EMPLOYMENT TRIBUNALS

Claimant: Ms S Wedderburn-Stewart

Respondent: ISS Mediclean Limited t/a Facility Services Healthcare

Heard at: **London South Employment Tribunal (by CVP)**

On: **1-4 March 2021 and**
25 March 2021 in chambers

Before: **Employment Judge Ferguson**
Members: **Mr S Townsend**
Ms D Mitchell

Representation
Claimant: Mr J Neckles (union representative)
Respondent: Ms I Egan (counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The complaint of unfair dismissal fails and is dismissed.

2. The complaint of wrongful dismissal fails and is dismissed.

3. The complaints of direct race discrimination, harassment related to race and victimisation are dismissed.

REASONS

INTRODUCTION

1. By a claim form presented on 14 October 2019, following a period of early conciliation from 15 August to 15 September 2019, the Claimant brought a number of complaints including unfair dismissal, wrongful dismissal and race discrimination. The Respondent defended the claim. At a preliminary hearing

on 14 April 2020 the Claimant clarified the claim and withdrew some complaints.

2. The live complaints and issues were agreed at the start of the hearing as follows:

BACKGROUND

1. The Claimant brings claims of:

1.1. "Ordinary" unfair dismissal under sections 94 – 98 of the Employment Rights Act 1996 ("ERA")

1.2. Wrongful dismissal under section 86 of the ERA 1996

1.3. Direct Race Discrimination, Victimisation & Harassment pursuant to S.13, 26 & 27 of the Equality Act 2010 ("EQA")

PRELIMINARY ISSUES TO BE DETERMINED AT FULL MERITS HEARING FOR CLAIMS UNDER SECTIONS 13, 26 & 27 EQA 2010:

2. Are any of the acts and/or detriments complained of presented later than three months from the date of the alleged treatment complained of or if part of a continuing course of treatment, the last such date?

3. If yes, is it just and equitable to extend time?

UNFAIR DISMISSAL PUSUANT TO SECTIONS 94-98 ERA 1996

4. Did the Respondent have a potentially fair reason for dismissing the Claimant? The Respondent relies upon conduct.

5. Did the Respondent genuinely believe the Claimant to be guilty of Misconduct?

6. Was that belief on reasonable grounds?

7. At the time of forming that belief, had the Respondent carried out as much investigation as was reasonable in the circumstances?

8. Did dismissal fall within the range of reasonable responses for the Respondent to take?

9. Did the Respondent follow a fair procedure in dismissing the Claimant?

10. If the Claimant's dismissal was unfair, should there be a 'Polkey' reduction in the compensation awarded and if so, by how much?

11. Did the Claimant's conduct contribute to the dismissal and if so, by how much, if any, should any Basic and Compensatory Awards be reduced?

12. Did the Respondent comply with the applicable statutory Acas Code of Practice when it dismissed the Claimant? If not, ought there to be any uplift?

WRONGFUL DISMISSAL PURSUANT TO SECTION 86 ERA 1996:

13. Did the Claimant's alleged conduct amount to a repudiatory breach of contract entitling the Respondent to dismiss her without notice?

14. If not, what notice period is the Claimant entitled to receive under section 86 of the ERA? (The Claimant claims 11 weeks' notice pay (09/02/2008 – 24/06/2019))

DIRECT RACE DISCRIMINATION PURSUANT TO SECTION 13 EQA 2010

15. Did the Respondent subject the Claimant to the following acts (paragraph 2.5 of her Particulars of Claim):

    a) Refusal of the Respondent to grant the Claimant flexible working hours to work nights instead of days on 3 occasions on 2012, 2015 and 23rd October 2018 in order to provide care for her disabled Son;

    b) Refusal by the Respondent to review the Claimant's Flexible Working Application within week beginning 26th November 2018;

    c) Bullying and harassing the Claimant by Line Manager Carol Davis between 2010 and 25/03/2018;

    d) Being verbally abused and assaulted by Line Manager Carol Davis on 25/03/2018;

    e) … [withdrawn]

    f) Being subjected to the disciplinary process by the Respondent on 06/11/2018 upon the allegation that the Claimant instigated and incited Line Manager Carol Davis to violence;

    g) Suspending the Claimant from duty on full pay from the 7th December 2018, which continued until her dismissal;

    h) Refusal of the Respondent to investigate and determine the Claimant's submitted Grievance Complaint of 28/11/2018;

    i) Failure to grant the Claimant a fair disciplinary process;

    j) Failure to determine the Claimant's submitted Grievance Complaint dated 28/11/2018 in accordance with the terms of the contractual Grievance Procedure;

    k) Dismissal;

    l) Failure by the Respondent to nullify the dismissal decision where there existed no evidence to support same;

    m) Undue delay in discharging an Appeal Outcome against dismissal.

16. The Claimant relies upon her race, which she described as "Black British of Caribbean origin and nationality (Jamaica)".

17. The Claimant relies upon a "white English/European" hypothetical comparator in materially the same circumstances as the Claimant.

18. Did the Respondent treat the Claimant less favourably than it would have treated the hypothetical comparator?

19. Has the Claimant proved primary facts from which, in the absence of any other explanation, the Tribunal could properly and fairly conclude that the difference in treatment was because of her race?

20. If so, has the Respondent shown that the treatment was for a non-discriminatory reason?

HARASSMENT PURSUANT TO SECTION 26 EQA 2010

21. Did the Respondent engage in the acts complained of at paragraph 15 above?

22. Was this treatment "unwanted conduct" for the purposes of s26(1) EqA?

23. If so, was the treatment related to the Claimant's race?

24. If so, did the conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, having regard to:

    24.1. The perception of the Claimant;

    24.2. The other circumstances of the case; and

    24.3. Whether it is reasonable for the conduct to have that effect.

VICTIMISATION PURSUANT TO S.26 EQA 2010:

25. Did the Claimant carry out a protected act for purposes of S. 27 (2) (a), (c) & (d) EQA 2010:

    25.1. Her complaints of 18 April and 28 November 2018

    25.2. Her employment tribunal claim, 230039/2019, which was dismissed upon withdrawal on 12 November 2019

    25.3. Her notice of appeal of 6 July 2019

26. If there was a protected act, did the Respondent carry out any of the acts set out at paragraph 15 above, insofar as they occurred after 18 April 2018, because of the protected act?

3. We considered as a preliminary issue on the first day of the hearing whether we had jurisdiction to consider the complaints at paragraph 15 (a) (as regards 2012 and 2015), (c) and (d) of the list of issues. We decided those complaints were out of time and we had no jurisdiction to hear them. Our reasons were given orally at the time. They were as follows.

4. As the Claimant contacted ACAS on 15 August 2019, any act prior to 16 May 2019 is prima facie out of time. We did not accept a submission by Mr Neckles that an earlier claim brought by the Claimant, in which she complained only of disability discrimination, and which was dismissed on withdrawal, means that

the Claimant should be treated as having contacted ACAS or presented her claim any earlier.

5. There were two issues for us to decide:

   (a) Whether the Claimant has established a prima facie case that any or all of the acts before 16 May 2019 were part of a continuing act that ended after that date.

   (b) In respect of any acts that took place (or continuing acts that ended) before 16 May 2019, whether it is just and equitable to extend the time limit.

6. Section 123 EQA provides, so far as relevant:

> **123 Time limits**
>
> (1) Subject to sections 140A and section 140B, proceedings on a complaint within section 120 may not be brought after the end of—
>
> (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.
>
> …
>
> (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;
>
> …

7. It is well established that there is a difference between a continuing act for the purposes of s.123(3) and an act that has continuing consequences. A decision, such as a decision not to promote someone, may have continuing consequences but it will not constitute a continuing act unless the Claimant can show the existence of a discriminatory policy, rule or practice. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 the Court of Appeal made it clear, however, that Tribunals should not take too literal an approach to this issue and where (as in that case) there are allegations of numerous discriminatory acts over a long period, the Claimant may be able to establish that there an ongoing situation or continuing state of affairs which constituted a continuing act. Ultimately, the Tribunal should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer (Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548). A continuing state of affairs, such as an employer's approach to calculating pension, can amount to a continuing act (Barclays Bank plc v Kapur and others (No.2) [1995] IRLR 87). In Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA the EAT held that a Tribunal erred in treating the decision to instigate disciplinary

procedures as a one-off act, when that decision created an ongoing state of affairs to which the Claimant was subject.

8. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123 (Southwark London Borough v Alfolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the claimant to show that it is just and equitable to extend the time limit.

9. As to the complaint at paragraph 15 (a) of the list of issues, we find there is no prima facie case of a continuing act from 2012 and extending beyond 16 May 2019. On the Claimant's own case the flexible working issue ended on 27 February 2019 when her grievance was not upheld. The Claimant has presented no evidence of the first two instances, other than an assertion in her witness statement that requests made in 2012 and 2015 were refused. She has not said to whom the requests were made or what the requests consisted of. She has not given any evidence on which we could find the conduct was linked to her race. The gaps between the three instances relied upon are considerable. In those circumstances we consider that these are, at their highest, isolated instances of alleged discrimination.

10. As to (c), no details of the alleged harassment and bullying were set out in the claim form, or in the agreed list of issues. The first time the Claimant gave any details was in her witness statement exchanged on the last working day before the hearing. She complains of five incidents dating from 2010, 2013, 2014, 2015 and the last incident on 25 March 2018. They are all allegations of poor treatment by the Claimant's line manager, Carol Davis. The Claimant made no complaints about these matters at the time, with the exception of the last incident. There is nothing in her evidence to suggest that race was a factor in these incidents. The mere fact that they all involved Ms Davis is not enough for them to constitute a continuing act. In any event, the last incident took place in March 2018. We do not accept that this is part of the same conduct as the remainder of the complaints, from (f) onwards, which all relate to the disciplinary proceedings against the Claimant from November 2018. Ms Davis had been dismissed in June 2018. The complaints about her conduct are entirely separate from the complaints about what action the Respondent took in relation to the Claimant. We concluded that, taking the claim at its its highest, any continuing act ended on 25 March 2018.

11. The complaints were therefore out of time. There is no basis on which we could find it just and equitable to extend time. The Claimant could have brought a claim about these matters sooner, as demonstrated by the fact that she did bring a complaint of disability discrimination in December 2018. The complaints are vague and unsupported by evidence, such that it would be very difficult for the Respondent to respond to them. The prejudice to the Respondent in having to defend these complaints is far greater than the prejudice to the Claimant in not being allowed to pursue them out of time.

12. We concluded that the Tribunal has no jurisdiction to hear those complaints. The hearing was therefore limited to the complaints from October 2018

onwards. Issues of jurisdiction as regards other acts that took place before 16 May 2019 would be considered after we heard all the evidence.

13. We heard evidence from the Claimant. On behalf of the Respondent we heard evidence from Russell Sherry, Monika Geniszewska, James Wagg, Daniel George and Toby Slaughter. We had a bundle of documents extending to 354 pages, plus a video recording and a number of documents which were added to the bundle during the course of the hearing.

THE FACTS

14. The Respondent is a large facilities company which provides various services such as cleaning to NHS Trusts including the Princess Royal University Hospital (PRUH) in Kent.

15. The Claimant describes her race as Black British of Caribbean origin and nationality.

16. The Claimant has been diagnosed with Mild General Learning Difficulties. A report by an expert in dyslexia and other learning difficulties, dated 1 August 2015, states:

> "Allowances should be made for Sophia's severe difficulties with managing reading materials and paperwork, along with the associated difficulties she has with processing information. Therefore:
>
> a. Sophia may need extra help and time to understand important documents.-
> b. Documents may need to be read and explained to her.
> c. Sophia will require help filling in and completing forms"

17. Mr Neckles, acting for the Claimant, did not request any reasonable adjustments be made to the Tribunal process as a result of the Claimant's difficulties, but we were mindful of the need for documents to be explained to her before she could be expected to answer questions about them. She was given extra time to find and read documents, and we made sure she understood what they were, and what they said.

18. We also took the report into account when assessing the Claimant's evidence. Because of her diagnosis, we have not reached conclusions about her credibility that we might have done otherwise. For example, she had a tendency to say things for the first time in her oral evidence that appeared to contradict the documentary evidence and even, on occasions, her own witness statement. She said at one stage that she had received a letter dated February 2019 in the middle of 2018. This evidence was completely implausible and confused, but we have not treated it as damaging to her credibility overall.

19. The Claimant commenced employment with the Respondent as a housekeeper/ cleaner at the PRUH on 2 February 2008, initially working 6 hours a week. She signed a new contract in 2009 and increased her hours to 20 a week. The Claimant disputed in cross-examination that she had signed the contract, saying that the address at the top was not her address at the time (or at any time). Even if there was a mistake as to the address, we find that the

Claimant did sign the contract. She accepted it was her signature and there is no basis on which we could find that the document has been altered or fabricated. The contract included the following:

> "Employee's Acceptance
> I acknowledge that I have read, understood and accept the terms contained within this statement and the accompanying handbook. I confirm that I am entitled to work in the UK."

20. The handbook includes "Rules of Conduct" and states that breaches of the rules may result in disciplinary action. Those highlighted in bold text are regarded as gross misconduct and may result in summary dismissal. The rules include:

> "Employees must not bring onto site personal items of electrical equipment such as mobile 'phones, radios and personal stereos without prior authorisation by management."

And in bold text:

> "Employees must not engage in any insubordinate, insulting, intimidatory or violent behaviour and must not injure or attempt to injure any other person."
>
> "Employees must not at any time do anything, either by act or omission, which brings the company into disrepute."

21. At all material times the Claimant's line manager was Carol Davis. In 2016 or 2017 the Claimant's hours were reduced as an alternative to redundancy. The evidence before us was somewhat unclear as to her contracted hours from then onwards, but the Claimant said her normal hours were 7.30am to 1.30pm or 2.30pm on Saturdays and Sundays.

22. The Claimant has an autistic son. She says that on more than one occasion she requested to change her shift pattern to increase her hours and work at nights because of her son's care needs, but these requests were ignored.

23. On Sunday 25 March 2018 the Claimant wanted to talk to Ms Davis. At some point during her shift she left the ward, where she normally worked, and went to the Respondent's staff area. The Claimant says that Ms Davis said she was busy and asked her to wait. The Claimant waited for a long time; at one stage she said it was around one and a half hours. The Claimant accepts that during the time she was waiting one of the supervisors radioed to try to find out where the Claimant was. When Ms Davis came out of the office there was an altercation between the Claimant and Ms Davis. The Claimant made a video and audio recording of the incident on her phone lasting 2 minutes and 14 seconds. We have watched the recording.

24. There was a transcript of the footage in the bundle which, having compared it with the actual footage, we find is accurate. We include it in full here:

> CD: Are you having a laugh, why are you down here just standing there.

SW: I don't need to be swear at, I am standing here because of you.
CD: I am not swearing at you, I said why the hell you are standing there.
SW: Yeah because of you for a reason, you said for me you are busy, you doing somethlng.
CD: I....I'm not even here Sophie speak to the supervisors
SW: There is no supervisors and don't shout at me.
CD: I have just radioed yer (you) to come and find you
SW: No she said to yer (you) she haven't seen Sophie on the ward.
CD: yeah because she is bloody looking for you.
SW: OK well I was down here to come and see you
CD: just go to work please.
SW: yeah and don't swear at me 'cause I'm not swearing at you.
CD: just go to, just go to work.
SW: Are you going to push me on the ward. Push me
CD: Don't start with me cause I am not in the fucking mood alright.
SW: No No don't start with me (..... not clear) well you're not in the mood.
CD: just go to fucking work
SW: Push me
CD: you lazy mare get to work
SW: Push me, Push me.
CD: I aint going push you mate.
SW: Ah ok.
CD: I aint gonna ..... go
SW: I came to you as a manager....
CD: I'm not here
SW: to have a word with you, and that's your attitude.
CD: Piss off
SW: OK thank you
CD; Piss right out of my…
SW: I got you on recording (reveals camera)
CD: Do you know what give me that
SW: no I'm not giving it to you.
CD: I'll go to the police.
SW: I'm not giving it to you, fight me.
CD: Fucking bitch
SW: Fight me
CD: You cow.
SW: fight me
CD: You cheeky.....
SW: You on recording, thank you, thank you very much, have a blessed day
CD: Yu bitch
SW: Thank you, thank you very much
CD: Do you know what I'll go to the police about you.
SW: Thank you, thank you.
CD: You can't record me....
SW: Thank you, thank you.
CD: You cannot record me without my permission.
SW: Thank you, thank you. Don't touch my phone, don't touch me.
CD: Give me that, here
SW: Don't touch me, don't touch me
Paula: Carol, Carol.

SW: Don’t touch me.
CD: You fucking...
SW: Don't touch me
Paula: Carol, Carol
SW: Don't touch me
Paula: Carol come away, Carol
SW: You touch me. Touch me. Touch me.
CD: You bitch
SW: Touch me, you touch me, don't touch me, don‘t touch me.
Mikee (unclear)
SW: Thank you, I’m gonna give this to my lawyer now, good job, good job, I didn't disrespect you, I going take this to my lawyer now about you, good job, well done to you manager, well done
Mikee (unclear)
SW: I’m glad you see and I got my phone on recording right through, what we gonna do with you.

25. Our full findings of what happened during the incident, and our general assessment of it, are set out in our conclusions below.

26. The Claimant called the police and they arrived shortly afterwards. The police note states:

> “Person (1) and P(2) have had an argument P(2) has then tried to grab P(1)s mobile phone out of her hand by grabbing her wrist and pushed her.”

27. Under “Outcome” it states: “Community resolution. P1 has agreed and P2 admits to trying to grab her phone.”

28. The Claimant went home and was then off sick due to “stress at work” until early November 2018.

29. In a letter postmarked 4 April Ms Davis sought to apologise to the Claimant for the incident. She wrote:

> “Dear Sophia
>
> Further to the incident on Sunday 25th March, where we got into a very heated argument I would like to confirm the agreement that we reached.
>
> Before I do so I would like to again apologise for my behaviour, I was unprofessional and I regret the incident.
>
> I am pleased that we have both agreed to move on from the incident and that you have deleted the video footage from your phone.
>
> In future I will make every effort to engage with you if you wish to see me. I would also request that you respect on occasions I will require you to book to see me as I often need to prioritise my workload.”

30. The Claimant denies that she ever agreed to delete the footage.

31. Around this time Ms Davis also informed Russell Sherry, the Respondent's General Manager for the PRUH site, that there had been an altercation with a member of staff in which she (Ms Davis) had behaved unprofessionally. She told him that the police had attended. Mr Sherry's evidence was that Ms Davis did not reveal the true extent of the incident and he took at face value an assurance that it had been resolved amicably.

32. On 18 April 2018 the Claimant wrote to Mr Sherry, raising a formal grievance against Ms Davis for physically and verbally abusing her in the workplace. She said she had approached Ms Davis to discuss her working hours, but Ms Davis said she was busy and to wait outside which the Claimant did. About an hour and a half later Ms Davis had still not come out to see the Claimant so she asked her again. Ms Davis said she was still busy. The grievance continues:

> "Some time later a supervisor asked her on the radio about where I was because they had not seen me on the ward, so I said that I was still here waiting to see her. It was then that she came out and verbally and physically assaulted me. There was no provocation on my part at all."

33. The Claimant said she had video evidence. She said she and other staff had experienced "constant verbal bullying and racist abuse" from Ms Davis.

34. Mr Sherry convened a grievance hearing, which took place on 4 May 2018. The Claimant attended with a union representative. During the meeting Mr Sherry watched the video footage. The Claimant suggested that the background to the incident was the Claimant wanting to increase her hours and work nights, and Ms Davis not responding to or denying her requests. She described the start of the incident as follows:

> "Ok on the day I ask her can I have a word. Paula was on the computer and Carol was looking over her shoulder at the screen. She said she was busy but I don't think she was busy. She was just looking at the screen. So I was waiting. She came to the door and said what the fuck are you doing still waiting here. I had been waiting 1 to 1.5 hours."

35. Later in the meeting, when explaining why she could not work with Ms Davis again, the Claimant said:

> "I am not happy working with her (Carol). They will pick, pick and pick. I will feel intimidated. I feel threatened. I will have to walk away from her. It is not the first time this has happened. The last time this happened someone said that I should try and video her. That's how she talks to most of her people. I should come to work and be happy. I asked her to put me on nights. She says if you want the job take it or you know here to go. It's unfair for me."

36. Mr Sherry's evidence about his reaction to seeing the video was as follows:

> "I was left stunned and speechless after seeing the footage. It demonstrated a complete failure of two people to communicate properly. It also seemed so contrived as at the start I saw Sophia turning her

> iPhone on and getting herself ready. She said that she was advised to tape the conversation. This gave the appearance of it being planned. There was some audio before the video footage kicked in where Carol was asking Sophia to go back to work. I would expect Carol to tell Sophia this. In fact, I thought Carol should have told her to do her job or go home otherwise she would have to investigate Sophia's conduct in being absent from work for so long. However, it went completely the wrong way. I was shocked at the way they both behaved. Carol should not have responded in the way she did, and my overriding feeling was sadness at seeing two grown adults behave in that way."

37. He said he suspended Ms Davis either on the day of the grievance hearing or very soon afterwards.

38. Mr Sherry sent the Claimant a grievance outcome letter on 10 May 2018. He upheld the grievance. There was some confusion in the Tribunal hearing about this because there were two versions of the letter in the bundle that differed slightly. Ultimately Mr Sherry said he would have drafted an initial version of the letter and there would have been some back and forth with HR. He thought it most likely that the version the Respondent had put in the bundle was his initial draft and the version the Claimant provided was the final version and the one that she actually received. The final version stated:

> "I have upheld your grievance, in finding that what is recorded shows what I consider to be unacceptable conduct requiring formal investigation under the Company's Disciplinary procedures. This will be scheduled to establish the full facts surrounding the matter. This, I believe, will require investigation meetings to be held with all of those involved in the incident."

39. The draft which did not go to the Claimant also included the following sentence:

> "Having reviewed the audio and video that you supplied I have some questions regarding your involvement in the incident that I wish to investigate further."

40. Having upheld the grievance, Mr Sherry conducted a disciplinary investigation in relation to Ms Davis's conduct during the incident.

41. In his oral evidence, he said that no such investigation was commenced at that stage in relation to the Claimant because she was off sick as a result of the incident. He said the Respondent would never commence a disciplinary investigation in those circumstances.

42. A disciplinary hearing took place in relation to Ms Davis on 25 May 2018, conducted by James Collins, General Manager. She was summarily dismissed. The letter of dismissal characterises Ms Davis's conduct as an unprovoked attack. There is also a somewhat confusing reference to the Claimant having been trying to get Ms Davis to sign a form for banking purposes. That appears to have been a misunderstanding; the Claimant has never said that that was why she wanted to talk to Ms Davis.

43. In the meantime there was further correspondence between the Claimant and Mr Sherry about her sickness absence and her request to change her hours. On 31 May Mr Sherry wrote to the Claimant, enclosing a flexible working request form. As to the investigation, he said the following:

> "As far as the investigation into Carol Davis's behaviour is concerned, whilst I am prepared to share information, our ability to do so is prescribed by our legal obligations to all parties in this matter, and, on what is considered by the Company to be reasonable in the circumstances. This similarly applies to any disciplinary action which may follow this investigation in relation to any person, which will be governed by the Company's rules, its policies and procedures and, its view of what is reasonable on the facts."

44. Following a number of occupational health reports, a stage two welfare meeting took place on 23 October 2018. During that meeting the Claimant handed Mr Sherry a completed copy of the flexible working form. He told her that this was not the correct forum to discuss it, and he also pointed out that there was an error in the hours she requested. He gave it back to her and said the request would be looked into after her return to work.

45. It was agreed the Claimant would return to work on a phased basis from 3 November 2018.

46. Mr Sherry said the following in his witness statement:

> "As Sophia had returned to work, I needed to address the incident of 25 March 2018 with her. I asked Lesley Simmons, the Operations Manager, to investigate her conduct. As Lesley had difficulty arranging a hearing with her…, I then asked Monika Geniszewska, who was new to ISS and the PRUH if she could investigate the incident."

47. On 6 November Ms Simmons wrote to the Claimant, inviting her to an investigation meeting. The letter said:

> "This meeting has been arranged because we are in the process of investigating allegations that have been made relating to your conduct in the workplace. The alleged misconduct occurred on the 25th March 2018 at approximately 11.45am, whereby it was believed that you instigated and engaged in an aggressive confrontation with another colleague, as well as, inciting this colleague to violence."

48. The Claimant requested to have a representative at the investigation meeting because of difficulties processing complicated information, which she said was due to dyslexia. The Respondent allowed this and rescheduled the investigation meeting to accommodate the Claimant and her representative's availability.

49. In the meantime, on 28 November 2018, the Claimant raised another formal grievance complaining of the "refusal to allow" her to make a formal request for flexible working on 23 October 2018. She also said it was "unfair and unreasonable" to start a reinvestigation of the incident on 25 March 2018.

50. The investigation meeting ultimately took place on 7 December 2018 and was conducted by Monika Geniszewska, Housekeeping Manager. Ms Geniszewska had very recently joined the site and did not know the Claimant or Ms Davis.

51. Mr Sherry said in his oral evidence that HR had advised it was best that he did not conduct the disciplinary investigation himself because he had already been involved in the grievance. Further, he had conducted the investigation in relation to Ms Davis and Mr Collins, another General Manager, conducted the disciplinary hearing, but that level of seniority was not warranted for the Claimant's disciplinary process.

52. During the investigation meeting the video footage was played. The Claimant maintained that Ms Davis had told her to wait. Ms Geniszewska asked the Claimant why she accused Ms Davis of swearing before she had done so. The Claimant alleged that Ms Davis had sworn before the recording started. The Claimant denied she had done anything wrong, and denied that she provoked Ms Davis. As for her conduct at the end of the recording, referring to her lawyer etc, she said she was "in panic".

53. At the end of the meeting the Claimant was suspended. This was confirmed in writing on 10 December 2018.

54. There was also a discussion about the Claimant taking annual leave over Christmas. She requested leave from 9 December to 8 January and Ms Geniszewska authorised this.

55. On 7 and 10 December 2018 Ms Geniszewska interviewed the two witnesses to the incident, MS (a porter) and Paula Bevis, another employee who was also Ms Davis's partner. Ms Bevis described the start of the incident as follows. The Claimant came downstairs and told Ms Davis she needed to speak with her. Ms Davis said she was not at work, she was only there for an office move, and said she would radio the supervisor to come and speak to the Claimant. Later Ms Davis saw the Claimant still standing outside the office and asked her "why the hell was she still standing here".

56. While the Claimant was abroad on annual leave Daniel George, another General Manager, was appointed to hear her grievance of 28 November. He twice invited her to meetings that she did not attend. There is no dispute that she could not have attended either of those meetings because she was away.

57. On 13 December 2018 the Claimant commenced Tribunal proceedings against the Respondent for disability discrimination. These proceedings were dismissed on withdrawal on 12 November 2019.

58. A further invitation to a grievance hearing was sent to the Claimant on 10 January 2019. This noted that the Claimant had failed to attend the two earlier hearings, and that the hearing would now take place on 23 January 2019 at 8.30am. Mr George included his mobile phone number and said the Claimant could contact him with any concerns or queries.

59. On 11 January 2019 Ms Geniszewska wrote to the Claimant to say she had concluded there was a case to answer and the matter would be referred to a disciplinary hearing.

60. The Claimant did not attend the grievance hearing on 23 January. At 9.52am she sent a request to postpone the hearing to Mr Sherry by email. This was forwarded to Mr George straight away. Mr George's evidence in his witness statement was that he had not seen the letter, but the relevant emails having been disclosed on day 3 of the hearing, he accepted that he had received it. That day he wrote to the Claimant saying her grievance treated as withdrawn in light of her failure to attend. There is some doubt about whether that letter was actually sent. The Claimant did not give evidence about it because the letter was only produced on day 3 after she had finished her evidence. Mr Neckles put it to Mr George in cross-examination that it was not sent. We do not consider it necessary to make a finding about this because it does not affect our conclusions on the Claimant's complaints.

61. On 1 February 2019 the Claimant was invited to a disciplinary hearing. The letter states:

> "During the formal disciplinary hearing the question of disciplinary action against you will be considered in relation to the alleged breaches of the following rules of conduct:
>
> - Employees must not engage in any insubordinate, insulting, violent or aggressive behaviour
> - Employees must not bring onto site personal items of electrical equipment such as mobile phones, radios and personal stereos without prior authorisation by management.
> - Employees must not at any time do anything, either by act or omission, which brings the company into disrepute.
>
> These relate to an incident which occurred on 25th of March at approximately 11:45am, whereby it was believed that you instigated and engaged in aggressive confrontation with another colleague.
>
> …
>
> Please find enclosed copies of witness statements and/or documentary evidence that will be addressed at the hearing:
> - Statement by Paula Bevis
> - Statement by [MS]
> - Transcript of audio recording"

62. In the Claimant's evidence she said for the first time that she did not receive this letter or any of the evidence said to be attached. She then said that she received it in 2018. We have referred to this confusing evidence above. Mr Neckles did not allege during his submissions that the letter or the enclosed evidence were not received, nor was any complaint made during the disciplinary process and it was not put to the Respondent's witnesses. We find that the Claimant was simply confused about this and she did receive the letter.

63. The disciplinary hearing took place on 7 February 2019. The Claimant was represented by Mr Neckles. The hearing was conducted by Mr James Wagg, General Manager for the Respondent at another NHS hospital site.

64. The mobile phone footage was played during the disciplinary hearing. Mr Wagg asked the Claimant why she said "push me". The Claimant said "Because she was in my face, that's not management behaviour". When asked why she did not say "step back" instead, Mr Neckles said that this was due to "intellect, cultural background, most people of colour would not respond that way". The Claimant said "At the time I panic, I've got learning difficulties it's my culture". Again the Claimant alleged that Ms Davis swore at her prior to the video recording. At one stage during the hearing the Claimant asked to adjourn but Mr Neckles would not allow it and continued to question the Claimant about the incident. Mr Neckles referred to Ms Davis's letter of apology and the police note. In his submissions towards the end of the hearing Mr Neckles complained about the Claimant not having been informed of the disciplinary charges before the investigation, and the Respondent not having disclosed who the "complainant" was who prompted the disciplinary investigation. He said he had refused the Claimant an adjournment because he wanted Mr Wagg to "see how she reacts under pressure". He said this was a person with disabilities, and she would react differently to him.

65. Mr Wagg's evidence to the Tribunal was that the Claimant's behaviour during the meeting was not what he expected. He said she sat through the whole meeting in a very uninterested way, looking around the room and playing on her mobile phone. He said "Mr Neckles kept pushing her for answers, but she did not seem to want to talk about the incident".

66. Mr Wagg said he would not make a decision that day and that he would consider the matter further.

67. At the end of the hearing the Claimant queried what was happening to her grievance. This was passed on to Mr George, who sent the Claimant a letter on 27 February stating that her grievance was treated as withdrawn, but "to bring matters to a close" he had investigated the points raised and decided not to uphold the grievance. On the flexible working request he said he had spoken to Mr Sherry who said the flexible working meeting could not be arranged until the Claimant's return to work. As to the disciplinary investigation, he said that the investigation would have been carried out earlier, but the Claimant had a long period of absence. It was not unreasonable for the Respondent to investigate the matter.

68. After the disciplinary hearing Mr Wagg made a further occupational health referral to make specific enquiries about whether the Claimant's learning difficulties might have impacted on her behaviour. A report was produced on 9 April 2019 which concluded "there is a possibility that her Mild learning difficulties may affect the way Miss Wedderburn manages conflict".

69. Mr Wagg decided that further clarity was required, so a number of specific questions were asked. The questions and answers were as follows:

> "5. Should a conflict arise at work with Sophia, what is the proposed suggestion to her manager on how to manage her? *Please refer to the link above for adjustments.* [Mencap guide to reasonable adjustments]
>
> 6. How does someone with a mild learning difficult (sic) as in Sophia's case manage conflict? *Difficult to manage. I think support, understanding and training to Sophia and her managers about the Learning Disabilities and how to manage employees with LD can help.*
>
> 7. How did you come to the opinion that she struggles with conflict when previous notes states she struggles when in difficult situations? *Difficult to answer. Each conflict needs to be individually managed as mentioned above.*
>
> 8. If she struggles with conflict, then what did she think about filming a situation covertly? *I am unable to medically answer this."*

70. Mr Wagg gave the following evidence to the Tribunal:

> "I was therefore left in a situation where OH could not confirm one way or another yet when Mr Neckles had put Sophia under pressure in the disciplinary meeting (something he said he had done deliberately) she went totally quiet."

71. He concluded that the Claimant should be summarily dismissed and he wrote to her on 24 June 2019 to confirm the outcome. In response to the enquiry about who the complainant was, he confirmed in the dismissal letter that the disciplinary investigation had been prompted by the company reviewing the footage the Claimant supplied as part of her grievance in April 2018.

72. Mr Wagg did not accept that Ms Davis had asked the Claimant to wait for her and found that the Claimant had been insubordinate in not returning to her ward when asked. Had she done so "matters may not have escalated in the way they did". He said his reasonable belief was that the Claimant did know how to manage herself in a highly pressured situation, contrary to Mr Neckles's arguments. He took into account both the 2015 assessment report, which diagnosed mild learning difficulties, and the occupational health report of 9 April 2019. He said he did not believe there was any reasonable adjustment that could have mitigated the Claimant's actions. He said:

> "You made an informed decision to behave the way you did. You admitted you covertly recorded her as you wanted to prove that Carol did not behave professionally towards you. On multiple occasions you wilfully chose to ignore her request that you go back to work. All of these actions combined does not lead me to believe that you did not understand the instructions you were being given. The incident between yourself and Carol Davis was clearly of an aggressive and violent nature of which is a direct violation of the ISS Rules of Conduct therefore this allegation is founded."

73. He also found proved the allegation of bringing the company into disrepute, noting that the incident occurred in the Respondent's offices in the hospital, and that the police were called.

74. No finding was made in relation to the mobile phone charge.

75. As to sanction, the letter states:

> "Furthermore, I did consider awarding you with a Final Written Warning, however, at the disciplinary hearing you failed to express any remorse on the part you played, you failed to take any responsibility for your actions and you failed to provide me with any explanation on what you would do differently should you become involved in conflict at work. I find that due to the nature of your actions, one being an act of gross misconduct, the damage to our trust and confidence in you is irreconcilable. We cannot continue to employ any staff member who would act in such a manner. Therefore, it was more appropriate to summarily dismiss you with immediate effect."

76. The Claimant appealed against her dismissal. Mr Neckles drafted the "notice of appeal", which alleged breaches of the ERA and EQA. At the appeal hearing on 21 August 2019 Mr Neckles made largely the same points he had made at the disciplinary hearing. The appeal was conducted by Toby Slaughter, General Manager at another NHS Trust site.

77. The appeal was dismissed by letter dated 6 November 2019. Mr Slaughter said in his evidence to the Tribunal that he could not recall why there was such a long delay. It was put to him that it was a deliberate attempt to deter the Claimant from bringing Tribunal proceedings. He strongly denied that.

THE LAW

Unfair dismissal

78. Pursuant to section 98 of the Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons or "some other substantial reason". A reason relating to the conduct of an employee is a fair reason within section 98(2). According to section 98(4) the determination of the question whether the dismissal is fair or unfair "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 "shall be determined in accordance with equity and the substantial merits of the case."

79. In misconduct cases the Tribunal should apply a three stage test, set out in British Home Stores Ltd v Burchell [1980] ICR 303, to the question of reasonableness. An employer will have acted reasonably in this context if:-

    79.1. It had a genuine belief in the employee's guilt;

79.2. based on reasonable grounds

79.3. and following a reasonable investigation.

80. The Tribunal must then consider whether it was reasonable for the employer to treat the misconduct as a sufficient reason for dismissal. In respect of each aspect of the employer's conduct the Tribunal must not substitute its view for that of the employer but must instead ask itself whether the employer's actions fell within a range of reasonable responses (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).

Race discrimination

81. The EQA provides, so far as relevant:

> **13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> …
>
> **26 Harassment**
>
> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.
>
> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because--
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

…

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

82. Race is a protected characteristic under the EQA.

CONCLUSIONS

83. We have reached the following conclusions about the incident on 25 March 2018.

84. We do not accept the Claimant's contention that Ms Davis asked her to wait. This is wholly inconsistent with the footage, from which it is clear that Ms Davis was surprised to see the Claimant there. We also consider it highly unlikely that she would have asked the Claimant to wait for such a long time when the Claimant was in the middle of her shift and should have been cleaning on the ward.

85. We also do not accept that there was any conversation immediately preceding the recording. The start of the recording tallies with how Ms Bevis said the conversation started, and it is also very similar to how the Claimant described the start of the conversation, albeit the Claimant claimed Ms Davis used the word "fuck". It is clear from the recording that she did not.

86. We find that the Claimant decided to start recording on her phone when she saw Ms Davis come out of her office. She did so in the expectation that Ms Davis would be angry and hoping to gather evidence to use against her. She recorded covertly at first, and the phone must have been in her pocket because there is no video image. The Claimant's evidence in cross-examination was that she told Ms Davis from the start that she was recording. The Claimant had never said that before and we do not accept that she did. Ms Davis's reaction

to the Claimant revealing that she was recording is totally inconsistent with that evidence.

87. It is clear that Ms Davis was exasperated to find the Claimant still there, given that she was meant to be cleaning on the ward. We find that Ms Davis was extremely annoyed, and that she did not want to talk to the Claimant, in part because she had told the Claimant she was not due to be at work that day ("I'm not even here"). Initially Ms Davis simply instructed the Claimant in very robust terms to get back to work. It is not an admirable management style; it was dismissive and disrespectful; she did not hide that she was extremely annoyed. Having said that, she was not seeking to have a confrontation with the Claimant. On the contrary she wanted the Claimant just to go back to work.

88. The tone changed entirely when the Claimant said, loudly and aggressively, "Are you going to push me on the ward. Push me." We find that the Claimant said that to provoke Ms Davis into saying or doing something that would be incriminating on the recording. It worked, and Ms Davis started being insulting and using bad language. Then, very shortly afterwards, the Claimant revealed that she had been recording the incident on her phone. Ms Davis's reaction was immediate and extreme. She lost control and became fixated on getting the phone from the Claimant. A physical altercation ensued, in which Ms Davis was the aggressor, but the Claimant continued to provoke her by saying "fight me, fight me". The fight had to be broken up by bystanders. We accept, consistent with the police note, that Ms Davis grabbed the Claimant's wrist and pushed her.

89. As to the Claimant's behaviour at the end of the incident, we agree with Ms Egan's characterisation of it in cross-examination, that the Claimant was triumphant. She knew that she had obtained evidence that would get Ms Davis into a lot of trouble.

Unfair dismissal

Reason for dismissal

90. Mr Wagg concluded in the dismissal letter that the Claimant was guilty of the following breaches of the rules of conduct:

    90.1. Insubordinate behaviour, by not returning to work when told to do so;

    90.2. Insubordinate, insulting, violent or aggressive behaviour during the altercation;

    90.3. Bringing the company into disrepute.

91. The Claimant has not disputed that those conclusions reflected his genuine belief or that they were the reason for her dismissal. We accept that he genuinely believed in the Claimant's guilt. We also find that the Respondent has shown the reason for dismissal related to the Claimant's conduct.

Reasonableness

92. We must next consider whether there were reasonable grounds for Mr Wagg's belief. We conclude that there were. For the same reasons given for our own conclusions about the incident, we find there were reasonable grounds to conclude the Claimant had not been asked to wait. She waited for Ms Davis for a very long time, possibly for an hour and a half, when she was meant to be working on the ward. Given that she then started covertly recording as soon as Ms Davis approached her, there were reasonable grounds to conclude that the Claimant did so in the hope of capturing Ms Davis doing or saying something unprofessional. The video footage speaks for itself and it is clear that the Claimant provoked Ms Davis, in particular by saying "push me" and "fight me". The footage provided reasonable grounds to conclude that the Claimant deliberately angered Ms Davis to get a reaction from her, and therefore bore a significant degree of responsibility for the incident escalating in the way it did. The Claimant's conduct as demonstrated by the footage was, at a minimum, "insubordinate" and "aggressive".

93. We also find there were reasonable grounds to conclude the Claimant brought the company into disrepute. The incident happened in the office and the police attended at the Claimant's request. There were also two other members of staff present. A physical altercation taking place at work, for which the Claimant bore significant responsibility, presented the company in a bad light.

94. Mr Neckles argued that Mr Wagg failed to take into account, or to give enough weight to the following:

    94.1. The police report, which said Ms Davis was blameworthy.

    94.2. The 2015 learning difficulty assessment.

    94.3. The totality of Ms Davis's disciplinary proceedings, resulting in her dismissal.

    94.4. The letter of apology from Ms Davis.

    94.5. The Claimant's original grievance of 18 April 2018.

95. As to the matters relating to Ms Davis's behaviour, it has never been disputed by the Respondent that she behaved appallingly during the incident. She was summarily dismissed very shortly after the Claimant submitted her grievance and provided the Respondent with the video footage. What Mr Wagg was considering was the Claimant's part in the incident and her level of culpability. A finding that Ms Davis was blameworthy, even if more so than the Claimant, does not preclude a finding that the Claimant was also guilty of gross misconduct.

96. We accept there is an apparent inconsistency between the two outcome letters in that Mr Collins appears to have taken the view in Ms Davis's case that it was an unprovoked attack. We do not know the basis for that decision because we have no information about the investigation or disciplinary process; we only have the dismissal letter itself. Mr Collins was not considering any charges against the Claimant and for whatever reason he appears to have underplayed the Claimant's contribution to the incident. That cannot affect the

reasonableness of Mr Wagg's conclusions. We must consider only whether those conclusions were reasonable and fair and we find that they were.

97. It was also reasonable for Mr Wagg to reject the suggestion that the Claimant's learning difficulties excused her behaviour. He clearly considered both the 2015 assessment and the occupational health report that he obtained specifically to address the point raised by the Claimant. The latter report did not support the Claimant's case, and even after making additional enquiries there was no clear advice on whether her difficulties might have affected her behaviour during the incident. It was reasonable for Mr Wagg to take into account the Claimant's demeanour during the disciplinary hearing, especially given that Mr Neckles expressly relied on it and her behaviour did not support a finding that she reacts aggressively when under pressure; on the contrary she was quiet and withdrawn.

98. As to the Claimant's original grievance, it is not clear whether that document was before Mr Wagg but the Claimant had every opportunity to put forward her version of events and Mr Wagg had the video. The grievance itself would not have added anything to the evidence before him.

99. Mr Neckles did not pursue the point before us but for completeness we should say that we consider it entirely reasonable of Mr Wagg to reject the assertion that the Claimant's race and/or cultural background explained or excused her behaviour. There was no evidential basis for the assertion, and in any event Mr Wagg concluded that the Claimant "made an informed decision" to behave the way she did. Given that finding, any cultural issues relating to the precise language used would not affect her culpability.

100. Mr Neckles argued that Mr Wagg made a further finding that the Claimant breached the duty of trust and confidence. Mr Wagg made no such finding as a separate disciplinary charge. He took into account what he considered to be "irreconcilable" damage to the Respondent's trust and confidence in the Claimant as a factor in deciding on the appropriate sanction. It was not a separate finding of misconduct.

101. As to the investigation, the principal complaint was that the Respondent failed to investigate the Claimant's allegation that there had been previous instances of poor treatment and racial abuse by Ms Davis. The Claimant gave no details of such allegations until the Tribunal proceedings, and in fact the allegations she now makes do not appear to have any connection to race. At the time of the investigation in the Claimant's case, it was a vague and unparticularised allegation. Ms Davis had already been dismissed so it would have been difficult for the Respondent to investigate. In any event, even if there had been earlier incidents, they would not have excused the Claimant's conduct. They might have explained why the Claimant wanted to record Ms Davis, but goading her into a physical altercation was inexcusable regardless of the background.

102. It was suggested during the hearing that the Respondent failed to investigate what happened before the recording started. The only relevance of this is that the Claimant said "I don't need to be swear at" right at the start of the exchange, which arguably raised the heat, given that Ms Davis had not

used any bad language by that point. This was something raised by Ms Geniszewska during the investigation meeting, and the Claimant claimed that Ms Davis used the word "fuck" before the recording started. That was not a plausible account because, for the reasons explained above in our own findings, the start of the recording was clearly the start of the conversation. In any event this specific detail was not relied upon by Mr Wagg.

103. Overall we are satisfied that the Respondent held a genuine belief in the Claimant's guilt on reasonable grounds and following a reasonable investigation.

104. We must consider whether the sanction of dismissal was within the range of reasonable responses. Mr Neckles did not argue that, if Mr Wagg reasonably found the disciplinary charges proved, dismissal was not a reasonable sanction. The language of the "violent behaviour" charge differed slightly to the language used in the rules of conduct in the handbook, but the Claimant does not complain about that, and in any event the overall meaning is the same. The Claimant's conduct resulted in a physical altercation taking place at work. She was insubordinate, aggressive and incited Ms Davis to violence. On any view that was serious misconduct and Mr Wagg was entitled to take into account her lack of remorse. We are satisfied that dismissal was a reasonable sanction.

Procedural fairness

105. Mr Neckles made a number of complaints about the procedure. His complaint that the Respondent failed to disclose who the "complainant" was is a red herring. The Respondent always said that the disciplinary process was triggered by the Claimant's own grievance and the video footage that she provided. It was Mr Sherry's decision to commence the disciplinary proceedings after the Claimant returned to work in November 2018. That was his prerogative as the General Manager and does not mean that he was the "complainant".

106. Mr Neckles argued it was unfair not to notify the Claimant of the disciplinary charges prior to the investigation stage. He then claimed that once the disrepute charge was "added" at the disciplinary stage, Mr Wagg effectively became the investigating officer for that matter and it was unfair for him also to act as the disciplinary officer. These complaints are based on a fundamental misunderstanding of the ACAS Code and the requirements of fairness in disciplinary proceedings. There is no requirement to notify the employee of the precise disciplinary allegations prior to the investigation. The purpose of the investigation is to decide whether there is a case to answer for possible misconduct. Once that has taken place the employer must notify the employee of any allegations that will be considered at a disciplinary hearing. That is what happened in this case.

107. Mr Neckles also complained of the Respondent's failure to produce an investigation report, pointing to ACAS guidance suggesting that it is best practice to do so. There is no requirement in the ACAS Code to produce an investigation report and we do not consider that the failure to do so in this case resulted in any unfairness to the Claimant. She knew from the invitation letter

what the allegations were and she was provided with all of the evidence considered by the Respondent.

108. Mr Neckles also complained about the appeal process. We do consider there was excessive delay in producing the appeal outcome, but we do not find it was intentional and given our finding that the original decision to dismiss was reasonable, it did not affect the fairness of the dismissal.

109. We conclude there was no procedural unfairness.

110. For the reasons given above the complaint of unfair dismissal fails and is dismissed.

Wrongful dismissal

111. Based on our factual findings above we are satisfied that the Claimant bore significant responsibility for the escalation of the incident. Ms Davis's behaviour was completely unacceptable, and as noted above she was somewhat abrupt from the start of the exchange. That does not, however, excuse the Claimant's conduct. She made a conscious decision to record her manager covertly and provoked her into a physically aggressive response in order to obtain damaging evidence against her. This happened in the workplace and was witnessed by other staff. The police were called. We find that the Claimant's conduct was insubordinate, and it incited Ms Davis to violence and brought the company into disrepute. It was clearly gross misconduct, as specified in the handbook, entitling the Respondent to dismiss summarily.

112. The point about the Claimant's learning difficulty does not apply to our consideration because the Claimant retracted it in her evidence. She expressly said it does not make her aggressive and did not affect her actions on the day in question.

113. The complaint of wrongful dismissal is also therefore dismissed.

Direct race discrimination/ harassment/ victimisation

114. We consider the factual allegations in turn, since they are each relied upon as instances of direct discrimination, harassment and victimisation. It is not in dispute that the Claimant did the protected acts relied upon. We must therefore consider whether the allegations are made out on the facts, and if they are, the reason for the Respondent's conduct. As for harassment we must consider the statutory test, including whether the conducted was related to race.

115. As a preliminary point we agree with Ms Egan's assertion in closing submissions that none of the managers who dealt with the Claimant had any prior knowledge of her and there is no evidence that any of them had a pre-existing negative opinion of her. Ms Geniszewska was newly appointed when she conducted the investigation and did not know either the Claimant or Ms Davis. Mr Wagg was from outside the PRUH. Mr George was also neutral, having never met the Claimant, either before her grievance or since. Mr

Slaughter was also at a different NHS Trust site. As for Mr Sherry, Mr Neckles relied heavily on his involvement throughout, and suggested that he wanted the Claimant dismissed because he was friends with Ms Davis. Mr Sherry denied that they were friends and there is no evidence that they were. We note he was new to the PRUH site in 2018. We accept that he did not know Ms Davis well and they were certainly not friends.

(a) Refusal of the Respondent to grant the Claimant flexible working hours to work nights instead of days on 3 occasions on 23rd October 2018 in order to provide care for her disabled Son.

and

(b) Refusal by the Respondent to review the Claimant's Flexible Working Application within week beginning 26th November 2018.

116. Mr Sherry provided the Claimant with the flexible working form to complete, which is strong evidence that he was willing to consider an application. He said that he did not consider the issue in the meeting of 23 October 2018 because it was not the correct forum and there were also mistakes on the form the Claimant had completed. He consistently said the matter would be considered once the Claimant had returned to work. The Claimant did not resubmit the form after this and in any event the disciplinary proceedings overtook events. We accept that the reason the matter was not considered was because Mr Sherry wanted to wait until the Claimant returned to work and then it became academic because of the disciplinary process. It had nothing to do with the Claimant's race or the fact that she had raised a grievance. Nor was it harassment related to race.

(f) Being subjected to the disciplinary process by the Respondent on 06/11/2018 upon the allegation that the Claimant instigated and incited Line Manager Carol Davis to violence.

117. We accept Mr Sherry's evidence that he had concerns about the Claimant's conduct during the incident from the outset and that the reason disciplinary proceedings were not conducted sooner was that she was off sick. The draft of the 10 May 2018 letter, although not sent to the Claimant, supports his evidence that he believed there was fault and potential misconduct by both parties. The letter of 31 May 2018 also suggests he was leaving open the possibility of disciplinary proceedings against the Claimant.

118. The video itself provided very good grounds to commence a disciplinary investigation into the Claimant's conduct and we accept that that was the reason Mr Sherry decided to pursue the matter when the Claimant returned to work in November 2018. We have rejected the suggestion that Mr Sherry was friends with Ms Davis. There is therefore no basis to find that it was "retaliation" for Ms Davis's dismissal.

119. The Claimant may feel aggrieved that raising a complaint against her manager resulted in disciplinary action being taken against her, as well as the manager, but the evidence justified it. There is no basis to find that Mr Sherry

was motivated by the fact that the Claimant brought a grievance, as opposed to the content of it and the evidence provided.

120. We therefore conclude that Mr Sherry's decision to commence disciplinary proceedings had nothing to do with the Claimant's race and nor was it motivated by her having brought a grievance. It was also not harassment related to race.

(g) Suspending the Claimant from duty on full pay from the 7th December 2018, which continued until her dismissal.

121. Mr Neckles argued that the decision to suspend the Claimant was a "knee-jerk reaction" and that Ms Geniszewska failed to consider alternatives. That was not put to Ms Geniszewska in cross-examination. In any event there is no basis on which we could find that Ms Geniszewska's decision was motivated by the Claimant's race or the fact that she had done protected acts. The Claimant was suspected of gross misconduct and there is no suggestion that the Respondent was not entitled under its disciplinary policy to suspend her pending the outcome of the process. The Claimant has not established facts from which we could conclude there was an unlawful motive, so this complaint must fail.

(h) Refusal of the Respondent to investigate and determine the Claimant's submitted Grievance Complaint of 28/11/2018.

and

(j) Failure to determine the Claimant's submitted Grievance Complaint dated 28/11/2018 in accordance with the terms of the contractual Grievance Procedure.

122. The first point to note is that Mr George did investigate and determine the Claimant's grievance, giving an outcome on 27 February 2019. This complaint is really about the failure to hold a meeting with the Claimant.

123. There is a slight oddity in that Mr George originally wrote to the Claimant on 23 January 2019 saying her grievance was treated as withdrawn, but then subsequently decided to investigate the matter and deliver an outcome. It is possible that the first letter was not sent. That would explain why the Claimant chased the outcome at the end of the disciplinary hearing. There is also some doubt about whether Mr George read and considered the application to postpone that was forwarded to him at 9.54am on 23 January 2019. There is no dispute that the email was sent to him, but he said in his witness statement (written before seeing the emails that were produced on day three of the hearing) that he did not receive the letter and he did not refer to it in his letter that evening saying she had failed to attend.

124. Mr George's oral evidence was that he took advice from HR and decided not to arrange a further meeting after the Claimant's non-attendance on 23 January 2019. He felt that the Claimant had had ample opportunity to contact him and had not done so. He therefore made his decision based on the information he had. He spoke to Mr Sherry and HR before reaching his conclusions.

125. We accept that Mr George's approach was somewhat confused because on the one hand he said the grievance was treated as withdrawn but on the other he proceeded to investigate and determine it. That does not suggest, however, that he was motivated to any extent by the Claimant's race or the fact she had done protected acts. Mr Neckles argued that Mr George took his decisions jointly with Mr Sherry (who he claimed was prejudiced against the Claimant). That suggestion was not put to Mr Sherry in cross-examination. It was raised for the first time in cross-examination of Mr George and we agree with Ms Egan's submission that this is likely to have been because Mr Neckles was surprised to discover that Mr George was black and it would have been uncomfortable to submit that he personally was motived by the Claimant's race. Mr George denied that Mr Sherry influenced his decisions; he said that he was the one dealing with the grievance. He asked questions of those involved and took advice from HR but the decisions were his own.

126. Overall we consider there is no evidence to support a finding that Mr George was motivated by the Claimant's race or the fact she had done protected acts. Nor was any of his conduct "related" to race. We accept his evidence that he was not influenced by Mr Sherry. The process was somewhat confused, but the Claimant's failure to make any contact prior to the meeting on 23 January 2019, despite having Mr George's mobile number, provided a plausible explanation for treating the grievance as withdrawn or determining it in her absence. This complaint fails.

(i) Failure to grant the Claimant a fair disciplinary process.

127. Mr Neckles clarified at the start of the hearing that this allegation was limited to (a) failure to notify the Claimant of the three disciplinary charges prior to the investigation, (b) the addition of the mobile phone use allegation in the disciplinary invite letter and (c) the failure to investigate historical complaints about Ms Davis.

128. As to (a), we have already noted above that there is no requirement to notify an employee of disciplinary allegations prior to the investigation stage. There is therefore no detriment or conduct that could constitute harassment.

129. As to (b), we heard no evidence about who decided to include this as an allegation or their reasons for doing so. The Respondents' witnesses were not cross-examined about it. In those circumstances there is no basis on which we could find that it had any unlawful motive or that it constituted harassment related to race. It is also doubtful whether it would constitute a detriment given that Mr Wagg did not rely on it in his decision to dismiss.

130. We have already found that it was not unreasonable not to investigate the historical matters in the context of the Claimant's disciplinary process. The Claimant did not provide any details of the allegations. There was therefore no detriment. Further there is no evidence to suggest that anyone involved in the process was motivated by the Claimant's race or the fact she had done protected acts.

(k) Dismissal.

131. We have found above that Mr Wagg's belief in the Claimant's guilt was the reason for her dismissal. There were good grounds for him to reach the conclusions he did. For the same reasons as those given above in relation to the commencement of the disciplinary proceedings, we find the Respondent's conduct had nothing to do with the Claimant's race or the fact she had done protected acts. Nor was it harassment related to race.

(l) Failure by the Respondent to nullify the dismissal decision where there existed no evidence to support same.

132. Again, the Claimant has not established facts from which we could conclude that Mr Slaughter's decision to dismiss the appeal had anything to do with her race or the fact she had done protected acts. Mr Neckles raised the same points he had raised in the disciplinary hearing, and we have found Mr Wagg's rejection of those points was reasonable. It follows that the decision to dismiss the appeal was also reasonable. Mr Slaughter's evidence was that he considered each of the points raised on appeal and concluded that the Claimant was guilty of gross misconduct and that the process had been fair. We accept that was the reason why he dismissed the appeal. This complaint also fails.

(m) Undue delay in discharging an Appeal Outcome against dismissal.

133. There was undue delay in providing the Claimant with an appeal outcome, which we accept could constitute a detriment. That is not on its own enough to shift the burden of proof to the Respondent. The Claimant has not established facts from which we could conclude that the delay was because of her race. We have already found that it was not deliberate. The complaints of direct discrimination, victimisation and harassment therefore fail.

Jurisdiction

134. We have addressed each of the allegations on the basis that the Tribunal may have jurisdiction to consider them. Given our findings above, however, there was no continuing act of discrimination and therefore allegations (a) to (j) are out of time. The Claimant has not explained why she did not bring proceedings in respect of those complaints sooner, and we note that she brought separate Tribunal proceedings in December 2018 which did not include any of these complaints. In those circumstances it is not just and equitable to extend the time limit. The Tribunal has no jurisdiction to consider them.

<u>Postscript</u>

135. On 22 March 2021, between the conclusion of the hearing and the date on which the Tribunal was due to sit in chambers, Mr Neckles sent an email to the Tribunal attaching a number of authorities. No further submissions had been requested by the Tribunal and neither party had applied for permission to make further submissions. The email also did not explain the relevance of the attachments. We therefore disregarded it.

Employment Judge Ferguson

Date: 6 April 2021