Case Number: 2204503/2018, 2204504/2018, 2206445/2018, 2206446/2018, 2206447/2018, 2206448/2018, 2206449/2018, 2200656/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Miss A Ovonlen-Jones		The Royal Marsden NHS Foundation Trust

Heard at: London Central **On**: 5-16 October 2020

Before: Employment Judge Stout
Mrs H Craik
Mr D Shaw

Representations
For the claimant: Ms L Millin (counsel)
For the respondent: Mr J Gidney (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Respondent did not victimise the Claimant in contravention of ss 27 and 39(2)(c) or (d) of the Equality Act 2010 (EA 2010).

(2) The Respondent did not discriminate against the Claimant because of her race or sex in contravention of ss 13 and 39(2)(c) of the EA 2010.

(3) The Claimant's claim of unfair dismissal under part X of the Employment Rights Act 1996 (ERA 1996) is not well-founded and is dismissed.

REASONS

Introduction

1. Ms Ovonlen-Jones (the Claimant) was employed by the Royal Marsden NHS Foundation Trust (the Respondent) as a Band 3 Health Care Assistant in Theatres at the Respondent's Chelsea site from 13 February 2012 until her dismissal on 26 October 2018. The Respondent's case is that the Claimant was dismissed for misconduct. The Claimant in these proceedings claims that her dismissal was unfair under Part X of the Employment Rights Act 1996 (ERA 1996) and/or an act of victimisation contrary to ss 27 and 39(2)(c)/(d) of the Equality Act 2010 (EA 2010). She further claims that, prior to dismissal, she was victimised and directly discriminated against on grounds of her race and/or sex contrary to ss 13 and 39(2)(c) EA 2010.

The issues

2. The issues to be determined were identified in the Schedule to the Order of EJ Taylor of 20 December 2019. EJ Taylor's Order makes clear that the List of Issues in that Schedule *"By consent …shall be the only claims and issues for determination. No other claims or issues will be pursued by the Claimant"*. This agreement was reached by the parties in the face of a strike-out application by the Respondent which was not pursued as a result of the Claimant's agreement to withdraw other matters raised in her claim forms.

3. Notwithstanding this agreement and order the Claimant's witness statements raised many other issues, including matters that were subject of the claims heard and determined by a previous tribunal (which we refer to herein as 'the Wade Tribunal') and which are accordingly *res judicata*, or are matters which could and should have been brought forward to that Tribunal but which were not and which it is now an abuse of process for the Claimant to pursue in these proceedings under the rule in *Henderson v Henderson*.

4. However, there has been no application to amend the claim in light of the Claimant's witness statements and accordingly, although we read the Claimant's statements in full, we have not made findings about matters other than those which properly form the subject of the claims in these proceedings, and matters of background which appear in our judgment to be relevant to those claims.

5. The issues that we have to determine are therefore as follows:-

<u>Victimisation (S27 of the Equality Act)</u>

1. The Claimant relies on the following Protected Acts:

1.1 the presentation on 7th July 2017 of her Claim of age, race and sex discrimination, Case Number 2206529 / 2017 ('Claim 1') to the Employment Tribunal, pursuant to section 27(2)(a) of the Equality Act 2010 (the bringing of proceedings under the Act); and,

1.2 the presentation on 30th November 2017 of her Claim of age, race and sex discrimination, Case Number 2207940 / 2017 ('Claim 2') to the Employment Tribunal, pursuant to section 27(2)(a) of the Equality Act 2010 (the bringing of proceedings under the Act); and,

1.3 giving evidence or information in connection with Claim 1, being proceedings under the Act, pursuant to section 27(2)(b) of the Equality Act 2010; and,

1.4 giving evidence or information in connection with Claim 2, being proceedings under the Act, pursuant to section 27(2)(b) of the Equality Act 2010;

2. The Respondent accepts that the 4 acts set out in sub paragraphs (1.1) to (1.4) above qualify as Protected Acts for the purposes of the Claimant's claim of victimisation pursuant to section 27 of the Equality Act 2010.

3. Did the Respondent subject the Claimant to the following acts of detriment:

3.1 On 20th April 2018 did Lian Lee, at meeting with Claimant in morning, refer allegations regarding the Claimant to a formal investigation by Human Resources when they did not merit such referral rather than dealing with them through informal procedure?

3.2 On 20th April 2018 did Graham Simmons and Lian Lee (i) falsely accuse Claimant of covertly recording sickness absence meeting held on 4th August 2017 and (ii) threaten the Claimant if she failed to produce the covert recording within one week?

3.3 On 3rd May 2018 did Lian Lee insist that Claimant have an Appraisal with Sister Jean Arjoon, contrary to the advice of the Occupational Health doctor who had advised that a different appraiser should be nominated?

3.4 On 17th May 2018 did Tina Kitcher fail to validate a Care Certificate for the Claimant?

3.5 On 30th May 2018 did Graham Simmons and/or Lian Lee temporarily redeploy the Claimant to the Endoscopy Department following the conclusion of Claim 1 and Claim 2?

3.6 On 20th July 2018 did Robin Hurst-Baird issue a 1st formal sickness absence warning contrary to Trust policy rules?

3.7 On or about 25th July 2018 did Andrew Dimech and/or Graham Simmons suspend the Claimant?

3.8 On or about 28th August 2018 did Andrew Dimech and/or Graham Simmons defer indefinitely Claimant's appeal against 1st formal sickness absence warning?
3.9 On 26th October 2018 did the Respondent dismiss the Claimant?

4. If and insofar as it may be found that the Claimant was subjected to any of the detriments set out in sub paragraphs 3.1 to 3.9 was she subjected to such detriment or detriments because she did a protected act as listed under sub paragraphs 1.1 to 1.4, which may include consideration of whether:

4.1 Has the Claimant proved facts from which, in the absence of an explanation, it could be concluded that the Respondent had unlawfully victimised her?
4.2 If so, can the Respondent show that the provisions of section 27 of the Equality Act were not contravened in any way?

5. Have any of the following complaints, namely those made in respect of the detriments listed under sub paragraphs 3.1, 3.2, 3.3, 3.4, 3.5 and/or 3.7 been brought out of time including the question of whether it is just and equitable to apply a time limit in excess of 3 months?

<u>Direct Discrimination on the grounds of race and/or sex (S13 Equality Act)</u>

6. The Claimant is a woman, whose ethnicity is black African.

7. Did the Respondent treat the Claimant less favourably than the Respondent did treat or would treat others in circumstances which were not materially different in the following ways, namely:

7.1 On 20th July 2018 by issuing her with a first formal sickness absence warning contrary to Trust policy rules?
7.2 On 25th July 2018 by suspending her? The Claimant relies on an actual comparator (namely Marvin Debil) or, alternatively, a hypothetical comparator.

8. This may include consideration of whether the Claimant has proved facts from which, in the absence of an explanation, it could be concluded that the Respondent unlawfully discriminated against her: (a) because of her race in respect of sub-paragraph 7.1 and 7.2 or (b) because of her gender in respect of sub paragraph 7.2? If a prima facie case of discrimination is proven under paragraph 8, can the Respondent show that the provisions of section 13 of the Equality Act were not contravened in any way?

<u>Unfair Dismissal</u>

9. What was the reason, or if more than one, the principal reason for the Claimant's dismissal? Was it conduct, as the Respondent asserts?

10. Did the Respondent act reasonably or unreasonably in treating conduct as a sufficient reason for dismissing the Claimant?

11. Did the Respondent's dismissing officer, Sofia Colas, have a genuine belief that the Claimant was guilty of misconduct?

12. Was Sofia Colas belief held on reasonable grounds after a reasonable investigation?

13. Did the sanction of dismissal fall within a range of reasonable responses to the Claimant's conduct that were open to the Respondent?

14. If and in so far as any procedural failings is identified, would dismissal have occurred in any event?

15. Did the Claimant, by her own conduct, contribute to her dismissal, and if so to what extent?

The Evidence and Hearing

6. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

7. In particular, we heard an application from the Respondent, after evidence was complete and shortly before closing submissions, for three further documents to be admitted. We decided to admit two emails from Ms Kitcher (which we therefore deal with in our judgment below). Although these had been disclosed unreasonably late, and the Claimant objected to their admission contending that they were fraudulent, we saw no reason to doubt that the emails were genuine. Further, since it appeared to us that they might assist us in resolving some factual disputes about a very confused part of the evidence, we considered it was in the interests of justice to admit the emails, although we directed ourselves to give less weight to them given that the Claimant challenged their authenticity and had not had an opportunity to cross-examine Ms Kitcher on them. We did not admit a third email from a member of the Respondent's IT department which purported to give expert evidence about a disputed email attachment. We did not understand precisely what the IT person had looked at when reaching his conclusion and in any event we considered it to be unfair to the Claimant to admit expert evidence so late in the day when the Claimant had not had an opportunity obtain expert evidence of her own.

8. Otherwise, we explained our reasons for various case management decisions carefully as we went along.

9. We should also record here that Ms Millin, counsel for the Claimant had only been instructed on Saturday, with the case starting on Monday morning. The two counsel had been very co-operative over the weekend but it had not been possible for Ms Millin to get a full copy of the trial bundle. It was agreed that she should take one of the Tribunal copies and the Respondent would bring a further set. In part to give Ms Millin an opportunity to read into the case, and in part because of the volume of reading material, we agreed to do 1.5 days' reading at the start of the hearing and to start evidence at 2pm on Day 2. The Claimant attended Tribunal on the first day without hard copies of her witness statements. This she rectified in the course of the morning of Day 1.

10. We heard evidence from the Claimant and, for the Respondent, from:

    a. Ms Tina Kitcher (Theatre Sister/ Practice Educator- Theatres)
    b. Ms Robin Hurst-Baird (Deputy Matron – Theatres and Endoscopy)
    c. Ms Lian Lee (Matron – theatres and Endoscopy)
    d. Mr Andrew Dimech (Divisional Clinical Nurse Director – Clinical Services and Lead Cancer Nurse, currently Acting Chief Nurse)
    e. Mr Graham Simmons (Head of Employee Relations)
    f. Ms Jessica Wells (Clinical Business Unit Manager – Surgery and Acute Inpatient Management)
    g. Ms Sofia Colas (Director of Operations – Private Care)
    h. Ms Eleanor Bateman (Divisional Director – Cancer Services)

Adjustments

11. We asked the parties at the outset of the hearing to identify any adjustments that needed to be made for any participant during the hearing. No adjustments were sought at that stage, although one witness (Ms Lee) did indicate that she had hearing difficulties and we made clear that she should ask if there was anything she missed.

The facts

12. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

13. In setting out our findings of fact, we deal as we go along with our findings as to the reasons that various witnesses acted as they did, where it is necessary for us to determine this as part of considering the Claimant's victimisation and discrimination claims. In reaching our conclusions in respect of those matters

we have directed ourselves in accordance with the legal principles set out further below. We have also kept in mind, when addressing each incident, the totality of the evidence that we have heard and have considered the bigger picture when addressing the reasons why each individual about which the Claimant complains took the decisions or actions which they did.

Background

14. The Respondent is an NHS Trust based in Chelsea and is well known for its excellence in cancer care.

15. The Claimant was employed by the Respondent as a Healthcare Assistant – Theatres (HCA) from 13 February 2012 until 26 October 2018. She describes herself as a "British lady of Black African descent".

16. The Claimant worked in the Surgical Theatres Department in Chelsea. We heard evidence from Mr Dimech that there would be between 40 and 90 people working in the department at any one time, depending on how many theatres were operating. The Claimant herself worked within the team of about 50 for which Ms Lian Lee was the responsible Matron during the period with which we are concerned. The team is very diverse in terms of ethnicity and predominantly female.

17. As HCA the Claimant's role was to assist staff during operations, including setting up and cleaning theatres, moving and checking equipment and moving patients to theatre. The Theatres Department in Chelsea consists of surgeons and consultants and a scrub team who support surgeons carrying out often complex surgery on cancer patients. It is a pressurised environment but staff are required to be patient and compassionate with each other because the work can be stressful and involves severely ill patients.

18. As HCA the Claimant was not in a regulated profession (unlike the more senior clinical staff who were witnesses before us such as Ms Kitcher, Ms Lee, Ms Hurst-Baird and Mr Dimech). However, she was subject to the Department of Health's Code of Conduct for Healthcare Support Workers and Adult Social Care Workers. That Code required her, among other things, to *"work in collaboration with your colleagues to ensure the delivery of high quality, safe and compassionate healthcare, care and support"*, *"always behave and present yourself in a way that does not call into question your suitability to work in a health and social care environment"*, *"comply with your employers' agreed ways of working"*, and *"always treat people with respect and compassion"*.

The Claimant's previous claims

19. The Claimant has brought previous proceedings against this Respondent and the findings of fact in those previous proceedings are binding on us. Those proceedings considered two claims the Claimant brought, the first on 7 July

2017, case number 2206529/2017 (Claim 1), the second on 30 November 2017, case number 2207940/2017 (Claim 2). They were heard over five days 4-11 April 2018 before a panel chaired by EJ Wade (the Wade Tribunal). Some of the witnesses before us in these proceedings were also the subject of allegations by the Claimant, or were witnesses, in the previous proceedings, in particular Ms Kitcher, Mr Dimech and Ms Hurst-Baird. Mr Simmons also attended the Tribunal on the first day as an observer.

20. In those proceedings the Claimant brought claims of direct discrimination (race and age) and victimisation. The focus of the Claimant's claims, at least by the time of the final hearing, was her lack of career progression within the Trust. She complained that a number of people had not provided her with the support necessary to enable her to progress to courses that would lead to additional qualifications. However, a number of claims were also withdrawn by the Claimant either prior to or at the final hearing.

21. It is of significance to the present proceedings that the withdrawn complaints included a claim about the conduct of a formal sickness absence meeting on 4 August 2017. That was a meeting led by the Claimant's line manager, Sister Jean Arjoon, accompanied by Mr Peters (HR). The Claimant attended with her friend/representative Jenin Ola. In Claim 2, the Claimant complained that Mr Peters shouted at her and was hostile toward her in this meeting and contended that this was because of the tribunal proceedings she had commenced. There was no complaint in Claim 2 about the conduct of Ms Arjoon. The Claimant withdrew the complaint about Mr Peters in the course of the hearing in April 2018 after she learned that Jenin Ola had covertly recorded the meeting on 4 August 2017. This is a matter that is of significance in these proceedings and we return to it below.

22. Judgment and reasons were sent to the parties on 14 May 2018. The Claimant's claims were dismissed. The Tribunal found that the Claimant had suffered no detriment in relation to her career development. The Tribunal further found that *"the claimant had no basis for any of her claims and the fact that she is 'trigger-happy' unfortunately demonstrates her poor ability to assess the situation objectively"*.

23. It is of relevance to the present claims that the Wade Tribunal found (paras 66-67) that *"It is the claimant's case that she was consistently denied opportunities for ODP training but there is no evidence that she ever made an application for a secondment to do an ODP. As has already been said, she did not take up the advice given* [by Ms Kitcher] *to study towards it, for example by doing a Care Certificate"*. At para 41 the Tribunal found: *"Ms Kitcher was remarkably consistent in offering support despite her frustration that the claimant would not listen and the claimant was remarkably consistent in not playing the game. That was the reason why the claimant did not get what she wanted from her practice educators; it was not connected to a protected act or to her race or age."* The Wade Tribunal also observed (para 69): *"We applaud the respondent's desire to resolve problems informally, but there must come a time when the nettle has to be grasped for the sake of staff and patients. We are sure that the claimant has a strongly held belief that she*

is the victim here but her judgment is not objective. She is the common denominator in all the conflict which we have recorded above, and we have not recorded all of it, and for that reason alone it is she who, on a balance of probabilities, is the main cause. During the hearing we were taken to countless comments from many colleagues about the wide range of difficulties which they experienced in working with her. We very much hope that the parties, individually or together, will find a way of bringing this period of conflict to an end."

24. The judgment of the Wade Tribunal also records that since shortly after joining the Trust in 2012 the Claimant has raised complaints about discrimination and victimisation, and in June 2013 the Claimant was subject to her first disciplinary investigation which culminated in a first written warning for rude and unprofessional communications on 14 January 2014. The Claimant was also given an informal warning for misconduct on 12 November 2015 (pp 504-506) by Mr Dimech. In the first half of 2017 further complaints were made about the Claimant by different members of staff and a disciplinary investigation commenced on 13 July 2017 (which was less than a week after the Claimant had submitted Claim 1 to the tribunal). On each of the occasions that disciplinary proceedings were commenced the Claimant submitted a grievance at or around the same time as the disciplinary investigations. The Wade Tribunal noted at para 52 *"Given the number of complaints made by the claimant it would be impossible to avoid any coincidence of timing between disciplinary actions and protected acts".*

25. The Claimant sought to appeal the judgment of the Wade Tribunal but the appeal was dismissed under Rule 3(7) on 11 October 2018. The Respondent also subsequently made an application for costs against the Claimant, and was awarded costs in the sum of £3,000, which the Claimant has not paid.

Sickness absence 2017

26. On 21 April 2017 the Claimant was issued with an informal warning under the Respondent's *Managing Frequent and Intermittent Sickness Absence Procedure*. Between 21 and 23 June 2017 the Claimant was absent for 33 hours and between 6 July 2017 and 7 July 2017 the Claimant was absent for 22 hours. On 21 July 2017 the Claimant's line manager, Ms Arjoon, invited the Claimant to a formal meeting under the Respondent's sickness absence policy.

27. That meeting took place on 4 August 2017 and was attended by Ms Arjoon, Michael Peters (Employee Relations), the Claimant and her friend/representative Jenin Ola. It was the meeting about which the Claimant complained as part of Claim 2 as set out above, alleging in those proceedings that she was at that meeting victimised by Mr Peters for having brought the tribunal proceedings. It was a difficult meeting and Ms Ola submitted a complaint about it on 8 August 2017 (p 575). On 16 August 2017 Ms Arjoon wrote to confirm that the Claimant had not 'triggered' the sickness absence policy and apologised for the error on her part (p 588). She further indicated

that she had planned to explore how the Claimant was progressing with action points she had been given with the informal warning in April 2017, but that she had been unable to do so because of interruptions by the Claimant and Ms Ola. She concluded the letter with the following paragraph, on which the Claimant's counsel placed some reliance in these proceedings:

> However I do wish to take the opportunity to raise with you that I was concerned by your conduct in the meeting. You raised your voice during the meeting and interrupted me on numerous occasions which resulted in the meeting lasting around 2 hours. I understand that you may find such meetings stressful but I did find your behaviour to be challenging and not in accordance with Trust values. I certainly hope that you will reflect on this and I will see a change in your conduct at future meetings we have.

28. In this hearing, the Tribunal asked the Claimant whether she could explain the nature of her disagreement with Ms Arjoon about the application of the sickness absence policy, or what it was that Ms Arjoon had got wrong and she said that it was something to do with failing to apply a pro rata trigger and could not elaborate further.

29. However, it is apparent from the notes of that meeting which are in the bundle and which we have reviewed in the course of deliberations (p 590) that at the 4 August 2017 meeting Ms Arjoon considered the Claimant had 'triggered' under the sickness absence procedure for two reasons: first, because as a part-time worker the Claimant's pro rata trigger level was 53 hours and she had had a further 55 hours sickness absence since her informal warning; and, secondly, because she had in addition had 5 hours leave not recorded on the system when she had gone home early after a meeting on 7 June 2017 and asked for it not to be recorded as sick leave, but "Health roster" had since advised that it should be recorded as sick leave. The Claimant and Ms Ola disagreed arguing that no one had told the Claimant in advance her pro rata trigger was 53 hours, rather than the full-time equivalent of 60 hours mentioned in the policy, and contending that the 5 hours should not be counted.

30. Ms Arjoon evidently ultimately accepted that the Claimant had not reached the trigger of *"More than 60 hours absence (pro rata for part time staff) during any 12 months period over at least 3 occasions"* since the Claimant had received the informal warning on 21 April 2017, presumably because she agreed not to include the additional 5 hours' leave and thus the Claimant had not been sick on three occasions.

<u>Disciplinary warning 2017</u>

31. The outcome of the disciplinary proceedings that began with the appointment of an investigator on 13 July 2017 (mentioned above) was that the Claimant was issued with a formal written warning on 21 December 2017, which was to take effect from the date of the disciplinary hearing (15 December 2017)

and to remain live for 12 months (p 655). The two grounds of misconduct upheld were that on 9 June 2017 the Claimant wrote inappropriate comments on the allocation board and did not ask the co-ordinator about the allocation, and on the same day she stuck a sheet of A4 paper on her back with writing on it which included the word 'prejudice' and other words.

32. The Claimant appealed against that decision, unsuccessfully. She was informed on 2 March 2018 that the written warning would remain in place.

Praise for the Claimant and her team

33. As the Claimant has placed some emphasis on it, we record our findings that she and her team were praised and thanked for their work during the period that we are considering. In particular, we heard that in 2017 the whole Department received an award for team work, that on 15 September 2017 Matron Lee praised the Claimant for something she had done at work (p 606) and that on 14 February 2018 Matron Lee congratulated the Theatre team that included the Claimant for their excellent performance while treating a patient on 8 February 2018. Mr Dimech was copied into that latter communication and added his congratulations (p 705). We have not ultimately found these matters to have any bearing on the issues with which we are concerned. It has never been suggested that there is anything wrong with the Claimant's clinical practice.

Detriment 3.3 – Appraisal with Jean Arjoon (victimisation)

34. The Respondent operates an annual appraisal process for staff. The Claimant had for the previous five years been appraised annually by her line manager Ms Arjoon. Her appraisal for 2018 was due to take place in February 2018. Ms Arjoon had to rearrange the first date that they had agreed for this and set a new date of 28 February 2018. It was on being informed of this new date that the Claimant wrote to Ms Arjoon by letter of 23 February 2018 (p 707) stating that she no longer had *"professional trust"* in Ms Arjoon doing her appraisal and that the relationship between appraiser/appraisee had broken down irretrievably because Ms Arjoon *"wrongfully formally disciplined unnecessarily"* by calling the meeting on 4 August 2017 under the sickness absence policy (referred to above). She alleged that the wrongful disciplinary had been brought against her because she had done 'protected acts'. She added that over the past four years targets that were set by Ms Arjoon for career development were not 'implemented' or 'facilitated' by her. She requested a change of appraiser.

35. Although the Claimant begins her letter of 23 February 2018 by suggesting that this loss of trust is something she had raised previously, we have seen no evidence that she did so. A letter that she wrote after the sickness absence meeting itself on 15 August 2017 (p 586) does not make this particular point (although it expresses the Claimant's unhappiness about the process generally). Further, as already noted, in Claim 2, which she brought some

months after the meeting, she made no claims against Ms Arjoon at all and confined her complaints about the 4 August 2017 meeting to the actions of Mr Peters (and then withdrew those complaints in any event).

36. On 27 February 2018 the Claimant wrote to Ms Arjoon, Nina Singh (Director of Workforce) and Lorna Adair (of the Employee Relations (ER) team) (p 708) making the same points, formally requesting that she be allocated another appraiser and saying that she was therefore *"unable to keep the appointment that has been scheduled for 28 February 2018"*.

37. Ms Adair directed the Claimant first to raise the request with her department, and Ms Lee and Ms Hurst-Baird then considered the matter. The Respondent's appraisal policy provides for appraisals to be done by a person's line manager *"or, where appropriate, another appropriately trained senior team member"*. Ms Lee and Ms Hurst-Baird felt that the Claimant's line manager Ms Arjoon was the appropriate person to carry out the appraisal, particularly given that so far as they could see the Claimant and Ms Arjoon were working well together on a day-to-day basis and the Claimant had not previously complained about Ms Arjoon. Ms Hurst-Baird discussed the matter with the Claimant on 7 March 2018 and told the Claimant that she should see Ms Arjoon about an appraisal. Ms Hurst-Baird reported that the Claimant then said this was like *"sending a rapist to go rape a rape victim"*, which shocked Ms Hurst-Baird who asked her to refrain from using such language and reported it that same day to ER (pp 723-4). Ms Hurst-Baird then wrote to the Claimant on 8 March 2018 (p 725) directing her to attend the appraisal with Ms Arjoon on 15 March 2018 and that if she did not attend this would be failure to follow reasonable management instructions and a disciplinary matter.

38. The Claimant has always denied making the comment about a rapist, but asserts that she said it was like sending an abuse victim back to their abuser. This is the way that the Claimant put it in her letter of 8 March 2018 (p 727) responding to Ms Hurst-Baird. In that letter she also said that she was stressed and this was about her mental health. Ms Hurst-Baird referred the Claimant to occupational health (OH). The Claimant also self-referred to OH at about the same time. This allegation against the Claimant is one that was ultimately upheld by the Respondent at the end of the disciplinary process that followed and, for essentially the same reasons as those given by Ms Colas in her dismissal letter (i.e. that Ms Hurst-Baird wrote the comment down straight away, had no reason to make it up and appeared genuinely upset by it), we also accept Ms Hurst-Baird's account of this particular incident. We would add that we find it inherently unlikely that Mr Hurst-Baird would make up such a comment and inherently likely that the Claimant would, having made the comment, seek to 'play it down' by saying she said 'abuser' and 'abuse victim' (although we agree with the Respondent's counsel that 'abuser' and 'abuse victim' are not much better terms in the circumstances).

39. The Claimant was then on sick leave on 15-16 March 2018 and did not attend her appraisal which had been rescheduled for that date. The appraisal was rescheduled again, but the Claimant took the position that she would not attend unless a new appraiser was used. The Claimant in these proceedings

has repeatedly said that she did not 'refuse' to attend an appraisal with Ms Arjoon, but we find this to be a semantic point. It is clear that she refused to attend.

40. There was further correspondence between the parties and discussion about the appraisal during the latter part of March. On 23 March 2018, Ms Hurst-Baird sent an email indicating that the matter would be considered again once the report from OH was received (p 751).

41. On 21 March 2018 (p 732) and 16 May 2018 (p 858) the Claimant attended RTW interviews with Ms Arjoon without protest. The Claimant confirmed in evidence that she had no problem with Ms Arjoon being her line manager or dealing with sickness absence / return to work interviews after the August 2017 meeting. She just objected to her being her appraiser. In evidence she said (as she had said at the time) that this was because Ms Arjoon had not put her forward for development targets and because of her handling of the sickness absence meeting on 4 August 2017.

42. On 19 April 2018 (p 775) and 4 May 2018 (p 836) OH advised considering an alternative appraiser for the Claimant. Both OH reports take a similar approach, acknowledging that the decision on appraiser is a management issue. The 19 April letter put it as follows:

- For employer support and so the Trust is deemed to be performing it's duties in relation to HSE guidelines on stress management at work, it might be worth considering assigning Agatha to a different appraiser if this would help improve her symptoms and avoid any further negative impact on her psychological wellbeing
- To seek advice from HR whether re-assigning Agatha to a different appraiser is in line with any of the principles of the appraisal and development review such as session 2.7 and explore this further.

43. The 4 May letter added that this *"may be considered an adjustment in terms of the Equality Act 2010, which may apply in this case"*. However, neither letter expresses the opinion that a change in appraiser *would* have an impact on the Claimant's health, or is necessary because of some condition from which she is suffering, or that the Claimant has (or even is likely) to have a disability within the definition in the EA 2010. The letter of 19 April did, though, recommend (without qualification or deferral to management view) that a stress risk assessment should be carried out, and one was subsequently done by Ms Lee as we describe further below.

44. On 3 May 2018 Ms Lee met with the Claimant to discuss the appraisal issue again. She explained that she had decided that the Claimant should continue to be appraised by Ms Arjoon. Her reasons for that, reflected in an email she sent to OH and Ms Hurst-Baird on 27 April 2018 (pp 816-817), were that Ms Arjoon was the only person line managing the Claimant and no other Band 7 could provide an objective assessment of the Claimant's performance. The Claimant had been working closely with Ms Arjoon clinically and performing well when working with Ms Arjoon. Ms Lee had spoken to Ms Arjoon about it

and received feedback from her as to how effective the Claimant had been when working with her during a major procedure.

45. Ms Lee maintained these reasons in her evidence in these proceedings, including under cross-examination. She also provided further evidence about why there was no one else available to appraise the Claimant: no one else was working as closely with her; all the other available Band 7s had been the subject of allegations by the Claimant in the previous claims; Band 6s had either been the subject of complaints by the Claimant (indeed one had not been a witness at the previous Tribunal only because she was in counselling because of things that had happened with the Claimant in the past), or had not completed their appraisal training; Ms Hurst-Baird would not have been appropriate because the Claimant had complained about her previously; and Ms Lee was adamant that it would not have been appropriate for her to do it, given her seniority, the fact that she had been at the Trust for less than a year and did not work closely with the Claimant. The Claimant suggested in oral evidence that other individuals (including Ms Ola) were appraised by Band 6s, however her instructions to her counsel when she was cross-examining was that Ms Ola was appraised by Ms Lee. In the circumstances, we do not accept the Claimant's evidence on this point and, in any event, it cannot assist because we have no evidence at all about what Ms Ola's role was or who she worked with and so can make no judgment about who might be an appropriate appraiser for her. In the circumstances, we accept the Respondent's evidence as to the lack of alternative appraisers.

46. We also accept the Respondent's view that there was no good reason for the Claimant not to be appraised by her line manager and that the reasons advanced by the Claimant for saying there was a loss of trust and confidence were not reasonable in the circumstances. It is not reasonable for someone to say that they have lost trust and confidence in a colleague they have been working with because they make a mistake about the application of a sickness absence policy for which they apologise (even if in the same letter they express reservations about the person's conduct at the meeting in question). Nor was it reasonable for the Claimant suddenly to decide that it was Ms Arjoon who was responsible for her lack of professional development progress over the past six years, particularly at a point when she was bringing proceedings against the Respondent alleging that multiple other people, but not Ms Arjoon, were responsible for that.

47. It is not clear to us that Ms Lee re-visited the issue of the appraiser after receipt of the OH advice of 4 May 2018 (indeed, Ms Lee did not recall even having seen this second letter), but in any event we do not see what difference that advice could make given our view of its contents and the reasons advanced by Ms Lee for her decision.

48. Ms Lee had joined the Trust as Deputy Matron around July 2017 and then stepped up to the Matron role later that year. She had not been informed about the Claimant's previous claims until December 2017. In her witness statement she linked learning of this to being advised by Mr Dimech that the Claimant had been issued with the written warning for misconduct, but in oral

evidence what was at the forefront of her mind was that she had been told when she was asked to release staff who were witnesses for the hearing dates. She said she did not know that the Claimant had brought claims for discrimination (para 18). It was suggested to her by counsel for the Claimant that she must have known this because the Claimant was still in employment so it could not have been a claim for unfair dismissal, but we do not consider that it can be assumed that anyone not experienced in employment law would know it was likely that a claim brought during employment would be one of discrimination, and it was not even put to Ms Lee that she must have guessed or 'believed' (to use the statutory language) that the claim was one of discrimination. In the circumstances, there is no evidence from which we could conclude that Ms Lee either knew or believed that the Claimant had brought discrimination or victimisation claims against the Respondent in the previous Tribunal proceedings.

49. In any event, we find that the reasons that Ms Lee has given at all times for not changing the Claimant's appraiser were genuinely her reasons. They are reasonable and consistent and provide a complete explanation for her decision in this regard. The previous Tribunal proceedings played no part in her decision-making.

50. We add that it was put to Ms Lee and Ms Hurst-Baird that Ms Arjoon was not an appropriate person to have appraised the Claimant because an email from her on 23 March 2018 (p 796) indicates that she found *"very amusing"* the Claimant walking out of theatres shouting *"You all guilty", "Ta", "The wicked shall perish in hell"*, and that this was unprofessional. This email from Ms Arjoon at the time was taken as raising a complaint about the Claimant and was one of the allegations of misconduct for which she was subsequently subjected to disciplinary proceedings. However, we do not consider this means that Ms Arjoon was an inappropriate person to appraise. Indeed, on one view, it shows that she was prepared to overlook poor behaviour by the Claimant and was not personally offended by it, which makes her an appropriate person to conduct an appraisal.

<u>Alleged misconduct during March and April 2018</u>

51. During March 2018 a number of employees made complaints about the Claimant. Ms Lee was away during March 2018 and so these allegations were initially handled by Ms Hurst-Baird as Ms Lee's deputy and the Employee Relations team.

52. The first of these was Ms Hurst-Baird's complaint of 7 March 2018 about the Claimant making the *"sending a rapist to rape a rape victim"* comment as set out above.

53. The second was on 23 March 2018, when Desanka Babic (Theatre Sister, Practice Educator) and Ms Arjoon (as noted above) reported the incident where the Claimant was said to have been shouting in a loud voice in front of

the Sister's office *"You go home, watch your health"* and walking towards the lift shouting *"You all guilty", "Ta", "The wicked shall perish in hell".*

54. The third was on 28 March 2018 when Ms Arjoon reported that the Claimant had started arguing with Renata Alves (Team Leader) over a break, and that the Claimant had subsequently raised her voice to Ms Arjoon as well (p 758). Ms Arjoon recorded at the time that she had spoken to Mr Dimech who had enquired about the safety of team members and advised her to record the incident.

55. These matters were referred by Ms Lee and Ms Hurst-Baird to ER, and then to Mr Dimech. Ms Hurst-Baird also informed Mr Dimech about the Claimant's refusal to attend her appraisal with Ms Arjoon. Mr Dimech first heard about these matters at the end of March 2018, which was very shortly before the Wade Tribunal hearing was due to start. He decided it was not appropriate to take action before or during the Tribunal hearing itself because, as we understood his evidence, he did not want it to complicate those proceedings.

56. The last day of the hearing was Wednesday, 11 April 2018 and the Claimant returned to work the next day. Her name was omitted from the team schedule that day, but this was a mistake that had happened before with the Claimant and other staff and no claim about it was made in these proceedings, nor was the matter put to the Respondent's witnesses.

<u>Detriment 3.1 – decision to refer to disciplinary investigation - meeting with Lian Lee on 20 April 2018 (victimisation)</u>

57. On Monday, 16 April 2018 Mr Dimech decided to initiate a formal disciplinary process by commissioning a formal disciplinary investigation, which he did by writing to Jessica Wells to appoint her as investigating manager and set out terms of reference for her investigation.

58. The allegations that Mr Dimech asked Ms Wells to investigate were as follows:

- During March 2018 Agatha Ovonlen-Jones, Healthcare Assistant, repeatedly refused to follow a reasonable management instruction to have her appraisal with Jean Arjoon, Theatres Sister.
- On 7th March 2018 when Robin Hurst-Baird, Deputy Matron, discussed with Ms Ovonlen-Jones having her appraisal with Sister Arjoon, Ms Ovonlen-Jones made the comment "it is like you are sending a rapist to go rape a rape victim" which is inappropriate and offensive.
- On 23rd March 2018, Ms Ovonlen-Jones was speaking in a loud voice as she passed the sister's office where Sister Arjoon and Desanka Babic, Practice Educator, were and when Sister Arjoon looked out of the office, Ms Ovonlen-Jones made an inappropriate comment to her "You all guilty. Ta. The wicked shall perish in hell".
- On 28th March 2018 Ms Ovonlen-Jones was late returning from her lunch break and when this was raised with her by Renata Alves, Team Leader, Ms Ovonlen-Jones argued with her and shouted at her.
- On 28th March 2018 when Sister Arjoon tried to speak to Ms Ovonlen-Jones about her returning back late from her break, Ms Ovonlen-Jones refused to discuss it with her, she spoke in a loud voice and pointed and waived her finger at Sister Arjoon.

59. Mr Dimech did not suggest that he was unaware of the nature of the Claimant's previous claims and we find that he knew that the Claimant had brought discrimination claims against the Respondent. Mr Dimech maintains that this played no part in his decision to refer the matter for disciplinary investigation. He says that he took that step because they were sufficiently serious allegations to warrant formal investigation, in particular given that the Claimant had a live written warning on file. We find that this is a complete and adequate explanation for why Mr Dimech referred the matters to formal disciplinary investigation. This is particularly so given that he acted as soon as the Tribunal hearing was over, without waiting for the result of that hearing.

60. We also do not consider he could reasonably have done anything else. With a live warning on file for similar conduct, it would have been irresponsible for Mr Dimech not to refer the allegations to a formal disciplinary investigation. Like the Wade Tribunal, we do not consider that the coincidence in timing of the Tribunal proceedings and the Claimant's acts of misconduct (and thus the need for a disciplinary investigation) means that Mr Dimech's decision must have been tainted by the Claimant's protected acts. Nor do we consider that the evidence of praise for the Claimant and her team previously means that there was a sudden turn in the Respondent's attitude toward her after the Tribunal hearing. On the contrary, there is a long history on the part of the Claimant of poor behaviour towards other members of staff and so far as we can see the Respondent has appropriately dealt with this on an increasingly formal basis in accordance with its disciplinary procedures.

61. On 20 April 2018 the Claimant met with Ms Lee who advised her that a disciplinary investigation had been commenced and later that day Ms Wells emailed the Claimant providing her with a letter (pp 776-778) setting out the allegations and inviting her to an investigation meeting on 25 April 2018. The letter made clear that the Claimant could be accompanied to this meeting.

62. The Claimant contends that it was Ms Lee's decision to refer the allegations for a formal disciplinary investigation, but we find that it was not, it was Mr Dimech's decision. Further, we do not find that Ms Lee played a material role in referring the matters to ER in the first place because she was absent in March 2018 and it appears that all the allegations went straight to ER when they were made. In any event, we accept Ms Lee's evidence that she felt that there were a number of serious issues and that given the need to provide an efficient and safe service to patients it was appropriate to refer them to Mr Dimech.

<u>Detriment 3.2 – covert recording (victimisation)</u>

63. As noted above, the Claimant's claims before the Wade Tribunal had included an allegation against Mr Peters in relation to the 4 August 2017 sickness absence meeting. During the course of the hearing the Claimant's representative at that meeting (Jenin Ola) told the Claimant and the Claimant's legal advisers that she had recorded the meeting of 4 August

2017. The Claimant's counsel told the Respondent that there was a recording, but not the circumstances in which it had been made, or that it was Ms Ola who had done it.

64. The Respondent then sought disclosure of the recording that had been mentioned by counsel. This request was first made between solicitors by email of 6 April 2018. The Claimant's solicitor replied on 8 April 2018 that (p 1120) *"Our Counsel would like to make it clear that he has* not *listened to the transcript, and was not intending to rely on the recording in the Tribunal"* , but *"You are of course entitled to a copy of the recording and we will provide a copy of the same, but we query the need for a transcript: there does not seem to be a dispute between the parties about what was said in the hearing"*. On 9 April 2018 the Respondent's solicitor requested the recording again (p 1119) and later that morning, the Claimant's solicitor clarified that she did not herself have a copy of it, but would discuss it with counsel. It appears from Mr Peters' email of 4 June 2018 (p 892) that it was on 9 April 2018 that the Claimant then decided to drop her allegations concerning the 4 August 2017 meeting and Mr Peters was then no longer required as a witness.

65. The Respondent did not, however, drop the issue of the recording. The Respondent's solicitor continued to press the Claimant's solicitor for it. By email of 10 April 2018 the Claimant's solicitor promised to provide the recording, but never did. Much later, she confirmed by email of 23 July 2018 (p 1111) that she had never had it.

66. Mr Simmons was following the progress of these enquiries and was concerned that there had been a covert recording of the sickness absence meeting in breach of the Respondent's Policy and Conduct Rules. He gave evidence to the Tribunal that he also considered that the recording would help resolve complaints the Claimant and Ms Ola had raised about the conduct of managers at that meeting, although we do not accept that this consideration played any real part in his decision-making as those complaints had been dropped by this point.

67. In a meeting of which Mr Simmons made a note immediately after the event (p 782) and also by email and letter of 20 April 2018 he asked the Claimant to provide a copy of the recording by 25 April 2018 (p 780). He tried to give the Claimant a copy of the letter at the meeting, but she refused to accept it and he understood her to deny that the recording existed, so he read the letter out to her and then emailed the letter to her later that day confirming the conversation (p 812). The Claimant in oral evidence denied having refused to accept the letter, and said that she had not denied that the recording existed. While we expect that the Claimant probably did not outright deny that the recording existed, we accept that what she did say (which would have been along the lines of her subsequent email) would reasonably have come across to Mr Simmons as a denial that the recording existed. Given Mr Simmons' double contemporaneous record of the meeting in his note at p 782 and his email at p 812, we accept that he genuinely (and reasonably) understood the Claimant both to be refusing to accept the letter and denying that the recording existed. We add at this point that delivery of letters in person is a

standard practice adopted by the Respondent's ER department for members of staff who are in work. This is not something that was done especially to humiliate or upset the Claimant as was suggested to the Respondent's witnesses in cross-examination.

68. Since we accept Mr Simmons' evidence as to what he said in the meeting, it follows that he did not in the letter or at the meeting either accuse the Claimant of making a covert recording or threaten her if he she did not provide it. We are fortified in this conclusion by the Claimant's email of 25 April 2018 (p 811), which we consider would be in rather different terms if she genuinely considered she was accused of making a covert recording. That email does not suggest that the Claimant felt she had been falsely accused of making the recording. Instead, she says she is setting the record straight as to whether "a recording exists". She referred Mr Simmons to her lawyers, said that she did not instruct or collude anyone in recording the meeting, that she did not have the equipment to do so, but she did accept that over the Bank Holiday weekend it was brought to her attention that a recording existed. She said that she did not physically possess it or make it and she could not therefore provide it. Mr Simmons responded on 26 April 2018 (p 810) asking her to say who was it who brought it to her attention over the bank holiday. The Claimant did not reply.

69. In the meantime, following Mr Simmons's meeting with the Claimant on 20 April 2018, and before receiving the Claimant's email of 25 April 2018, Mr Dimech on 24 April 2018 added to the terms of reference two allegations arising out of the Tribunal proceedings (p 790) as follows:

> - During the recent Employment Tribunal Ms Ovonlen-Jones's solicitor informed the Trust's solicitor that a recording had been made covertly of a sickness hearing in August 2017. Ms Ovonlen-Jones has been asked for a copy of the recording but has refused and denied that a recording was made. Email communication from her solicitor confirms the existence of a recording.
> - During the recent Employment Tribunal a copy of a student timetable was produced by Ms Ovonlen-Jones as intended evidence. The particular document contains hand written notes showing that it belongs to Desanka Babic, Practice Educator, and was obtained without her knowledge or permission.

70. Mr Dimech also added to these terms of reference that Ms Wells should *"Review Ms Ovonlen-Jones' wider behaviour as to whether it is disruptive, manipulative and makes her unmanageable"*. When questioned by the Tribunal as to why he had added this more serious over-arching charge, Mr Dimech said that it was because he wanted to get clarity from the investigation about the wider picture with the Claimant's behaviour. While he perhaps made his point a little too forcefully, we also accept that he genuinely believed that behaviour such as the Claimant was alleged to have engaged in had the potential to impact on patient safety because it could affect the way the team worked together. It is obvious that poor communication and conflict between staff, in particular where staff become afraid to challenge others because of the way they may react, may have an adverse impact on patient care.

71. The adding of additional allegations to terms of reference in this way was an exceptional step, but one that we find to be reasonable in the circumstances

as these were on their face allegations of misconduct that warranted investigation. Moreover, although they were allegations that arose out of what happened at the Tribunal, the Claimant's actions which potentially constituted misconduct were separate from (and unnecessary to) the EA 2010 claims that she was making in those proceedings, or the evidence that she gave in connection with them. If a litigant acts (or appears to have acted) improperly in obtaining evidence for a Tribunal in a discrimination claim, the anti-victimisation provisions do not provide them with immunity against an employer taking disciplinary action in respect of that misconduct, provided that the (apparent) misconduct is genuinely the reason for the employer's action. With regard to Mr Dimech's reasons for acting at this point, we do consider that the additions he made to the terms of reference on 24 April 2018 were made with a view to building the strongest possible case against the Claimant, but we find that this was because he was genuinely concerned about her conduct and behaviour, its impact on patient safety and other staff and not because she had brought claims under the EA 2010.

The disciplinary investigation

72. Ms Wells had not worked with the Claimant previously and did not have any prior knowledge of her. They met for the first time at the first investigation meeting on 25 April 2018. She learnt about the Claimant's previous employment tribunal proceedings from Desanka Babic and the Claimant and her representative during the course of the investigation. At no point, however, did anyone tell her that the Claimant had brought discrimination claims. She was questioned in the same way as Ms Lee on this point and for the same reasons we are not prepared to infer that she knew or believed that the Claimant had brought discrimination claims at the time when she was carrying out her investigation.

73. The first investigation meeting was only the day after Mr Dimech had added the two additional allegations to the terms of reference. The Claimant complained that it was not professional for these allegations to be added in without her being given notice of them, but she did not object to answering questions about them at that meeting. The Claimant did not bring a representative with her to this meeting as she had wrongly thought that she had not been entitled to bring one, but she also did not object to going ahead without a representative.

74. As part of her investigation, Ms Wells also interviewed ten other witnesses as detailed in her report which she completed in June 2018. The Claimant suggested in oral evidence (for the first time) that some of these witnesses had been unnecessary, and were just interviewed to bolster claims against her, but we do not accept this as it is apparent that all witnesses questioned were witnesses that Ms Wells had reason to believe may have relevant evidence to give. This particular complaint by the Claimant was not put to Ms Wells in any event.

75. All witnesses interviewed, and the Claimant herself, were sent the notes of each meeting after the interview and given an opportunity to clarify or correct anything in the notes. We can therefore rely on the notes as an accurate record of the meetings.

76. On 30 April 2018, Ms Wells wrote to the Claimant again inviting her to a second investigation meeting on 9 May 2018 (p 819).

77. On 8 May 2018 the Claimant commenced Claim Nos. 2204503/2018 and 2204504/18 claiming race and age discrimination and victimisation in relation to the disciplinary investigation (the first two of the claims that are consolidated in these proceedings).

78. On 9 May 2018 the Claimant was unwell and informed Ms Wells that she would not attend the second investigation meeting (p 854).

79. By email of 10 May 2018 Ms Wells wrote to the Claimant saying that to avoid further delay could the Claimant answer three further questions by email so that the investigation could be concluded. The questions included whether it was Jenin Ola who made the covert recording. In her evidence to the Tribunal, the Claimant said that it was Ms Ola who made the recording (something which her representative Edward Carey told the Respondent at the final disciplinary hearing in October 2018). The Claimant in her oral evidence maintained that she had answered this question in her reply to Ms Wells of 17 May 2018 (p 866), but she did not. That email elaborately avoids answering this question. The Tribunal asked the Claimant why that was and the Claimant was unable to say, although she suggested that the email looked incomplete. In the Claimant's defence at the disciplinary hearing before Ms Colas (see below) Mr Carey suggested that the Claimant was trying to protect her friend, but that is not an explanation that the Claimant ever gave at the time, nor is it an explanation that she gave to the Tribunal when she had the opportunity. While we do not necessarily agree with Ms Colas that if this was the Claimant's motivation it did not amount to mitigation, given that the Claimant has never suggested that this was her motivation, even now it is 'in the open' that it was Ms Ola who did the recording, the question of this being a mitigating factor does not arise.

<u>Detriment 3.4 – Validation of Care Certificate (victimisation)</u>

80. Since 2015 the Respondent has made it a mandatory requirement for all HCAs to complete the Care Certificate training programme. This covers fundamental skills such as patient care and health and safety. The Claimant had been reluctant to do the Care Certificate, regarding it as unnecessary for an experienced HCA. On 3 November 2016 Ms Kitcher had informed the Claimant that, as an experienced practitioner, she could complete just 4 out of the 15 modules in order to obtain the certificate and the Claimant agreed with this. However, from July 2017 the Claimant refused to meet with Ms Kitcher about this. As set out above, the Wade tribunal dismissed the Claimant's claim that Ms Kitcher had acted unlawfully regarding the Care

Certificate insofar as the events before that Tribunal were concerned and found that the Claimant had not since 2016 taken Ms Kitcher's consistent advice to complete the Care Certificate.

81. After the Tribunal hearing Ms Kitcher contacted the Claimant about the Care Certificate again. The meeting had to be rescheduled as a result of Ms Kitcher extending her annual leave because her daughter had had a baby (p 861). The meeting took place on 17 May 2018. Very shortly before this meeting Ms Kitcher had been informed that the Claimant had been unsuccessful at the Employment Tribunal (judgment having been sent to the parties on 14 May 2018). Her evidence, which we accept, was that she intended to have a 'fresh start' with the Claimant and wipe the slate clean. However, at the meeting on 17 May 2020 the Claimant wanted to discuss the employment tribunal and did so at some length, although she also apologised for putting Ms Kitcher through it and said it was nothing personal. Ms Kitcher accepted her apology and, because the Claimant appeared nervous about coming into work she said, intending to compliment the Claimant on her courage at returning to work but using what she accepts to have been inappropriate language, words to the effect of 'you have a lot of balls turning up to work after the ET hearing'. The Claimant also says that Ms Kitcher said words along the lines of *"I can see that you love your job and like everyone else you've got bills to pay. Look, let's us make a fresh start from today".* We accept that this was also said as it reflects what Ms Kitcher said was her intended approach to the Claimant.

82. Ms Kitcher then went through the Claimant's workbook with her. Ms Kitcher's email of 21 May 2018 to Ms Lee, Ms Hurst-Baird, and Mr Dimech (p 861b) indicates that the Claimant had still not accepted that she needed to do the Care Certificate and that Ms Kitcher had to explain this requirement again. She found that the Claimant had not started on the modules. They discussed how the Claimant now had 20 weeks to complete the four modules, which was ample time in Ms Kitcher's view as normally staff have to complete 15 modules within that time. It is apparent both from her evidence to the Tribunal and her emails at the time that although Ms Kitcher had gone into the meeting intending it to be a fresh start, she was frustrated by the fact that the Claimant had not taken the same approach and had also still not taken on board previous advice about the Care Certificate.

83. Ms Kitcher was worried after that conversation that she had used inappropriate language when she said that the Claimant had 'balls for turning up' and she was also worried about how to handle the Claimant bringing up the ET claim. As already noted, she wrote to senior colleagues by email on 21 May 2018 conveying the essence of the conversation (p 861b). This was the first of many emails over the next couple of months where Ms Kitcher copied in these more senior individuals. Her evidence, which we accept, was that this is her standard practice where an individual is posing challenges or there is a performance issue. On this occasion, Ms Lee responded warning Ms Kitcher not to touch on ET matters in future and Ms Kitcher replied that she had no intention of doing so, it was the Claimant who raised it.

84. The position as at 17 May 2018 was thus that the Claimant had four modules to complete for her Care Certificate which needed to be done in 20 weeks.

85. The Claimant and Ms Kitcher were due to meet on 24 May 2018 but it had to be rescheduled because the Claimant was having a trial day in Endoscopy, then she was unable to meet on 30 May 2018 due to clinical work (p 893) but hoped to meet on 31 May 2018.

86. The Claimant sent Ms Kitcher the completed Equality and Diversity (E&D) module on 6 June 2018 (p 895). Ms Kitcher said in email of 6 June 2018 that she would need time go through it and said she would see her on Friday, which would have been 8 June 2018 (p 896). However, she did not see her on Friday. Ms Kitcher's evidence was that when she read the E&D module she was very concerned about what the Claimant had written as she had discussed her own situation rather than answering the questions in the module so Ms Kitcher could not sign this off.

87. On 14 June 2018 Ms Kitcher was interviewed in relation to the disciplinary investigation (p 919). It is clear from that interview that she was finding dealing with the Claimant at this point very difficult, and this was also her evidence in these proceedings.

88. Ms Kitcher spoke to Mr Simmons on or about 15 June 2018 (p 939) seeking support regarding dealing with the Claimant and managing her other workload. She also emailed Mr Dimech on the same day (p 938) and asked for some time out from dealing with the Claimant. She wrote again to Mr Dimech on 18 June (p 937):

> Thank you for your reply. I just need a break from a little while from grief of having to repeat myself constantly and walking on egg shells.

89. On 28 June 2018 the Claimant emailed Ms Kitcher a set of four modules which she had completed (p 1032). On 2 July 2018 Ms Kitcher told the Claimant that she would review these and arrange a time to meet. On 4 July 2018 Ms Kitcher asked to speak with Ms Lee and Ms Hurst-Baird about it as she was not sure how to deal with the Claimant's response to the E&D module, which the Claimant had answered with reference to her own personal perceived experiences of discrimination and victimisation rather than focusing on the question asked (p 1031).

90. Ms Kitcher had been going to provide some initial feedback to the Claimant on 9 July 2018 (pp 1036-1037) by email, but first sought Ms Lee's views on that and then did not email the Claimant. On 18 July 2018 the Claimant chased Ms Kitcher (p 1067), copying in Andrew Dimech and Nina Singh, complaining that it had been nearly three weeks since she had asked for the modules to be signed off. Ms Kitcher replied (p 1066) at 08.57 saying that there was no need for the Claimant to copy in senior managers, but offering to meet at 3.30pm that day. She also said in that email that she had printed out and marked with pencil amendments and additions Fluids and Nutrition and Infection Control and that those could be signed off once discussed, but

the others need further discussions 'as you have gone off track on some of the questions'. The Claimant could not make that date because she was due to have a meeting with Ms Hurst-Baird regarding her sickness absence (see below) and so Ms Kitcher emailed to say that she would 'see the Claimant next week'. Subsequently, at 11:15 Ms Kitcher emailed senior colleagues explaining that part of the reason she had not got in touch with the Claimant over the last month was because of her request to have a *"break from having to discuss emotive and challenging situations with her"*, and partly because of other work that she had on that month. She said that 'just wished to document this should there be any further repercussions from Miss Ovonlen-Jones' (p 1070).

91. There is a lack of clarity about what happened later on 19 July which was also the day of the Claimant's sickness absence formal meeting and first disciplinary hearing, both of which we deal with below. At the least, Ms Kitcher did on 19 July deliver a copy of the E&D module with her handwritten amendments to the Claimant in the Endoscopy department, although they did not meet in person. Neither party had a clear recollection of this, but we find that this was done as there is no other way the Claimant could have received the version of the E&D module we have in the bundle with handwritten amendments, and it is clear that she did receive that because the next day, 20 July 2018, the Claimant emailed Ms Kitcher saying that she had redone the E&D Module (p 1080) and attached what she believed to be an amended version of that module. The Claimant has produced for the Tribunal an email with that amended version as an attachment. Ms Kitcher's evidence is that what was sent through by the Claimant had not been amended and the Respondent has provided that email to the Tribunal with an unamended version of the attachment. It is not possible for us to tell which version is genuine because the document properties for both versions indicate (clearly wrongly) that they were last modified on 6 June 2018 at 14.56. In any event, ultimately nothing turns on which version was sent. If the unamended version was sent that would have become apparent and been corrected in due course, had the Claimant not been suspended shortly thereafter.

92. What is also not clear is what happened to the other three modules. If we were basing our judgment solely on the emails that we had prior to the Respondent disclosing and seeking to add to the bundle (just before closing submissions) a further email from Ms Kitcher of 19 July 2018 at 16.35, then we would have concluded that the position was as per Ms Kitcher's email at 08.57 and that the other three modules were very nearly ready to be signed off, but had not been signed off as there were still minor points to discuss with the Claimant.

93. With the additional email from Ms Kitcher of 16.35, the picture is only very slightly different. We acknowledge that the Claimant denies receiving this email and that she did not, as a result of its late disclosure, have an opportunity to cross-examine Ms Kitcher and to put to Ms Kitcher her contention that the email is fraudulent, but we cannot imagine that such cross-examination would have persuaded us that the email was fraudulent, given that it looks in every respect like a genuine email, there is nothing inherently

implausible about someone sending a fresh email with a new subject title rather than replying to a previous chain, and the email is also one that we would expect to have existed given Ms Kitcher's consistent practice between May and July 2018 of documenting by email to senior managers all of her interactions with the Claimant. Even if Ms Kitcher had only taken the E&D module (and not all four modules) round to the Claimant in Endoscopy (as she clearly did), we would have expected her to send such an email as a record. As it is, we accept that the email is genuine, and therefore accept it as corroboration of Ms Kitcher's oral evidence to us that she did in fact take all four annotated modules round to the Claimant on 19 July 2018. It is not, however, evidence that the other three modules had been signed off (and we do not therefore accept Ms Kitcher's oral evidence to that effect) as the email concludes by asking the Claimant to look at the recommendations and that they will meet next week for 45 minutes to discuss. While we have accepted this email and its genuineness, we have given it less weight than we would have done had there been cross-examination on it, and as noted above have considered what the position would have been if we had not admitted this further email into evidence.

94. Whatever happened on 19 July 2018, there is no dispute that after the Claimant sent the email on the evening of Friday, 20 July 2018 with the possibly amended version of the E&D module there was no further contact or exchange between the Claimant and Ms Kitcher prior to the Claimant being suspended on Wednesday, 25 July 2018. No action was taken by Ms Kitcher in relation to the Care Certificate after that point and the Claimant at no point chased or asked for any further action to be taken.

95. We find that the reason Ms Kitcher did not validate the Claimant's Care Certificate was because it was not complete either on 17 May 2018 or at any point before the Claimant was suspended on 25 July 2018 and the Claimant did not thereafter pursue the matter. Although we do consider that part of the reason why Ms Kitcher delayed in responding to the Claimant in June and July 2018 was because she was finding it difficult to cope with the Claimant and this was in part because of the Tribunal proceedings, this only explains the delay. It is not the reason why Ms Kitcher did not sign off the Care Certificate. Had the Claimant not been suspended, we are satisfied that Ms Kitcher would have validated the Claimant's care certificate within the 20-week period that the Claimant had to complete it (which would have ended in October 2018). That is, she would have done if she was satisfied that the Claimant had made the necessary amendments and we do not know what her view would have been of the amended version of the E&D module that the Claimant says she emailed on 20 July 2018 because Ms Kitcher did not see that version (or, at least, did not have an opportunity to review it). We consider that Ms Kitcher approached the marking of the Claimant's work on the modules objectively and her comments on the Claimant's E&D module that we have seen are appropriate and reasonable. Whatever her difficulties in coping with the Claimant, she did not allow them to affect her assessment of the Claimant's work.

96. We should add that the Claimant in her witness statement alleged that redeployment to Endoscopy prevented her completing the Care Certificate modules, but this is plainly not the case as she continued to work on the modules and to liaise with Ms Kitcher as set out above following her move to Endoscopy on 30 May 2018 (which we deal with below).

Detriment 3.5 – temporary redeployment (victimisation)

97. While the disciplinary investigation was still on-going, senior staff (in particular Mr Dimech, Mr Simmons and Ms Lee, but also those more senior to them including the Chief Nurse Eamonn Sullivan and Nina Singh, Director of Workforce) were concerned about what appeared to them to be the breakdown in working relationship between the Claimant and other staff in her team. There was also the ongoing problem that the Claimant had refused to be appraised by Ms Arjoon even after Ms Lee's further decision on that of 3 May 2018 (see above). As already noted, the Respondent's position (which we accept) is that poor working relationships between staff pose a risk to patient safety and they considered that there was such a risk in the case of the Claimant and her team. It was decided that it would be best for the Claimant to be temporarily redeployed. This is something that the Respondent does for staff from time to time, but Mr Simmons was unable to think of another example where it had been done as an alternative to suspension. Mr Simmons, Ms Lee and Mr Dimech all viewed it as an alternative to suspending the Claimant while the disciplinary investigation continued, but this was not what they said to the Claimant. When questioned about this by the Tribunal, Mr Simmons acknowledged that that had been a deliberate decision because he considered it was less threatening simply to propose redeployment than to say explicitly that it was an alternative to suspension.

98. The decision was presented to the Claimant by Mr Simmons at a meeting on 23 May 2018 at which Ms Lee was also present (p 863) and confirmed in a subsequent email from Ms Lee (p 877), which included the following:

> I have informed you that we have heard you said there is irreversible breakdown in your working relationship with your line manager Sister Jean Arjoon. In addition to this Theatre staff have found it difficult to ask you to do things because they are anxious about your reaction. They are working around you and find it difficult to discuss things with you because they do not want to encounter conflict. This has an impact on effective team communication and team working.
> I have identified that it is a risk to patient safety if there is lack of team communication and team members are working around you to avoid difficulty.
> We recognised that it is stressful for everyone to work in theatre post ET but in a highly pressurised clinical environment good communication and effective team working is key Patient safety is essential and any risk cannot be ignored.

99. The Claimant was given two options for redeployment: Theatres in Sutton or Endoscopy in Chelsea, in both cases as a supernumerary. At her request she was given a chance to try out both options and chose the latter. The Claimant was told at the time that it would be a temporary measure for approximately 4-6 weeks to allow time to consider how working relationships,

communication and team working could be repaired and rebuilt. In the event, however, the Claimant remained redeployed until she was suspended on 25 July 2018 and never returned to her substantive post.

100. On 30 May 2018 the Claimant submitted a grievance about the move to Endoscopy (pp 888-9), asserting it was victimisation and asking to return to her substantive role or, if not, be employed in Endoscopy at Band 4 rather than Band 3 (they were all Band 3 roles). The grievance was acknowledged by Ms Lee and a grievance meeting took place on 28 June 2018 in the Claimant's absence as there had already been previous postponements. The grievance was not upheld as Victoria Ward (Lead Nurse/Project Manager Macmillan Hotline) decided that the redeployment was necessary due to the breakdown in working relationships and not because of the tribunal claims (pp 1019-1022). The Claimant was notified of that decision on 3 July 2018. The Claimant appealed on 13 July 2018. An appeal hearing was scheduled for 23 August 2018 but did not take place because the Claimant was suspended at the time (we deal with this below).

101. The Claimant complains that redeployment was an act of victimisation and the Respondent's argument that she was a risk to "patient safety" was a sham, as it had not been suggested previously that she was a risk to patient safety when redeployment was proposed on previous occasions in 2015 and 2017. However, we do not accept the Claimant's argument in this regard. We find that senior managers at the Respondent genuinely regarded the Claimant's behaviour, and the resulting difficulties in working relationships between her and multiple members of her team, posed a risk to patient safety. This is because, as we have already accepted, poor communication between team members, or an unwillingness to challenge team members because of fear of how they may react, poses a risk to patients. We find that the Respondent's decision to redeploy the Claimant was, objectively viewed, clearly to her benefit. It provided her with the opportunity for a completely fresh start in a new team, at a time when she was facing significant disciplinary allegations, there were multiple relationship problems with individuals in her own team and an impasse had been reached with regard to her appraisal, which she was still refusing to have carried out by her line manager.

102. Further, we find that the senior managers involved in the decision to redeploy (in particular Mr Simmons, Mr Dimech and Ms Lee from whom we have heard) were not influenced in that decision by the fact that the Claimant had brought proceedings under the EA 2010 against the Respondent. They acted because of the difficulties in working relationships within the team and their concerns for patient safety.

103. The Claimant in her witness statement further alleges that in redeploying her to Endoscopy Ms Kitcher made it possible to appoint her "Younger, White Male Porter boyfriend named Finn" to the Claimant's previous role, and victimised her for the ET claim. However, Ms Lee in her witness statement explains that there was a live job advert at this time for two HCAs in Chelsea Theatres but not as a replacement for the Claimant but existing vacancies in the team. Even now, the Claimant's role has not been filled. Neither side

cross-examined on these points and given that the initial burden is on the Claimant with regard to the discrimination and victimisation claims we record for completeness that we do not accept this part of her case.

Support for the Claimant

104. Following the Claimant's move to Endoscopy on 30 May 2018, the Respondent took two particular steps to support her:-

105. First, on 20 June 2018 Ms Lee completed a stress risk assessment with the Claimant as recommended by OH, during which she confirmed (p 953) that she had no concern about lack of support and felt a *"sense of inclusiveness"* by the Endoscopy team. The stress risk assessment was also updated on 6 July.

106. Secondly, Mr Simmons, Mr Dimech, Ms Lee and others discussed and drew up a draft action plan with advice from Learning and Development with a view to supporting the Claimant in mending relationships and returning to her substantive post. A draft was sent between Mr Simmons and Mr Dimech on 18 June 2018 (p 944) and it was suggested repeatedly in cross-examination of the Respondent's witnesses that this was a 'sham' document intended to protect the Respondent from a victimisation claim. It was, however, clear that the Claimant's counsel had not appreciated that there is documentary evidence in the bundle that on its face shows the Respondent took this beyond the draft theoretical stage even in the short period that there was before the Claimant was suspended on 25 July 2018. In particular, Ms Lee discussed it with the Claimant in a meeting on 6 July, and a copy was sent to her by Mr Dimech on 11 July (p 1039), where he explained he was in the process of arranging the professional development element of the plan with the Professional Education Lead and Apprenticeship Manager and they were also working with external suppliers on other elements. On 23 July 2018 Mr Dimech wrote to the Claimant about the first component of the draft remedial action plan (p 1237), giving her contact details of the Professional Development Lead and Apprenticeship Manager who the Claimant was to contact to arrange a suitable time to discuss. The Claimant in cross-examination denied having seen this email at p 1237 previously, but it was not suggested to Mr Dimech that it was not genuine and we have no reason to doubt that it is. In any event, we find that the Respondent's efforts with the draft action plan were not a 'sham'. They were genuine and had the incidents on 20 July not happened we have no reason to believe that the Respondent would not have followed through with the plan.

First disciplinary hearing – 19 July 2018

107. Ms Wells concluded her investigation into the disciplinary allegations in June 2018 and prepared a detailed 25-page report with 32 appendices (p 957ff). With the exception of one allegation (concerning rudeness to Ms Arjoon) Ms Wells found that there was evidence to substantiate all the allegations. She further concluded that there was *"evidence to support that Ms Ovonlen-Jones'*

behaviour is disruptive to the wider team and causes difficulty for managers in senior positions as well as her direct line manager, to manage and support her in line with normal procedures. Ms Ovonlen-Jones has repeatedly demonstrated behaviours which negatively impact team effectiveness and morale and limit how other staff feel they are able to interact with her which poses a risk to patient safety".

108. In the light of Ms Wells' conclusion in her report, on 21 June 2018 Mr Dimech considered that the allegations that had been substantiated were serious enough to warrant disciplinary proceedings, and sent the Claimant a letter inviting her to a disciplinary hearing at which it was stated the following allegations would be considered (p 981):

1. During March 2018 you repeatedly failed to follow reasonable management instructions to have your appraisal with your line manager, Sister Jean Arjoon.

2. On 7 March 2018 during a meeting with Deputy Matron Robin Hurst-Baird to discuss having your appraisal with Sister Arjoon, you made the comment, "It is like you are sending a rapist to go rape a rape victim", which was highly inappropriate and highly offensive behaviour.

3. On 28 March 2018 when you returned late from your lunch break and Team Leader, Renata Alves attempted to address this with you, you argued with her and shouted at her and she found your manner very aggressive.

4. You were obstructive and uncooperative during the investigation and would not, despite repeated requests, provide details or a copy of a covert recording made of a formal sickness meeting in August 2017.

5. You obtained a personal copy of a student timetable belonging to Sister Desanka Babic from her office without her knowledge and consent, amounting to a serious breach of trust and confidence.

6. Your overall behaviour has been disruptive, manipulative and could be considered unmanageable.

109. The hearing took place on 19 July 2018, having been rescheduled from 11 July 2018. It was chaired by Sofia Colas (Director of Operations – Private Care). The Claimant attended with her representative. Ms Colas had had no prior knowledge of or contact with the Claimant and met her for the first time on 19 July 2018. She was experienced in managing disciplinary processes. At the hearing (and at the reconvened hearing on 12 October 2018 – see below), she learned from the Claimant and her representative about the Tribunal proceedings and that they were discrimination claims, as she refers to this in this dismissal letter ultimately sent on 26 October 2018 (p 1245ff). She had no prior knowledge of those claims, however, and we accept that the only information she received about them was from the Claimant and her representative.

<u>Altercation with Marvin Debil – 20 July 2018</u>

110. On 20 July 2018 an incident occurred between Marvin Debil (Decontamination Lead Technician/HCA in the Endoscopy Unit) and the

Claimant. Mr Debil reported it immediately to Ms Hurst-Baird and prepared a statement that same day (p 1090-92). In that statement he describes how he was using the computer to prepare a report that Matron had requested at about 10.15am. He stood up to speak on his phone with the Health Edge Support Team and was still standing in front of the computer with his hand on the mouse, when the Claimant sat down at the computer and switched users without asking whether he had finished or not. As a result, he lost the report he was working on. He said to the Claimant that it was inappropriate for her to switch user without confirming that he was finished or not. She said that he was not using the computer, he was on his phone. He said that he was on the phone to the support team and she *"flares up like a lightning"* and *"shouted 'YOU ARE A LIAR' and 'GO'".* He described how this upset him greatly as he had not been called a liar previously, he was shaking and upset and went straight to speak to Ms Hurst-Baird.

111. After the incident, Mr Debil had seen Laurence Padua (Sister) and Ms Hurst-Baird and they provided statements attesting to how upset Mr Debil was after the incident (pp 1088-1097 and 1104).

112. The Claimant was asked on five occasions by the Respondent, beginning immediately after the incident, to provide a statement. She was also informed by Mr Dimech on 25 July 2018 that this was being added to the ongoing disciplinary proceedings as an allegation, along with allegations about her conduct when Ms Hurst-Baird tried to give her a letter with the outcome of the sickness absence meeting which took place on the same day (see below) (pp 1123-1124).

113. The Claimant did draft a statement on 25 July 2018 and sent it to her representative (p 1206), but in the end she did not share this with the Respondent until 11 October 2018 (p 1205), the day before the reconvened disciplinary hearing (see below).

114. In the Claimant's statement of 25 July 2018, she states that she did not use the computer when told not to by Marvin. This is also what she said in the disciplinary hearing with Ms Colas on 12 October 2018 (p 1210), although she accepted that she had said "that's a lie" to Marvin when he said that he was using the computer. Ms Colas gave evidence both to the appeal hearing with Ms Bateman and to this tribunal that she checked twice with the Claimant whether she had used the computer and that she confirmed not. These particular questions do not appear in the notes of the disciplinary hearing, but given Ms Colas' recollection at the appeal stage, we are prepared to accept that she did check these points. In any event, it is absolutely clear from the notes that the Claimant said that she did not use the computer and that Ms Colas understood her to be saying that. Further, we note that at no point before giving evidence in these proceedings did the Claimant admit that she did use the computer. It is not in her grounds of appeal against dismissal (p 1271).

115. It was because the Claimant had denied using the computer that Ms Colas checked the computer log records and found that the Claimant had in fact

logged onto the computer a number of times that morning, including on the first occasion at 10.09 when her log-on had occurred in the very same minute as Mr Debil was logged off. Ms Colas regarded this as strong evidence that Mr Debil's account of the incident was to be preferred and that the Claimant had lied about this incident.

116. In the Claimant's evidence to this hearing she was very clear that she had used the computer and that what she had done was to 'switch user' when she thought that Mr Debil was not using the computer. We find that the account the Claimant gave at this hearing may well be closer to the truth of what happened at the time, and the Claimant may not have realised that the effect of switching user was to log the other person off the system. However, this is not the account that the Claimant gave to the Respondent during the disciplinary proceedings as set out above and, like Ms Colas, we conclude that the Claimant lied about this incident to the Respondent and that Mr Debil's account of the incident is accordingly to be preferred.

117. In the circumstances, contrary to suggestions made by the Claimant's counsel during cross-examination, the Claimant was not wrongly accused by the Respondent in relation to this incident, nor was the Respondent's ultimate conclusion that this was an act of misconduct by the Claimant an unreasonable one based on the evidence they had. This was not a minor incident, but one which caused Mr Debil significant upset which we have (and the Respondent had) no reason to doubt was genuine. Further, since Mr Debil is relied on by the Claimant as a comparator, we record our finding that Mr Debil's circumstances were completely different to the Claimant's at this point. Although there had been one previous occasion when a colleague had considered him to be rude on the phone, this had been dealt with informally by Ms Padua and Mr Debil had apologised (p 1222). He was not already subject to a live warning in relation to his conduct. He was not already subject to a disciplinary investigation in relation to similar incidents. He had apologised for the previous incident (something the Claimant never did in relation to any of her incidents). Further, he was not the aggressor on this occasion, but the person who complained.

118. We should add that the fact that there was subsequently on 12 September 2018 a further complaint by another member of staff about Mr Debil (p 1298) does not show that the Claimant was treated less favourably than him on 20 July. Nor does it show that he must have been the aggressor on 20 July. Further, the fact that that further incident was also dealt with informally in his case also does not show that he was treated more favourably. In his case that was only the second such incident in over a year, not (as was the case with the Claimant on 20 July) a further incident when she was already on a live warning and subject to disciplinary proceedings for seven other allegations.

Detriment 3.6/7.1 – first formal sickness absence warning (victimisation/discrimination)

119. As set out above, the Claimant had received an informal warning for sickness absence on 21 April 2017. The Claimant had two further periods of absence in June and July 2017 which Ms Arjoon had wrongly thought triggered a further stage of the sickness policy when she invited the Claimant to a formal meeting on 4 August 2017. On 15 and 16 March 2018 the Claimant had two further days of sickness absence, which absence did as a matter of fact take her over the '60 hours on 3 occasions within 12 months' trigger in the sickness absence policy (even as that applies for full-time staff; at 66 hours' absence it was well above the pro-rata target of 52.5 hours which actually applied to the Claimant). Under the policy (paragraph 5.1.1), Ms Arjoon should therefore have informed the Claimant at the Return to Work (RtW) meeting following this absence that she had triggered the policy. She did not do so, and in fact ticked the box on the RtW form to indicate that no trigger had been reached. At this hearing, the Claimant in oral evidence appeared at times to suggest that she had been told by Ms Arjoon at the RtW that she had not triggered the policy. However, this is not how she put it at the time to Ms Hurst-Baird who subsequently dealt with this (p 1015). In her letter to Ms Hurst-Baird of 2 July 2018 she said simply that she had not been told she had triggered. We therefore accept that the trigger was simply not discussed at the RtW meeting and this was a breach of the policy.

120. It is not usually Ms Hurst-Baird's role to directly manage individual sickness absences, but it is her role to review and monitor the management of sickness absence by the Band 7s in her department. In May 2018 Ms Hurst-Baird was reviewing the team's absences when she noticed that the Claimant's absences had met a trigger on the policy and were therefore showing in 'yellow' on the system. The sickness absence system is an automatic system and should have been checked by Ms Arjoon previously. Ms Hurst-Baird was unable to say whether Ms Arjoon had checked the system or not at the time. There was a delay in running the absence report, which was done on 8 June 2018 and Ms Hurst-Baird wrote to the Claimant on 27 June 2018 about this and invited her to a formal meeting on 13 July 2018. This was postponed at the Claimant's request and took place on 19 July 2018. Mr Peters was present with Ms Hurst-Baird at the meeting to provide ER support and Mr Carey attended as the Claimant's representative.

121. The Claimant at that meeting, and in these proceedings, maintained that she should not be regarded as having triggered the sickness policy because she had been told by Ms Arjoon following the 4 August 2017 meeting that she had not triggered the policy and therefore the previous absences of June and July 2017 should have been discounted.

122. However, this is clearly not how the policy works and the Claimant was not able to point to any paragraph in the policy that supported her position. Rather, the policy is clear (para 4.1, last bullet) that *"With the issue of an informal warning the clock will be reset for the next 12 months and those absences that have been the subject of the informal warning will not be taken into account again."* In the Claimant's case that meant that the clock was reset

when she was issued with an informal warning in April 2017. It did not mean that it was reset when she had not triggered the policy in August 2017.

123. Ms Hurst-Baird decided that the Claimant should be issued with a first formal warning for sickness absence and she prepared a letter on 20 July 2018 to give to the Claimant (p 1101-2). This letter includes an apology for the fact that the trigger was not discussed at the March 2018 RtW interview, and an explanation as to why Ms Hurst-Baird considered that it was still reasonable to issue a formal warning given that the policy trigger had been reached. It also explains why there was a three-month delay in dealing with the matter and why she considered that in the particular circumstances this was *"in a timely manner"* as required by para 4.2 of the policy. She also addressed Mr Carey's allegation that the warning was simply retaliation given poor relations with the Claimant and other staff and denied this, stating that she was taking action purely on the basis that a trigger point had been reached under the policy.

124. In these proceedings, Ms Hurst-Baird gave oral evidence consistent with the letter that she wrote on 20 July 2018.

125. The Claimant was given a right to appeal this decision, which she exercised on 27 July 2018, but the appeal was deferred in circumstances we deal with below.

126. The Claimant has alleged that Ms Hurst-Baird's decision to issue her with a warning was in breach of the Trust's policy rules, but we find that it was not. The fact that the Claimant was not told at the RtW in March 2018 that she had hit a trigger (as required by the policy) does not mean that the later issuing of the warning was not in line with the policy. On the contrary, the policy provides that a warning will be issued where a trigger is hit. Further, we find that the reason why Ms Hurst-Baird issued the Claimant with a warning was simply that she was applying the policy. We cannot see that she could have done any differently. She would have given a warning to anyone with the same sickness absence record as the Claimant and the Employment Tribunal proceedings had nothing to do with it. There is also no evidence at all from which we could conclude that Ms Hurst-Baird was discriminating against the Claimant on grounds of race when issuing this warning.

127. Later on 20 July 2018 (after the Claimant had had the altercation with Mr Debil dealt with above) Ms Hurst-Baird tried to deliver the sickness absence warning letter to the Claimant in Endoscopy. She also had to ask the Claimant for a statement about the incident earlier that day with Mr Debil. The Claimant refused to accept the warning letter and told her that she required it by email. When asked about providing a statement, she accused Ms Hurst-Baird of harassing her. In her statement prepared immediately after the event Ms Hurst-Baird said that she found the Claimant's behaviour in terms of her *"volume of voice, tone of voice and body language to be very threatening"*. She said that she felt *"scared and vulnerable"* and left the situation because she feared it might escalate into physical violence. She said that as she left the Claimant shouted after her *"there are cameras in here"* (pp 1096-97). Ms

Hurst-Baird did not feel it was safe for the Claimant to continue working alongside Mr Debil in the back washroom and so she suggested that the Claimant should not come back to work that day. Ms Hurst-Baird also discussed the situation with Mr Dimech and told him that she felt unsafe, stressed and unable to manage the situation any more. Ms Hurst-Baird was subsequently absent from work for a period which she said was partly due to personal issues, but partly also to do with the stress of managing the Claimant. It was for this reason that she felt unable even to meet with Ms Wells who was tasked with investigating the events of 20 July 2018.

128. The Claimant in her witness statement accused Ms Hurst-Baird of victimising, harassing and threatening her on 20 July, but otherwise provided no details about her interaction with Ms Hurst-Baird on that day. In oral evidence, it appeared that what she considered to be 'harassment' was Ms Hurst-Baird walking all the way from Theatres to Endoscopy to give her the letter. The Claimant also denied having refused to accept the letter and said that she could prove this as she still had the brown envelope it came in, but Ms Hurst-Baird told us that she had left the letter in the room with the Claimant when she refused to accept it and so that would explain why the Claimant has the envelope. (We note that this was also Ms Colas' conclusion in the disciplinary outcome letter: p 1253). Further, there is an obvious similarity between this occasion and the occasion when the Claimant refused to accept the covert recording letter from Mr Simmons on 20 April 2018). There is no reason for the Respondent's witnesses to be making this up, and their evidence on each occasion is backed up by the contemporaneous documentary evidence. On this occasion, therefore we prefer Ms Hurst-Baird's account of this incident, which is also consistent with her written report of it immediately after the event.

<u>Detriment 3.7/7.2 – 25 July 2018 suspension (victimisation/discrimination)</u>

129. Following the incidents of 20 July 2018 there were discussions between senior managers, in particular Mr Dimech, Eamonn Sullivan and Mr Simmons as to what the next steps should be. It was agreed that the incidents with Mr Debil and Ms Hurst-Baird on 20 July 2018 should be referred for investigation under the disciplinary policy. There was a question as to whether this should be a new investigation or whether it should be added to the existing proceedings. Mr Simmons ascertained from Ms Colas that although she had heard the disciplinary she had not yet informed the Claimant of the outcome. Mr Simmons did not ask, and Ms Colas did not tell him, what conclusions she had already reached on the matters before her. Ms Simmons decided that it would be the best use of resources, given the stage that had been reached, for the allegations all to be considered together. He therefore asked Ms Colas to pause in her deliberations, but did not tell her why.

130. It was also agreed, by the same group of senior managers, that the Claimant should now be suspended. Although Mr Dimech describes in his statement that consideration was give to a further redeployment, it was clear from his

oral evidence that he felt strongly that once the further incidents on 20 July 2018 had occurred there really was no other option but to suspend. He felt that the Claimant had been given a chance for a fresh start with a new team in Endoscopy. Following the incident with Mr Debil he felt it was clear that the Claimant might repeat her behaviour wherever she was deployed. He was again forthright in expressing his view that communication and relationship problems posed a risk to patient safety and that it was 'untenable' for the Claimant to continue working in a clinical environment following the incident on 20 July 2018. The decision was therefore taken to suspend the Claimant and the Claimant was notified of this by letter of 25 July 2018 from Mr Dimech (pp 1123-1124). The letter explains that the Claimant is being suspended pending investigation into the following allegations:

1. You caused an altercation with Marvin Debil, Decontamination Lead Technician/Health Care Assistant, over the use of a computer.

2. You logged Marvin Debil off the computer without his consent causing him to lose information.

3. You shouted at Marvin Debil and called him a liar.

4. Your behaviour towards Marvin Debil caused him to become upset and afraid of you.

5. You refused to accept a letter handed to you from Robin Hurst-Baird confirming the outcome of a sickness hearing the day before.

6. You spoke to Robin Hurst-Baird using a raised voice and tone that she found to be threatening and aggressive, and which made her feel scared and vulnerable.

131. Mr Dimech's letter made clear that the suspension was precautionary and without prejudice. He requested that the Claimant should provide a statement in response to all the allegations by 27 July 2018, which she did not do.

132. The Claimant complains that Mr Dimech discriminated against her because of her race or sex and/or victimised her by his decision to suspend. For the discrimination complaint she relies on Mr Debil as a comparator. However, Mr Debil's circumstances were not the same as the Claimant for the reasons that we have set out above and he is not an appropriate comparator under EA 2010, s 23. Further, and in any event, we find that the reason Mr Dimech decided to suspend the Claimant was because he felt strongly that the Claimant had been given an opportunity for a fresh start, but had now demonstrated that she was not going to improve her behaviour and that unless she was suspended further such incidents may occur – incidents which he reasonably considered could pose a risk to patient safety. The Claimant's race and sex played no part in this decision, nor did the fact that the Claimant had brought Tribunal proceedings. It was clear to us that anyone with the same disciplinary record and behaviour as the Claimant would have been treated in the same way.

133. In line with the Respondent's policy, Mr Dimech kept the Claimant's suspension under review.

Detriment 3.8 – deferral of appeals

134. On 6 August 2018 Mr Dimech and Mr Simmons agreed that it was appropriate to defer dealing with the Claimant's appeal against the rejection of her grievance in relation to redeployment, and her appeal against the sickness absence warning. Mr Dimech informed the Claimant of that on that date and subsequently confirmed on 20 November 2018 that would remain the position until after the conclusion of the disciplinary process, which was still ongoing at that point (p 1287). They gave evidence that this decision was taken because they considered it important to conclude the disciplinary proceedings as swiftly as possible given that the Claimant was suspended, and because they considered it was not a good use of the Trust's resources to have multiple proceedings ongoing.

135. The disciplinary policy at p 415 provides at 6.1:

> 6.1 Where an employee raises a grievance during a disciplinary process, the manager responsible will need to make a judgement about the best way to handle the two issues. Both disciplinary and grievance issues should be dealt with promptly and without unreasonable delay. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently. Any procedural issues with the disciplinary action should be raised by the employee as part of their case at the disciplinary hearing and not by way of a grievance. In the event that a grievance is raised in response to the instigation of formal disciplinary investigation, the hearing of the grievance will normally be deferred until the conclusion of the disciplinary action. The only exception to this would be a grievance relating to the length of time an employee has been suspended. In other cases the disciplinary process may be temporarily suspended in order to deal with the grievance.

136. We find that it was a reasonable management decision to defer the Claimant's grievance and sickness absence appeals. Although the policy envisages that grievances raised during a disciplinary process should be dealt with promptly and may be dealt with concurrently, it also says that grievances about the instigation of formal disciplinary investigations will be deferred until the conclusion of the disciplinary, so this is something the Respondent does in other situations. However, it is clear under the policy that the question of which order various processes should be dealt with is a matter for the discretion of the manager responsible. In this case, the Claimant's grievance about her redeployment and the appeal against the sickness absence warning were unrelated to the matters that were the subject of disciplinary investigation and could have no bearing on them. Given the resources that such procedures take up, it was reasonable to defer the appeals until after the conclusion of the disciplinary process. Moreover, the resultant delay in dealing with the appeals in this case was not 'unreasonable' because there are good explanations for why the disciplinary process took the time that it did to reach a conclusion (not least the fact that the Claimant brought a County Court injunction claim against the Trust in the middle of the process). Since it was reasonable to await the conclusion of the disciplinary proceedings, it follows that the consequent delay in dealing with the appeals was also reasonable.

Investigation of the 20 July incidents

137. Ms Wells investigated the allegations regarding the 20 July incidents. It was suggested by the Claimant's counsel in cross-examination of Ms Wells that because she had been told by Ms Hurst-Baird on 20 July that there had been a further incident with the Claimant this should have disqualified her from investigating the matter. However, Ms Hurst-Baird gave Ms Wells no details of the incident and we do not consider that this can reasonably be perceived as making any difference to the way Ms Wells approached the investigation. As part of her investigation, Ms Wells viewed CCTV footage of the incident with Mr Debil. This was not visible on camera, but the CCTV did show Mr Debil leaving the room in question after the incident looking concerned and uncomfortable and checking over his shoulder. Ms Wells was not aware that the CCTV would only be retained for a month and so did not request it be kept. As a result, no one else has been able to view the CCTV footage.

138. Ms Wells interviewed Mr Debil and Ms Padua and sought to interview Ms Hurst-Baird but as noted above she did not feel able to meet and only answered some questions by email. By email of 14 August 2018 she wrote (p 1157):

> I am sorry but I will be unable to accept this invitation as part of the investigation for the incident that took place on the 20th of July. I do not want to put myself through any unnecessary stress with this member of staff. I have already been through an employment tribunal this year with her, and most recently have been feeling very vulnerable and feel close to being bullied and harassed by her. This has caused me to take some leave due to stress and I feel that I can't do anymore without this having a detrimental impact on my work and personal life, and most importantly my health and wellbeing.
>
> I do not think I can cope with going through one more investigation or meeting that is related to this member of staff. I no longer feel safe in her presence and I am fearful of my health and wellbeing in her company.

139. Ms Wells also sought to interview the Claimant, arranging at least two dates, but the Claimant did not attend.

140. On 3 September 2018 the Claimant brought a County Court claim for an interim injunction regarding her suspension. This was dismissed by HHJ Hellman on 11 October 2018 and he ordered the Claimant to pay £15,000 costs, which she has not paid.

141. In September 2018 Ms Wells decided it was not reasonable to wait any longer for the Claimant to provide a statement and she concluded her investigation with a further report (pp 1186-1195). She found that there was evidence to substantiate all the allegations about the 20 July incidents.

Reconvened disciplinary hearing 12 October 2018

142. On 18 September 2018, having reviewed the report, Mr Dimech wrote to the Claimant inviting her to a reconvened disciplinary hearing on 12 October 2018 (pp 1199-1202). This letter sets out the five occasions on which the Claimant had previously been asked for a statement about the 20 July incidents and again invites her to provide a statement.

143. The Claimant's representative Mr Carey forwarded the Claimant's statement that she had prepared on 25 July 2020 to Ms Colas at 22.53 on 11 October 2018. It was also only at 11pm on 11 October 2018 that Ms Colas was sent Ms Well's second investigation report. This was because ER had been awaiting the outcome of the injunction application, although Ms Colas was told nothing about that until the appeal hearing several months later.

144. Although Ms Colas received the papers late, she confirmed that she had read them before the disciplinary hearing itself which started at 11am on 12 October 2018.

145. The reconvened hearing was attended by Ms Colas and a representative from ER who took notes. Ms Wells presented the management case and the Claimant was again represented by Mr Carey. The hearing focused on the incidents of 20 July 2018, in particular the incident with Mr Debil which we have dealt with above.

146. Following the hearing Ms Colas considered that there was some additional information that she required. She emailed Mr Dimech and Mr Sullivan to ask for further information on a number of matters (p 1231), she also got Ms Wells to ask for further information from Ms Kitcher about the Care Certificate process (p 1238) because the Claimant had said to Ms Colas that it was because of the Care Certificate that she needed to use the computer on 20 July, and she requested the computer log records to verify whether the Claimant had indeed not logged onto the computer as she claimed.

147. On 19 October 2018 the Claimant commenced Claim Number 2206445/2018 (the third of the claims that are joined in these proceedings).

<u>Detriment 3.9 - Dismissal (victimisation)</u>

148. Ms Colas then finalised her decision and sent an outcome letter to the Claimant on 26 October 2018 (p 1245ff). The outcome letter is 12 pages long and contains detailed analysis by Ms Colas of all the evidence before her, and reasons for each decision that she makes on disputed facts. Of the total of 12 allegations she had to consider, she upheld allegations 1, 2, 4, 6 and 7 to 12. She indicated that at the point of considering the first five allegations following the hearing on 19 July 2018 she had been minded to give the Claimant a final written warning because the first written warning had not had the necessary corrective effect and the Claimant had committed further instances of misconduct. However, Ms Colas considered that taking into account the further six allegations of misconduct that she had upheld that dismissal was the appropriate sanction. In reaching that conclusion she stated that she had taken into account the fact that the Claimant had shown no remorse or insight into her behaviour, and that the Claimant had lied *"on what is likely to be three separate occasions and there have been other occasions when at best what you have said is not correct"*. (We take the three occasions Ms Colas refers to here as being those she identifies on internal p 10 of her letter, i.e. two lies in relation to the incident with Mr Debil as set out in Allegation 7, and that she

had lied about how her redeployment had been handled and about not having received the action plan.) She stated that she had looked for any mitigating factors but was *"uncertain you have put forward any that outweigh the aggravating features I have identified above"*. She decided that the Claimant should be dismissed on notice, but would not be required to work her notice.

149. We find that the reason that Ms Colas decided the Claimant should be dismissed was because of her conduct. This was the sole reason operating in Ms Colas' mind. Although she was aware of the fact that the Claimant had brought discrimination claims against the Respondent, she had had no personal involvement in those matters at all (indeed, she had been on maternity leave up until shortly before she was asked to do this disciplinary), and we find the previous claims played no part in her decision. Her decision was reached following a scrupulous and detailed analysis of the evidence before her. Moreover, her balanced and open-minded approach to the case is evident from the fact that she did not uphold all of the allegations, and from her efforts to obtain further information and conduct further investigations following her meetings with the Claimant. It was vaguely suggested by Counsel for the Claimant that she might have felt under pressure from Mr Simmons and Mr Dimech or other more senior managers to dismiss, but she denied this and, in the absence of any evidence to support Counsel's suggestion, and in the face of the documentary evidence of Ms Colas' careful approach to the case, we accept her evidence that she made up her own mind about each of the allegations on the basis of the evidence before her.

Appeal against dismissal

150. The Claimant appealed on 9 November 2018 and her appeal hearing was initially scheduled for 5 December 2018. The Claimant's representative put in a statement of case on her behalf which made a number of points about the process that had been adopted by the Respondent, very few of which have been pursued by the Claimant in these proceedings. The appeal hearing was rescheduled on a number of occasions because of the non-availability of the Claimant or her representative and ultimately the Claimant confirmed that she would not attend the hearing which took place on 6 February 2019 (p 1308) and was chaired by Ms Bateman who decided not to uphold the appeal. The Claimant was notified on 14 March 2019 that her appeal had been dismissed.

The law

Discrimination

151. Under ss 13(1) and 39(2)(c) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent subjected the Claimant to a detriment and, if so, whether the Respondent thereby discriminated against the Claimant by treating her less favourably than it treats or would treat others because of a protected characteristic. The protected characteristics relied on by the Claimant are her race and/or sex.

152. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at paras 34-35 per Lord Hope and at paras 104-105 per Lord Scott. (Lord Nicholls (para 15), Lord Hutton (para 91) and Lord Rodger (para 123) agreed with Lord Hope.)

153. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). The Claimant relies on Mr Debil as an actual comparator. However, if we consider that Mr Debil's circumstances are not materially the same, we are invited also to consider how a hypothetical comparator would have been treated. We bear in mind in this regard that evidence about an alleged comparator may still be of important evidential value even if their circumstances are not materially the same so as to bring them within s 23(1) EA 2010.

154. The fact that someone is treated unreasonably does not mean that they have been discriminated against, they must have been treated less favourably: *Glasgow City Council v Zafar* [1998] ICR 120. However, where the evidence shows that the complainant is the only employee who has been subject to unreasonable treatment, the Tribunal must "consider carefully and with particular scrutiny" whether discrimination has played a part in the treatment: *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust* UKEAT/0269/15/JOJ at para 48 per Langstaff J.

155. The Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at para 29 per Lord Nicholls). Discrimination must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at paras 78-82).

156. If a decision-maker's reason for treatment of an employee is not influenced by a protected characteristic, but the decision-maker relies on the views or actions of another employee which are tainted by discrimination, it does not follow (without more) that the decision-maker discriminated against the individual: *CLFIS (UK) Ltd v Reynolds* [2015] EWCA Civ 439, [2015] ICR 1010. What matters is what was in the mind of the individual taking the decision (save, perhaps, in certain exceptional circumstances as identified by the Supreme Court in the 'whistle-blowing' case *Royal Mail Ltd v Jhuti* [2019] UKSC 55 – circumstances which are not suggested by the parties to be relevant to the present case).

157. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at paragraph 56). There must be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment.

158. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at para 32 *per* Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at para 32), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 *per* Mummery J at 874C-H and 875C-H.

Victimisation

159. Under ss 27(1) and s 39(2)(c)/(d) EA 2010 and s 39(2)(c)/(d), the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by subjecting her to a detriment because she did, or the Respondent believed she had done, or may do, a protected act. A protected act includes (so far as relevant in this case) bringing proceedings under the EA 2010 and giving evidence or information in connection with proceedings under that Act (s 27(2)). In deciding whether the reason for the treatment was the protected act, the Tribunal must follow the same approach as for discrimination set out above, including in relation to the application of the burden of proof.

160. However, a claim of victimisation cannot succeed unless the alleged victimiser is at least either aware of the protected act, or believes that a protected act has been done (or may be done). In *South London Healthcare NHS Trust v Dr Bial-Rubeyi* (UKEAT/0269/09/SM), the EAT found that there was no evidence from which the Tribunal could have concluded that the alleged victimiser was aware that the claimant had made a complaint of discrimination. In those circumstances, the EAT (McMullen J) substituted a finding that the Respondent did not victimise the Claimant.

161. Careful consideration needs to be given to cases where the employer's defence is that the detrimental treatment was not because of the protected act but because of the way in which the protected act was done, or because of some other feature. The question in such cases is the same as applies in

whistleblowing cases, it is *"whether the factors relied upon by the employer can properly be treated as separable from the making of protected [acts] and, if so, whether those factors were, in fact, the reasons why the employer acted as he did"*: *Panayiotou v Chief Constable Kernaghan* [2014] IRLR 500 *per* Lewis J at para 54 (a whistleblowing case). However, the EAT in *Martin v Devonshires* [2011] ICR 352 warned (in a discrimination context) that Tribunals should bear in mind the policy of the anti-victimisation provisions (which policy also underlies the protected disclosures legislation) and *"be slow to recognise a distinction between the complaint and the way it is made save in clear cases"* (per Underhill P, as he then was, at para 22).

Unfair dismissal

162. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. conduct in this case. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss, or alternatively what motivates them to do so, save in the limited circumstances (not relevant here) identified by the Supreme Court in *Jhuti v Royal Mail Ltd* [2018] IRLR 251.

163. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

164. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at para 48. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid).

165. Where conduct is relied on as the reason for dismissal, in determining whether dismissal is fair in all the circumstances under s 98(4), the Tribunal must be satisfied that the employer has a genuine belief that the employee

committed the misconduct in question, and that that belief is held on reasonable grounds, the employer having carried out such investigations as are reasonable in all the circumstances of the case: *BHS Ltd v Burchell* [1980] ICR 303 and *Foley v Post Office* [2000] ICR 1283.

166. Where a prior warning is relied on the Court of Appeal in *Davies v Sandwell MBC* [2013] EWCA Civ 135, [2013] IRLR 374 has held (at paras 20-24 *per* Mummery LJ) that the guiding principle remains that set out in s 98(4). The Tribunal must consider *"whether, in the particular case, it was reasonable for the employer to treat the [reason for dismissal], taken together with the circumstances of the final written warning, as sufficient to dismiss the claimant"*. In answering that question *"it is not the function of the ET to reopen the final warning"*, but it is relevant for the Tribunal to consider *"whether the final warning was issued in good faith, whether there were prima facie grounds for following the final warning procedure and whether it was manifestly inappropriate to issue the warning"* (which would include, it is agreed, if it was an act of unlawful discrimination).

167. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

168. Finally, given the nature of this case, it is relevant to note that where a breakdown in working relationships is relied on, the EAT in *Stockman v Phoenix House Ltd* [2017] ICR 84 at paragraph 21, indicated that, as a minimum, an employer is required to: *"fairly consider whether or not the relationship has deteriorated to such an extent that the employee holding the position that she does cannot be re-incorporated into the workforce without unacceptable disruption. That is likely to involve, as here, a careful exploration by the decision maker … of the employee's state of mind and future intentions judged against the background of what has happened. Of course, it would be unfair … to take into account matters that were not fully vented between decision maker and employee at the time that the decision was to be made. Ordinary common sense fairness requires that … [an] employee [should be given] the opportunity to demonstrate that she can fit back into the workplace without undue disruption"*.

Conclusions

Victimisation

169. There is no dispute that the Claimant did the following protected acts:
    a. the presentation on 7 July 2017 of Claim 1;
    b. the presentation on 30 November 2017 of Claim 2; and
    c. the giving of evidence or information in connection with those claims.

170. As to each of the alleged detriments, we find as follows:-

Detriment 3.1: On 20th April 2018 did Lian Lee, at meeting with Claimant in morning, refer allegations regarding the Claimant to a formal investigation by Human Resources when they did not merit such referral rather than dealing with them through informal procedure?

171. In the light of our findings of fact at paragraphs 51-62 above, it is clear that Ms Lee did not play a material part in the decision to refer the allegations to a formal investigation. That decision was Mr Dimech's. We accept that the Claimant could reasonably regard the referral of the allegations to a formal investigation as a detriment within the meaning of the Act. However, for the reasons we have set out at paragraph 59-62 above, we find as a fact that the Claimant's protected acts played no material part in Mr Dimech's reasons for making the referral. Nor, for completeness, did the Claimant's protected acts play any part in Ms Lee's reasons for acting as she did not even know or believe that the Claimant had done protected acts.

Detriment 3.2: On 20th April 2018 did Graham Simmons and Lian Lee (i) falsely accuse Claimant of covertly recording sickness absence meeting held on 4th August 2017 and (ii) threaten the Claimant if she failed to produce the covert recording within one week?

172. In the light of our findings of fact above at paragraphs 63-71, we must conclude that neither of these allegations is made out. Mr Simmons did not on 20 April 2018 (or at any time) accuse the Claimant of covertly recording the sickness absence meeting, nor did Mr Simmons on 20 April 2018 (or at any time) threaten her if she did not produce the covert recording within one week. Further, the subsequent inclusion of this matter in the terms of reference for the disciplinary investigation, and later in the allegations to be considered at the disciplinary hearing was not because the Respondent considered the Claimant had covertly recorded the meeting, but because of her failure to co-operate with enquiries about the recording.

173. Ms Lee was only an observer at the meeting on 20 April 2018 and played no part either in the decision to ask the Claimant about the recording or to include the Claimant's non-co-operative behaviour in relation to it in the terms of reference for the disciplinary investigation.

Detriment 3.3: On 3rd May 2018 did Lian Lee insist that Claimant have an Appraisal with Sister Jean Arjoon, contrary to the advice of the Occupational Health doctor who had advised that a different appraiser should be nominated?

174. There is no dispute that Ms Lee did insist that the Claimant should have an appraisal with Ms Arjoon, nor any dispute that the Claimant did not in the event have an appraisal because she refused to be appraised by Ms Arjoon. This decision was not, however, contrary to the advice of OH because, as set out at paragraphs 42-43 above, OH did not advise that a different appraiser

should be nominated, but only that management should consider identifying a different appraiser. In accordance with that recommendation, Ms Lee did consider again on 3 May 2018 whether the Claimant should have a different appraiser and decided that this was not appropriate for the reasons we have found at paragraphs 48-50 above. Ms Lee did not know or believe that the Claimant had done any protected acts and therefore she cannot have victimised the Claimant. In any event, the Claimant's previous claims played no part in Ms Lee's decision in this respect.

175. Moreover, we do not accept that the decision to require the Claimant to attend an appraisal with her line manager was in the circumstances a detriment. While we take into account the Claimant's views, we must apply an objective test and the Claimant's reasons for refusing to have Ms Arjoon do her appraisal were not reasonable (see paragraph 46). This was, to use the language of *Shamoon*, an unjustified grievance by the Claimant.

Detriment 3.4: On 17th May 2018 did Tina Kitcher fail to validate a Care Certificate for the Claimant?

176. We have set out our findings with regard to this alleged detriment at paragraphs 80-95 above. Ms Kitcher did not validate the Claimant's Care Certificate on 17 May 2018 because the Claimant had not even started it at that point. The claim as pleaded therefore fails. Further, she had not validated it by the time the Claimant was suspended on 25 July 2018 because the Claimant had not finished it and they had not had the planned further meeting following Ms Kitcher making handwritten annotations on all four modules. Had the Claimant then completed all modules appropriately, we are satisfied that Ms Kitcher would have validated the certificate, but that point was never reached. The fact that the Claimant had brought the Tribunal proceedings therefore played no part in the reasons why Ms Kitcher did not validate the Care Certificate.

177. In any event, we do not accept that the Claimant could reasonably consider that this constituted a detriment. It is not a detriment for work not to be signed off when it has not been appropriately completed.

Detriment 3.5: On 30th May 2018 did Graham Simmons and/or Lian Lee temporarily redeploy the Claimant to the Endoscopy Department following the conclusion of Claim 1 and Claim 2?

178. We have set out our findings with regard to this alleged detriment at paragraphs 97-103 above.

179. We find that the Respondent's decision to redeploy the Claimant was, objectively viewed, clearly to her benefit. It provided her with the opportunity for a completely fresh start in a new team, at a time when she was facing significant disciplinary allegations, there were multiple relationship problems with individuals in her own team and an impasse had been reached with regard to her appraisal, which she was still refusing to have carried out by her

line manager. It was, we find, not reasonable for the Claimant to regard this opportunity as a detriment.

180. However, even if we are wrong about this, we find that the senior managers involved in the decision to redeploy (in particular Mr Simmons, Mr Dimech and Ms Lee from whom we have heard) were not influenced in that decision by the fact that the Claimant had brought proceedings under the EA 2010 against the Respondent. For the reasons set out in our findings of fact, they acted because of the difficulties in working relationships within the team and their concerns for patient safety. This was a complete, and reasonable, explanation for the decision to redeploy.

Detriment 3.6: On 20th July 2018 did Robin Hurst-Baird issue a 1st formal sickness absence warning contrary to Trust policy rules?

181. For the reasons that we have set out above at paragraph 126, the issuing of the formal sickness absence warning by Ms Hurst-Baird was not in breach of the Respondent's procedure. Nonetheless, we accept that it constituted a detriment. However, the fact that the Claimant had brought the Tribunal proceedings did not have any influence on Ms Hurst-Baird's decision. She was simply applying the sickness absence policy and would have done the same with any employee.

Detriment 3.7: On or about 25th July 2018 did Andrew Dimech and/or Graham Simmons suspend the Claimant?

182. We accept that suspension constituted a detriment, but for the reasons set out at paragraph 132 above, the fact that the Claimant had brought the previous Tribunal proceedings played no part in the decision to suspend.

Detriment 3.8: On or about 28th August 2018 did Andrew Dimech and/or Graham Simmons defer indefinitely Claimant's appeal against 1st formal sickness absence warning?

183. We are, just, persuaded that the Claimant could reasonably perceive the deferral of her appeals to be to her detriment, even though going ahead with them would also have meant more work for her on matters irrelevant to the disciplinary allegations while she still had the disciplinary hearing hanging over her head. However, for the reasons set out at paragraph 136 above we do not consider that the Claimant's previous claims had anything to do with this decision, which was taken for good management reasons.

Detriment 3.9: On 26th October 2018 did the Respondent dismiss the Claimant?

184. For the reasons set out at paragraph 149 above, we find that Ms Colas decided to dismiss the Claimant solely because of her conduct. The previous Tribunal claims played no part whatsoever in her decision.

Discrimination

Detriment 7.1: On 20th July 2018 by issuing her with a first formal sickness absence warning contrary to Trust policy rules? (Race discrimination)

185. Although we accept that this was a detriment, for the reasons we have set out at paragraph 126 there was absolutely no evidence from which we could conclude that this was an act of race discrimination.

Detriment 7.2: On 25th July 2018 by suspending her? The Claimant relies on an actual comparator (namely Marvin Debil) or, alternatively, a hypothetical comparator. (Race/sex discrimination)

186. As with the allegation of victimisation, we accept that suspension constituted a detriment, but for the reasons set out at paragraph 132 above, the Claimant's race and sex played no part in the decision to suspend. Mr Debil was not an appropriate comparator for the reasons set out at paragraph 117, and we are satisfied for the reasons set out at paragraph 132 that anyone with the same disciplinary record as the Claimant who behaved as she did on 20 July 2018 would have been treated in the same way.

The time point

187. Since we have decided that the Claimant's claims under the EA 2010 fail, there is no need for us to consider whether some of them were brought out of time. However, we record that had it been necessary to decide that point, we would have decided that the claims were in time. This is because detriments 3.1, 3.2 and 3.3 were all included in the claims that the Claimant presented to the Tribunal on 8 May 2018 (i.e. claims 2204503 and 2204504/2018) and thus were brought within the three month time limit in s 123 EA 2010 (contrary to the Respondent's submissions). Further, 17 May 2018 is not really the relevant date at which to consider the position with the Care Certificate, which must properly be regarded as a 'continuing act' point which continued up until the Claimant was suspended on 25 July 2018. On that basis, that claim was in time as it was included in the claim presented on 21 October 2018 (claim 2206499/2018). On our analysis, therefore, the only claim that the Respondent is right to identify as being out of time is that relating to redeployment, which was not presented until 26 September 2018. However, it is less than a month out of time and, had any of the claims succeeded, we would very likely have found this to be part of a continuing act and that it was just and equitable in the circumstances to extend time given the plethora of proceedings and the fact that the Claimant, although an experienced litigant in person, was nonetheless acting in person at that point.

Unfair dismissal

188. We are satisfied that the sole reason that Ms Colas (and therefore also the Respondent) decided to dismiss the Claimant was because of her conduct. Our reasons in this respect are set out at paragraph 149 above. Further, we find that the Respondent acted reasonably in treating the Claimant's conduct as a sufficient reason for dismissing her. There had been a thorough investigation of each of the allegations, with all appropriate (and no inappropriate) witnesses interviewed. Ms Colas had considered the evidence carefully and gave detailed, cogent reasons in her decision letter as to why she reached the conclusions that she did. She had a genuine belief in the Claimant's misconduct, which was based on reasonable grounds.

189. While some of the allegations for which the Claimant was dismissed might have been described as 'minor' taken in isolation, most of them were not. We have in mind in this respect in particular the Claimant's unreasonable refusal to be appraised by her line manager, her saying to Ms Hurst-Baird that requiring her to be appraised by her line manager was like *"sending a rapist to rape a rape victim"* and her behaviour towards Mr Debil on 20 July 2018. While not individually gross misconduct, these were nonetheless each serious incidents of misconduct in their own right. Taken together with the fact (which is indisputable on the evidence before us) that the Claimant has never demonstrated any insight into her behaviour or its impact on others and has never apologised for any of the incidents, we consider that a reasonable employer could have dismissed the Claimant for the allegations that were upheld even if she did not have a prior warning for similar misconduct. Given that she did have a prior warning for similar misconduct, we find it difficult to imagine any employer not dismissing an employee in these circumstances. The decision was well within the range of reasonable responses.

190. Moreover, we find that the procedure adopted by the Respondent was fair. In particular, we consider that it was fair for the Respondent to group all the allegations against the Claimant together and have them dealt with in a single disciplinary process. It was a pure accident of timing that the incidents of 20 July came the day after the first disciplinary hearing on 19 July. Had they come before, there could have been no complaint about adding them to the same proceedings. We do not think that the fact that the disciplinary hearing had taken place makes any difference given that no final decision had been made. Further, it could make no difference to the outcome for the Claimant for there to be one set of disciplinary proceedings rather than two. Had Ms Colas reached a conclusion on the first set of allegations she would (reasonably in our opinion) have concluded that the Claimant should receive a final written warning. Any manager then considering the 20 July incidents would then, in our judgment, inevitably have dismissed the Claimant. In any event, we must apply a range of reasonable responses test to this procedural issue and we find that it was not only a fair but an eminently sensible managerial decision to deal with all the allegations in one set of proceedings rather than allowing a proliferation of processes with the inevitable increased burden on management time and resources.

191. We have also considered (although this point was not raised by the Claimant) whether any unfairness arose from Ms Colas' failure to give the Claimant an

opportunity to comment on the further investigations that she carried out following the disciplinary hearing on 12 October 2018 before issuing her decision on 26 October 2018. However, we are satisfied that the Claimant had a chance at the appeal stage to challenge any part of that additional evidence if she wished and that any unfairness in that respect was wholly cured by the appeal.

192. We should add that even if we had found that the Respondent's decision to deal with all the allegations in one set of proceedings rendered the dismissal unfair, we would have concluded that under *Polkey* the Claimant would have been fairly dismissed in any event within the same timescale. Given the delay occasioned by the Claimant's decision to commence injunction proceedings against the Trust, we consider that even if there had had to be a second separate disciplinary investigation and hearing it would still likely have concluded in October 2018 after the injunction.

193. Finally, given our conclusions on liability, we have not found it appropriate to consider what, on a hypothetical basis, we might have decided about the level of the Claimant's contribution to her dismissal if we had not found it to be fair and lawful.

Overall conclusion

194. The unanimous judgment of the Tribunal is the Claimant's claims for discrimination and victimisation under the EA 2010, and for unfair dismissal under the ERA 1996, fail and are dismissed.

195. The remedy hearing provisionally listed for 15 January 2021 is accordingly vacated.

_____
Employment Judge - Stout
Date: 19th Oct 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

20/10/2020.

…….....
FOR THE TRIBUNAL OFFICE - OLU