EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Hamilton**

Respondent: **Sandwell and West Birmingham Hospitals NHS Trust**

Heard at: **Birmingham**

On: **7-15 December 2020 and in chambers 24 & 25 February 2021**

Before: **Employment Judge Flood**
Mr Kelly
Mrs Whitehill

Representation
Claimant: In person (with her McKenzie friend, Miss Chan Ngo)
Respondent: Mr Graham (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is the complaints against the respondent of unfair dismissal (contrary to sections 95 (1) (c) and 94 Employment Rights Act 1996 ("ERA"), direct discrimination, harassment and victimisation (contrary to ss 13, 26 and 27 of the Equality Act 2010 ("EQA")) do not succeed and are dismissed.

REASONS

The Complaints and preliminary matters

1. By claim forms presented on 7 August 2019 and 1 February 2020, the claimant brought complaints of unfair (constructive) dismissal, direct age, race and sex discrimination; age, race and sex related harassment and victimisation against the respondent.

2. There were two preliminary hearings for case management before Employment Judges Self and Butler on 6 January and 16 April 2020. An agreed bundle of documents was produced for the hearing and where page numbers are referred to below, these are references to page numbers in the bundle. A consolidated list of issues had been produced (pages 1000-104).

3. During the course of the hearing, some changes were made to the list of issues by agreement. There were some changes to the dates of allegations on that list of issues (allegation 2 b. is said to have occurred on 17 December 2018 (not 17 January 2019); allegation 2e. on 6 February 2019 (not 25 January 2019) and allegation 2i. in March 2019 (not May 2019). The dates were also adjusted on the corresponding allegations of harassment at 5 b. e. and i. The claimant clarified that the allegation of direct discrimination at 2 b. and harassment at 5 b. was a claim related to age only and not to the protected characteristic of sex. She also confirmed that she was no longer pursuing allegations of direct discrimination at 2 f. h. and j and allegations of harassment at 5 f. h. and j. The claimant also confirmed that she was no longer pursuing the allegation of victimisation at 10 j. I updated the List of Issues to reflect these changes and this is set out below with revised numbering, where appropriate. I have also used the initials of various individuals as they are defined in the findings of fact at paragraphs 6 & 7 below. The list of issues was referred to extensively throughout the hearing.

4. We also had a Chronology and a Cast List prepared by the respondent.

5. The issues to be determined by the Tribunal were as follows:

JURISDICTION – OUT OF TIME

1. *Are the claimant's claims (direct discrimination, harassment and/or victimisation) out of time?*

    a. *If so, do any of the facts form part of a course of conduct by the respondent extending over a period of time such as to render them in time?*

    b. *If not, is it just and equitable to extend time?*

DIRECT DISCRIMINATION – s.13 Equality Act 2010

2. *Did the respondent subject the claimant to the following alleged treatment:*

    a. *AT being hostile towards the claimant and JS* ***(Age)***

    b. *On 17 December 2018, AT changed the claimant's working hours* ***(Age)***

    c. *Between January 2019 and June 2019, AT allowed other staff members to leave early when the claimant was told she had to stay until 5pm* ***(Race)***

    d. *On or around January 2019, AT gave the claimant additional cleaning duties on the cleaning rota* ***(Race)***

    e. *On 6 February 2019, AT questioned the claimant about why she was not signing the cleaning rota* ***(Race)***

f. *On 5 February 2019, AT ensured that the ward staff knew that the claimant should be on the ward until 5pm* ***(Race)***

g. *On or around February/March 2019, the claimant was not afforded the same opportunity of applying for MB's Band 4 position* ***(Race, Sex and Age)***

3. *If so, was the claimant subjected to that treatment because of her race and/or her sex and/or her age? The relevant protected characteristic has been identified next to each example of alleged less favourable treatment above.*

4. *If so, did the respondent treat the claimant less favourably than it treated, or would treat, a hypothetical comparator or in respect of allegation 2(g) above, MB.*

HARASSMENT – s.26 Equality Act 2010

5. *Did the respondent act as follows towards the claimant:*

a. *AT being hostile towards the claimant and JS* ***(Age)***

b. *On 17 December 2018, AT changed the claimant's working hours* ***(Age)***

c. *Between January 2019 and June 2019, AT allowed other staff members to leave early when the claimant was told she had to stay until 5pm* ***(Race)***

d. *On or around January 2019, AT gave the claimant additional cleaning duties on the cleaning rota* ***(Race)***

e. *On 6 February 2019, AT questioned the claimant about why she was not signing the cleaning rota* ***(Race)***

f. *On 5 February 2019, AT ensured that the ward staff knew that the claimant should be on the ward until 5pm* ***(Race)***

g. *On or around February/March 2019, the claimant was not afforded the same opportunity of applying for MB's Band 4 position* ***(Race, Sex and Age)***

6. *If so, did the respondent engage in unwanted conduct related to the claimant's race and/or sex and/or age? The relevant protected characteristic has been identified next to each example of conduct above.*

7. *Did the unwanted conduct have the purpose or effect of violating the claimant's dignity, and/or did the conduct create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

8. *Was it reasonable for the conduct to have that effect?*

VICTIMISATION – s.27 Equality Act 2010

9. *Did the claimant do a Protected Act? The claimant relies on the following as Protected Acts:*

    a. *Her complaint to JT on 6 February 2019;*
    b. *Her first grievance dated 15 March 2019; and*
    c. *Her second grievance dated 15 May 2019, submitted formally on 24 May 2019.*

10. *If so, as a matter of fact, did the respondent to the following:*

    a. *Was CR aggressive towards the claimant during a telephone conversation on 3 April 2019?*

    b. *Did CR fail to offer the claimant alternative support to attend an informal grievance meeting on 10 April 2019?*

    c. *Did CR fail to contact the claimant from 10 April 2019 onwards in her capacity as the claimant's union representative?*

    d. *Did the respondent circulate emails which should have been confidential between the claimant, the claimant's line manager and her union representative from 12 April 2019 onwards?*

    e. *Did NB and AH fail to assist the claimant find a permanent position from May 2019 onwards?*

    f. *Did NB refuse to acknowledge and provide a response to the claimant when she questioned his involvement in the loss of the Oncology service and related job losses on 25 October 2019?*

    g. *Did the respondent fail to provide an outcome to the claimant's second grievance?*

11. *If so, was the claimant subjected to those detriments because the claimant had done one or more of the Protected Acts identified above?*

CONSTRUCTIVE UNFAIR DISMISSAL

12. *Did the respondent commit a fundamental breach of the claimant's contract of employment amounting to a repudiation of that contract? (section 95 (1) (c) Employment Rights Act 1996). The claimant alleges the following acts amount to a fundamental breach of contract:*

    a. *The respondent's failure to follow the grievance policy*

    b. *The respondent's failure to provide the claimant with an outcome to her grievance and*

    c. *The treatment referred to in paragraphs 2, 5 and 10 above.*

13. *If the respondent did commit a fundamental breach, or breaches, of the claimant's contract of employment amounting to a repudiation of that contract, did the claimant resign in response to such a breach(es)?*

14. *If so, did the claimant nevertheless delay in resigning and thereby affirm her contract of employment?*

15. *If the claimant was constructively dismissed, what was the reason or principal reason for her dismissal and is it a potentially fair reason within s.98(2) of the Employment Rights Act 1996?*

16. *Was the dismissal fair within the meaning of s.98(4) of the Employment Rights Act 1996?*

REMEDY

17. *If the claimant was unlawfully discriminated against, what compensation should the claimant be awarded under s124 Equality Act 2010?*

18. *If the claimant was unfairly dismissed:*

    a. *What basic award is she entitled to under s.119 of the Employment Rights Act 1996?*

    b. *What compensatory award would be just and equitable in all the circumstances having regard to the loss sustained by the claimant under s.123 Employment Rights Act 1996?*

19. *In particular:*

    a. *Has the claimant reasonably mitigated her losses; and*

    b. *Should any basic and/or compensatory awards be reduced by reason for the claimant's own culpable or blameworthy conduct pursuant to s.122(2) Employment Rights Act 1996 and/or s.123(6)?*

Findings of Fact

6. The claimant attended to give evidence and called additional witnesses, Mrs S Reid ("SR") and Mrs K Smith ("KS") former employees of the respondent who had worked with the claimant; and Mr A Hamilton ("AH") and Miss S Hamilton ("SH"), the claimant's son and daughter. Ms S Wiltshire ("SW"), lead nurse for Oncology and Haematology, Ms J Thomas ("JT"), Matron for Respiratory, Gastrointestinal and Haematology at the time the claimant was employed, Ms A Turley ("AT"), Band 6 Chemotherapy Sister; Mr N Bellis ("NB"), Human Resources Business Partner; Mr M Warner ("MW"), Band 7, Senior Charge Nurse and Ms D Radway ("DR"), Human Resources Business Partner, all of the respondent gave evidence for the respondent. We considered the evidence given both in written statements and oral evidence given in cross examination, re-examination and in answer to questioning from the Tribunal. We considered the ET1s and the ET3s together with relevant numbered documents referred to

below that were pointed out to us in the Bundle.

7. In order to determine the issues set out above, it was not necessary to make detailed findings on all the matters heard in evidence. We have made findings not only on allegations made as specific discrimination complaints but on other relevant matters raised as background. These findings may be relevant to drawing inferences and conclusions. We made the following findings of fact:

7.1. The claimant is a 64 year old Caribbean mixed race woman.

7.2. The respondent is an NHS Trust which provides healthcare services to patients across Sandwell and West Birmingham.

7.3. The claimant started work with the respondent in October 1999 carrying out various roles before she became a Senior Health Care Assistant (HCA) in the respondent's Oncology Department based at its City Hospital from 2001. As a senior HCA she was banded at Band 3. Her role in the Oncology department was mainly supporting doctors ensuring that the chemotherapy prescriptions were following the correct path. She was liaising internally with colleagues chasing appointments and CT scans and with other clinical teams within the hospital and external bodies. She accompanied doctors as a chaperone to patients and took patient observations using an observation machine. She did not carry out venous blood samples or conduct ECG tests nor did she regularly check respirations with a stethoscope, although accepted that these were matters that HCAs did in other teams. At the Oncology department at City Hospital, there had been a separate chemotherapy area which the claimant was never called upon to work on, although she would have helped if she had been asked. The respondent acknowledged that the claimant was dedicated to her work and her work was of an exceptionally high standard.

Claimant's contract of employment, job description and relevant policies

7.4. We were not shown a copy of the claimant's contract of employment. We were shown a job description at page 138-141 and a person specification at pages 142- 144 for the position of Senior HCA which the claimant was performing. The claimant said she had not seen this job description and had not heard any reference to the term "generic" as regards her role until 12 June 2018 in an e mail from NB (see para 7.20 below). SW stated that this job description had been in place since 2005. She said it had been introduced as part of the NHS Agenda for change in 2004/5 when all employees' job descriptions were changed. Her recollection was that in 2008 when Cancer Services took over management of the department she was running, that she was required to ensure that every employee had signed a job description which was done at the time. We accept the evidence of SW on this and find that the claimant was issued with this job description at that time, but may have just not recollected this, as it was some time ago. This was the job description that applied to her employment with the respondent.

7.5. The Grievance policy that applied to the claimant was at pages 642-652 and contained the following provisions:

"8. Informal Resolution of Problems

8.1 The ACAS Code of Practice recommends that employees should aim to settle most grievances informally either with their immediate line manager or the next level of management. For this reason and the swifter resolution of grievance issues, the informal procedure constitutes step 1 of the Trust's Grievance and Disputes Procedure.

8.2 It is expected that unless there are highly exceptional circumstances all grievances should be considered at Stage 1 before a formal grievance is considered.

8.3 A decision not to proceed without an informal stage of the grievance procedure will require the authorisation of the Director of Workforce or their Deputy."

and

"10. Time Limits

It is in the interest of both the Trust and its employee (s) that grievances are resolved quickly, ideally within two months of them being raised formally. Where possible, dates for hearings should be agreed in consultation with the employee and their representative. Any changes to the hearing date or time should be agreed within five working days of the initial date being set. An extension of the time limit may be permitted by mutual agreement."

It set out four stages in detail. Step 1 being described as Informal Resolution with Immediate Manager/Manager at an appropriate level, stating that: "*Grievances must be discussed between the employee (s) and the immediate manager/next level of management in the first instances. The manager will endeavour to resolve the matter informally, taking into account the issues involved and the employee's preference for outcome."* Step 2 is headed up as "*The Employee sets out the nature of the grievance in writing"* and notes that if the grievance has not been resolved informally then "*the employee(s) or their representative may lodge a formal grievance by informing the relevant manager (normally at Divisional General Manager level) in writing by completing the Grievances and Disputes Form. The individual lodging the grievance should state that they are lodging a grievance in writing using the appropriate form, identify the full nature of and the reason for the Grievance together with the desired outcome.*" Step 3 goes on to describe the hearing of the grievance stating that:

"The Manager hearing the grievance will convene a meeting to discuss the grievance within 10 working days, of receipt of the written grievance. At the meeting the employee should have the chance to explain the nature of their grievance and the manager involved in the informal resolution of the grievance should outline their attempts to resolve the grievance informally. After the meeting the Manager may undertake whatever investigation is felt appropriate and should communicate their decision in writing within 10 working days. If the employee is dissatisfied with the outcome and remains

aggrieved they will have the opportunity to appeal in line with Step 4 of the Procedure."

Trade union representation and involvement

7.6. A feature of the claims made by the claimant relates to actions of the claimant's trade union (which was Unison) representative, C Rickards ("CR"). NB explained that CR was employed by the respondent and then seconded to the role of Trust Convenor and referred us to a copy of her job description at page 115-124. He explained his understanding that CR was always acting as the claimant's union representative (and not as an employee of the respondent in her day to day role) in all dealings she had with the claimant. He referred us to the "Conditions for Providing Assistance" issued by Unison at page 278-81. This provides:

" At all times, action taken on your behalf will be on the basis of agreement reached between you and your representative about the best way UNISON can assist you. Throughout the procedure, you will be kept informed and no decision will be made without first consulting you."

NB confirmed that in order for the trade union representatives to represent employees, they are provided with a respondent e mail address and facilities such as an office, but when advising or representing employees on matters relating to their employment with the respondent, they are acting as representatives of Unison, not the respondent. We note that at various e mails sent by CR to the claimant and employees of the respondent (see e.g. paras 7.20 and 7.20) there is no express reference to CR's role and she does not include an e mail footer or signature block to explain that she is sending an e mail as a trade union representative. Nonetheless we are satisfied that it was clear to both the claimant and the employees of the respondent that CR was in her communications with them both and throughout her interactions, carrying out her function as a UNISON trade union representative, not in the course of her employment with the respondent in her day to day role. The claimant regularly asked CR to represent her in matters about her employment with the respondent by both attending meetings with or about her, or sending e mails on her behalf and that of other employees to the respondent (see paras 7.20, 7.21 and 7.24 below). It is in no doubt that the claimant understood that she was asking CR to do such things, and CR was doing them because CR was a UNISON union representative and not working on behalf of the respondent itself.

Changes to the Oncology department

7.7. In 2017, the respondent decided to make changes to the way it delivered its oncology service. At this time the respondent delivered a large oncology outpatient service across two units; the Oncology Unit the claimant was working at in City Hospital and the Newton 5 Day Unit at Sandwell General Hospital. Patients were treated by visiting oncologists from University Hospitals Birmingham NHS Foundation Trust (UHB). Having had a number of discussions with the respondent, UHB decided to withdraw its services from the respondent which led to a 60% reduction in chemotherapy day services offered by the respondent. A service review was undertaken and

a decision was made to retain the day unit at Newton 5 (as this was the respondent's haematology ward) and to close the dedicated oncology outpatient unit at City Hospital where the claimant worked.

7.8. A restructure plan was carried out by Mr S Hildrew ("SH"), the respondent's Directorate General Manager at the time. We were referred to the Business Planning Workforce Savings Project document that he prepared (page 126 to 128). This document explained that the respondent and UHB did not consider that TUPE applied to the staff working who were affected by the changes, as they did not deliver oncology only services but rather a combined oncology and haematology service. The respondent planned to deploy staff to other roles within Medicine and determined that no redundancies would be required. The respondent uses the term deployment to refer to moving staff members working under a general or generic job description to alternative roles within the care group/division. It was described as being similar to when a ward or unit closes and the staff are not put at risk of redundancy as they can be deployed to work elsewhere as they have general job descriptions. The claimant took exception to the description of her role as being a generic HCA. She described outpatients and ward work as two separate types of caring in that outpatients is more of a supporting role whereas ward work is closer to nursing. The respondent accepted that the day to day role being performed by the claimant when at the Oncology unit at City Hospital was very different to in patient ward work. The claimant was also unable to do many of the tasks involved in ward work due to an ongoing health issue with her back.

7.9. At page 127 the Project document identified the role that the claimant was carrying out and that this would be one of the job roles affected by the change. It also identified a number of other roles in this position, including 5 Band 3 HCAs, 3 Band 2 Ward Clerks and 1 Band 4 Assistant Practitioner. This Band 4 role had been included in the Oncology restructure as the person carrying out this role, M Bird ("MB") whose substantive post was on the inpatient ward of Newton 5 at Sandwell Hospital was temporarily working on the Newton 5 day unit at the time for health reasons. It went on to note that there would be no change in overall headcount for these roles and that employees in these roles would be subject to "*deployment within Medicine*" and went on to state that "*Post will only be at risk if deployment is unsuccessful*". At page 131 we were shown a document which summarised the changes. This had not been issued to the claimant but was part of the message delivered to employees at the time. Again this identified the role the claimant had been performing as one of the "*Staff Affected*" and noted that this role would be "*subject to deployment within Medicine as posts arise*". It also identified the role MB had been performing and stated that this role would be subject to "*deployment within Medicine when post available until then will stay with unit"*. It went on to describe the deployment process as follows:

"Staff will be given the opportunity to apply for any vacancies that have been released from restricted advertisements for "at risk" staff and consideration will be given for their working hours and any reasonable adjustments owing to ongoing health conditions (which may need to be assessed by an Occupational Health referral to ensure up to date information is available).

As with the usual Ward deployment process both managers and staff will need to be flexible wherever possible."

7.10. The respondent held a staff meeting at the City Hospital on 23 October 2017 which the claimant attended where the information above was communicated. The claimant became concerned about her job security after this meeting as although she was told she was not at risk of redundancy, she did not feel secure as the role she had been performing had gone and she would now be put in a temporary position. SW acknowledged that the claimant was in a difficult situation and the restructure affected and unsettled a number of staff at the time

7.11. We were shown two letters which the respondent says were issued to employees affected by the changes. At page 135 there was a letter dated 7 November 2017 and at page 136-7, a letter dated 17 November 2017. The first letter set out that the trust would be consulting with employees about the changes to outpatient and chemotherapy services. It had the following reference in it:

"As discussed at the meeting the Trust is giving an undertaking that staff will either move with the revised service or be deployed into generic roles within the Medicine and Emergency Care Group in the first instance"

The letter went on to state that 1:1 meetings would be held and made reference to the availability of trade union support and staff counselling. The second letter was similar in content but confirmed that the decision had *"now been made"* and further*:*

"The move of the service to a single site is likely to be effect from the end of February due to the phased transition of chemotherapy and oncology for individual tumour sites and will require both a reduction in staffing levels and for some staff a move of base location. The required staffing structure in the new unit is detailed in the attached paper and whilst less staff will be required we will be looking to deploy any affected staff into a similar role at the same band within Medicine."

7.12. The claimant said she had received the second letter but had never been issued with the first letter above, which made reference to being "*deployed into generic roles*". She points to the style of the first letter, the fact that the date had been written on and that the letter was not signed off formally with SH's job title and cc'd to other senior members of staff (as the second letter is). She invites us to find that this letter was not a letter written by SH and not genuine. SW told us that she recalls both letters being produced at the time of the restructure by SW or his assistant and that the letters were then e mailed to her to hand out to employees affected by the restructure. She remembers printing two letters out and putting them in envelopes and handing out to employees (although does not specifically remember handing it to the claimant). She recollected stating at the time that the letters should have been sent direct to employees' homes rather than being handed out at work. We accept that the letters were handed out and not sent and that both are genuine, although we cannot conclude that the claimant was definitely in receipt of both letters.

7.13. The claimant and two of her colleagues who were HCAs were in discussion at the time with the support of CR with management about what the restructure would mean for them. On 29 November 2017, SH e mailed SW with further information and asked her to pass this on to the claimant and her colleagues which she did. This confirmed that the claimant was not formally at risk and was not being offered posts for redeployment across the Trust under that process. He explained that they were going through the deployment process which would happen when employees were not being put at risk of redundancy and stated that "*any vacancy put out to advert they can have first choice of, without interview*" and could be "*slotted in*" and "*we are not expecting them to realistically consider things outside of their expertise or area (e.g band 2 catering, portering etc*". He went on to confirm that the current process would continue until the end of February and through the natural process of turnover jobs would come up over the next three months.

7.14. The claimant started to have discussions about potential roles and mentioned some discussions with the Breast Unit. The claimant unfortunately suffered a bleed to the brain in December 2017 resulting in emergency surgery and she was unwell and absent from work until 6 April 2018. The process of transferring the oncology work was complex and difficult and involved transferring 1200 cancer patients who were in the process of undergoing treatment and so had to fit around those treatment dates. During the claimant's absence from work there were some internal discussions between SW and members of HR about the role the claimant and other affected staff could move to. At pages 147-153 there were some e mails between NB, SW and A Hawkins ("AH") (the Acting Group Director of Nursing at the time) regarding affected employees and suitable vacancies but no discussions took place with the claimant at that time.

7.15. There was an occupational health meeting before the claimant returned to work on 16 February 2018. The claimant returned to work on a phased return on 6 April 2018. There is some dispute about the extent to which SW assisted the claimant in looking for new positions on her return. We accept that the job vacancy list was on display within the working area around that time. SW made reference to numerous conversations taking place but the claimant says that these were just passing conversations. We conclude that there were some brief discussions about job roles but nothing substantial between 6 April 2018 until 23 April 2018, when SW contacted HR about alternative roles for the claimant asking about vacancy lists (page 160) and this is sent on 25 April 2018. AH notified SW of a ward vacancy on 25 April 2018 but SW informed her that the claimant would not be fit for ward work (page 159). There then followed some further e mails about whether OH advice had been sought about this. There were some further e mails about a role in bowel screening and the information about the role was sent to the claimant on 25 April 2018 (page 164). The claimant met with the lead for this role on 27 April 2018 but ultimately decided that it was not suitable as it involved too much administrative work. The claimant requested a meeting with SW to discuss her position on 26 April 2018. At this meeting the claimant informed SW that she was considering taking legal advice and asked whether SW it was possible for her to be made redundant.

SW does not recall full details of this conversation although does recall the claimant mentioning legal advice and we note she contacted HR about this (page 166) where she confirms that she will continue to look for potential vacancies for the claimant.

Move to Newton 5 on 30 April 2018

7.16. The oncology unit at City Hospital closed on 30 April and on this date the claimant was transferred to work on the Newton 5 Day Unit at Sandwell Hospital. SW met with JT the Matron and EW the ward manager on Newton 5 on 1 May 2018 to perform a handover. SW explained that she had intended to carry on looking for roles for the oncology staff who had been displaced as a result of this restructure but was informed that this would be picked up by JT and EW for those staff moving to Newton 5, the claimant, SR and J Stevens ("JS") (a Band 2 HCA). SW e mailed JT and EW (copying HR) updating them on where the job search had got to (Page 172). There does not appear to have been any discussion about individual working hours of employees transferring. This e mail confirms that as at 1 May 2018, a request had been made for OH to advise on whether the claimant was fit for ward work, mentions that she may require redeployment on the grounds of ill health and confirmed that she would be moved on a temporary basis to Newton 5 day unit. It is not clear how this was communicated to the claimant but she, JS and SR were informed that they would be transferred to start working on 30 April 2018. The claimant was not notified in writing of any change at this time or informed what would happen next. It is clear that this move was not handled as well as it could have been by the respondent. It would have been better and more appropriate for the claimant and other employees to have been sent a letter confirming what was happening to them when the oncology unit closed and what would happen moving forward. This may have alleviated some of the issues that subsequently arose and it is clear to us that from this point on the claimant was unhappy at work and felt insecure and uncertain about her future.

7.17. The claimant started working on Newton 5 on 30 April and describes meeting EW on her first day who welcomed her and the others to the team and informed the claimant that she was unsure what she could ask the claimant to do as the unit was already over-staffed. When the claimant arrived on Newton 5, she did not have a specific role allocated to her and she describes her and JS rearranging the day unit to try and fill her time. SR took on the role of ward clerk for Newton 5 in patient ward at that time, as the existing ward clerk was off sick. We heard evidence about the structure of Newton 5 which was a haematology unit. This was split into two separate parts: the in-patient ward and the day unit (where patients undergoing chemotherapy were treated). It is clear that even before the claimant arrived at this ward, there were some differences between the two areas. The in-patient ward was (generally) much busier (as it was not just dealing with oncology but was also a wider haematology ward) and the day unit could be quiet at times. Employees in the day unit were asked to help out on the ward at busy times. This situation intensified when the claimant arrived as the day unit became less busy because of the loss of oncology patients due to restructure referred to above (para 7.7 above). The Newton 5 day unit was in the position where it had less work and more employees

allocated to it. The claimant describes a meeting where all employees were informed by JT that day unit employees would be asked to help out on the ward at busy times. The claimant was concerned about this, given her back issues (see 7.8 above), so requested a meeting where she and JS (who also had a back injury) informed JT about their health issues. JT asked the claimant and JS to carry out the role of activities co-ordinator on the ward, although this was not in the end pursued.

7.18. The claimant e mailed SW on 9 May 2018 (page 176) complaining that she had not had a one to one or consultation or correspondence on her move. SW responded by summarising what she understood had taken place to date and informing her that JT would be taking over the deployment process. The claimant's union representative at that time, CR, was also communicating with SW about the process at this time (175). On 10 May 2018 the claimant attended an OH appointment (178) . This confirms at page 178:

"My opinion is that a ward role which involves lifting, carrying, bending and other significant manual handling activities would not be suitable as these can aggravate her back problems. Roles such as outpatients' department, other areas where patients are less likely to need support with mobility, taking bloods, doing ECGs, general observations may be more suitable"

7.19. It is clear that tension was already in place in Newton 5 when the claimant and JS arrived. This was exacerbated as the already overstaffed day unit now had two additional HCAs without defined roles. The nursing staff on the Newton 5 ward were busy and asked day unit staff (including the claimant) to assist at busy times. However, the nursing staff, and in particular AT, did not have the full information about what restrictions the claimant and JS were under due to their back injuries. She had not seen the OH report referred to at para 7.18 above. In addition, the work that had been done by the claimant as a HCA on the previous oncology outpatients' unit was very different to that carried out by HCAs on the ward (see paras 7.3 and 7.8). Again, it is not clear that the day to day nursing staff on the ward knew this. The claimant was asked on some occasions to help out on the ward to do work that she did not feel able to do. MW gave evidence that the claimant would not do patient observations. AT also stated that the claimant did not want to take blood pressure readings as it was not part of her role. The claimant says that she did not know how to use the equipment used on the ward (VitalPac) for taking observations as this had not been used in her previous role in oncology outpatients but did not refuse to carry out any tasks. We find that there was a difference in the perception of what was taking place at this time. The busy nursing staff assumed that the claimant would be able to easily carry out the tasks that she was being asked to do and interpreted her reticence to do these as a refusal. The claimant did not always explain to the staff why she was unable to do the tasks. When this was clear, it was possible for a more constructive resolution to be found. We heard evidence from JT about a time she asked the claimant to take observations from patients in the ward and the claimant told her she was not sure what she was doing. JT started the round with her, showing her how to use the machine on some patients and the claimant was then able to do this successfully and to a very high standard to patients

on her own. The claimant said that she felt humiliated and belittled by AT and made reference to the fact that she was coming from City Hospital with old skills and was not as up to date. She mentioned some of the gestures and facial expressions she felt were used and that the team felt that she (and JS) were "*old biddies*". We accept that the claimant felt that this was how she was being perceived but we could not find any other evidence to suggest that AT, JT or MW did or said anything during this time which referenced the claimant's age or suggested that her skills were out of date or were hostile to her. The claimant's witnesses, SR and KS, both stated that they did not believe that anything that happened to the claimant was related to her age, KS noting that she was a similar age to the claimant and did not experience any difficulties. SR noted that many of the nursing staff were a similar age and some were older and she did not see any hostility to anyone.

7.20. When the claimant first started on Newton 5, she was working the same hours she had been doing at the oncology unit in City Hospital, namely working 4 days a week from 7.30 am. to 5pm. The claimant was clearly underutilised as the weeks progressed following her move and she described spending her days going around looking for things to do to pass the time. SR said she noticed that the claimant spent her time doing menial tasks, mainly cleaning over and over again and rearranging library books. She said that she felt the claimant was "*surplus to requirements*" and did not have a proper job role. SR said that the claimant's situation became worse when JS went off sick and she felt like an "outcast" and this was because she did not have a job role or a clear purpose. SR said she noticed a deterioration in the claimant during this time as she became withdrawn and quiet. The claimant raised concerns via CR on 31 May 2018 (page 185) and we saw an e mail at page 183 where CR e mailed SW, NB, EW and S Hylton on 12 June to raise various points, including matters about how the initial restructure had been handled. NB replied on the same day to CR direct on the matters raised about the initial restructure (page 182) and stated that the process was one of deployment to generic roles within Medicine and that there was never any intention to declare affected staff at risk of redundancy as there would always been a need for "*generic roles*" such as the Senior HCA role. JT also replied to CR's e mail the same day (page 187) and made a number of points including that the claimant and JS had been asked to carry out the role of activity co-ordinator (see para 7.17 above) which was later turned down by the claimant (as noted in an email from JT at page 198). The claimant then asked CR to raise a grievance on her behalf later than day (page 184). No grievance was submitted at this time by CR or the claimant.

7.21. The claimant was signed off sick due to work related stress and was absent from the end of June 2018 to 16 December 2018. The claimant was in contact with EW during her sickness absence and attended two sickness review meetings following which letters were sent confirming the discussions by EW (page 203-4 and 207-8). During the second meeting, the possibility of the claimant being put on the medical redeployment register was discussed. It was explained to the claimant in the letter sent on 19 October (207-8) that this would involve the claimant being placed on a redeployment register for 10 weeks during which time attempts would be

made to find a suitable role within the wider trust, failing which dismissal on the grounds of ill health may be considered. The claimant was unhappy with this being raised and also that her period of absence was being linked to a recent bereavement which she said was not the case. She notified the respondent of her views on 23 October 2018 (page 209). At this time EW also discussed the possibility of the claimant being deployed to a new HCA role within emergency care (although as it was a new role the claimant was unsure whether it would be suitable) and also encouraged the claimant to join the NHS Jobs website to look for vacancies in the Trust. Following an e mail from CR to JT on 26 November, JT (who was the claimant's line manager as EW was on sick leave) arranged for the claimant to meet with the senior sister recruiting for a HCA for the Single Point of Access team. The claimant and JT met with her on 5 December 2018 to discuss the role but the claimant indicated that it would not be suitable as it was administration based and she did not have the skills for it. JT confirmed this in an e mail to the claimant the same day (page 224-5) where the claimant was sent a list of the current vacant HCA posts and JT noted that the claimant had decided she did not want to pursue the route of redeployment on medical grounds, therefore if none of the posts were suitable or if redeployment was not considered, that a request being made for a hearing to consider dismissal due to ill health. CR replied on the claimant's behalf and reminded JT that the claimant needed to be found a suitable alternative post, but in the meantime, "*temporarily she should be placed back on the Day unit, where she is familiar with the work and does not need to learn another post."*

7.22. Shortly before her return from sick leave, the claimant met with JT on 17 December 2018 and a note of their discussion was e mailed to the claimant on 18 December (page 222-3). The claimant's working hours were not discussed in this meeting and she was informed that she would be mentored by AT on her return (who had recently taken on a Band 6 chemotherapy sister in the day unit). In the afternoon after this meeting, AT telephoned the claimant. The claimant alleges that during this telephone conversation, AT "*changed her working hours*" telling her that she would be working 8.30am to 4.30pm Monday to Friday. AT did inform the claimant during this phone call that these were her working hours, and says she understood that this had been agreed in the meeting between the claimant and JT. She explained that as a Band 6 sister, she did not have the authority to make changes to the working hours of employees. The claimant did not tell AT during this conversation that she could not work these hours due to other commitments, nor explain what these commitments were. We conclude that a conversation around the claimant's hours did take place and the claimant was informed by AT she would be working from 8.30-4.30 5 days a week. We do not accept that there was any reference to changing the claimant's hours but that AT was under the impression that these were the hours the claimant was working. There was clearly a miscommunication during this phone call which may have been alleviated if the claimant had informed AT what her hours were and had been and that she could not work the hours AT notified her of. The claimant informed JT on 19 December 2018 by e mail that she did not want AT to be copied on emails regarding her ongoing situation.

7.23. The claimant returned from sick leave on a phased return after taking some annual leave on 8 January 2019. There were clearly some problems from the outset and we saw an e mail from AT to SW on 23 January at page 228 where she explains that she was "*struggling*" and was "*way out of her depth*" managing the claimant. She mentions that the claimant was unhappy with her hours, had some issues with her hours and was "*not the easiest to deal with*". The claimant complained to the Tribunal that this email was copied to JT, MW, M Katakia (MK) and L Winsper (other nurses in Newton 5) with the comment "*Just keep you all in the loop, as I feel I will need further assistance and guidance*". However we accept AT's explanation that she was unsure how to deal with the claimant's concerns being a relatively junior member of staff. As a result of this e mail, there was a meeting on 24 January 2019 between the claimant, AT and JT where these issues were discussed. It was agreed by all that the claimant would work between 8am and 5pm Monday to Thursday and then from 8am to 11am on Friday, as a compromise to the claimant's needs and to try and fit around the unit's opening hours. It was also agreed that for the 30 minutes of the claimant's working day before the unit opened at 8.30 am and after it closed at 4.30pm, the claimant would undertake cleaning and preparatory tasks. The issue of the claimant's annual leave was also discussed and sorted out.

Allegations re not allowing claimant to apply for MB's Band 4 position

7.24. The claimant was still in contact with CR and on 29 January 2019, CR emailed JT for an update on the claimant's employment position and asking for any "*substantive employment proposals moving forward*" (page 232). JT replied that day to say that there were no jobs in outpatients and that the claimant would continue to work in Newton 5. JT also asked for the assistance of SG in HR and copied her into this e mail. Following a telephone call from the claimant to HR on 22 February, SG arranged a meeting which she attended with the claimant, CR and EW at the Unison offices at City Hospital on 28 February 2019. The main discussion during that meeting was the handling of the restructure in 2017/18. The claimant was told that the Band 4 HCA post being performed by MB (which had been an affected role in the initial restructure, see para 7.9 above) had now been reinstated and was being done by MB and had not been advertised. JT gave evidence on this decision telling us that MB, as an Assistant Practitioner, was in a clinical role and had qualifications and training to provide clinical care to patients and he had always been based at Newton 5. She explained that the number of chemotherapy nurses on Newton 5 had decreased around this time and it became beneficial to continue to have MB working on the unit to carry out some of the clinical tasks nurses had been doing (he could carry out many of the roles a Band 5 nurse could do). She also clarified that the post was not advertised as it was felt there was no need, as MB was already in the role and had been for some time. NB told us that the claimant and MB had different roles and the claimant as a Senior HCA would not have had the qualifications of experience to be appointed to this post. AT told us that the Band 4 Assistant Practitioner role required a university qualification taking 2 years; that this role had its own clinical caseload and was more akin to a Band 5 nursing role. MW addressed the issue of the difference in these two roles in an e mail shown at page 424 and we also saw the job description for the Band 4 Assistant

Practitioner role at page 619-622. We find that the Band 4 role was significantly different to the Senior HCA role that the claimant had both in terms of competencies and qualifications.

Allegation re giving claimant additional cleaning duties on the cleaning rota

7.25. JT had at this time asked AT to put together a cleaning rota setting out the tasks that needed to be done on the day unit on a daily basis. Following the meeting referred to at 7.23 above, AT wrote to the claimant confirming the discussions (page 230), and also enclosing a cleaning rota she had devised (page 231). This document was headed *"[Claimant's first name] Cleaning Rota and Preparation for the Day*" and set out a number of tasks for the claimant to do between the hours of 8am-8.30am; between 8.30am and 4.30am when the unit was open; and between 4.30pm and 5pm. The claimant did not object to any of the tasks listed on this document per se (stating that these were all tasks she was already performing). The claimant complained about the fact that she had been identified by name on this document and that it was described as a cleaning rota. She was also concerned that it had been sent to her home address and when she returned to work, a version of this document was on display in the staff room and had some handwritten additions on this (page 237). It appears to be the handwritten additions that are the subject of the claimant's discrimination and harassment claims. The claimant said at this stage it was clear to her that AT was discriminating against her and she it made her feel that she was "*being treated lower than a slave*" and it reminded her of stories her father told her as a child "*how black people were treated like slaves and allocated all the menial jobs*". We accepted that the claimant was extremely upset about the cleaning rota and that she had a genuine belief that there was a link to her race.

7.26. AT told us that she was not motivated by the claimant's race in putting the claimant's name on the cleaning rota, and it was an error on her part having not at this time devised a document like this before. She said that she did not realise that the claimant was offended until the claimant raised it with JT. AT said that she had sent the cleaning rota to the claimant's home address because she thought it was good practice to put what had been discussed during the meeting in writing, including the cleaning duties that were discussed. She told us she displayed it as it was necessary for all wards to have visible signed cleaning rotas to demonstrate that cleaning had been done in case of inspections from the infection control team or the Care Quality Commission. AT told us that the handwritten comments "*ensure staffroom clean and tidy and fridge clean*" written on the rota shown at page 237, had been added by her because the staff had recently been allocated a staff room which had previously been an office and there were additional cleaning duties to be covered, so these were handwritten on this version of the rota. These tasks were already included on the rota sent to the claimant but omitted from the version displayed, hence their inclusion by hand. We accepted her explanations as genuine. JT said that she had asked AT to produce a cleaning rota for the ward and to display it, again stating that a cleaning rota needed to be on display in the event of spot checks being carried out and so there was visibility and accountability on wards to show that the cleaning was taking place. JT said she did not

realise that the claimant's name had been added and this should not have been done and it should have been a general ward cleaning rota. JT said that when the claimant complained to her about the rota being displayed with her name on it, it was removed and replaced with a version which did not name the claimant and that she apologised to the claimant for the error. We accepted the evidence of JT on this issue. The claimant's witnesses KS and SR both stated that they did not believe the decision to ask the claimant to carry out cleaning duties was related to her race. SR said it was her view that it was the claimant's lack of a defined job role, and not her race which led to the claimant being asked to carry out cleaning duties more generally.

Allegation re AT allowing others to leave early whilst claimant made to stay until 5pm

7.27. The claimant told us that when she went back to work she "*noticed AT and other members of staff leaving early*". The claimant's evidence was that although she took no notice of this at first, as the weeks went on she had noticed that she was the only member of the day unit that did not have the privilege of leaving early. She said she concluded that this was because of her race, after the incident set out at para 7.28 below. When questioned about how she knew what time staff should have left (in order to conclude that they had left early) the claimant said she had a pretty good idea as to when staff were due to leave and was quite sure she was not wrong about this. The claimant did not ever ask AT if she could leave early. AT agreed that she did allow staff members to leave their shift early between January and June 2019 and said this was agreed appropriately if the staff member requested it and had time owed to them (e.g. if they had worked through a break) or needed to leave for a personal reason such as a medical appointment. She said that the same treatment was and would have been applied to all staff who asked to leave early for such reasons including the claimant. She also said that if the claimant had asked to leave early and all her tasks had been completed and everything was done, she would have permitted this. We accepted her evidence on this matter. She denied that the claimant's race played any part in decisions about this. KS and SR both told us that they did not agree with the claimant's allegation that race was the reason why staff were being allowed to leave early and the claimant was not.

Allegation that on 5 February 2019 AT ensured that ward staff knew that the claimant should be on the ward until 5pm

7.28. The claimant described an occasion when she was completing some of her e learning at the end of the day on one of the computers in the ward when AT came and said to her that she had told the ward staff that the claimant worked until 5 pm if they needed anything. The claimant said she felt that was her "*way of highlighting that I never had the same privileges as her and other members of staff by leaving early*". AT said she did not recall this particular incident and said she did not go out of her way to inform ward staff that the claimant worked until 5 pm. AT explained that it was known that the claimant's working hours meant she worked until 5 pm. and was the last member of staff at work in the day unit. She accepts that she may have

informed staff still working on the ward that the claimant was working until 5 pm and that the reason for this was so that staff working on the ward knew that the claimant was still there (as all other day unit staff had gone home by this time). She denied that there was any element of race involved. We accepted that this incident did take place as the claimant suggests. We accept AT's evidence about why she told other staff members that the claimant worked until 5 pm.

Allegation re AT questioning claimant on 6 February why she was not signing the cleaning rota

7.29. On 6 February, there was a discussion between the claimant and AT about working hours and the cleaning rota. The claimant told us that she had asked another member of staff that morning what her working hours were and also whether there was a roster with everyone's working hours on it. She then said that AT came "*flying over*" to her whilst she was attending to a patient and asked her why she had been asking about working hours and then asked her why she had not signed the cleaning rota that was on display. The claimant told AT she was not going to sign it (she accepts she had not signed it for 3 days). AT recalls a similar conversation with the claimant and her recollection of that conversation is set out in her e mail to JT of that date (page 234). AT explained that another staff member had reported to her that the claimant had been asking about working hours and complained that it was unfair. She accepted that she had asked the claimant why the cleaning rota had not been signed for 3 days and the claimant told her she was not going to do this and she did not have do it this. AT also asked the claimant why she had raised the issue of working hours and whether there was a problem to which the claimant told her she felt that staff members seemed to do what they want and it wasn't fair. AT says that this conversation did not take place in front of a patient, although we find that patients were likely to have been in the vicinity at least. AT denies that asking the claimant about not signing the rota was motivated by the claimant's race. It is clear to us that the relationship between AT and the claimant was not good at this point and the claimant felt that she was being treated differently. However we accept the evidence of AT that she asked the question because the claimant had not signed the cleaning rota for 3 days.

Meeting on 6 February 2019

7.30. As a result of the conversation set out above, both the claimant and AT indicated that they would like a discussion with JT about issues arising and this was arranged for the afternoon of 6 February 2019. The claimant's case is that she made a complaint of discrimination to JT during this meeting. It was during this meeting that the claimant complained about the cleaning rota having her name on, being displayed and about the additional tasks on it. The claimant's evidence was that she "*expressed how unhappy I was that I solely had been given a designated cleaning rota to adhere to and sign*" following which JT explained the reason for the rota and also showed the claimant a cleaning rota that was displayed on a nearby ward (Priory 5). The claimant also said to JT that she was concerned about other staff leaving early whilst she was being required to stay until 5 pm and that

she felt AT was not treating her fairly and was asking her to do task she was not trained to undertake. The claimant did not give any evidence that she mentioned that any of the treatment was due to her race (or age or sex) and indeed in cross examination answers confirmed that she did not discuss the issue of race with JT that day.

7.31. JT's account of the meeting is similar and she recorded in a letter sent to the claimant on page 245-6. We find that the claimant did not complain at this meeting that she thought any of this had been done because of her race (or age or sex). As a result of the issues raised by the claimant, JT agreed that the cleaning rota would be standardised by EW to the Trust cleaning checklist to ensure that it could not further be changed. JT also said she would be introducing a signing in and out sheet for staff on the day unit which would need to be completed by all staff. She also dealt with the claimant's complaint about duties being allocated unfairly and informed the claimant that she would be expected to work across both the day unit and the ward as far as her competencies and occupational health recommendation allowed. She went on to state that she would "*reiterate to the leadership team that there are limitations to ward work such as personal patient care, making beds and manual handling tasks*" but that she would continue to help the ward area with "*other tasks such as patient's observation, collecting blood products within the HCA role*".

7.32. EW returned to work during February 2019 and she continued to discuss potential vacancies with the claimant elsewhere. On 11 February 2019 she sent the claimant a list of vacancies and asked her to let her know if she wanted to do a shadow shift on any of the areas. EW also contacted NB on 25 February (see page 254) to ask for an "*up to date list of vacancies within the trust for at risk employees*". She was informed by NB that the claimant was not at risk but could be deployed to any vacant post within Medicine without applying but would have to apply for posts outside Medicine (page 253). The claimant was also continuing her wider job search during this period and was sent a vacancy bulletin at her request from the recruitment team on 12 February 2019 (page 252). She arranged to visit the pain clinic to discuss a possible HCA role on 27 February 2019 (see e mails at page 256). The role was unsuitable for the claimant because of a requirement to wear a lead apron which the claimant was unable to wear because of her back problems.

7.33. There were clearly still some tensions between the claimant and AT and other staff members which carried on after the meeting of 6 February. The claimant said that AT continued to leave early. A team meeting took place on 6 March 2019 and during the meeting the claimant had questioned the accuracy of the entries on the signing in sheet and questioned the working hours of other employees. JT said she ended the team meeting early as she felt other staff members were becoming annoyed at the claimant and she felt relationships were breaking down. JT then met with the claimant and EW (who had recently returned from sick leave). At this meeting it was agreed that the claimant would be removed from the day unit and would work directly for EW providing administrative and other support on the ward. EW wrote to the claimant after this meeting to confirm the discussions (page 258) noting that "*it was clear at the meeting that you are distressed and*

unhappy working in the chemotherapy day unit and relationships between yourself and the team are breaking down". She also made reference to the claimant's attempts to find roles elsewhere and specifically mentioned the pain management role. She suggested that the claimant contact her if she had any further concerns.

Allegations re alleged treatment of MK

7.34. The claimant gave evidence in her witness statement and during the hearing that she had noticed that MK (who she said was of Indian descent) was being harassed and bullied by AT. She alleged that AT would talk about her to other members of staff and unfairly allocated her additional work which she was unable to complete during her working hours. No specific incidents of bullying or harassment involving AT and MK were mentioned. The claimant pointed to a WhatsApp exchange she had with MK in November 2019 as evidence that this had taken place (pages 458-461). During this exchange, the claimant asked MK whether she left because of being "bullied by staff" to which MK replied "*I did speak to HR and left a long letter with them about the issues which would be classed as bullying using their own guidelines*". JT denied that there had been any bullying of MK and stated that MK never made such allegations nor had she witnessed any of the things alleged by the claimant. She was of the view that MK left her role primarily due to her childcare obligations. She explained that MK had initially been the only Band 6 nurse on the ward with small children, so had been given first priority to take her annual leave during the school holidays. However when AT and another nurse, became Band 6 nurses, and they also had small children, the taking of leave during school holidays had to be shared between the 3 employees which did cause some disagreement between the 3 employees. AT also confirmed that other than disagreements about having to work around each other as to the taking of school holidays, that she and MK got on well and did not have any difficulties with each other. We were not able to find that any such bullying or harassment of MK took place as alleged by the claimant on the basis of the evidence that we heard.

Claimant's grievance raised 15 March 2019

7.35. The claimant raised a grievance on 15 March in a letter addressed to the Trust Chief Executive, Mr Lewis (pages 260-263). This letter set out the events from the claimant's perspective from the start of her career with the respondent and in particular from the restructure of the oncology department from October 2017. The claimant complained about the way this had been carried out by management (SW in particular) and about the way her move to Newton 5 had happened. She complained about the lack of a substantive role for her at Newton 5 and that she was being asked to carry out tasks she was not trained or physically able to do on the ward. She also complained about AT actions in changing her hours and about the cleaning rota stating that in this regard "*I have not been treated with any equality*". She further complained about the lack of a suitable permanent role for her and stated that she felt she was now left "*in limbo*" and stated that "*the outcome I want from this situation is to be given my redundancy*". The claimant went on to complain about not being considered for the Band

4 role carried out by MB that had now been made permanent stating that she felt she had "*been totally discriminated and have not been treated with any equality which has left me feeling distressed and upset.*" This was also copied to NB, SG, JT, EW, SW and CR (pages 276-7). The claimant completed this grievance herself and without any input from CR.

7.36. The claimant sent this grievance again on 30 March 2019 copying the same people (pages 269-272) and followed this up with an e mail to NB, EW and CR chasing a response. NB replied on 2 April 2019 stating that he was not aware that the claimant had not received a response, and that her grievance had been forwarded to the Director of People and OD (as it had been raised at Executive level) and "*she has decided that this will be heard at Stage 1*". He attached a copy of the grievance policy. A grievance meeting was arranged by e mail on 10 April 2019 between EW and NB and AH to take place that Friday, 12 April (see pages 283-285).

7.37. At this time the claimant was having conversations with CR about her grievance and the circumstances surrounding this. We were referred to an e mail from CR to the claimant on 10 April 2019 (page 278-280). This letter referenced a telephone conversation between the claimant and CR that day and just over a week earlier and that the claimant had said CR had shouted at her and was aggressive. This would appear to be the telephone conversation between the claimant and CR which took place on 3 April 2019 which forms part of the claimant's complaint of victimisation (see para 10a. of the List of Issues above). The claimant did not say anything about this conversation to the Tribunal in her witness statement. During cross examination she said that CR was aggressive in tone and attitude and had told the claimant that she should not have raised a grievance, especially not involving Mr Lewis. The email from CR suggests that she did inform the claimant she was unhappy that a grievance had been submitted without involving CR, as her representative, referring her to the trade union's conditions for providing assistance and informing her that a complaint could be made to the regional officer. The claimant explained that after the conversation with CR she lost trust in the ability of CR to represent her as she felt that CR had a conflict of interest. She accepted that CR was acting in her capacity as a union representative when writing this letter to the claimant and advising her. The claimant e mailed CR to let her know that the grievance meeting was scheduled for that Friday and CR informed the claimant she was unable to attend (page 282). The claimant was not contacted further by CR after that date.

7.38. The claimant attended the meeting on 12 April 2019 with AH and NB. She did not have a trade union representative with her. The claimant told us that at this meeting she was told by AH that this was an informal meeting. No minutes were taken. During this meeting the various vacancies that had been discussed with the claimant were discussed and AH indicated that she thought there was a vacancy in Coronary care that might be suitable. The claimant raised the complaints about the cleaning rota and also mentioned that the she was concerned that MB was not being expected to a find a new role as a post had been found for him on Newton 5. AH told the claimant that she wanted to discuss these matters with JT before responding to her. AH e mailed the claimant after the meeting (page 286) and thanked the

claimant for attending and that she would "*fully respond with your main concerns that you raised later*". The claimant was offered a 2 week trial period for role in Coronary care.

7.39. The claimant replied on 15 April 2019 thanking AF for "*listening to her concerns*" and informing AH that having been to see the matron in Coronary care, she had been advised that there was no vacancy there. There was then some further discussion and correspondence between the claimant, EW and JT about possible roles including a possible role in endoscopy and patient flow. NB sent a list of the current vacancies within Medicine on 2 May 2019 to JT (page 293-4). EW e mailed NB on 3 May 2019 (copying the claimant and JT) about a Band 4 vacancy that the claimant had mentioned to her as a Macmillan Cancer support worker, and asked him to confirm whether the claimant would have to apply for this role. He replied the same day to confirm that the claimant would have to apply for the role as a post outside Medicine and asked EW to support the claimant or ask someone else to do this (page 295).

7.40. The claimant sent an e mail to AH chasing an outcome to her grievance on 29 April 2019 and AH responded stating that JT would be meeting with her next week "*to discuss how you were made to feel*" and that further vacancies would be provided and discussed. The claimant met JT on 8 May to further discuss the matters raised in the claimant's grievance and possible vacancies. No minutes or notes were taken but JT sent the claimant an e mail on 9 May 2019 confirming her account of what was discussed (page 307). This made reference to the issue of the cleaning rota, confirming that the claimant should not have been named on it and apologising for this. A mediation with AT was suggested. JT went on to discuss roles that had been considered including a Band 4 job the claimant was interested in pursuing in the cancer service. The claimant was informed that as this fell outside Medicine the claimant would need to apply for it. The e mail then stated that the claimant had "*declined*" posts in the past and that deployment activities would continue but the claimant may need to be deployed into a band 3 generic post "*alongside occupational health requirements and following discussion with you*." The claimant replied on 14 May (page 305) disputing many of the points made and it is clear that the claimant was unhappy with the outcome that she had been provided. She went on to raise the fact that JT had not mentioned in her response the complaint made (and discussed at the meeting) that she was a victim of discrimination with respect to MB's position stating that "*a white and younger male was favoured*". The claimant was off work from 13 May 2019 onwards and did not return to work.

7.41. The claimant submitted a second grievance on 14 May 2019 again to the chief executive (pages 310-312). This letter stated:

"*On the grounds that I've already submitted a grievance and in breach of the Trust's own grievance policy, the Trust has not arranged a grievance meeting despite the fact that the grievance was dated 15/03/2019.*
I have had an informal chat with [AH and NB] to discuss some of the issues regarding my first grievance, to which I was told no minutes will be taken and I was assured by [AH] that she would get back to me but this has not

happened to date.
Instead [JT] has been instructed to hold a meeting with me to, again, repeat how I feel.
The minutes she provided following this meeting has completely disregarded the extent to what I feel. In fact, the response has added to my stress and anxiety levels to the point where my GP has deemed it necessary for me to be off for work related stress."

7.42. The claimant also submitted a Subject Access Request on this date, and although this no longer forms a part of the claim, this document states that the claimant stated that her grievance "*has not been considered to date and it is clear that my concerns are being either misunderstood or disregarded. Therefore I am in the position of having to consider my position after 19.5 years of loyal service.*" NB replied on 20 May 2019 (page 314) and asks the claimant to complete and return a stage 3 grievance document. He stated in this e mail "*From your e mail I am taking it that you are not satisfied with the ongoing attempts to find you another role & resolve this matter informally and want to proceed with your Grievance*". The claimant completed the attached grievance and disputes form (page 316-317) and sent it in to NB on the 24 May (page 316). This document sets out the complaints regarding the oncology restructure and the fact that she remained in a temporary position. It raised the matter of MB's role being offered to him as a "*combination of racial and gender discrimination*". It then went on to state "*I felt racially victimised by being sent a cleaning rota which has nothing at all to do with my job role, with hand written tasks on "ensuring the staff room and fridge is clean at all times*", *which reminded me of stories my father would tell me when I was a child, similar to slavery times".* It went on to complain about only informal meetings being held after her first grievance and stated that she had "*no response*" from her first grievance and no results to the informal meetings. In the section where desired outcome was to be added, the claimant stated "*Redundancy or settlement to be agreed*". The grievance was acknowledged formally on 19 June 2019 (page 325) in a letter from Human Resources which arranged a Stage 3 grievance meeting for 16 July 2019.

7.43. In response to cross examination, NB confirmed that after the claimant had submitted her grievance in May 2019 that he and AH were not providing assistance to her with regard to job roles. He said that this was because the grievance involved the actions of him and AH and that as this may have required them to attend a second grievance hearing, that he and AF kept themselves distant from direct involvement with the claimant's job search and left it to JT to co-ordinate. He was not challenged further on this explanation and we accepted this evidence. NB was also then involved in informal discussions with EF about resolving the claimant's complaints.

Settlement discussions/postponement of 16 July grievance meeting

7.44. At around the same time, the claimant had made contact again with her trade union and was being advised and represented at this stage by E Fanos, the Regional Organiser ("EF"). With the agreement of the claimant, EF entered into off the record discussions with NB about sorting the matter out informally. Whilst we have not considered what was discussed during

these meetings, the claimant asked EF to pursue an off the record discussion about settlement on 2 July 2019 (page 334). The claimant completed a new case form asking to be represented by her trade union and EF wrote to the claimant on 8 July 2019 suggesting that the grievance "*be paused subject to the outcome of off the record conversations re settlement which you said is your preferred way forward*." (page 342) The claimant responded on the same day stating that whilst she was satisfied to pursue settlement discussions, she did not want to pause the grievance meeting scheduled for 16 July 2019 and wanted EF to attend with her (page 343). EF informed the claimant in reply the same day that she would not be able to attend that date and that after then she was on leave and would not return until 19 August 2019. Subsequent e mails between the claimant and EF (page 350) suggest that during discussions between EF and NB, that NB suggested pausing the grievance to allow for discussions on settlement to take place and then informed EF that they may have to reschedule the grievance as there was a problem with HR support being available. The grievance meeting scheduled for 16 July 2019 was subsequently cancelled by the respondent by a letter of 11 July 2019 (page 358). EF was clearly still in discussions with NB about a potential settlement on 17 July 2019 and we saw an e mail from the claimant to EF with reference to this on 23 July 2019 (page 369). The claimant indicated that she was prepared to discuss a potential settlement with the respondent's new HR Director, F Mahmood who was new in post and asked EF to arrange this on F Mahmood's return from annual leave. It is not clear whether these discussions took place.

7.45. The claimant's 1st claim presented to Tribunal for age, race and sex discrimination and victimisation on 7 August 2019. On 12 August 2019 the claimant informed EF by e mail that she had done this and we saw an e mail on page 374. The claimant spoke to EF on 21 August and followed this up with an e mail on 21 August 2019 (page 377).

7.46. During this period, the claimant remained off sick. EW left her position and line management responsibility for the claimant was passed to MW from May 2019 onwards. MW made notes of all his interactions with the claimant from this time and we were referred to these by both parties (pages 519-557).

7.47. MW attended a sickness review meeting attended by S Mannu from HR, the claimant and EF on 28 August 2019 and wrote to her after this (letter at page 378). The claimant became concerned after this letter had been sent to her that her confidentiality was being breached in the production of letters and MW said that he had written and sealed this before sending it to the claimant. The claimant was unhappy with the way this meeting had gone and we can see this in her e mail to EF on page 380 where she tells EF that she felt this meeting was held in an insensitive manner and with no empathy. In telephone conversations later that month the claimant expressed her concern that MW was contacting her weekly and that she felt harassed. The claimant set out her concerns in an e mail of 22 September 2019 (page 402) and MW replied to the claimant on 25 September (398-402) and said that he sought HR advice on the contents of his reply before he sent this to the claimant. In this letter MW set out the roles that he understood that the claimant had considered but she had declined with her

reasons for turning these down. The claimant disputed the information provided by MW in this letter in an e mail of 29 September 2019 and it is clear that the claimant was unhappy with the interactions she was having with the respondent at this time and also with the view taken by MW about the various roles that had been discussed. She made reference to the stress she was suffering and felt that comments in the letter from MW were impacting on her wellbeing and mental health.

7.48. MW and the claimant (together with EF) met for a further sickness absence review meeting on 30 September 2019 and as well as discussion about the claimant's current health and whether roles were available, MW informed the claimant that her sick pay would be reducing to 50% from October and to nil pay from January 2020. There was a discussion about medical redeployment as the claimant was not able to do ward work for health reasons and it is clear that the claimant was not happy about pursuing this option as she felt she had not been deployed from her last role to the ward but was sent there and was still waiting for an alternative position to be found. Future contact was also discussed as was the possibility of ill health retirement. The discussions were confirmed in writing on 2 October 2019 (page 409-411) and the claimant was informed that she should let the respondent know her decision about whether she wished to pursue medical redeployment by 4 October. She later asked that she could defer her decision on this matter until her grievance had been resolved (Page 413).

7.49. The claimant's grievance hearing had been rearranged for 27 September 2019 (see letter at page 382) but it did not take place on this date and was rearranged for 25 October 2019. The grievance meeting was chaired by A Binns ("AB") and DR was in attendance for HR. NB also attended the grievance hearing to present the management case as to how the claimant's circumstances had been dealt with. The claimant attended with her union representative, A Mc Crory (as EF was unavailable which was discussed in e mails between EF and the claimant at page 415). No formal minutes or notes of the grievance were taken (which we were surprised about). We were shown a copy of the handwritten notes made by AB at page 432-5. It is clear that the restructure and its circumstances were discussed during this grievance as well as what had happened to the claimant since she moved to Newton 5. The claimant raised the issue of cleaning duties and said she felt she had been discriminated against because of race and sex because she was the only member of staff who had been allocated specific cleaning duties. The claimant also raised the issue of MB and that he had been more favourably treated as a white man as he did not have to seek deployment but stayed in his same position on Newton 5 and the various roles that had been considered for were discussed in detail.

7.50. NB addressed the points the claimant raised from the respondent's perspective, explaining that the claimant was to be deployed on the closure of oncology as she held a generic HCA role and that it had been felt this could be done by her line management within Medicine. He acknowledged that a more consistent and wider approach could be undertaken to widen the search across the organisation. NB addressed the issues raised about the cleaning duties stating that this had been addressed, found not to be related to race and that the claimant had received an apology. He also

explained that MB had been successfully deployed to Newton 5 as he was a higher band to the claimant and had more clinical responsibility. Part of the claimant's complaint appears to relate to the failure of NB to respond to the claimant in this meeting when questioned about his involvement in the oncology restructure. It is not entirely clear what this allegation relates to. NB said he had explained to the claimant that he had not been involved in the discussions about the loss of oncology service but he provided some support from a HR perspective at the time. It does not appear that this matter was explored much further than this.

7.51. At the end of the hearing, AB determined that the claimant's grievance would be largely upheld and the claimant was told this at the end of the meeting. DR explained that it had been reasonable to assume that someone in the claimant's role could be deployed elsewhere. However she also concluded that the claimant had not been provided with consistent management support to find an alternative role and it was inappropriate that the claimant had been on a temporary placement in Newton 5 for so long. She recommended that supporting the claimant in her job search should be discussed across the Trust at the Group Director of Nursing level. DR explained that AB also concluded that the claimant needed to be more flexible in the positions she would consider, subject to her occupational health requirements.

7.52. AB did not uphold the element of the claimant's grievance that related to discrimination regarding MB being appointed to a role. AB was satisfied that the Band 4 Assistant Practitioner role was markedly different from the claimant's Band 3 HCA role and could not be compared. It was concluded that there was a need for his particular skills and experiences and that he had always been based on Newtown 5 even if this was part of the oncology budget. AB concluded that this could have been better explained to the claimant but that there was no case for discrimination. The claimant agreed that she understood her complaint about the Band 4 role had not been upheld, but did not accept that she was informed that the grievance panel had decided that race did not play a part. We conclude that this may not have been stated explicitly, but as the claimant was informed that her complaint on this point had not been upheld and the reasons for this, she was aware that the discrimination allegation had not been accepted. The claimant's union representative thanked AB for her decision at the end. DR also stated that she explained to the claimant that there would be a delay in providing the outcome in writing as AB was about to take three weeks annual leave.

7.53. DR sent an email to J Thompson the respondent's Group Director of Nursing on the evening after the grievance hearing setting out the outcome (page 437). This e mail concluded that there had been "*limited and inconsistent management support*" to try and secure the claimant an alternative position and that the grievance manager struggled to accept that here were no vacancies that could have been presented to the claimant, that would have suited her with some workplace adjustments. She also noted that the claimant "*may not have been very flexible in her consideration of alternative positions*" which may have contributed to the situation. The e mail confirmed that much of the complaint had to be upheld and that Ms

Thompson would be provided with a "*copy of the letter confirming the outcome shortly*". It made reference to a preference of the claimant not returning to work on Newton 5 whilst a job was found as there was no meaningful work for her to undertake there and some relationship issues with staff members. Ms Thompson responded that she would be happy to find a role within the group for the claimant and asked to meet with her, asking for a meeting to be arranged as the "*sooner we can get this resolved the better for all concerned*". It is not clear what steps were taken to action this and it is unfortunate that the prompt action recommended in this e mail was not taken at this stage. This chain of e mails was forwarded to MW on 28 October. DR explained that the delay in providing this written outcome to the claimant was caused initially by the absence of AB on holiday for 3 weeks and also because she was waiting for feedback from Ms Thompson on next steps.

7.54. The claimant got in touch with MW on 4 November to confirm she was taking annual leave until 21 November 2019. MW phoned the claimant on 22 November as part of their agreed contact arrangements and to discuss whether the holiday just taken meant she was returning to work or taking holiday during sickness. He told the claimant that he was aware her grievance had been upheld but was awaiting the outcome before deciding on the next steps in the sickness absence process. The claimant informed MW that she was unhappy that she had not received any correspondence from the grievance and MW apologised on behalf of the respondent. MW told the claimant that they were awaiting a meeting to be arranged between her and Ms Thompson following her grievance. When the claimant asked MW who Ms Thompson was he told her she was the Group Director of Nursing and that he hoped this meeting would take place within the next few weeks. On 25 November, the claimant sent an e mail to MW (page 445-446) confirming the situation regarding her holiday but querying why she had been asked about this whilst a sick note was still in place. She also complained about the delay to the grievance outcome stating:

"*I made you aware that I was appalled and upset that up to date I had not received any minutes or feedback from my Grievance apart from being told verbally on the day by AB that my Grievance had been up held it is totally unacceptable. Even if HR were sorting out an appropriate job to offer me at the bare minimum I should have received a letter or e mail out lining the out come of the Grievance which you also agreed with.*
I find the lack of equality and respect shown to me which has been ongoing for the past 3 years is becoming very stressful and intolerable which is having a huge impact on my mental and physical wellbeing."

7.55. MW replied to the claimant the same day (page 445) responding on the holiday query and further stating:

"As discussed on Friday there has been a delay and I can only offer an apology on the trusts behalf but I'm sure they will contact you at some point with some formal correspondence for your hearing."

He copied DR, SM, and EF into this e mail and added to DR "*is there any way we could get the report to [claimant] regarding the grievance in October*

2019?"

MW also sent the claimant a vacancy bulletin that same day (page 447) and in that e mail referred to the "*redeployment process*", informing the claimant she would be invited to a meeting to discuss this next week and enclosing a copy of the sickness absence process. The claimant was posted a letter that same day inviting her to this meeting (page 457).

7.56. Having received this letter the claimant was concerned as to the use of the terminology "redeployment process" and telephoned MW to ask about this. A note of the conversation is at page 547-8. MW told the claimant that given the occupational health advice and because her grievance had been upheld, she would now need to be redeployed and that is why he used that term. The claimant asked whether MW had discussed her complaint about the delay in receiving the grievance outcome with HR and MW said he had forwarded her e mail to DR to try and get some correspondence for her.

Claimant submits resignation on 2 December 2019

7.57. The claimant made her decision to resign around this time. She told us that following this conversation with MW and having heard that he had received an e mail about her grievance, and that "*no-one had the decency*" to inform her about it in writing, broke all the trust she had in the respondent. She explained that she was concerned that people in the respondent were having discussions about her behind her back but not involving her. She explained that this was the "*straw that broke the camel's back*" and confirmed her decision to resign. She e mailed MW to confirm that she was resigning on 2 December (page 467-8) stating "*I have been driven to resign from the Trust because of stress*".

7.58. MW phoned the claimant and offered to discuss her resignation with her but the claimant did not want to do this. MW confirmed their discussions in writing in an e mail of 6 December (page 467) acknowledging that her employment would terminate as at 29 December 2019 and she would remain on sick leave until that date.

7.59. The claimant also wrote to DR on 2 December to inform her of her decision to resign (page 465-466) stating:
"*I have been driven to resign from the Trust because of undue stress, harassment and victimisation caused by various members of the Trust*." And further stated:
"*Although I was verbally told in the presence of the named above that my Grievance had been upheld to date I am still awaiting a full out come of the meeting in writing to include the minutes and what was discussed. I believe there is a report which circulates, surrounding this meeting, which neither my unison representative nor myself has received. Manager [MW] has sent you an e mail requesting a copy of this report sent over on the 22 November but to date I'm still waiting to hear from you* ." and
"*It has been 5 week's since the hearing, the Trust has not acted within there own Grievance policy which is continually causing me immense undue stress and anxiety*."

7.60. DR replied the same day and acknowledged the claimant's resignation and also stating:
"*I would also like to sincerely apologise for the delay to confirming the outcome of the hearing which you and you representative received verbally at the end of the hearing. I accept as we discussed that there would be a slight delay in the confirmation of the outcome due to [AB]'s annual leave. You recall she was breaking up that day for annual leave. However I accept that the delay was excessive and personally take full responsibility for the delay in the issuing of this confirmation."*

The letter went on to ask the claimant whether she wished to reconsider her resignation or discuss with anyone including Ms Thompson as arrangements were being made for a meeting to be set up with her. The claimant replied to this again that day asking for further information regarding the grievance outcome and what would happen next. She also raised a question as to why MB's position was kept when oncology ceased to operate and why she was not "*afforded the same opportunity*". She went on to state that she was unaware of the proposed meeting with Ms Thompson until it was mentioned by MW in their previous conversation and was "*baffled as to why everybody seems to know about this meeting but myself*". The email went on to say her reason for resigning was "*because I find the stress that the Trust has put me through over the last 2 years intolerable and no matter how many attempts I've made to resolve this situation, I am continually pointed in varying directions, all of which detract from the main issues and points at hand. This whole ordeal has caused immense stress and anxiety, not only affecting me but my family life too."*

7.61. There were some further telephone conversations between the claimant and DR after her resignation and it is clear that some of these conversations upset the claimant and she felt she was being harassed (although DR denied that this was the case). Although we appreciate that these were of concern to the claimant, we have not explored this period much further as it does not specifically form part of the claim before us. The Written outcome of grievance was provided to the claimant on 24 December 2019 (page 477). DR explained that this further delay was caused by her capacity issues during December (and as she felt that the claimant already had a verbal outcome in October) and she took full responsibility for this delay. The written outcome confirmed what had been communicated to the claimant but provided further detail. It did not address the complaint about the cleaning duties and rota, and DR explained that this was because during the hearing this had been discussed and it had been noted that the claimant had received an apology for this at the relevant time. The claimant was informed of her right to appeal.

7.62. She presented a grievance appeal on 20 January 2020 (page 560) and there then followed discussions about what the basis for the appeal was. The claimant's appeal was ultimately never heard due to operational pressures on the respondent as a result of the Covid 19 pandemic and because the respondent states it is not clear what the basis of appeal is.

7.63. The claimant's 2nd claim was presented to the Tribunal on 21 February 2020 (pages 50 to 61) by which she made a claim of constructive unfair dismissal.

The Relevant Law

Unfair dismissal complaints

8. The relevant sections of the ERA we considered were as follows:

94. The right
(1) An employee has the right not to be unfairly dismissed by his employer.

95. Circumstances in which an employee is dismissed.
(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
(a) the contract under which he is employed is terminated by the employer (whether with or without notice),
(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

98 General
(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—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

……

(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.

9. The relevant authorities which we have considered on the claim for constructive dismissal are as follows:

Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 - the employer's conduct which can give rise to a constructive dismissal must involve a "significant breach of contract going to the root of the contract of employment", sometimes referred to as a repudiatory breach.

Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, [1997] ICR 606. The implied term of trust and confidence was summarised as follows:

> *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

Omilaju v Waltham Forest London Borough Council ([2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75) -if the act of the employer that caused resignation was not by itself a fundamental breach of contract, the employee may on a course of conduct considered as a whole in establishing constructive dismissal. The 'last straw' must contribute, however slightly, to the breach of trust and confidence.

Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833 - in an ordinary case of constructive dismissal tribunals should ask themselves the following questions:

i. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
ii. Has he or she affirmed the contract since that act?
iii. If not, was that act (or omission) by itself a repudiatory breach of contract?
iv. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?
v. Did the employee resign in response (or partly in response) to that breach?

Direct discrimination, harassment and victimisation complaints (ss 13, 26 and 27 EQA)

10. The relevant sections of the EQA applicable to this claim are as follows:

4 The protected characteristics
The following characteristics are protected characteristics: …
Age,…race, …sex;"

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".

23 Comparison by reference to circumstances
(1) On a comparison of cases for the purposes of section 13....there must be no material difference between the circumstances relating to each case."

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."

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.
(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.
(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval."

123 Time limits

(1) [Subject to [sections 140A and 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;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

136 Burden of proof

(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.

11. The relevant authorities which we have considered on the direct discrimination and victimisation claims are as follows:

Anya v University of Oxford & Another [2001] IRLR 377 **-** it is necessary for the employment tribunal to look beyond any act in question to the general background evidence in order to consider whether prohibited factors have played a part in the employer's judgment. This is particularly so when establishing unconscious factors.

Igen v Wong and Others [2005] IRLR 258 and Madarassy v Nomura International PLC [2007] IRLR 246.
The employment tribunal should go through a two-stage process, the first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination, after which, and only if the claimant has proved such facts, the respondent is required to establish on the balance of probabilities that it did not commit the unlawful act of discrimination. In concluding as to whether the claimant had established a prima facie case, the tribunal is to examine all the evidence provided by the respondent and the claimant.

Madarrassy vNomura International Ltd 2007 ICR 867 - the bare facts of the difference in protected characteristic and less favourable treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

Nagarajan v London Regional Transport [1999] IRLR 572, HL,-The crucial question in every case was, *'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?*'

Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065, HL, - The test is what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason? Looked at as a question of causation ('but for …'), it was an objective test. The anti-discrimination legislation required something different; the test should be subjective: *'Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.*'

Bahl v Law Society [2003] IRLR 640 – "*where the alleged discriminator acts unreasonably then a tribunal will want to know why he has acted in that way. If he gives a non-discriminatory explanation which the tribunal considers to be honestly given, then that is likely to be a full answer to any discrimination claim. It need not be, because it is possible that he is subconsciously influenced by unlawful discriminatory considerations. But again, there should be proper evidence from which such an inference can be drawn. It cannot be enough merely that the victim is a member of a minority group. This would be to commit the error identified above in connection with the Zafar case: the inference of discrimination would be based*

on no more than the fact that others sometimes discriminate unlawfully against minority groups."

12. In relation to harassment the following authorities were relevant:

Richmond Pharmacology V Miss A Dhalliwell [2009] ICR 724. There are two alternative bases of liability in the harassment provisions, that of purpose and effect, which means that the respondent may be held liable on the basis that the effect of his conduct has been to produce the prescribed consequences even if that was not a purpose, and conversely that he may be liable if he acted for the purposes of producing the prescribed consequences but did not, in fact, do so. A respondent should not be held liable merely because his conduct has had the effect of producing the prescribed consequence. It should be reasonable that the consequence has occurred and that the alleged victim of the conduct must feel that their dignity has been violated or that an adverse environment has been created. Therefore, it must be objectively decided whether or not a reasonable person would have felt, as the claimant felt, about the treatment in question, and the claimant must, additionally, subjectively feel that their dignity has been violated, etc.

Pemberton v Inwood [2018] EWCA Civ 564. Underhill J *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).*

13. On whether acts were done in the course of employment:

Jones v Tower Boot Co Ltd [1997] IRLR 168, [1997] ICR 254, CA - The correct test of whether something is done in the course of employment is whether, interpreting the words 'in the course of employment' as they would be interpreted in everyday speech, the conduct in question falls within the meaning of the phrase.

Forbes v LHR Airport Ltd [2019] IRLR 890 - the question of whether conduct is or is not in the course of employment within the meaning of s 109 is very much one of fact to be determined by the tribunal having regard to all the relevant circumstances. The words 'in the course of employment' are to be construed in the sense in which the lay person would understand them and there is no clear dividing line between conduct that is in the course of employment and that which is not. Each case will depend on its own particular facts. The relevant factors to be taken into account might include whether the impugned act was done at work or outside of work, and if done outside of work, whether there is nevertheless a sufficient nexus or connection with work such as to render it in the course of employment.

UNITE the Union v Nailard [2018] EWCA Civ 1203, [2018] IRLR 730.

An elected trade union official can make the union liable for acts of discrimination, not because he or she is an 'employee' under sub-s (1) but because he or she constitutes the union's agent under sub-s (2):

14. On whether the discrimination complaints are in time:

Section 33(3) of the Limitation Act 1980 (power to extend time in personal injury actions) specified a number of factors that a court is required to consider when balancing the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

British Coal Corporation v Keeble [1997] IRLR 336, it was held that the Tribunal's power to extend time was similarly as broad under the 'just and equitable' formula. However, it is unnecessary for a tribunal to go through the above list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] IRLR 220).

Robertson and Bexley Community Centre (trading as Leisure Link) 2003 IRLR 434CA - there is no presumption that time should be extended to validate an out of time claim unless the Claimant can justify the failure to issue the claim in time. The Tribunal cannot hear a claim unless the Claimant convinces the Tribunal that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640 - the "such other period as the employment tribunal thinks just and equitable" extension indicates that Parliament chose to give the tribunal the widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent".

Conclusions

15. The issues between the parties which fell to be determined by the Tribunal were set out above. We have approached some of the issues in a different order but set out our conclusions on each issue below:

EQA, section 13: direct discrimination because of age, race or sex

16. It is clear to us from the claimant's evidence at the Tribunal hearing that she holds a genuine and strong belief that she has been discriminated against in particular because of her race. The claimant was less resolute on her contentions that age played a part where it is said to, although we accept she believed that her age was a factor for the acts contended. We were not

convinced that the claimant held a genuine belief that her sex played a part in the respondent's decision making on the one element of her claim that relates to this protected characteristic. However in all instances for us to reach the conclusion that the claimant has been subjected to such discrimination, there must be evidence, although it is possible that evidence could be inferences drawn from relevant circumstances. A belief, that there has been unlawful discrimination, however strongly held is not enough.

17. In order to decide the complaints of direct discrimination, we had to determine whether the respondent subjected the claimant to the treatment complained of (which is set out at paragraphs 2 a. to g. of the List of Issues above and then go on to decide whether any of this was "less favourable treatment", (i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances). We had to decide whether any such less favourable treatment was because of the claimant's age, race or sex (as pleaded for each particular allegation) or because of age, race or sex more generally.

18. We applied the two-stage burden of proof referred to above. We first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of age, race or sex. The next stage was to consider whether the respondent had proved that the treatment was in no sense whatsoever because of age, race or sex. We also had to determine whether the allegations were presented within the time limits set out in 123(1)(a) & (b) of the EQA and if not whether time should be extended on a "just and equitable" basis. We have considered first the substance of the complaints, before returning to the issue of time limits and whether we have jurisdiction to consider the complaints. We set out below our conclusions on these matters for each allegation listed in the List of Issues above with reference to each paragraph number whether the allegation is listed:

Paragraph 2. a. AT being hostile towards the claimant and JS ***(Age)***

19. The claimant has not been able to show that AT was "hostile" towards the claimant and JS as a matter of fact. We refer to our findings of fact at paragraph 7.17 and 7.19 above that there were some tensions when the claimant and JS arrived at Newton 5 on 30 April 2018. Newton 5 was already split into a ward and a day unit and whilst the ward was generally very busy, the day unit was perceived to be less so. Having two additional staff members join the day unit, who were not able for perfectly valid reasons to assist a busy ward, clearly caused some tension and perhaps even resentment amongst busy nursing staff, especially as the staff did not perhaps know why certain tasks could not be done. However we did not find any particular instances at this time when AT was hostile to the claimant. We heard evidence from JT, AT and MW about occasions when the claimant was asked to assist in the ward but was unable to do so. The claimant suggested that AT and other members of staff used gestures and facial expressions which made her feel that they perceived her skills to be outdated. However we were not able to conclude that this amounted to hostility from AT . This part of the complaint is not established on the facts on the balance of probabilities.

Paragraph 2. b. On 17 December 2018 AT changed the claimant's working hours (Age)

20. We accept that the claimant was informed by AT during a phone call on this date that her hours would be different to those she had been working. Whether or not AT "changed" the hours during this phone call or had the authority to do so, is not the substance of the allegation. We accept that prior to her being on long term sick leave the claimant's working hours were 4 days a week from 7.30 a.m to 5 pm and when she spoke on the phone with AT following the meeting on 17 December, she was informed they were 8.30am to 4.30pm Monday to Friday.

21. However, we conclude that the claimant has not met the first stage of showing a prima facie case that this was discrimination, nor indeed provided any credible evidence that AT treated her less favourably than a hypothetical comparator on the grounds of her age when she informed her of her working hours being different. We conclude this for the following reasons:

    21.1. AT had no appreciation of what the claimant's working hours were before she went on long term sick. She had only been recently appointed to the role and had been asked by JT to be the claimant's mentor and was not her line manager. She was informing the claimant of the working hours, she understood to be already in place.

    21.2. The explanation of AT as to why the claimant was told that her hours would be what they were i.e. that these were the opening hours of the day unit, was clear, convincing and eminently plausible. From AT's perspective, there was no requirement for anyone to be working at the day unit outside its opening hours.

    21.3. The claimant did not inform AT that she was unable to do these working hours or explain why this might be the case before or during this conversation. The claimant's suggestion that her need to work these hours as an older person (who was more likely to have caring responsibilities for aging parents and/or grandchildren) was not pleaded or supported by any real evidence. There is no suggestion that AT had any knowledge of the claimant's personal circumstances.

    21.4. There is no evidence to suggest that any other HCA in the same situation who was not the claimant's age would have been treated differently as regards her working hours.

22. Therefore, as the claimant has not proved primary facts from which the Tribunal could conclude that the complaint was because of age, we do not find that this shifts the burden of proof to explain the reason for the treatment. AT informed the claimant during this conversation of these working hours because she understood these were the hours to be worked by the claimant which matched the hours of the day unit. Even if the burden had shifted it, the respondent would have discharged that burden. This treatment was not because of the claimant's age or age more generally. This allegation of direct age discrimination is dismissed.

Paragraph 2.c. Between January 2019 and June 2019, AT allowed other staff members to leave early when the Claimant was told she had to stay until 5pm ***(Race)***

23. AT allowed staff members to leave early during this period and we refer to our findings of fact at paragraph 7.27. Staff left before the end of their shifts from time to time (with agreement from line managers) to attend appointments or because they had time owing to them. However we were not able to find any occasion when the claimant asked to leave before the end of her shift at 5pm and AT or anyone else told her she had to stay until 5pm. There is no evidence of any difference in treatment between the claimant and other employees on these facts. The claimant may have perceived that she was unable to leave before 5pm but on Monday to Thursday, her working hours were 8am until 5pm (see 7.23 above). That is the reason why she was working until that time. If there had been an occasion when the claimant had asked to leave early for an appointment or because she had time owing to her, this would also have been granted. This was not done. This allegation is not made out on the facts and is dismissed.

Paragraph 2.d. On or around January 2019, AT gave the Claimant additional cleaning duties on the cleaning rota ***(Race)***

24. We refer to our findings of fact at paragraphs 7.25 and 7.26. Mr Graham asks the Tribunal to follow very closely the allegation in the list of issues and submits that this allegation solely relates to the allegation that AT made some handwritten additions to the cleaning rota that was on display in Newton 5. He points to the document at page 237 and states that this is the full extent of the claimant's complaint relating to cleaning and this is not a wider claim about being asked to carry out these duties, having a cleaning rota sent to her, the rota having her name on it or anything else related to cleaning. We have not limited the extent of this issue like this as it was clear to us that the claimant was complaining about wider issues related to this cleaning rota. She was in fact complaining about a) the fact that a cleaning rota was prepared for her; b) that she had been identified by name on that rota; c) that it had been sent to her home address; d) that when she returned to work, a version of this document was on display in the staff room and e) AT made some handwritten additions on this. We have considered all these actions as one allegation which we refer to as the cleaning rota allegation. Firstly we accept that all actions complained of in the cleaning rota allegation were taken by AT. AT prepared this rota (on instruction from JT); she added the claimant's name and sent this to the claimant's home address; she displayed the rota in Newton 5 and she made the handwritten amendments complained of. We next look at whether the cleaning rota allegation was less favourable treatment on the ground of face. We first considered whether the claimant had proved facts from which, if unexplained, we could conclude that the treatment was because of race. The claimant relies on the fact that she is Caribbean mixed race and points out that she was the only staff member on Newton 5 that had a cleaning rota prepared for her in this manner. We take full account of what the claimant told us of why she felt AT was behaving in a racist manner on this issue, as she told us she could feel that this was her motivation, having experienced racism throughout her life (and that perhaps her colleagues who were not black would not recognise this as racist behaviour). We have no doubt that the claimant's

feelings on this were genuinely held on the basis of her lived experience of racism which we do not doubt in any way. However as a Tribunal we must look at evidence, and on the basis of the evidence we heard, we are not able to make any findings of fact either directly or by inferences which suggests that race played any part in what AT did in relation to the cleaning rota allegations which would shift the burden of proof. We conclude this for the following reasons:

24.1. Cleaning is an integral and vital part of the role of an HCA and a qualified nurse and all parties recognised its vital importance to the role and the safety of patients. The claimant had no objection to the tasks listed on the cleaning rota (with the exception of those related to the cleaning of the staff room and the fridge).

24.2. The claimant was employed as an HCA and at the time was working on the outpatients unit with vulnerable cancer patients and keeping the unit clean was a key task. The claimant did not at the time have a defined role within the unit as we have heard much about and was not able due to her occupational health restrictions to carry out ward duties on the other Newton 5 Unit. The claimant was also working outside the opening hours of that unit (between 7.30am and 8am and between 4.30pm and 5pm). The claimant agreed that she would carry out cleaning and preparation tasks during these additional times. The rota that had been prepared aimed to set out and codify the tasks that would be carried out during these times when the unit was not open.

24.3. We accepted the evidence of AT as to why she did what she did with regard to the cleaning rota allegation (see paragraph 7.27 above). These explanations were logical, plausible and convincing.

24.4. There is no evidence that any other HCA working the hours of the claimant would have been treated any differently. The claimant was the only HCA in her position with regard to the cleaning rota allegation. The claimant points to her race and to how the cleaning rota allegations made her feel, but cannot point to the "something more" which might suggest that the actions of AT were racially motivated.

The burden of proof test at stage one is not met and this allegation of direct race discrimination does not succeed.

Paragraph 2.d. - On 6 February 2019, AT questioned the claimant about why she was not signing the cleaning rota ***(Race)***

25. We refer to our findings of fact at paragraph 7.29 above. The facts behind this allegation are established in that on this date AT did ask the claimant why she had not signed the cleaning rota on this date. Moving on to whether this was less favourable treatment on the grounds of race, we conclude that the claimant has not proved any facts which firstly show that there was any less favourable treatment or from which, if unexplained, we could conclude that the treatment was because of race. We accepted the explanation as to why the claimant was asked about not signing the rota entirely. We cannot see anything in our fact finding either directly or by inference which suggests that there was any other

reason why the claimant was asked why she had not signed the rota, other than the fact that she had not in fact signed the rota for 3 days. This complaint therefore does not succeed.

Paragraph 2.e. - On 5 February 2019, AT ensured that the ward staff knew that the claimant should be on the ward until 5pm ***(Race)***

26. Our findings of fact at paragraph 7.28 above are that the incident alleged did take place. We do not accept that AT "*ensured*" that ward staff knew that the claimant "*should*" be on the ward until 5 p.m. but conclude that AT informed ward staff that the claimant would be on the ward until 5 p.m. The next question is whether the claimant was treated less favorably because of her race in this regard. The claimant has not been able to establish any element of less favourable treatment for this allegation. We cannot see how informing staff members that another member of staff was working until 5pm (their agreed working hours) was in any way less favourable treatment and we conclude that any other employee in a similar situation as the claimant would have been treated exactly the same way. We accepted the explanation of AT as to why this took place. There is nothing to suggest that race played a part in the decision of AT at all in this matter. This complaint is dismissed.

Paragraph 2.f. - On or around February/March 2019, the claimant was not afforded the same opportunity of applying for MB's Band 4 position ***(Race, Sex and Age)***

27. It is clear that the claimant was not given the opportunity to apply for the position as a Band 4 Assistant Practitioner on the Newton 5 day unit that is currently performed by MB (see our findings of fact at paragraphs 7.24 above). We must then go on to decide whether there was any less favourable treatment and whether this was because of the claimant's age, race or sex. The claimant identifies MB as a direct comparator in this allegation. We have found at paragraph 7.9 above that the claimant and MB were both identified as being in "*affected roles*" in the initial Oncology restructure on October 2017 and that they would be "*subject to deployment within Medicine as posts arise*". However we also note that the claimant and MB were in different positions in that firstly the claimant was a Band 3 Senior HCA and MB was a Band 4 Assistant Practitioner. We accepted the evidence of JT, NB and MW (paragraph 7.24) that this was a substantially different role to a Senior HCA as it was clinical role requiring additional qualifications and training. Therefore as a starting point we do not conclude that the claimant was in a comparable position to MB when considering whether she should be appointed to this role. The significant differences in the roles meant that there is and was a material difference between the circumstances of MB and the claimant. Nonetheless we have also considered whether the claimant has shown that the act of failing to advertise MB's position or consider her for it before it was allocated to him was in any way related to her age, race or sex. We also conclude that she has failed to do this. We accepted the evidence of all the respondent's witnesses as to the significant differences between the role MB was carrying out to that performed by the claimant. MB was already performing this role in Newton 5 and had been doing so since before the Oncology restructure was announced and this is why it was not advertised. This is a clear and cogent explanation as to why this role was not advertised or considered as a role suitable for the claimant

and it is clearly not related to the claimant's age, race or sex. For these reasons, this complaint also fails.

28. Accordingly, all the claimant's complaints of unlawful discrimination because of race, sex or age made against the respondent under section 13 EQA all fail.

EQA, section 13: Harassment claims

29. The claimant also makes complaints of harassment relating to the exact same allegations that are said to be direct discrimination as set out above. In order to determine these complaints, we need to decide whether the claimant was subject to unwanted conduct of the type described; then determine whether the conduct was related to age, race or sex. We are then required to consider whether the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her, having regard to: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

30. The allegation at 5.a and 5.c. relates to the same conduct which we have already found was not direct discrimination at paragraphs 19 and 23 above. Whether it is harassment is a different test, but as set out above we do not find that the underlying facts are proved in this allegation. We did not make any findings of fact that there was hostility from AT as regards allegation 5.a. and did not find that there was any difference in treatment as regards being able to leave work early for allegation 5.c. Therefore as the conduct relied on did not take place, these claims can go no further and these complaints of harassment are dismissed.

31. The facts behind allegations numbered 5 b. and d. to g. are found to have been made out (at least in part). The next question for these allegations is whether the conduct is question is related to race (or age/sex on allegation number 5.g.) On this point we make the overall conclusion on all of the remaining harassment allegations made that none of the conduct complained of was related to race or age or sex. It is a key component of harassment under section 26 EQA that it has to relate to the protected characteristic. Our findings of fact above and conclusions on the direct discrimination claim make it clear that none of the actions were related to or on the grounds of race or age or sex. Therefore the harassment claim of the claimant must fail on this ground alone. It is not necessary to go on to answer the remaining questions as to whether the conduct was unwanted, what its purpose or effect is. In any event our view is that none of the conduct could be said to have the purpose that is required and we also doubt that given the findings of fact and the evidence of the claimant even at its highest, none of the allegations could even have said to have had this effect.

32. The complaint of harassment against the respondent accordingly fails and is dismissed for the above reasons.

Equality Act, section 27: victimisation

33. The claimant also complains of victimisation. It is accepted that the claimant did a protected act when she raised her grievances on 15 March 2019 and 15 May 2019 (submitted formally on 24 May 2019) (paragraph 9. b & c, of the List of Issues). We have considered for completeness whether the claimant's complaint to JT on 6 February 2019 was also a protected act (paragraph 9.a. of the List of Issues). We refer to our findings of fact at paragraph 7.30 above. The claimant did not raise a complaint about the treatment she was discussing was due to her age or race or sex (or any other protected characteristic) in the meeting with JT on 6 February 2019. None of the other circumstances which amount to a protected act under section 27 (2) EQA apply. We conclude that the claimant did not do a protected act on this date.

34. The provisions on the two-stage burden of proof set out at Section 136 EQA apply equally in victimisation cases. Once a claimant establishes a prima facie case of victimisation, the burden of proof shifts to the respondent to show that the contravention did not occur. To discharge the burden of proof, there must be cogent evidence that the treatment was in "no sense whatsoever" because of the protected act. The claimant makes 7 allegations of detrimental treatment which she says took place because she did a protected act when she raised allegations of discrimination during grievances on 15 March and 15 May 2019. They fall into broadly three categories, those involving CR on 3, 10 and from 10 April onwards (paragraph 10 a.-c. of the List of Issues); those involving actions of NB and AH from May 2019 onwards and specifically of NB on 25 October 2019 (paragraphs 10. & f. of the List of Issues); and general allegations of the respondent from 12 April 2019 onwards and more generally after the raising of a grievance (paragraphs 10.d and g. of the List of Issues). Dealing with each in turn:

Paragraph 10 a.-c. of the List of Issues – allegations involving CR

35. We have considered section 109 (1) EQA and the relevant factors set out in Jones v Tower Boot Co Ltd [1997] IRLR 168 and Forbes v LHR Airport Limited [2019] UKEAT/0174/18/DA. Whether or not an act is in the course of employment within the meaning of that section is a question of fact for the Tribunal to determine having regard to all the circumstances. We did not hear from CR herself so have considered the evidence of the claimant and the other respondent witnesses and the documents we were referred to make this finding of fact. We refer to our findings of fact at paragraph 7.6 above and it is our conclusion that whatever CR did on 3 and 10 April and from 10 April 2019 onwards as regards the claimant, she was doing this whilst acting as the claimant's trade union representative, and not in the course of her employment with the respondent. She was if anything acting as an agent of UNISON, the recognised trade union, under the provisions of section 109 (2) EQA when she was representing and advising the claimant (see UNITE the Union v Nailard [2018] EWCA Civ 1203, [2018] IRLR 730) . Her actions, whatever they were are not something that we can find the respondent liable for in these proceedings and we must dismiss the complaint against it on this basis.

36. However, for completeness, we also conclude that the claimant has not been able to provide any cogent evidence to suggest that any of the actions of CR

were because she made a complaint of discrimination. The letter sent by CR at the time suggests that CR was concerned that a grievance had been submitted without involving CR and UNISON who were acting on the claimant's behalf at that time. There is no evidence to suggest that the inclusion of an allegation of discrimination in that grievance played any part at all in what CR did or did not do. The burden of proof would not therefore have passed to the respondent (or indeed CR or UNISON had a claim been presented against either of them) to explain that the actions were in no sense whatsoever because of the protected act. The complaints of victimisation set out at paragraph 10 a,. b. & c. of the List of Issues are dismissed.

Paragraphs 10 e. & f. of the List of Issues – Allegation that NB and AH failed to assist the claimant find a permanent position from May 2019 onwards and that NB refused to acknowledge and provide a response to the Claimant when she questioned his involvement in the loss of the Oncology service and related job losses on 25 October 2019

37. Dealing firstly with the allegation that NB and AH failed to assist the claimant to find a permanent position from May 2019 onwards, then we refer to paragraph 7.39 and note that on 2 May 2019 NB was still involved in the claimant's job search having sent a list of vacancies to JT on this date in May. However we also refer to paragraphs 7.42 and 7.43 above and NB's confirmation that after the claimant had submitted her grievance on 14 May 2019 (and formally on 24 May 2019) that he and AH were no longer assisting with the claimant's job search. Therefore the facts pleaded for this allegation are made out. It is also the case that the fact of the claimant having raised a grievance was the reason why this was the case. However this is not what the claimant has to show to make out an allegation of victimisation. The claimant must prove facts which suggest that the protected act was the reason i.e. the fact that the grievance contained an allegation of discrimination. The claimant has entirely failed to do this and so has not proved facts from which we could conclude that the decision to stop assistance with the job search was because of the protected act. We accepted that NB and AH were no longer involved in the claimant's job search because the grievance she raised related to their actions in carrying out the job search. The claimant was not satisfied with their actions and so whilst the grievance was ongoing, they no longer played a part in the search. The claimant did not challenge this explanation or put to NB that the allegations of discrimination were in any way relevant to this. The burden of proof does not shift to the respondent and there is no need for us to examine of the burden of proof provisions further. This allegation of victimisation does not succeed.

38. We then looked at the allegation that NB *refused to acknowledge and provide a response to the Claimant when she questioned his involvement in the loss of the Oncology service and related job losses* on 25 October 2019. We refer to our findings of fact at paragraph 7.50 and we conclude that the facts behind this allegation were unclear and in any event have not been made out. This allegation of victimisation is also dismissed.

Paragraphs 10.d and g. of the List of Issues – that the respondent circulated emails which should have been confidential between the Claimant, the Claimant's line manager and her union representative from 12 April 2019 onwards and failed to provide an outcome to the Claimant's second grievance?

39. On the first matter, it was unclear which e mails the claimant was referring to in this allegation. There have been very many e mails sent during the period we have considered, a great number of which we were referred to and many of which are mentioned in our findings of fact above. It is not possible, proportionate or in the interests of the overriding objective for the Tribunal to examine each and every e mail in the Bundle sent by the respondent, consider who was on the circulation list and determine whether this was appropriate. We do conclude however that we did not see any emails that were circulated to any individual that were inappropriate or not somehow involved in the claimant's circumstances. It is clear that the claimant became very concerned about how her information was being used by the respondent (and indeed complains about how her subject access request was handled, although this is no longer part of this claim). There may be avenues for the claimant to raise issues of data security elsewhere but as a more general comment, we have found nothing to suggest that there was any causal link between the protected acts and the decisions on circulating e mails. Therefore, we do not find that the claim of victimisation is made out and it is dismissed.

40. Secondly the claimant suggests that she was not provided with an outcome to her second grievance and that this was because she did the protected acts. We refer to our findings of fact at paragraphs 7.51 and 7.52 which confirm that the claimant was told verbally that her grievance had been upheld on 27 October 2019 and paragraph 7.61 that a written outcome was provided on 24 December 2019. The claimant may have been unhappy with the delay in particular in getting a written outcome but we cannot say that she was not provided with an outcome and therefore as this factual allegation is not made out, the complaint of victimisation is dismissed.

41. Although none of the claimant's complaints of discrimination have been held to be successful, we have also considered the issue of limitation as this was identified on the List of Issues. The claimant presented her claim for discrimination on 7 August 2019. The early conciliation period was 15 May to 13 June 2019. Given these dates, any complaint about something that happened before 10 April 2019 is potentially out of time. Allegations 2 b., 2d., 2e, 2f ,5b, 5d, 5e, 5f, and 9a were therefore presented out of time unless they formed part of a continuing act ending with an act of discrimination presented in time. Since we have not found any of the complaints to be well founded on their merits, these cannot form part of a continuing act of discrimination with any later acts.

42. The Tribunal, therefore, only had jurisdiction to consider allegations if it is just and equitable to do so in all the circumstances. Considering the relevant law above, in particular, British Coal Corporation v Keeble and Robertson v Bexley Community Care above, we concluded that would have been just and equitable to extend time to consider these and accordingly we determined all such allegations on their merits as set out above. As the evidence had all been collated and prepared by the respondent and presented and heard at the time we were considering this issue, it caused no prejudice to the respondent for us to consider these allegations with those that were in time.

Was the claimant constructively and unfairly dismissed?

43. The first question we asked ourselves was whether the respondent breached the claimant's contract of employment? The claimant contended that there were three breaches of her contact of employment all of which are said to be a breach of the implied term of trust and confidence in her contract of employment. The acts relied upon were set out at paragraphs 12 a, b and c. We have considered these in their reverse order as this is more logical in the context of our findings and conclusions. We also were cognisant that there was a long history to the claimant's employment situation that had led her to be where she was. The Oncology restructure and how it was handled back in 2017/18 was perhaps the reason for and the starting point for the difficulties the claimant encountered. The ongoing job search and lack of a substantial role for the claimant whilst it took place had a significant effect on the claimant. However matters relating to this restructure nor the search for a job in the long period of time following it were not matters which are said to be a fundamental breach of contract entitling the claimant to resign. We have confined our consideration to those matters the claimant says amounted to a breach of contract and which led to her resignation.

44. The claimant says at 12 c, that the treatment referred to in paragraphs 2, 5 and 10 of the List of Issues amounted to a fundamental breach of contract. The first issue to consider is whether that allegation encompasses that such treatment amounted to direct discrimination, harassment and victimisation ad so was a fundamental breach of contract, or whether more general complaints are made about the acts behind the allegations of direct discrimination, harassment and victimisation. Mr Graham addressed me on this during the hearing and referred us to page 56 which set out the details of complaint the claimant submitted in her second claim form when she made the complaint of unfair dismissal. He submits that the claimant is abundantly clear here when she refers to "*over 2 years of discrimination, victimisation and harassment*" leading her to make a decision to resign, that the breach relied upon is that these acts were unlawful discrimination and victimisation and therefore being a fundamental breach of contract. The claimant did not make a particular submission on this point, but we have assumed that she would allege the more general position. We conclude that Mr Graham's submission on this particular issue is correct and on correct interpretation of the case as pleaded and the List of Issues agreed between the parties after two preliminary hearings, that the claimant relies on acts of discrimination and victimisation being made out in order to support the breach of contract pleaded at paragraph 10 c. Naturally if the claimant had established that any acts of unlawful discrimination or victimisation had taken place, it is very likely that this would have amounted to a fundamental breach of her contract of employment. However as those claims have not been successful, we cannot conclude that the allegation at 10c is made out.

45. We then looked at the allegation at paragraph 10b relied upon by the claimant where she says that the respondent failed to provide her with an outcome to her grievance. The claimant raised two grievances during her employment. The first was raised on 15 March 2019 (see paragraph 7.35 above) and resubmitted on 30 March 2019. The second was raised on 15 May 2019 (and submitted formally on 24 May 2019). Dealing with the second grievance first, We refer to our findings of fact at paragraphs 7.51, 7.52 and 7.62 and our

conclusion at paragraph 26 above. The claimant was provided with an outcome to her second grievance so this factual allegation is not made out.

46. Looking back at the claimant's first grievance, we refer to our findings of fact at paragraphs 7.36, 7.38 and 7.40. Although not termed or labelled as a grievance outcome, the claimant was on 9 May 2019 sent an e mail by JT which set out a response to the points raised by the claimant in her grievance and discussed during the meeting that day. We conclude that this was a grievance outcome. The claimant clearly treated this as such as shortly after receiving this, she raised a further grievance making reference to this meeting and that she was unhappy with it. It would have been better if this response had been more accurately labelled as stage 1 grievance outcome and made this absolutely clear to the claimant but this was in all respects a grievance outcome albeit not one that the claimant accepted or was happy with. The factual allegation is therefore not made out.

47. Lastly the claimant relies on at paragraph 12 a of the List of Issues the respondent's failure to follow the grievance policy. The first issue relates to her first grievance raised on 15 March 2019 (see paragraph 7.35 above). The claimant says that she had already been through the informal part of the grievance procedure during her meeting with AT and JT on 6 February 2019 (see paragraph 7.31 above) and with JT and EW on 6 March 2019 (see paragraph 7.33) and so her written grievance should have been treated at stage 2, leading to a formal hearing at Stage 3. She complains that treating this grievance as the informal stage is a failure to follow the grievance policy. We can understand that the claimant was frustrated that having submitted a document in relatively formal terms addressed to the Chief Executive on 15 March 2019, an informal meeting is arranged with NB and AH on 12 April 2019 (see paragraphs 7.36 and 7.38) and then with JT on 9 May 2019 (see paragraph 7.40). However we do not conclude that these actions did not follow the grievance procedure of the respondent in particular because of the paragraph 8.2 of that procedure that "*unless there are highly exceptional circumstances all grievances should be considered at Stage 1 before a formal grievance is considered"* (paragraph 7.5 above). Although the claimant had discussed maters with JT and EW, this had not been considered as part of a grievance process until the claimant submitted her grievance on 15 March 2019. The written grievance dealt with wider issues than had been in discussion between the claimant, JT, AT and EW informally. The respondent decided that the grievance should be heard at Stage 1 and informed the claimant (paragraph 7.36). The claimant did not object, attended the meetings set up and did not raise an objection during either of these meetings to her grievance being considered at Stage 1. In hindsight, it may have assisted resolution for the claimant's grievance to have been escalated directly to stage 3 at this point (with the authorisation of the Director of Workforce or their deputy) as one of those "*highly exceptional circumstances*" where the informal stage did not take place. This might have foreshortened the process and led to a resolution earlier. However there was no "*failure to follow*" the grievance procedure by not taking this course of action.

48. The claimant also points to delays in dealing with her first grievance. Having raised it on 15 March 2019, she did not get an acknowledgment from anyone until she resubmitted in on 30 March 2019 and NB replied on 2 April 2019 (see

paragraph 7.36). She attended a meeting on 12 April and 9 May 2019 and received the written record of the final meeting on that day. We agree that this could have been dealt with in a much more timely manner with 7 weeks elapsing from submitting her grievance to being informed in writing what would result from it. However there is no formal timescale for the informal stage of the respondent's grievance procedure, so we cannot say that there was a "failure to follow" it with this delay. As with other matters, had this been dealt with earlier, it may have avoided some of the later difficulties.

49. The final complaint that appears to be made as regards the first grievance is that an outcome was not provided. We refer to our conclusions at paragraph 31 above that a grievance outcome was provided when JT sent her e mail to the claimant on 9 May 2019.

50. We then moved on to consider the claimant's second grievance raised on 14 May 2019 (and submitted formally on 24 May 2019) – see paragraphs 7.41 and 7.42 above. The claimant again makes a number of complaints about this grievance and how it was handled, so we have considered each of these to see if any amount to a failure to follow the grievance procedure. She firstly complains that a meeting was not held to discuss this grievance until 25 October 2019, some 5 months after her grievance was submitted. This is of course a significant length of time on any account. The claimant points to clause 12.3 of the grievance procedure which states that a meeting will be convened to discuss a grievance raised at stage 2 within 10 working days (paragraph 7.5 above). This was quite patently not done. However the respondent points us to clause 10 which deals with time limits which provides that extension of time limits may be agreed. It points out that it was not the case that nothing was happening during this 5 month period to try and resolve matters. The claimant's grievance was acknowledged on 19 June 2019 and a meeting originally arranged for 16 July. This was still outside the 10 working day limit but indicated that the matter was being progressed.

51. There is clearly then a significant gap in the timeline. We know that during this time, the claimant and her trade union representative were in contact with NB and having off the record discussions to try and resolve matters via settlement. Whilst we accept that the claimant did not agree to a pause in her grievance as suggested by NB (paragraph 7.44) and the meeting on 16 July 2019 was cancelled because of HR availability issue, neither the claimant or the respondent took active steps during this period to rearrange the grievance hearing. We conclude that this was a matter both parties were agreeable to, as the settlement discussions were still ongoing and unresolved, certainly by 23 July 2019 (see paragraph 7.44 above). It looks as if the claimant was still discussing matters of possible settlement with her union representative during August 2019 around the time she presented her first Tribunal claim (paragraph 7.45 above). The claimant was then also being assisted by EF during the sickness absence review process and this appears to have been the claimant's main focus during September. The claimant was off sick throughout this period and it was not until 27 October 2019 that a grievance meeting was able to be arranged. This is clearly a long time for the claimant to wait, but we are satisfied that the claimant's grievance had been put on hold with her at the very least implicit agreement for much of this period whilst alternative ways of resolving issues were explored. Once it became apparent that this would not happen the

grievance process was restarted. We conclude that the delays between July and October 2019 were unfortunate but explained by the fact that other matters were being addressed between the parties. Therefore we do not conclude that the respondent was failing to follow its grievance procedure during this period.

52. The claimant finally complains about the fact that she did not receive a full outcome to her grievance, alleging that the outcome at the meeting on 25 October 2019 was only partial and she did then not receive a written outcome by the time she resigned. We conclude that the claimant was provided with a verbal outcome at the hearing when she was informed that her grievance was being upheld. It is certainly the case that the way that her employment situation would be dealt with had not been resolved at the end of the hearing but she had been provided with an outcome and a plan of action moving forward. However we do accept that as at 2 December 2019, the claimant had not received a written outcome to her grievance and the respondent did fail to follow its own grievance procedure in that the grievance manager did not "*communicate their decision in writing within 10 working days"*. The claimant did not agree to this timeline being extended (as she did in terms of the delay in arranging of the grievance meeting) and in fact made it clear on 25 November that she was appalled and upset that she had not received any "*minutes or feedback*" (see paragraph 7.54 above). In this regard the failure to provide a written outcome within the 10 day period was a failure to follow its own procedure. More generally we do conclude that the respondent did not follow its stated aim that it is in the interests of the respondent and employees that grievances are resolved quickly, ideally within two months of them being raised formally. We acknowledged that this is an aim rather than a specific deadline, but the respondent did not act in a timely manner generally in the way it handled the claimant's grievance.

53. We next have to consider whether these failures in terms of the grievance procedure amount to a fundamental breach of contract which entitled the claimant to resign. In the first instance the claimant does not appear to suggest that the grievance procedure was contractual and that accordingly the respondent was in breach of any express terms of the claimant's contract of employment. Rather it is suggested that by failing to follow its grievance procedure, it was in breach of the implied term of trust and confidence. We accept that a disregard for an employer's own policies and procedures could amount to conduct of this nature. We have had to consider whether the two failures we have found, namely the delay in the procedure overall and in providing a written outcome within 10 working days was unreasonable in the circumstances and was conduct calculated or likely to destroy trust and confidence. We conclude that these two delays, although hugely unfortunate, clearly upset the claimant and may have proved one of the final matters which led her to resign her employment, we cannot go as far as to say it amounted to a breach of the implied term of trust and confidence. The delay in resolving the matter after the grievance had been submitted and the failure to provide a written outcome within the 10 working day period was not a deliberate or calculated act likely to damage the relationship of trust and confidence. The delays have been explained (see paras 7.53 and 7.60) and an apology was provided by MW for the delay to the written outcome at the time (para 7.55) and before the claimant resigned. The claimant was aware at this time that her grievance had been upheld and MW had informed her of

a forthcoming meeting with a senior nursing professional (see para 7.54). The respondent was at this stage still in pursuit of a resolution to the claimant's difficulties (even if this had happened somewhat later than had been hoped). Delay appears to have been caused by communication difficulties and workload issues by the respondent's staff. We cannot conclude that this amounted to a matter which involved a repudiatory breach of contract.

54. All the acts relied upon given our findings of fact and conclusions above, even viewed as a course of conduct, would not cumulatively amount to conduct calculated and likely to destroy or seriously damage the relationship of trust and confidence. Whatever ultimately caused the claimant's resignation, the claimant therefore did not resign, in response to a repudiatory breach of contract. The claimant was not constructively dismissed by the respondent, it cannot be an unfair dismissal and the claim is dismissed.

55. We wanted to inform the parties that the Tribunal found that this was a most unfortunate set of circumstances which led to the respondent losing a highly capable, caring and devoted member of its staff. We have not been able to conclude that the claimant was subject to discrimination, victimisation or that she was constructively dismissed by the respondent. However we do conclude that the claimant's situation was at various times not dealt with sensitively or promptly. We do not necessarily attribute blame to any individual within the respondent and have not found any unlawful conduct, but the claimant's comment that she felt she was "*passed around like a book*" resonated with the Tribunal as to how a large bureaucratic employer can be perceived by its employees. We were all saddened to hear how the claimant came to feel that she no longer wished to work for the respondent, in a role that she clearly excelled at and was very proud to perform. We wish the claimant well in her new role as a HCA and hope that the respondent is able to learn some lessons as to how inevitable change within organisations can perhaps be more sensitively handled at an individual level.

Employment Judge Flood

Date: 24 March 2021