# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Christian

**Respondent:** Vocare Ltd

**Heard at:** Birmingham
**On:** 1 – 7 September 2020
**Before:** Employment Judge Meichen, Mr RW White, Mr J Reeves

**Appearances:**
For the claimant: Mr Taylor, lay representative For the respondent: Mr Hussain, litigation consultant

# JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claim of constructive unfair dismissal succeeds.
2. The claim of direct race discrimination fails and is dismissed.
3. There will be a remedy/costs hearing and orders for that will be made separately.

# REASONS

Following the hearing the claimant's representative made a request for the written reasons. What follows is therefore more or less a transcript of the oral judgment and reasons delivered and recorded at the end of the hearing. For clarity, I (the Employment Judge) have added a little more detail on how we reached our decision on the race discrimination claim.

## Introduction

1. The Claimant was employed by the Respondent as an Advanced Nurse Practitioner between May 2016 and February 2019.

2. The Claimant claims direct race discrimination, in which she relies on her colour as being the reason for the alleged less favourable treatment, and constructive unfair dismissal.

3. For the purpose of the constructive dismissal claim, the Claimant relies on

an allegation that the Respondent breached the implied trust and confidence term which is contained in every employment contract ("the implied term"). The Claimant relies on a course of conduct carried out by the Respondent which taken together she says amounted to a breach of the implied term. The two claims overlap in the sense that the conduct which the Claimant says amounted to a breach of the implied term, she also alleges to have been direct race discrimination.

4. The matters which the Claimant relies upon to show breach of the implied term were at first set out in detail in her resignation letter which is dated 13 February 2019 and then confirmed in her ET1 Claim Form. The Claimant relies on a series of events starting from when she was suspended on the 23 May 2018.

5. The Claimant complains first and foremost that the decision to suspend her was unjustified. She then complains about the process which was followed once she was suspended and also about the investigation and process which was followed in respect of her grievance which was first raised on 12 September 2018.

6. Finally, the Claimant complains about the Appeal process in respect of her grievance and in particular the Appeal Outcome Letter which is dated 25 January 2019. The Claimant says that was the "last straw" which finally caused her to resign, which she did by way of a letter dated 13 February 2019.

**Summary of the law to be applied to the direct race discrimination claim**

7. Section 13 Equality Act 2010 provides that: "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".

8. The burden of proof provisions applies to this claim. Section 136(2) Equality Act 2010 sets out the applicable provision as follows: "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". Section 136(3) then states as follows: "but subsection (2) does not apply if A shows that A did not contravene the provision".

9. In addition to the above, well-known case law has demonstrated that the burden of proof requires the employment tribunal to go through a twostage process in respect of the evidence. The first stage requires the claimant to prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination (this is often referred to as a "prima facie case"). The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and has been reaffirmed recently in the case of Efobi v Royal Mail Group Limited [2019] IRLR 352.

10. It is also well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. These principles are most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.

11. In addition to the above case law has shown that mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular the case of Bahl v The Law Society and others [2004] IRLR 799).

**Summary of the law to be applied to the constructive dismissal claim**

12. The fundamental questions which we must ask ourselves have been settled since the case of Western Excavating Ltd v Sharp [1978] 1 All ER 713. They are as follows:

(i) Did the Respondent breach a fundamental term of the contract?
(ii) Did the Claimant resign in response to the breach?
(iii) Did the Claimant delay too long before resigning, thereby affirming the contract?

13. In this case the Claimant relies on an allegation that the Respondent breached the implied term of trust and confidence. The concept of the duty of trust and confidence was clearly set out in Mahmud v Bank of Credit and Commerce International SA [1997] IRLR 462. The contractual term was described there 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”.

14. More recent case law has clarified that it is not necessary for the employer to act in a way which is both calculated and likely to destroy the relationship of trust and confidence, instead either requirement need only be satisfied – see Baldwin v Brighton & Hove City Council [2007] IRLR 232.

15. The Claimant argues that there was a series of acts making up the breach of the implied term. The question for the tribunal will therefore be “does the cumulative series of acts taken together amount to a breach of the implied term?” (Lewis v Motorworld Garages Ltd [1985] IRLR 465, per Glidewell LJ).

16. In cases where a series of acts is relied upon the tribunal must consider the “last straw” which caused the Claimant to resign. The last straw must not be an innocuous act – it must be something which goes towards the breach of the implied term (see London Borough of Waltham Forest v Omilaju [2005] ICR 481).

17. Tying together the case law identified above the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 clarified the approach to be taken by the tribunal as follows:

*In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

*(1) 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?*

*(2) Has he or she affirmed the contract since that act?*

*(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*

*(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation….)*

*(5) Did the employee resign in response (or partly in response) to that breach?•*

**Summary of the law considering the potential effect of suspension on breach of the implied term**

18. From at least the case of Gogay v Hertfordshire County Council 2000 IRLR 703, CA, it has been recognized that there should be 'reasonable and proper cause' for an employer to suspend an employee. If there is not and the suspension was in effect a 'knee-jerk reaction' then the employer may well have acted in breach of the implied term.

19. The Court of Appeal reiterated the approach in Gogay in Crawford and anor v Suffolk Mental Health Partnership NHS Trust 2012 IRLR 402, CA. The Court in that case warned employers against automatically imposing suspension in response to even very serious allegations and pointed out that employees frequently feel belittled and demoralised by their exclusion from work.

20. In London Borough of Lambeth v Agoreyo 2019 IRLR 560, CA. the Court of Appeal again found that the only relevant question in each case is whether the employer had reasonable and proper cause to suspend the employee, not whether the suspension was necessary. The Court of Appeal also observed that each case had to be decided on its own facts and that consideration of whether suspension was a 'neutral act' was unlikely to assist.

21. Accordingly, suspension in the absence of a contractual right to suspend will not inevitably lead to the conclusion that trust and confidence has been breached.

22. Instead it seems to us to be clear that what matters instead is whether the employer is able to show a reasonable and proper rationale as to why it was appropriate to suspend rather than follow other options, and that the absence of such evidence would suggest that the suspension was simply an automatic knee-jerk reaction. A knee jerk suspension in that sense may well mean that the employer has acted in breach of the implied term.

## Our findings of fact

23. In this section we will record both our Findings of Fact and also any Findings to the effect that there has been conduct going towards breach of the implied term. As a starting point, two matters should be introduced by way of relevant background.

24. The first relevant background point is that the Respondent has a capability procedure and a disciplinary procedure.

25. The capability procedure includes a mechanism for suspending for poor performance only where performance has failed to improve following formal reviews – see page 500 of the bundle. The capability procedure goes on to indicate that performance issues should be dealt with by way of a development review process and only where that fails should formal capability procedures be invoked. The procedures then involve meeting the employee, setting performance targets and reviewing progress.

26. Suspension is identified as a clear possibility under the disciplinary procedure. Relevantly, that procedure states that it is important to keep suspension under review and that if at any time it becomes clear that suspension is not warranted, it should be lifted. We consider that those are highly important safeguards which the Respondent should adopt when dealing with any suspended employee.

27. Before us, the Respondent accepted that the decision to suspend the Claimant was made outside of either procedure. In and of itself, we do not consider that that was a matter which went towards a breach of the implied term.

28. The second important matter which is important to state by way of background, relates to the Claimant's professional expertise. She has been qualified as a Nurse Practitioner for some 17-years and she gave unchallenged evidence in her witness statement that during that time she has never been subject to any form of disciplinary or capability procedure. We accept her evidence on that point.

29. Moreover, and even more pertinently, we have seen the Claimant's appraisal which the Respondent conducted in March 2018. That appraisal recorded a glowing account of the Claimant's work. She was described as being of a "gold standard" in numerous aspects of her work including her documentation.

30. We therefore find that by the time of the events we are concerned with, in May 2018, the Claimant was an experienced and highly regarded professional and that has been a factor or some importance in our overall decision-making.

31. On or around 16 May 2018, the Claimant raised an issue regarding her workload. The Claimant believed that she was being given the most complex cases to deal with. This appears to have prompted a review of the Claimant's cases which was carried out by her Line Manager who was Fiona Michelli. As a result of that review, Fiona Michelli identified some concerns. Her concerns included that the Claimant's documentation in terms of note-keeping was not to the standard to be expected of an advanced practitioner. She also had concerns over the Claimant's prescribing; in particular, she considered a case where the Claimant had apparently prescribed Amoxicillin and the decision to prescribe that drug was subsequently revoked by a GP.

32. In light of those concerns there was a meeting attended by three members of the Respondent's management team which included Natasha Byrne who was the Centre Manager. That meeting took place on 22 May 2018. At that meeting, the team agreed that further investigation was necessary and they also decided that advice should be sought from the Claimant's professional regulator which was the Nursing and Midwifery Council ("the NMC").

33. The meeting notes record that the management team were concerned that the risks identified posed a potential concern for patient safety and that it would be difficult to allow further practice until a full investigation had taken place. Despite that, suspension was not identified as an agreed step forward at that meeting. Instead, it was agreed that Fiona and Natasha would meet with the Claimant on the morning of 23 May to discuss the concerns further.

34. There then appears to have been a telephone conversation between Fiona Michelli and the NMC. It appears that Fiona Michelli reported that a Nurse Practitioner had been making errors in her notes and was prescribing incorrectly. The information regarding this conversation comes from a subject access request which the Claimant made of the NMC. It is unclear from the outcome of that request what advice, if any, the NMC gave at that stage. We note that the Respondent's concerns at that point had not been investigated or even raised at all with the Claimant.

35. Fiona Michelli sent an email to Natasha Byrne and others later on 22 May. In that email, she said that she felt the best course of action would be to suspend the Claimant. She also said that the Claimant was currently unable to demonstrate a safe level of clinical autonomy in her current role.

36. It appears then that the decision to suspend had been taken based on Fiona Michelli's view that that would be the best course of action. She reached that conclusion because it was her view that the Claimant was unable to demonstrate a safe level of clinical autonomy. It is not entirely clear how that view could be justified at that stage, but it appears to have been based on

the concerns over the claimant's documentation and in particular the concern that she had wrongly prescribed Amoxicillen.

37. Subsequent to that email, Natasha Byrne then sent a further email at 5.30am on 23 May. In that email Natasha said that she would be meeting with Fiona and the Claimant that morning and would be suspending her. It is therefore clear to us that the decision to suspend the Claimant had been made prior to the meeting of the 23 May taking place. That means that the decision to suspend was taken before any of the Respondent's concerns were discussed with the Claimant.

38. In a further email sent on the 23 May, which was after the meeting with the Claimant, Natasha Byrne said that the suspension had been done to protect patients and the reputation of the Respondent from potential malpractice. Again, it is not entirely clear to us how Natasha Byrne reached a conclusion that the Claimant posed any risk either to patients or to the reputation of the Respondent but it appears to have been based on the two concerns we have identified.

39. The meeting at which the Claimant was suspended, took place on the morning of the 23 May before the Claimant started her shift. There were notes of this meeting contained in the trial bundle at page 82, however the Claimant had not been provided with a copy of these notes at the time. So, at the time, she had had no opportunity to agree or otherwise with the contents of them.

40. Before us, the Claimant has made it plain that she does not agree with the contents of those notes. In particular, the Claimant's evidence is that she was informed as soon as the meeting started that she was to be suspended, but this is not recorded in the notes. This is a point of some importance because in their evidence to the subsequent investigation, Fiona and Natasha said that the decision to suspend was only taken during the course of the meeting when they decided that the Claimant had not shown sufficient insight into the concerns which they were raising.

41. We have no hesitation in accepting the Claimant's evidence as to when in the meeting she was told she was suspended. The emails which we have just referred to show unequivocally that the decision to suspend was not taken as claimed by Fiona and Natasha during the meeting, but was instead taken by them prior to the meeting taking place. This is consistent with the Claimant being told right at the start of the meeting that she was going to be suspended.

42. Moreover, for reasons which have not been explained to us, neither Fiona nor Natasha have given evidence to this Tribunal. That means that we have been unable to test their evidence on these key areas. We can only say that it appears to us to be possible than in hindsight Fiona and Natasha realised that their decision to suspend appeared hasty and this affected the evidence they later gave. In contrast, the Claimant attended the Tribunal to give evidence and was challenged where appropriate. In our view, she gave an honest and truthful account of what had taken place; we had no reason to

disbelieve her on any significant issue and we therefore accept her version of events of this meeting.

43. The other significant point in dispute about the events of the meeting was that it was the Claimant's case that she was not told in the meeting about the concern relating to the prescription of Amoxicillin. In contrast, the meeting notes record that that was mentioned. Again, for the same reasons we prefer the Claimant's evidence and we find that that the matter of the Amoxicillin prescription was not discussed during the meeting. The fact that Natasha and Fiona did not attempt to discuss what appears to have been their key concern with the Claimant is consistent with the fact that they had decided to suspend prior to the meeting taking place and therefore they were not concerned at that stage with obtaining the Claimant's version of events.

44. We have not seen any evidence which would justify suspending the Claimant at this stage on the grounds that she posed a risk to patient safety or a risk to the Respondent's reputation. The reason for suspension which has been given throughout this case is that suspension was justified on that ground, but in our view the concern that the Claimant posed such a risk has simply not been substantiated. We have not seen any evidence that demonstrates that by reason of the two concerns we have identified the Claimant posed a risk to patient safety or the Respondent's reputation. We therefore conclude the decision the suspend in this case was not taken with reasonable and proper cause. We therefore find that the suspension of the claimant in the manner we have described is a matter which contributes to a breach of the implied term.

45. The day after her suspension, on 24 May 2018, the Claimant was sent a letter confirming the suspension. The letter records that concerns had been raised regarding the Claimant's documentation and prescribing. It says that the Respondent now needs to undertake a thorough investigation of the Claimant's clinical practice and undertake a case note review.

46. We understand that the investigation of the Claimant's clinical practice was to address the concerns which had been raised regarding her prescribing. The case note review on the other hand was to address the concerns about the Claimant's documentation and in particular her notetaking.

47. However, the investigation of the Claimant's medical practice simply did not take place. Not only was there no "thorough" investigation of her practice, but there was no investigation at all. In particular the Respondent never investigated the case of the Claimant prescribing Amoxicillin and so they never, as far as we are aware, got to the bottom of whether the Claimant had wrongly prescribed that drug and if she had whether that was something which created a risk to patient safety or which alternatively could be explained, for example by differing views as to best clinical practice. We find the failure to investigate these matters surprising and difficult to understand.

48. It is not at all clear to us how concerns over that case, which appeared to have been the main factor justifying a suspension, did not in the end justify

any investigation at all. Moreover, it was never explained to the Claimant that the decision had been taken not to investigate her clinical practice and she was never informed of the outcome of that process. The situation was that the Claimant was left in the dark.

49. We find that this failure to undertake an investigation into the Claimant's clinical practice reinforces our conclusion that there was no reasonable and proper cause for the suspension in the first place. If there was a reasonable and proper cause for the suspension then the reasons for the suspension would have merited full investigation. Moreover, we find that the failure to investigate as the Respondent had told the Claimant they would and the failure to explain to the Claimant why that was not taking place, were further matters which went towards breach of the implied term.

50. The failure of the Respondents to inform the Claimant as to what was going on is in our judgment made all the more serious because the letter of the 24 May refers to the Respondent informing the Claimant that they would arrange a meeting with her to deliver the outcome of the investigation, once it had been concluded. It therefore seems to us that the onus was clearly on the Respondent to keep the Claimant informed as to what was going on with the investigation.

51. The other important information which was contained in the letter of the 24 May is that the Respondent informed the Claimant they would keep her suspension under review. As we have already indicated, we regard the review process in respect of a suspension, particularly a suspension of a highly regarded professional, as an important safeguard. We have also noted that in terms of the disciplinary policy, which we consider was applicable by analogy, that the Respondent's own policy made it clear that they would keep suspensions reviewed.

52. Despite that and despite what the Claimant was told in the letter of the 24 May, the Respondent did not review the Claimant's suspension at all. We have seen no evidence of any review process and no witness has been able to speak to or point to any evidence of such a review. We consider that was a further matter which goes towards a breach of the implied term.

53. On the 29 May 2018, Natasha Byrne sought the assistance of Marie Kavanagh who was the Respondent's Clinical Support Manager. Marie Kavanagh was tasked with undertaking the case note review into the Claimant's documentation and note keeping. In summary what happened was that Marie Kavanagh was sent a number of the Claimant's case notes (some dating all the way back to 2016/17) and she was asked to comment in particular on the Claimant's notetaking and documentation based on what she was provided with.

54. To her credit, Marie Kavanagh undertook that case note review promptly. In fact, she concluded it by the 31 May 2018 when she wrote an email to Fiona and Natasha among others in which she outlined her findings.
Marie Kavanagh's view was that there were issues regarding the Claimant's notetaking and documentation and that in numerous ways the

Claimant's documentation was not at the standard which the Respondent would expect from an advanced practitioner. In order to address that, Marie Kavanagh recommended a meeting with the Claimant to go through the cases and look at improving her documentation.

55. In our view, the absolutely crucial finding of Marie Kavanagh however, was that despite the concerns which she had over the Claimant's notetaking, her view was that the Claimant's actions and outcomes in terms of the cases she had seen were "not unsafe". In other words, they were safe.

56. Bearing in mind that the Respondent had not investigated any other matter other than the case note review undertaken by Marie Kavanagh, this is in our view a very important finding. It indicated that there was no basis on which to suppose that the Claimant posed a risk to patient safety. It seems to us therefore that at this stage, the Claimant's suspension was crying out to be reviewed. Indeed, we would go further and say that in light of Marie Kavanagh's clear finding the supposed basis on which the suspension was justified (i.e. because the Claimant posed a risk to patient safety) was shown to be unsubstantiated, or at least unsupported by the only investigation the respondent was carrying out. For that reason, we would conclude that the suspension should have been lifted at this stage. Again, we consider that the failure to review and indeed the failure to lift the suspension at this point was a further matter going towards a breach of the implied term.

57. The other matter which is very concerning at this stage in the process is that the outcome of Marie Kavanagh's review was not communicated to the Claimant. Again, the Claimant was left in the dark as to what Marie Kavanagh's findings were. In particular, she was not informed of the crucial finding which was that her action and outcomes had been deemed to be safe. Again, we find this failure to communicate was a further matter going towards breach of the implied term.

58. On the 20 June 2018, the Claimant was invited to what was described as an initial review. The letter of that date made it clear that the Claimant was now being dealt with under the Respondent's capability procedure. The meeting was described as an informal meeting. It appears then at this stage that the Respondent had made the decision that the Claimant was to be taken through the capability process and that the appropriate starting point was simply an informal discussion.

59. It is difficult to understand how the Respondent could at the same time have viewed the matter as one which merited a relatively low-level capability intervention, but at the same time, apparently decide that it was appropriate for the Claimant's suspension to continue. Again, we find that at that stage it should have been clear that the Claimant's suspension should have been reviewed and lifted and the failure to do so was a matter going towards breach of the implied term.

60. The initial review meeting took place with the Claimant on the 11 July 2018. In attendance were Natasha Byrne and Fiona Michelli. The Claimant was represented by Mr Taylor. During the meeting the Claimant made it clear

just how aggrieved she was about the fact that she had been suspended. She pointed out that if there was an issue surrounding her documentation or prescribing, then it could and should have been dealt with via supervision.

61. It seems that at the meeting, the Claimant agreed in principle to a performance improvement plan which would address the concerns around her notetaking. On behalf of the Respondent at the Hearing before us, Mr Hussain characterised this meeting as one where the Claimant affirmed her contract of employment. We do not agree with that. Reading the meeting notes in full, it is plain to us that the Claimant was extremely aggrieved to the point of being very upset about her suspension. It seems to us to have been made clear, reading the notes as a whole, that the Claimant did not regard the matter as closed, not least because she indicated that she would want a written apology as to what had happened.

62. Moreover, we do not think that the matter can be regarded as Mr Hussain puts it as "done and dusted" at this stage because the Claimant's suspension was still continuing by the time of the meeting and indeed continued after the meeting for some considerable time. The claimant plainly raised with the Respondent how dissatisfied she was about that and we see no basis on which to conclude that she affirmed her contract at this or any other point.

63. After the meeting on the 11 July, it was not until the 9 August 2018 that the Claimant was sent a letter from Fiona Michelli outlining what had been agreed at the meeting. That delay from the 11 July until the 9 August 2018 is one of a number of delays in this case which have been quite simply unexplained. The bottom line is that the Claimant was suspended for around 3½ months from the 23 May 2018 until 5 September 2018. It has not been clear to us why it was that the suspension needed to last as long as it did and it seems to us there are a number of delays which are unexplained and therefore wholly unjustified. The respondent was simply not acting promptly to deal with the claimant's suspension and bring it to an end in circumstances where there was no ongoing justification for the suspension. We therefore find that the delays are further matters going towards breach of the implied term.

64. Notwithstanding the evidence which we have already referred to, that is that the review of the Claimant's case notes indicated that her decisions were safe, Fiona Michelli in her letter of 9 August again indicated that the decision to suspend had been taken in order to ensure patient safety. The Claimant was not told however what the basis was on which it had been found that she posed a potential risk to patient safety. At that stage, Fiona Michelli indicated that the performance improvement plan which she was proposing would involve supervision of the Claimant and in particular that Fiona Michelli would meet on a weekly basis with the Claimant to supervise her and check that the plan was being adhered to.

65. Again, it seems to us difficult to understand how the Respondent could have viewed this as a low-level capability issue, which could be dealt with simply by way of supervision, but did not at the same time seek to review and lift

the Claimant's suspension. In the event, it was not until 30 August 2018 that the Claimant was informed by HR that her suspension had been lifted and that she would be able to come back to work.

66. We find that the delay in lifting the suspension was a matter which was wholly unjustified and went towards a breach of the implied term.

67. The Claimant then came back to work on the 5 September 2018 and she was only back at work for two days. It is obvious from the Claimant's account as to what took place on those two days that the Claimant was still very aggrieved and upset about her suspension. Her strength of feeling was such that she ended up in tears on the first day and was sent home. On the second day, the Claimant again found things difficult and she then went off sick and did not return to work.

68. On 12 September 2018, the Claimant raised a grievance. In her grievance the Claimant complained in particular about what she described as an unreasonable suspension. She raised a number of pertinent questions. In particular the Claimant asked the Respondent to demonstrate how her suspension was kept under review. She also asked what the findings were in the investigation which had apparently been undertaken and why those findings had not been presented to her.

69. In our view, those questions were highly relevant and completely fair questions for the Claimant to ask. What is striking however is that the Respondent does not appear to have answered those questions at any stage in the grievance or appeal process. In our view, that is an indication that the investigation into the Claimant's grievance was not properly carried out and the relevant matters raised by the Claimant were not properly considered. We find that was a further matter going towards a breach of the implied term.

70. It is also notable that the Claimant identified in her grievance letter that she had been told that her suspension was for protective reasons and she asked for full details as to the process which had been gone through in order to determine that suspension was justified on that basis.

71. As the matter was investigated, the decision-makers of both the grievance and appeal stages repeated the Respondent's position that the suspension had been justified in order to protect patient safety. But it seems to us they did not do what the Claimant had quite reasonably requested what they should do which was to analyse the process which was undertaken in order to reach the conclusion that the Claimant posed a potential risk to patient safety. That meant in effect that the decisionmakers simply repeated the Respondent's position that suspension was justified, but they did not seek to understand whether that position was substantiated. In our judgment, that was a considerable failing on the part of the decision makers and this was a further matter which went towards a breach of the implied term.

72. The final point which we should record regarding the Claimant's grievance is that within it the Claimant indicated that she regarded herself as accepting

her pay under protest and she made it clear that she did not affirm her employment contract by continuing to accept pay.

73. The Claimant's grievance was initially dealt with by Helen Poole; however she became ill and it was decided that Marie Kavanagh would respond to the grievance instead. The Claimant pointed out that Marie Kavanagh was not truly independent as she had been previously involved in the process by way of undertaking the case note review. We would agree with the Claimant that it would have been better if somebody with no previous involvement had been appointed to consider her grievance. Nevertheless, Marie Kavanagh held a meeting with the Claimant to discuss her grievance on the 30 October 2018 and she also considered the evidence which had been provided in writing from Natasha Byrne and Fiona Michelli.

74. At the meeting on the 30 October the Claimant was again represented by Mr Taylor and subsequent to that meeting, the Claimant wrote to say that she had been assured by Marie Kavanagh that she would carry out a thorough investigation and for that reason she would not object to Marie Kavanagh hearing the grievance. In her email confirming that, the Claimant also said that she expected that where bullying, unfair treatment or discrimination had been identified, that that would be acknowledged and steps would be taken to address it.

75. Marie Kavanagh's grievance outcome letter was sent to the Claimant on 11 December 2018. The decision was not to uphold the Claimant's grievance. Marie Kavanagh made a specific finding that the Claimant's cases had been reviewed and discussed with her at the meeting on the 23 May prior to the decision being made that she was to be suspended. It was fairly pointed out by Mr Taylor during the course of the Hearing before us that that finding was seemingly contradicted by the emails sent by Natasha and Fiona prior to the meeting of 23 May, to which we have referred. Those emails demonstrate that the decision to suspend was made before the meeting even took place.

76. Marie Kavanagh's evidence in response to that point was that she was aware of those emails and she did not put them to either Natasha or Fiona, but she nevertheless accepted Natasha and Fiona's evidence. In our view, that finding is very difficult to justify. It seems to us that it indicates that the decision maker was closing her mind to evidence which tended to undermine the Respondent's case. We find that is a further matter going towards breach of the implied term.

77. Marie Kavanagh's key finding was that the suspension was justified because it was a last resort and because it was done in order to protect the Claimant from any further incidents and to protect patients and to mitigate any potential risk to the business. However, Marie Kavanagh in her outcome did not seek to identify or analyse the basis on which the Respondent had deemed the Claimant to pose any risk. Before us, she was not able to identify the evidence which would suggest that the Claimant posed any potential risk. It seems to us therefore to be quite clear that Marie Kavanagh had simply accepted the Respondent's view that suspension was justified because the Claimant posed a risk, but had not sought to question

or analyse that view to any extent. We find that that failing was a further matter going towards a breach of the implied term.

78. It is also surprising to us that despite being the person who actually made the findings in the case note review, Marie Kavanagh did not, in the course of her grievance decision making, communicate those findings to the Claimant. In particular, she did not communicate the finding that the Claimant's outcomes had been deemed to be safe. Marie Kavanagh also failed to make a finding about the failure of the Respondent to review the Claimant's suspension. We find that those failings are significant and they are further matters going towards breach of the implied term.

79. The Claimant appealed the grievance outcome by way of letter dated the 26 December 2018. It is clear from that letter that the Claimant was fully aware of and alive to the failings of the grievance process which we have just identified. In particular, the Claimant said that the grievance outcome was a one-sided approach and that findings had been reached that were biased. She pointed out that no documentary evidence was provided to refute her claims and the information that was relied upon to not uphold the grievance was untested and contained untruths and inconsistencies.

80. The Claimant referred to the specific evidence which illustrated that the decision to suspend the Claimant had been made prior to the meeting on the 23 May and she said that if Marie Kavanagh had conducted a proper investigation, she would have established that the assertion that the decision to suspend had been made during the course of the meeting was untrue. The Claimant went on to explain that given that the issue which the Respondent was dealing with was essentially one of poor performance, that there were plainly alternatives to suspension, in particular by way of applying the Respondent's appraisal and supervision policy.

81. The Claimant pointed out that no attempt had been made to explore alternatives to suspension and also that she had not been questioned about her alleged poor performance. She again repeated that she had not been informed of the outcome of any investigation or review and the reasons given for her suspension had become muddled and unclear. The Claimant pointed out, in our view quite fairly, that Marie Kavanagh had shown a tendency to accept untested statements as evidence without seeing if there was anything to substantiate the statements being made.

82. We reflect on those points because it seems to us quite clear when considering the Claimant's appeal that she raised a number of important points which would merit thorough and careful consideration.

83. Sarah Rose who is the Respondent's interim Regional Director, was appointed to hear the Claimant's grievance appeal. An Appeal Hearing was organised to take place on the 24 January 2019. It is apparent from the notes of that meeting that it was a detailed meeting at which the Claimant raised a number of important points along the lines of the ones which we have already summarised from her Appeal letter.

84. At the start of the meeting, Sarah Rose identified that the Claimant was again being represented by Mr. Taylor, that Mr. Taylor was neither a union representative nor a work colleague and therefore applying the Respondent's procedures Mr. Taylor was not entitled to represent the Claimant. The Claimant and Mr. Taylor pointed out that Mr Taylor had been allowed to represent her at numerous previous meetings. This was a fair point to raise, but there was no compelling reason presented why the Respondent should modify its procedures to allow Mr. Taylor to represent. The Respondent was in our view entitled to apply the letter of its policies and procedures and those procedures clearly identify that only a trade union representative or a work colleague would be allowed to represent.

85. As we've said, a number of matters were discussed in considerable detail at the Appeal meeting and a key issue was the justification or otherwise for the Claimant's suspension. As to that point, Sarah Rose's view as recorded in the meeting notes, was that it was unclear what options were open at the time of the Claimant's suspension, but that on reflection, suspension probably wasn't an option. It appears from that that Sarah Rose's own view was that suspension was not an option which should have been used in this case. We would have expected that view to have informed her findings.

86. Nevertheless, in the end Sarah Rose's response was simply to repeat the Respondent's assertion that the suspension was carried out to ensure patient safety. Again, that assertion was repeated without any analysis of what the evidence was that suggested that the Claimant posed a risk to patient safety. Again, at the Hearing before us, Sarah Rose was not able to point to any evidence which would substantiate the assertion that the Claimant posed a potential risk to patient safety. Again, then it appears to us that Sarah Rose made the same mistake as Marie Kavanagh in that she simply repeated the Respondent's assertion without seeking to question it or to analyse it or even attempt to assess the evidence which may have substantiated it. We consider that that was a considerable failure which went towards breach of the implied term.

87. A further matter, which is difficult to understand in terms of Sarah Rose's involvement, is that the Claimant expressed a view during the course of the Appeal meeting that her treatment at the hands of Fiona and Natasha amounted to bullying. Sarah Rose's position appears to have been that if the Claimant had wanted that to be investigated, it should be investigated separately and therefore she regarded it as something which was outside of the original grievance.

88. However, as is clear from the Appeal meeting notes, the Claimant's position was that she regarded her original grievance as containing the matters which formed the basis for her allegation that she had been bullied. Notwithstanding that, Sarah Rose appears to have continued in the meeting on the basis of her belief that if the Claimant wanted bullying to be addressed, she would have to have it investigated separately. We do not see any reason why there should have had to have been a separate investigation when the Claimant made it clear that the allegations which she believed constituted bullying were set out in her original grievance.

89. The Grievance Appeal outcome was sent by letter dated 25 January. The Claimant points out that was just one day after the Grievance Appeal meeting and there is no evidence that Sarah Rose conducted any investigation other than meeting with the Claimant and reviewing the documentation which had been collated as part of the grievance process. The Claimant therefore suggests, effectively, that this indicates that the approach of Sarah Rose was cursory and did not involve a thorough assessment of the important issues which she had raised. We would tend to agree with that characterisation of this appeal.

90. The Appeal outcome letter identified that there were three key points to the Appeal. In summary, they were firstly that the decision to suspend was inappropriate, secondly the way in which the Claimant had been treated amounted to bullying and thirdly, that the investigation by Marie Kavanagh was biased.

91. The decision on all those matters was that none of them were upheld.

92. In relation to the decision to suspend, Sarah Rose found this had been justified because the Claimant posed a potential risk to the patients. Again, the outcome letter did not seek to explain how that assertion could be substantiated.

93. Secondly, despite having explained in the meeting that she thought there would need to be a separate investigation into bullying, Sarah Rose then made a finding that there would had been no evidence presented by the Claimant to corroborate an allegation of bullying.

94. Thirdly, in relation to the allegation that the investigation had been flawed, Sarah Rose said that there was no evidence to corroborate that allegation.

95. In relation to that point, Sarah Rose appears to have simply ignored the specific point which the Claimant had raised in her appeal which was that Fiona and Natasha's evidence as to when the decision to suspend was taken was contradicted by other evidence and that point had not been taken on board as part of the grievance analysis. It therefore seems to us that in addition to failing to analyse the assessment that the Claimant posed a potential risk, Sarah Rose also made the same mistake as Marie Kavanagh in that she closed her mind to the evidence which undermined the Respondent's case.

96. In light of those failings, we conclude that the grievance appeal outcome was a further matter going towards breach of the implied term.

97. We have had regard to the Claimant's evidence as to how she felt when she received the appeal outcome and she described herself in her witness statement as being in total shock and disbelief, crying uncontrollably and feeling as though she was having nervous breakdown when she read that outcome. In the circumstances, we accept that the Claimant would have had a reaction of being very upset because it does seem to us that the

important points which she had raised and which she reasonably expected would be engaged with on the appeal had not been considered or analysed to the extent that they plainly deserved.

98. We therefore find that the Appeal outcome was an effective last straw in this case in the sense that it contributed to the breach of the implied term which we have found. Our finding is that the Appeal outcome was a part of a course of conduct comprising the acts and omissions which we have identified above that, viewed cumulatively, amounted to a repudiatory breach of the implied trust and confidence term.

**Conclusions on constructive dismissal**

99. As is apparent from the above, we have found that the Respondent did through a cumulative series of actions breach the implied term of trust and confidence in the Claimant's employment contract.

100. In summary, the key matters which we found went towards breach of the implied term were:

a. The decision to suspend without reasonable and proper cause. It seems to us that the decision could not, as the respondent claimed, be described as a last resort and it was instead a kneejerk reaction. There is little evidence that other options were considered and it seems to us that less severe options than immediate suspension were viable (in particular to discuss the concerns with the Claimant and attempt to address them through supervision). The decision to suspend was taken before the Respondent had even spoken to the Claimant and, we find, without any thorough consideration of why it was appropriate to suspend. In particular, the evidence to substantiate the concern that the Claimant may pose a risk to patient safety was not properly identified or analysed.

b. The failure to review the Claimant's suspension.

c. The failure to lift the Claimant's suspension, particularly when the Respondent's finding was that she was not unsafe and matters could be dealt with at the first informal stage of the capability process.

d. The failure to communicate the outcome of the Respondent's investigation to the Claimant, in particular the finding that her actions were not unsafe.

e. The failure to adequately investigate and deal with the Claimant's grievance at both the initial and appeal stage. Especially the decision-makers' tendency to accept assertions which were in the Respondent's favour without any proper analysis as to whether those assertions were substantiated.

f. The particular failing in the grievance/appeal process of repeating the finding that the claimant's suspension was justified because of a

potential risk to patient safety without seeking to analyse or adequately identify the evidence which might suggest that the Claimant posed such a risk.

g. The particular failing in the grievance/appeal process of repeating the assertion that the decision to suspend was only made after matters had been discussed with the Claimant at the meeting on the 23 May when that finding was contradicted by the email evidence which the Claimant brought to the decision makers' attention.

101. Our view is that by the conduct summarised above the Respondent acted in a way which was likely to at least seriously damage the relationship of confidence and trust between employer and employee. We find that the respondent did not have reasonable and proper cause to conduct itself in any of the ways we have summarised above.

102. We find that the Appeal outcome was an effective "last straw" in relation to the course of conduct summarised above for the reasons we have already explained. We have considered whether the Claimant can be said to have affirmed the contract since that outcome. We find that she did not. The reality is that the Claimant resigned promptly after the Appeal outcome was sent (she resigned on the 13 February) and there is nothing in that period which can possibly be said to constitute an affirmation of the contract of employment.

103. We also find that the Claimant resigned in response to the breach. This was made clear in her resignation letter and no other alternative reason has been suggested by the Respondent.

104. We find that the Respondent has not shown any potentially fair reason for dismissal. No real evidence or argument has been presented to that effect.

105. We therefore find that the claim of constructive dismissal succeeds.

**Conclusions on Polkey/contribution/uplift**

106. We consider first whether the Claimant contributed to her dismissal or whether there should be a Polkey deduction in this case.

107. Regarding Polkey, we see no basis on which the Respondent could fairly have dismissed the Claimant. At most, the only issue which has in any way been substantiated was an issue regarding notetaking which would merit consideration at the early stages of a capability process. There is no evidence before us of any matter which could possibly justify a fair dismissal. For that reason, we will not make any Polkey reduction.

108. Regarding contributory conduct, we have to consider whether the conduct of the claimant was culpable or blameworthy in the sense that it was foolish or perverse or unreasonable in the circumstances, and if so whether it caused or contributed to the dismissal and whether it is therefore

just and equitable to reduce the assessment of the claimant's loss. It is also appropriate for us to bear in mind that it has recently been confirmed by the EAT that contributory conduct in this context includes conduct which may fall short of gross misconduct and it need not necessarily amount to a breach of contract (Jagex ltd v McCambridge UKEAT/0041/19/LA).

109. We cannot see any conduct of the Claimant which reaches the threshold for contributory conduct. Again, we have to bear in mind that on the evidence before us the Claimant was guilty, at worst, of a relatively low-level capability issue of inadequate notetaking. That does not seem to us to amount to contributory conduct in the sense we have just described. We therefore decline to make any reduction from contributory conduct.

110. We deal next with the question of an uplift for a failure to comply with the ACAS Code. We have to consider whether the claim to which the proceedings relate concerns a matter to which a Code of Practice applies (which was not in dispute in this case) and if so, whether the employer has unreasonably failed to comply with that Code. If we find there was such an unreasonable failure, then we may if we consider it just and equitable to do so increase any award we make to the Claimant by no more than 25%.

111. In this case, the Claimant was not subject to any sort of disciplinary procedure. We therefore find that the disciplinary ACAS Code does not apply. The Claimant did however raise a grievance and we therefore find that the grievance ACAS Code did apply.

112. We have considered this point and although we have found numerous defects in the Respondent's handling of the Claimant's grievance, the basic steps identified as procedural matters which the Respondent must comply with within the Code of Practice were done.

113. We therefore do not make any uplift for a failure to comply with an ACAS Code in this case.

**Conclusions on race discrimination**

114. Finally, we turn to the Claimant's direct race discrimination claim. The first point to note is that the Claimant has not identified an actual comparator whose circumstances were similar to her own. We have considered the comparator who the Claimant put forward, but we didn't find that their circumstances were truly comparable to those of the Claimant – in our view they were materially different and the actual comparator in this case was of no evidential value. However, the Claimant may still rely upon a hypothetical comparator and this is the basis on which the Claimant's case most appropriately falls to be considered.

115. Although we recognise that it will not be the same in every case in this case we were assisted by focusing on the burden of proof provisions. The Claimant did not put forward any particular points which she relied on to raise a prima facie case of discrimination. Instead the Claimant asked us to, in effect, consider the Respondent's overall mistreatment of her (and the

lack of an adequate reason for her treatment) and find that was sufficient to establish a prima facie case. A number of our findings indicate that we agree that the Respondent got things badly wrong and so we reflected on whether the Claimant had shown a prima facie case at some length.

116. We reminded ourselves that the Supreme Court has emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: "The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be *proved*, and it is for the claimant to discharge that burden."

117. Although the threshold to cross before the burden of proof is reversed is a relatively low one – "facts from which the tribunal *could* conclude" – inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status and/or incompetence are not, by themselves, such "facts"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33.

118. Further, we must look for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred (see South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23). In relation to a direct discrimination claim such as this one it is for the claimant to prove a prima facie case of less favourable treatment. The claimant must show that she was treated less favourably than the respondent treats or would treat others and merely proving, without more, that the respondent treated her badly is insufficient.

119. Before the burden can shift there must be something to suggest that the treatment was due to the protected characteristic – in this case the claimant's colour (see B and C v A [2010] IRLR 400). In other words, it is not sufficient to shift the burden of proof that the conduct is simply unfair or unreasonable if it is unconnected to the protected characteristic. That point is demonstrated by the case of St Christopher's Fellowship v Walters Ennis [2010] EWCA Civ 921 and it is notable that in that case the Court of Appeal held that although the Tribunal's finding that the claimant was badly treated fully justified the finding of constructive dismissal it could not in the circumstances lead to a finding, in the absence of an adequate explanation, of an act of discrimination. In addition to the general approach then that case demonstrates that findings of bad treatment which lead to a claim of constructive dismissal succeeding do not necessarily amount to a prima facie case of discrimination.

120. We have found a series of failings on the part of the Respondents which we find included some quite lamentable treatment of this experienced healthcare professional. However, applying the burden of proof provisions

as we have set them out above, we did not find that the Claimant has proved any facts from which we could consider that the treatment constituted unlawful acts of race discrimination. There are no facts that we have found from which we could infer that the reason for the Claimant's treatment, however unreasonable it was, was her colour. We emphasise that in reaching this conclusion we have stepped back and reviewed all of our findings of fact and the totality of the evidence that was presented to us.

121. It was appropriate when doing so to bear in mind the guidance given by the EAT in Chief Constable of Kent Constabulary v Bowler EAT 0214/16 where it was held that an employment tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and internal appeal against the rejection of those grievances. In so holding the EAT observed: 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'.

122. We concluded that the respondent's treatment of the claimant was at various times unreasonable and unjustified but the Claimant had not shown anything more from which we could conclude that the Respondent committed unlawful race discrimination. The Respondent's failings in this case all flowed from the decision to suspend, which is the key matter complained of by the Claimant. Our findings demonstrate that the suspension was a kneejerk decision; it was unjustified and the Respondent did not have reasonable and proper cause to suspend. However, we do not think that finding raises an inference of race discrimination.

123. In making that determination we have considered carefully the chain of events leading to the Claimant being suspended. It seems clear from the evidence that we have seen that the Claimant's managers quickly formed a view that the Claimant posed a risk to patient safety and they acted based entirely on that view. Up until that point the Claimant had been highly regarded at the Respondent, including by her managers. It does not therefore seem to us that we have any basis on which to suppose that the view that they formed at the suspension stage was not genuine or that it was formed for any reason other than the case review carried out in the days leading up to the Claimant's suspension.

124. We also considered the fact that the Respondent did not call either Natasha Byrne or Fiona Michelli to give evidence. The Respondent effectively relied on the documentary evidence and the evidence obtained in the grievance and appeal processes which indicated that the decision to suspend had been taken because of concerns of a risk to patient safety. This failure of the Respondent to call the witnesses or to give any reason for not calling them adversely affected our findings on the Respondent's credibility. In particular, it was part of the reason why we found the concerns to have been inadequately substantiated and part of the reason why we found against the Respondent about what had happened at the meeting on

23 October. However even with that adverse effect on the Respondent's credibility we still did not make any findings of fact from which the tribunal could conclude that the Respondent had committed an unlawful act of race discrimination.

125. It was also relevant that the Claimant had not made any allegations against either Fiona Michelli or Natasha Byrne (or indeed any other individual) which could enable her to show a prima facie case of race discrimination. In that context the failure to call those individuals was not a matter from which we could infer race discrimination.

126. It was clear to us from the evidence that the Claimant's managers had made an assumption based on the concerns we have identified that the Claimant posed a potential risk to patient safety. However, there was no basis for us to infer that the Claimant's treatment was less favourable than a hypothetical comparator who was a different colour. There was no basis for us to infer that the Respondent would not have had the same concerns and taken the same action in respect of a hypothetical comparator who was a different colour.

127. In relation to the process which was followed after the Claimant was suspended and the grievance and appeal processes, we have found that the Respondent mishandled the various processes in the ways which we have described above. However, the Claimant has not shown potentially less favourable treatment from which an inference of discrimination could properly be drawn. The Claimant has simply not adduced any evidence to support the contention that her treatment was less favourable by comparison with the treatment of those of a different colour.

128. In this case there were instances of the Respondent's unreasonable treatment of the Claimant which lacked any real explanation – in particular the delay in reviewing and lifting the Claimant's suspension. However, the Court of Appeal has cautioned tribunals "against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground" (Igen v Wong [2005] IRLR 258 at para. 51). There were failures to review, to promptly lift the Claimant's suspension and to communicate with the Claimant about the investigation but absent any evidence of discriminatory behaviour we did not see that these were failures from which we could infer race discrimination - these were in our judgement examples of ineptitude on the part of the Respondent.

129. Similarly, we considered the failures of the decision makers at the grievance and appeal stage. In particular, our finding that the decisionmakers tended to accept assertions made by the employer without any proper analysis as to whether those assertions were substantiated. Absent any evidence of discriminatory behaviour this was not a failure from which we could infer race discrimination – rather in our judgement it indicated simply that the matters raised by the Claimant had been inadequately investigated and scrutinised.

130. We observed that it is not uncommon in Employment Tribunal proceedings to find the type of failure which we identified – such as a failure to properly investigate and a failure to conclude processes promptly – and indeed it is not uncommon for those types of failures to be unexplained or inadequately explained. As the overall evidential picture did not include any evidence of discriminatory behaviour we could not infer race discrimination from those failures alone, even taking into account the absence of proper explanation.

131. We therefore concluded that the Claimant had not done anything more than show that she had been treated badly or unreasonably by the Respondent. Applying the holistic approach which the Claimant encouraged us to take we did not find anything which could possibly connect the unreasonable treatment to the Claimant's colour.

132. The Claimant had identified a course of conduct which taken cumulatively amounted to a breach of the implied term but she had not identified any particular acts which she said were race discrimination, or identified any particular matters which should lead us to make an inference of discrimination. Instead, the Claimant only asked us to look at the whole course of conduct and find it was so unfair that it must have been tainted by race discrimination. The problem was that the Claimant did not put forward any evidence of discriminatory behaviour; the behaviour could only be said to be unreasonable, unfair and/or unjustified. We did not find any facts from which we could decide that unlawful discrimination had taken place and the Claimant had therefore failed to prove a prima facie case.

133. We therefore concluded that the burden of proof has not shifted to the Respondent and the direct race discrimination claim must fail.

Employment Judge Meichen
26 October 2020