passage in the notes of that interview, and when giving oral evidence to us, Ms Woods was (evidently reluctantly) adamant that that passage was accurate. The claimant denied saying words to the effect that "she would keep going with the DATIX's until Paige gets fired", but we accepted Ms Woods' evidence that the claimant had said words to that effect, if not those words themselves, to her. We did so having seen and heard her give evidence, and having found her to be an honest witness, doing her best to tell us the truth.

15 In addition, Ms Burke was recorded by Ms Horn to have said during the latter's interview with her of 16 January 2019 (at page 317 in a comment which Ms Burke thought had been made "off the record"):

> "I think Ernessa is acting very arrogant on the ward at the moment. She has refused to move when asked as she said she wasn't allowed to go to a certain place because Paige would be there, but it would have been in a different bay; after this request, she told Grainne McDevitt that she had a headache and was going home. She was actually asked to escort a patient to scanning so wouldn't have seen Paige. Have you spoken with Fiona Woods?"

16 When Ms Horn's HR adviser said "That isn't a name that has been given to us", Ms Burke continued:

> "She has been close to Ernessa, but told me that Ernessa had told her that she was 'going to get' me, Paige and Emma Robinson from Ward 23 because we were racist. I also had to speak to Ernessa about following the correct procedure when she reports an incident as before officially reporting it, she went to Ward 22 to tell one of the HCA's about it and this was overheard by Agatha, one of the Sisters on Ward 22, and then I believe it was at that point that Agatha escalated it. Ernessa seems to be very keen to tell everyone what has happened and her work ethics are getting worse. She is refusing to do tasks and being obstructive. She should remember that we are supposed to be non-judgemental towards patients and perhaps should go on a dementia course so she understands better."

17 While the factors to which we refer in paragraphs 12-16 above were not directly relevant to the issues in the case, they were as far as we were concerned an important part of the background against which we had to decide precisely what happened on 10 August 2018, which was the subject of the issues stated in paragraph 3.1 above.

The events of 10 August 2018

<u>The evidence</u>

18 The events of 10 August 2018 which were one of the bases of these claims were the subject of a number of different accounts, given to Ms Horn and Ms Moffatt in the course of their investigations. Mr Uberoi said to us that it would be almost impossible to come to a reliable conclusion about what happened on that day, but when pressed on that, he recognised that it was incumbent on us to come to a conclusion on that, doing the best we could on the evidence before us, on the balance of probabilities.

19 Mr Uberoi set out in a table in paragraph 29 of his written closing submissions a number of the things that were said to Ms Moffatt and Ms Horn about what had been said by Ms Tindale-Wignall to the claimant on 10 August 2018 about the things said by the patient referred to in paragraph 3.1 above. However, while it was helpful to have that evidence collated in that table (and we set it out below), there were other relevant records of what had been said on that day by Ms Tindale-Wignall to the claimant, to which we now turn.

20 We saw that the first time that the exchange between the claimant and Ms Tindale-Wignall of 10 August 2018 was recorded in writing was in an email sent on 11 August 2018 by Mr Kieran Dunne to Ms Synan-Jones. Given its proximity in time to the events of 10 August 2018, we regarded it as being potentially a reasonably reliable record of what happened on 10 August. The email was at pages 207-208. So far as relevant, it was in these terms:

"Following tonight['s] events, I will try to prepare a statement for my involvement and what happened for the lead investigator.

I will get you a quick summary of what happened:

At 21:30 hrs last night I was called by ward 22 (Sr Mruz) to say that a HCA wanted to report a safeguarding alert against a member of staff. As Sr Mruz had been working the long day she was happy to stay if needed but by the time I had arrived on the ward I could [see] she had gone home as HCA was confident to talk to me on her own.

In the sister office on ward 22 I spoke to HCA Ernessa Durpe [sic] who stated to me that on the previous night shift she had witnessed SN Paige Tindall-Wignall [sic] assaulted a vulnerable patient. The patient in question is in B12 and has required 1:1 specialling as she suffers with dementia and can become aggressive physically and verbally.

HCA Durpe said that she had been informing SN Paige about the racist comments which the patient had been saying to her but realised that because of her dementia there was nothing that could be done to address this. HCA Durpe said she was upset with the attitude of SN Paige because Paige had said "that is older people mentality", she felt SN Paige was not understanding the concept of racism and was labelling all old people under one bracket.

After delivering personal care to the patient at 05:30 by 4 individual (SN Mercado, HCA Basarte, HCA Durpe and a bank HCA), HCA Durpe and the bank HCA had stayed behind the curtain and SN Paige came behind with them. HCA Durpe informed SN Paige that the patient was continuing with the racist comments to which SN Paige went to address the patient in an antagonising matter which resulted in the patient slapping SN Paige In the chest.
HCA Dupre states her and the bank HCA witnessed SN Paige striking the patient with an open palm on her Rt forearm

HCA Dupre said she was horrified at the behaviour of SN Paige. When I asked why she did not address the issue with her line manager she said she felt it would not be addressed correctly and would be mismanaged. The reason for the sister on ward 22 being involved is that HCA Dupre had been crying in the kitchen before the start of her shift tonight and was approached by a HCA from 22. She did not inform her of the allegation of assault but was speaking about the lack of support or understanding in regards to the racist comments. From this Sr Mruz spoke to her and this is when HCA Dupre felt she had the courage to speak up about what she has witnessed the previous night." (Emphasis by underlining added by us.)

21 The claimant did not complete a report known as a "Datix" report about the alleged slapping by Ms Tindale-Wignall of the patient to whom the respondent referred (and we refer below) as "B12" (since the patient was in the place on Ward 23 identified as B12). This was, apparently, contrary to her initial intention, as Ms Mohammed was recorded at page 237 to have said to Ms Moffatt on 7 November 2018 in answer to the question "What action did you/other colleagues take when the alleged assault occurred?":

> "The HCA (Ernessa) said she was going to do a datix to report the incident, she asked for my name for evidence. The patient seemed to be normal after this incident."

22 Instead, on 16 August 2018 the claimant completed the Datix report at page 209, which was in these terms (verbatim, i.e. the text is as it was in the original):

> "patient was calling black memebers of staff (hca's) (monkey, dirty, black bitches)nurse in charge of night shift was informed of this and, resonded to health care assisants that racial dicrimination from older patients is acceptable and that staff should understand this was normal back in the day of race segragation and staff of colour should accept this and be more understanding to racial abuse, this includes pateints with and without capacity."

23 What happened to that report is directly relevant to the claims made here (see the issues stated in paragraphs 3.2 and 3.8.1 above), but it is also relevant at this point. That is for these reasons.

23.1 When the claimant completed the Datix report of 16 August 2018 at page 209, that was the first time that she wrote anything about the verbal exchange which had occurred between her and Ms Tindale-Wignall about patient B12 on 10 August 2018.

23.2 Mr Scudder changed the terms of the report. The original terms of the report were as a result not shown to the claimant or anyone else in the respondent's organisation until June 2019. We return below to the reason why Mr Scudder changed the words used by the claimant, but we mention it now because it shows that at no time until after the claimant made her claim in these proceedings was Ms Tindale-Wignall made aware that it had been alleged that she had said words to the effect that "racial discrimination from older patients is acceptable and that staff should understand this was normal back in the day of race segregation and staff of colour should accept this and be more understanding towards racial abuse, from patients with as well as without capacity". The words which Mr Scudder substituted for those which the claimant had used were on page 210 and were these:

> "Patient was calling black members of staff by racial and discriminatory names (Examples: Monkey, black bitch). The patient is known to have a diagnosis of dementia. Escalated to nurse in charge of shift who explained that the patient has advanced dementia and allthough this language is unacceptable we have to be aware that these comments are part of her dementia and not to be taken personally."

24 What the claimant said in her witness statement about the exchange between her and Ms Tindale-Wignall during the early morning of 10 August 2018 was this:

> "3. On the morning of 10 August 2018, I was working a nightshift on Ward 23, which is my regular ward. I was working in a patient bay where one of the patients was a woman with dementia who was being 'specialed' (one to one supervision) by an agency Healthcare Assistant. The patient with dementia called me and a colleague, Bank Staff, Ayishat Mohammed, 'black bitches', 'monkeys', 'dirty' and other racist names.
>
> 4. I found this language offensive [and] spoke to the Band 5 nurse who was in charge on that shift, Paige Tindale-Wignall. I noted that the patient was only attacking me and the other Black HCA; she was not being abusive to the white staff.
>
> 5. Paige Tindale-Wignall (white) replied by asking me what I wanted her to do about it in a disinterested manner. She then added that the patient's language was acceptable from older patients and that it was the 'norm' back in the day and that I should be more understanding about racial insults from older people (as reported page 209).
>
> 6. I responded by disputing the fact that such language was ever the 'norm' and told her that I found it very offensive. I was shocked and said that it has never been normal to be racist. To class that as normal is just wrong. My great Grandmother was white, I told Paige that you cannot generalise the older generation as the same (page 296). Paige Tindale-Wignall continued to argue with me in front of staff and patients, attempting to justify the racist comments of the patient, she was not interested in what I had to say. I found the fact that I had been told to accept racism, insulting and humiliating. At no time did she step in to support me or de-escalate the situation when the racist comments were being made."

25 However, when she stated a grievance about the matter, on 17 November 2018, the claimant wrote this (page 291):

"On the morning of my night shift I approach the nurse in charge who was in B-Bay because I wanted to talk to her about an observation I had made about a patient who was shouting at myself and another black member of staff. (BANK HCA A.Mohammed). The patient was calling us "black bitches, dirty, monkeys" even though there were other members of staff present who were of white race (HCA J.Bassart, RGN A.Mercado) the patient was targeting myself and the other black member staff by trying to hit us and shouting racist insults towards us constantly pointing and swearing in the direction of myself and the other coloured staff, the patient would express a lot of aggression towards us when we approached her bedside but was more calm to staff who was of white race.

When explaining this to the nurse in charge (RGN P.T.W) she said to me with a disinterested tone of voice what do I want her to do about it? I replied by saying "I'm aware the patient has dementia, there for the patient doesn't have capacity to know what they are saying is offensive but I just wanted to inform her on what I observed". (R.Rosales, J.Bassart, A.Mercado, A.Mohammed) was present at the time when I approach the nurse and witness the discussion. The nurse in charge then said I need to understand this was the "norm" back in the day and I should be more understanding to racial insults from "old people".

I then tried to explain to the nurse in front of the other members of staff that this was never the "norm" back in the day of race segregation and in fact it was an error of disgraceful racism then and still is now, and making such statement is wrong. I also explained that back in the day not all white people were racist towards people of colour and a small number of white people fought for black rights, as well as having interracial relationships and mixed race families. I explain it was offensive to black people and people of colour to justify wrongdoings because of the colour of people skin."

26 Ms Tindale-Wignall's witness statement contained this passage about the events of 10 August 2018:

"8 There was an incident on 10 August 2018 relating to a patient who was being treated for a fractured Neck of Femur. The patient had dementia and was very confused. Her family had reported to us that this was her first time in hospital, which was likely to make her more anxious. Several members of staff on Ward 23 had been warned by the patient's carer that she was prone to making racist comments and that my colleagues and I should ignore them as the patient did not mean them. I am unable to state whether the claimant was aware of this particular fact, but it was handed over that the patient had dementia and was confused. Additionally, the butterfly sign, signifying dementia, was posted above her therefore the Claimant should have been aware the patient has cognitive difficulties.

9 The patient had been unsettled throughout the shift. She had been shouting and attempting to get her legs out of the bed. She required 1:1 care/being bay watched for her safety which she received. She had been making racist remarks to colleagues, had lashed out a member of staff administering her personal care and had tried to kick another in the abdomen.

10 At 05:30, the patient required transferring to a new mattress because the first one was flat. Myself, the Claimant and two other members of staff, whom I am unable to recall, assisted me. The patient was shouting and making racist comments, calling some of my colleagues “gorillas”, which upset me and made me feel incredibly uncomfortable. I did not feel these comments were directed towards anyone in particular and felt the patient was shouting these remarks due to there being mixed ethnicities present.

11 Whilst I was attempting to move the patient onto another mattress, the patient scratched me and dug her nails into my arm. I then moved around to the patient’s side so that she could be placed in the recovery position ready for transfer onto a PAT slide and then onto the working mattress. I noticed the patient moving her arm towards the breast pocket of my dress and I thought she was going to hurt me again. In self-defence, I moved the patient’s arm securely back towards the bed and into the recovery position so that the transfer could be completed.

12 Following the patient’s transfer, I was called to see the 555 nurse who was standing opposite the nursing station and in front of B bay. The 555 nurse is a senior nurse tasked with clinical site management and typically comes during the shift to ensure safety of the ward including staffing and any issues or falls. On this occasion I recall her asking why we moved the patient at that time. I responded that the mattress had been faulty all night and had deflated, the patient was a high risk of pressure damage and we needed to check if she required any personal care and it seemed reasonable to do both at the same time to limit distress. This conversation on the ward lasted approximately 10 minutes. I was so upset by the patient’s comments towards the Claimant that I took the Claimant into the clinical room on the ward to discuss them with her. I advised her that racism is unacceptable; however things had likely to have been different when the patient had been younger. By this I meant to reassure the Claimant that I appreciated that the comments were inappropriate but that the patient did not understand what she was saying due to her dementia, that the patient did not mean any harm, and that her remarks should not be taken personally. I did not mean that racism had ever been previously acceptable. I felt that my

> conversation with the Claimant had been supportive and thought it was enough to address any potential concerns the Claimant might have had."

27 In oral evidence, Ms Tindale-Wignall told us about the situation towards the end of a night shift such as that of 9-10 August 2018. She said that at the time when the incident about which the claimant complained occurred, which was at between 05:00 and 05:30 on 10 August 2018, the following tasks needed to be completed before the end of the night-shift and the start of the day-shift (which was 07:30):

27.1 preparing patients for surgery;

27.2 turning patients;

27.3 getting them clean;

27.4 checking their skin, their blood pressure, their heart rate, their temperature, and their vital signs in general;

27.5 doing morning medications and medication checks; those patients who might be operated on that day would receive their medication before the day shift started in case they were indeed operated on that day;

27.6 checking intravenously-given medications;

27.7 printing off handover sheets for the patients, which would include such information as what extra medication was required for the patient during the coming day, and any relevant handover notes; and

27.8 updating the ward's whiteboard.

28 Ms Tindale-Wignall said that there was "quite a lot to do in the morning, especially for the nurse in charge", and that what the nurse in charge had to do was to ensure that if something that needed to be done had not been done then it was made known to the incoming nursing team when handing over to them.

29 Ms Tindale-Wignall also said that every patient has a care plan and a flow chart monitoring "what goes in and out", and that it was necessary to make sure that all charts were up to date. It was also necessary to record in the patient's notes when a patient had been poorly overnight.

30 The table in paragraph 29 of Mr Uberoi's written closing submissions set out the evidence in the bundle of documents about what had been said by the claimant and Ms Tindale-Wignall on 10 August 2018 about patient B12's racist comments in the following manner.

Individual	**What was recorded**	**Page(s)**
Ayishat Mohammed	"SH: Do you recall any conversations between Paige and Ernessa about the racist comments? AM: Yes, and Paige said to Ernessa that the patient didn't mean the comments that she had said, but she has dementia so doesn't know what she is saying. KM: Do you recall any conversations about racism being 'the norm' when the patient was younger? AM: No, I don't really remember anything else being said."	340
Ric Rosales	"I'm not really sure why I am here as I didn't hear any conversations. Ernessa saw me afterwards and said that she had told Paige about a patient making racist remarks towards her and that she was upset by Paige's response. She told me that Paige said that she would have to deal with it as the patient had dementia, but I think Ernessa had taken it that Paige wasn't going to help her. I'm not sure what Paige said or how she meant it though as I wasn't there when the conversation happened."	311
Alizia Mercado	"What I heard was Ernessa telling Paige that the patient had dementia and that maybe in her time when she was younger, that sort of language was normal to her. I don't know if Paige worded it quite right, but I think Ernessa took it a different way." "Do you feel that Paige was unsympathetic towards Ernessa?" AM: "She was very neutral about it ." "It was just her normal conversation tone and no differently to how she normally speaks."	321
Ms Tindale-Wignall	"Prior to this allegation of physical assault, I had to take my colleague Ernessa into the office to reassure her that the patient	229

	didn't mean any harm and that she had dementia. I asked her not to take the comments personally but Ernessa did not seem to be happy with this explanation."	
	"… I went to speak to Ernessa and I said to her that I know it isn't right that those comments were made, but unfortunately the patient has dementia. I said to her that racism is not acceptable now and that it had been different in the times when the lady was younger; I didn't mean that it should ever have been acceptable. I felt really bad that these comments had been made by the patient which is why I spoke to Ernessa about it."	325
Carmel Synan-Jones	"All she said was that the patient had made some racist comments and she had felt that Paige was not taking them seriously and should have defended her. Paige's defence was that the patient did not have capacity and it is difficult for Paige to have done anything given the patient has dementia."	306
Fiona Woods	"Ernessa has told me many times that a patient called her racist names and she told Paige about it but Paige said the comments were made because the patient had dementia, and Ernessa wasn't happy about this."	331

31 In addition, at page 255, there was this record of what Ms Mercado had said to Ms Moffatt on 17 January 2019:

> "Aliza M: Patient in B12 had Dementia and we knew that she could be verbally aggressive. There was a Special on the Ward (not sure who) but they were with ED and they were trying to get obs done on the patient (will call her B12).
>
> B12 made a racist comment to ED and the other person and was calling them "monkeys". ED was unhappy with the comments and told PTW. PTW replied that B12 had dementia so was hard to control. ED appeared to take exception to PTW saying that older people make comments like that because times were different.

ED was not happy with the explanation."

Our conclusions about what was said by Ms Tindale-Wignall to the claimant in the morning of 10 August 2018

32 We found what Ms Tindale-Wignall said in paragraph 12 of her witness statement (which we have set out in paragraph 26 above) was not wholly accurate. We concluded that Ms Tindale-Wignall was mistaken in thinking that she had sought out the claimant to discuss the comments of patient B12. We did so because Ms Tindale-Wignall herself said in paragraph 10 of her witness statement that she "did not feel these comments were directed towards anyone in particular". We concluded that Mr Dunne's email at pages 207-208 (the material part of which we have set out in paragraph 20 above) was in part a reliable account of what Ms Tindale-Wignall had said, as remembered by the claimant on 11 August 2018; it was reliable in so far as it showed (by the use of the words "HCA Durpe said that she had been informing SN Paige about the racist comments which the patient had been saying to her but realised that because of her dementia there was nothing that could be done to address this") that the claimant at that time was well aware that nothing could be done about the use of highly offensive and inappropriate language by patient B12 because of patient B12's advanced dementia. However, we concluded that while Mr Dunne's email was accurate in reporting that the claimant had said that Ms Tindale-Wignall had said words to the effect that "that is older people mentality", that was not what Ms Tindale-Wignall actually said.

33 We found the record at page 321, set out in Mr Uberoi's table which we have repeated in paragraph 30 above, was the most accurate record of what Ms Tindale-Wignall had said to the claimant on 10 August 2018. On page 321, there was also this question and answer recorded, immediately following the words "She was very neutral about it":

"SH: How long did this conversation go on for?

AM: Not long, that was all that was discussed."

34 We were unable to accept that the claimant's Datix report of 16 August 2018 at page 209 was accurate in relation to what Ms Tindale-Wignall said to the claimant on 10 August 2018. In coming to that conclusion, we took into account the fact that the claimant at no time subsequently stated in terms that Ms Tindale-Wignall had said that it was acceptable for an older person, whether or not they were suffering from dementia, to make racist comments. None of the other persons who were present and who were interviewed by either Ms Horn or Ms Moffatt recalled those words being used by Ms Tindale-Wignall, and we were sure that if those words had in fact been used then they would have been remembered by any bystander, not least because some of them were persons of colour. Further, we ourselves heard and saw Ms Tindale-Wignall give evidence. In doing so, she spoke quite quickly and could have been perceived

by the claimant to have spoken abruptly as a result. In addition, we took into account the fact that, without knowing that the claimant was complaining about the manner in which Ms Tindale-Wignall had spoken to her on 10 August 2018 about racism (that lack of knowledge being the result of Mr Scudder having taken that allegation out of the wording of the Datix report of the claimant of 16 August 2018, as we record in paragraph 23.2 above), Ms Tindale-Wignall on 5 October 2018 described herself as having been made uncomfortable by the racist comments of patient B12: see paragraph 56.2 below.

35 Separately, it was unlikely that reference would have been made by Ms Tindale-Wignall to "racial segregation", as alleged in the Datix report which the claimant made (see paragraph 22 above: the words used by the claimant were "race segragation"), as

35.1 none of the other interviewees reported that word being used by Ms Tindale-Wignall,

35.2 there was (see paragraph 20 above) no record of a reference by Ms Tindale-Wignall to racial segregation in Mr Dunne's email of 11 August 2018 (written five days before the Datix report at page 209 and only a day after the events about which it was written), and

35.3 there has never been formal racial segregation in this country.

36 Therefore, on the balance of probabilities, and having seen and heard both the claimant and Ms Tindale-Wignall give evidence on the matter, we concluded that Ms Tindale-Wignall did <u>not</u> say that "racial discrimination in older patients is acceptable and that staff should understand this was normal back in the day of race segregation and staff of colour should accept this and be more understanding about racial abuse, this includes patients with and without capacity".

Mr Scudder's rewording of the claimant's Datix report of 16 August 2018

37 Mr Scudder's evidence about the changes which he made to the terms of the Datix report made by the claimant was in paragraphs 3-10 of his witness statement. He amplified that evidence in cross-examination and in answer to our questions. Initially, we had considerable difficulty understanding why Mr Scudder made changes to the claimant's Datix report. His explanation for making the changes was primarily in paragraph 3 of his witness statement, which was in these terms:

> "Within my role as Matron/Lead Nurse, it is my responsibility to make reasonable changes to Datix incidents that I review. These changes can be for several reasons, including changes to spelling, grammar, context, background, the removal of defamatory language and opinion and to ensure that they do not contain patient identifiable information. These

changes should not change the tone of the incident report but must ensure that it is factual and free from personal opinion."

38 When pressed on the justification for doing that in the respondent's Policy for Adverse Incident Reporting and Investigation of Incidents at pages 163-193, Mr Scudder was able to point only at paragraph 11 on pages 176-177, which was in these terms:

"**11. General principles when reporting incidents on Datix**

11.1 All staff should remember that patient safety incidents reported by the Trust are uploaded to a national database known as the National Reporting and Learning System (NRLS) and that various external bodies such as Clinical Commissioning Groups; NHS England and the CQC (Care Quality Commission) have access to this information and may follow up on any incident the Trust reports. Trigger lists on what to report are available in appendix 2.

11.2 It is therefore important the Datix system is used appropriately to report incidents and near misses and that incidents reported are a clear and factual account of events as they occurred.

11.3 The following principles should be applied when reporting incidents and near misses;

- Record facts only – not opinions
- Be clear and concise as to what happened i.e. who, what, when, where and how
- Include information on immediate actions taken following the incident
- Do not include patient or staff names in the description of the incident (staff and patients involved should be included in the contacts section)
- include what harm occurred if this Is known at the time of the incident, and assign the appropriate level of harm that has occurred to the patient
- Ensure the incident location is correctly assigned
- Ensure the incident is categorised correctly using the drop down options available
- Provide a contact name and hospital email address This enables the investigator to contact the reporter if additional information is required and to give feedback at the conclusion of the investigation".

39 Mr Scudder said he would have gone through a number of Datix reports in one session, and that he would carry out the task of going through all of the Datix reports which had been received in relation to the wards for which he was responsible whenever he logged onto his computer. He said that he was

managing 5 wards at the time, which had in total over 200 staff. He said that he would, when he logged onto his computer, usually find about 20-30 Datix reports which he would need to (using his word) triage. He said that he had never before received what was in reality a grievance about the conduct of another member of staff via the Datix system. He said that he made the assumption that the report at page 209 was purely about a patient using racist remarks against staff members, and that it could suitably be investigated by the relevant ward manager, in this case Ms Burke.

40 Mr Scudder accepted in cross-examination that that was a "completely inaccurate" assumption to have made. He said that if he had understood the report at page 209, which we have set out in paragraph 22 above, correctly, then it would have "raised [his] suspicions immediately" and he would have "escalated" the report to the "staff team", meaning the respondent's corporate management team, including its human resources ("HR") team. His explanation for that was that the Datix reporting system was neither designed nor intended to be used as a means of raising a grievance: rather, it was, he said, supposed to be used for reporting incidents that happened at ward level which were appropriately investigated by a matron or a ward manager. Those were incidents affecting the safety of patients or staff.

41 We noted that the respondent's Datix reporting procedure did not envisage all reports being subjected to a detailed investigation. That was clear from the following passage on page 178:

> "**14.3 Which Incidents should be investigated?**
> 14.3.1 The Trust does not have sufficient resources to conduct a detailed investigation into each Incident, therefore a 'sifting' process is required to decide which incidents will be fully investigated and which will be Included in a quarterly thematic review.
>
> 14.3.2 There are two main considerations when making this decision:
> - The level of harm to the patient, staff member or other
> - The potential for learning, which could include investigating those incidents which are of high frequency but of low severity
>
> 14.3.3 All reported incidents are graded according to the actual impact on the patient(s)/person(s), the potential future risk to patients/persons and to the organisation.
>
> 14.3.4 The level of authority of managers to determine which incidents require an investigation or which can be included within a thematic review will be agreed by the members of the Clinical Operations Board. This will be decided depending on the common themes arising from the quarterly risk management report."

42 We accepted that Mr Scudder regarded it as his duty to review and revise Datix reports when he received them, as he described in paragraph 3 of his witness statement, which we have set out in paragraph 37 above. The Datix report at page 209 was clearly made by the claimant, and therefore Mr Scudder knew that she had made it. We accepted his evidence that he had not previously seen a Datix report which was in reality only about the conduct of another member of staff, and that if he had understood the report at page 209 correctly, then he would have regarded it as a grievance and sought the assistance of the respondent's corporate (including its HR) team. It was understandable that he did not see the report as a complaint by the claimant about the conduct of Ms Tindale-Wignall towards the claimant because the report at page 209 did not in terms say that the complaint was to that effect. In addition, the claimant in that report stated that it was about "Behaviour - Inappropriate/Aggression", concerning "Verbal Abuse", which she categorised as "Racial", and the only verbal abuse recorded in the report was racial abuse of the staff by a patient.

43 We were entirely satisfied that Mr Scudder's decision to reword the report at page 209 had nothing whatsoever to do with the claimant's race.

44 Ms Burke's investigation of the Datix report as amended by Mr Scudder was recorded in the document at pages 210-217. Ms Burke's evidence about the manner in which she investigated that report and her conclusion on it was in paragraphs 9 and 10 of her witness statement, which were in these terms:

> '9 As part of my Datix investigation I interviewed the Claimant who had been caring for the patient. The Ward team would have completed a behaviour chart to log the patient's actions and any further inappropriate comments. I asked the Claimant to escalate any future serious concerns to me as ward manager. I reassured myself that the safeguarding team was aware of issues involving this patient, namely that she has advanced dementia, lacks capacity to make decisions about her own care, is unable to retain any information given to her, and is prone to making racist or abusive comments as a feature of her dementia. It was acknowledged that [it] can be extremely challenging for staff to deal with the latter and, as a result, the safeguarding team were involved with the ongoing management of this patient. This involved daily 1:1 support from the patient's carer, who I noted to be of a mixed ethnic background and whom had never voiced concerns in relation to the patient's language.
>
> 10 I concluded my investigation on 17 September 2018, providing a decision of "no adverse outcome", meaning that there was an incident but that no harm had occurred as a result of it (page 212).'

45 When asked in cross-examination about that conclusion, Ms Burke's response was to say that it was arrived at because "the Datix was investigated from the

patient's point of view rather than members of staff as this was all to do with the patient." We accepted that evidence of Ms Burke.

The changing of the claimant's shifts and what happened on 13 or 14 November 2018 when the claimant was rostered to work with Ms Tindale-Wignall

The background

46 Ms Tindale-Wignall was suspended on 11 August 2018 ("and escorted off site immediately", as recorded in the note at page 230 to which we refer further in paragraph 56 below). Her suspension was lifted on 4 September 2018 by Mr Scudder, on the basis (stated in the letter from him to Ms Tindale-Wignall dated 28 September 2018 at page 286) that "following the findings of the safeguarding and Police investigation into the allegation that you physically assaulted a patient on 10 August 2018, this allegation has not be[en] upheld". However, as the letter continued, the respondent needed to conduct its own investigation into the matter. Ms Moffatt carried out that investigation and in the course of it she had a conversation with the claimant about the claimant's shifts on 10 October 2018. That conversation led to issues 3.5-3.7 above. We return to that conversation in paragraph 53 below.

The changing of the claimant's shifts

47 It was the claimant's evidence in paragraph 37 of her witness statement that she spoke to Ms Burke on 12 September 2018 and that after that, Ms Burke agreed that she, the claimant, would not be rostered to work with Ms Tindale-Wignall again. The precise words used by the claimant in that paragraph are material:

> "I felt unsupported and discussed the discrimination with my line manager, Sister Jo Burke. Sister Burke told me to leave it with her and that it shouldn't happen again. I believe that this was on 12 September 2018. I could not speak to her before that as she was on annual leave. I explained to my line manager, Sister Johanna Burke, on or around 12 September 2018, what had happened between me and Paige Tindale-Wignall and said to her that I did not want to work with Paige Tindale-Wignall again and that I did not feel comfortable working with her. Sister Jo gave me her word that I would not be rostered with her again (page 302), and said she would look into my complaints, however, I continued to be rostered to work with Paige. I continued to feel stress and anxiety, especially as I kept seeing Paige Tindale-Wignall on the ward. I felt that I was being isolated and ignored."

48 Ms Burke's witness statement dealt with this matter in three paragraphs at the bottom of page 3 (page 48 of the witness statement bundle), which contained 2 paragraphs numbered 14. The three paragraphs were as follows:

> "13. The Claimant alleges in her Claim Form that she discussed the discrimination with me and that I said leave it with me and it should not happen again. I did recall a conversation with the Claimant on I believe 16th August 2018. She had wanted to ask me about the way Paige Tindale-Wignall had handled the Claimant's reporting to her of the patient's comments. However, I had been informed by my line-manager, John Scudder, not to discuss the incident with the Claimant as it was a safeguarding incident subject to an ongoing investigation. This is common practice when a safeguarding investigation is ongoing. My understanding was also that I could not discuss the racist language incident. I therefore spoke with the Claimant only in general terms about the fact that the patient involved in the incident of 10 August 2018 had dementia, and about racism as a subject but I did not enter into specifics.
>
> 14. The Claimant also spoke with me on about her desire not to work with Paige Tindale-Wignall, I cannot now recollect the precise date of this conversation. I had decided not to allocate the Claimant to work the same shifts as Paige Tindale-Wignall following the conclusion of the safeguarding investigation. I refer to the letter dated 22 November 2018 in which the Claimant was advised that effort that she and Paige are not working together [sic], but this may not be possible to achieve because of the nature of work [sic].
>
> 14. In view of the ongoing investigation and the fact that the Claimant did not specifically want to work with Paige, I organised their rotas so that they were not working together. However, there were some occasions, because of staff shortages, that I had to move the Claimant rather than Paige. This was due to management of the care of our patients and had nothing to do with the Claimant's grievance."

49 The "letter dated 22 November 2018" to which Ms Burke referred in the first of those paragraphs numbered 14 was at page 293 and was in fact (we were told by Mr Scudder and Ms Burke, and we accepted) written by Mr Scudder. It was given to the claimant after she had, on 17 November 2018, stated the grievance to which we refer in paragraph 25 above. The letter was a formal acknowledgement of the claimant's grievance and contained this paragraph:

> "Due to the nature of the allegations made, I will make every effort to ensure that you and the person named in the grievance form are not working together. Due to the nature of the work that we carry out, it may not always be possible to achieve this but please be assured that every effort will be made."

50 The respondent has an "E-Rostering Policy (Non Medical)", of which there was a copy at pages 130-158. In paragraph 6.3, on page 143, this was stated:

> **"6.3. Skill Mix and Staffing**
>
> 6.3.1. All rosters are expected to comply with the Trust's Safe Staffing Levels Policy.
>
> When creating the roster the following rules should apply:
>
> 6.3.2. Each clinical area should have a total number of staff and skill mix per shift, agreed with the Ward Manager, Matron and Finance. The required staffing levels are known as demand.
>
> 6.3.3. Each clinical area should have a level of staff with specific competencies on each shift, i.e. the ability to take charge, IV designated staff etc, as agreed with the Ward/Unit Manager, Senior Charge Nurse or Team Leader concerned.
>
> 6.3.4. In areas where the workload is known to vary according to the day of the week, staff numbers and skill mix should reflect this.
>
> 6.3.5. There should be a designated nurse in charge who has been identified as having the required skills and competencies for a co-ordinating role.
>
> 6.3.6. Staff will be required to work a variety of shifts and shift patterns as agreed by their Ward Manager/Team Leader. Ward/Unit Managers should ensure that normal hours do not exceed an average of 48 hours over a 17 week period.
>
> 6.3.7. Roster requests will be agreed and prioritised by the Ward/Unit Manager, provided that roster rules in regard to cover, skill mix and annual leave can be met."

51 In paragraph 10.2 on page 151, this was said:

> "Shift changes should be kept to a minimum. Any changes to the published roster should be made in negotiation with the staff involved. The changes must be published as soon as the change has been made."

52 When it was put to the claimant in cross-examination that she had asked for the changes to her shifts, so that she was not required to work with Ms Tindale-

Wignall, she agreed. When it was then put to her that as a result, she knew why her shifts were changed, namely to comply with her request, she said that that was true, but that she "was the one who was victimised", which "should not have been the case". However, the claimant accepted, when answering a question from Mr Bone, that the respondent's hospital's operational and patient care needs could override the respondent's ability to ensure that staff did not work together.

53 In the course of the disciplinary investigation into the alleged assault committed by Ms Tindale-Wignall on 10 August 2018 to which we refer in paragraph 46 above, Ms Moffatt contacted the claimant with a view to arranging an interview with her. Ms Moffatt accepted that she had had a conversation with the claimant on or around 10 October 2018, but not that it was as described by the claimant in paragraphs 39 and 40 of the claimant's witness statement. What claimant said in those paragraphs was this:

> "39. Another Matron, Tracey Moffat, spoke to me on 10 October 2018, when she took me onto a Fire Escape, to talk to me about working with Paige Tindale-Wignall. She asked me if I would be prepared to have a meeting with Paige Tindale-Wignall on 16 October 2018 to try and reach some kind of truce between the two of us. This approach was all verbal; nothing was put in writing.
>
> 40. I repeatedly expressed the fact that I did not feel safe working with Paige Tindale-Wignall and it was suggested to me by Tracey Moffat, that I might wish to work somewhere else. I replied that I did not want to work with Paige Tindale-Wignall, that I was fearful of working with her, but did not want to leave the ward also, especially as I had done nothing wrong. The Matron replied that she understood but that she had to look out for the patients and that maybe Paige Tindale-Wignall did not mean what she had said to me and that maybe she did not say it in 'that kind of way'. I was upset and offended by this reaction and lack of compassion, it also gave me the impression that she was on Paige's side and not mine even though she had not witnessed the incident. She was not taking it seriously and instead tried to explain Paige Tindale-Wignall's reaction. She was trying to minimise what had happened and make light of it; that was not acceptable. The patient had dementia, I appreciate that there was little that could be done about that, but there was so much that could be done in relation to the Respondent's reaction to it and support of me in that situation. Instead, my concerns were deleted and swept under the carpet by the white managers."

54 In cross-examination, the claimant said that she feared for her safety if she was required to work with Ms Tindale-Wignall because if Ms Tindale-Wignall could hit a patient then she could also hit a colleague. Ms Moffatt was adamant that the claimant had not said that she was afraid of working with Ms Tindale-

Wignall, and said that she had never had an employee express a fear of that nature. She said that if such a fear had been expressed by the claimant at that time, then she, Ms Moffatt, would have asked more questions about it. Ms Moffatt accepted, however, that the claimant had said to her that there was "some conflict between her and Paige" and that as a result Ms Moffat had "suggested working elsewhere". When asked whether she accepted saying something like "Paige did not mean it in that kind of way", Ms Moffatt said (and we accepted her evidence in this regard):

> "I cannot recall the conversation in that detail but I was suggesting that Paige might not have meant what she said in the way that the claimant said."

55 Ms Moffatt referred to that meeting in paragraph 14 of her witness statement, in which she referred to and in effect confirmed the accuracy of the note at page 346. That note was of an interview of her conducted on 31 January 2019 by Ms Erin Davage, an HR Business Partner employed by the respondent, who was investigating the claimant's claims made to this tribunal. Paragraph 14 of Ms Moffatt's witness statement was all material, and we therefore now set out its substance in full:

> 14.1.1 I was asked to recount a conversation with the Claimant on 10 October 2018. The Claimant had alleged that this was to discuss the Claimant working with Paige Tindale-Wignall; however, this was not my recollection.
>
> 14.1.2 The purpose of the conversation was to invite the Claimant to the disciplinary investigation meeting into the alleged assault on the patient by Paige Tindale-Wignall. The Respondent's disciplinary policy requires that interviewees be given 5 days' notice of any investigation interview and I asked the Claimant whether she would be willing to waive that requirement. The Claimant declined, stating she required the presence of a Union representative and this would need to be arranged. I confirmed that I was happy to postpone her interview accordingly.
>
> 14.1.3 The Claimant then proceeded to attempt to discuss the incident involving Paige Tindale-Wignall and the patient, and the allegations that Paige Tindale-Wignall had been racist towards her. As investigator for one part of the incident (the alleged assault), I advised the Claimant that I was unable to discuss her allegations. I advised the Claimant to discuss it instead with her line-manager (Johanna Burke).
>
> 14.1.4 I made a recommendation that the Claimant request her line-manager not place her on the same shifts as Paige Tindale-Wignall.

14.1.5 I do not accept that the Claimant's allegations that I had attempted to arrange a meeting with Paige Tindale-Wignall on 16 October 2018 to try to reach a truce between them. [Sic]

14.1.6 I did not recall the Claimant saying that she did not feel safe, or was fearful of working with Paige Tindale-Wignall, and that if she had said such a thing, I would have explored that further with her. [Sic]

14.1.7 I confirmed that I recalled suggesting to the Claimant that perhaps Paige Tindale-Wignall had not meant what she said to the Claimant, and that maybe she did not say it in the same way as the Claimant had perceived it. I clarified to Erin Davage that I intended this to mean that I did not think Paige Tindale-Wignall intended what she said to be disrespectful. I did not recall that the Claimant was upset by my remarks.

14.1.8 I acknowledged that the Claimant was upset that Paige Tindale-Wignall was not receptive to her complaint about the patient's comments."

56 In assessing both the reliability of that passage and its likely effect, we took into account the following factors.

56.1 Ms Moffatt had by 10 October 2018 received from the claimant her account of what had happened by way of physical contact between Ms Tindale-Wignall and patient B12 on 10 August 2018: there was a copy of that account at page 281, and it was stamped as having been received (evidently by the respondent) on 5 October 2018. There was no reference in that statement to racist comments made by patient B12 and (consequently, but in any event) no reference to anything said by Ms Tindale-Wignall to the claimant about any such comments. Thus, as far as Ms Moffatt was concerned, the claimant's introduction of the topic of the patient's racist comments and what Ms Tindale-Wignall said to her (the claimant) about them was likely to have taken Ms Moffatt by surprise.

56.2 Having said that, Ms Moffatt had already by then, on 5 October 2018, interviewed Ms Tindale-Wignall in the course of her investigation. The notes of that interview were at pages 227-231. At page 229, the notes show that during the interview, Ms Tindale-Wignall described the background to the "alleged physical assault on the patient" and in doing so said this:

> "The patient needed to be transferred to another mattress at 5.30am because her mattress was flat. The patient was shouting and making racist comments and flapping her hands and legs whilst we tried to

> do the swap. I felt uncomfortable because of the racist comments, the patient was calling my colleagues 'gorillas'. In order to transfer the patient safely the patient needed to be laid in recovery position for the PAT slide to go under her.
> The patient had been lashing out previously scratching and digging her nails into my arm as I was at the top end of the bed."

56.3 Before referring to that transfer, Ms Tindale-Wignall is recorded to have said this:

> "Prior to this allegation of physical assault, I had to take my colleague Ernessa into the office to reassure her that the patient didn't mean any harm and that she had dementia. I asked her not to take the comments personally but Ernessa did not seem to be happy with this explanation."

56.4 However, later on in the notes on page 229, there was this record of what Ms Tindale-Wignall had said:

> "Apart from the remarks during the transfer patient had been shouting racist remarks towards staff present. All through the night the patient was shouting she needed a wee and repeatedly swung her legs out of bed, she needed 1-1 attention. The patient also tried kicking a colleague in the abdomen.
>
> Earlier whilst doing personal care the patient lashed out at staff."

56.5 As a result, it is highly likely, and we so found, that the note about Ms Tindale-Wignall taking "Ernessa into the office to reassure her that the patient didn't mean any harm and that she had dementia" was made in relation to the patient's racist comments.

56.6 In any event, Ms Moffatt was on 10 October 2018, when she spoke to the claimant, as a result of what Ms Tindale-Wignall had said to her on 5 October 2018 aware that the patient had made racist comments and that the claimant had been unhappy with Ms Tindale-Wignall's "explanation" that "the patient didn't mean any harm and that she had dementia".

56.7 While it is what one might characterise as a matter of common sense that it cannot be expected that reasoning or remonstrating with a patient with advanced dementia about the making of offensive comments will have the effect of deterring the patient from repeating such comments, that was the purport of what was said by Ms Tindale-Wignall when she was interviewed by Ms Horn on 18 January 2019 as noted in the following passage on page 327:

"SH: Is there any guidance available on the ward on what to do when there is an abusive patient?

PTW: No, but we fill out a DATIX and a behaviour chart if it is a dementia patient. Most of the time you just have to brush off the abuse as you just don't have the time to worry about it and if the patient doesn't have capacity then anything you say to them will not change the comments they come out with because they can't retain the information."

"SH: On reflection, is there anything that you would have said or done differently?

PTW: I probably wouldn't delve into a conversation with her again and I would tell her to speak to Jo Burke instead when she was next on duty, but I felt like I needed to talk to her because the comments weren't very nice and that is why I reassured her that the patient didn't mean anything by them. She didn't say anything to me afterwards that she was upset by our conversation as if she had then I could have explained further what I meant and I could have apologised for the way she perceived what I had said. This could have been easily resolved but she has chosen to take this route."

56.8 Similarly, Ms Mercado, when asked by Ms Horn on 17 January 2019 (see page 322) "Is there a process or support available when a patient has made racial or abusive comments towards a member of staff?", said this:

"I'm not aware of it if there is one. If it is a dementia patient, what can we really do? We can tell them that what they said isn't very nice, but they either won't understand or won't retain the information."

56.9 Further, as recorded on page 315, Ms Burke said to Ms Horn on 16 January 2019 when Ms Horn asked "If an HCA raises a concern of this nature with a nurse, what action would you expect them to take?":

"A 1: 1 meeting with the person who the issue was raised about. The difficulty in this situation is that the patient didn't have capacity so they don't understand what they are saying. All you can do is keep calm and call security if they are aggressive."

56.10 Also, as recorded on page 306, Ms Synan-Jones said to Ms Horn on 21 December 2018 in answer to the question "Do you recall any issues that Ernessa raised that were of a personal nature?":

"All she said was that the patient had made some racist comments and she had felt that Paige was not taking them seriously and

should have defended her. Paige's defence was that the patient did not have capacity and it is difficult for Paige to have done anything given the patient has dementia."

56.11 Nowhere did the claimant say precisely what she said to Ms Moffatt to which Ms Moffatt responded in words to the effect (as stated in paragraph 14.1.7 of her witness statement, which we have set out in paragraph 55 above) "perhaps Paige Tindale-Wignall had not meant what she said to the Claimant, and that maybe she did not say it in the same way as the Claimant had perceived it."

57 Given all of the above factors, and having heard and seen Ms Moffatt and the claimant give evidence, we accepted Ms Moffatt's evidence that she did not seek out the claimant to see whether the claimant was prepared to have a meeting to try and reach a truce. We also accepted Ms Moffatt's evidence that she was simply seeking to arrange an interview with the claimant without giving her the normal five days' written notice. We concluded that what Ms Moffatt did was to query the claimant's description of what had been said by Ms Tindale-Wignall to her on 10 August 2018 about the offensive words used by patient B12. We also concluded that that was an objectively understandable response, given that

57.1 one cannot (as stated several times to Ms Moffatt as we record in paragraph 56 above) expect reasoning or remonstrating with a patient with advanced dementia to have any effect;

57.2 patient B12 was recorded by Mr Scudder in his rewording of the Datix report filed by the claimant on 16 August 2018 to have advanced dementia: see paragraph 23.2 above;

57.3 the claimant's complaint to Ms Tindale-Wignall about the racist words used by patient B12 was therefore difficult to understand;

57.4 Ms Tindale-Wignall had by then, in fact only five days before, unprompted and without knowing that the claimant had complained about what she had said to the claimant on 10 August 2018 about the patient's racist comments, said to Ms Moffatt, as we describe in paragraph 56 above, that she (Ms Tindale-Wignall) "felt uncomfortable because of the racist comments"; and

57.5 Ms Moffatt was unaware on 10 October 2018 that the claimant had made any kind of complaint about the manner in which Ms Tindale-Wignall had responded to the claimant's stated unhappiness (which, we acknowledge was entirely understandable) about the racist comments.

58 If and to the extent that it could reasonably be said that Ms Moffatt should (in order to ensure that the claimant was not given any reason to think that any

member of the respondent's management had arrived at a view on the matter, in advance of any formal complaint by the claimant about it) have simply acknowledged the claimant's complaint about the manner in which Ms Tindale-Wignall spoke to her (the claimant) on 10 August 2018, and not responded by suggesting in effect that the claimant might have been mistaken, that would in these circumstances be a counsel of perfection. That is because

58.1 the claimant had not at that time made a formal complaint about what Ms Tindale-Wignall had said on 10 August 2018: she submitted her formal grievance only on 17 November 2018 (see paragraph 25 above),

58.2 Ms Moffatt's intention in approaching the claimant on 10 October 2018 was simply to see whether the claimant would be willing to attend an investigation meeting without the usual five days' notice in advance, and

58.3 Ms Moffatt was therefore taken by surprise by what the claimant had said, which, as we say above, was reasonably capable, in the circumstances as we have found them to be, of being regarded as likely to be mistaken.

59 In any event, we accepted Ms Moffatt's evidence that she did not mean in querying the claimant's characterisation of what Ms Tindale-Wignall had said on 10 August 2018 to be disrespectful towards the claimant in any way.

<u>The events of 13 or 14 November 2018</u>

60 The claimant was off work because of sickness between 30 October and 12 November 2018. In paragraphs 42 and 43 of her witness statement, the claimant described what had happened on her return:

> "42. I came back to work on 13 and 14 November 2018, only to find that when I came back to the ward, Paige Tindale-Wignall was working alongside me and shouted at me to deal with a patient in front of staff, patients and visitors. I was allocated to A bay and the side room 13 or 14 which is opposite and I heard Paige shout 'Ernessa side room 13 (or 14) is wet and needs changing now'. She said it in a rude way and loud way. She shouted this in a rude and unprofessional way in front of a full ward of people.
>
> 43. I felt humiliated and reported this further incident to Matron, John Scudder. I was in tears when I reported it to him. I believe John Scudder spoke to the Sister in charge, Louisa White, about the incident who said I did not have to look after that side room anymore. After this incident, Paige was reallocated to another Healthcare Assistant to look after room 13 or 14 so that I did not have to deal with her again that shift."

61 The claimant described that situation in her grievance at pages 287-291A, at page 288 by hand, in terms that were consistent with those paragraphs, and at 291-291A in the following terms:

> "I spoke to my manager Sister J.Burke about what was said and how it made me feel uncomfortable and that I felt unsafe to work with this member of staff after everything that I had witness and happened on the shift. I was told by my manager she would deal with the situation.
>
> But instead I was made to feel extremely uncomfortable and on edge when I was allocated to work with the same nurse in B-Bay only a few weeks after the incident had happened, and management was fully aware of the event as well as an investigation was taking place about the same nurse assaulting a patient. But yet still I was partnered with the same nurse in B-Bay to look after patients on a long day shift. I feel that my case is not being treated seriously as a black member of staff and as a Health Care Assistant. I felt the nurse was exercising her power as the nurse in charge of the shift and the use of white privilege by being able to assault a patient who is completely vulnerable and justifying racism as "norm" or was the "norm". Especially coming from someone who isn't black who doesn't understand the struggles as a person of colour and know what I have been through as a black person in society, this nurse is a person that has never experience racism and may never experience racism and discrimination and doesn't understand how hurtful and disrespectful it is."

62 Mr Scudder did not recall being approached by the claimant in tears on 13 or 14 November 2018. In fact, he said, staff approaching him in tears was not uncommon. However, he was sure that the claimant had not approached him at that time in distress. We accepted that he genuinely had no recollection of the claimant approaching him at that time.

63 Ms Tindale-Wignall had no recollection of the alleged incident. She was pressed on it in cross-examination, and she was adamant that she neither said the words alleged, nor that she said anything in a rude way to the claimant. She could not in fact recall working with the claimant after 10 August 2018.

64 Ms Horn carried out an investigation into the claimant's grievance of 17 November 2018. On 13 December 2018, Ms Horn interviewed the claimant in the course of that investigation. There were notes of the interview at pages 294-303. At pages 298-299, there was this exchange:

> "SH: You mentioned in your grievance that on 14th November 2018 after returning to work from a period of sickness absence, that Paige started shouting at you in front of staff, patients and visitors; can you talk me through what happened on this day?

ED: I was allocated to A bay and the side room 13 which is opposite and I heard Paige shout 'Ernessa side room 13 is wet and needs changing now' and then I saw her walking away. I went to see the patient and asked if they were ok, but the patient wasn't wet at all as there was a catheter in place, just a bit sweaty; I have kept my handover sheet in case I needed it as evidence. It also wasn't very professional as she said it loudly in front of everyone that was attending the board round.

KM: Did anyone make a comment or look over?

ED: No, they were all making notes and listening to the board round, but it was very unprofessional and not very dignified for the patient.

SH: Did you say anything to Paige?

ED: No."

65 When giving oral evidence, we (through Employment Judge Hyams) asked the claimant whether she still had that "handover sheet". The claimant said that she did not because she had destroyed it, but she then, the next day, provided a copy of it to us. We inserted it into the bundle as page 299A. In fact, the sheet was dated 14 November 2018: it stated that it had been printed at 06:14 on 14 November 2018, and it had a number of entries, including that the patient had a "peg feed", and that a catheter was "inserted 03/11/18".

66 Ms Tindale-Wignall told us during her oral evidence that the handover sheet showed that the patient had been admitted to the ward on 29 September 2018. Ms Tindale-Wignall observed that a catheter had been inserted a long time after that date and that it was common to remove a catheter at about 05:30 or 06:00 on the day before the patient's intended date of discharge to see whether the patient was able to go home without a catheter care package in place. The handover sheet showed that the patient's intended day of discharge was 15 November 2018. Ms Tindale-Wignall also said that the patient might have been wet for a number of reasons, namely

66.1 if a catheter was in place then it might have been bypassed,

66.2 from an opening of the patient's bowels,

66.3 the patient's bed might have got wet when the patient was washed,

66.4 a drink could have been spilt, or

66.5 there could have been a leak from the peg feed.

67 Thus, said Ms Tindale-Wignall, the term "wet" can cover a broad range of things as applied to a patient in a bed on Ward 23. We accepted that evidence of Ms Tindale-Wignall.

68 In cross-examination, the claimant said that she would not have objected to the words used by Ms Tindale-Wignall on 13 or 14 November 2018 about which she now complained if they had been accurate, but that she did now take issue with what Ms Tindale-Wignall had said then because "it was a lie". We noted, however, that the claimant did not go to Ms Tindale-Wignall and point out that the patient was dry and had a catheter in, which one might have expected if a change of the bedsheets was evidently not required.

69 In all of the above circumstances, we concluded that even if the words about which the claimant complained were used by Ms Tindale-Wignall, they were not in any way objectionable, nor were they said in an objectionable way.

Christmas 2018

70 The claimant's complaint about what happened in December 2018 was stated in paragraphs 49 and 50 of her witness statement, which were as follows:

> "49. In December 2018, three of my shifts were changed without my consent by the Respondent. I also had a shift changed in January 2019. These shift changes were made without following policy. I spoke to Sandra Horn, Gynaecology Lead Nurse and the person who was carrying out the investigation into my grievance. I requested to see the policies only to discover that in fact the Respondent was required to speak to staff and that any changes should be made in negotiation with that member of staff before any shift changes are made (page 151). This did not happen to me.
>
> 50. On 28 December 2018, I was due to work a night shift and was moved ward to Ward 20, as Paige Tindale-Wignall was in charge of Ward 23 that night, despite the fact that I had requested that particular shift first (page 308). Again, I had been allocated a shift with Paige Tindale-Wignall and again I was the one to pay the price as I was the one who was moved, despite the fact that I had done nothing wrong. In contrast, Paige Tindale-Wignall continued to work with vulnerable adults on Ward 23."

71 Mr Tomison clarified the claim stated in issues 7.8 and 7.10 on page 34 after we had heard oral evidence, and said that those issues concerned what happened only in December 2018. That is why the issues set out in paragraph numbers 3.8.5 and 3.8.7 above are confined to that month. Mr Tomison's written closing submissions dealt with those issues in paragraphs 85 and 86, as follows:

> "85. Facts: The Claimant's evidence is that: ...
> d. Three of her shifts were changed in December 2018 without her consent (paragraph 49 of her statement).
>
> e. She worked fewer nightshifts since raising the incidents (paragraph 69 of her statement), as reflected in the dates listed in the grievance outcome [355].
>
> 86. In the grievance outcome, it was found that: (1) the Claimant had not been informed that her shifts had been moved prior to them being moved which was in breach of the relevant policy [354], and (2) that her nightshifts had been cancelled or changed on several occasions [355]."

72 In fact, Ms Horn's grievance report included a recommendation that the claimant be paid for the loss of any night shift enhancements which she would have received if she had not been moved from the shifts listed in the grievance report at page 355 and the claimant was paid those enhancements despite not having worked the nights in question. The final two dates in that list were 5 and 6 December 2018. There was no evidence before us of any other days in December 2018 when the claimant's shifts were changed from night to day shift.

73 Ms Burke's written evidence on this aspect of the matter was in the paragraphs of her witness statement that we have set out in paragraph 48 above, and they did not deal with the situation which occurred on 28 December 2018. However, there was at page 308 a copy of a text exchange of that day between the claimant and Ms Burke about the ward change which the respondent accepted had happened on that day. That started with Ms Burke writing (at 4:56pm) to the claimant:

> "Good afternoon Ernessa. I have organised a swap with ward 20 tonight as can not move the staff nurse."

74 The claimant replied "Oh, OK then I'm being moved again", to which Ms Burke replied "Yes matron aware", to which the claimant responded: "OK thanks for letting me know."

75 In oral evidence, Ms Burke said that that message was sent by her nearly 2 hours after the end of her shift of that day, and that she had spent that time trying to organise the shifts so that the claimant was not moved. Ms Burke said that on that day Ward 23 had a high percentage shortfall in trained nursing staff (by which she meant, she told us and we accepted, registered nurses such as Ms Tindale-Wignall), that there had been a staff huddle during the afternoon during which she told Matron about it, and that "with surgical colleagues we decided to do a swap of the claimant's shift". She then said this:

> "The ward had a high percentage of trained nurse shortfalls and we would have covered the day shifts rather than the night shifts as the night shifts would be met by agency nurses.
>
> We were running at, I believe, 12.5% shortfall of trained nurses for the ward."

76 We accepted that evidence of Ms Burke in its entirety.

Ms Moffatt's conclusion on the allegation of misconduct by Ms Tindale-Wignall on 10 August 2018 by hitting patient B12

77 On 19 February 2019, Ms Moffatt completed her investigation into the allegation of misconduct by Ms Tindale-Wignall. The report of that investigation and its appendices were at pages 269-286. In paragraph 6.2 of the report, at page 274, Ms Moffatt wrote this:

> "From the investigatory meeting with Ayishat Mohammed (AM), Bank Healthcare Assistant(Appendix 5) it was established that:
>
> - The patient '*ripped off my lanyard and punched me in the chest at the start of the shift*'
> - The patient had been calling some of the staff including her names like '*black monkey*'
>
> - Whilst delivering the patient's care, the patient was shouting and hitting out. PTW came round and asked the patient to stop shouting and hitting
>
> - '*The patient hit PTW on the arm and PTW hit her back*', and AM heard the sound of the hit
>
> - AM stated that '*PTW hit the patient's arm*'.
>
> - AM stated that she felt that '*PTW did not seem like the kind of person that can hit a patient*'.
>
> - AM felt that PTW seemed very angry and that maybe she was not thinking right and that is why PTW did it.
>
> - AM reported that the, '*Patient seemed to be normal after this incident*'.

78 In paragraph 7 of the report, at page 277, Ms Moffatt wrote this:

> "7.4 There is conflicting evidence with regard to whether PTW actually hit the patient intentionally or was acting in self-defence by

deflecting the arm as it came towards her. There is a possibility that this was perceived by other staff as hitting the patient.

7.5 The statements made by ED and Aliza M are conflicting. Aliza M describes the alleged assault and that she was present when it occurred – ED in her account says that Aliza M came into the bay and upon hearing a sound asked if the patient had hit someone to then be told by ED that PTW had hit the patient – so therefore indicating that AM was not present when the alleged assault happened.

7.6 The statements are conflicting about what was actually happening when this alleged incident occurred – it was not clear whether the patient was being moved onto another bed with the aid of a pat slide / or if the patient was sitting out in a chair and the incident happened when the patient was moved back into bed. This point is to be considered in relation to the clarity of the events reflected in the statements and therefore the facts in relation to the actual incident."

79 However, in paragraph 6.5 of her report, at page 275, Ms Moffatt recorded that Ms Mercado had said that "she would have told someone straight away if she thought it was serious".

The relevant law

Harassment and direct discrimination

80 Section 26 of the EqA 2010 provides:

"(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."

81 We return to section 26 below, after considering the meaning of the words "conduct related to a relevant protected characteristic". In order to do that, it is helpful to consider the effect of section 13 of the EqA 2010, which provides:

> "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."

82 There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 a very helpful discussion about the impact (or otherwise) of the use of the words "unwanted conduct related to a relevant protected characteristic" in section 26(1) of the EqA 2010 instead of the words in section 13, namely "because of a protected characteristic". Only rarely will a claim of harassment add anything to a claim of discrimination. In addition, as Underhill LJ confirmed in paragraphs 83-101 of that judgment, a mental element is required in a claim of harassment as much as in a claim of direct discrimination.

83 We were referred by Mr Tomison to the decision of the Employment Appeal Tribunal in *Hartley v Foreign and Commonwealth Office* UKEAT/0033/15 (27 May 2016, unreported) in support of the proposition (based in part on paragraph 7.9 of the Equality Code) that 'the connection between the conduct and the protected characteristic required for harassment ("related to") is broader than the connection in direct discrimination ("because of")'.

84 We observed that the Equality Code was issued under section 14 of the Equality Act 2006, section 15(4)(b) of which provides that it "shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant". We noted that *Hartley* preceded the decision of the Court of Appeal in *Nailard*, and that *Hartley* concerned an issue which was summarised in the Employment Appeal Tribunal ("EAT") transcript of the judgment as follows:

> 'Whether conduct is "related to" a disability should be determined having regard to the evidence as a whole; the perception of the person who made the remark is not decisive.'

85 If *Hartley* is taken as authority only for that proposition, then it is obviously correct and unaffected by the decision of the Court of Appeal in *Nailard*. Paragraphs 23-26 of HHJ Richardson's judgment in *Hartley* show that the EAT's decision in that case can indeed be taken as authority only for that proposition. We noted that in paragraph 23 of his judgment in *Hartley*, HHJ Richardson quoted the part of paragraph 7.9 of the Equality Code on which Mr

Tomison relied. However, quoting a part of a code, whether or not it is a statutory code, which asserts something as a proposition of law cannot make that assertion into a statement of the law if it is inconsistent with a binding judgment. We noted too that neither *Hartley* nor paragraph 7.9 of the Equality Code were referred to in *Nailard*.

86 Mr Tomison's submission (in paragraph 25 of his written closing submissions) on the effect of *Hartley* and *Nailard* was this:

> 'Unlike for direct discrimination where there is reference to "less favourable treatment" in section 13 and a definition of appropriate comparators in section 26 EqA, there is no statutory requirement for a comparator in harassment claims. That said, there is a requirement for a 'subjective element'. As Underhill LJ explained in *Unite the Union v Nailard* [2018] IRLR 730 at [108]-[109], the tribunal is required to make findings as the motivations and thought processes of the individual decision-makers as to whether their actions were "related to" the protected characteristic. I accept that it can be helpful in assessing the decision-maker's thought processes to consider the comparative position, but in my submission the treatment of a comparator is not determinative - the question is whether, factually, the decision-maker's conduct was related to the protected characteristic.'

87 We could see in the EqA 2010 no justification for the proposition that there is a requirement for a comparator in any circumstances: section 23 of that Act merely applies where a comparison is made. In many cases, particularly given the terms of section 23, it will be possible to have only a hypothetical comparator, but no such comparator is a requirement in any circumstances. In any event, we regarded paragraphs 83-101 of Underhill LJ's judgment in *Nailard* as showing that there has to be a connection in the mind of the alleged harasser between the allegedly harassing conduct and the protected characteristic in question. Here, that characteristic was race. The approach which we needed to take here was, as Mr Tomison submitted, shown by paragraphs 108-109 of Underhill's judgment. In fact, the opening part of paragraph 110 is helpful also. Those paragraphs are as follows:

> '**Harassment**
>
> 108. Mr Carr [counsel for the claimant] submitted that, even if the employed officials' conduct could not be said to be "because of" the Claimant's sex, it was on any view "related to" it within the meaning of section 26. I have already explained at paras 96-98 above why that language does not cover cases of third party liability; and for the reasons given at para 104, the present claim is, on the ET's reasoning, in substance such a case. If the employed officials, and through them the union, are to be liable for harassing the claimant because of their failure to protect her from the harassment of the lay officials, and (in the case of Mr

> Kavanagh) for transferring her, that can only be because of their own motivation, as to which the tribunal made no finding.
>
> 109. Mr Segal [counsel for the respondent employer, the union] sought in his post-hearing submissions to distinguish between a situation where an employer was "culpably inactive knowing that an employee is subjected to continuing harassment (as on the facts of the *Burton* case)" and one where he was "culpably inactive without [any such knowledge]"; and to show that the employment tribunal's findings established that the case was in the latter category. I am not sure of the relevance of the distinction; but since we did not hear oral submissions on it I prefer to say no more than that, on the law as I believe it to be, the employer will not be automatically liable in either situation. I repeat, to avoid any possible misunderstanding, that the key word is "automatically": it will of course be liable if the mental processes of the individual decision-taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic.
>
> **Conclusion**
>
> 110. For those reasons I agree with the appeal tribunal that the reasoning of the employment tribunal was flawed. It found the union liable on the basis of the acts and omissions of the employed officials without making any finding as to whether the claimant's sex formed part of their motivation.'

The burden of proof

88 We turn then to section 136 of the EqA 2010. It provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

89 There is much case law concerning the application of that provision, and we refer to some of it immediately below. However, we bore it in mind that (as the House of Lords said in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337) in some cases the best way to approach the question whether or not there has been for example direct discrimination within

the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

90 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's explanation for the treatment. That is clear from the line of cases discussed in paragraph L[807] of *Harvey on Industrial Relations and Employment Law*, as follows:

> "Whether considering, then, the legacy legislation or the Equality Act burden of proof provision, the two-stage process remains the starting point. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246, [2007] ICR 867, CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it (also restated in *St Christopher's Fellowship v Walter-Ennis* [2010] EWCA Civ 921, [2010] EqLR 82). That means that the claimant has to 'set up a prima facie case'. In *Madarassy* it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically; Underhill P in *Hussain v Vision Security Ltd and Mitie Security Group Ltd* UKEAT/0439/10, [2011] All ER (D) 238 (Apr), [2011] EqLR 699 warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act. A note of caution, however, is necessary against taking from *Igen* [i.e. *Igen Ltd v Wong* [2005] ICR 931] a mechanistic approach to the proof of discrimination by reference to RRA 1976 s 54A. In *Laing v Manchester City Council* [2006] IRLR 748, [2006] ICR 1519 Elias P observed as follows:
>
> > ''71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.
> > 72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate

explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.

73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.''

In *Commissioner of Police of the Metropolis v Maxwell* UKEAT/0232/12, [2013] EqLR 680 it was emphasised that particularly in cases where there are a large number of complaints the tribunal is not obliged to go through the two stage approach in relation to each and every one."

Harassment in practice

91 The provisions of section 26 of the EqA 2010 were the subject of detailed submissions by both parties here. We took those submissions into account fully. Both counsel relied on the decision of the Employment Appeal Tribunal in *Richmond Pharmacology v Dhaliwal* [2009] ICR 724, Mr Uberoi rather more so. He referred us also to *Land Registry v Grant (Equality and Human Rights Commission intervening)* [2011] ICR 1390, where Elias LJ said in relation to the claimed harassment in that case:

"the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

92 In paragraph 22 of *Dhaliwal*, the Employment Appeal Tribunal (Underhill P presiding) said this:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

93 In *Betsi Cadwaladr University Health Board v Hughes* (unreported; UKEAT/0179/13/JOJ, 28 February 2014), the Employment Appeal Tribunal (Langstaff P presiding) said this in paragraphs 12 and 13 of its judgment having just set out paragraph 22 of the judgment in *Dhaliwal*:

> '12. We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.
>
> 13. It was agreed, too, that context was very important in determining the question of environment and effect. Thus, as Elias LJ said in *Grant*, context is important. As this Tribunal said, in *Warby v Wunda Group plc*, UKEAT 0434/11, 27 January 2012:
>
> > "…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;".'

94 Both counsel referred to *Dhaliwal* as authority for the proposition that the intent of the impugned conduct is relevant. That was said at the end of the following passage in the judgment of that case, the whole of which (including the footnotes, which we have integrated into the text by inserting them in square brackets and putting them into italics) was in our view helpful:

> '14. Secondly, it is important to note the formal breakdown of "element (2)" into two alternative bases of liability—"purpose" and "effect". That means that a respondent may be held liable on the basis that the effect of his conduct has been to produce the proscribed consequences even if that was not his purpose; and, conversely, that he may be liable if he acted for

the purposes of producing the proscribed consequences but did not in fact do so (or in any event has not been shown to have done so) [*Those alternative forms of liability could be described, from the perpetrator's point of view, as "objective" and "subjective"; but using that terminology risks confusion with the separate question whether the effect on the victim should be judged "subjectively" or "objectively"—as to which, see para 15.*]. It might be thought that successful claims of the latter kind will be rare, since in a case where the respondent has intended [*We use "intend" as the equivalent verb to the noun "purpose" used in the statute: "purpose" as a verb has an archaic ring. In this context at least there is no real difference between the terms "purpose" and "intention".*] to bring about the proscribed consequences, and his conduct has had a sufficient impact on the claimant for her to bring proceedings, it would be prima facie surprising if the tribunal were not to find that those consequences had occurred. For that reason we suspect that in most cases the primary focus will be on the effect of the unwanted conduct rather than on the respondent's purpose (though that does not necessarily exclude consideration of the respondent's mental processes because of "element (3)" as discussed below).

15. Thirdly, although the proviso in subsection (2) is rather clumsily expressed, its broad thrust seems to us to be clear. A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That, as Mr Majumdar rightly submitted to us, creates an objective standard. However, he suggested that, that being so, the phrase "having regard to … the perception of that other person" was liable to cause confusion and to lead tribunals to apply a "subjective" test by the back door. We do not believe that there is a real difficulty here. The proscribed consequences are, of their nature, concerned with the feelings of the putative victim: that is, the victim must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created. That can, if you like, be described as introducing a "subjective" element; but overall the criterion is objective because what the tribunal is required to consider is whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Thus if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it

was evidently innocently intended than if it was evidently intended to hurt. [*This is not to reintroduce a requirement of "purpose" by the back door: the point is not that the perpetrator cannot be liable unless he intended to cause offence but rather that, if he evidently did not intend to, it may not be reasonable for the claimant to have taken offence.*]'

Detrimental treatment for making a protected disclosure

95 The law relating to detrimental treatment for making a protected disclosure can be seen as being of the same sort as the law relating to direct discrimination within the meaning of section 13 of the EqA 2010. Given our above findings of fact, we did not need to explore the law relating to detrimental treatment for making a protected disclosure.

Our conclusions

96 We therefore now state our conclusions on the issues set out in paragraph 3 above in the order in which they are there set out.

Harassment

Paragraph 3.1.1

97 Did Ms Tindale-Wignall on 10 August 2018 engage in unwanted conduct related to the claimant's race which was either done for the purpose, or had the effect (taking into account the content of section 26(4) of the EqA 2010), of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, by not treating the claimant's reports of race discrimination by a patient during that morning in the form of abusive racial language seriously? No. She took the claimant's reports of race discrimination by patient B12 entirely seriously.

Paragraph 3.1.2

98 Did Ms Tindale-Wignall on 10 August 2018 engage in such conduct by telling the claimant that the race discrimination to which she was subjected that morning by that patient was the "norm" "back in the day" and that the claimant should be more understanding about racial insults from older people? No; for the reasons we state in paragraphs 33-36 above, we concluded that Ms Tindale-Wignall did not do that.

Paragraph 3.1.3

99 Did Ms Tindale-Wignall on 10 August 2018 engage in such conduct by, in front of staff and patients, arguing with the claimant and attempting to justify the racist language used by the patient? No. For the reasons stated in paragraphs 33-36 above, we concluded that Ms Tindale-Wignall did not do that.

100 We add that if we had concluded that Ms Tindale-Wignall had done any of the three things referred to in paragraph 3.1 above, then we would have had to consider whether the conduct was related to the claimant's race. In doing so, we would have taken into account the whole of the background, including

100.1 the fact that (as we conclude in paragraph 12 above) the relationship between the claimant and Ms Tindale-Wignall was "strained" before 10 August 2018;

100.2 that while the claimant's upset at patient B12's racist language was wholly understandable (and we record here our own abhorrence of that language), given that (as we say in paragraphs 56.7 to 56.10 above) nothing could in practice be done about it, the engaging by the claimant of Ms Tindale-Wignall in conversation about the language was capable of being seen to be (1) a result of the claimant's strong (and, again, wholly understandable) objection to the language but (2) likely to lead to no more than agreement that it was objectionable; and, to the extent that they were relevant

100.3 the factors referred to in paragraphs 13-16 above.

101 We add also that if we had concluded that Ms Tindale-Wignall had done any of the three things referred to in paragraph 3.1 above and we had concluded that it was, or they were, in any way related to the claimant's race, then we would have had to consider whether it was, or they were, unwanted conduct which was either done for the purpose, or had the effect (taking into account the content of section 26(4) of the EqA 2010), of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. In doing so we would have had to take into account something that the claimant said in oral evidence, which was that she would not have raised a grievance about Ms Tindale-Wignall's response on 10 August 2018 to her complaint about patient B12's racial abuse if Ms Tindale-Wignall had not, as the claimant claimed, shouted at her on 13 or 14 November 2018.

Paragraphs 3.2 and 3.3

102 Did the respondent, through Mr Scudder and Ms Burke, engage in unwanted conduct related to the claimant's race which was either done for the purpose, or had the effect (taking into account the content of section 26(4) of the EqA 2010), of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, by failing to investigate the claimant's allegation of race discrimination made in the Datix report at page 209 in accordance with the respondent's Policy for Adverse Incident Reporting and Investigation of Incidents (at page 163)? No; for the reasons we state in paragraphs 42 and 43 above, we accepted that Mr Scudder's conduct in that regard was in no way related to the claimant's race. Ms Burke's conduct in

investigating the Datix report was in our view incapable of being regarded as in any way harassment within the meaning of section 26 of the EqA 2010, given that (1) as we state in paragraph 23.2 above, she investigated the words which Mr Scudder had passed to her (i.e. as set out at the end of paragraph 23.2 above), and (2) as we conclude in paragraph 45 above, she focused purely on the impact on patient B12. In any event, we concluded from (1) Ms Burke's oral evidence and (2) the fact that there was in the circumstances nothing to justify the conclusion that her conduct in investigating the Datix report as given to her by Mr Scudder was in any way related to the claimant's race, that Ms Burke's conduct in investigating that report was in no way related to the claimant's race.

Paragraph 3.4

103 If it was such conduct, was it done for the purpose or did it have the effect (applying section 26(4) of the EqA 2010) of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? We did not need to answer this question, given our conclusions stated in the preceding paragraph above.

Paragraph 3.5

104 Did Ms Moffatt say to the claimant that maybe Ms Tindale-Wignall did not mean what she had said in "that kind of way"? Yes; as we record in paragraph 55 above, Ms Moffatt accepted that she did say something like that.

Paragraph 3.6

105 If so was that to any extent unwanted conduct related to the claimant's race? In this regard, we considered what would have happened if a black person had raised concerns in the same way that the claimant did with Ms Moffatt, in the circumstances we describe in paragraph 57 above. Given the factors to which we refer in paragraphs 57-59 above, we concluded that Ms Moffatt would have reacted in precisely the same way to the same concerns raised by a person of any race, and that Ms Moffatt's response to the claimant's concerns was in no way related to the claimant's race.

106 If we had concluded that the conduct was to any extent related to the claimant's race, then we would have concluded that

106.1 the conduct did not have the purpose (i.e. Ms Moffatt in no way intended it to have the effect) of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and

106.2 it was not reasonable for it to have that effect, given that

106.2.1 the claimant had herself raised the issue of Ms Tindale-Wignall's response to her (the claimant's) complaint about the language used by patient B12, and

106.2.2 in the circumstances that we discuss in paragraphs 57 and 58 above, it was justifiable for Ms Moffatt to query the claimant's description of the words used by Ms Tindale-Wignall, in part because Ms Moffatt had by then heard from Ms Tindale-Wignall about her discomfort at the words used by patient B12, and in part because of the inherent improbability of a nurse in a position of the sort held by Ms Tindale-Wignall in a hospital of the sort in which she and the claimant worked acting in the way that the claimant complained.

Direct race discrimination

Paragraph 3.8.1

107 Was the claimant treated by the respondent less favourably than the respondent treats or would have treated others to any extent because of the claimant's race by Mr Scudder failing to deal with the claimant's Datix report at page 209 in accordance with the respondent's Policy for Adverse Incident Reporting and Investigation of Incidents (at page 163)? No; as we conclude in paragraph 43 above, Mr Scudder's conduct in relation to that report had nothing whatsoever to do with the claimant's race.

Paragraph 3.8.2

108 Was the claimant treated by the respondent less favourably than the respondent treats or would have treated others to any extent because of the claimant's race by continuing to roster the claimant to work with Ms Tindale-Wignall after the latter had returned to work in September 2018 "despite the claimant objecting and fearing for her safety"? No. We noted that what the claimant was seeking was special treatment, so that none of her shifts changed, but all of those of Ms Tindale-Wignall which co-incided, did. On the basis of the evidence to which we refer in paragraphs 48-52 above, we concluded that the claimant was treated no less favourably than anyone else would have been in the same circumstances, so that the manner in which she was treated in relation to being rostered with Ms Tindale-Wignall was at all times (from the return of Ms Tindale-Wignall after her suspension onwards) not less favourable treatment than she would have received if she had been (for example) white.

Paragraph 3.8.3

109 Was the claimant treated by the respondent less favourably than the respondent treats or would have treated others to any extent because of the

claimant's race by on or around 13 or 14 November 2018 rostering the claimant to work with Ms Tindale-Wignall? No. This is for the reasons stated in paragraph 108 above.

Paragraph 3.8.4

110 Was the claimant treated by the respondent less favourably than the respondent treats or would have treated others to any extent because of the claimant's race by Ms Tindale-Wignall shouting at the claimant on 13 or 14 November 2018 in front of staff and patients? No. As indicated in paragraph 69 above, we concluded that Ms Tindale-Wignall did not shout at the claimant and that the words which she used were wholly unobjectionable. The fact that the patient had had a catheter inserted did not (as we record in paragraph 67 above) mean that the patient was not wet, but in any event, we were completely satisfied that Ms Tindale-Wignall's conduct towards the claimant on that day was in no way less favourable than it would have been if the claimant had been, say, white.

Paragraph 3.8.5

111 Was the claimant treated by the respondent less favourably than the respondent treats or would have treated others to any extent because of the claimant's race by changing the claimant's shift patterns in December 2018 without her consent? No; for the reasons stated in paragraph 108 above, the claimant was not treated in any way less favourably because of her race in regard to the changing of shift patterns in December 2018.

Paragraph 3.8.6

112 Was the claimant treated by the respondent less favourably than the respondent treats or would have treated others to any extent because of the claimant's race by causing the claimant on 28 December 2018 to work elsewhere than on the ward on which she usually worked, i.e. Ward 23? No. for the reasons stated in paragraph 108 above, the claimant was not treated in any way less favourably because of her race in regard to where she worked on 28 December 2018. It was notable in any event that (as we record we found in paragraphs 73-76 above) Ms Burke had stayed at work for over 2 hours after the end of her shift on 28 December 2018, seeking to avoid the need to move the claimant from her usual shift that day. That was inconsistent with treating the claimant less favourably than (say) Ms Tindale-Wignall because of the claimant's race.

Paragraph 3.8.7

113 Was the claimant treated by the respondent less favourably than the respondent treats or would have treated others to any extent because of the claimant's race by causing the claimant to lose out on night shift enhancements

by reducing the number of night shifts worked by the claimant in December 2018? No; for the reasons stated in paragraph 108 above, the claimant was not treated in any way less favourably because of her race in regard to the changing of shift patterns in December 2018.

Whistleblowing detriment

Paragraph 3.9

114 It being agreed by the respondent that the claimant disclosed information within the meaning of section 43A and 43B(1) of the ERA 1996 on 11 August 2018 about the alleged conduct of Ms P Tindale-Wignall on 10 August 2018, did the claimant have a reasonable belief that

114.1 the disclosure was made in the public interest and/or

114.2 Ms Tindale-Wignall had either (a) committed the offence of assault and/or battery, or (b) endangered the patient's health or safety?

115 Given Ms Moffatt's findings which we have set out in paragraphs 77-79 above, we concluded that (despite what Mr Uberoi submitted in paragraph 8 of his written closing submissions) the claimant did have a reasonable belief that the disclosure tended to show that Ms Tindale-Wignall had either (a) committed the offence of assault and/or battery, or (b) endangered the patient's health or safety. As a result, we concluded also that the claimant had a reasonable belief that the disclosure was in the public interest.

Paragraph 3.10

116 If the answer to the question stated in paragraph 3.9 above is "yes", was the claimant treated detrimentally on or around 13 November 2018 by Ms Tindale-Wignall shouting at the claimant in front of staff and patients? No. In our view, for the reason stated in paragraph 69 above (which has to be read against the background of paragraphs 60-68) the claimant was not treated detrimentally by Ms Tindale-Wignall shouting at her in front of staff and patients on or around 13 November 2018.

Paragraph 3.11

117 If the answer to that question is "yes", was that a detrimental act done on the ground that the claimant had made the disclosure referred to in paragraph 3.9 above? This question did not arise, but if it had done then we would have concluded that whatever Ms Tindale-Wignall did on or around 13 November 2018 when the claimant returned to work after being absent because of sickness, it had nothing whatsoever to do with the fact that the claimant had made the allegation that Ms Tindale-Wignall had hit patient B12.

In conclusion

118 In conclusion, none of the claimant's claims succeeded.

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Employment Judge Hyams

Date: 25 September 2020

JUDGMENT SENT TO THE PARTIES ON

29 September 2020

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FOR THE TRIBUNAL OFFICE