EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Jarrett**

Respondent: **Care UK Clinical Services Ltd**

Heard at: **East London Hearing Centre**

On: **6 and 7 May 2021 and In chambers on 8 June 2021**

Before: **Employment Judge Lewis**

Members: **M Daniels**
ML Wood

Representation
Claimant: Mr Jarrett
Respondent: Mr Sugarman - Counsel

RESERVED JUDGMENT

1. **The unanimous decision of tribunal is that the Claimant's claim for race discrimination succeeds.**

2. **A remedy hearing is to be listed**

REASONS

The Issues

1. By a claim issued on 16 August 2019 the Claimant brought complaints of unfair dismissal and race discrimination against the Respondent. The claim for unfair dismissal was dismissed at a preliminary hearing on the 16 December 2019 by Employment Judge McLaren on the basis that Mrs Jarrett lacked the two years qualifying service required under section 108 of the Employment Rights Act 1996 and therefore the tribunal has no jurisdiction to hear the unfair dismissal claim.

2. The claim for discrimination was allowed to proceed and the Mrs Jarrett was ordered to provide further particulars of the claim. At that hearing the basis of the discrimination complaint was identified in the following way.

3. The Claimant was employed as a pre-assessment nurse from 4 September 2017 until her dismissal on 20 March 2019 for sending a fax containing patient data to the CQC instead of the patient's doctor. The Claimant claims that her dismissal was because the Respondent did not accept this was a mistake but found it to be a malicious act and that this conclusion was based on her ethnicity. The Respondent denies this.

4. Mr Jarrett explained the Claimant's case in the following way, the Claimant's allegation was that she was dismissed for a genuine mistake and she considered that the reason her point of view was not believed and she was held to have had malicious intent, rather than having made a mistake, was because of her ethnicity. Mr Jarrett referred to the different treatment given to black people generally in society and gave an example of individuals accused of crimes, he also made reference to a number of incidents during his wife's employment with the Respondent from which he said race discrimination could be inferred. The Claimant was required to give further particulars of her claim for discrimination, setting out the facts and matters relied on in support of the contention that the motive for the action was her ethnicity, any examples of comparators in respect of the alleged less favourable treatment.

5. The Claimant provided a document dated 4 March 2020, setting out the further particulars of her claim of race discrimination. She identifies herself as a black British Afro-Caribbean female. The act of discrimination relied upon is her dismissal, the decision to dismiss being based on the Respondent choosing not to accept that her sending of the fax containing patient information to the CQC instead of the patient's doctor was a genuine mistake rather than a malicious act to discredit the organisation.

6. The Claimant set out a number of paragraphs citing examples illustrating what she says were acts of discrimination; not of all of those were directly relevant to the Respondent but the majority are alleged differences in treatment between black colleagues and white colleagues. Many of the allegations related to the head of the Out Patients department Mrs Agatha Pollock. Those matters were relied on by the Claimant as background evidence in support of her contention that she had been discriminated on the grounds of race.

The hearing

7. The final hearing took place by CVP over the course of two days. Despite sitting beyond normal tribunal hours it was not possible to conclude the evidence and submissions in time for the tribunal to deliberate immediately after the submissions and within the time originally allocated to the case. A separate day for deliberation in Chambers took place on 8 June 2021.

8. The tribunal were provided with an electronic bundle, a chronology and copies of the witness statements. The Claimant relied on the contents of the further information provided and an additional statement, and statements from her former colleague Comfort Ajagbe, who gave evidence, and a witness statement from

Toochukuw Jennifer Abazuwa (Jennifer) who was not called to give evidence. Ms Abazuwa's statement set out her account of having requested reduced hours on her return from maternity leave and the response to that request which she says was less favourable treatment.

9. The Respondent called Agatha Pollock, John O'Brien who made the decision to dismiss, and Mr Robin Anderson who heard the Claimant's appeal against dismissal. We were also provided with a skeleton argument by Mr Sugarman setting out his submissions and a summary of the relevant law.

Findings of fact

10. We set out below our findings based on the evidence we heard, as far as they are relevant to the decision and issues we had to decide.

Background facts from which the Claimant invited us to draw an inference of discrimination

11. We deal with the matters contained in the further particulars as far as possible using the same paragraph numbers and in the same order in which they were set out in that document however some paragraphs refer to more than one issue and some issues arise more than once. Mrs Pollock addressed in her witness statement the matters raised by the Claimant in her further particulars and she was cross-examined by Mr Jarrett.

Allegation that the Claimant was not given an induction [paragraph 5]

12. We accept Mrs Pollock's evidence that for the Claimant's first two weeks of employment she was treated as supernumerary and allocated colleagues to shadow, this was to allow her colleagues to talk her through the processes and for her to familiarise herself with the work and the way that the Respondent organised itself. She was also allocated a mentor who was a shift leader and when her shift leader, who worked part-time, was not present she shadowed another Registered nurse. Mrs Pollock told us this was in effect the Claimant's induction. The Claimant complained that she was given an induction folder but that her induction was never signed off. She compared this to her experience in other jobs, however the Claimant did not point to any other members of the Respondent's staff who were given a different type of induction.

13. We are satisfied that this was a standard induction as far as the Respondent was concerned. The Respondent also relied on the review of the probationary period, pointing to the fact that this was signed off. Whilst the Claimant complains that the review meeting itself was rushed we find no evidence of any difference in treatment between the Claimant and any of her white colleagues and no evidence of less favourable treatment. The process could possibly have been better organised and a more formal induction carried out but we do not find any evidence of discrimination in this regard.

Appraisal [paragraph 5.1 and 6]

14. The Claimant complains that she was not provided with an appraisal when

she ought to have been, she was employed for nearly 18 months before appraisals were raised and that it was only raised at the last-minute when the CQC visit was imminent and that this was simply a box ticking exercise.

15. Mrs Pollock pointed to the end of probation review meeting that took place in March 2018 as a form of appraisal and told us that Claimant was then due to be appraised within the period October 2018 to September 2019. There was a delay in carrying out Mrs Pollock's appraisal as a result of which the other appraisals were running behind as her appraisal was meant to precede the appraisals of the shift leaders who would then appraise their own line reports; it was a sequential process depending on seniority. Mrs Pollock told us that she chased up the supervisors in mid-November to arrange appraisals but noticed in January that the Claimant's appraisal had not been carried out and arranged for the Claimant's supervisor Naimah Hussain to arrange an appraisal for the Claimant. The Claimant was too busy on 22 January, the date that the appraisal had been arranged, just prior to the CQC visit and the appraisal was postponed until 30 January. The appraisal did not take place on that date because by then the Claimant had been suspended. The bundle contained an email dated 23 October 2018 from Mrs Pollock to the relevant supervisors, including Naimah Hussain, informing them of the date of their appraisals in October and November and reminding them that they should make arrangements for appraisals of their own line reports [page 328-329].

16. We accept Mrs Pollock's evidence in respect of the arrangements for the appraisals and find that the explanation has nothing to do with race, there was no evidence of any less favourable treatment of the Claimant in respect of her appraisal, the responsibility for arranging the appraisal fell to the Claimant's line manager . It was not just the Claimant's appraisal that had not been arranged and that there were number of staff for whom supervisors had to be chased in respect of arranging the appraisals.

Acting up and training [paragraphs 6.1, 19.1, 19.2, 20 20.1.21]

17. The Claimant made a number of complaints in respect of lack of opportunities for training and while white staff were informed about and encouraged to go on training and given acting up opportunities.

18. One example given was in respect of Caroline Greaves, a white part-time nurse who attended a three-day pre-assessment training course although she only worked two days a week, whilst the Claimant who was full-time was not told anything about this training which she described as "important and desirable ".

19. Mrs Pollock gave evidence about the arrangements for training at the Respondent. She told us, and it was not disputed, that all mandatory training records were booked on the learning management system (LMS) and any training opportunities outside the standard mandatory ones were available to all staff within the LMS event calendar. If there is a specific training course a member of staff would like to attend that is not advertised in the calendar then staff are encouraged to obtain the course information and discuss with either Mrs Pollock or their mentor as to the whether the course was relevant to their role and their area of work. If on occasion a course was approved locally it was then sent the head of nursing for final review/approval. Mrs Pollock denied that white colleagues were encouraged to go on more training courses than non-white colleagues or given more

opportunities for acting up.

20. In respect of Caroline Greaves, Mrs Pollock explained that firstly, the fact that she only worked two days a week would not have been a reason not to permit her to go on a training course, and secondly, however in this instance Miss Greaves was sent on this training following feedback from the Consultant Pre-assessment Lead, Zanetta Priscepionkaite, as part of an ongoing project she was involved in. The project was to develop senior nurses into anaesthetic pre-assessment nurses. If successful, this training would then be made available to all members of the team. However, the more experienced members of the team were sent on the training first and Miss Greaves had the relevant experience in pre-assessment which at that point the Claimant did not have. Miss Greaves was employed three days a week by Aspire and it was Aspire who had suggested that she attend the training and the Respondent had agreed to release her to go on it.

21. The Claimant also compared her treatment to that of Kelly O'Brien, a healthcare assistant who was white, whom she said was given the opportunity to go on several training courses and was transferred into many interesting roles whereas these opportunities were not given to the Claimant or her black colleagues. The Claimant was unable to specify what these opportunities for interesting roles were.

22. Mrs Pollock told the tribunal that the Claimant's assertion was incorrect, and that Kelly O'Brien only attended training courses that were available to all healthcare assistant staff and did not transfer into any other roles. Kelly and Comfort were both Senior Healthcare Assistants and they, along with the Claimant, had access to the same training opportunities. Mrs Pollock was aware that due to personal circumstances, Comfort was struggling to work within normal clinic hours, so when the opportunity arose for a clinic preparation role she approached Comfort to see if she would be interested, as the hours were potentially more suitable for her. Mrs Pollock recalled that at that time Comfort was extremely happy to accept the role and it gave her the flexibility that she required with the working day. Mrs Pollock also denied that white staff were told about good external training and able to attend it when black staff were not. She confirmed that external training would not be approved if the individual had not completed their internal mandatory training; this was not Mrs Pollock's decision, but a directive set by the Head of Nursing. The Claimant was unable to point to any other examples.

23. We accept Mrs Pollock's explanation for the way the training was organised, and for the fact that Miss Greaves received specialist training. We also accept that her explanation as to the reason that the request from Comfort to go on an ophthalmology course was declined. We accept that this explanation was given to Comfort at the time. On the evidence before us we are satisfied that it was not anything to do with race.

Acting up opportunities [paragraphs 14, 14.1.14.2 16.1]

24. We were told that was no such thing as acting up: there was no circumstances in which a new member of staff would be told that they were supervising or acting up in regards to other staff of the same level of qualification and the supervisory roles were conducted by the shift leaders. We were told by the Respondent, and it was not disputed ,that the shift leaders were from a number of different ethnic backgrounds, including Asian, black British and white.

25. The Claimant was unable to give any specific examples in respect of acting up opportunities. We have accepted the Respondent's evidence on this issue.

Mrs Pollock ruling with a rod of iron [paragraphs 8 -12] and disrespecting the Claimant [10.1, 11.0]

26. The Claimant's allegation that Mrs Pollock head of the Out Patients department, who is a white Irish woman, rules with a rod of iron and most staff are scared of her. The Claimant alleged that Mrs Pollock often shouted at her and other black staff in the office and in front of others, including patients, that she talked to black staff roughly and without respect but not to white staff in the same way. Although the Claimant gave evidence that most staff were scared of Mrs Pollock and that she and some of her black colleagues perceived that she did not speak to white colleagues in the same way, we were not presented with evidence of any specific incidents upon which we could make a finding and we were not provided with any cogent evidence of differential treatment other than those set out below. It was accepted that "most staff" includes a number of white staff as well as black staff.

27. The Claimant relied on the "trouser incident" as an example of being shouted at and treated with disrespect by Mrs Pollock. The Claimant alleges that on one occasion Mrs Pollock shouted at her and said "you're too lazy to stitch up your trousers, you Toe Rag". According to the Claimant this took place after Mrs Pollock had previously suggested that the Claimant sew up the hem of her trousers because she thought they was too long, and that she shouted this in front of staff and patients which left the Claimant feeling small, harassed and disrespected.

28. Mrs Pollock denied shouting at any staff members, she also denied ruling with a rod of iron and considered herself to be compassionate and fair. She gave examples of occasion when she had granted compassionate leave to the Claimant on a discretionary basis. Mrs Pollock accepted she asked the Claimant to take up or secure the hem of her trousers but denied ever calling her a "toe rag". In her evidence to the tribunal Comfort Ajagbe stated that she heard Mrs Pollock telling the Claimant to take up her trousers but did not hear the words, "toe rag", those words were reported to her by the Claimant afterwards.

29. We find on the balance of probabilities that the words were not used. We accept Mrs Pollock's evidence that she did not use those words and we find it is more likely that the Claimant misheard what was said. Whilst we are satisfied that if the words were used it would be unpleasant and evidence that would illustrate of a lack of a respectful conduct, we do not find that the term carries racial overtones or connotations and, if it had been used, it is not evidence, without more, of a discriminatory motive.

walking into the room without knocking which demonstrated a lack of respect [allegation at 10.1 of the Claimant's further particulars]

30. Comfort Ajagbe told the tribunal that this also happened to her. Mrs Pollock denied ever knowingly walking into a room where a staff member was with a patient without knocking. She was clear that she always knocked before entering a consulting room as nurses could be completing Pre-assessments or consultants could be conducting personal examinations. We accept that it would not just be the Claimant or her colleagues, who would be affected if this had happened but

also the patient. We consider it unlikely that Mrs Pollock would walk into a consulting room without knocking knowing that patient could be inside, regardless of who was with them. The Claimant accepted that she had not asked her white colleagues if the same thing had happened to them, she had only discussed it with her black colleagues.

Mrs Pollock saying to the Claimant that "it's like talking to a brick wall".

31. Mrs Pollock denied saying this to the Claimant and was clear that it was not something she would ever say to any member of staff. She did not recall ever rolling her eyes at the Claimant. Even if it was said we do not find that this without more could amount to a discriminatory conduct.

32. We have not found there to be evidence of any differential (less favourable) treatment.

Mrs Pollock was responsible for bringing in white Irish staff [paragraph14 -14.2]

33. The Claimant accepted that she did not know the background of all the staff and told us that she had assumed that a number of the white staff were also Irish. We accept the Respondent's evidence that there was only one other Irish nurse on their staff The Respondent provided information as to the mix of backgrounds and nationalities of staff which was not challenged. The Claimant did not dispute that there were 4 white British staff, 3 Eastern European staff, 3 Asian staff, and 6 black British or black African staff. She simply said she had did not know their background. She also accepted that Mrs Pollock had been responsible for recruiting herself, Jennifer and Levinia who were all black. We find that this allegation was made based on an erroneous assumption and was not supported by the evidence.

Failure to provide a work jacket [paragraph 15]

34. Ms Pollock accepted there was a delay in providing the work jacket to the Claimant but told the tribunal this was not deliberate or related to her race. The Respondent described the jacket as non-standard piece of uniform, it was available on request but was not to be worn when with patients. The Claimant disputed it was non- standard, she described it as essential as the building was very cold. She accepted that staff were told not to wear it when seeing patients. We were taken to documents in the bundle that show the Claimant asked Mrs Pollock whether she had ordered her a jacket on 19 October 2017 and received a response from Mrs Pollock at 10.20 am the next day informing her it had been ordered [page 323]. The fleece for the Claimant was included in an order in an email dated 16th November 2017 [page 333]. Mrs Pollock told us that the reason for the delay in the Claimant receiving her fleece was due to problems with the suppliers and the order having to be repeated. This evidence was not challenged. We do not draw any inference from the delay in the Claimant receiving her jacket.

That Mrs Pollock's daughter, Joanna, was also employed by Care UK working in the same department as her mother and had been promoted over other ethnic staff who had worked there longer [paragraph 16]

35. Mrs Pollock's evidence that her daughter was not recruited by her nor was she managed by her was not disputed. The Claimant accepted that she did not know how Joanna Pollock was recruited or promoted, she simply perceived it be favouritism. We accept the uncontested evidence of Mrs Pollock and do not find this allegation to be made out.

The Claimant complains that on occasions she had to have words with white staff members who felt that they could speak to her in a disrespectful manner [paragraph 17]

36. The Claimant accepted that when she raised an incident between herself and Caroline Greaves with Mrs Pollock in August 2018 it was not reported as race discrimination at that time [338-338] She also accepted that she told Ms Pollock she had resolved the matter informally [p337].

Allegation that white staff were allowed to work on reduced hours to suit their family circumstances, but black staff were not [paragraph *22]*

37. The treatment of Comfort Ajagbe was compared to that of a white member of staff called Misha. We are satisfied on the evidence before us that there had been an offer to Comfort Ajagbe to give her a different shift and reduce her hours which she did not accept. We find that she misunderstood the implication of the offer to change shifts and, on the basis of her evidence to us it appears she had not understood that this would in fact reduce her hours. However, we are satisfied that the offer was genuine and that it did show a willingness to try to accommodate her family circumstances and reduce her hours within the parameters of the requirements of the clinic and its opening times. Comfort Ajagbe accepted that she did not know Misha's hours were only reduced when she became a bank member of staff which meant that she was not guaranteed any work and was effectively on zero hours and was only provided work when cover was needed. We are satisfied that is a very different set of circumstances.

38. The Claimant also alleged that a white colleague called Pamela had her hours reduced from 3 to 2 days. We were told, and it was not contested, that Pamela's hours were reduced when she started studying for her Master's and that this was before Mrs Pollock became a manager. This was a permanent alteration to reduce her days. The Claimant accepted that Pamela was on 15 hours throughout the time that she worked with her. We are satisfied there is no basis to suggest there with less favourable treatment of Comfort Ajagbe on the basis of her race.

A white consultant thinking it was funny to ask the Claimant if she ate rhino meet for lunch [paragraph 23]

39. The Claimant accepted that the consultant was employed temporarily as a locum and that she did not report the comment at the time. We are unable to infer therefore that the Respondent was aware of the comment let alone tolerated it having been made. There was no evidence that it came to their attention.

Black staff leaving without jobs to go to [paragraph *24]*

40. It was suggested that a four black staff left during the period November 2018 to June 2019 without having another job to go to and that this was as a result of their feeling let down and disrespected. The four people mentioned were Levinia, Jennifer, Comfort and Lorna (that is, the Claimant). It was put to the Claimant, and it was not contested, that Levinia went back to a former employer for whom she had worked previously and that this was at a higher salary. Comfort Ajagbe accepted that Levinia went back to her previous employer, she told us that Levinia had simply said she liked it there, that is at her previous employer's, and had not mentioned anything about her salary. It was not disputed that Jennifer left because she was unable to keep to 8:30 a.m. starts due to her childcare responsibilities. We have found that Comfort was offered a change in shifts and did not accept it for the reasons given above. Lorna is the Claimant, the fact that she was dismissed for gross misconduct is the subject of her complaint to this tribunal.

41. We considered the evidence in respect of Mrs Pollock's treatment of staff generally, from which we are invited to infer that there was less favourable treatment of and a lack of respect for black staff, in the round. We are unable to find any reliable evidence of that and only find impressionistic evidence from the Claimant and from Comfort. A number of the examples were shown to be based on a misunderstanding and in respect of others there is no comparison to be drawn. Looking at the totality of the evidence we have not found anything from which we could draw an inference of less favourable treatment. We do not find any evidence that Miss Pollock treated white staff better than black staff. We note however that there was clearly a perception within the organisation from not just the Claimant but also other black staff, including Comfort, that there was a culture in the organisation where black staff were not respected and evidence of a lack of clear communication which led to at least some staff feeling that they were not valued.

The Claimant's dismissal

42. We turn to the decision to dismiss, which is the subject of the substantive complaint before us.

43. The Respondent set out its case on the Claimant's dismissal [at paragraph 9 of its ET3 as follows:

> *"At a disciplinary hearing held on 20 March 2019 it was found that:*
>
> 1. *The Claimant had by her own admission faxed Patient Identifiable Data to the Care Quality Commission's (CQC) fax number. This was during the week that the CQC visited the centre to carry out their regulatory inspection.*
>
> 2. *On the balance of probability, it was thought likely that the act of sending the information to the CQC was a conscious and deliberate act, possibly intended to discredit the Respondent at a crucial point in the accreditation cycle.*

3. *In the course of the above incident the Claimant failed to comply with the Respondent's policy regarding Safe Haven controls in its Fax Management Policy, despite confirming that she had received both the appropriate training and was aware of her responsibilities under these controls."*

Evidence from the investigation

44. Mr O'Brien was appointed to hear the disciplinary. He was provided with an investigation report prepared by Sam Buckler, Operation Manager Will Adams NHS Treatment Centre. In the course of its investigation into the incident the Respondent obtained an explanation from the Claimant. Mr O'Brien summarised the Claimant's response to the allegations against her as follows: [paragraph numbers are from his witness statement]

> "12. In response to the allegations against her, Mrs Jarrett produced a statement and this is at pages 223-228. Mrs Jarrett read out her statement during her investigation interview on 13 February 2019 (pages 229-235). Mrs Jarrett accepted that she had sent the fax to the CQC but denied that she had done so with any malicious intent. Mrs Jarrett explained that she had attempted to fax the patient's GP several times on 22 January 2019 but the line was busy so the fax did not go through. Mrs Jarrett attempted to telephone the GP surgery but was unable to get through to anyone. Mrs Jarrett then checked the patient's paperwork and noticed there was another fax number written on the front of the patient's GP referral. Mrs Jarrett assumed that the triage team, which is a team of nurses who evaluate referrals for suitability, had written the number on the patient's referral so she decided to use that number. Mrs Jarrett attempted to send the patient referral to the new number but it would not go through. Mrs Jarrett therefore placed the patient's file in the grey cabinet with a view to re-trying to send the fax when she was back in work. When Mrs Jarrett was back in work on 24 January 2019 she re-sent the fax to the new number she had found (beginning 0300) and the fax went through. Mrs Jarrett strongly denied that she had sent the fax to the CQC on purpose saying she was happy working at Care UK and would not have done anything to damage her employment and career. "

45. Mr O'Brien told the Tribunal that when he read the investigation report the following points stood out for him:

13.1 The timing of the information being sent to the CQC being at the time a CQC inspection was taking place.

13.2 The significant difference between the fax number of the GP practice and that of the CQC.

13.3 The fact that the first time that Mrs Jarrett attempted to send the fax through to the 03000 it did not transmit. Mrs Jarrett then amended the number when she sent the fax the second time. These numbers did not even slightly resemble that of the GP practice and both numbers used by LJ for transmission are those of the CQC. Further,

the first number used was the CQC's telephone number and the second number was the CQC's fax number (page 215).

13.4 That the file cover sheet with the number used by Mrs Jarrett could not be found and was presumed removed or destroyed.

13.5 That Mrs Jarrett's log book which could have shed light onto the matter could not be located and was presumed removed or destroyed.

46. Mr O'Brien reached the decision that the allegations against Mrs Jarrett had been established on the balance of probability. He made his decision on the following grounds:

32.1 Mrs Jarrett had admitted faxing patient identifiable information to the CQC during the week the CQC was carrying out its inspection. I considered the timing of the incident was highly relevant because it would have been obvious that that any serious breach of protocol (such as uncontrolled transmission of patient identifiable data) during the physical inspection could cause maximum embarrassment to the service, be difficult to recover from and impact upon the CQC rating. At the time of the inspection, NELTC had a 'requires improvement' rating. All teams at NELTC had worked extremely hard to improve the service and were hoping for an improved rating. A serious breach of confidentiality could easily have impacted on the rating resulting in another 'requires improvement' rating or even an 'unsatisfactory' rating. As a member of the nursing team, Mrs Jarrett would have been aware of NELTC rating and the significance of the CQC inspection for NELTC.

32.2 Mrs Jarrett's actions had been a conscious and deliberate act. This conclusion was arrived at for a number of reasons:

32.2.1 The significant difference between the fax number of the GP practice and that of the CQC. Whenever a different fax number is to be used it must be verified as per the Safe Haven protocol and Mrs Jarrett was aware of this requirement. It seemed to me that such a significantly different number should have raised alarm bells to Mrs Jarrett to check it before using it. A simple internet search would have confirmed that the number was for the CQC but Mrs Jarrett took no steps to verify the number despite knowing that she should have checked the number before using it. Further, Mrs Jarrett made no attempt to use the original GP number on 24 January 2019.

32.2.2 Further, I thought it highly relevant that the number used on 22 January 2019 was the CQC's telephone number whereas on 24 January 2019 the CQC's fax number was used. Mrs Jarrett had maintained that the CQC's fax number

was written on the patient's cover sheet. When Mrs Jarrett attempted to send the fax on 22 January 2019 it did not transmit. She then re-sent the fax on 24 January 2019 to a different number and this time it was successful. It seemed to me to be too coincidental that Mrs Jarrett had accidentally entered the CQC's telephone number on 22 January 2019 and then was able to enter the correct fax number without having checked the number she was using.

32.2.3 Mrs Jarrett decided to retain the patient records until she returned to work, rather than to hand them over to a colleague who could have sent the fax for her. This seemed to be a strange and unnecessary course of action. It seemed to me that by retaining ownership of the patient's file Mrs Jarrett could ensure that the fax was sent to a specific number.

32.2.4 The alleged documentation with the CQC fax number written on it (the patient cover sheet) could not be found and was presumed removed/destroyed. There is no reason that the cover sheet would be removed or destroyed except to obscure any audit-trail. On the balance of probability, I reached the conclusion that Mrs Jarrett had removed or destroyed the cover sheet because in its absence her version of events could not be tested.

32.2.5 The other original documentation, namely Mrs Jarrett's Log Book, which would have shed light onto the matter could not be located and was presumed removed or destroyed. Again, the documentation would have provided an audit-trail for the events under investigation. On the balance of probability, I concluded that Mrs Jarrett must have removed or destroyed her log book because again, its absence meant her actions could not be verified.

32.2.6 The timing of the information being sent to the CQC was also suggestive of an action calculated to maximise the negative impact upon the service.

32.2.7 Mrs Jarrett had failed to comply with Care UK's Safe Haven controls which she was aware of.

33 In addition to the above detail, as noted below, as the disciplinary meeting progressed, Mrs Jarrett appeared to show no remorse over her actions. As the hearing went on her demeanour gradually changed and she became more defensive, more strident and less open. Mrs Jarrett repeated statements that she had made a mistake but showed no evident insight as to the potential consequences and implications for Care UK. I found Mrs Jarrett's position to be somewhat at odds with what one might expect in such a situation, where you might expect any individual to appear sorry and apologetic for the errors made and offer assurances that they will never make the same mistake again."

47. In deciding that dismissal was the appropriate sanction Mr O'Brien told the Tribunal,

> 36. A big issue for me when I was considering what sanction to impose was an assessment of Mrs Jarrett's attitude. I spent a considerable amount of time deliberating between a final written warning and dismissal. However, Mrs Jarrett's attitude and lack of insight and remorse tipped the balance for me. I had significant concerns that Mrs Jarrett's actions could well be repeated and that maintaining Mrs Jarrett's employment presented a significant risk to future patient confidentiality. I therefore concluded that the misconduct amounted to gross misconduct and that summary dismissal was appropriate in this case.
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> …
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> 37. I would like to make it clear that my decision to dismiss Mrs Jarrett was not taken lightly. I was extremely mindful of the impact on her and I went through the evidence very carefully and I considered in detail what she had said during the disciplinary hearing. In the end it was the lingering fear that Mrs Jarrett's actions might be repeated that tipped the balance in arriving at my final decision to dismiss Mrs Jarrett.

48. The Claimant's interview is at page 227. The Claimant admitted straight away that she was the person responsible for sending the fax to the CQC instead of the patient's GP surgery. She accepted she made an error and that this was a serious breach of the patient data privacy requirements and apologised for this. She disputed that she had done so deliberately, as a malicious act, stating that she had made a mistake.

49. We find that the CQC visit was against the background where the previous CQC report had not been favourable. The Respondent had spent considerable time, effort and financial resources in preparing for the next CQC visit i.e. in remedying the matters where it had been found to have fallen short on the previous occasion. The outcome of the CQC visit was of significant consequence to the organisation and it was extremely important that the visit went well and a favourable report grading was received.

50. Having been taken to the notes of the investigation we find that in her response to the allegation the Claimant was clear from the outset that the fax number of the CQC was written down in handwriting on the front sheet of the patient's file; she asked for her log book to be located and maintained that if the front sheet and/or her missing log book were located they would support her account. She also gave a clear explanation as to why she had taken the file back and placed it in the temporary filing cabinet , i.e because she didn't' want to leave her task to someone else and thought she could complete it when she was next on duty.

51. We find there was no investigation into what happened to the patient's file before it reached the Claimant. The Respondent did not look into whether someone in triage or medical records had put a note on the file or whether it was possible that someone on reception had the file on their desk or access to the file and on the morning of the visit from the CQC. We are satisfied from the evidence before us that there was no investigation of any exculpatory matters forward by the Claimant in support of her explanation. Having heard the evidence we have found that consideration was given to matters that pointed towards her guilt rather than matters that might suggest her innocence.

52. We are satisfied on the evidence before us that the Triage Medical Records Department account of what took place was accepted at face value, as was the account of Miss Joanna Pollock, who worked on the reception desk.

53. Mr O'Brien concluded that on the balance of probability the Claimant had sent the fax to the CQC in an attempt to discredit Care UK and not by accident as she claimed.

54. The tribunal were asked to consider how it was that the Respondent made the leap from the Claimant admitting that she had sent the fax in error to the wrong number to concluding that it was deliberate and malicious when she had no ascertainable motive. There was no suggestion that she had a grievance or a grudge against anyone or was a disgruntled employee.

55. Mr O'Brien was asked to explain why he could not accept or did not accept the Claimant's explanation or take her explanation at face value. He told us that he took into account that the Claimant had received training in fax handling and patient data, he considered that the removal of the cover sheet was suggestive of guilt rather than, as the Claimant was suggesting, something that would actually support her case and show that she was telling the truth. Mr O'Brien could not explain why this had not been looked into and why he dismissed the possibility that it might support the Claimant's explanation. He pointed to what he perceived to be the Claimant's lack of remorse and relied on the Claimant's demeanour in the hearing before him.

56. The Claimant 's case was that that finding was tainted by race that if she had been white the Respondent would have believed her explanation i.e. that it was an error and not deliberate.

57. Mr O'Brien told us that what tipped the balance against the Claimant when he considered the sanction was her "attitude and lack of insight and remorse". When asked, he accepted that she had clearly said in the investigation that she was sorry. He accepted that he had not asked her if she was sorry or raised that question with her.

58. Mr O'Brien also relied on what he described as the Claimant's "attitude" at the disciplinary hearing saying that her answers became shorter and her demeanour became more" strident", he described the Claimant as not being open to conversation and just wanting to read her witness statement. Mr O'Brien accepted that it was clear the Claimant was very nervous in the disciplinary and told him she wished to stick to her prepared statement in order to be clear that she had said what she wished to say. He could not explain why he had interpreted that as an illustration of hostility or lack of contrition.

59. We find that the Respondent completely discounted the Claimant's previous good record and many years as a registered nurse, the impact on her registration if she were found guilty of the misconduct, and the fact that there were many ways to discredit the organisation with the CQC anonymously without having her name and identity directly on the fax document.

The appeal

60. The Claimant appealed against her dismissal and Mr Anderson conducted the appeal hearing. He confirmed in his evidence that in her letter of appeal the Claimant set out some issues with the investigation undertaken and said she considered she was being treated disproportionately harshly given her good work record with Care UK. Mr Anderson noted that the Claimant said she considered that her treatment confirmed her suspicion that institutional racism was at play as she considered she was treated worse than other colleagues.

61. The Claimant said that she had found the whole disciplinary process daunting and distressing as the allegations related to her reputation and she would have to declare the reasons for her dismissal when applying for jobs. The Claimant then queried how Care UK had reached the conclusion that she had sent the fax maliciously as there was no evidence to support this conclusion.

62. Mr Anderson was aware at the appeal hearing that the Claimant was alleging that she had been discriminated against because of her race. She had asked why there was no investigation into what had happened to her log book. She also said that she was very sorry for sending the patent data to the wrong number and not following the fax protocol. The Claimant provided a report from a fax engineer confirming that the fax logs referred to in the investigation were inaccurate and she also pointed out errors in the investigation report where faxes were stated as being sent when they had in fact been received. Mr Anderson accepted in evidence that the key factors relied on in reaching the decision to dismiss were the attitude and demeanour of the Claimant. He upheld the decision to dismiss.

The relevant law

Direct discrimination

63. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

64. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

Causation

65. The House of Lords considered the test to be applied when determining whether a person discriminated “because of” a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see *James v Eastleigh Borough Council* [1990] IRLR 572. The council’s motive, which had

been benign, was besides the point. In that case the council had applied a criterion, though on the face of it gender neutral in that it allowed pensioners free entry, was inherently discriminatory because it required men to pay for swimming pool entry between the ages of 60 and 65 whereas women could enter the swimming pool free of charge. Sex discrimination was thus made out. In cases of this kind what was going on in the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose, will be irrelevant.

66. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he or she did. Although motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his or her reason? This is a subjective test and is a question of fact. See *Nagarajan v London Regional Transport* 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in *Amnesty International v Ahmed* [2009] IRLR 884.

Comparators

67. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

68. In constructing a hypothetical comparator and determining how they would have been treated, evidence that comes from how individuals were in fact treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as "evidential comparators"; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or "statutory", comparators; see, *Ahsan v Watt* [2007] UKHL 51.

69. Whether there is a factual difference between the position of a Claimant and a comparator is in truth a material difference is an issue which cannot be resolved without determining why the Claimant was treated as he or she was; see: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

The burden of proof

70. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

71. Thus, it has been said that the Tribunal must consider a two-stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see *Igen Ltd v Wong and Others* CA [2005] IRLR 258.

72. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

73. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

74. However, 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 a possibility of discrimination. “Could conclude” must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see *Madarassy v Nomura International* [2007] IRLR 246. As stated in *Madarassy*, “the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination”.

75. If the Claimant does not prove such facts, his or her claim will fail. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see *Glasgow City Council v Zafar* [1998] ICR 120 and *Bahl v The Law Society* [2004] IRLR 799."

76. In *Laing v Manchester City Council* [2006] ICR 1519, the EAT stated, among other things, that:

> *“No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An*

> *example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"'*

Guidance in the case law

77. In the case of *London Borough of Islington v Ladele* [2009] IRLR 154 the EAT gave further guidance on the question of comparison and the application of the burden of proof as follows:

> (1) In every case the tribunal has to determine the reason why the Claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport* [1999] IRLR 572, 575 - 'this is the crucial question'. He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.
>
> (2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial …
>
> (3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the section 136 of the Equality Act 2010. These are set out in *Igen*. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the Claimant to establish a prima facie case of discrimination:
>
> > 'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably on the prohibited ground, then the burden of proof moves to the employer.'

If the Claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal must find that there is discrimination.

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the Claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the Claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in *Zafar v Glasgow City Council* [1997] IRLR 229:

> 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in *Bahl v Law Society* [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test … The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in *Anya v University of Oxford* [2001] IRLR 377 …

(7) As we have said, it is implicit in the concept of discrimination that the Claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in … *Ahsan* … a case

of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paragraphs 36-37):

> The discrimination … is defined … as treating someone on racial grounds "less favourably than he treats or would treat other persons". The meaning of these apparently simple words was considered by the House in *Shamoon* … Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:
>
> (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.
>
> (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant …
>
> (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated … This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.
>
> It is probably uncommon to find a real person who qualifies … as a statutory comparator. … At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the Respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.' "

78. The following extract in italics from: *Ayodele v Citylink Limited* [2017] EWCA Civ 1913

> *36.In Igen Ltd v Wong [2005] ICR 931 this Court considered the effect of the amendments to the various discrimination statutes that had been made in relation to the burden of proof, including section 54A of the Race Relations Act. The lead judgment in this Court was given by Peter Gibson LJ. At para. 22 he accepted the submission made by counsel on behalf of the employee in that case and said:*

"The words 'in the absence of an adequate explanation', followed by 'could', indicate that the ET is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that, unless the Respondent provides an adequate explanation, the complainant will succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the Respondent at the first stage. …"

37.In the well-known guidance which was annexed to the judgment of this Court it was stated in para. (6):

"In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts."

38….

39.However, it should be noted that, in Laing v Manchester City Council [2006] ICR 1519, the EAT made it clear that there is an important distinction in this context between "facts" and "explanation". The judgment was given by Elias J (President), sitting with lay members. At para. 51 Elias J said:

> *"We note in particular three features of this section [section 54A of the Race Relations Act]. First, the onus is on the complainant to prove facts from which a finding of discrimination, absent an explanation, could be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799." (Emphasis in original)*

40.In para. 54 Elias J referred to what Peter Gibson LJ had said in the Igen case.

41.In Laing itself there was evidence adduced by the employer that the relevant person had indiscriminately treated all subordinates in an abrupt fashion. Counsel for the employee made the submission that that evidence should not have been taken into account by the ET at the first stage of the Igen analysis. This was because it was neither part of the evidence adduced by the Claimant nor evidence adduced by the employer which assisted the Claimant's case. It was argued therefore that this evidence was irrelevant to whether or not there was a prima facie case: see para. 57 of the judgment. In contrast counsel for the Respondents submitted that the ET should have regard to all the facts at the first stage to see what proper inferences can be drawn and that the treatment of others was plainly a highly material fact: see para. 58. The EAT agreed with that submission for the Respondents for a number of reasons, which are set out at para. 59:

> *"… First, we think that their argument is strongly supported by paragraphs (4) and (5) of the annex [the guidance in Igen] … These paragraphs focus on all the primary facts before the tribunal. In our view the reference to 'the complainant proves facts' in section 54A(2) does not mean that it is only the facts adduced by him (plus supporting facts adduced by the Respondent) that can be considered; it is merely indicating that at that stage the burden rests on the complainant to satisfy the tribunal, after a consideration of all the facts, that a prima facie case exists sufficient to require an explanation."*

42.At para. 60 Elias J said:

> *"Second, the obligation for the employer to provide an explanation once the prima facie case has been established, strongly suggests that he is expected to provide a reason for the treatment. An explanation is just that; the employer must explain. Why has he done what could be considered to be a racially discriminatory act? It is not the language one would expect to describe facts that he may have adduced to counter or to put into context the evidence adduced by the Claimant." (Emphasis in original)*

43.At para. 62 Elias J observed that there may well be evidence which should not properly be described as an explanation for the treatment:

> *"Rather it is merely factual evidence presenting a fuller picture of the material facts and putting the facts adduced by the employee in context, and thereby demonstrating that there is nothing about the circumstances to justify an inference of race discrimination …"*

44.At para. 63 Elias J gave as a third reason for his view:

> *"Third, Mr Leiper's approach would be requiring tribunals to adopt mental gymnastics. They will of course have heard all the evidence; they are then being asked to differentiate between the evidential source of different facts and artificially to pretend at stage one that they are not aware of those adduced by the employer. To leave out of account the explanation, as they are required to do, is itself artificial, although the distinction between fact and explanation is at least usually tolerably clear. But this approach would significantly and artificially complicate the fundamentally simple question of asking why the employer acted as he did."*

45.At para. 64 Elias J noted that there may be case in which the tribunal, having heard all the evidence, may be wholly convinced that the treatment relied upon simply did not occur. He went on:

> *"It is absurd to say that the employer is providing an explanation for the treatment when it did not even take place; he is simply adducing facts to dispute the evidence of the employee. It is plainly unjust to place the onus on the employer to show that the comments were not made and to prove that the employee is lying. It is for the employee to prove that he suffered the treatment, not merely to assert it, and this must be done to the satisfaction of the tribunal after all the evidence has been considered. Matters of credibility in particular can*

only be assessed in the light of all the evidence, and it cannot be right to require the employer to prove – let alone, in the language of the section to 'explain' – that the employee is lying." (Emphasis in original)

46.At para. 65 Elias J said:

"In our view, if one considers the burden of proof provision in the context of what a Claimant needs to establish in a discrimination claim, what it envisages is that the onus lies on the employee to show potentially less favourable treatment from which an inference of discrimination could properly be drawn. Typically this will involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. That involves a consideration of all material facts (as opposed to any explanation)."

47.At para. 66 he said:

"It is only if the Claimant succeeds in establishing that less favourable treatment that the onus switches to the employer to show an adequate, in the sense of non-discriminatory, reason for the difference in treatment. That requires a consideration of the subjective reasons which cause the employer to act as he did: see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, 341, para. 7, per Lord Nicholls of Birkenhead."

48.Realistically, however, Elias J recognised at para. 68:

"That is not to say that fact and explanation are hermetically sealed compartments. There is plainly a relationship between them. … Facts are not unrelated to the explanation, although they are not to be confused with it."

49.Finally, at para.76 Elias J rightly observed that ETs "are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. …"

50.Laing was approved by this Court in Madarassy, in which the lead judgment was given by Mummery LJ. At para. 79 he described the approach of Elias J in Laing as "sound in principle and workable in practice. This Court should approve it."

51.At para.70 Mummery LJ said:

"Although no doubt logical, there is an area of unreality about all of this. From a practical point of view it should be noted that, although section 63A(2) [of the Sex Discrimination Act 1975, as amended] involves a two-stage analysis of the evidence, the tribunal does not in practice hear the evidence and the argument in two stages. The Employment Tribunal will have heard all the evidence in the case before it embarks on the two-stage analysis in order to decide, first, whether the burden of proof has moved to the Respondent and, if so, secondly, whether the Respondent has discharged the burden of proof."

52.At para. 71 he continued:

> *"Section 63A(2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the Respondent disputing and rebutting the complainant's evidence of discrimination. The Respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy." (Emphasis added)*

53.At para. 72 Mummery LJ continued:

> *"Such evidence from the Respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegation of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in Laing … para. 64, it would be absurd if the burden of proof moved to the Respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all."*

54.The approach of this Court in cases such as Igen was approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054: see in particular para. 25 (Lord Hope DPSC).

Conclusions

79. We find that the fact that the Respondent did not explore any evidence that might support the Claimant's account and disbelieved her explanation, finding that she sent the fax deliberately and maliciously demands an explanation. We find that the accounts of the Triage Medical Records department as to what took place on the day was accepted at face value, as was the account of Miss Pollock. The evidence before us suggested that those people also had access to the file and could possibly be responsible for the CQC's number being written on the file sheet but their accounts were believed without further question. We find there is a difference between their treatment and that of the Claimant who gave an explanation, whilst accepting that the fax was sent to the wrong number in error, itself an admission of misconduct. We are satisfied on the evidence before us that disbelieving the Claimant's explanation in the circumstances requires an explanation.

80. It was submitted on the Respondent's behalf that that it had not been directly put to Mr O'Brien that he was racist or had reached his conclusion because of the Claimant's race. We are satisfied that the substance of the claim was put to Mr O'Brien. He was not directly asked if he was racist but the claim that he had to meet was clear. The Claimant's case was that subconscious bias was in play. The Respondent set out its understanding of the Claimant's case at paragraph 4 of its

amended Response as follows:

> "It is the Claimant's case that because of her race the Respondent attributed malicious motive to her actions which ultimately led to her dismissal."

81. The Claimant's case that there was no proper reason to disbelieve her account or to believe that she had malicious motive was squarely put to Mr O'Brien; the allegation that this was an act of race discrimination was the entire thrust of the case. A person may discriminate without being conscious that they are doing so, the House of Lords (as it then was) in *Nagarajan* reminded us that "Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination".

82. We made the following findings from which we could conclude there to have been race discrimination : (i) the failure to investigate the cover sheet and the missing logbook which the Claimant had maintained throughout would exonerate her, or at least support her response to the allegation and show that what she was saying was true -for instance we find there was no investigation into where the photocopy of the letter came from; (ii) the lack of acknowledgement of the Claimant's contrition and her apology; (iii) the failure to take into account the Claimant's lack of any motive; (iv) the lack of explanation for the difference in approach to the Triage Medical Records department and reception desk.

83. We find that any evidence that pointed away from the Claimant having done the act deliberately and maliciously was not fully investigated or was discounted. There was no satisfactory explanation as to why the Respondent believed the Claimant would deliberately and maliciously send the fax to the CQC. There was no evidence of any known grudge or any reason to suggest the Claimant would wish to jeopardise her career and reputation by sending the fax. We find it surprising that there is no explanation as to why this was not taken into consideration by the Respondent. We are satisfied that this was something that ought to have been taken into account.

84. Whilst we accept that Mr O'Brien did not consciously discriminate against the Claimant because of her race we find that the factors relied on, her demeanour, attitude, her supposed lack of remorse, are matters that demonstrate subconscious bias and are not free from the taint of race discrimination. We find that the Respondent has failed to discharge the burden on it to explain the difference in treatment.

85. We reminded ourselves that it is good practice to cross-check by constructing a hypothetical comparator and are satisfied on the evidence before us that there was a dismissive and negative approach taken to the Claimant and her explanation that would not have been evident had the person in the frame been white, we considered that had Miss Joanna Pollock for instance been in the frame her explanation would not have been met so dismissively.

86. We do find that the Claimant's race had a causative effect on the way the Claimant was treated. We are satisfied that the decision to dismiss the Claimant was tainted by considerations of race. We find that Mr O'Brien was prepared to think the worst of the Claimant even though logic would suggest that her actions,

which she readily admitted, were more likely to have been a mistake.

87. We find that the explanation for her treated has been in large part based on assumptions made about the Claimant's demeanour, her supposed lack of contrition and lack of an apology which were tainted by race discrimination. We find that the Claimant clearly did apologise and stated that she was very sorry during the investigation. Mr O'Brien accepted that she was clearly very nervous in the disciplinary and told him she wished to stick to her prepared statement in order to be clear that she had said what she wished to say rather than being an illustration of hostility or lack of contrition. Having heard Mr O'Brien's evidence we are satisfied that those negative connotations were tainted by race discrimination.

88. The Claimant's claim for race discrimination succeeds. A remedy hearing will be listed in due course.

89. I apologise to the parties for the length of time it has taken to send out this written judgment, the tribunal's deliberation having taken place in chambers in June 2021. Unfortunately, this has been due to the severe lack of judicial resources.

Employment Judge C Lewis
Date: 23 November 2021