EMPLOYMENT TRIBUNALS

Claimant: Susan Brannan

Respondent: Navigo Health and Social Care CIC

Heard at: Midlands (East) conducted by Cloud Video Platform

On: 21st, 22nd and 23rd September 2021

Before: Employment Judge Broughton

Appearances:

Claimant: In Person

Respondent: Ms Smith - counsel

JUDGMENT

The decision of the Employment Tribunal is that:

1. The claim of automatic unfair dismissal under section 103A ERA is not well founded and is dismissed.

2. The Tribunal find that the claim of ordinary unfair dismissal under section 94 and 98 ERA is well founded and succeeds subject to a 50% reduction in both the basic and compensatory award for contributory fault. No Polkey deduction is made.

REASONS

The Claim

1. The ACAS early conciliation period commenced on the 28 February 2020 and ended on the 28 March 2020. The claim was issued on the 22 April 2020.

The issues

2. At a preliminary hearing on the 22 July 2020 Employment Judge Dyal identified the issues to be determined by the Tribunal with the parties and they were agreed to be as follows;

1. *Did the claimant may make any protected disclosures?*

2. *The claimant contends that she disclosed the following information;*

    a. *A on 3 June 2019, told Janine Smith that some of the overseas nursing staff were not engaging with services users or meeting their needs, that a service user had been force fed, that staff had been falling asleep on duty and arriving late to duty.*

    b. *On 26 June 2019, told Freedoms Nwokedie, that the care on the ward was poor such that there was a view among staff that they would not want their own parent's to be cared for on the ward.*

    c. *On 1 October 2019, responded to a staff survey and reported that staff were uncaring, falling as keep and leaving shifts early to work elsewhere, leaving staff shortages and putting patient's safety at risk*

    d. *On 2 October 2019, told Tom Hunter, that service users were vulnerable and put at risk by staff falling sleep and working in other places*

3. *In respect of the information disclosed;*

    a. *Did it, in the claimant's reasonable belief, tend to show that there was or had been a danger to the health and safety of a services users?*

    b. *Was it, in the claimant's reasonable belief, in the public interest to make the disclosures?*

Unfair dismissal

4. *What was the reason for the claimant's dismissal:*

    c. *The respondent contends that it was conduct*

    d. *The claimant contends that it was protected disclosure (s) and thus that the dismissal was unfair by section 103A Employment Rights Act.*

5. *If the reason for dismissal was a potentially fair one, was it fair in all the circumstances having regards to s.98 ERA?*

3. The claimant does not complain of any acts of detrimental treatment under section 47B Employment Rights Act 1996 (ERA). Her claim is concerned only with the act of dismissal.

4. At the commencement of today's hearing, counsel for the respondent informed the Tribunal that the respondent is no longer disputing that the claimant made the four qualifying disclosures. The respondent concedes that the claimant on all those occasions made disclosures which the respondent accepts was a disclosure of information which in the reasonable belief of the claimant tended to show that the health and safety of any individual has been, is being or is likely to be endangered, namely the patients cared for by the respondent and that the claimant held a reasonable belief that the disclosure of this information was in the public interest pursuant to section 43B (1)(d) ERA.

5. Counsel for the respondent confirmed, that the only legal issue in dispute as far as the section 103A ERA claim is concerned is therefore causation; whether the reason

for dismissal or if more than one, the principal reason, for dismissal was that the claimant had a made one or more of those protected disclosures.

6. The issues were otherwise agreed to be as set out in the record of the Preliminary Hearing (above).

Evidence

7. The claimant produced a witness statement and swore to the truth of it under oath and was cross examined by the respondent. The claimant also produced a witness statement from her UNISON Union representative, Ms Anna Kuzemczak . The claimant had sent into the Tribunal a signed copy however, it was undated. Ms Kuzemczak did not attend the hearing. The respondent did not object to the statement of Ms Kuzemczak being admitted into evidence subject to representations regarding the weight to be attached to it.

8. The respondent called two witnesses who provided witness statements, swore to their accuracy under oath and were cross examined by the claimant; Mr Michael John Reeve, Director of Operations of the respondent and Ms Elizabeth Jane Lewington, Chief Executive of the respondent.

Findings of Fact

9. All findings of fact by this Tribunal are on a balance of probabilities. All the evidence has been considered, albeit only the evidence and facts relevant to the Tribunal's determination of the issues in dispute between the parties is set out in this judgment. References to page numbers in square brackets, are to page numbers in the agreed bundle. Words emboldened in quotations reflect the Tribunal's own emphasis.

Background

10. The claimant was employed by the respondent as a Registered Nurse Practitioner from 20 February 2010 to 4 December 2019. She summarily dismissed on the ground of misconduct.

11. The respondent is a not for profit social enterprise which provides mental health care in North East Lincolnshire.

12. The claimant had worked for the respondent as at the date of termination, for approximately 9 years and been a Registered Nurse for approximately 25 years. There is no dispute that the claimant is an experienced and devoted nurse.

13. Ms Lynne Robinson, Clinical Lead held regular supervision meetings with the claimant.

14. The Senior Operational Manager was Ms Freedom Nwokedie, who was Ms Robinson's supervisor. Ms Nwokedie was the person the claimant could raise concerns directly with, if she had concerns about patient care.

15. Ms Janine Smith, was the Assistant Director into whom Ms Nwokedie directly reported into.

16. Ms Nwokedie did not give evidence before this Tribunal and no witness statement was provided by her. The claimant gave evidence about the state of her relationship with Ms Nwokedie for the period from January 2019. The claimant gave evidence under cross examination that Ms Nwokedie had not spoken to her since Christmas

2018. Ms Nwokedie managed a choir which the claimant sang in, and there was some disagreement between them both when someone else took over its management. The claimant's undisputed evidence is that she found Ms Nwokedie unapproachable from that point . While the Tribunal accepts the relationship was no longer on the same friendly terms and this may have made it more awkward for the claimant to approach Ms Nwokedie with concerns, the claimant did attempt to do so however the Tribunal accept the claimant's evidence that there was something of a 'rift' in their working relationship.

Policies – whistleblowing

17. The respondent has a Whistleblowing policy. There had been a number of versions of it during the period in which the claimant had been employed. The version in place from May 2018 includes the following provisions;

"*Our Freedom To Speak Up (FTSU) Guardian is a nationally mandated post, which is independent and has been appointed specifically for the purposes of supporting an open culture where any issues of safety, malpractice etc can be raised. The FTSU Guardian will therefore act as first point of contact where concerns can be raised in confidence.*" [p.44]

18. The policy sets out the telephone number and email address of Claire Withers, the FTSU and states that the FTSU Guardian; " *will ensure that initial enquiries are dealt with in the strictest confidence*…" [p.48]

19. The policy includes a flowchart [p.56] which provides that after raising concerns, there will be a preliminary fact find interview within 24 to 72 hours and then an investigation completed within 20 days with feedback to the initiator within 10 days of the investigation being concluded.

Datix

20. The respondent uses Datix which is a web-based incident reporting and risk management software system.

21. The claimant confirmed under cross examination that she knew that it was her responsibility to report any relevant issues, which would include accidents and incidents involving risks to patients, onto the Datix system so they could be recorded and followed up. The claimant also accepted that she knew she had a duty to speak out if she felt someone was at risk and she understood the routes by which she could do so.

Disciplinary policy

22. The disciplinary policy sets out examples of Gross Misconduct which include; "*Unlawful discrimination or harassment".*

23. The Disciplinary Policy includes a flowchart [p.75] which starts with identification of the alleged misconduct and then a Preliminary Investigation where the Manager meets the employee to establish facts. The Manager is then to consider the facts and decide whether the matter can be resolved informally or if more serious, the Manager is required to *commission* an investigation and consider suspension.

March 2019

24. The respondent has two mental health units, the Konar ward and the Jane Smith ward. The relevant events which lead to the dismissal of the claimant, began in March 2019 following the arrival of some new nurses from Nigeria who worked as nurses and support workers on the Konar ward.

Transition

25. The undisputed evidence of the claimant is that the respondent did not arrange any welcome meeting or cultural training.

26. The Tribunal find that on the evidence before it, that the respondent did not put in place effective measures to address the integration of the new staff into the team. Despite the claimant accepting the evidence which Mr Watson, Head of Workforce, gave during the disciplinary hearing that no issues about recruitment or retention issues were brought to the attention of HR, there is evidence from a number of staff during the disciplinary investigation process, that there were differences in the way the new nurses worked and this caused some unrest on the Konar ward. There were some cultural differences and this created some concern and some anxiety for not just the existing staff but for the new staff. The fact that Mr Watson had apparently no awareness of any unrest, demonstrates the Tribunal find, a lack of engagement and communication with staff working on the ward.

27. Had their been a more proactive and better communication, this may have mitigated some of the difficulties.

28. The claimant complains in her statement of evidence that the new nurses were speaking in "*their own language*" which was upsetting some service users who are older people with mental health issues.

29. The claimant alleges that (w/s para 3);"*The **new nurses** did not engage with service users and were not meeting their needs"; and " **The nurses** were challenged by me and other nursing staff".*

30. While the Tribunal accept, that there were concerns with some of the new nurses, which would include two incidents of forceful feeding of a patient, the claimant would display a pattern when writing and talking about the new nurses of referring to them collectively, as a group, rather than identifying issues and concerns with particular individuals.

28 April 2019 – supervision meeting

31. The claimant voiced her concerns about the new nurses with Ms Robinson, Clinical lead in a supervision meeting on 28 April 2019.The record of that supervision meeting [p.90/91] records the following comments from Ms Robinson;

*"We discussed the new staff that have started on the unit ready for the opening of the complex care unit, sue stated that at times the unit can be very busy with staff and she finds that at times jobs are not always getting done, but that she understands that at the present time we are inducting new staff ready for the new unit. I asked if she had any particular issues she said that she needed to speak with **a new member of staff about the way they were feeding a service user as she thought they were not listening to the service user**, I asked Sue how she felt about this and she stated " it's all about patient care" and I am happy to speak to people to explain the ethos of Konar".*

32. The claimant confirmed under cross examination that the reference to '*new staff'*, is a reference to the new nurses from Nigeria, again a reference to them as a collective.

33. The claimant under cross examination confirmed that although she considered this incident of how a service user was being fed, to be serious, she did not enter the incident on Datix, she raised it instead during the supervision meeting and was content to address this directly with the new nurse concerned. The Tribunal note that there is no comment in the record by Ms Robinson that the incident should be formally reported and she does not ask the claimant to do so. The Tribunal accept therefore that Ms Robinson was in agreement that this was an appropriate way to proceed, and the Tribunal find on balance that this response was because the nurse was new and allowances were being made for a period of transition to the working practices of the respondent.

34. The record is signed by Ms Robinson but not signed by the claimant however she does not dispute its accuracy.

35. The claimant in answer to question from the Tribunal, believed that Ms. Nwokedie would have known what she had mentioned in the supervision meeting, that her comments would have been fed back to her. Given that Ms. Nwokedie did not give evidence to rebut this, and that she was responsible for the operation of the Konar suite and the recruitment of the new nurses, the Tribunal finds that on a balance of probabilities, what had been discussed with the claimant at this meeting, would have been reported back to Ms. Nwokedie by her immediate supervisor.

8 May 2019 supervision

36. The claimant had a further supervision meeting with Ms Robinson on 8 May 2019.The record of that supervision meeting is signed by both the claimant and Ms Robinson [p.92/94].The notes record that the claimant is having difficulties outside of work and is having counselling.

37. The notes also record that the claimant is finding the changes to' system one' difficult. It is common between the parties that the claimant was having difficulties completing administration using the computer system. Ms Nwokedie, had asked Ms Robinson to discuss with the claimant the option of the claimant stepping down to a lower band role as a Support Worker which would involve more interaction with the patients, part of the job which the claimant enjoyed. The notes record that; "*Sue feels that maybe the time is right for this - she is going to go away and think about this.* …"

38. An agreed action was for Ms Robinson to arrange for the claimant to meet with Ms Nwokedie to review this. At 67 years of age, the claimant gave evidence before this Tribunal that she felt she was nearing the end of her career as a nurse.

39. The record of the meeting, signed by the claimant did not indicate that the claimant was opposed to the change of role, the notes reflect that she appeared to be receptive to it.

40. The claimant under cross examination conceded that this discussion about the difficulties she was having and the suggestion of accepting a lower band role, left her nonetheless feeling '*insecure'*.

41. The claimant did not raise at this meeting, any concerns about the new nurses. It would the Tribunal find, become clear however, that the claimant would see a link between Ms Nwokedie plans to recruit more new nurses from overseas and her

suggestion of that claimant stepping down from a Registered Nursing role. The respondent denies any such link however Ms Nwokedie was never interviewed or asked by the respondent during the disciplinary proceedings about whether this was part of her thought process and she has not provided any witness statement for the purposes of these proceedings. The Tribunal consider however, that when recruiting new nurses who some of which, had accepted less senior positions to move to the UK and were ambitious to achieve Registered Nurse status, that an incumbent nurse who by her own admission, was nearing the end of her nursing career and who was struggling with elements of the role, it may well have seemed for progression purposes, helpful to move the claimant into a support role.

42. However, this move to a support worker role was the Tribunal find raised with the claimant at the suggestion of Ms Nwokedie, prior to any of the protected disclosures and the Tribunal find no link between that suggestion and the protected disclosures.
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13 May 2019

43. The claimant's evidence is that concerns were raised about the new nurses '*speaking in their own language*' at a staff meeting on 13 May 2019. The claimant does not identify by name the other members of staff she alleges voiced concerns and the Tribunal was not provided with any record/minutes of that meeting. The Tribunal accept on balance, that this issue was raised by other staff.

44. The claimant also gives evidence that Ms Nwokedie had stated at this meeting that she was over budget with staffing however she was going to Nigeria to recruit more nurses and the claimant complains that; *"This made staff very insecure due to being told there no money in the budget for staff."*

45. The claimant accepted under cross examination that the situation also made her personally feel insecure.

Events from 13 May 2019

46. The claimant complains that the new nurses from Nigeria were turning up late for shifts and were falling sleep on duty.

47. The claimant complains that the new nurses were reprimanded by other qualified staff and reports were made to Ms Nwokedie but not action was taken. The claimant does not identify who the other staff are who she alleged reprimanded the new nurses, she does not identify the dates these events took place or which new nurses were involved.

48. The claimant does not allege that these other staff made any entries on to the Datix system of these instances and the claimant conceded in cross examination that she had not mentioned these verbal reprimands or the failure by Ms Nwokedie to take action, during the disciplinary process.

49. The claimant would later complain that some staff had other jobs which meant they were tired at work. The respondent would later identify one case where someone was working elsewhere.

50. The Tribunal accept the claimant's evidence on a balance of probabilities, that some new nurses were reprimanded by other staff for being late and there may have been a limited number of occasions when a member of staff was asleep, however the Tribunal do not accept that the instances were as serious or frequent as the claimant

alleges otherwise the incidents would have been entered on to the Datix system and the claimant would have raised the incidents and/or failure by Ms Nwokedie to take appropriate action, if not prior to, then at least during the disciplinary process when she had union representation and was during the course of that process, complaining about the performance and conduct of new nurses.

3 June 2019 : Protected Disclosure 1 – to Janine Smith

51. The claimant then met with Ms Janine Smith, Associate Director for Business Service Delivery. The respondent has not provided any record or minutes of this meeting.

52. The claimant was due to be interviewed by a researcher for the Government about how the respondent treats registered carers who also have to work, (the claimant was herself a working carer). During this meeting to discuss the interview, the claimant refers to discussing the progression of her future career again.

53. The claimant denied that there had been a discussion about her taking a lower band role in this meeting but accepted that they had discussed her difficulties with the computer but Ms Smith had it seemed made her feel more secure. Under cross examination the undisputed evidence of the claimant is that Ms Smith gave her a lot of confidence that as long as the claimant was happy , Ms Smith was happy for her to continue in her current role.

54. The discussion then moved onto a discussion about the claimant's unhappiness on the ward. Her undisputed evidence is that she raised that she and that other staff were unhappy. It is not in dispute that she made a protected disclosure; she disclosed to Ms Smith that the new nurses were falling asleep on shift and not meeting the needs of service users. She also disclosed that a service user had been seen to be force fed by one of the Nigerian nurses. The 'force-feeding' incident the claimant clarified under cross examination, had taken place on Saturday 1 June 2019 and she had reported it to Ms Smith at this meeting on Monday 3 June 2019.

55. The claimant also alleges in her statement of evidence, that she disclosed that the new nurses wanted to lock service users in their room. The alleged disclosure about staff wanting to lock service users in their room, was not part of the alleged pleaded disclosure. The Tribunal explained to the claimant the process for making an amendment to the pleaded case and that she could make an amendment application at any stage of the process. The claimant informed the Tribunal that she was content to proceed with the case as pleaded and did not want to make an application to amend.

56. During the investigation hearing with the claimant on 5 November 2019, she would recount what had been discussed at this meeting with Ms Smith, [p.143]as follows;

"*I also wanted to use the appointment to say things aren't good on the ward. And in between that**, a colleague** came to me and said, " I wouldn't want my mum and Dad on this ward at the moment" There was allsorts [sic] going around. I told the overseas nurses that we don't lock the doors because they're wanting to lock their patients in their rooms. So I said, right, went to Janine.."*

57. The claimant under cross examination gave evidence that the nurse during the incident on the 1 June, was forcing the utensil into the patient's mouth. In her statement in evidence she referred to having to remove the utensil from the nurse to prevent her continuing to force the patient to feed. The claimant under cross examination confirmed that despite how serious she describes the incident, she did

not report it on Datix and because it happened on a Saturday at 5.30pm, she waited to reported it on Monday 3 June 2019 to management. However under cross examination she accepted that she had contact details for various managers and could have contacted a manager at the time but that she decided not to report it on Datix because she understood that; *"… the new nurses were struggling with cultural change"*

58. The claimant chose not to raise this issue to Ms Nwokedie but bypassed Ms Nwokedie and reported the incident to Ms Smith. In the investigation hearing [p.143] she did not however describe removing the utensil or mentioned it being forced into the patient's mouth but described; a nurse force feeding a patient and " *I have to take the dish off them*..". During the disciplinary appeal hearing [p.217] she described the incident as follows;

" This patient didn't need to be force- fed. She ate herself. Twice, I told her to stop feeding this patient, and she took no notice of me. I had to take the dish off her in the end" and "….she was walking around the room with her".

59. The Tribunal find on a balance of probabilities, that the incident was not as serious as the claimant now alleges i.e. that a feeding utensil was not forced into a patient's mouth but what the Tribunal find more likely, is that the nurse was being overbearing or overly insistent with the patient about feeding, which is more consistent with how the claimant described the incident in the meeting in November 2019 (and would explain why she did not contact management immediately and make a Datix report). Although the claimant alleges she waited because it happened on a weekend, in the investigation meeting she records not that she went to see Ms Smith *because* of this alleged force-feeding incident but that she was seeing Ms Smith about the interview with the Government researcher anyway and felt; " *Whilst I'm here I'm' also unhappy about the ward".*

60. The claimant's evidence is that she was told by Ms Smith during this meeting that the new nurses had come from 40 bedded wards in Nigeria and there was only one qualified nurse on each shift . They used medication restraint and their family performed all personal care for the patients. The claimant alleges that they discussed how staff were afraid to comment because of ' *racist connotations'* and alleges Ms Smith stated; *"it's not racism, if they are not doing their job they can go home, tell staff to come and speak to me and I will them that and to not go to Claire Withers as it would cause problems across Navigo"*

61. The claimant also alleges that Ms Smith made the following comments to her;

"…Freedom has taken her eye off the ball"; And

"you know you will get it in the neck from Freedom"

62. The claimant's recalled the discussion with Ms Smith during the disciplinary investigation meeting on 5 November 2019 [p.143 - 144] however, her account of what Ms Smith had said was; *"It's about care and they can go home if they're not going to care properly"* ***They were Janine's exact words*** *. She said to tell the girls not to go to Claire and to go to her instead."*

63. The claimant accepted in cross examination that she had not during the disciplinary investigation mentioned the alleged comments that *"…Freedom has taken her eye off the ball"; And "you know you will get it in the neck from Freedom".* The claimant's explanation for not mentioning these alleged comments is that she was distressed in the meeting and taking medication, namely Diazepam because she was not

sleeping. The Tribunal note that she referred to taking this medication and the respondent does not dispute this however, she never mentioned these alleged comments in the disciplinary or appeal hearing either and she did discuss many matters in some detail. Ms Smith did not attend this Tribunal hearing to give evidence and neither was a statement submitted by her for the purpose of these proceedings, however, given the Tribunal's finding that the claimant has embellished her account of some of the events, the Tribunal find that on balance, given her failure to recount this detail in those important meetings, that these additional comments were not made but in any event, they were not brought to the attention of those conducting the disciplinary process.

64. The claimant asserts that by taking her concerns to Ms. Smith, she had taken it out of *"the family"* i.e. outside of the Konar unit by not raising it with Ms. Nwokedie and she felt this was the start of the problem between them.

65. Mr Reeve gave evidence that he would expect Ms Smith to raise serious concerns with him however he did not know whether that was because she had investigated it herself. The respondent disclosed during the course of this hearing, further documents recording a supervision meeting between Ms Nwokedie and Ms Smith dated 4 June 2019. These are not documents which Mr Reeve had, had sight of during the disciplinary hearing and counsel for the respondent accepted therefore that their content was not relevant to the fairness of the dismissal but relevant to the questions which had been raised about the steps Ms Smith had taken or not taken, to address the claimant's concerns raised with her on the 3 June 2019 and whether the respondent had ' swept them under the carpet' or addressed them.

66. Neither Ms Smith nor Ms Nwokedie were present to give evidence about the document, although Mrs Lewington gave evidence under oath that she recognised the signatures on the document as theirs. That of course only takes us so far because they are not present to give evidence under oath as to the accuracy of the content of the records.

67. Within the supervision notes, it refers to the claimant feeling that Ms Nwokedie wants to get rid of her and all the attention has been on the overseas nurses to the neglect of the current staff [p.358]. The note reports Ms Nwokedie as stating that she did not want the claimant to leave and had asked Ms Robinson to follow up her request to drop to a support worker role. Ms Smith also refers to the claimant raising issues about patient safety and that "*force feeding obviously would not be tolerated*" and it records Ms Smith agreeing to ask for this to be discussed with the nurse concerned directly.

68. The note also refers to Ms Smith informing Ms Nwokedie about concerns raised by the claimant about patient safety but records that the claimant had not been specific about the issues, commenting that; "*they do not understand our practices".*

69. There is a follow up file not on 6 June 2019 [p. 360]. This notes that Ms Nwokedie had met with Ms Maitanmi, the nurses alleged to have force fed the patient, and she denied force feeding. Ms Nwokedie was asked by Ms Smith to meet with the claimant to discuss this force feeding issue further and reassure her that there was no intention to get rid of her and; " *Freedom raised concerns that Jacqui had informed her that she was worried that [the claimant] was becoming paranoid about Freedom and the Nigerian nurses" .* The reference to Jacqui it is not in dispute, is a reference to Jacqueline Ellis.

70. The claimant disputes the content of the file note and in particular the comment about Ms Ellis referring to her as 'paranoid'. Ms Ellis would during the investigation

interview with her as part of the disciplinary proceedings, later express concern about the claimant linking the arrival of the new nurses with her own position. The evidence Ms Ellis would later give during the disciplinary proceedings, is evidence which would support that such a concern had been expressed to Ms Nwokedie at this time . The Tribunal find on balance that a comment was made to that effect by Ms Ellis about the claimant appearing 'paranoid'.

NHS survey

71. The results of a staff survey showed a culture of bullying in older peoples mental health and the Chief Executive, Ms Lewington invited staff by email to '*say it as it is'*. The claimant made an appointment to meet with Ms Lewington on 27 June 2019 to discuss her concerns.

26 June: 2 Protected Disclosure – to Ms Nwokedie

72. It is not in dispute that the claimant was then called to a meeting with Ms Nwokedie and Ms Robinson on 26 June 2019 and was asked what her concerns were. Ms Smith had asked Ms Nwokedie to meet with the claimant to follow up on the concerns the claimant had raised with Ms Smith.

73. The Tribunal find that Ms Smith was therefore addressing the concerns raised with her by the claimant, even though she had not categorised the complaints as whistleblowing.

74. The claimant alleges that she informed Ms Nwokedie in this meeting that there was a view amongst ***staff*** that they would not want their own parent's to be cared for on the ward.

75. The claimant accepted that during the disciplinary investigation interview on 5 November 2019 [p.143] the claimant would allege that only" …***a colleague*** *"* had commented that they would not want their parents on the ward. Either the Tribunal find the claimant was exaggerating when she gave this feedback to Ms Nwokedie or has exaggerated since what she reported to her at the time.

76. The claimant alleges in her evidence in chief, that she informed Ms Nwokedie at this meeting about Ms Maitanmi force feeding a service user and how staff wanted to lock service users in their rooms. The claimant had not pleaded that she had made a protected disclosure during this meeting of anything other than the comment about staff not wanting their own parent's to be cared for on the ward. The claimant confirmed that she did not wish to amend her claim.

77. The claimant was then informed by Ms Nwokedie that Ms Prest, Ms Nwokedie's secretary, had complained that the claimant had made some racist comments about the new nurses. The claimant complains that Ms Nwokedie was aggressive toward her and accused her of being a '*racist'.* The claimant denied that she had made remarks which were racist. It is not alleged that the claimant was told what the specific allegations were.

78. The claimant alleges that Ms Nwokedie went on to complain about the claimant's work, threatened to start a performance management /capability process and asked her why she was still working when she had a pension. She also alleges Ms Nwokedie commented that she knew about the claimant's appointment with Ms Lewington.

79. The claimant left work and went home as she was so upset. She cancelled her meeting with Ms Lewington as she felt she had said enough.

80. When the claimant was interviewed on the 5 November 2019 she complained that at this meeting; *" I was called a racist" and "what are you doing working anyway, when you've got your pension…?" and ". It was aggressive. It was abusive…"*

81. The claimant informed the investigating officers that Ms Robinson had been presented during this meeting when these things had been said to her [p.148] however, although Ms Robinson was interviewed, she was not interviewed again after the claimant raised these allegations and asked about the meeting.

82. There is a further file note for the 26 June 2019, [p.361] in which Ms Nwokdei reports to Ms Smith that she had met with the claimant with Ms Robinson present and felt this had been a constructive meeting and they had agreed to move forward. The claimant denies the accuracy of the note which does not record Ms Nwokedie accusing the claimant fo being racist .

83. Ms Nwokedie was not interviewed and thus did not rebut the claimant's account of their meeting.

84. The claimant would report to the Chairman, Mr Hunter on 2 October 2019 that Ms Nwokedie had accused her of being racist and that this had upset her.

85. Given the claimant has consistently complained that Ms Nwokedie accused her of being racist, the Tribunal accept her account that she did so.

86. It is also not in dispute that the claimant did cancel her meeting with Mrs Lewington on the 27 June 2019 and that she did refer to 'victimisation' later in the feedback in a staff survey.

87. Following this meeting, Ms Nwokedie moved the claimant to the Jane Smith Unit on 26 June . This may have been an attempt to address the issues with the new nurses. There is no evidence that Ms Nwokedie took any further steps to address the unrest on the ward. There was no diversity training arranged whether for the claimant or the team more generally to address the integration issues.

88. There well have been legitimate concerns over the divisive language the claimant was using about the new nurses however the Tribunal find that the claimant had some genuine concerns about a difference in working practices and this does not appear to have been really engaged with and addressed by the respondent in a constructive manner.

89. During the disciplinary proceedings, Mr Reeve makes the comment that there is no documentary evidence about any unsettlement on the ward [p. 197]. Ms Kuzemczak confirms that nothing has come to her attention from JCC or from the Union however, she does go on to state; " *However, at the investigations, I said to you, didn't I Lynne, things came to my attention that I knew nothing about and I said I would follow up at JCC. I've not had the opportunity yet."* Despite the comments that staff would make during the disciplinary proceedings, Mr Reeve would appear unwilling to acknowledge that there had been any issues in the integration of the new staff.

90. Mr Reeve may not have been aware of any unsettlement however he does not seek to explain in the disciplinary hearing, why Mr Ayangbile, one of the Nigerian nurses, (whose evidence Mr Reeve would rely upon to make a finding that the claimant had

made racist comments) had made the following observations, if there were no issues about the integration of the new staff ;

"Someone came from another site… If have an issue, talk to whoever did the rota if you want to be on with a white… Some people just feel threatened…"

And;

" *I think it's nice that you're looking at it. I just want to find a way so people can work amicably. I've made efforts to be here…It shouldn't be like this. .. people need time to adapt. Some are doing better than others, One colleague describes us as slaves and their masters"…"*

91. Ms Robinson, in her interview on 22 October 2019 states; "*we've had an influx, and I'm not just taking about Nigerian nurses getting their PINs, we've had a lot of support workers in general on account of opening the complex care unit. This has meant we've had a lot of staff starting at the same time, which in itself , causes unrest with the ward…"*

92. Mr Reeve appears to the Tribunal to have taken at face value the lack of any formal reporting back of issues and chosen to not acknowledge the evidence of unsettlement on the '*shop floor'* which had not been escalated and thus it appears, had not been addressed by management.

93. Ms Ellis, a Senior Nursing Practitioner in her statement during the disciplinary investigation, commented on what she saw as a lack of understanding about equality and perhaps lack of appropriate training for staff [p.124];

"So, some of the service users do struggle. It is difficult and… particularly, like I say, in that age group, but it is, it's the language and the language they use, ***that some of our staff use****. I think ' you can't really say that. You can't say white. You need to say English but that's education, isn't it? That's people's lack of education* ***and I'm not sure Equality and Diversity E- learning covers it quite frankly. It ticks a box yes, but it doesn't adequately prepare the staff member for a multicultural workforce."***

94. Mr Reeve does not enquire about whether and what diversity training has been given to prepare the staff for the arrival of the new nurses and the difference in working practices and cultures. In his evidence before the Tribunal he expressed the view that whether there had been unsettlement or not, that would not justify the comments that were alleged to have been made by the claimant.

OPMHS forms: 3 Protected Disclosure - 1 October 2019

95. Ms Lewington arranged for staff to complete a staff feedback forms. The claimant alleges staff would not fill in the form for fear of repercussions but she did so. The claimant did not identify herself on the form and had her sister in law complete the survey (Survey), to disguise her identity.

96. The form she filled in [p.246] includes comments in response to set questions. The forms asks what 3 things the person would have to improve job satisfaction and morale, to which the claimant responded "*1. Favouritism for all members of staff .All grades apparent split the teams and fuels conflicts 2.Some staff are not adhering to Navigo code of conduct e.g. working at other agencies 3. Victimisation"*

97. The claimant also made the following comments which are the disclosures the claimant relies upon as protected disclosures;

    5. *"It has been noted that some members of staff are working in other agencies (Bradley Woodlands) and are leaving shifts early, coming in late, sleeping on duty, compromising their service users and colleagues*

    6. *Not safe working practice and have not been reprimanded*

98. The claimant also made the following comments;

    7. *There appears to be a culture of victimisation against staff who complain. There have been comments made of ageism and racism.*

    8. *Konar has unfortunately as become a TOXIC environment"*

99. Despite going to significant lengths to keep her feedback form anonymous, the claimant alleges that she informed staff on the ward what she had said in the form, including Ms Grimes.

100. Ms Grimes did not give evidence before this Tribunal and there was no witness statement from her refuting that she had been told by the claimant what she had put in the form. On a balance of probabilities, the Tribunal accept the claimant's evidence, that she did tell her and others. The claimant does not dispute however that she did not mention what she had written at the time to any members of the management team, however she believes that Ms Grimes will have fed back her comments to Ms Nwokedie.

3 September 2019

101. The claimant alleges that she was called into Ms Nwokedie's office and accused of encouraging staff to fill in the Survey and told that it would hurt Ms Smith and the respondent. There is no record of this meeting and the claimant does not mention it during the formal disciplinary process.

102. However, Ms Prest in her investigation interview on 6 November 2019 [p.169] refers to the alleged racist comments being made to her by the claimant around the time of the Wellbeing Project and that she was aware that they were collating the questionnaires at that time to be handed in and the claimant, she alleges, was putting pressure on people to hand these in; " *I don't want to use the term bullying but harassing*…"

103. Given that Ms Prest had reported to Ms Nwokedie that the claimant had made racist comments on 3 June 2019, the Tribunal find that on a balance of probabilities that she would also have reported to Ms Nwokedie that the claimant was "*harassing' staff to complete the Survey*" to Ms Nwokedie.

104. Given how direct Ms Nwokedie had been with the claimant in their 26 June meeting, following the report back from Ms Prest about her comments, the Tribunal accept on a balance of probabilities, the claimant's account that this discussion took place. Ms Nwokedie had not kept a record of this meeting or if she had, it has not been produced.

105. There is no direct evidence however that Ms Nwokedie had been told what the claimant had put in the Survey, however given that she knew that the claimant was encouraging staff to fill it in, and given the nature of the claimant's comments in that

Survey and how open she had been with staff about what she had written, the Tribunal find on a balance of probabilities, that Ms Nwokedie would have been aware of her feedback in the Survey.

27 September 2019

106. There was a staff away day on the 27 September 2019. Ms Leanne Grimes was at that time, a newly qualified staff nurse. The claimant alleges that Ms Grimes told her ; "*not to fire bullets*" because Ms Nwokedie was not happy with her . The claimant alleged under cross examination that Ms Grimes was aware that the claimant had been to see Ms Smith and seen Ms Nwokedie on 26 June 2019 and had given feedback on the staff Survey on 1 October 2019. The claimant understood that what Ms Grimes was telling her was that Ms Nwokedie was not happy because the claimant was disclosing what was happening on the ward.

107. In the investigation meeting however on 5 November 2019 , the claimant complained that the '***team'*** at the away day had said to her not to fire bullets. She did not allege that Ms Grimes only had said this or that she had made any reference to Ms Nwokedie being unhappy with her. Ms Nwokedie however was the one who was facilitating the away day.

108. The Tribunal find on a balance of probabilities, that Ms Grimes may have been one of the team who told the claimant did not raise issues and as the meeting was being facilitated by Ms Nwokedie that was likely to be because it was anticipated that they may not be well received by Ms Nwokedie

109. The investigating officers did not ask Ms Grimes whether r this had been said by her and why.

110. Ms Nwokedie facilitated the meeting and the claimant's evidence is that staff did not voice their concerns because they were frightened to do so.

111. In terms of the claimant's relationship with Ms Grimes, the claimant described how Ms Grimes had been a colleague of her for years and that; " *I was very close to Leanne Grimes, she thanked me with a card when she went to do her training, for how I had supported her".* Under cross examination the claimant also alleges that Ms Grimes was also very close to Ms Nwokedie but accepted that she had not mentioned this during the internal disciplinary process. Nor would the claimant allege that Ms Nwokedie had manipulated or otherwise influenced Ms Grimes to make false allegations against her.

Ongoing concerns

112. The claimant alleges that there were ongoing issues on the Konar ward; of the new nurses forcing medication and fluids on service users who did not have the capacity to say no and not changing wet beds but staff were fearful to report it. The claimant does not allege she witnessed these incidents herself but under cross examination gave evidence that; *" other staff told me but would not report it".*

113. The claimant accepted however, that she never mentioned any of these alleged incidents during any of her protected disclosures (other than force feeding food but not fluids or medication) or indeed during the internal disciplinary process. Her explanation was that it was not raised because the young staff nurses who told her, were fearful to report it. However, the claimant is an experienced Registered Nurse, she had raised concerns and was therefore prepared to do so . She understood the

need to report serious incidents and yet accepted under cross examination that she had not reported any of these incidents reported to her by staff, had not entered them on Datix or made a report, even if anonymously, to the CQC or the charity Public Concern at Work. Her explanation for not making anyone within management aware of these reports, was that the young nurses told her not to report it however, the Tribunal do not find that explanation, given her seniority and understanding of the various routes to raise issues anonymously to be credible.

114. Either therefore the claimant was potentially neglectful in not reporting such serious incidents, as an experienced Registered Nurse or is exaggerating for the purpose of these proceedings, the ongoing situation on the ward.

115. On a balance of probabilities, given that the claimant was prepared to raise issues with the performance of the new nurses with the respondent and also did so during the disciplinary proceedings, the Tribunal find that the claimant has embellished within her statement of evidence, the ongoing problems with the performance of the new nurses and that the situation had actually, as Ms Ellis (who is supportive of the claimant) explained in her interview during the disciplinary investigation begun 'to settle'. [p.123].

2 October 2019: 4 Protected Disclosure to Tom Hunter

116. The claimant arranged a meeting with Mr Tom Hunter on 2 October 2019. Mr Hunter is the Chairman of the respondent. The claimant was Trustee of the Charity and *"knew"* she could speak to him because she had lots of dealings with him as a Trustee. In answer to a question from the Tribunal the claimant confirmed that she is not complaining about what Mr Hunter did, she does not allege that he victimised her.

117. Mr Hunter prepared a file note of that meeting although this was not disclosed to the claimant until these proceedings [p.282-283]. The claimant accepted that the note accurately reflected that she had asked to see him because of concerns over what she thought was a failing standard of case in elderly services, that she had commented that she felt the integration of the new nurses into the existing workforce was not going well and that the nurses from Nigeria " *keep themselves separate and often spoke in their own language in mixed company".*

118. The claimant also under cross examination confirmed that the notes accurately record that she expressed the view that there was a difference in the caring culture between the overseas workers and the respondent's culture which had not been addressed and the new nurses at 'home' relied heavily on families delivering much of the hands on care. Further, the claimant accepted that the notes accurately record her providing examples of where she felt care was compromised including that staff (she denies making reference to 'overseas staff') were arriving late for shifts or falling asleep in the office, after working overtime at a local private care provider and she referred again to witnessing an 'overseas worker' force feeding a patient.

119. The claimant alleges that she was referring to staff generally working elsewhere, (about 4 or 5 staff) and that she did not inform Mr Hunter that it was only the Nigerian nurses. We did not hear evidence from Mr Hunter and neither had he provided a witness statement for the purposes of these proceedings.

120. The file note goes on to record a conversation with Mr Reeve on 10 October and 12 October 2019.

121. The claimant informed Mr Hunter that Ms Nwokedie had called her a 'racist' which had upset her and informed him that she had spoken to Ms Smith regarding the standard of care, who had said to her; *"she would address these with Freedom, and that she should be assured that if the overseas worker [sic] were not good enough they would be going home."* Mr Hunter advised the claimant to speak with Claire Withers, however , she did not do so.

122. The claimant had referred to coming to the end of her career and feeling that there was some ageism being shown in the way she was being treated and in terms of two of the new overseas workers ; *"Peter and Chico …they were beautiful and caring people and she had not experienced any of these problems with them."*

123. The undisputed evidence of Mr Reeve is that the respondent investigated the concerns about staff going from the mental health suites to work in other units and found only one case of this happening.

9 October 2019 email

124. Ms Nwokedie then sent out an email to all staff requiring them to declare if they had a second job [97] and; "*can I also emphasis that on no account should anyone leave shift early without approval from Susan and Lynne.*

Susan and Lynne we need to monitor this as some staff ***have been reported*** *as leaving their shift early to go to somewhere else to work, which [sic] unacceptable."*

125. The claimant refers to the coincidence of Ms Nwokedie addressing this issue in an email sent on 9 October 2019 after she had raised this issue with Mr Hunter on 2 October 2019 as evidence that Ms Nwokedie was aware of her protected disclosure to Mr Hunter.

126. The allegation from Ms Grimes about the claimant was sent to Ms Nwokedie by Ms Grimes on 8 October.

127. The claimant now alleges, but did not allege during the disciplinary proceedings, that Mr Hunter had spoken to Ms Nwokedie before the 8 October and told her about the claimant's protected disclosure and in response to this, Ms Nwokedie persuaded Ms Grimes to make false claims of racism against her..

128. The respondent did not produce any witness statement from Mr Hunter and he did not attend this hearing. There is no evidence therefore from Mr Hunter confirming who he had spoken to about his meeting with the claimant on 2 October and when.

129. There is no direct evidence of any information disclosed by Mr Hunter to anyone other than Mr Reeve before the 10 October 2019, and the Tribunal do not consider in the circumstances that it is reasonable to draw an inference from the timing of the 9 October 2019 email from Ms Nwokeide alone, that she had been made aware of what had been discussed.

130. Mr Hunter had made no file note of any discussion with Ms Nwokedie to that effect and the Tribunal takes into account the evidence of Mrs Lewington that the matter

of staff working elsewhere was already a matter being looking into as a result of the Survey.

131. On a balance of probabilities, therefore the Tribunal find that Mr Hunter had not discussed his conversation with the claimant to anyone prior to his discussion with Mr Reeve on 10 October 2019.

10 October 2019 email

132. On the 10 October 2019, Ms Smith forwarded to Mr Reeve an email she had received raising concerns about comments the claimant was making about the new Nigerian nurses [p.350 /351].This email had been sent from Ms Grimes to Ms Nwokedie on 8 October 2019 [p.348]

133. Mr Reeve responded on 11 October to Ms Smith stating that the advice of HR is to suspend the claimant and confirming that Ms Smith was to find out the names of the two home treatments team workers which Ms Grimes alleges were witnesses . He also refers to a second part of the investigation which was for her to reassure herself about the information obtained from Mr Hunter about the claimant's comments around the unit as a whole; "*but importantly the accusation that staff are working long days and then going elsewhere to work despite the need to declare".*

Allegations: Leanne Grimes

134. The email which the claimant does not dispute was sent by Ms Grimes to Ms Nwokeidie, refers to comments alleged to have been made by the claimant over the last few weeks [p.100];

"A couple of weeks ago on an early shift 2 staff members from home treatment came to accompany one of the service users on Konar out of the day …I overheard [sic] Sue say to them " have you come to play spot the white person"

Another time during a conversation between myself and Sue she stated to me that " Freedom isn't interested in you white girls anymore" and went on to further add that banding promotions/ training and development on Konar will no longer be available to all staff , stating; " it's all about them now " referring to the newest recruited nurses"

" on another occasion during a conversation between Sue, Myself and other members of staff, Sue stated" this is our hard earned NHSs money bringing these over…. Sue then expressed (what I interpreted as her annoyance) at the fact that her son in law had not passed the interview stage for a job on Konar suite at the beginning of the year stating " yet half of these can't speak English, how is that fair"…

"This weekend just gone Sue was working nights and she came on duty stating she was not happy with how the rota had been done and stated, " have you seen this, I'm the only white person on.."

"I have also noticed that when Sue comes on duty she goes round certain members of staff and asks, " how have they been lately?" Again referred to the newly recruited nurses .,, I have over heard her telling staff to " report them if you see anting " referring to the newly recruited nurses and that " we need to stick together" and " it's us and then now"…

135. Ms Grimes at the end of the email refers to; " *These kinds of comments are becoming more frequent…and they are beginning to make staff, myself included, feel very uncomfortable"*

136. The claimant alleges that these complaints sent in on 8 October, 6 days after she had her meeting with Mr Hunter are lies and that Ms Nwokedie had put Ms Grimes up to it.

Jodie Prest

137. Ms Prest then sent an email to Ms Nwokedie. Mr Reeve gave evidence that this was sent to him by Ms Smith on 14 October 2019 [p.99]. He was not sure whether it had gone to Ms Nwokedie first . Mr Reeve presumed it was sent after 10 October and came about because Ms Smith was taking steps to identify witnesses.

138. The claimant alleges that the conversation with Jodie Prest must have taken place took place on 3 June 2019 following her meeting earlier that day with Ms Smith. Ms Prest alleges that while passing the claimant on the ward she enquired how she was, to which the claimant replied;

"she wasn't having it and stating service users were at risk " and " they've come to our country they need to do what we do and she wasn't having them treating our service users like that"

139. Ms Prest alleges that the claimant informed her that she had gone to see Ms Smith about it but corrected herself to say she had gone to see her about something else but had felt the need to express her worries to her . The claimant is alleged to have gone on to say;

"… that it was all well and good pushing nurses like herself out the door to make room for all of them to come and take our jobs. "

140. The claimant under cross examination did not dispute that during the disciplinary proceeding she had not offered any reason why Ms Prest would have lied about what had been said to her. The claimant now asserts however that Ms Prest and Ms Nwokedie were close.

141. The claimant alleges that Ms Prest did not escalate this complaint in June 2019, and only did so after the claimant had made the protected disclosures. Although she had been aware at the 26 June meeting complaints had been made, there is no evidence the detail had been given to her then and neither Ms Prest nor Ms Nwokedie had escalated the complaint.

142. The claimant in answer to a question from the Tribunal, gave evidence that she had only mentioned to Ms Prest in this conversation on 3 June, that she should go to Ms Smith with any concerns she has and not Ms Withers as it; " *would cause problems in [the respondent]"* but that she denied mentioning that Ms Smith had said or commented herself, that they "*can go home*" if not doing their jobs or words to that effect.

143. The claimant however, under cross examination gave evidence that she recalled the conversation with Ms Prest which was in June and that the claimant had commented that she was unhappy with the care of the new nurses and that she had said;

*" …I was unhappy with the care, we do good care, if **they** are coming to work with us **they** need to do our holistic care."*

[Tribunal stress]

144. The claimant denies however making the comment that they are "*pushing good nurses like herself out of the door to make room for all of them to come and take our jobs".*

Complaint from Mr Ayangbile

145. On the 14 October Ms Smith also sent an email including within the body of it the content of an email from Pete Ayangbile, one of the Nigerian nurses. The email was sent to Ms Nwokedie on 10 October 2019;

"I am writing on behalf of the Nigerian nurses to let you know how we have been feeling due to the treatments we are receiving from ***some of the staff****…*

Some of the staff have been fantastic and supportive which we are grateful for, however, there are few staff who made the transition stressful and are still making it very difficult for others to adapt to our new environment

When I started in February , there was a member of staff who would not even let me stand in the medication room because I was not a registered nurse in the UK at the moment but this particular staff would allow a year one student take part in medication with subversion…

Another member of staff will usually feel uncomfortable whenever she is on shift with black and minority groups. I find this attitude a disgraceful one … This member of staff once said " I am the only white on shift"…"

146. The claimant alleges that Mr Ayangbile is 'well supported ' by Ms Nwokedie.

147. The claimant alleges that Ms Prest, Ms Grimes and Mr Ayangbile had made false allegations. That they had lied. The claimant alleges that it is retaliation for her making the protected disclosures and that they were aware she had made all 4 protected disclosures because she had told them. She had told them she had seen Ms Smith and that they were to raise issues with Ms Smith and not Ms Withers. She alleges manipulation by Ms Nwokedie, although she accepts there is no direct evidence of that.

148. The claimant accepted under that the allegations which had been made by Ms Prest, Ms Grimes and Peter were serious and that the respondent had a duty to investigate them. The claimant also accepted that if the respondent found them to be true, then disciplinary action should be taken however she denies the allegations.

Suspension - 15 October 2019

149. On 15 October 2019 the claimant was called into a meeting with Ms Janine Smith and Ms Blackburn of HR and suspended for making racist comments.

150. The claimant complains that the respondent's disciplinary process was not followed in that she was not given an informal meeting prior to suspension, mediation was not offered and there was no preliminary investigation [p.60] . The claimant complains that the Flowchart was not followed in that there was no discussion with her to establish the facts before suspension and that after 23 years of good service, they should have first asked her about the allegations before suspension.

151. It is not in dispute that there was no preliminary fact finding meeting and there was no explanation from the respondent why no such meeting took place, however it is not in dispute that HR had recommended suspension.

152. There is a precautionary suspension checklist [p.104/105] which it is not in dispute was competed by Susan Boerger manager at the time. It refers to the claimant remaining in work during the investigation making it difficult to maintain confidentiality of the investigation, she works on shift with the people who have come forward raising the issues. The claimant does not dispute the rationale behind the decision to suspend but complains about the failure to give her chance to provide her evidence/response to the allegations first.

153. The letter confirming suspension dated 18 October 2019 from Ms Smith [p.108] set out allegations which related to the following 4 alleged comments;

" have you come to play spot the white person?"

"Freedom isn't interest in you white girls anymore"

" When referring to the rat you stated " have you seen this, I'm the only white person on"

"In a conversation you stated " this is our hard earned NHS money bringing these over"

154. The claimant complains in her statement of evidence, that the suspension was because of the comments she made in the staff Survey and the disclosure to Mr Hunter. Ms Kuzemczak in her statement, give evidence that the claimant raised with her that she felt the allegations were a direct result of the information she had provided in the response to the Survey and her complaint about poor care, but she is not specific about which complaint.

Investigation

155. An investigation was then carried out by Ms Fletcher, Assistant Director of Community Mental health and Wellbeing Services , supported by Ms Blackburn , Workforce Manager (HR). The claimant does not allege that those who carried out the investigation were motivated by the public interest disclosures.

Leanne Grimes interview : 22 October 2019

156. Ms Grimes complains in her email of the 8 October 2019 of a number of comments made by the claimant;

Have you come to play Spot the White Person?"

157. That during an early shift a couple of weekends prior, two staff from the Home Treatment Team came over to take a service user out and Ms Grimes states that she heard the claimant state to them; " *Have you come to play Spot the White Person?"*

158. Ms Grimes does not accept that the claimant could have been repeating what a service user had said because; "*they were all in the lounge bit and I've never heard one of the service users say that, to be honest"*

Freedom isn't interested in you white girls anymore

159. Ms Grimes gives evidence that she had just come back as a nurse, in September 2019, and alleges that the claimant had said " *If I were you I'd look for something*

else" and when asked why, stated; " *It's Freedom. She's not interested in you white girls. It's all about them now.."*

Sticking together

160. Ms Grimes refers to the claimant saying things such as " *we need to stick together. It's us against them now*" and that she *"zooms in*" on her and implies that Ms Nwokedie is a bully.

This is our hard earned NHS money

161. Ms Grimes alleges that while travelling in a car with the claimant and the claimant's daughter in law, to some Mental Health Act training , the claimant is alleged to have commented;

"*Did you hear that lot talking in the training ?"She was referring to the new nurses. She said that they hadn't paid any notice and that it had been good training . She said, It's our hard earning NHS money, tax money, bringing them over here and all they've done is sit in there talking".*

Comment about being the only white person on the rota

162. Ms Grimes gives evidence that she was on a late shift when the claimant came into the kitchen and commented that she was the " *only white person*" on the rota and that it was *"absolutely bloody ridiculous"*

163. Ms Grimes alleges that Jacqui Ellis was present. It is not in dispute that the Jacqui mentioned is Ms Jacqueline Ellis.

Interview with Claire Farmery and June Stringer :22 October 2019

164. On the 22 October 2019 there is an interview with Claire Farmery and June Stringer, [p.111-115] both Support Workers who have been identified as the two staff from the Home Treatment Team who the claimant spoken to when making the ; "*play Spot the White Person?" comment.*

'Have you come to spot the white person' allegation

165. Ms Stringer in the interview raises communication issues with the new overseas staff;

"" ..To be truthful, he couldn't understand me and I couldn't understand him. The language wasn't very good at all. I did feel and I did mention it, that he wasn't able to handover to me in a way I could understand…" [p.113]

166. When asked whether they have heard any comments about the overseas staff which may be inappropriate, their evidence is that they had not heard anything and specifically when asked whether they had heard a member of staff say " *Have you come to play spot the white person"*; Ms Farmery is recorded in the notes as audibly gasping, which implies that she was shocked and which would indicate that this was not something she had heard before. When it was put to her that the claimant is alleged to have said it to her, she responds; *" No. I would remember that".*

167. Ms Stringer states that the only time she has heard that, was from a patient and not from staff and they referred to patients having commented on not understanding the

overseas staff when they speak to them. Ms Stringer states; *"But, not definitely from a member* of *staff, it's from a patient that I've heard that said before".*

168. The evidence of these two witnesses therefore does not support the allegation by Ms Grimes.

169. One possibility is of course that Ms Grimes heard the claimant mentioning what a patient had said although she discounts it on the basis that she had not heard service users say this, however that itself is at odds with the evidence of these two witnesses.

170. Mr Reeve did not consider that these two witnesses had any reason to deny the comment had been said, if they had heard it. He considered them to be genuine.

Jacqueline Ellis interview: 22 October 2019

171. There is an interview with Jacqueline Ellis, Senior Nurse Practitioner on 22 October 2019 [p.121 -125] who candidly declares at the start of her meeting that she is a good friend of the claimant outside of work.

172. Her evidence is that the claimant now works on the Jane Smith Suite (JSS) and she works on Konar and that they had last worked together before she went off sick ,returning in July 2019 albeit they see each other during handovers .

173. When asked about the integration of the new staff she gives evidence that;

" *They've had difficulty integrating, It's a very different way of working for them".*

174. Ms Ellis refers to the difficulty they have in moving from more senior roles in Nigeria to support worker jobs, the amount of studying they are required to do and that Grimsby is not very multicultural and;

"*They don't do personal care. Their families , there's basically a nurse and security and then families, so it's very different . I think there's been so many changes in such a short period of time, We've gone from being a very supportive , close-knit, cohesive team…and it's not just the overseas nurses…There's been a lot of new Support Workers to train plus an influx of nurses from Nigeria as well. It's an awful lot and then, with hindsight, it could have been handled a bit differently, maybe.."*

175. Ms Ellis also talks about the impact on existing staff; " …*because when they are classed in the numbers and they don't know their job , and then you've got existing Support Workers who do their job and know what needs doing and are passionate about what they do and maintaining high standards.."*

176. When asked whether she had overheard the claimant making comments about the new nurses she states; *"No. I know when I was off sick, Lynne had a conversation with [the claimant] about whether she wanted to continue her professional nursing registration. She rang me and said" They want me to give up my registration and I don't want to" I said, " Go and speak to Lynne. I don't think they want you to " I know she made the comment with the Nigerian nurses coming over and there was never any connection…"*

177. The claimant accepts that she discussed the change of role with Ms Ellis and that they have been friends of over 25 years and that Ms Ellis was not lying when she gave evidence that the claimant had made a connection between her stepping down and the arrival of the nurses from Nigeria; " *No – there was a lot of unsettlement –*

other staff were saying, what about our training, it was general." She accepted that she was unsettled and did not dispute that she connected her insecurity with the incoming new nurses and when asked by the Tribunal what she meant by feeling unsettled explained; "*The nurses came in March, we had no cultural training, no explanation, the girls wanted to be associate nurses and wanted to do training – nurses were paid to stay for 5 years.."*

178. The claimant referred to the nurses coming as Support Workers and it was unsettling because these were young nurses' who wanted to develop their careers. She referred to there not being the money to spend on young nurses to continue their careers and have their courses funded by the respondent because money was being spent on the nurses from overseas. The claimant alleges the secondments stopped when the Nigerian nurses' came over, however this is not accepted by the respondent. Mr Reeve gave evidence that Health Education England stopped the secondment support in 2017/18, external reasons therefore meant secondments had stopped and this was the same country wide and was not linked to the recruitment of the nurses from Nigeria. The Tribunal find that this was most likely a misunderstanding on the part of the claimant over why funding for the secondments had stopped, and this the Tribunal find on a balance of probabilities, fuelled her antagonism toward the recruitment of more, younger staff, albeit not an issue which affected the claimant directly.

Lynne Robinson : 22 October 2019

179. There was then an interview this Ms Robinson [p.126/127]. When asked about the claimant and the discussion about her moving into a Support Worker role, she also gave evidence that the claimant linked this to the arrival of the new nurses;

"… *And then we met again, four weeks later, she said, " I don't know if I want to lose my PIN" What she'd done , she'd connected us employing a group of nurses with asking her to step down, which isn't what we actually asked her at all…. She said, " It's just how I'm feeling and I feel useless.."*

180. Ms Robinson gave evidence that in terms of the atmosphere on the unit, a lot of staff had started at the same time, which in itself causes *'unrest'* within the ward.

Peter Ayangbile: 22 October 2019

181. During an interview with Mr Ayangbile, a Mental Health Practitioner, he reports that comments are made on the ward including; "*have you seen the white lady? The white lady not on shift. If you have an issue talk to whoever did the rota if you want to be on with a white ".*

182. When asked who has made those comments, he gave evidence that the claimant had but not to him directly. He also alleges that Ms Maitanmi had told him the claimant had said was; "*you're here to take our jobs*".

183. He comments; "*They say to my colleague. They say to us. They say to everyone".* However, Mr Ayangbile confirms that he is talking about more than one individual but is not asked to identify who they are.

184. He also comments at the end of the interview that; *" One colleague describes us as slaves and their masters".* He is not asked who that it is, despite how serious and overly racist the comment is. He does not allege this was said by the claimant.

5 November 2019 – investigatory meeting

185. By letter of the 23 October 2019 the claimant is invited to a disciplinary meeting on 5 November to be conducted by the investing officer Ms Fletcher. [p.141 – 157]

186. The claimant attends that meeting with her Union representative.[p.141].

187. The claimant confirmed under cross examination that she was given an opportunity to say everything she wanted to say but that she was on Diazepam at the time but accepted that Ms Kuzemczak also put forward arguments on her behalf. She does not dispute the notes of the meeting

188. The claimant denied making the allegations but accepts that she offered no explanation at the time why Ms Grimes, Ms Prest and Mr Ayangbile would make the allegations. She did not allege that Ms Nwokedie had manipulated them into doing so.

189. Within the meeting she make the following comments about the new nurses and the impact on the patients;;

" And no offence to the Nigerian girls, but there's no passion."

"…these old people, they are frightened and I can understand why. These are people from an ethnic minority town, which we are, and all of a sudden, these girls- yeah they're nurses, but they've come from such a different environment …and they are not used to that. Senior Management need to come in and have day with us, see the faces, the fear, the little old people. It's not right. It's not right It's not right" [p.147]

And;

" We got Peter and Chico first. They're all from different part of Nigeria, different tribes. They're even falling out with each other because they were living together in one place…

190. The claimant alleges under cross examination that she had been told by the nurses they were 'tribal' and that some would not get into her car because of the difference in tribes. That these comments about 'tribes' were made by her, was put to her under cross examinations as evidence of her racist attitude however, the respondent did not interview any of the Nigerian nurses who the claimant alleged had spoken to her about a tribal culture. The Tribunal does not accept that this is necessarily indicative of a racist attitude, it depends for example whether she is genuinely repeating what the Nigerian nurses have said to her about their culture.

191. The claimant also comments; *"I keep thinking,' has someone interpreted something wrong? On the 3 October, I was on nights, It was my first night. Soon as I'd finished, we had handover. One of our patients, Michael said " is there someone British I can speak to? I said, "That'll be me Michael". Off the cuff, not like that ".*

192. In terms of the discussion about her moving down to a support worker role, the claimant explains in this meeting why she decided not to do so [.p153/154]; "*I* have *got that last supervision thing. I went home and thought about it going down to a Band 4 and not having that paperwork… It was just we're going to recruit more nurses'. … Then we were thinking, what* ***about us****? **What's happening to us**? So I thought, actually no, do you know what, I'm not going to be a Support Worker, I'm going to be a Staff nurse and If I'm going to need extra support, then I will".*

193. The claimant confirmed the "us" means the staff excluding the Nigerian nurses. These thought processes do seem to indicate that the claimant had developed a 'them and us' attitude toward the new nurses and was unsettled and anxious about what she saw as the impact on the staff, the patients and her position.

Further interviews

Jolie Prest 6 November 2019 [P.167]

194. During an interview conducted with Ms Prest she alleges that during a conversation with the claimant she made comments including;

" *You know they're trying to push me out by bringing in these lot" I said, " What lot ? She said " They come to our country" I knew who she was talking about. Sharon was around, going into different bedrooms*" [p.168].

195. Ms Prest recalls speaking to Ms Maitanmi, who had come in the day before and had been upset about an incident when she was feeding a patient and the claimant had intervened. Ms Prest gave evidence that Ms Maitanmi the next day, when Ms Prest was speaking to the claimant, Ms Maitanmi was around going in and out of the bedrooms while the claimant was making the alleged comments.

196. The claimant alleges that Ms Prest was lying about what she had said to her.

Ms Maitanmi : 6 November 2019 [p.159]

197. The respondent then interviewed Ms Maitanmi on 6 November 219, a Senior Nursing Assistant from Nigeria. She accepts that the claimant had taken food from her while feeding a patient but denied force feeding the patient and alleges on a later occasion that the claimant made the comment *" This is our NHS money, They're taking out jobs. Poor people don't have jobs. They don't know* anything*. They're full of nothing. They're empty*" She alleges that Ms Jolie Prest was in the corridor at the time these comments were made. What Ms Maitanmi alleges was said is not wholly consistent with what is said by Ms Prest.

198. Ms Maitanmi denies force-feeding a patient but questions why the claimant could not correct her rather than report her, which would indicate that Ms Maitanmi accepts that what she was doing required correction and she goes on to comment: "*The following week, I was told that this had been written on my file*". This would also indicate that there was an issue with how she was feeding the patient and that she was upset that this was recorded on her personal file. This is supportive of the legitimacy of the claimant's concerns.

199. The claimant now alleges that the comments were alleged to have been said by her the day after the 'force-feeding' incident which would have meant that the claimant had said them on Sunday 2 June 2019 but Ms Prest being a secretary would not work on Sundays.

200. Mr Reeve's undisputed evidence is that this issue about Ms Prest not being in work on the day the claimant is alleged to have made the comments, was not raised in the disciplinary hearing with him. The claimant did however say in the disciplinary hearing [p.197] that she did not Datix the incident because it was a weekend. Mr Reeve does not assert that he asked about the rotas to check who was working given the conflict in the account of events. He accepted that he would not expect Ms Prest, as an administrative person to work Sundays although they sometimes do.

Investigation report: 21 November 2019

201. A report was prepared following the investigation [p.177 - 183]. It does not carry out any meaningful evaluation of the evidence but recommends that Ms Grime, Ms Prest and Ms Maitama had heard comments by the claimant that are racial in nature, that

it is in breach of the respondents Code of Conduct which states; *Treat people as equal, be a good role model and advert for services, be supportive of colleagues and treat all with respect and challenge discrimination and abuse and promote diversity.*

202. The recommendation is that it is treated as gross misconduct.

4 December 2019 – disciplinary hearing

203. A disciplinary hearing took place and was chaired by Mr Reeve supported by Mr Watson. Also in attendance was Ms Fletcher on investigating Officer, supported by Ms Blackburn.

204. Mr Reeve was aware before dismissing, according to his statement of evidence, that the claimant had raised with Ms Smith concerns relating to some of the overseas staff not treating patients properly, that she had complained to Ms Nwokedie about the standard of patient case and he was aware of the conversation with Mr Hunter on 2 October about staff falling asleep and putting service users at risk. He was not challenged about his alleged lack of knowledge of the claimant's response to the Survey. The Tribunal find therefore that he was not aware of that protected disclosure but he was aware of the others..

205. The claimant was again accompanied by Ms Kuzemczak and does not dispute the accuracy of the respondent's notes of the meeting

206. The claimant does not dispute receiving the documents relevant to the disciplinary prior to the hearing attached with a letter dated 26 November 2019 [p. 184].

207. The claimant and her union representative challenged the quality and weight of the incriminating evidence.

Allegation : " have you to come play Spot the White person"

208. The claimant put it to Mr Reeve under cross examination that she was not working the weekend before the 14 October 2019, and the weekend before that, on 4 October she was on night shift while Ms Grimes was on the day and evening shift and thus they would not have been working together. However, she accepted she did not explain that to Mr Reeve during the investigation or disciplinary hearing however, despite the conflict in evidence it was apparent during cross examination that neither the investigating officers nor Mr Reeve took the simple step of checking who was working according to the rota Mr Reeve however gave evidence that there would still have been a handover for ½ hour where they would have had a chance to meet.

209. Mr Reeves in cross examination stated that the witnesses; Ms Farmery and Ms Stringer had confirmed that they had *seen* the claimant on that shift however that was not their evidence. They were not told when the incident was supposed have taken place and they do not actually say they *saw* the claimant at all, only that they do see her when they go on the ward to or collect take service users.

210. In the interview they are told [p. 120] it was an early shift a couple of weeks before their interview on the 22 October (i.e. the 5 October 2019) although Ms Fletcher than states it would have been 5 weeks earlier " *But the date doesn't matter. I guess for us its if you heard a member of staff say that comment".* There is therefore a lack of clarity over the date and no confirmation of when these witnesses saw the claimant on the ward, they simply confirm they never heard the comment.

Allegation: " this is our hard earned NHS money bringing these over"

211. This was alleged by Ms Grimes to have been said during a car journey after some training. There were 3 passengers in the car but the third who was the claimant's daughter in law had never been interviewed. It was one person's word against another..

212. There were a number of evidential issues which the claimant raised during her cross examination of Mr Reeves which she accepted she had not brought to his attention during the disciplinary process including the allegation from Ms Grimes that [p.130] that the claimant was not happy that a member of staff from the Philippines was offered a job with the respondent which the claimant's son in law had applied for at the start of the year, when the claimant alleges her son in law had already secured a job as domestic support worker.

213. Ms Kuzemczak also raised a concern that there is a link between making the protected disclosures and the allegations [p.190] however that is not addressed by Mr Reeve who states that the investigation is about the comments the claimant made not about the issues she raised about the performance of new nurses [p.191] which misses the point about whether there may have been an ulterior motive behind the complaints about the claimant. Under cross examination the claimant accepted that in the hearing that she had agreed with Mr Reeve that the disciplinary was separate from the disclosures but her evidence is that what she was not agreeing to was that there was no connection between them. Whether there was any ill feeling created by the protected disclosures was clearly not considered by Mr Reeve although it was not clearly explained who it was alleged had victimised the claimant.

214. Mr Reeve enquires why Ms Nwokedie was not interviewed and the explanation is that she did not hear anything herself, everything was reported to her third hand. However Ms Nwokedie had called the claimant 'racist' (as reported to Mr Hunter) and therefore the Tribunal find it surprising that she was not asked about this allegation or as operations director, whether she was aware of any issues of staff being unsettled.

215. According to Mrs Lewington, she was aware that Ms Nwokedie knew about the complaint from Ms Prest back in June, it is surprising therefore that she was not asked at some stage in the process, what had been reported to her at the time, given the denial by the claimant.

216. When put to Mr Reeve under cross examination that the allegations were only raised after the claimant had made the disclosure to Mr Hunter on 2 October, Mr Reeve gave evidence that no own knew that conversation with Mr Hunter had taken place until he spoke to Mr Reeve 10 October 2019 [p.283]. The allegation came through from Ms Grimes to Ms Nwokedie on 8 October 2019 i.e. prior to that. However, Mr Reeve never asked Mr Hunter who he had spoken to, he relies it would seem on an assumption that he had not done so because Mr Hunter only works one day per week as Chair, on Wednesdays. He had the meeting with the claimant on a Wednesday , therefore Mr Reeve presumed the next time he raised it was when he was next working the following and spoke to Mr Reeve.

217. Ms Grimes had said racist comments were out of character for the claimant and Mr Reeve accepted he had no reason not to accept that was the case.

218. During the hearing the claimant is asked about her relationship with Mr Grimes and confirms that there is no reason for her to say what she had and that she could not believe what she is saying. She also described her relationship with Ms Prest as

good and further that Ms Prest is mixed race and that would not therefore say anything like that to her.

219. Mr Reeves concluded that;

"*given the written and oral evidence presented it was the view of the panel that based on the balance of probabilities you did say these inappropriate and racist comments and therefore have fallen short of the expectations that Navigo sets out for all employees and as outlined in our Code of Conduct, namely that you have not treated people as equal and not been a good role model as well as not promoting diversity in the workplace .It is therefore my decision to summarily dismiss you on the grounds of gross misconduct without note or payment in lieu of notice".*

220. The claimant complains that Mr Reeve; "*really pushed me about my health and mitigating circumstances and stress outside of work"* at the end of the hearing which indicated he had made his mind up before the adjournment. He does indeed ask about any mitigation, and it may well be that by the end of the meeting he had formed a view of what the outcome was likely to be. The Tribunal do not find his line of questioning to be unreasonable or that this amounts to bullying. The claimant states it was his ' tone' of voice was ' hard and callous' and that she had known him for over 20 years as a colleague and friend. Her representative did not object to his tone in the meeting. It is not alleged that he was rude or raised his voice. The claimant was no doubt use to dealing with on friendlier terms and was by this stage experiencing considerable anxiety , she states that during the disciplinary process; *"I was traumatised and on Diazepam*..."

221. The claimant accepted under cross examination that the alleged comments would not be what is expected from a nurse caring for vulnerable peoples and that it would be reasonable to dismiss *if a reasonable investigation* had been carried out.

Disciplinary outcome letter

222. Mr Reeve sets out in the later his view that the claimant on a balance of probabilities, did make inappropriate and racist comments He referred to four members of staff saying that the claimant had made racist comments, although actually only 3 had heard the alleged comments directly.

Appeal

223. The claimant lodged an appeal on 13 February 2019. The grounds of appeal were that the decision was biased, which the claimant would later clarify prior to the appeal hearing was an allegation [p.208] that it was a result of the whistleblowing.

224. The claimant also appealed on the ground that the material facts had been misinterpreted, which she clarified later refers to the concerns raised via whistleblowing and to Mr Hunter [p.208]. The claimant complains that the findings are not on a balance or probabilities, due to the number of witnesses who corroborate the allegations as against those who do not.

225. Ms Kuzemczak challenges the fairness of the decision to dismiss on that ground that there was insufficient corroborating evidence to reach a finding on a balance of probabilities, in that of the 8 staff interviewed, only 3 gave evidence supportive of the allegations. She also raised the failure to interview all the relevant witnesses which could appear as ' cherry picking'; Ms Janine Smuth, Mr Hunter, Ms Nwokedie ,Vicky Walton, Chico and Natalie were not interviewed.

226. The claimant now mentioned that during the journey to the Mental Health Training when she is alleged to have made a racist comment; there were two other people in the care; Chico and Natalie. Mrs Lewington however made the decision at the appeal stage not to request that further interviews were undertaken because Mrs Lewington in essence, considered there was sufficient evidence of misconduct. Neither the claimant nor her representative asked for the witnesses to attend the disciplinary or appeal however, they did clearly make the point that they should be interviewed by the respondent.

227. Mr Reeve was present at the appeal hearing and conceded that the investigation could have been *" more relevant* ". He refers to his own questioning of the investigators around why Ms Nwokedie had not been questioned.

228. It was clarified that there was to be a second part to the investigation, looking into the issues the claimant had raised with Mr Hunter.

229. Ms Lewington does not dispute that she was aware of the protected disclosures before or at the latest by the time of the appeal hearing.

Appeal outcome

230. Ms Lewington did not uphold the appeal. Finding that of the 6 people based on Konar, four had either heard the inappropriate comments or heard other comments judged to have racist undertones and she determined that even if not judged to be appropriate evidence on a balance of probabilities, there was what she called "*sufficient triangulation of evidence*" to uphold the decision.

231. Mrs Lewington explained that the " triangulation theory" means that if 3 different people raise the same or similar content, it makes it more likely that the event is true "*if hear something very similar in 3 independent views, all give veracity to the statement, I take it is true or correct".*

232. With regards to the question about unsettlement on the unit, she determined that no degree of unrest would justify the language . With regards to the breadth of the investigation, she decided that there was such a "s*trong correlation"* between the alleged comments that she did not consider it necessary to require the other people in the car to be interviewed.

233. The claimant accepts that at no point during the internal process, did she allege that Ms Nwokedie had manipulated the witnesses into making these false allegations. When asked by the Tribunal why she did not raise it, she stated that she did now know why; it was just *"my thoughts and feelings"*

234. The claimant did not inform Mrs Lewington that she believed Mr Reeve had victimised her by dismissing her.

235. Mrs Lewington's undisputed evidence is that she recommended a further investigation into the claimant by Mr Ayangbile and Ms Maitanmi that other comments had been made by others but that no significant concerns arose from it.

Post dismissal

236. Following the termination of the claimant's employment she wrote to Matt Hancock MP [p.235]. The letter was copied to the respondents Freedom to Speak up Guardian e. The claimant also wrote to Dr Melton of the CCG on 27 February 2020

repeating the protected disclosures and referring to her dismissal for making whistleblowing disclosures.

237. The claimant received a letter from Ms Lewington but not until the 31 July 2020. The claimant complains that the letter was threatening in that Ms Lewington stated; *"I would hope that a line may now be drawn under the matter.*

238. The claimant complains about the delay in dealing with the issues raised. Mrs Lewington gave evidence that this was due to the Covid pandemic however, the letter from Mrs Lewington is a full response , consisting of 6 pages and addressing the various issues and allegations raised. The Tribunal do not find, given the fullness of the response that it amounted to bullying for Mrs Lewington to comment that she hoped that a line may be drawn under the matter. The claimant does not complain of post termination acts of victimisation in her claim.

239. Mrs Lewington responded to the issues raised and noted some further disclosures she mentioned dating back to June, July and August 2019 , had not been raised by the claimant while employed, had not been mentioned in her response to the Survey and there was no Datix report for them .Following a complaint received by the CQC in March 2020, the undisputed evidence of Mrs Lewington is that the Datix reports for September 2019 to February 2020 were disclosed to the CQC and the CQC were satisfied with the reports and actions.

Submissions

240. I set out in summary the submissions of the parties.

Respondents submissions

Ordinary unfair dismissal claim

241. In terms of the reason for dismissal it is misconduct. In terms of whether the dismissing officer had a belief in the misconduct, counsel reminded the Tribunal that it is not for it to put itself in the shoes of the respondent. The respondent as the employer is entitled to take a reasonable decision in the circumstances, whether or not that is a decision the Tribunal may reach.

Reason for dismissal

242. Counsel refers to ***Jhuti,*** and that if there is evidence that someone in the organisation who is higher in the management hierarchy than the employee, has intervened, that can infect the reason for dismissal even where the dismissing officer is in agreement with the decision to dismiss. However, counsel referred to ***University Hospital North Tees and Hartlepool NHS Foundation Trust v Fairhall EAT 0150/20*** *and* submits that if there is no evidence of an 'Iago' situation. The question is simply, what was in the dismissing officer's mind at the relevant time.

243. Counsel submits that the burden is on the respondent to establish the reason for dismissal but that it is a low burden and the reason in this case is clear, there were complaints against the claimant which had to be dealt with and the evidence of Mr Reeve and Ms Lewington was clear and credible; the dismissal was for misconduct.

Genuineness of belief

244. Counsel submits that there was an honest belief and that other than the allegation that the whistleblowing was behind It, it is submitted that the claimant had produced no evidence to challenge the honesty of the belief .

Reasonable grounds for the belief.

245. It is submitted that the respondent had before them complaints from various individuals,. They also had the evidence by Mr Ayangbile , his evidence was not direct but relevant. There was also context; namely that the nurses from Nigeria came in March, the claimant was clearly feeling insecure about her role and abilities whether she would remain as a nurse .The claimant it is submitted was generally unsettled on the ward with the potential changes taking place. It is submitted that the dismissing an appeal officer, had grounds to find that this context lead to the claimant being unhappy and she expressed it by taking these anxieties 'out' on a particular group of people.

246. There are 4 primary allegations and those comments had a similar context.. The claimant was unhappy with the ' Nigerian girls'. The comments she made about them 'taking out jobs', etc underpins the comments and cannot be looked at, it is submitted, in isolation. It was reasonable, counsel submits, for the decision makers to draw an inference from these comments that she had also made similar comments,

247. The claimant it is submitted sought to challenge the more 'niche' aspects for example when someone was on shift etc however, it is submitted that none of these were raised at the disciplinary hearing or appeal. It is appreciated that the claimant was struggling however it is submitted that the question is whether the decision maker had reasonable grounds and if the claimant or representative had not raised a challenge they cannot be criticised it is submitted unless those issues were obvious to them . It is submitted those ' niche' points were not obvious, otherwise the union representative would have identified and raised them.

Investigation

248. It is submitted that there was a reasonable investigation. Small errors it is submitted are likely to be made by an employer. The respondents interviewed a number of people and the claimant was told of the allegations and warned of the potential consequences.

Appeal

249. Counsel submits that the Tribunal may consider why at the appeal, the other witnesses were not interviewed, it is submitted that this was not 'laid at the door' of Mr Reeves . The trade union representative raised an issue about 1 other person at the disciplinary. In terms fo the appeal , counsel invites the Tribunal to take into account that an explanation as given by Mrs Lewington for not carry out more interviews.

250. It is submitted that the investigation was within the band of reasonable responses in that; (1) ne of the witnesses not interviewed was the claimant's daughter in law; she would not be independent, (2) When raised at appeal; it calls into question why this was not raise before(3) The claimant and the trade union representative had the chance to call and bring people along and take statements and the Tribunal should consider why they did not do so (4) It would have made no difference. The respondent carried out a reasonable investigation, if other people did not witness the comments, there were still multiple people making allegations : Polkey would

apply. (5) The notes of the interviews show that the respondent did not pay lip service to the investigation, the questions were detailed and lengthy.

Within band of reasonable responses

251. Turning to the last question, counsel submits that dismissal was within the band of reasonable responses.

252. Counsels submits that it cannot be in dispute that where a nurse of the claimant's standing is found guilty of making these comments, dismissal is within the band of reasonable responses It is summitted that it would be 'impossible' to say that no reasonable employer would dismiss in those circumstances.

Polkey

253. Counsel refers to the failure to carry out further interviews and submits that it would have made no difference to the outcome. These are 'tiny' areas not obvious and not raised by the claimant .

254. However, counsel submits that if the Tribunal consider that they do undermine the fairness of the process, and would have made a difference to the outcome, then the Tribunal should consider contributory fault; there was an absolute denial from the claimant without explaining why all these colleagues would make up these allegations other than she alleges that Freedom was behind it all however, this allegation was made for the first time at this hearing . Counsel submits that the claimant is 'entirely blameworthy' .

255. The Tribunal is invited to consider how the claimant referred to ' tribes', to ' Nigerian girls' and that this showed the ' start of a dangerous thought process of us versus them – a rhetoric that lead the claimant down the path of making these racist comments',

Whistleblowing

256. The influence the disclosure had on the dismissal, is submitted is still unclear, it is not clear whether the claimant is simply alleging decision maker was motivated by her disclosure or Freedom was an 'Iago' figure .

257. The claimant has the burden of proof; counsel submits that there is no evidence to suggest or imply that the decision maker was motivated by the disclosure. There is nothing other than Mr Reeve and Mrs Lewington accepting that they knew about the disclosures.

258. The burden of proof it is submitted cannot be shifted in these circumstances. The claimant is relying only on her feelings. Mr Reeve instigated a separate investigation about the disclosures. Measures taken by Mr Lewington to carry out further investigations were delayed by Coved. Later investigation by CQC show there were no issues.

259. It is submitted that there is no evidence that the respondent wanted to 'shove' things under the carpet. There is no evidence they were hiding anything.

260. It is submitted that the claimant was linking her insecurities to the new nurses; in March to July 2019 the claimant was increasingly becoming frustrated by her situation and offensive remarks were increasing.

261. The timing is not relevant counsel submits, when the context is considered of the claimant's increasing frustration over that period and the timing alone therefore is not sufficient to establish any causative link.

262. The allegation Freedom was behind it was not made at the time, not made in her witness statement and not made in her pleading.

263. It is submitted that the claimant feels the decision is unfair and she is looking for a reason but there is no evidence to support that Freedom was ' behind it'.

264. In summary counsel submits that the ordinary unfair dismissal was fair and the burden does not shift.

Automatic Unfair Dismissal

265. Counsel accepts in her submissions that the only question for determination is the question of motivation in the context of the causation issue.; did Mr Reeve decide to dismiss and Ms Lewington to uphold that decision, because the claimant had made one or more of the protected disclosures.

Claimants submissions

266. The claimant refers to being a nurse for 25 years and a good nurse,

267. The claimant submits that she made the 'Nigerian girls' welcome , she showed them the local schools and gave them lifts in her car. She is upset at being accused of not supporting them.

268. The claimant submits that she raised the grievance on 3 June 2019, and there was no investigation. She was exposed as a whistle-blower to her line manager and there has been no outcome to the disclosures she made. The whistleblowing policy was not followed and she alleges poor care continued.

269. The claimant refers to being called a racist by Ms Nwokedie on 26 June 2019 just days after she raised her concerns. She refers to having a close working relationship for 7 or 8 years with Ms Nwokedie and she then chose after all those years, to call her a racist and she had never questioned her ability to work as a nurse until then.

270. The claimant alleges that Ms Prest was manipulated by Ms Nwokedie , she is close to her as her secretary. That Ms Grimes is one of Ms Nwokedie's 'favourites', an issue she raised in her feedback to the Survey (that there are favourites – she did not identify who they are). And that Ms Nwokedie is a bully. The claimant confirmed that she essentially relies on the fact that the matters which occurred in June 2019 were not complained about until October 2019 and the timings, to establish the causal connection

271. The claimant refers to the statement of her union representative and in particular that out of 8 staff interviews, only 3 had heard any inappropriate comments, and other witnesses were not interviewed ; and she asserts 3 out of 8 does not establish her guilt on a balance of probabilities.

272. The claimant refers to Mr Reeves referring to the witness who gave evidence against her as ' genuine' and questions whether he is alleging the other 5 were not.

273. The claimant refers to Mr Reeve trying to allege that stress caused her to make the comments which as a mental health nurse was inappropriate behaviour from him.

274. The claimant alleges that the investigation was flawed in that there was no investigation into her whistleblowing disclosures and it was predetermined.

275. The claimant clarified that she is alleging that Mr Reeves, Ms Lewington and Ms Nwokedie all discriminated against her for whistleblowing.

Legal Principles

Unfair Dismissal

276. The starting point is the statute:

98 General.

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—
…..

(b)relates to the conduct of the employee,
…..

(3)In subsection (2)(a)—

(4)[Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

Summary of statutory requirements

277. Section 98 of the Employment Rights Act 1996 sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal.

The reason for dismissal

278. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' :***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*.**

279. As Lord Justice Griffiths put it in ***Gilham and ors v Kent County Council (No.2) 1985 ICR 233, CA***: 'The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason **could** justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to S.98(4)] and the question of reasonableness.'

280. Tribunals must also take account of the genuinely held beliefs of the employer at the time of the dismissal. However, what a Tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal: ***Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA*****,**.

Conduct

281. Conduct is a potentially fair reason for dismissal under Section 98(2)(b) of the Employment Rights Act 1996.

282. In relation to conduct dismissals the leading authority on fairness is the case of **BHS v** Burchell **[1978] IRLR 379**, which sets out a three part test namely

283. That "band of reasonable responses test" also applies in assessing the reasonableness of the investigation carried out into a conduct matter: **Sainsbury's Supermarkets v Hitt [2003] IRLR 23.**

Disciplinary hearing

284. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of the claimant's dismissal.

285. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: **Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439**.

Polkey

286. The Tribunal must consider what would have happened had the unfairness not occurred and may reduce an award on a just and equitable basis: **Polkey v A E Dayton Services Ltd [1988] ICR 142 HL.**

Procedural Fairness

287. The House of Lords' decision in ***Polkey vAE Dayton Services Ltd 1988 ICR 142, HL*** establishes procedural fairness as an integral part of the reasonableness test under S.98(4).

288. Not every procedural defect will render a dismissal unfair. For example, in ***D'Silva v*** Manchester ***Metropolitan University and ors EAT 0328/16*** **t**he EAT upheld an employment tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair.

289. When assessing whether the employer adopted a reasonable procedure, tribunals should use the range of reasonable responses test ***J Sainsbury plc v Hitt 2003 ICR 111, CA*****;** ***Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 699, CA*****.**

Appeal

290. House of Lords in ***West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL*****,** :the employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.

Contributory fault

291. Section 123(6) of the Employment Rights Act 1996 (ERA) states that: '*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the* compensatory *award by such proportion as it considers just and equitable having regard to that finding*.'

292. There is an equivalent provision for reduction of the basic award contained in S.122(2) ERA which provides merely that; "*where the tribunal considers that any conduct of* the *complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal* ***shall*** *reduce or further reduce that amount accordingly"*

293. **EAT in *Optikinetics Ltd v Whooley 1999 ICR 984, EAT***, held that S.122(2) gives tribunals a wide discretion whether or not to reduce the basic award on the ground of any kind of conduct on the employee's part that occurred prior to the dismissal and that this discretion allowed a tribunal to choose, in an appropriate case, to make no reduction at all. This contrasts with the position under S.123(6) where, to justify any reduction at all on account of an employee's conduct, the conduct in question must be shown to have **caused or contributed to the employee's dismissal**. This required the tribunal to consider what was the reason operating on the mind of the dismissing officer.

294. In ***Nelson v BBC (No.2) 1980 ICR 110, CA*****,** the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

- *the conduct must be culpable or blameworthy*
- *the conduct must have actually caused or contributed to the dismissal, and*
- *it must be just and equitable to reduce the award by the proportion specified.*

295. It is a prerequisite of a reduction of either a basic award under Section 122(2) or a compensatory award under Section 123(6), that the Tribunal find the conduct in question to have been blameworthy: **Sanha v Facilicom Cleaning Services Ltd UKEAT/0250/18/VP**

296. ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL:*** when assessing the compensatory award payable in respect of the unfair dismissal, tribunal is to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

Automatic Unfair Dismissal : section 103A ERA

Disclosures qualifying for protection

297. The term "protected disclosure" is defined in sections 43A-43H of the 1996 Act. The basic structure of those provisions is as follows:

(*1) Section 43A defines a protected disclosure as a "qualifying disclosure" which is made by a worker in accordance with any of sections 43C to 43H .*

(2) Section 43B defines a qualifying disclosure essentially by reference to the subject-matter of the disclosure: I set it out in full below.

(3) Sections 43C to 43H prescribe six kinds of circumstances in which a qualifying disclosure will be protected, essentially by reference to the class of person to whom the disclosure is made.

298. The opening words of section 43B of ERA provide that:

"(1*) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –*."

Section 43B then lists of six categories of wrongdoing. The categories relevant relied upon by the Claimant are those set out within section 43B(1)(a)(b) and (d);

(a) that a criminal offence has been committed, is being committed or is likely to be committed

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject

(d) that the health and safety of any individual has been, is being or is likely to be endangered. person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject".

Dismissal

299. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure.

300. The principal reason is the reason that operated on the employer's mind at the time of the dismissal. Lord Denning MR in ***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*.** If the fact that the employee made a protected disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under section 103A will not be made out.

301. As Lord Justice Elias confirmed in ***Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*,** the causation test for unfair dismissal is stricter than that for unlawful detriment under section 47B . A claim under section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, so long as it *materially influences* the decision-maker. Section 103A requires the disclosure to be the *primary motivation* for a dismissal.

Imputing motive

302. The Tribunal has had regard to the Court of Appeal decision in ***Orr v Milton Keynes Council 2011 ICR 704, CA*,** and **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC**

303. ***In Co-Operative Group Ltd v Baddeley 2014 EWCA Civ 658, CA***. In the course of giving the only judgment of a unanimous Court, Lord Justice Underhill stated:

'There was some discussion before us of whether… there might not be circumstances where

the actual decision-maker acts for an admissible reason but the decision is unfair because (to use Lord Justice Cairns' language [in Abernethy v Mott Hay and Anderson 1974 ICR 323, CA]) the facts known to him or beliefs held by him have been manipulated by some other person involved in the disciplinary process who has an inadmissible motivation — for short, an Iago situation. [COG Ltd] ***accepted that in such a case the motivation of the manipulator could in principle be attributed to the employer, at least where he was a manager with some responsibility for the investigation; and for my part I think that must be correct'.***

304. ***Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC*** Lord Wilson observed that in searching for the reason for a dismissal, courts need generally look no further than at the reasons given by the appointed decision-maker however ' *If a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination'*.

305. In ***University Hospital North Tees and Hartlepool NHS Foundation Trust v Fairhall EAT 0150/20*** the EAT emphasised that *Jhuti* does not apply where the decision-maker is aware of the protected disclosure and thus not deceived into dismissing for an unrelated reason.

Burden of Proof

306. The position under section 103A is that the burden is on the employer to show the reason for dismissal. Where the employee argues that the real reason for dismissal was an automatically unfair reason the employee acquires an **evidential burden to show, without having to prove, that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason advanced.**

307. Once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal: ***Maund v Penwith District Council 1984 ICR 143, CA***

308. The Tribunal has remined itself of the Court of Appeal in ***Kuzel v Roche Products Ltd 2008 ICR 799, CA*****,** Mummery LJ set out essentially a three-stage approach to S.103A claim.

Drawing inferences.

309. In ***Kuzel v*** Roche ***Products Ltd*** Mummery LJ that a Tribunal assessing the reason for dismissal can draw '*reasonable inferences from primary facts established by the evidence or not contested in the evidence*'.

310. In the words of Lord Justice Mummery in ***ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA:*** '[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.' The Tribunal also considered the guidance in **Broecker v Metroline Travel Ltd EAT 0124/16**

Reasonableness - relevance

311. Lord Justice Mummery in ***ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA***:

'[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.'

Contributory conduct.

312. A tribunal may reduce the amount of any award by so much as appears just and equitable if it finds that the complainant has caused or contributed to the employer's act or failure to act about which the complaint was made — .49(5).

Analysis and Conclusions

The reason for dismissal

Knowledge

313. The Tribunal find that Ms Nwokedie was aware of the disclosures the claimant made on 3 June 2019 to Ms Smith, for the reasons set out in its findings. The disclosures on the 26 June were made direct to Ms Nwokedie. In terms of her knowledge about the Survey and what the claimant had said in that Survey, the Tribunal have also made a finding on a balance of probabilities, that Ms Nwokedie was aware of the claimant's feedback as set out above. The Tribunal have however made a finding that Ms Nwokedie was not , on a balance of probabilities, aware of what the claimant had said to Mr Hunter on 2 October 2019, prior to the receipt of the complaint from Ms Grimes on 8 October 2019.

314. The Tribunal find that Mr Hunter by the end of the disciplinary hearing, was aware of all the protected disclosures other than what had been included within the Survey and that Mr Lewington by the close of the appeal hearing, had knowledge of all the protected disclosures.

Reason for dismissal

315. The claimant was a nurse devoted to good patient care and had enjoyed a long career as a Registered Nurse. It was clear in how she presented to this Tribunal, that the way in which her employment had ended with the respondent has and continues to cause her considerable hurt.

316. The respondent had brought onto the Konar ward new nurses and there was in the early part of 2019 a lot of change, in part because of the preparations for the opening of the complex care unit.

317. Despite the failure the Tribunal find, by Mr Reeve to acknowledge this factor and the management team to engage with the experience of the workers on the 'ground', there was the Tribunal have found for the reasons set out in its findings, unrest on the ward following the arrival of the new nurses from Nigeria and some staff felt unsettled by it. The respondent had not prepared staff for the changes and in particular how to work alongside new nurses who had a different way of working. There was no evidence of a planned and structured approach to the transition and

integration of these new staff, to the detriment of both the new staff (according to the experience of Mr Ayangbile and Ms Maitanmi) and existing staff.

318. The claimant was insecure in her role by her own admission. She had outside stresses and was nearing the end of a career. which clearly had been important to her and was not confident in some of the computer based aspects of the role. The arrival of the new nurses created a significant level of insecurity and anxiety, which better communication may have helped to mitigate.

319. There were genuine issues with the performance of some of the new staff. Ms Ellis refers to this and there is no suggestion by Mr Reeve or Ms Lewington that Ms Ellis was not making anything other than genuine and honest observations.

320. Ms Stringer raised a difficulty in a handover from one member of staff because of the language difference and again there is no suggestion from the investigating team, Mr Reeve or Mrs Lewington that this was not a honest and genuine concern which she had raised.

321. That there were such issues is at odds with the attitude of Mr Reeve during the disciplinary hearing, where he was willing to accept that there was no serious unrest on the ward because this had not been communicated to management through the normal channels.

322. Mr Reeve was quick to discount the observations of staff who had been interviewed, including Mr Ayangbile and his experience on the ward.

323. Had Mr Reeve genuinely wanted to understand the context and environment in which the claimant was working at this time, he could have spoken directly to for witnesses including Ms Ellis. He could also have spoken with the Operations Director Ms Nwokedie including asking her why she had accused the claimant of being racist in June 2019 and what equality and diversity training or other support had been put in place to assist with the integration of the new staff.

324. While counsel for the respondent stresses the context to support the culpability of the claimant, equally the Tribunal find there is context around the respondent's seeming failure to manage what was clearly a challenging and unsettling situation for the existing and new nurses who it seems were left to work through the cultural differences and differences in working practices without much acknowledgment of the challenges by management or practical support..

325. The claimant then made her first disclosure on 3 June and goes above Ms Nwokedie's head by making it to Ms Smith and around the same time Ms Prest informs Ms Nwokedie about comments the claimant has made which she feels were racist. The Tribunal accept that the follow up meeting on 26 June was fraught and left the claimant upset.

326. Had Ms Nwokedie wished to do so, she could have dealt with that complaint by Ms Prest as a disciplinary matter but did not do so. The Tribunal find that more could have been done at that stage to understand why the claimant was feeling so unsettled and whether there was a broader issue around integration and a need for some more support and training. That it seems was a missed opportunity to take more positive action.

327. There is then the discussion about the staff Survey with Ms Nwokedie, who is abrupt with the claimant but takes no further action. Ms Nwokedie the Tribunal conclude, by telling the claimant that her behaviour will harm the respondent was seeking to

discourage her from raising her discontent rather than address her concerns with more constructive communication and provide more reassurance.

328. The Tribunal do not find that Ms Nwokedie was aware of the discussion with Tom Hunter on 2 October 2019 and it is her awareness of that and the timing of the complaint on the 8 October 219, which the claimant primarily relies on to evidence her claim that Ms Nwoekdie manipulated or encouraged the concerns to be raised by Ms Grimes.

329. Ms Grimes had only returned to teaching in September 2019, she reports various incidents in the few weeks following her return and then sends an email because she is concerned at how frequently these comments are being made. It may well be that Ms Grimes spoke to Ms Nwokedie about the complaints first. There is no statement or interview at the time with Ms Nwokedie about how this was escalated and Ms Grimes is not asked the question. However, there is nothing to suggest that Ms Grimes was persuaded or put under any pressure to make these complaints, even if she was encouraged to formalise them, in circumstances where Ms Nwokedie had spoken to the claimant previously about racist comments and given the backdrop of a previous complaint Ms Prest, it would not have been unreasonable to recommend she formalises her complaints so that they could be investigated.

330. The Tribunal conclude that Ms Nwokedie did not manipulate Ms Grimes into escalating these concerns and the Tribunal do not find that, even if what Ms Grimes was reporting was not the truth, that Ms Nwokedie had persuaded her to make false allegations. It is a leap to conclude that because Ms Nwokedie was aware that disclosures had been made, she had manipulated a member of staff into making serious and false allegations of racism and the evidence does not support that.

331. The Tribunal conclude that Ms Nwokedie had managerial responsibility for the claimant, she did not have personal responsibility for the dismissal or had any responsibility for the investigation process, and she did not procure her dismissal by encouraging Ms Grimes to make false allegations and did not deliberately manipulate evidence against her, by which Mr Reeve and Mrs Lewington were innocently misled. This is not an 'Iago' type situation: ***Jhuti***

Mr Reeves

332. The claimant alleges that the sole or principal reason why Mr Reeves dismissed the claimant was because of one or more of the protected disclosures.

333. The claimant has established that she made the protected disclosures and she is critical of the disciplinary investigation and the decision which Mr Reeves made, which she alleges was predetermined.

334. The investigation involved interviews with a number of witnesses. The interviews are reasonably thorough and open questions in the main are asked. The answers appear to have been fully recorded even where, as in the case of Ms Stringer and Ms Farmery, they are not supportive of the case against the claimant.

335. Given the complaint was raised by Ms Prest to Ms Nwokedie and the claimant alleges she had called her a racist back in June, it would be reasonable to consider that Ms Nwokedie may have had some helpful evidence, even if this is just to confirm what Mr Prest had reported to her in June and whether this was consistent with what Ms Prest is now alleging she had witnessed. The reason however, they did not interview Ms Nwokedie was because she had not heard the alleged comments first

hand and by this stage the claimant was not alleging at that stage that Ms Nwokedie had procured the making of false complaints.

336. The claimant does not allege that those carrying out the investigation were motivated by the protected disclosures and on the face of it, it would be reasonable for the disciplining officer to .

337. The claimant raises concern during the disciplinary hearing that the comments have come about because she has raised concerns about poor care but that is not explored with her, why she believes that and who she alleges has done what because of the disclosures, the focus by Mr Reeve is very much on the allegations about the claimant.

338. The claimant raises with Mr Reeve at the hearing that Ms Farmery and Ms Stringer would not have seen her on shift on the weekend of the 4 October because she was not working however Mr Reeve does not request any further investigation to establish if that is correct by checking the rota.

339. The other witnesses in the car were not interviewed, and Mr Reeve does not ask for this to be done. The reason given is that as it was the claimant's daughter in law, it was considered she would not be impartial.

340. The Tribunal comment on the fairness in terms of the reasonableness only for these purposes, in considering whether it is reasonable to draw any adverse inferences however, the Tribunal do not find that it is reasonable to draw any inferences from the way the disciplinary hearing was conducted. There were flaws in the process but the Tribunal do not consider, given the substance of the allegations and evidence, that it is reasonable to draw any inference from that, that may support a finding that the real reason behind the dismissal was the protected disclosures. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence and the Tribunal find that the evidence does not support a finding that when deciding to dismiss, what motivated Mr Reeve was one or more of the protected disclosures and certainly the evidence does not support a conclusion that this was the sole or principal reason for dismissal. : ***Broecker***

341. In terms of what was operating on Mr Reeves, the Tribunal accept his evidence that he was concerned only with the allegations and that he had considered the evidence and acknowledged that the evidence was not one sided and therefore applied a balance of probabilities test. There is no direct evidence that he was concerned about the claimant's disclosures and no reasonable basis on which to draw an inference that this motivated him.

342. The Tribunal find that the sole or principal reason for the dismissal were the allegations of misconduct and that Mr Reeve, regardless of any flaws in the process, had made a genuine attempt to weigh up the evidence. He tried to encourage the claimant to put forward mitigation but she saw this unreasonably, as bullying. He was concerned that she was unwilling to accept any wrongdoing and the allegations were on the face of it, serious.

Mrs Lewington

343. In terms of the appeal process, there are flaws with the appeal , in particular the failure to request that other witnesses were interviewed and the Tribunal has some concerns with the approach taken by Mrs Lewington which is addressed below however, the Tribunal do not find any direct evidence or that it is reasonable to draw

any inference, that the reason for the decision to uphold the dismissal was anything other than the serious allegations of racist behaviour and the belief that the claimant had made the comments as alleged.

344. The Tribunal find that the sole or principal reason or the decision to dismiss and uphold that dismissal were the allegation of misconduct and not any of the protected disclosures.

The claim of automatic unfair dismissal under section 103A ERA is not well founded and is dismissed.

Unfair dismissal

Reason for dismissal : section 98 (1)

345. The Tribunal is satisfied that the belief held by the respondent that the claimant had committed the alleged acts, namely made the alleged comments was reasonably considered to be in breach of its Code of Conduct and was the reason for the decision to terminate her employment.

346. The Tribunal find that the misconduct was the reason operating on the employer's mind at the relevant time. On the face of it, the reason could just the dismissal and thus it passes as a substantial reason and the inquiry moves on to the question of reasonableness.

Reasonableness : section 98 (2)

Suspension

347. The claimant complains that she did not have a preliminary hearing prior to suspension. The ACAS code does not provide that such a hearing is required. The respondent's own policy does provide for this. However, the rationale for suspension was within the band of reasonable responses as set out the in findings, and the claimant was given a chance at the investigation hearing to respond to the allegations.

348. While not strictly in accordance with the respondent's policy, the Tribunal do not consider that this undermined the fairness of the process and such action was not outside the band of reasonable responses given the reasons for suspension and the seriousness of the allegations, nor did it render the process unfair not to offer mediation or to deal with the matter through an informal process given how serious the allegations were.

Belief

349. The Tribunal accept that Mr Reeve formed a genuine belief in the guilt of the claimant however the issue in this case is really whether that belief was based on reasonable grounds following a reasonable investigation, given the conflict in the evidence.

Investigation and Disciplinary

350. When assessing reasonableness, the Tribunal is concerned only with what was known or reasonably should have been known, by the employer at the time and the

standard of the hypothetical reasonable employer is central to the section 98(4) assessment of reasonableness.

351. The Tribunal has reminded itself that what it is concerned with, is a band of reasonable responses when assessing the reasonableness of the investigation.

352. There was the Tribunal find, a failure to carry out a simple check of the rota to check whether the alleged witnesses were present on the days in question. In terms of Ms Prest, the respondent was aware that the incident took place at the weekend. However the issue of whether she would be working on a Sunday was not raised by the claimant during the investigation or disciplinary, and in any event, what she is alleged to have heard was supported (albeit with some differences in exact terminology) by Ms Maitanmi. The investigation carried out around this allegation although not optimum, was within the band of reasonable responses.

353. In terms of further investigation into the whistleblowing allegation, the claimant raised at the disciplinary that the allegations were made after she received complaints of poor care, the claimant did not whoever allege that Ms Nwokedie had persuaded Ms Prest and Ms Grimes to make false accusations such that it would have been outside the band of reasonable responses not to interview Ms Nwokedie and put the allegation to her.

354. Mr Reeve the Tribunal find, did not consider sufficiently the context in terms of the unsettlement on the ward, he was dismissive of there being problems.

355. The respondent failed to investigate further what was going on in the ward at that time and to fail to adequately consider the evidence given during the investigation about unrest. He dismissed this on the basis that there had been no feedback through the more formal channels, which would include via UNISON. The UNISON representative herself however indicated that she had become aware through this disciplinary proceeding of matters she needed to investigate further, however Mr Reeve did not enquire of her what those were.

356. While Mr Reeve gave evidence that he was of the view that it would have made no difference if there was more general unrest, to the seriousness of the claimant's comments. The Tribunal accept that a reasonable employer acting reasonably may take the view that comments of this nature cannot be justified regardless of context. Although the Tribunal consider that it would be reasonable to take that into account at least in mitigation however, the claimant had representation and was invited to put forward mitigating arguments but maintained that she had not made the comments.

357. Despite these deficiencies in the process, the Tribunal do not consider that these flaws are in themselves so serious that the investigation falls outside the band of reasonable responses. However, we now turn to whether in terms of each of each of the specific allegations, belief in the claimant's guilt was based on reasonable grounds;.

358. The allegation that Ms Nwokedie had said "*Freedom is not interested in you white girls anymore*"; was Ms Grimes word against the claimant's. The claimant did not put forward any reasons why Ms Grimes would have lied. Mr Reeve gave evidence that he took into account that it was one person's word against another but it was reasonable to take into account the wider evidence about the claimant's feelings toward the new nurses when assessing the likelihood that she had made this comment, not least given the absence of any alleged axe to grind by Ms Grimes. This was the Tribunal find a belief based on reasonable grounds following a

reasonable investigation into that allegation. The Tribunal consider it within the band of reasonable responses for the respondent to decide that the claimant's feelings and at times divisive language about the new nurses, 'tipped' the balance evidentially.

359. The allegation that the claimant had said she was the "*only white person"* on shift, was not supported by Ms Ellis who was the only other person present.

360. Mr Reeve gave evidence that he took into account that the claimant had referred to being the "*only European white*" on shift in the investigation interview and the Tribunal find it was reasonable to form the belief on a balance of probabilities, that the claimant may well have referred to herself in those terms and in the context of her concerns about the performance of the Nigerian nurses, this was a reasonable belief to have, based on a reasonable investigation into that allegation, despite Ms Ellis not having witnessed the comment.

361. In terms of the alleged comment that; " *This is our hard earned NHS money bringing **these** over".* This was allegedly said on a car journey and Mr Reeve's evidence is that he considered that it had not been directly supported by witnesses but there was evidence from Ms Prest and Ms Maitanmi that the claimant had previously made comments about the Nigerian nurses taking "*our jobs*" and " *this is our NHS money*". The Tribunal consider that the belief that she had made this comment was made on reasonable grounds at this stage, when Mr Reeve was not aware that other people (other than the claimant's daughter in law), including a Nigerian nurse was present in the car at the time it is alleged this was said. The previous comments again having 'tipped' the balance evidentially.

362. With respect to the allegation that that claimant had said "*have you come to play spot the white person*?". The claimant denied having made this comment and the two witnesses did not recall hearing it. Mr Reeve's evidence is that he took that into account. He does not explain in his summary however at the end of the disciplinary hearing, the outcome letter or even his evidence in chief how he reconciled that evidence . He refers to other comments the claimant had made about the ' influx' of nurses' and reference to 'tribes' which he found were racist in nature and no doubt this have informed his view of the likelihood this comment was made. However, this was a specific comment, which is sarcastic and for that reason may perhaps be viewed as more offensive, and not only do the witnesses say they did not hear it, they gave evidence that they would have remembered it. Further, this comment was not made direct to Ms Grimes but allegedly overheard by her. The evidence of the two witnesses was that a service user does use that sort of language . Ms Grimes according to her evidence, was not aware of this.

363. There was the possibility of misinterpretation or mishearing which does not appear to have been properly considered. It is the direct evidence of 3 witnesses that the claimant did not say this, against a witness who overheard the comment.

364. The Tribunal do not consider it was within the band of reasonable responses, where someone claims to have overheard a comment between three people, where all three deny it was said, to make a finding on a balance of probabilities that it was said.

365. While there was evidence of the claimant using divisive language, Mr Reeve accepted that the two witnesses who gave direct evidence, were also genuine and would not have lied to cover up for the claimant.

366. There appears to have been genuine shock recorded in the interview, by Ms Farmery at the suggestion that had been said by a member of staff.

367. It was easier the Tribunal conclude, for the respondent to find the claimant guilty on all counts than wrestle with the evidential issues each allegation raised. That Mr Reeve did not do so can be inferred from the absence of any detailed consideration in his summing up at the end of the disciplinary hearing and his outcome letter. In his summing up he states;

" ..*three staff have raised concerns directly around comments you have made, all stating they feel to be racist or indirectly suggesting a racist undertone. So, on the balance of probability, you did make those comments, "* [p.201]

368. In response to questions from the Tribunal, Mr Reeve gave evidence that if the only allegation had been the one about *let's play spot the white person*";

" If only Leanne Grimes had heard it, it would not result in dismissal. If Leanne Grimes and [claimant] said one thing and other another thing, on balance of probabilities, would have been 50/50 and would not have dismissed"

369. The Tribunal do not accept that it was within the band of reasonable responses, to find that the claimant had made the comment; " *have you come to play spot the white person*?" in circumstances where there were witnesses who deny it was said, who were shocked at the suggestion and where the complainant had only overheard the comment and there was the scope for misinterpretation. While it may be inferred that the claimant had made this comment because of other comments, the nature of the comment is different, in that it is sarcastic and derogatory and the Tribunal do not consider it reasonable to rely on inference where the direct evidence is so weighted against the allegation.

370. The Tribunal find that the fairness of the process was undermined by the finding that the claimant had made this comment. The respondent appears to have ' lumped' it in with the rest of the allegations, which of themselves are only reached applying a balance of probabilities test.

371. It is not clear whether the respondent viewed each allegation as potentially gross misconduct, it refers to the offence being gross misconduct in the context of the finding being that all four comments had been made. However, and in any event, in terms of whether the sanction would have been any different and whether it would have made a difference to the outcome, the appeal is part of the disciplinary process and the Tribunal will now consider that part of the process;

Appeal

372. The decision that there was no evidence of bias as alleged, is within the band of reasonable responses. The claimant and her representative had not established any evidence and spoken of having a "*feeling"* but had not alleged that there was otherwise any evidence to support that. It was not alleged that Ms Nwokedie had procured false evidence. Mrs Lewington concludes that any degree of unrest would not warrant the comments which were made and the Tribunal consider that it was within the band of reasonable responses not to treat this failing by Mr Reeve to engage with the unrest on the ward, as undermining the reasonableness of the decision to dismiss.

373. While the claimant identified that Ms Nwokedie and Ms Smith had not been interviewed, they did not explain what relevance that had to their grounds of appeal

and the Tribunal do not therefore consider that this undermined the fairness of the appeal.

374. What is of concern to this Tribunal however, in terms of the fairness of the appeal, is the decision not to interview the other witnesses to the 'car' incident and the approach to the evidence. At the appeal, the claimant raised that there had been other witnesses in the car in the September incident when she was alleged to have said *"This is our hard earned NHS money bringing **these** over",* including a Nigerian nurse, Chico and another member of staff Natalie in addition to her daughter in law. However, Mrs Lewington chose not to interview those witnesses.

375. Mrs Lewington in her summary at the end of the hearing refers to the number of witnesses in the 'round', rather than addressing the individual allegations and concludes that even if this itself is not judged to be appropriate evidence on the balance of probabilities, she believes she has " *sufficient triangulation of evidence* " to uphold the decision.

376. Mrs Lewington does not appear to have considered whether and what weight to attach to the witnesses who gave evidence which undermined the evidence of Ms Grimes. The approach of Mrs Lewington appears to be that the accounts from witnesses who do not support the allegations, have no evidential weight or renders the evidence neutral because what is more important evidentially, is the number of allegations of the same or similar type of offence.

377. In relation to two of the allegations there are witnesses who were present at the alleged time and gave evidence they did not hear the alleged comments, that has got to carry some important evidential weight . If those witnesses had confirmed the comments had been said, doubtless the respondent would have considered that compelling evidence and attached significant weight to it and not concerned itself with " triangulation". Triangulation' to assess credibility is concerned with the number of allegations however, sheer number of allegations discounts the credibility and/or reliability of the underlying allegations.

378. It was not one person's word against another in relation to two of the allegations; it was the word of Ms Grimes against 3 witnesses in respect of one allegation (Ms Farmery, Ms Stringer and the claimant) and her word against that of two witnesses in respect of another (Ms Ellis and the claimant).

379. Had the other witnesses in the car been interviewed and denied what had been said, this would have been the third out of 4 occasions, when the **direct** evidence was not supportive of the allegations.

380. It would also have been within the band of reasonable responses, to find that with regard to the "only white person on shift", this had not been said in the face of contradictory direct evidence.

381. Mr Reeve believes Ms Grimes and Ms Prest to be genuine, but he also considered the other witnesses to also be genuine.

382. The respondent took into account the complaint made in June 2019 by Mr Prest but that was not directly about the four incidents reported by Ms Grimes and that complaint was about an incident 4 months prior, making it more difficult for the claimant to respond to it. While it has weight in terms of inference, it is not direct evidence of what was said in September and October.

383. Mrs Lewington decided not to require an investigation into this new evidence about witnesses in the car but assess credibility by reference to a triangulation of evidence. If one piece of information is proven not to be reliable because of the overwhelming number of witnesses who can give first hand evidence, then the mere existence of allegations (particularly where the evidence is so finely balanced in terms of the other allegations) does not the Tribunal find, provide a reliable outcome to determine the guilt in that other offence.

384. The Tribunal find that it was not within the band of reasonable responses to fail to speak with the other witnesses to hear their account of what had actually been said in the car during that conversation in September 2019 and not factor that into the weight to be attached to the evidence, as it relates to that particular allegation.

385. The Tribunal consider that this failure to interview the witnesses fatally undermined the fairness of that appeal and in doing so the disciplinary process.

386. It offends natural justice, particularly where such serious allegations are made and where the long standing career and professional reputation of someone is at stake, not to interview relevant witnesses.

387. The other witnesses were employees of the respondent. There is no suggestion it would have created any difficulty to have paused the appeal, to interview them. The decision not to interview them and apply a principle of triangulation based on the number of allegations, was outside the band of reasonable responses and undermined fatally the fairness of the appeal process.

388. Had those witnesses been interviewed, the only reasonable response may have been to making a finding that such a comment was not made. That would have left it within the band of reasonable responses to make a finding of guilt in respect of two of the offences however, given the other findings were also reliant upon the evidence of the same witness (Ms Grimes), the respondent may have reached a finding that Ms Grimes was not a reliable witness, or it may have applied a lesser sanction. The respondent witnesses did not give evidence about what sanction would have been applied in those circumstances however, Mr Reeve gave evidence that had there been one allegation involving one person's word against another, he would not have been expected it to even reach a disciplinary hearing.

The Tribunal find that the claim of ordinary unfair dismissal is well founded and succeeds.

Polkey

389. The Tribunal has gone on to consider what would have happened had the unfairness not occurred.

390. Counsel for the respondent, on this issue of a failure specifically to interview the other witnesses, invites the Tribunal to find that it would have made no difference to the outcome and invites the Tribunal to make a Polkey deduction of 100%.

391. The Tribunal, however, do not find it possible to determine what the outcome would have been had a fair approach been taken, to interviewing all the relevant witnesses and applying a reasonable evaluation of the evidence, without knowing what the witnesses would have said. Neither party called them to give evidence to enable any assessment to be made. Either party could have done so and neither party provided a satisfactory reason for not doing so.

392. Had the witnesses, including the Nigerian colleague in the car, resoundingly supported the claimant, the respondent may, acting within a band of reasonable responses, not taken any disciplinary action or may have made a finding that based on the remaining proven allegations, they were not deemed sufficiently serious to dismiss but may have taken some disciplinary action short of dismissal.

393. The claimant had made a similar comment in June 2019, and no action at all was taken in connection with that. Mr Reeve gave evidence that he would not have expected one allegation where it was one person's word against another, to reach a disciplinary hearing.

394. If the other witnesses in the car, had denied hearing the alleged remark, there would have been **direct** evidence supporting the claimant's account that 3 out of 4 alleged comments were not made.

395. The Tribunal do not consider that it is appropriate to make a Polkey deduction in circumstances where it remains unknown what those witnesses in the car would have said had a reasonable investigation been carried out and how that may have impacted on the findings in respect of the reliability of Mr Grimes more generally as a witness and/or whether the respondent would have considered the remaining offences sufficiently serious to dismiss.

Contributory fault

396. The Tribunal now turn to the question of whether any conduct of the claimant before dismissal was such that it would be just and equitable to reduce the basic award or whether the dismissal was to any extent caused or contributed to by any action of the complainant for the purposes of the compensatory award.

397. The allegation that Ms Nwokedie had said "*Freedom is not interested in you white girls anymore*"; was not witnessed. It is Ms Grimes word against the claimant's. The claimant herself can provide no reason why Ms Grimes would have lied about her making this comment other than because she is close to Ms Nwokedie. The claimant's evidence is that Ms Smith had told her that Ms Nwokedie had taken her "*eye off the ball"* and that she would "*get it in the neck*" from her for raising complaints about the new nurses. The Tribunal have found that the comments were not made by Ms Smith, but the fact the claimant alleges they were, the Tribunal finds does reveal the thought process and the perceptions of the claimant at that time, namely that Ms Nwokedie did not want to hear complaints from the existing nurses about the new Nigerian nurses.

398. The Tribunal find that it is more likely than not, that the claimant had made if not this exact comment to Ms Grimes, than based on the evidence now before the Tribunal, on a balance of probabilities, she had made some such comment . The claimant had described herself during the disciplinary investigation as the only "*white European*" on shift and the Tribunal find it is more likely than not, that the claimant had made a reference to "white girls" or " white European girls" and Ms Nwokedie's lack of interest in them.

399. The allegation that the claimant she had said she was the "*only white person on shift",* was not supported by Ms Ellis who had not heard this said. However, again taking into account that the claimant in the investigation comments that during a weekend on shift she had been the "*only European white*" on shift, the Tribunal find on balance of probabilities, that the claimant may well have referred to herself on those terms with someone such as Ms Grimes who she felt comfortable with but on a balance of probabilities, given the claimant and Ms Ellis gave direct evidence that

it had not been said, the Tribunal conclude on a balance of probabilities that it was not said on this occasion as alleged but given the claimant's past conduct, that conduct contributed to the respondent's finding that it had been said.

400. In terms potentially of the more serious allegation ; "*let's play spot the white person*", which is sarcastic and scornful and thus potentially more offensive, the two witnesses who are alleged to have been present deny hearing the claimant say this. Their evidence is that a service user may have.

401. Ms Grimes alleges she had overheard this comment, she does not allege it was said directly to her and it is possible she did not hear the claimant say it but overheard her commenting on what a service user had said or perhaps it was a service user who had said it. Ms Grimes discounted that possibility in her interview on the basis she had not heard service users make such a comment but that is at odds with the description of various witnesses about the service users they look after and how they are not from a multicultural background and can make inappropriate comments about the staff from ethnic minority groups. On a balance of probabilities, on the evidence available the Tribunal do not find that the claimant made this comment but that does not mean that Ms Grimes lied, there may be an alternative explanation for what she believes she heard.

402. In terms of the alleged comment that; " *This is our hard earned NHS money bringing these over".* This was allegedly said on a car journey. It transpired at the appeal, that there were a number of people in that car, including a Nigerian nurse, Chico. However, the respondent made no attempt to ask them what had been said. The claimant alleges that the reason for not disclosing that Chico and Natalie was present at the disciplinary hearing was because of the impact of the medication she was taking but by the appeal she had recalled their presence. Neither the claimant nor her union representative called them as witnesses or obtained a statement from them however they had asked for them to be interviewed and they were not.

403. Ms Prest had complained in June 2019 of a similar comment being made, which Ms Maitanmi (although the Tribunal find, she had embellished what had been said), had confirmed hearing similar comments that day. The Tribunal also take into account thar the claimant was unhappy about what was being spent from the budget on the nurses, was concerned about the training cost and lack of secondment funding for existing nurses and in the interview with her she comments [p.143]; " *nobody said anything .They just appeared. These girls had come and they could speak English very well. Staff here getting very unsettled "* ***what are they going to do without job?"…"***

404. The claimant does when referring to the Nigerian nurses 'lump' the Nigerian nurses together as one group. Rather than identifying certain individuals who do not provide a good service, she complains about them as one group identifying them by their ethnicity. Her language about them is divisive. The Tribunal accepts her evidence that she got on well with the first two Nigerian workers, and that she offered support to others, however the Tribunal find that the claimant probably felt overwhelmed by the number of new nurses who had arrived and the prospect of further nurses.

405. The Tribunal find on a balance of probabilities, that these comments about NHS spending and taking over jobs was said. However, the evidence from those other witnesses who were in the car when this particular comment was alleged to have been said, may have made a significant difference to the finding. Our finding is based on a balance of probabilities on the evidence presented to this Tribunal. The past blameworthy conduct of the claimant had however been a factor which the respondent had reasonably taken into account in drawing inferences.

406. In the circumstances the Tribunal find that the conduct of the claimant, as a finding of fact on the evidence as presented to it (which is separate from the issue of the fairness of the dismissal and what the respondent should have done to investigate further) was blameworthy and her conduct in the past had contributed to the findings against her including the inferences which were drawn and thus the outcome.

407. The claimant more so than other colleagues, was resistant to the arrival of the new nurses and the changes. Her language and attitude the Tribunal find, became divisive and her resentment over the money being spent and what she saw as the impact on opportunities for existing staff, negatively affected her perception of the new nurses and this was exhibited in the '*them and us'* language she was using.

408. Had there been a reasonable investigation and an approach to the evidence, which was within the band of reasonable responses, the outcome may not have been dismissal however, the claimant's conduct was blameworthy and did contribute the Tribunal find to the termination of her employment, and the claimant must take some responsibility for the consequences of her behaviour and thus for the dismissal. The Tribunal find that the appropriate reduction to the basic and compensatory award is 50%.

409. The case will be listed for a hearing to determine remedy.

Employment Judge Broughton

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Date: 15 December 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

7 January 2022

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FOR THE TRIBUNAL OFFICE

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