EMPLOYMENT TRIBUNALS

Claimant: ABC

Respondent: University Hospitals of North Midlands NHS Trust

Heard at: Birmingham Employment Tribunal (by CVP)

On: 11 January 2021- 29 January 2021, with a further day added for deliberation on 09 February 2021

Before: Employment Judge Mark Butler
Mr S Woodall
Mr T Liburd

Representation
Claimant: Mr Lewis-Bale (Counsel)
Respondent: Mr Fodder (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V. A face to face hearing was not held because of the ongoing pandemic and all issues could be determined in a remote hearing. The documents that I were referred to are across two very short bundles.

JUDGMENT

1. The claimant's claims for direct race discrimination, harassment related to race and unfair dismissal are all ill-founded and dismissed.

2. The claimant's claims for direct disability discrimination are dismissed on withdrawal.

REASONS

1. The claims in this case arise following the presentation of a claim form on 23 December 2017. The claimant brought a number of different complaints. Through a series of Preliminary Hearings (noted below), the claims being brought were recorded as being for direct race discrimination, harassment related to race, direct disability discrimination and unfair

dismissal. This claim was brought following the claimant being dismissed from her position on 03 August 2017.

2. In readying this case for final hearing, this case was considered at Preliminary Hearings by EJ Battisby on 05 March 2018, EJ Harding on 01 June 2018, EJ Gaskell on 08 and 09 August 2018 and EJ Perry on 15 Nov 2019.

3. In short, the Preliminary Hearings referred to above led to the claim being fully particularised.

4. I note here that there is a large proportion of the claimant's witness statement that, appears on the face of it at least, to go beyond the pleaded case. Mr Lewis-Bale was reminded of the need to present the claimant's case with the list of issues in mind.

5. The case was listed to be heard as an in-person hearing. However, due to the current ongoing pandemic, a decision was made to hold the hearing remotely. This was challenging due to the extent of evidence that the tribunal had to consider. However, this was considered a more appropriate course of action than to either postponing the hearing or requiring significant numbers to travel into the hearing room.

6. Being mindful of the claimant expressing that she had an anxiety impairment, and the impact that remote hearings can have on everybody involved, the panel ensured that there were plenty of rest breaks, including a free day mid-hearing. The parties were reminded that should additional rest breaks be needed then all they needed to do was to inform the panel, and appropriate breaks would be given. Much of this was done with guidance from the Equal Treatment Bench Book in mind.

7. On the afternoon of day 3, and confirmed on the morning of day 4, Mr Lewis-Bale informed the tribunal that the claimant, having reviewed matters, was withdrawing the complaints of direct disability discrimination. This led to Mr Fodder standing down of Ms Sheila Langley, Ms Alison Perry and Mr Daniel Hooper

8. Counsel informed the tribunal on day 1 that they had taken an agreed view that as the unfair dismissal complaint was the central complaint in this case, then the respondent's witnesses would give evidence first. The tribunal had no objections to this approach.

9. We heard evidence from Ms Caroline Brown, Ms Jane Teasdale, Ms Noeleen Hellis, Ms Rosie Cormie, Ms Sarah Clubley, Ms Amanda Heath, Ms Samantha Morris, Ms Vicky Terry, Ms Dani Khoo, Ms Soumi Mukerjee, Ms Di Poulson, Ms Gail Meers, Ms Gaynor Kay Travis, Ms Helen Inwood, Ms Karen Eptlett, Ms Jane Haire, Ms Sara Barnes and Ms Namita Thomas on behalf of the respondent.

10. We heard evidence from the claimant. The claimant did produce a witness statement from Ms Nkechinyelu Molokwu. However, the claimant did not appear to be in contact with Ms Molokwu, and so this witness did not attend. However, on perusing this witness statement there was no relevant evidence that went to the issues in dispue contained in the witness

statement, and so the tribunal was not impeded by Ms Molokwu's non-attendance. The tribunal did consider Ms Molokwu's witness statement, and placed weight on it that it considered necessary in the circumstances.

11. Although we do not feel the need to question the credibility of any of the witnesses, the tribunal did consider that the claimant was unreliable as a witness on occasion. There were two reasons in particular for this. First, the claimant's recollection of events did not always accord with contemporaneous notes. Although this is unsurprising given the amount of time that had passed in relation to a number of allegations, and memories do fade. And secondly, the claimant sought to change her case during cross examination of her. This was in circumstances where the claimant's developing/changed case had not been put to the respondent's witnesses under cross-examination. This unreliability factor is one that the tribunal took into account when weighing up the evidence and making its finding of facts.

12. The tribunal was assisted with a primary evidence bundle that contained some 2734 electronic pages. The tribunal also received a separate additional bundle of evidence from the claimant. It was explained to the tribunal that the parties were not in agreement as to the relevancy of these documents. The claimant considered them relevant, whilst the respondent did not, and so did not agree to their inclusion in the final hearing bundle. This was not a matter that the tribunal had to resolve, as at no point during proceedings was the tribunal referred to any documents in this separate bundle by Mr Lewis-Bale on behalf of the claimant. The tribunal can only presume that the documents were not considered relevant by the claimant, otherwise she would have sought permission through her counsel to rely on such documents when cross-examining the witnesses of the respondent.

13. On the morning of day 7, the Mr Lewis-Bale informed the tribunal that the claimant had received the deeply sad news that her mother had passed away. We had, and continue to have, great sympathy for the claimant in these circumstances, and hope that post-hearing she is keeping well in what must be extremely trying times. The claimant was free to turn on and off her camera as she saw fit during the hearing on day 7, so as to protect her privacy given the news she had received. I only asked that she turned her camera on at the beginning and end of each session so that I could make sure that she was still accessing the hearing, and we had not lost her attendance over the CVP network. I was also made aware that the claimant had the means of contacting Mr Lewis-Bale should an issue arise in terms of her attendance in the remote tribunal room. We are grateful for the pragmatism shown by Mr Fodder during this hearing, especially in suggesting that the claimant's evidence could be delayed in the circumstances. A short break in proceedings was thought appropriate and implemented, at least in terms of hearing evidence from her. Which in itself can be quite stressful, and none more so than when a person is trying to digest such terrible and saddening news. This led to the claimant starting her evidence on day 11, rather than day 9 as originally planned.

14. We thank both Mr Lewis-Bale and Mr Fodder for the manner in which they conducted these proceedings, which can be tricky over a remote hearing. Their approach ensured that the hearing remained relevant to the issues to be determined, and was able to be completed in the time estimate, even with the need to constantly adjust the timetable.

List of issues

15. The list of issues are as recorded by EJ Perry following a Preliminary Hearing on 15 November 2019. The parties confirmed that this was the list of issues in this case. The list of issues can be found at pp138(6)-138(9). Rather than copying the list of issues here, the issues have been broken up and included in the section entitled findings of fact, below. This will make it easier to follow the findings of fact that we made in relation to the specific issues that we were asked to determine.

Law

16. This case was brought on allegations of direct race discrimination, racial harassment and unfair dismissal.

17. During closing submissions we were taken to various case law. Our intention is not to present all of this case law in full here. However, we do present some of the important guiding principles that are of significance in this judgment. I have added emphasis to important parts of judgments considered, where I thought it necessary.

18. Mr Lewis-Bale highlighted the case of Johnson v Gore Wood 2 AC 1.

19. Mr Fodder directed the tribunal to considered the following:

    a. Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285

    b. Sutton Oak Church of England School v Whittaker UKEAT/0211/18 (13 December 2013, unreported)

    c. Hewage v Grampian Health Board [2012] ICR 1054

    d. Nagarjan v London Regional Transport [1999] IRLR 572

    e. Chief Constable of Yorkshire Police v Khan [2001] UKHL 48

    f. Amnesty International v Ahmed [2009] IRLR 884

    g. Pemberton v Inwood [2018] EWCA Civ 564

    h. UNITE the Union v Nailard [2018] EWCA Civ 1203

    i. Madarassy v Nomura International plc [2007] IRLR 246

    j. Laing v Manchester City Council [2006] IRLR 748

    k. Owusu v London Fire and Civil Defence Authority [1995] IRLR 574

l. Hendricks v Metropolitan Police Comr [2003] ICR 530

m. British Coal Corporation v Keeble [1997] IRLR 336

n. Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23

o. Southwark London Borough v Alfolabi [2003] IRLR 220

p. Robertson v Bexley Community Centre [2003] IRLR 434

q. Ahmed v Ministry of Justice UKEAT/0390/14

r. Henderson v Henderson (1843) 3 Hare 100

s. Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1

t. Manson v Vooght [1999] BPIR 389

u. Agbenowossi-Koffi v Donvand Ltd (t/a Gullivers Travel Associates) [2014] EWCA Civ 855

v. London Borough of Haringey v O'Brien UKEAT/0004/16

w. Linfood Cash and Carry Ld v Thomson [1989] IRLR 235

x. British Leyland (UK) Ltd v Swift [1981] IRLR 91

y. Taylor v OCS Group Ltd [2006] IRLR 613

Unfair Dismissal

20. The test of unfair dismissal is set out in section 98 of the Employment Rights Act 1996:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
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> > (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> >
> > (b)that it is either [conduct] or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. ...
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> > (a) depends on whether in 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, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

Equality Act 2010: burden of proof

21. The burden of proof in relation to Equality Act claims is dealt with at s.136 of the Equality Act 2010. At s.136(2) it is provided that:

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

22. Lord Justice Mummery (with which Laws and Maurice Kay LJJ agreed) in **Madarassy v Nomura International plc [2007] ICR 867**, at paragraphs 56-58, provided a summary of the principles that apply when considering the burden of proof in Equality Act Claims:

> "56. The court in *Igen v Wong…* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination**. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
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> 57. "Could… conclude" in section 63A (2) must mean that **"a reasonable tribunal could properly conclude" from all the evidence before it.** This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; **for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment**.
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> 58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The

absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim." (emphasis added)

23. Mummery LJ also explained further how evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (paras. 71-72):

> "71. Section 63A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. **The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.**
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> 72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground…."

24. Lord Justice Mummery also pointed out that it will often be appropriate for the tribunal to go straight to the second stage. An example is where the employer is asserting that whether the burden at the first stage has been discharged or not, he has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by that approach since it is effectively assumed in his favour that the burden at the first stage has been discharged.

25. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant succeeds in doing this, then the onus will be on the respondent to prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require

consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment.

Equality Act: Direct Race Discrimination

26. Direct discrimination is provided for by section 13 of the Equality Act 2010. It is defined as occurring when:

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

27. Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** gave guidance as to the approach an employment tribunal should consider when determining a direct discrimination complaint:

> "7. …In deciding a discrimination claim one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.
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> 8. No doubt there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined.
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> …
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> 11. …employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all

the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

28. This is further explained by Mr Justice Underhill P (as he then was), in **Amnesty International v Ahmed [2009] IRLR 884:**

> "32. The basic question in a direct discrimination case is what is or are the "ground" or "grounds" for the treatment complained of.[3] That is the language of the definitions of direct discrimination in the main discrimination statutes and the various more recent employment equality regulations. It is also the terminology used in the underlying Directives: see, e.g., art. 2.2 (a) of Directive EU/2000/43 ("the Race Directive"). There is however no difference between that formulation and asking what was the "reason" that the act complained of was done, which is the language used in the victimisation provisions (e.g. s. 2 (1) of the 1976 Act): see *per* Lord Nicholls in **Nagarajan** at p. 512 D-E (also, to the same effect, Lord Steyn at p. 521 C-D).[4]
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> 33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. **James v Eastleigh** is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the Council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The Council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p. 772 C-D), "gender based".[5] In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in **James v Eastleigh** decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.
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> 34. But that is not the only kind of case. In other cases – of which **Nagarajan** is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act.

> Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in **James v Eastleigh**, a benign motive is irrelevant. This is the point being made in the second paragraph of the passage which we have quoted from the speech of Lord Nicholls in **Nagarajan** (see para. 29 above). The distinctions involved may seem subtle, but they are real, as the example given by Lord Nicholls at the end of that paragraph makes clear.
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> …
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> 37. …although (as Lord Goff points out) the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else – all that matter is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Equality Act: Detriment

29. The concept of detriment was given consideration before the then House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 227**. Lord Hope at paragraphs 34-36 explained that “This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment"”. Whereas Lord Scott at paragraph 105 explained that “…If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice”

Equality Act: Racial Harassment

30. Harassment is defined under the Equality Act 2010 at section 26. Where it is defined as occurring where

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

Equality Act: Time limits

31. Time limits in the Equality Act 2010 are provided for under s.123. And it states that a complaint must be brought before the end of

(1) (a)the period of 3 months starting with the date of the act to which the complaint relates, or
(b)such other period as the employment tribunal thinks just and equitable.

AND

(3)For the purposes of this section—
(a)conduct extending over a period is to be treated as done at the end of the period;
(b)failure to do something is to be treated as occurring when the person in question decided on it.

Abuse of process

32. Johnson v Gore Wood 2 AC 1:

> "But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

Submissions

33. We received written opening submissions on behalf of both parties, as well as closing submissions from both counsel on the morning of day 13. These were supplemented by oral closing submissions on the afternoon of day 13. These are not repeated in full here. However, the tribunal has considered each of these in reaching its decision.

Findings of fact

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. We do not repeat all of the evidence here. And we do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

ISSUE:

6.4). The Claimant's application for Band 5 role was rejected in January 2014 by Ms Teasdale and Ms Hellis. Did the Respondent thereby subject the Claimant to a detriment and if so did the Respondent thereby treat the Claimant less favourably than it treated or would have treated others because of her race. The Claimant relies on Liam Buckley and Ashley Bridges as comparators [and/or] a hypothetical comparator.

6.5). The Claimant's application for Band 5 role was rejected on 5 June 2014 by Ms Teasdale and Ms Hellis. Did the Respondent thereby subject the Claimant to a detriment and if so did the Respondent thereby treat the Claimant less favourably than it treated or would have treated others because of her race. The Claimant relies on Simon Davies and Pip Oram as comparators [and/or] a hypothetical comparator.

34. The claimant qualified as a physiotherapist in Nigeria in 2004. Following registering with HCPC in 2008, she worked as a rotational physiotherapist in the University College Hospital, Ibadan, Nigeria between 2009 and 2011.

35. The claimant moved to the UK in 2011, for the purpose of completing a Master's Degree in 'Advancing Physiotherapy', which she duly did.

36. The claimant gained some work experience working as a locum Band 5 physiotherapist at Cannock Chase Hospital between November 2013 and February 2014.

37. The respondent will appoint, on average, around 20 physiotherapists each calendar year. Their largest intake is often in or around March. This is deliberate, as this coincides with individuals who are due to complete their studies and enter the job-market.

38. As part of the interview processes (at least insofar as those that are relevant to the issues in this case are concerned), Ms Teasdale and Ms Hellis decided in advance of interviewing candidates which questions they would ask. These questions were then set out on a pro-forma. This pro-forma was then populated with the answers that each respective candidate gave during interview.

39. Further, as part of the pre-interview discussions between Ms Teasdale and Ms Hellis, a minimum score was set. The purpose of this was to identify all of the candidates which they would like to retain with the trust,

irrespective of the number of posts available. This was used by Ms Teasdale and Ms Hellis to identify candidates that they would offer alternative roles, subject to availability, and encourage to apply for future recruitment opportunities, should the candidate not be successful in securing the primary role for which they had been interviewed.

40. Following the interviewing of candidates, each candidate was then scored on a score sheet based on their interview performance. An example of the score sheet can be seen p.284e.

41. The respondent destroys the majority of recruitment documents after a period of 12 months, in line with its Human Resource Storage Guidelines (seen at p.215a of the bundle). The only documents that were retained from the 2014 interviews were the completed pro-forma answer sheets of successful candidates.

42. On 14 January 2014, the claimant interviewed for a Rotational Band 5 Physiotherapist role by Ms Teasdale and Ms Hellis. This interview consisted of 8 pre-prepared questions. The claimant's answers can be seen at pp220-225. Answers provided by other candidates, namely AB and LB can be seen at pp.225a-225l.

43. At the interview, the claimant indicated that if she was not successful in interview for the Rotational Band 5 Physiotherapist role then she would like to be considered for the alternative roles of Band 5 Bank Physiotherapist or a temporary Band 3 Physiotherapist.

44. The claimant scored at least the minimum score required to be offered an alternative role; however, was not ranked high enough to be offered one of the Band 5 roles that she applied for.

45. During feedback over the phone about her interview with Ms Hellis, the claimant indicated that she would like to take up the offer of a role as a Band 5 Bank Physiotherapist. However, following discussions the claimant had with a colleague in her then employment, she decided instead to accept a temporary Band 3 Physiotherapist role. The claimant was subsequently offered by letter, dated 15 January 2014, a temporary Band 3 Physiotherapist role (with end date of 31 March 2014) with the respondent. The claimant accepted this role.

46. Both AB and LB were interviewed by Ms Teasdale and Ms Hellis on 14 January 2014:

    a. LB was appointed following interview on a 1 month temporary Band 5 contract. Which was later extended until 31 May 2014. LB was further interviewed for a permanent Band 5 role on 05 June 2014 (interview notes at pp.284a-284b). LB's contract was extended, until they were offered a permanent role from 01 September 2014.

    b. AB was appointed on a temporary Band 5 contract from 30 January 2014. AB's contract was extended on a number of occasions, before they were recruited to a permanent Band 5 role on 30 April 2014.

47. On 24 February 2014, the claimant commenced employment as a Temporary Band 3 physiotherapist. This contract, which was initially due to expire on 31 March 2014, was subject to a number of extensions up until 31 October 2014.

48. On 05 June 2014, the claimant was interviewed for a Band 5 Physiotherapist role by Ms Teasdale and Ms Hellis. The claimant was not successful in securing this role at interview. Again, in interview feedback, it was explained to the claimant that she had performed well in interview but that there were other candidates that had scored higher based on the interview questions asked.

49. SD was interviewed on 09 June 2014. A copy of Ms Hellis's interview notes can be seen at pp284a-284b. They were appointed to a temporary Band 5 post on 07 July 2014, before this was made permanent on 01 November 2014.

50. PO was interviewed on 08 October 2014. They were offered a temporary Band 5 post on 16 December 2014, before starting a permanent post on 01 April 2015.

51. On 27 October 2014, the claimant was appointed to a temporary Band 5 Physiotherapist role. This was without a further interview. Although beyond the respondent's three months rule (that being a rule operated by the respondent that allows it to appoint to a vacancy without a need to re-interview a candidate, so long as the vacancy arises within 3 months of the candidate's last interview with the respondent) that the respondent has, the claimant was appointed to this post based on her interview performance of 05 June 2014. This contract had an end date of 31 January 2015 (see p.303 of the bundle).

52. The claimant's temporary post was extended on 28 January 2015, with an end date fixed at 31 March 2015 (see ppp.330-331).

53. On 01 April 2015, the claimant is appointed to a permanent Band 5 physio role.

54. On 19 January 2015, Ms Teasdale and Ms Hellis appointed Ms Nkechinyelu Molokwu, who is black/Nigerian, to a temporary Band 5 Physiotherapist role. Before her post was made permanent on 01 January 2016. Ms Molokwu was promoted to a Band 6 role on 02 October 2017, following a successful interview before a 3-member panel, which included Ms Brown.

ISSUE:

1) *In September/October 2014 the Claimant was sent to critical care for 2 weeks. She understood this placement was a condition of employment as a Band 5 Physiotherapist. Did the Respondent thereby subject the Claimant to a detriment and if so did the Respondent treat the Claimant less favourably that it treated or would have treated others because of her race. The Claimant relies on Simon Davies, Pip Oram, Liam Buckley and Ashley Bridges as comparators.*

55. On 16 September 2014, the claimant met with Ms Teasdale. At this meeting:

a. the extension of the claimant's temporary contract was discussed.

b. It was also identified by the claimant that a rotation to acute respiratory care would support her in one of her learning and development needs. This is the unchallenged evidence of Ms Teasdale.

56. By email, dated 17 September 2014, Ms Teasdale confirmed that the claimant's temporary contract was being extended until 31 October, and that she had asked the principal therapists to look at doing a swap for her onto acute medical wards, and to look at supervision arrangements at band level 5, as per their conversation the day before (see p.293b).

57. The claimant replied to Ms Teadale on 19 September 2014 (pp293a-293b). The claimant explained:

I am also willing to work/shadow as a band 5 in an acute medical ward if you feel that this would be beneficial in my future posts.

58. The management team, including Ms Teasdale, considered that the best area for the claimant to gain this learning and development would be Critical Care. This was likely based on there being access to appropriate patients, staffing levels of the team and availability of senior staff to give the best level of supervision and training support. Again this is the unchallenged evidence of Ms Teasdale.

59. The decision to rotate the claimant into the critical care team was communicated to the claimant by Ms Teasdale by email on 19 September 2014, when she wrote:

Having discussed this with the principal therapists the plan is to transfer you temporarily to the critical care team where Steph and Deb can oversee you in a Band 5 capacity.
We will make a decision from there about future opportunities for you.

60. This plan was never objected to by the claimant at the time.

61. None of Simon Davies, Pip Oram, Liam Buckley, Ashley Bridges or Nkechinyelu Molokwu had specific arrangements to work on critical care; however, none of them had specific learning and development needs that would require such an arrangement.

ISSUE:

6.9). In December 2015 Ms Soumi Mukherjee refused to give the Claimant the option to choose between a 3 year and a 5 year tier 2 visa. Did the Respondent thereby subject the Claimant to a detriment and if so did the Respondent thereby treat the Claimant less favourably than it treated or would have treated others because of her race. The Claimant relies on Dani Khoo as a comparator [and/or] a hypothetical comparator.

62. Ms Mukherjee, as part of her role, at least until she left the employ of the respondent on 21 December 2018, would complete the relevant online form that provides Certificate of Sponsorships, along with a unique certificate number, which is then used by an employee to apply for a visa.

63. Ms Mukherjee would apply for approximately 75-100 Certificates of Sponsorship per year. She did not issue a 5 year Certificate of

Sponsorship to any employee of the respondent. The practice of the respondent, in the mind of Ms Mukherjee, was that it would only issue tier 2 visas of up to 3 year in length. This is a practice that Ms Mukherjee adopted due to her understanding.

64. Ms Khoo was issued a Certificate of Sponsorship, with the respondent named as the Sponsor, on 24 November 2014. This covered the 12 month period of 01 December 2014 to 30 November 2015 (see pp.310a-310d).

65. The claimant was issued a Certificate of Sponsorship, with the respondent named as the Sponsor, on 25 November 2014. This covered the 12 month period of 01 December 2014 to 30 November 2015 (see pp.310e-310f).

66. Ms Khoo was issued a further Certificate of Sponsorship, with the respondent named as the Sponsor, on 21 October 2015. This covered the 3 year period of 15 December 2015 to 14 December 2018 (see pp.413-414).

67. The claimant was issued a further Certificate of Sponsorship, with the respondent named as the Sponsor, on 09 November 2015. This covered the 3 year period of 13 December 2015 to 12 December 2018 (see pp.431-432).

68. Ms Khoo's unchallenged evidence, and which we accept, is that she had never been offered a choice between a 3 year and a 5 year Certificate of Sponsorship.

69. In an email discussion on 25-27 November 2015 between the claimant and Ms Khoo concerning visa application/certificate of sponsorships, the claimant asked a question concerning how long Ms Khoo had applied for. Ms Khoo's response was that '*If you have a permanent position, you just have to decide if you want 3 or 5 years and pay accordingly*' (see p.438a-438b).

70. Following email discussion with Ms Poulson, the claimant applied for and received a 5 year Certificate of Sponsorship.

ISSUE:

6.11). In July 2017 Ms Caroline Brown denied the Claimant access to patient notes to enable her to challenge Ms Clubley's allegations.

a). Did the Respondent thereby subject the Claimant to a detriment and if so did the Respondent thereby treat the Claimant less favourably than it treated or would have treated others because of her race. The Claimant relies on a hypothetical comparator.

b). Did the Respondent thereby engage in unwanted conduct related to Claimant's race with the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

71. At the Stage 2 Capability meeting (notes of which are at pp1599 -1605, which took place on 23 June 2017, it was explained to the claimant by Ms

Brown that, based on advice that she had received, that the claimant would be placed on clinical suspension form 26 June 2017, but that she would continue with non-clinical duties. Such suspension is recorded as being partly at the claimant's request and partly due to workforce planning difficulties (see p.1604).

72. On 26 June 2017, the claimant was suspended from clinical duties in line with that discussed on 23 June 2017.

73. The claimant was allowed to use her non-clinical time to meet with her union representatives and to work on her case for the hearing.

74. All employees of the respondent are subject to the respondent's Information Governance Policy. This regulates access to patient notes, amongst other things. Breach of which is a disciplinary offence.

75. Two members of staff separately informed Ms Brown that they believed that the claimant was accessing patient clinical records for the purpose of developing her statement of case. Ms Brown checked with Ms Hellis as to whether the claimant had received permission to access patient notes and patient identifiable data, which it was explained that she had not.

76. Ms Brown, following HR advice from Ms Barnes, advised Ms Cain that she would need to contact Ms Barnes to arrange legitimate access for the claimant to patient notes in compliance with the Information Governance Policy. This is a plausible conclusion, given that Ms Cain engaged in communication with Ms Barnes with respect access to patient notes from 24 July 2017 (see p.588C), and which references data protection matters.

77. Ms Brown explained to the claimant, discretely, reminded the claimant of the Information Governance Policy and that she should stop accessing patients' notes for the time being and that she should contact Shona Cain regarding this. Although the claimant under cross examination stated that Ms Brown did not say this, on balance we find that Ms Brown did. This paragraph, along with the preceding two paragraphs, is consistent, to a large degree, with that present in the claimant's WhatsApp message discussion with Ms Cain at pp686x-686z.

78. On 25 July 2017, Ms Cain phoned Ms Barnes to request some patient notes on behalf of the claimant to support her case. This was followed up by email (see p.585f). MS Barnes replied by email on that same date, seeking information on which notes the claimant was wanting, and explaining that she would have to 'link in with clinical governance', as she understood that it was them that would arrange for the claimant and Ms Cain to go and view them.

79. Ms Barnes discussed the claimant's request for notes with the governance team, who advised her that she would need to arrange with health records for the notes to be provided to HR, before then arranging for Ms Cain and the claimant to view them. It was explained to Ms Barnes that the nothing

could be taken away form the notes, however, a redacted version could be made available of any notes on the day of the hearing for the panel. This information was emailed to Ms Cain on 26 July 2017, whilst also stating that this could be arranged as soon as details of the patients required were provided (see p.585c).

80. On 26 July 2017, Ms Cain made a request by email to Ms Barnes for access to three sets of patient notes: patient JB, patient OAM and patient EF. As part of this email, Ms Cain also asked for an extension of time to submit the claimant's statement of case, as they would need to access the patient notes before this could be completed (see pp.585b-585c).

81. On 26 July 2017, at 13.52, Ms Barnes emailed Ms Cain to explain that she was being sent copies of notes for JB and EF, and arranged for the claimant and Ms Cain to view these in her presence on the afternoon of 27 July 2017. On that same day, at 14.32, Ms Barnes again emailed Ms Cain to explain that the she and the claimant could have access to the notes for patient OAM (which were held on the Electronic Document Records Management system(, with Ms Hellis in attendance, on the 26 July 2017 after 3.30pm, but that Ms Cain would have to make the specific arrangements with Ms Hellis direct. Confirmation that the claimant's request for an extension to the deadline to provide her statement of case had been granted was also provided to Ms Cain in this email (see pp.585a-585b).

82. The claimant and Ms Cain met with Ms Barnes to review the notes of JB and EF on 27 July 2017.

83. The claimant, nor Ms Cain on the claimant's behalf, contacted Ms Hellis to arrange to see OAM's notes. Although Ms Barnes presumed that the claimant had met with Ms Hellis to view the file, we find that on balance this unlikely took place and that was because the claimant nor Ms Cain arranged for the viewing to take place. Ms Hellis gave no evidence of such a meeting, and although not in the claimant's witness evidence, she was clear under cross examination that she did not meet with Ms Hellis. Further, there are no emails or record of contact by the claimant or Ms Cain to arrange the viewing of OAM notes with Ms Hellis.

84. However, despite not meeting with Ms Hellis to review OAM's notes, the claimant did view the OAM patient notes and was provided with a copy of them in advance of the panel hearing. This is the unchallenged evidence of Ms Barnes's supplemental witness statement (paragraph 5), and the notes of OAM are attached to the claimant's statement of case (see p.1666). Which must mean that she had had access to them at some point.

85. On 28 July 2018, the claimant submitted her statement of case.

86. On 02 August 2018, the claimant sent an email to Ms Barnes and requested another set of patient notes, this being patient RC. Ms Barnes

replied that same day explaining that it was too short notice. This was told to the claimant as the capability panel hearing was due to take place the following day (pp588g-588h).

87. On 14 September 2017, Mr Jim Fahie, who was the claimant's new union representative, emailed Ms Barnes requesting an anonymized copy of patient notes that had been requested preciously (p.614b). Following emails between MS Barnes, Ms Poulson and Ms Haires as to who would be appropriate to deal with these matters, it was decided that Ms Haire's should be the point of contact for such requests for the purposes of the appeal, but with Ms Barnes in support (see pp.614a-614b).

88. The process for requesting notes for the purpose of the claimant's appeal was set out in an email composed by Ms Barnes, and which was sent to Mr Fahie on 20 September 2017 (p.614h).

89. The claimant on 25 September 2017, by email to Ms Haire, made a request for two sets of patient notes, those being for patients RC and CB. (pp.618d-618e).

90. Ms Haire by email on 28 September 2017 agreed that the claimant could view the notes as requested, under supervision, and that this should be arranged through Ms Barnes (pp.618b-618c).

91. Ms Barnes requested the names so that she could locate the relevant patient notes, but asked that either the claimant or Mr Fahie calls her with the names rather than putting them in an email (pp.618a-618b).

92. At some point between 28 September and 02 October 2017, the claimant had had a phone conversation with Ms Barnes. The names of patients, for which notes were required, was clarified as being patients with initials RC and CB only, and it was arranged for the claimant to view the notes under the supervision of Ms Barnes on 02 October 2017.

93. On 02 October 2017, at 09.28, Ms Cain emailed Ms Barnes with a list of 11 patient names, which she says that the claimant and Mr Fahie are requesting to look through. Ms Barnes responded to Ms Cain to explain that the claimant had been in contact directly with her, and had only asked to see two sets of patient notes, namely CB and RC.

94. The claimant attended a meeting with Ms Barnes, where she was given access to the patient notes relating to RC and CB. The claimant confirmed that she only wanted access to the two sets of patient notes and copied the relevant sections she wanted. These formed part of the appeal bundle. The claimant produces no witness evidence on this, and her answers under cross examination on this point were ambiguous. Ms Barnes gave clear answers under cross examination, that is consistent with the written evidence that we have seen.

ISSUE (1st capability process):

6.2). The Claimant was subjected to a performance management process between March 2015 and October/November 2016. Did the Respondent thereby subject the Claimant to a detriment and if so did the Respondent thereby treat the Claimant less favourably than it treated or would have treated others because of her race? The Claimant relies on Chris Gilpin as a comparator.

95. The capability management process was provided for under Policy No HR29 'Capability Process'. There are two relevant policies in this case. There is the old policy, which was used between July 2010 and May 2015 (see pp.139-170), and there is the current policy that came into effect from May 2015 (pp.171-191).

96. Whilst working as a Band 3, the claimant completed a placement on a non-acute step down facility in the community for frail elderly patients, known as Stadium Court. For the most of this rotation, the claimant received positive feedback. During this placement, Ms Gemma Cooke raised a concern with Ms Brown about the claimant's manual handling practice. The concern was that using unsafe methods to move the patient could have caused injury to the patient and both of the Technical Instructors, which led to an interjection by Ms Cooke.

97. During February 2015, the claimant applied for a permanent Band 6 respiratory physiotherapist position. The claimant was shortlisted for this role. The claimant evidenced that she had previous respiratory physiotherapist experience in her application, as this was a requirement to be shortlisted for this role.

98. At interview on 27 February 2015, the claimant was asked questions relating to interpretation of arterial blood gasses (ABG's) or contradictions to manual hyperinflation, amongst other things (a copy of the claimant's answers in interview are at pp.353h-353m).

99. As part of the claimant's on-call induction with Ms Massey, a Senior Physiotherapist, Ms Massey on 13 March 2015 raised concerns about the claimant's clinical performance in relation to a number of matters, including providing normal values for ABG's or interpreting what type of failure a patient was in. Further, question were raised in relation to a lack of clinical reasoning. This led to an action of not allowing the claimant to work unsupervised, and the need to introduce an action plan to develop objectives (see Ms Massey's feedback on the claimant at pp.767-769).

100. Ms Thomas, also identified similar issues, to that noted in the 3 paragraphs immediately above this one, with the claimant during her initial 6 weeks (02 February 2015 to 13 March 2015) of her cardiothoracic rotation.

101. Following a discussion between Ms Brown and Ms Thomas, it was decided that Ms Thomas would meet with the claimant with a view to developing a learning package, with clearly defined learning objectives.

102. The claimant and Ms Thomas had a 1-2-1 meeting on 13 March 2015. During the meeting, the claimant raised concerns about feeling under pressure and in relation to the level of scrutiny she felt under. The meeting was used to develop a learning plan to help the claimant improve her clinical and non-clinical skills. This was to be done using clear weekly objectives alongside long-term objectives, with progress to be assessed in weekly meetings. These weekly meetings would also be used to identify whether the claimant had any other learning needs that needed to be addressed. The next agreed date of review was recorded as 18 March 2015. The claimant signed the form in agreement with its contents (see p.771).

103. Although the meeting of 13 March 2015 was recorded on a discussion form that has a header that suggests that it was part of the respondent's disciplinary process, this was not in fact part of such a process. The claimant was not put through a disciplinary process at this time. Ms Brown explains that this form was used to ensure that there was structure to file notes. This was consistent evidence in Ms Brown's written evidence, her oral evidence and is consistent with the correspondence between Ms Brown and Ms Barnes of HR during May 2015 (see p.887).

104. The claimant was absent from work from 16 March 2015 to 18 March 2015 with sickness, before being on annual leave from 20 March 2015 to 07 April 2015. Ms Thomas was on annual leave from 08 April 2015 to 10 April 2015.

105. On 11 and 12 April 2015, the claimant worked with Ms Claire Collinge as part of her on-call induction. Ms Collinge provided feedback on the claimant's performance during that weekend. Ms Collinge raised a number of matters including that the claimant needed continuous direction and prompting with all patients, she wasn't forthcoming with questions, that she did not show initiative and that her communication with patients was confusing at times. Ms Collinge concluded that she would question whether the claimant was competent enough to go on the rota (see email at p.1065).

106. The first review of the claimant's progress toward the agreed objectives took place on 16 April 2015. This meeting was between the claimant and Ms Thomas. In this meeting, the claimant explained to Ms Thomas that there were differences in respiratory physiotherapy approaches between the UK and Nigeria.

107. On 17 April 2015, the claimant, Ms Thomas and Ms Cormie had a further meeting. It was noted in this discussion that the structured learning plan had been reviewed, and that a more structured plan would be beneficial to the claimant. In this meeting, it was suggested that the claimant could help the senior physiotherapists understand her learning needs by writing down 'a summary of the types of respiratory patients and conditions she had dealt with and seen in Nigeria and to identify with what

she had seen since working here what was unknown/unfamiliar to her'. A more detailed learning plan was presented to the claimant in this meeting, which was to take the form of a 4 week planned learning framework, followed by a 2 week period of independent caseload (so long as her supervisors identified safe practice in the initial 4 week period). Band 7 Supervisor's would review the claimant's progress on a weekly basis (see pp.839-841). The new learning plan, which was to start on 20 April 2015 is set out at pp.779-783. This was the start of the informal stage under the capability policy, which was explained to the claimant in the meeting of 17 April 2015.

108. During the initial 4 week of this process, although there were some issues highlighted by Band 7 supervisors, it was felt that the claimant 'had shown improvement enough to warrant a trial of independent case load management and also to assess her ability without direct supervision to assess, identify, problems rationalise treatment, implement treatment analyse and formulate treatment plans for the future…' (a record of the claimant's weekly progress is at pp.835-837).

109. During week 5 of the informal stage of the capability process, 3 incidents were identified following the withdrawal of supervision, which were considered unsafe clinical incidents (the evidence of Ms Brown Witness statement, paragraphs 36-39 went unchallenged on these points):

a. Blood pressure patient: An unsafe practice of mobilizing a patient without first reassessing the patient following a drop in the patients normal blood pressure. Failing to accurately record in the patients' notes that the reading had been taken by the claimant herself or from the patients observation charts. Failure to perform serial monitoring of the patient's blood pressure during treatment, or to check blood pressure during standing or exercise, or to ask specific questions relating to the patients symptoms that linked to blood pressure changes when she stood the patient up (see point 4 on both p.874 and p.875).
b. Cardiothoracic patient: that the claimant mobilized a cardiac patient under 30 minutes after they had their CVP line removed, and had not documented vital cardiac/blood pressure observations. (see point 3 on p.874 and p.875)
c. Cardiothoracic patient (2): that the claimant had not realized that a patient, who she was transferring from a bed into a chair, was slipping out of the chair, and which needed Ms Thomas's intervention (ss point 2 on p.873 and p.874).

110. The claimant met with Ms Thomas and Ms Cormie on 22 May 2015. The claimant was provided with a copy of a letter in which the discussion was recorded. The claimant at no point challenged the accuracy of this letter, and therefore this must be an accurate record of the discussion. Within the letter, and therefore during the meeting, it was explained to the claimant that it was not safe for her begin on-call respiratory work. The claimant was further advised that she would be notified of what the

decision on next steps were once Ms Thomas and Ms Cormie had discussed matters with Ms Brown.

111. Ms Thomas sent an email to Ms Brown on 22 May 2015. This included an attachment, which contained clinical concerns that Ms Thomas had with the claimant (see pp.880-884).

112. Ms Brown sought guidance from HR (pp.885-889). HR advised that the claimant should be moved on to the new Capability Policy, which had now come into effect.

113. Ms Brown and Ms Cormie met with the claimant on 03 June 2015. Ms Brown made the decision to escalate the capability management to the formal process under the new May 2015 Capability Policy. This was because the claimant had not yet progressed to a satisfactory level of competence in the field of respiratory physiotherapy. It was explained to the claimant that this would involve a more structured and supportive package to assist develop the claimant's performance. It was agreed that this package would be a 7-week package. A letter summarising the discussions that took place in that meeting were sent to the claimant as part of a letter dated 06 July 2015 (pp.362-363).

114. Ms Cormie and the claimant developed what is described as SMART objectives, that formed the basis of the claimant's development plan. These were developed to match the performance gaps that had been identified (pp.915-919).

115. The claimant met with her supervisors weekly, which was to review the claimant's progress against the SMART objectives.

116. 0n 30 June 2015, Ms Cormie met with the claimant to review the claimant's progress over the first 3 weeks of the learning package. As part of this discussion, areas were identified where the claimant had made progress against her SMART objectives. However, it was also highlighted that there was a 'lack of demonstration of knowledge' which was having a negative impact on time management' (pp.934-936).

117. On 02 July 2015, the claimant attended at the 4 week review with MS Brown. During this meeting the claimant raised a number of concerns with the process, which led to Ms Brown modifying aspects of it. (pp.950-951).

118. The claimant was absent from work on sick leave between 09 July 2015 and 16 July 2015.

119. The claimant met with both Ms Brown, and Ms Sara Cummins, a Principal Therapist with the respondent on 17 July 2015. It was explained to the claimant that Ms Brown had discussed with HR, and that given her recent period of illness and that she had not met the week 2 and 3 objectives it would be unfair to re-start the process from week 5. The plan

was to modify the process to give the claimant more time to achieve her objectives. A revised timetable was put in place (see pp.954-956).

120. Week 4, 5 and 6 SMART objective progress sheets were completed (pp.977-1012).

121. The week 7 capability review meeting took place on 14 August 2015. Ms Brown, Ms Cormie and MS Elson, a HR advisor attended the review meeting, whilst the claimant was supported by a colleague, Sister Chidi. In this meeting, week 7 progress was discussed (pp.1019-1034).

122. Following discussion of progress and a number of concerns raised by the claimant, it was decided that that the claimant would proceed to stage 2 of the modified capability procedure. The reason for this was due to insufficient progress against the SMART objectives. This was communicated in the meeting of 14 August 2015, and recorded in a letter dated 17 August 2015, which provides a summary of the discussion (see pp.1016-1017). The decision to progress to stage 2 was explained:

> Unfortunately it was reported by Rosie that whilst progress had been made she was unable to sign off completely any of the objectives as you had not consistently demonstrated the level of performance required and still needed senior support and supervision when treating patients. We did however report that a key area was communication and it was anticipated that if these objectives were met and you could communicate your clinical reasoning to your supervisor many of the other objectives could be achieved.
>
> Having reviewed the progress to date I went on to state that whilst improvements have been made there has not been sufficient progress with in the time frame set and your supervisor continues to see shortfalls in your performance that require you to be supervised, despite their extended support, so you would now proceed to Stage 2 of the modified capability procedure. Laura explained that this meant a report would now be developed of progress to date and the support given in order for this to be presented to a panel. You would have an opportunity to respond to this, including any mitigating circumstances. Options for the panel as a result of this would be your dismissal on grounds of capability, redeployment or a further review period. Further information is available at Appendix 3 of the capability policy and details will be provided in writing once a date is agreed. Ahead of any meeting you would now have an opportunity to continue to work towards achievement of the plan to achieve the objectives and we would continue to support you to do so.

123. The final capability hearing took place on 19 October 2015, chaired by Ms Stephanie Morris. Having considered both the staff side's case and the management case, the Panel decided to extend the capability process for another 3 months. This was due to the switch from the old capability policy to the new policy mid0way through the process. The claimant did not raise any allegations of race discrimination as part of her case (see pp.420-421).

124. Ms Brown met with the claimant on 30 October 2015 to discuss the next steps in the process. Before meeting again with the claimant, and Ms Cain as her CSP representative, on 09 November 2015 to formally begin the 3 month Formal Capability Review Period and to clarify the objectives against which her progress would be reviewed. The discussion in the meeting of 09 November 2015 was recorded in a letter dated 18 November 2015, and sent to the claimant (pp.436-437).

125. Following good feedback and progress during this period, the claimant met with Ms Brown on 13 January 2016, with a view to signing off on the majority of the claimant's capability objectives. Unfortunately, this meeting was only very brief as there was an incident involving Patient 20.

126. The claimant was suspended from work on 13 January 2016.

127. Following the conclusion of disciplinary process, the claimant returned from work on 20 June 2016.

128. The claimant, accompanied by Ms Cain, met with Ms Brown on 28 June 2016. It was agreed that the claimant would be given a six week time frame to revisit her competencies and complete the sign off process (see pp.513-514).

129. On 11 August 2016, Ms Brown met with the claimant and informed her that her performance had improved to the required level and consistently maintained to a satisfactory level. The claimant was signed off as competent in respiratory physiotherapy and in On-call. This brought an end to the stage 2 capability process.

130. Chris Gilpin was not in materially comparable circumstances to that of the claimant. Mr Gilpin has never been subjected to a development or capability management process during his employ with the respondent.

ISSUE (Second Capability Process):

6.3). The Claimant was subjected to a second performance management process between 13 Jan 2017 and 3 August 2017. Did the Respondent thereby subject the Claimant to a detriment and if so did the Respondent thereby treat the Claimant less favourably than it treated or would have treated others because of her race? The Claimant relies on a hypothetical comparator.

131. Patient 1 was an 8 year old boy that had had a knee operation. The claimant provided outpatient treatment to Patient 1 on two separate occasions, those being 28 October 2016 and 17 November 2016.

132. On 17 January 2017, Patient 1 was treated by one of the Advanced (Band 7) Physiotherapists working with the Outpatient Department. This was because Patient 1 arrived for treatment late due to snow fall.

133. The Band 7 escalated concerns about the claimant's treatment of Patient 1 to Ms Heath.

134. Ms Heath concluded that the claimant had ignored all of the post-operative instructions that was recorded by the consultant surgeons in her treatments of 28 October 2016 and 17 November 2016 (see pp.1201-1212). The claimant accepted that she had made a mistake with the treatment of Patient 1.

135. Ms Heath concluded that this safety incident called into question the claimant's clinical reasoning and standard of performance. And that this triggered the requirement for a review under the informal stage of the respondent's capability policy. It was explained that Ms Brown would oversee any support needs of the claimant. This was all explained to the claimant in a meeting of 13 January 2017 (see pp.1198 and 1199). And this was confirmed by letter dated 18 January 2017 (see p.1196).

136. Ms Brown was appointed to take line management lead on the capability process.

137. Ms Brown met with the claimant on 25 January 2017. This was the first informal meeting under the capability process. Ms Brown, Ms Terry and the claimant attended at this meeting. A number of matters were discussed in this meeting. Including the identifying of learning needs, exploring if there were ay underlying causes for the capability issues, and to set SMART objectives. Discussion also took place as to why the claimant had been placed into the capability process. This included discussing the incident that was identified on 13 January 2017, and a further two incidents (patient A38365 and patient C09618). It was further discussed that Ms Teasdale and Ms Hellis had made a decision that the claimant should not participate in weekend or late shift working on the rota, but that this decision would be reviewed towards the end of the six week development period (for the letter recording the details of this meeting see pp.556-562).

138. The claimant met with both Ms Brown and Ms Terry on 01 February 2017. In this meeting the new performance SMART objectives were agreed, which covered a six week period (these are at pp.1328-1339). The claimant's 6 week learning timetable is at pp.1363-1364.

139. As part of this process, it was agreed that the claimant's progress would be considered through completing of learning logs, case reflections and through discussions of patient sessions between the claimant and her supervisor.

140. Between 08 February 2017 and 22 February 2017, there were three clinical incidents reported by Ms Clubley, as supervisor, which involved the claimant.

141. Clinical incident 1 was discussed with the claimant initially with Ms Clubley immediately after the event, and then at a progress meeting that took place on 15 February 2017, in the presence of Ms Brown, Ms Clubley and Ms Cain (as the claimant's CSP representative). In this incident it was reported that the claimant had failed to identify in the patient's post-operative notes that there was a discrepancy in the weight-baring status of the patient. The claimant did not challenge the accuracy of this note (see patient treatment record at p.1416, which is signed as accurate by both Ms Clubley and the claimant).

142. Clinical incident 2 was discussed with the claimant immediately after the event, and then at a progress meeting that took place on 15 February 2017, in the presence of Ms Brown, Ms Clubley and Ms Cain (as the claimant's CSP representative). In this incident the claimant had failed to recognise that a patient was showing signs of becoming unwell during treatment, and therefore failed to modify the treatment accordingly. This led to Ms Clubley intervening in the treatment. The claimant did not challenge the accuracy of this note (see patient treatment record at p.1421, which is signed as accurate by both Ms Clubley and the claimant).

143. Clinical incident 3. This matter was discussed with the claimant following the conclusion of the treatment of the patient. In this incident, the claimant's supervisor, Ms Clubley, flagged concerns about the claimant's decision to continue with mobilising the patient without further investigation, despite what was described as unusual and worsening upper limb pins and needles. This led to Ms Clubley having to intervene to top the transfer assessment (see p1431-1432). The claimant did not challenge the accuracy of this record with Ms Clubley in cross-examination, nor with Ms Brown.

144. Ms Brown held a review meeting with the claimant on 22 February 2017. And following discussion with HR, Ms Brown decided that the claimant's case would progress to the first formal stage of capability management. This decision was made based on the three clinical incidents recorded above. This is all recorded in the letter dated 10 May 2017 (see p.563).

145. The claimant was absent from work between 23 February 2017 until 08 May 2017.

146. The claimant met with Ms Brown on 09 May 2017, with Ms Terry and Ms Clubley also in attendance. Notes of that meeting are at pp.1448-1449. The purpose of the meeting was to:

- Review progress and learning needs in relation to Uju's development,
- Recap of her SMART objectives and feedback from the meeting on the 22.2.17
- Explain where capability process is at and to clarify the next steps for Uju.

147. The first formal meeting under the capability policy took place between the claimant, with Ms Bridges accompanying the claimant as her CSP representative, Ms Terry, Ms Clubley and Ms Brown on 17 May 2017. During this meeting the three clinical incidents that led to the escalation to the formal part of the capability process were discussed. Discussion of the SMART objectives, the setting of a 6 week review period, arrangements for reviewing progress and the claimant's health also took place (see pp.564-567).

148. Following further clinical incidents (clinical incident 5, which was discussed with the claimant in the first formal progress review meeting on 24 May 2017 (see.1481-1493) and clinical incidents 6 and 7, which were

discussed with the claimant in the second formal progress review meeting on 31 May 2017, Ms Brown escalated the matter to Ms Hellis. Following advice from HR, it was decided that the claimant's case would progress to the second formal stage of the capability procedures. This is documented in the letter dated 01 June 2017. The reason for this was that:

PE). In all cases your performance during these incidents were considered to be below an acceptable standard of a Junior Physiotherapist and if it had not been for the actions of your Advanced Physiotherapists would have posed a clinical risk that may have presented a significant danger to patients.

149. The initial second formal capability meeting took place on 07 June 2017. Ms Brown was accompanied by Ms Barnes, of HR, and the claimant was accompanied by Mr Bridges, her CSP representative. It was explained in that meeting that the second formal review period would be shortened to two weeks given the level of clinical risk associated with the three incidents discussed in the first formal stage. It was further advised that any further clinical incidents that raise a safety concern within that two week period would trigger a final review. Whereas, if there were improvements in the claimant's performance during the 2 week formal period, then there was scope to extend the period to enable the claimant to complete her objectives. The main areas of key concern that needed to be addressed by the claimant were discussed and recorded. The option of redeployment was also explored with the claimant (this was all recorded in a letter dated 07 June 2017, see pp.572-575).

150. On 16 June 2017, the claimant met with Ms Brown and Ms Clubley to review progress during the first week of the second formal capability stage. The claimant was not accompanied by a union representative at this meeting, despite having had the opportunity to be accompanied. Notes of this meeting are at pp.1557-1562.

151. During this meeting, 4 patient matters, one of which was considered a safety concern, had been identified and were discussed:

a. The first concerned a spinal patient (ACDF patient) on ward 218. Where concerns were raised by Ms Clubley that the claimant had failed to adequately control the treatment situation, and to pick up on and react to patient cues (Patient Treatment Record is at pp.1564-1565). This was considered a safety issue by Ms Brown
b. An Orif Clcaneus potential discharge patient seen on ward 218 with Ms Clubley. Where communication with patients were discussed.
c. A total knee replacement patient seen with Ms Rachel Sutton. The discussion concerned patient progression, treatment and to escalate matters where necessary.
d. A spinal patient that the claimant had seen with Ms Clubley on 09 June 2017, where following mobilising the patient, the claimant re-auscultated the patient at different points to her initial auscultation.

152. Ms Brown decided that she would need to discuss with Ms Barnes the next steps to take, given the safety incident with the ACDF patient.

153. A final second stage capability review meeting took place on 23 June 2017. Ms Brown, Ms Barnes, Ms Heathcote (as minute taker), the claimant and both CSP representatives, Ms Cain and Mr Bridges were in attendance. A letter summarising the discussion of that meeting was sent to the claimant on 29 June 2017 (see pp.1597-1598), with the notes of that meeting at pp.1599-1605. Five clinical incidents of risk to patients were discussed in this meeting:

a. The first incident of concern was that already discussed at the meeting of 16 June 2017, that being the ACDF patient, noted above.
b. The second incident of concern had also already been discussed at the meeting of 16 June 2017. This was the total knee replacement patient seen with Ms Rachel Sutton.
c. A second total knee replacement patient was discussed. This patient was seen with Ms Clubley on 20 June 2017. It was recorded that the claimant had wanted the patient to undertake various exercises, including encouraging the patient to bend their knee. Ms Clubley intervened in the treatment as she considered the treatment inappropriate as the patient's knee had been bleeding and she did not want to open the wound which would increase the risk of infection. We accept Ms Clubley's evidence on this, given its consistency with the documents at pp.1607-1610, which includes a summary email to Ms Brown and the Patient Treatment Record, both of which were recorded at the time of the incident.
d. A Tibial Plateau ORIF with fibular fracture, who the claimant treated with Ms Terry on 22 June 2017. During treatment, Ms Terry became concerned that the patient was becoming faint and that the claimant had missed visual cues of this. This included the patient leaning onto a frame with his forearms and going pale. Ms Terry intervened in this treatment. Ms Terry recorded an accurate note in relation to this matter (see reflection and feedback note completed by MS Terry on 22 June 2017, p.1614).
e. On 20 June 2017, a patient who was identified as Enhanced Recovery, where it was recorded that the claimant had failed to identify necessary missing information. Ms Terry's produced a reflection of this event following the event (see.pp.1616-1617). In relation to one particular patient, the claimant communicated to Ms Terry that the patient was not for enhanced recovery. On investigation, Ms Terry realised that the post-operation record, where enhanced recovery would be recorded, had not been completed (p.1619). On considering the patient notes, it was clear to Ms Terry that the claimant had not investigated further, and that she had not considered the typed orthopaedic note which stated:

'Complex Primary Right THR & Adductor Tenotomy'

Post op plan:
Immobilisation: Abduction pillow for 24 hr
Mobilisation: FWB as tolerated
Rehab: Enhanced recovery protocol.

The claimant had not read all of the information regarding the operation procedure before reaching her conclusion.

154. On the basis of the further unsafe clinical incidents, and as the claimant had not demonstrated significant improvement in her practice against the objectives that were set, Ms Brown explained that the decision had been made that the claimant would be referred to the final review panel. This decision was made by Ms Brown, and was the final decision that Ms Brown made in relation to the claimant's capability process.

155. Ms Brown explained to the claimant that dismissal was a potential outcome of the panel, and that she was suspended from clinical duties, which was partly at the request of the claimant.

ISSUE:

6.12). The Claimant was dismissed on 3 August 2017. Did the Respondent thereby treat the Claimant less favourably than it treated or would have treated others because of her race? The Claimant relies on Naomi Wardle as a comparator [and/or] a hypothetical comparator.

AND

Unfair dismissal

1) *Has the Respondent shown the reason for dismissal and was it a potentially fair one in accordance with s. 98 (1) and (2) of the Employment Rights Act 1996.*
2) *The Respondent asserts that it was a reason related to the Claimant's capability/performance.*
3) *Was the dismissal fair or unfair in accordance with 98 (4) ERA.*
4) *If the dismissal was unfair then should there be a Polkey reduction in compensation and/or on account of any contributory fault on the part of the Claimant? If so, how much?*

156. The final panel hearing was arrange to take place on 03 August 2017. This comprised of Ms Meers (chair), and Ms Travis-Kay. It is they that had the responsibility of considering the evidence in the hearing and to make a decision as to what, if any, action was to be taken with respect the claimant.

157. In preparation for the final panel, Ms Brown prepared a detailed report, which had a number of appendices appended to it. This was completed on 26 June 2017 (pp.1125-1636).

158. The claimant produced a staff side case dated 27 July 2017 (see pp.1637-1644).

159. The final panel hearing took place on 03 August 2017. Notes of this hearing were found at pp.1718-1766. During the hearing:

a. Ms Brown presented the capability report that she had produced;
b. The panel then asked questions of Ms Brown;
c. Mrs Cain, on behalf of the claimant, presented the staff side case;
d. The claimant specifically addressed two of the incidents referred to in the report;
e. Ms Brown questioned the claimant;
f. Ms Brown made a closing statement;
g. Both Ms Cain and the claimant made a closing statement.

160. The panel considered alternatives to dismissal, in particular whether the claimant could be moved to a static band 5 role. However, this was considered not possible given the clinical issues raised about the claimant's practice.

161. Having considered the case put forward by both sides, the panel determined that the claimant should be dismissed on the ground of capability with immediate effect. The claimant was informed this in the meeting (see pp.1765-1766), with the decision further communicated to the claimant by letter dated 03 August 2017 (pp.1709-1711). The precise reasoning that the panel had in mind when reaching the decision to dismiss is expressed in the letter as:

> The panel considered your request of a static post at band 5 within a clinical area such as critical care, frail elderly or County Hospital. We agreed that you had not demonstrated sustained autonomous learning, development or clinical skill to maintain a band 5 position.
>
> It is with this in mind that the panel concluded that your employment with the trust will be terminated on the grounds of capability with immediate effect.

162. The claimant appealed the decision to dismiss her on 23 August 2017 (see p. 607-608). The claimant appealed on the following grounds:

- The supervisor's report on my performance in the last two weeks of the capability process does not accurately reflect my performance in those two weeks. Consequently, the decision made by the panel was based on inaccurate information. (Evidence to be provided)
- The Trust's policy regarding the escalation process was not correctly and/or properly followed. I was informed of escalation before prior information was given to my union representative as stated in the Trust's policy. (Evidence to be provided)
- The panel did not or omitted in further investigating inaccurate statements raised at the panel hearing. Of much importance, that band

5s are not allowed to attend external courses. This information was not further investigated for its accuracy. (Evidence to be provided)

- The dismissal letter stated that "we were not provided any reassurance that you were able to sustain or transfer your ongoing learning into another clinical setting." I would like to state that I am able to transfer my learning into other clinical settings as evidenced by my successful clinical rotations in critical care, frail elderly care and emergency portals. (Performance evidence to be provided)
- The panel did not consider the suggested options to dismissal.
- I would like to appeal your decision because of discrimination and bullying towards me that I previously reported and mentioned at the hearing. (Evidence of discrimination and bullying to be provided)
- That I was not fairly represented by my Union because my representative also works for the same NHS employer. Consequently, the panel quorum was not properly and impartially constituted.

163. The appeal hearing took place on 09 October 2017, with Ms Inwood chairing the hearing, and with Ms Eptlett also on the panel. The claimant attended the hearing, with her representative, Mr Fahie (notes of the meeting are at pp.1937-1956).

164. The claimant's appeal was dismissed. The reasons for this decision are contained in the letter dated 18 October 2017, at pp.634-641.

165. The comparator put forward by the claimant, referred to X during the hearing, had not been the subject of any clinical performance issues.

ISSUE:

6.6). Between June to July 2015 Ms Rosie Cormie, whilst supervising the Claimant, wrote a report which contained allegedly false allegations about the Claimant's performance namely that she had stood a patient up without checking her blood pressure. Did the Respondent thereby engage in unwanted conduct related to the Claimant's race with the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? (The patient that the Claimant is referring to is Patient LB who was treated by the Claimant on 19 May 2015. The medical records for Patient LB are in bundle 2 behind Appendix 16 [pp.846-868]. The report that the Claimant is referring to is a typed letter from Rosie Cormie to the Claimant posted on 29 June 2015 [p.353- 358 bundle 1]).

166. The claimant treated the patient, LB, on 19 May 2015.

167. As part of the patient treatment, the claimant records the patients blood pressure. However, there is no indication as to whether this reading was taken from the claimant or from the nurses chart. There was only one blood pressure reading recorded during the claimant's treatment of the patient (see copy of claimant's notes on treatment of LB at p.862).

168. Ms Cormie recorded her concerns of the claimant's treatment of patient LB, which included certain detail being missed (see p.848).

169. A Patient Session Record was completed by Ms Cormie on 22 May 2015 (see p.847). This recorded a number of matters, including:

a. That the claimant had undertaken basic observations and identified that blood pressure was down, but had not noted whether this was out of trend;
b. Did not recheck the patient's blood pressure during the treatment, and had not question the patient about symptoms.

170. The above, caused Ms Cormie concern with the claimant's treatment, as there was an entry in the patient's medical records from Dr Ahmed concerning blood pressure issues, which would have then required blood pressure to be carefully monitored and recorded.

BACKGROUND MATTER 2:

2) *Between February 2017 and June 2017 Ms Vicky Terry wrote allegedly inaccurate statements about the Claimant's performance namely:*

i). That the Claimant did not respond quickly to a patient's faintness (The inaccurate statement referred to is a reflection and feedback report by Vicky Terry dated 22.06.2017 found in Appendix 68, p.1614 of Bundle 3).

(ii). That the Claimant did not identify patients for enhanced recovery (The inaccurate statement referred to is reflection and feedback report by Vicky Terry dated 20.06.2017 found in Appendix 69, p. 1616 of Bundle 3).

(iii) That the Claimant needed a prompt to perform neurological tests on a post-lumbar decompression patient (The inaccurate statement referred to is found in a Patient Session Record dated 22.06.2017 at Appendix 70 page 1626 - 1628of Bundle 3).

Did the Respondent thereby:

subject the Claimant to a detriment and if so did the Respondent thereby treat the Claimant less favourably than it treated or would have treated others because of her race? The Claimant relies on a hypothetical comparator.

engage in unwanted conduct related to Claimant's race with the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

171. The first and second of these issues have already been addressed above, at paragraphs 152(d) and 152(e).

172. On the 22 June 2017, the claimant was treating a post-lumbar decompression statement.

173. There was a miscommunication between the claimant and Ms Terry in terms of what treatment had been undertaken. This is clear in the discussion at the final hearing capability hearing on 03 August 2017 between Ms Brown and Ms Cain (see p.1747).

174. This matter was not deemed to be a clinical incident, and had no bearing on the decision reached by the panel at the final capability hearing.

Miscellaneous matters

175. On 06 June 2016, the claimant presented a claim form ('the 2016 claim') alleging direct race discrimination by the respondent. This was brought whilst the claimant was employed by the respondent. In bringing this complaint the claimant had the benefit of legal representation.

Conclusions

Race Discrimination

176. Through non-appointment to the band 5 role in either January or June 2014, this tribunal accepts that this could well be considered a detriment by the claimant. However, the claimant has not adduced evidence to satisfy the tribunal that there is a prima facie case that these detriments were in any way less favourable treatment because of her race.

177. The claimant's case on this issue, put simply, is that she was not appointed to the Band 5 roles in January or June 2014 due to her race. However, this is implausible, given that both Ms Teasdale and Ms Hellis scored the claimant of such a score that led to the claimant being appointed to an alternative role, with a view to keeping her within the trust. This temporary role was extended on numerous occasions. With Ms Hellis appointing the claimant from 01 April 2015 on a permanent contract to a band 5 role. If Ms Teasdale and/or Ms Hellis had wanted to discriminate against the claimant in the way that she brings her claim then they had the opportunity to do so through denying the claimant any employment with the respondent following interview.

178. However, even if we are wrong on that, the tribunal, given its findings above, are satisfied that appointments made by Ms Hellis and Ms Teasdale were based on scoring of candidates undertaken at interview stage, based on answers given to objective questions. There is no evidence that race tainted this process. The explanation given by Ms Hellis and Ms Teasdale, and accepted by the tribunal, would have satisfied the burden that would have rested with the respondent, had the claimant satisfied the initial burden that rested on her.

179. Furthermore, the later appointment of Ms Nkechinyelu Molokwu, who is black/Nigerian, and a reverse comparator to the claimant, to a temporary Band 5 Physiotherapist role (which was made permanent on 01 January 2016), following the same process that the claimant had gone through, further supports our conclusion on these issues.

180. Turning to the two week placement of the claimant in Critical Care. The claimant has adduced no evidence to satisfy the tribunal that she perceived this treatment to be a detriment at the time. To the contrary, the claimant appeared content, based on the contemporaneous documents, to be given the opportunity to rotate into Critical Care. Not only did she appear content, she indicated a willingness to be considered for such placements. Further, there is no evidence brought forward of the claimant bringing complaint about this placement.

181. The reason behind this rotation is clearly due to the learning and development needs of the claimant. It was identified by the claimant that she would benefit from a rotation to an acute medical ward. And this is what led to this rotation being facilitated. The rotation was because of development need and not because of or related to the claimant's race as alleged.

182. Further, the comparators referred to, namely Simon Davies, Pip Oram, Liam Buckley and Ashley Bridges, are not suitable comparators as there is no evidence to suggest that they had the same learning and development needs as that of the claimant. Simply being of a different race and not being required to undertake a rotation on critical care does not make these individuals suitable comparators.

183. In respect of the issue relating to not being given a choice between a 3 year and a 5 year tier 2 visa, we make relatively short conclusions. There is no evidence adduced by the claimant that Ms Mukherjee treated the claimant differently to anybody else, nor that she would in the future, had Ms Mukherjee remained employed by the respondent. Indeed, the claimant was treated exactly the same by Ms Mukherjee as her named comparator, Ms Khoo, and all other visa applications which were completed by Ms Mukherjee. Further, the claimant was, albeit at a later date, given a 5 year tier 2 visa. In these circumstances, the claimant has not satisfied the initial burden that rests on her. There is simply no evidence form which this tribunal can conclude that the claimant has been subjected to less favourable treatment because of her race.

184. Given our findings of fact above, the claimant has failed to establish that she has been treated to a detriment in respect of her request for patient notes. All of the notes that she requested, she was given access to, save for one set of patient notes due to the timing of the request, which was only a day before the final panel was due to meet. This is against all other requests being positively responded to. Ms Brown did request that the claimant stop accessing patient clinical notes directly, due to being under clinical suspension. However, as part of this, explained that this was due to the respondent's Information Governance Policy, and that there was a process that she needed to follow. It would be unreasonable for this tribunal to consider either the response to the late request for a set of patient notes or the approach from Ms Brown to be a detriment for the purposes of a race discrimination claim. Where the claimant followed the appropriate procedure and the request was able to be met, the respondent

gave the claimant access to relevant patient notes. Furthermore, the claimant has adduced no evidence that would go anyway to establishing a causative link between any such allegations and her race.

185. Also based on our findings above, the tribunal is satisfied that the claimant was subjected to a performance management process between 17 April 2015 and October/November 2016 due to unsafe practices that were identified. This triggered the initial process, but further clinical incidents and lack of progress towards learning objectives triggered the need for the process to progress through its various stages. The claimant adduces no evidence that satisfies the initial burden that rests on her, with there being no evidence presented to support that this process was in any way influenced by her race.

186. Similar to those conclusions made in relation to the first capability process, the claimant's second performance management process was initiated and was progressed through the relevant stages due to unsafe practices of the claimant being identified. Likewise, the claimant adduces no evidence that satisfies the initial burden that rests on her, with there being no evidence presented to support that this process was in any way influenced by her race. There are a series of incidents that take place during this period. These matters were all discussed, and, in the decision of this tribunal, were the reasons why the capability process was escalated as it was. These decisions were made for reasons that were nothing to do with the claimant's race.

187. In terms of the dismissal of the claimant on 03 August 2017 being an act of discrimination, the claimant adduced no evidence to suggest that the decision by the panel to dismiss her was in any way related to her race, nor that the decision-makers had any knowledge that they were making their decision on information tainted by allegations of race discrimination. In reaching the decision to dismiss the claimant, the panel chaired by Meers, reached their decision to dismiss the claimant based on the evidence of clinical incidents and based on the information that came out of the discussions at that panel meeting. There is simply no evidence brought by the claimant that would support any other conclusion.

188. Moving on to the allegation that Ms Cormie wrote an allegedly false allegation in a typed letter dated 29 June 2015. The tribunal was satisfied that the report produced by Ms Cormie was both accurate based on her observations, and was an objective appraisal of the claimant. There may well be a disagreement between the claimant and Ms Cormie as to what was required with this patient; however, the letter itself does not record that the claimant had not checked blood pressure before standing the patient up, as alleged in the agreed issue, but that the claimant had failed to provide sufficient information in terms of when the blood pressure reading was taken nor did the claimant re-check the patient's blood pressure throughout treatment of that patient, especially given the patient's medical records. And in our findings, both of these statements are accurate. The claimant has not been subjected to a detriment in these

circumstances. And further, there is nothing to support that any such report was in any way written in some part due to the claimant's race. Had that been the case then Ms Cormie is unlikely to have recorded some positive aspects of the claimant's treatment.

189. In relation to the allegations of false reports produced by Ms Terry. Based on our findings of fact above, the claimant has not adduced any evidence to establish either a detriment, nor that any such treatment could be considered to be less favourable treatment or unwanted conduct related to her race. The reports, we found were accurate, and were based on observations made by Ms Terry at the time.

190. For the avoidance of any doubt, we conclude that the claimant has not satisfied the initial burden that rests on her in respect of any of the allegations of race discrimination, and so all of those allegations fail. But further, that in all of the situations, had the claimant satisfied the initial burden, the respondent had adduced evidence to support that such treatment was for reasons unconnected to the claimant's race.

Unfair Dismissal

191. Turning to the unfair dismissal complaint. It is clear, based on the evidence that we have seen in this case that the reason for the claimant's dismissal was for the potentially fair reason of capability. The dismissing panel clearly had this in mind at the point of deciding to dismiss the claimant.

192. In reaching the decision to dismiss the claimant, the respondent had undertaken a thorough investigation process. This involved going through a number of different stages of the respondent's capability process. Each clinical incident identified, led to a discussion between the claimant and the supervisor in question. Before, being considered in review meetings (as per our findings of fact). At each stage the claimant was warned of the need to improve. The claimant had ample opportunity to discuss incidents within these meetings. And Ms Brown, in particular, listened to both the views of the relevant supervisor and the claimant, before reaching her conclusions. We have already found that the reports relied upon were accurate reports, and that it was on the basis of these identified clinical incidents that led to the claimant going through the capability process.

193. In advance of the final panel hearing on 03 August 2017, both Ms Brown, on behalf of management, and the claimant put together a file outlining their case, and attaching all the necessary evidence. These were put before final panel chaired by Ms Meers. Ms Brown's report is at pp.1125-1174 of the bundle, with 73 appendices attached (pp.117501636). The claimant's response is at pp.1637-1644, and has 14 appendices attached (pp.1645-1703).

194. It is this tribunal's decision that the panel's decision to dismiss the claimant for capability reasons, based on all of the evidence it had before it, collected through a series of thorough investigations and meetings with the claimant, and the recording of incidents in reports from the claimant's supervisors that we found to be accurate reports, is a decision that falls within the band of reasonable responses. We are also satisfied that the panel did consider alternatives to dismissal, which is what we would expect a reasonable employer to do.

195. Further, there does not appear to be any failings in respect of the appeal process that would have rendered the overall process to be unfair either.

196. In these circumstances, the dismissal was a fair dismissal and the claimant's claim for unfair dismissal is dismissed.

Jurisdiction: time

197. Given that we have concluded that none of the matters above were acts of discrimination, then the question as to whether the discrimination claim or parts of it were out of time does fall away. However, we consider it prudent to comment on this in any event.

198. In terms of the allegations themselves, they have been pleaded as isolated events, which would mean, given the date of presentation of the claim form and the dates of ACAS early conciliation, that any act that took place before 26 July 2017 would fall outside of the primary time limit.

199. The claimant's case did change to a degree during proceedings, with the claimant trying to introduce that the allegations were part of a continuing act, with Ms Brown being the instigator of all of the matters complained of. And that all of the allegations were part of Ms Brown's plan to discriminate against her and have her dismissed from the respondent. However, that makes little sense in the overall context of the case. This would require this tribunal to find that the initial appointment, extension of contracts and elevation to a Band 5 permanent role were all with a view to dismissing her later for reasons connected to her race. It would require this tribunal to conclude that there was a conspiracy, with Ms Brown orchestrating the falsifying of documents, of which the claimant brought no evidence and which was not put to the respondent's witnesses under cross examination. It would require the tribunal to conclude that she was deemed to be competent during the first capability process with a view to putting her through a second such process, at which point the claimant would be dismissed. In short, such is extremely implausible.

200. The majority of the allegations, it is clear as to when the treatment complained of took place. However, this needed further exploration with respect the second capability process. The claimant explained in her evidence that her allegation of discrimination with respect the second

capability process concerned the decisions of Ms Brown to first put her into the process, and secondly to escalate her through the process. The last decision in this respect made by Ms Brown was at the final second stage capability review meeting on 23 June 2017. This must be the final date that forms part of this specific allegation, especially given that the decision to dismiss is pleaded separately, and Ms Brown had no decision-making responsibility at that stage.

201. This means all acts, taking account of the dates on which the acts took place, aside from the allegation relating to access to patient notes and the allegation that the decision to dismiss her was an act of discrimination, are outside of the primary time limit and would require an extension of time, which would be on a just and equitable basis. The burden of which rests on the claimant. The claimant has put forward no evidence as to why it would be just and equitable to extend time to give the tribunal to determine these matters, nor were any submissions made in this respect by Mr Lewis-Bale (and rightly so given the lack of evidence provided by the claimant).

202. So even if we were wrong in relation to our conclusions that the allegations brought were not acts of discrimination, those matters outside of the primary time limit would have been dismissed for being brought out of time in any event.

203. The abuse of process issue as per the rule in Henderson v Henderson is not a matter that this tribunal needs to address, given our findings above, in respect of both the substantive claims and the alternative position in relation to time limit/jurisdiction.

Employment Judge **Mark Butler**

Date21/02/2021