EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Dr O E Oduwaiye	AND	Royal Cornwall Hospital NHS Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 13 and 14 December 2021

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: In person
For the Respondent: Mr G Powell of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's claims are all dismissed.

RESERVED REASONS

1. In this case the claimant Dr Oluwakemi Elizabeth Oduwaiye claims that she has been discriminated against because of a protected characteristic, namely her race. The claim is for direct discrimination and harassment. She also brings monetary claims relating to her unpaid notice pay and accrued but unpaid holiday pay. The respondent denies that there was any discrimination, and it denies the monetary claims.
2. The parties consented to this matter been determined by an Employment Judge sitting alone pursuant to section 4(3)(e) of the Employment Tribunals Act 1996.
3. I have heard from the claimant. For the respondent I have heard from Mr Peter Gray, Mrs Evette Grobbelaar, Mr Venkat Reddy, and Mr Adam Linney. I also accepted witness statements in support of the claimant from Dr Gbemisola Peter-Ayeni and Ms Jemima Twum Prempeh but they were not here to be questioned on these statements and so I can only attach limited weight to their evidence.
4. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence,

both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

5. The Facts:
6. The respondent provides a wide range of acute and general hospital services to the population of approximately 500,000 people across Cornwall. The claimant is Dr Oluwakemi Elizabeth Oduwaiye who describes herself as Black. The claimant joined the respondent's Ear Nose and Throat (ENT) department in January 2020 as a locum doctor. The claimant was given notice on 28 April 2020 that her employment would terminate with effect from 5 May 2020.
7. Mr Peter Gray, from whom I have heard, was at that time the respondent's ENT, Audiology & Rheumatology Service Manager - Specialist Services & Surgery. Mr Gray's Service Manager role involves managing the delivery of the relevant service and working with the finance department to ensure that departments work within budget constraints. Hid role also involves dealing with HR issues including recruitment.
8. When the need arises, the respondent fills temporary vacancies with locum doctors. The respondent uses KernowMedic which is an in-house recruitment service which can find locum doctors for all specialties by reference to an agreed list of recruitment agencies. The advantage of such a locum arrangement is that it is temporary, which gives both parties freedom to give short notice to end the arrangement. The disadvantage for the respondent in using agency staff such as locum doctors is that they are sourced by an agency and are inherently more expensive. For this reason, locum doctors are a very expensive resource and the respondent discourages its managers from using agency and locum staff if they can be avoided.
9. The recruitment process for locum doctors commences when KernowMedic receive a locum request form. They send this out to the various approved agencies to invite the submission of CVs from their clients who might be suitable locum applicants. The respondent will then vet the CVs and appoint a locum doctor on that basis. There would not normally be an interview prior to the appointment of a locum doctor. The recruitment process is very different for any permanent substantive post for which there would normally be a competitive interview.
10. Mrs Evette Grobbelaar, from whom I have heard, is a consultant ENT Surgeon employed by the respondent. She was the respondent's Clinical Specialty Lead for ENT until January 2020, when another ENT consultant Mr Venkat Reddy, from whom I have also heard, took over that role. The ENT department includes three different tiers of doctors: junior doctors, middle grade doctors, and consultants. Middle grade doctors usually will have at least two years of specialist ENT experience. If a middle grade doctor is in a recognised training rotation, then he or she is referred to as a Specialist Registrar. Specialist Registrars are appointed nationally and complete an approved training programme which almost always includes rotating through different hospitals. The respondent has a contractual obligation to provide Specialist Registrars with training opportunities. They will have a protected timetable, and there is a requirement of set numbers of theatre sessions to fulfil their training needs.
11. In January 2020 one of the Specialist Registrars within the ENT Service unexpectedly commenced her maternity leave. This had an impact on the treatment rota and Mr Gray decided that this temporary vacancy need to be filled. He raised a locum request form which was approved by the respondent's General Manager for Specialist Surgery in Services and forwarded to KernowMedic to source an appropriate locum.
12. As a result of this process the claimant was appointed as a locum doctor to the respondent's ENT department. She had ST3+ level experience which meant that she would be expected to manage general ENT outpatient clinics with support, and to cover the middle grade on call rota. The ENT department has a three tier on call rota with a junior doctor, the middle grade doctor, and a consultant. At that time the respondent only employed five middle grade doctors in the ENT department, and with one now absent on maternity leave, the respondent was unable to cover the middle grade on call rota with only four members of staff. This is why a locum was needed and the claimant was considered to be a key appointment in providing on-call cover and support.

13. The claimant suggests that she discussed the vacancy with her recruitment agency DRC Locums, and only accepted the assignment on the basis that it was a contract for at least 11 months to cover maternity leave, and at a certain hourly rate which she approved. Even if that is the case, that was not the contract which the claimant agreed with the respondent. The claimant signed what was described as a "Fixed Term Worker Contract" on 6 February 2020. It was described as a Contract of Temporary Employment, for a Temporary Worker. The commencement date was expressed to be 25 October 2019 and the end date of 4 November 2020, subject to the other provisions of the contract. In fact, the claimant commenced employment on 13 January 2020 as maternity leave cover for the Registrar ENT doctor mentioned above.
14. Clause 2.1 provided that it was temporary employment under a fixed term contract which was subject to the remaining terms of the contract so that it would continue until the date specified (4 November 2020) "unless terminated earlier by either party giving the other party statutory minimum notice in accordance with clause 29.1 below". Clause 29.1 provided that if either the respondent or the claimant was to terminate the contract before the end date of 4 November 2020 than "you will be required to give the Trust and the Trust will be required to give you statutory minimum notice."
15. Clause 4 provided that the claimant's main duties will be those "generally consistent" with her job title. Clause 24.1 provided that holiday entitlement would not be paid as a separate payment at the time of each holiday, but it would be paid by increasing normal pay by 12.07% which would also be referred to in payslips. Clause 24.1 also made it clear that "For the avoidance of doubt, the hourly rate referred to … contains the 12.07% uplift".
16. Clause 26 provided that the claimant was to be paid at the agreed hourly rate but that she was required to complete a timesheet for each day and which had to be approved by the Trust each week to confirm the number of hours worked, and that payment would be based on that approved timesheet.
17. The front sheet including the summary information included the claimant's address of 19 Brogan Street in Manchester which the claimant says is an old and incorrect address from some four years previously. It is clear that the respondent could not have created such an address of its own volition, given that it used to be an accurate address, and it must have come from DRC Locums. The claimant did not draw to the respondent's attention that this address was incorrect, and she signed the contract to agree it. This would appear to explain why payslips which were sent to the claimant at that address were not apparently received by the claimant.
18. Other relevant terms of engagement include that the respondent does not normally offer accommodation on site to locum doctors when they are on call. Neither does it offer accommodation on site to doctors who live within 30 minutes of the hospital in question. The claimant worked at Treliske Hospital in Truro, and she had arranged temporary accommodation in Falmouth.
19. It seems that Mrs Grobbelaar was not aware of these restrictions with regard to the provision of on-call accommodation, and she assisted the claimant in obtaining accommodation on site when she was on call. It is clear from the contemporaneous documents that the respondent arranged for on-call accommodation for the claimant on each of 17, 20, and 30 January 2020, and 4, 5, 6, 17 and 21 February 2020. The respondent also arranged for on-call accommodation on 27 February 20 which the claimant did not use.
20. During this period the claimant had asked Mr Gray to arrange an on-call room for her. By email of 19 February 2020 to the claimant Mr Gray explained that he could not authorise one for her for two reasons: the first was that locum/agency staff were not permitted by the respondent to use on-call rooms; and secondly because she lived less than 30 minutes away from the hospital. The claimant replied to the effect that she lived roughly 45 minutes from the hospital and that if she was not authorised to use the on-call rooms again then it would take longer for her to arrive when called in. On-call rooms were then provided for the claimant as set out above. However, during this period the claimant complained about the state of the on-call accommodation by email on 22 February 2020. She complained to

Mr Gray that the room was not fit for purpose and was dirty and stained. As noted above she did not use the respondent's on-call room facilities after this time.

21. On 18 March 2020 the claimant also made enquiries of the respondent's administrative team about alternative accommodation. They had made enquiries at the claimant's request about accommodation at a local hotel for three nights over a weekend on which the claimant was due to be on-call, which was available provided the claimant paid herself, which she decided not to do. The respondent also had access to student accommodation known as Sanctuary Accommodation, but this also required payment with a minimum booking of one month. The claimant declined, but in a subsequent email confirmed to Ms Johns who tried to make the arrangements "I know you're always happy to help and you have been helping me a great deal too and I appreciate you so much."
22. Meanwhile, on 19 January 2020 Miss Srinisivan, a Specialty ENT Doctor in the department, fractured her wrist, and had to take sick leave. Miss Srinisivan's workload had been predominantly clinic based, and the service requirements in the ENT Department changed significantly as a result of her absence on sick leave. There was suddenly a large outpatient capacity deficit, and because of this it was decided by the respondent to redeploy the claimant to provide this cover and retain the service provisions. This was in accordance with the range of job duties set out in the claimant's contract, but it had a knock-on effect of reducing the number of sessions which the claimant was undertaking in the operating theatre. The claimant was a locum doctor and not a training specialist doctor, which meant there was no training requirement on the respondent to provide a certain number of theatre sessions for her. The respondent was unable to reduce theatre sessions for training specialist registrars because of the contractual obligation to provide them with training in theatre, which was not in place for the claimant. This is why the management of the ENT department (which included Mr Gray and Mr Reddy as well as Mrs Grobbelaar) decided to make this change to cover the clinics. The rota was changed accordingly with effect from 9 March 2020
23. The claimant was also concerned that she should have a nurse present with her when working in clinic. This was to assist with administrative support, and also to act as a chaperone as a shield against unjustified complaints. She refers to a conversation with an ENT consultant Mr Mitchell whom she says confirmed to her on 22 February 2020 that the respondent was short-staffed. On 9 March 2020 she emailed Mr Reddy and raised the concern that she had filled in outcome forms in clinic and had to give the sheets back to patients and asked them to return these to the reception desk, and that "it would be nice to have a nurse in clinic with me who can confirm this". Mr Reddy raised the claimant's concern with the respondent's management and was sympathetic to the claimant's view that the respondent should not necessarily be relying on patients to take forms back to reception.
24. With regard to available nurses the respondent generally had available one full-time qualified nurse and three nursing assistants, that is to say four employees, to cover five different clinics or rooms. The claimant asserts that other colleagues always had a nurse available with them, but that she did not. The weight of evidence on this point is against the claimant, and I prefer the evidence of Mr Reddy, Mrs Grobbelaar and Mr Gray to the effect that individual nurses were not allocated to individual doctors and were spread across the department.
25. On 16 March 2020 the respondent's Blood Transfusion Manager raised a concern by email that there was a shortage of Evicel Fibrin glue, which is a medicine which was used across different departments. Mr Reddy was then asked to circulate this concern amongst colleagues in the ENT Department which he did on 15 March 2020 by email to 19 recipients, including the claimant. He merely asked: "Who has been using this and what for?" The claimant replied on the following day: "Dear Mr Reddy, I have indeed been using evicel for haemostatis in some persistent posterior epistaxis as an alternative to Floseal and rapid rhino nasal packing. This has reduced our epistaxis admission significantly over the last few weeks. I hope this helps? Kind regards, Elizabeth". Mr Reddy replied: "Unfortunately there is none left for the whole hospital now, and no alternatives can be sourced for various reasons. As previously discussed between us, this is why it needs to

be properly business planned so that more could be brought in if approved, rather than just implementing a change to typical practice. I do not doubt that it has worked, but there is a correct way to go about it. If you want to put a business case together, that's fine, and I'll help you with this, but at the moment there is no more in the trust so you need to do without it until a proper business plan has been put through and approved.". The claimant replied: "thank you for letting me know. I will meet you to discuss further at some point. Kind regards"

26. All of these events took place against the background of the developing Covid-19 pandemic. Hospitals all over the country were affected and the respondent needed to prepare for the emergency by creating as much bed space as possible within its hospital. With effect from the week commencing 23 March 2020, the respondent cancelled the majority of outpatient appointments and non-emergency planned surgeries. The ENT department within which the claimant worked was disproportionally affected by these cancellations because the Department predominantly offered outpatient services. The majority of this routine work simply stopped, and only a significantly reduced service continued. All doctors stopped providing their normal duties and were asked, if needed, to update their skills so that if necessary, they could support other departments. The ENT Department was left with an emergency walk in treatment clinic and on-call cover only. Operating theatres were deemed a high-risk area so only cancer and emergency cases were performed.
27. Mrs Grobbelaar was responsible for supervising and sending out amended department rotas which involved a three tier on-call system, and occasionally even only a two tier on-call system, to ensure that as many of the ENT doctors as possible would be available for redeployment elsewhere in the hospital. Mrs Grobbelaar sent a number of emails explaining the position to the ENT department team which included the claimant. The rotas reflected the two doctors on call in the two tier on-call system, or three doctors on different days where it was a three tier on-call system, with the other available doctors from the Department listed for potential redeployment elsewhere in the hospital.
28. On 27 April 2020 Mrs Grobbelaar emailed an update concerning emergency clinic cover. Previously the on-call team was expected to provide cover for the emergency clinics, but this new rota provided that the emergency clinic would be entered separately. The claimant was entered in the rota to cover the emergency clinic on Friday, 1 May 2020. She was not entered on the rota to cover the emergency clinic on any other day that week. Mrs Grobbelaar and Mr Reddy do not accept the claimant's contention that it was agreed that she would provide all emergency clinic cover for that week. The claimant has referred to a previous exchange of WhatsApp messages on 14 April 2020 with a colleague Dr Kel Anyanwu, in which he suggested that he would discuss the claimant's position with Mrs Grobbelaar who would then speak with Mr Reddy and Mr Gray and that "one idea was for you to do the emergency clinic daily". Again, the weight of evidence is against the claimant and I prefer the evidence of Mrs Grobbelaar Mr Reddy and Mr Gray to the effect that it was not agreed that the claimant would cover all emergency clinics herself.
29. This all coincided with the respondent's permanent objective to seek to reduce locum, agency and temporary staffing expenses, and with outpatient services largely coming to an end, the respondent was under even more pressure to control its temporary staffing in order to save costs. On 22 April 2020 Mr Gray emailed Mrs Grobbelaar and Mr Reddy to confirm that he had spoken with the claimant and that she was doing telephone clinics and administration work, and that she was not claiming a huge amount but wanted to stay. He raised the question "Could we manage without her?" Mrs Grobbelaar replied to the effect: "So on Elizabeth's situation if she is putting in reasonable claims could we hold off doing anything too dramatic for at least a couple of weeks?"
30. On 25 April 2020 there was then a directive throughout the hospital from the respondent's senior management. An email from Mrs Davies on that date to the department managers, including Mr Gray, was to this effect: "Further meetings have taken place with regard to the financial position we are in. With Covid currently not hitting us hard and acknowledging that elective work has been cut drastically, all locum contracts must cease by 31 May 2020. Business managers, please end all of the following spends: locum/agency doctors …" This

was consistent with a subsequent briefing session to all senior managers on 28 April 2020 to the effect that "all agency and bank [staff] should now be cancelled". It was also consistent with an email from the respondent's medical director to all departments on 29 April 2020 that: "The scrutiny on ADH/LLP/Bank/Agency/Locums will be intense … Any locums/bank/agency that are still required will need a watertight narrative to explain their need."

31. As a result of these directives Mr Gray spoke with the claimant to confirm that he was required to terminate her locum appointment. During that conversation the claimant raised the possibility of being retained under the Government's furlough scheme. Mr Gray confirmed the position in an email to the claimant dated 28 April 2020 which stated: "Following on from our conversation please take this email as your formal one week's notice. I have spoken to Paul [Bevins] in KernowMedic who informs me that the Trust is looking at the furlough scheme for locums on a case-by-case basis. If you have any questions on this please ask agency to contact KernowMedic directly. Finally on behalf of our specialty thank you for coming to work for us at RCHT. We all wish you the very best." This email was copied to Mr Bevins who responded to the claimant on 28 April 2020: "Just to be clear, the Trust is not currently looking to furlough any locums that are being asked to leave the Trust. The furlough scheme is in place to allow employers to retain employees if they are in a position in which they want to retain someone's services in the future. As our agreement is of a temporary nature, the scheme will not be used, but we will repost for any required roles at a later date as needed."
32. About this time the respondent also terminated the employment of Dr Muller, who is white, and who was employed as a locum consultant in the ENT department.
33. On 29 April 2020 the claimant sent an email to Ms Johns, who had previously assisted her in connection with the on-call accommodation, by way of a farewell message. The email commenced: "You probably already know this but I wanted to let you know myself that I'm sorry I will not be seeing you again as my contract has been prematurely terminated as a direct consequence of the ongoing pandemic …"
34. Although the claimant was given notice of one week, which ended on 5 May 2020, she returned home on 1 May 2020 and did not work after this day. There was then a dispute about her pay for that final week. As a locum doctor the claimant was required to submit timesheets for the hours she worked, and she would then be paid accordingly. Mr Gray became concerned when he saw that the claimant had submitted a timesheet for 42 hours when according to the rota she was only down to work on one day for that week (1 May 2020). Mr Gray was aware that the claimant might have been doing administration work which would not have been included on the rota and asked the respondent's IT team to check your login details which would show when she was doing administrative duties. Having carried out that investigation Mr Gray concluded that there was only evidence that the claimant had worked for 27 hours and 45 minutes rather than the 42 hours for which she had claimed. The claimant claims that she had run the emergency clinics, which Mr Gray had not expected to be the case because the claimant was only on the rota for an emergency clinic on Friday, 1 May 2020, and the respondent does not accept that it agreed that the claimant would undertake the emergency clinics on the previous days.
35. The claimant then took advice from her BMA Representative Mr Prescott who corresponded with the respondent on her behalf. He wrote by email to Mr Bevins on 21 May 2020 which included these comments: "On 28 April 2020 Dr Oduwaiye received notice of termination of her post at the Royal Cornwall. I recognise that no one could foresee the impact of the covid-19 pandemic however, the personal consequences upon Dr Oduwaiye, and her family, as a consequence of the Trust giving her notice have been catastrophic and wide-ranging … I understand that the employment of locums at the Royal Cornwall is to be considered on a case-by-case basis and, I'm aware that Dr Oduwaiye has already approached the Trust expressing her eagerness to continue working and requested that redeployment be considered in her case …"
36. On 26 May 2020 the claimant and Mr Prescott exchanged emails. It was clear that the claimant's concerns were limited to the dispute about paying her for the hours which she had claimed and the failure to furlough her. She said to Mr Prescott: "I'm getting

increasingly irritated that they are reluctant to pay me for the hours worked! Do they want us to go to the courts? I'm happy for that if that is the only way forward! They have to bear in mind that should this end up in the courts, I will be claiming for significant compensation for the trauma they are causing to me, the failure to furlough me as the government advised and unfair termination of my contract due to covid-19 as well as their refusal to pay me for the hours I have worked with them?"

37. As at that stage by the end of May 2020 the claimant had not raised any allegation, either formal or informal, of discrimination, less favourable treatment, or harassment on the grounds of race. It is also clear from the emails which she and Mr Prescott sent on her behalf that she accepted that the Covid-19 pandemic was the reason for the termination of her contract.
38. The claimant commenced the Early Conciliation process with ACAS on 16 June 2020 and the EC Certificate was issued on 23 June 2020. Before the claimant had presented these proceedings, the respondent was still trying to arrange for the claimant to be paid for the 27 hours and 45 minutes which Mr Gray considered she had worked. This was easier said than done because of the requirements of the payroll agency to make payments against an amended timesheet. The claimant disputed Mr Gray's assessment and did not issue an amended timesheet. The claimant then presented these proceedings on 27 July 2020.
39. The respondent then sought to resolve the pay dispute as a goodwill gesture even though it did not consider the claimant was due more than the 27 hours and 45 minutes which Mr Gray had earlier authorised. It made a payment for 39.5 hours on 18 December 2020 which was a net payment of £1,569.89. As usual the pay slip recorded that the hourly rate "includes 12.07% WTR" in respect of the holiday payment. The respondent then made a further payment on 25 June 2021 for 5.5 hours in the net sum of £302.68 which meant that the claimant has now been paid for 45 hours for her final week against a timesheet which she had previously submitted for 42 hours.
40. I also make the following findings of fact in connection with other allegations which the claimant has raised.
41. The claimant alleges that she was excluded from team interactions. These allegations were vague and unsupported, and they were also inconsistent in that the claimant admitted that she would speak to the consultants if and when she needed their input or advice and would not do so if she did not need it. On the other hand, she alleged that she expected them to speak to her. The evidence of Mr Reddy and Mrs Grobbelaar was that they did speak to the claimant and they did involve her, and this was normal interaction in the context of the claimant's duties, and those of other more junior doctors in their department who were in training or were likely to have information about specific patients whom they had seen. Mr Reddy accepted that there may have been one occasion when the claimant was waiting for him to see her, and that he did not do so, but this was in the context of having to be elsewhere to treat an emergency patient. These allegations are also inconsistent with Mrs Grobbelaar's attempt to retain the claimant for as long as possible against the directive to terminate the locum arrangements. The weight of evidence is against the claimant, and I reject the allegation that the claimant was excluded from team interactions.
42. The next allegation is that Mrs Grobbelaar and/or Mr Reddy criticised the claimant behind her back, especially to junior colleagues. The claimant only gave one example which concerns comments made by Mrs Grobbelaar to a colleague Dr Kim, when the claimant was not present to hear that conversation, and Dr Kim has not given evidence. Mrs Grobbelaar does not recall any such conversation and can recall no reason for her to have been unhappy with the claimant. On the contrary, the respondent accepts that the claimant was a valuable member of the team. The issue of the Evicel glue was not in my judgment an example of the claimant being undermined or criticised. Given the depletion of this medicine which was required in other departments, it was entirely appropriate for Mr Reddy to make enquiries as to its use, and he was prepared to support the claimant in a business case for its future use if she wished. There is no evidence that the claimant was criticised behind her back to junior colleagues as alleged.
43. The only remaining allegation not already dealt with in these findings of fact is an allegation that Mr Gray was "constantly spot checking on her" before he dismissed her. Mr Gray

denies this but does accept that there was discussion in the Department about emergency clinics and that Mr Gray was working in and with the Department to assist its reorganisation of the difficult and busy time. It was Mr Gray's normal role to be assessing and analysing all aspects of the ENT Department at that time.

44. Finally, I make the following observations with regard to the claimant's credibility. In the first place the claimant's allegations were simply not supported by the contemporaneous documents. Indeed, the opposite was usually the case in that the contemporaneous documents undermined and contradicted the assertions made by the claimant. In addition, the weight of evidence was against the claimant and the respondent's four witnesses were consistent and measured in their rejection of the various allegations against them. In addition, the claimant had access to a qualified BMA employment representative, and it is clear that the claimant's concerns at the time (which he presented on her behalf) were limited to the early termination of her contract which she had hoped would run to the end of November 2020; whether she might be put on furlough; whether she would be able to return to the respondent's employment; and why her last week's pay had been delayed. All of this is inconsistent with her allegations presented to this Tribunal that she was the victim of a consistent course of conduct of discrimination and/or harassment. Two of the claimant's allegations were particularly serious, namely that her dismissal was an act of direct discrimination because she is Black, and secondly that the respondent maintained an on-call room in poor condition which it chose only to allocate to her because she is Black and/or to other employees who are Black or from other ethnic minorities because of their race. These two allegations were effectively that senior managers of the respondent have colluded deliberately to discriminate against the claimant and others because of their race, when it would clearly involve significant acts of gross misconduct on their part to do so, and without any evidence adduced by the claimant to support those allegations. For all of these reasons, where there was a conflict on the evidence between the claimant and that of the respondent, I preferred the respondent's evidence.
45. Having established the above facts, I now apply the law.
46. <u>The Law:</u>
47. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination and harassment.
48. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.
49. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
50. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
51. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
52. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order") and the claim was outstanding on the termination of employment.
53. The claimant also claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.
54. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations"). Regulation 14 explains the entitlement to leave where a worker's employment is terminated during the course of his

leave year, and as at the date of termination of employment the amount of leave which she has taken is different from the amount of leave to which she is entitled in that leave year.

55. Section 86 of the Employment Rights Act 1996 governs minimum periods of notice. Under section 86(1)(a) the statutory minimum period of notice is not less than one week where the employee's continuous employment is less than two years.
56. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
57. I have considered the cases of: Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Hewage v Grampian Health Board [2012] IRLR 870 SC; Ayodele v Citylink Ltd and Anor CA [2017]; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; Robinson-Steele v RD Retail Services Ltd [2006] IRLR 386 ECJ; and Lyddon v Englefield Brickworks Ltd [2008] IRLR 198 EAT. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
58. The Race Discrimination Claims:
59. The issues to be determined by this Tribunal were agreed at a case management preliminary hearing on 6 May 2021 before me, and I confirmed the Agreed List of Issues in an order on the same day ("the Case Management Order"). There are 10 specific allegations of harassment. The claim for direct discrimination relies on the act of dismissal (which the respondent accepts did occur), in addition to the 10 allegations of harassment which are repeated as allegations of direct race discrimination. My findings with regard to the claimant's dismissal, and the 10 specific allegations of harassment, are as follows.
60. The Claimant's Dismissal:
61. The termination of the claimant's employment coincided with the onset of the covid-19 pandemic and the directive from the respondent's senior management to terminate all locum/agency appointments and to cancel outpatient clinics. The decision to dismiss the claimant was entirely consistent with this timescale and the instructions from the respondent's senior management. The decision not to retain the claimant under the furlough scheme was again consistent with respondent's need to cut costs, and no other locum doctors were retained under the furlough scheme. Indeed, in general terms the furlough scheme was not open to public sector employees. There were clearly sound financial and organisational reasons for the respondent to terminate the relationship with the claimant and not retain her. There is simply no evidence that other locum doctors were retained or put on furlough, and no evidence that the claimant was treated less favourably than any actual or hypothetical White comparator was or would have been. Indeed, the opposite is the case, because a white locum consultant namely Dr Muller was also dismissed. I have no hesitation against this background in rejecting the serious allegation raised by the claimant she was dismissed because she is Black.
62. Allegation 1: "Excluding the claimant from team interactions". For the reasons explained in the findings of fact above, I do not accept that the claimant was excluded from any team interactions, and this allegation is rejected.
63. Allegation 2: "Constantly criticising the claimant's work behind her back, especially to junior colleagues (who are not Black)". For the reasons explained in the findings of fact above, I do not accept that the claimant was criticised behind her back as alleged, and this allegation is rejected.
64. Allegation 3: "Denying the claimant support from nurses for her clinics despite all other colleagues always having nurses in their clinics". For the reasons explained in the findings of fact above, I do not accept that all of the claimant's colleagues always had nurses in their clinics when the claimant did not. I accept that there would have been occasions upon which the claimant did not have a nurse, but she seems to accept that the Department was understaffed and there was one nurse and three nursing assistants required to cover five

different rooms or clinics. There is simply no evidence that the claimant was denied nursing support as alleged, and certainly no evidence that she was denied nursing support because she is Black.

65. Allegation 4: "Denying the claimant on call room facilities where none of her other colleagues had experienced the same; and refusing the claimant theatre sessions despite initial negotiations and the fact she was covering a trainee doctor on maternity leave who would have had regular theatre sessions. The sessions were then offered to other doctors who are not Black". There are two elements this allegation. In the first place it is simply not the case that the claimant was denied on call room facilities. On the contrary, despite the respondent's normal requirements which would have precluded her as a locum doctor from having access to on-call accommodation, Mrs Grobbelaar was happy to encourage Ms Johns to assist the claimant in this respect. She stayed in the on-call accommodation on a number of occasions as set out in the findings of fact above. After Mr Gray had queried whether the claimant was entitled to these rooms, he continued to assist her in obtaining rooms. Even after the claimant complained about the poor condition of one room Ms Johns assisted her in making enquiries with regards the other facilities. The allegation that she was denied on call room facilities is completely contrary to the evidence of contemporaneous documents. In addition, there is no evidence that the claimant was denied on-call facilities because she is Black.
66. The second constituent element of this allegation is that the claimant was refused theatre staff sessions which are offered to other doctors who are not Black. As confirmed in the findings of fact above, it is true that the claimant was required to do less theatre sessions after 9 March 2020 but this was because there was an identified need to cover the clinics of Miss Srinivasan who was absent on sick leave. The respondent was not required to provide the claimant with theatre sessions as it was for colleagues in Specialist Training, and the change of rotas was in accordance with the wide ambit of job duties to which the claimant had agreed in her contract of employment. The respondent had valid reasons to act in the way that it did, and there is no evidence to suggest that the claimant was denied theatre staff sessions because she is Black.
67. Allegation 5: "Ignoring the claimant's email requesting a meeting to discuss her concerns about the above matters". The claimant gave evidence that she sent an email on 2 March 2020 requesting a meeting to discuss her concerns. However, the claimant was unable to adduce this email in evidence. Mrs Grobbelaar accepts that the claimant raised a concern about the theatre sessions, and she addressed this concern and gave an explanation, as noted above. I accept Mrs Grobbelaar's evidence that she was not hostile or dismissive of the claimant. Indeed, the contemporaneous documents suggest otherwise because Mrs Grobbelaar was keen to retain the claimant despite the senior management directive to dismiss all locum doctors.
68. Allegation 6: "Acting in a hostile and dismissive way towards the claimant when she wished to progress that email which have been ignored". As noted under the above allegation, I accept Mrs Grobbelaar's evidence that she was not hostile or dismissive of the claimant, and she was not ignored.
69. Allegation 7: "Continuing to deny on call room facilities and then being offered a room which was scheduled for refurbishment and which was in a poor state, and only offered to Black and/or ethnic minority workers." As noted above, it is simply not the case that the claimant was denied on call room facilities. On the contrary, despite the respondent's normal requirements which would have precluded her as a locum doctor from having access to on-call accommodation, Mrs Grobbelaar was happy to encourage Ms Johns to assist the claimant in this respect. After Mr Gray had queried whether the claimant was entitled to these rooms, he continued to assist her in obtaining rooms. Even after the claimant complained about the poor condition of one room Ms Johns assisted her in making enquiries with regards the other facilities. The suggestion maintained by the claimant to the effect that the respondent deliberately retains poor on call room facilities which are offered only to black and ethnic minority doctors because of their race was not supported by any evidence and I have no hesitation in rejecting that allegation.

70. Allegation 8: “Being denied her final week’s wage”. The claimant is correct that the respondent failed to pay her final week’s pay when the claimant submitted her timesheet to claim for the same. Mr Gray had a good reason for challenging the timesheet which the claimant had submitted because on the face of the rota for that week the claimant could not have done the hours which she had claimed before leaving the respondent’s premises without working out her notice. He tried to pay her the reduced amount of hours which he thought were supportable but this proved difficult in the absence of an amended timesheet from the claimant. The respondent eventually paid for 45 hours for that week even though it maintained that the claimant had only worked for 27 ½ hours, and she had only submitted a timesheet for 42. There is no evidence to suggest that this delayed payment was imposed on the claimant because she is black, an allegation which Mr Gray denies, when he clearly had a valid reason for challenging the initial claim.
71. Allegation 9: “Mr Peter Gray constantly spot checking on her before he dismissed her”. For the reasons explained in the findings of fact above, this allegation is rejected.
72. Allegation 10: “Terminating the claimant’s contract and refusing her furlough leave even though this was offered to all other employees”. It is true that the claimant’s contract was terminated, and I have dealt with this above. It is also true that the claimant was not retained under the furlough scheme, but it is simply not the case that the claimant was refused furlough when it was offered to all other employees. There is simply no evidence to suggest that the claimant was denied furlough leave when other locum doctors were allowed to take it, nor that this occurred because she is Black.
73. The Direct Race Discrimination Claim:
74. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed and/or suffered the same allegedly less favourable treatment as the claimant. In this case the claimant relies on a hypothetical White comparator.
75. In Madarassy v Nomura International Plc Mummery LJ stated: “The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an act of discrimination”. The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.
76. In this case, I find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.
77. The Harassment Claims:
78. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator’s intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
79. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: “In order to decide whether any conduct falling within

subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

80. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." Similarly, Langstaff P emphasised in Betsi at para 12: "The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc ..."
81. I now deal with the 10 specific allegations of harassment (which replicate the allegations of direct discrimination above) as follows.
82. Allegation 1: "Excluding the claimant from team interactions". For the reasons explained in the findings of fact above, I do not accept that the claimant was excluded from any team interactions, and this allegation is rejected. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.
83. Allegation 2: "Constantly criticising the claimant's work behind her back, especially to junior colleagues (who are not Black)". For the reasons explained in the findings of fact above, I do not accept that the claimant was criticised behind her back as alleged, and this allegation is rejected. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.
84. Allegation 3: "Denying the claimant support from nurses for her clinics despite all other colleagues always having nurses in their clinics". For the reasons explained in the findings of fact above, I do not accept that all of the claimant's colleagues always had nurses in their clinics when the claimant did not. There is simply no evidence that the claimant was denied nursing support as alleged, and certainly no evidence that she was denied nursing support because she is Black. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.
85. Allegation 4: "Denying the claimant on call room facilities where none of her other colleagues had experienced the same; and refusing the claimant theatre sessions despite initial negotiations and the fact she was covering a trainee doctor on maternity leave who would have had regular theatre sessions. The sessions were then offered to other doctors who are not Black". There are two elements this allegation. In the first place it is simply not the case that the claimant was denied on call room facilities. On the contrary, despite the respondent's normal requirements which would have precluded her as a locum doctor from having access to on-call accommodation, Mrs Grobbelaar was happy to encourage Ms Johns to assist the claimant in this respect. She stayed in the on-call accommodation on a number of occasions as set out in the findings of fact above. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.

86. The second constituent element of this allegation is that the claimant was refused theatre staff sessions which are offered to other doctors who are not Black. As confirmed in the findings of fact above, it is true that the claimant was required to do less theatre sessions after 9 March 2020 but this was because there was an identified need to cover the clinics of Miss Srinivasan who was absent on sick leave. The respondent was not required to provide the claimant with theatre sessions as it was for colleagues in Specialist Training, and the change of rotas was in accordance with the wide ambit of job duties to which the claimant had agreed in her contract of employment. The respondent had valid reasons to act in the way that it did, and there is no evidence to suggest that the claimant was denied theatre staff sessions because she is Black. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.
87. Allegation 5: "Ignoring the claimant's email requesting a meeting to discuss her concerns about the above matters". The claimant gave evidence that she sent an email on 2 March 2020 requesting a meeting to discuss her concerns. However, the claimant was unable to adduce this email in evidence. Mrs Grobbelaar accepts that the claimant raised a concern about the theatre sessions, and she addressed this concern and gave an explanation, as noted above. I accept Mrs Grobbelaar's evidence that she was not hostile or dismissive of the claimant. Indeed, the contemporaneous documents suggest otherwise because Mrs Grobbelaar was keen to retain the claimant despite the senior management directive to dismiss all locum doctors. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.
88. Allegation 6: "Acting in a hostile and dismissive way towards the claimant when she wished to progress that email which have been ignored". As noted under the above allegation, I accept Mrs Grobbelaar's evidence that she was not hostile or dismissive of the claimant, and she was not ignored. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.
89. Allegation 7: "Continuing to deny on call room facilities and then being offered a room which was scheduled for refurbishment and which was in a poor state, and only offered to Black and/or ethnic minority workers." As noted above, it is simply not the case that the claimant was denied on call room facilities. The suggestion maintained by the claimant to the effect that the respondent deliberately retains poor on call room facilities which are offered only to black and ethnic minority doctors because of their race was not supported by any evidence and I have no hesitation in rejecting that allegation. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.
90. Allegation 8: "Being denied her final week's wage". The claimant is correct that the respondent failed to pay her final week's pay when the claimant submitted her timesheet to claim for the same. Mr Gray had a good reason for challenging the timesheet which the claimant had submitted. There is no evidence to suggest that this delayed payment was imposed on the claimant because she is Black, an allegation which Mr Gray denies, when he clearly had a valid reason for challenging the initial claim. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.
91. Allegation 9: "Mr Peter Gray constantly spot checking on her before he dismissed her". For the reasons explained in the findings of fact above, this allegation is rejected. I do not accept that there was any conduct in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.
92. Allegation 10: "Terminating the claimant's contract and refusing her furlough leave even though this was offered to all other employees". It is true that the claimant's contract was terminated, and I have dealt with this above. It is also true that the claimant was not retained under the furlough scheme, but it is simply not the case that the claimant was refused furlough when it was offered to all other employees. There is simply no evidence to suggest that the claimant was denied furlough leave when other locum doctors were allowed to take it, nor that this occurred because she is Black. I do not accept that there was any conduct

in this case which it was reasonable for the claimant to conclude had the proscribed effect on her.

93. For all these reasons in my judgment the claimant did not suffer the prescribed effect of harassment, whether related to the fact that she is Black, or otherwise. Accordingly I also dismiss the claimant's claims of harassment.
94. The Monetary Claims:
95. The claimant brings two monetary claims. The first relates to the payments made for the last week of her employment. The second relates to accrued but unpaid holiday pay. I deal with each of these in turn.
96. The claim for payment in respect of the work done in the last week of the claimant's employment is brought as a claim for breach of contract and/or for unlawful deduction from wages. The claimant accepted at this hearing that she has now been paid in full for this week. She submitted a claim for 42 hours, and 39.5 hours were paid on 18 December 2020, and a further 5 ½ hours were paid on 25 June 2021. The claimant has now been paid in full for 45 hours against her claim for 42 hours. She has now been paid this claim in full, and accordingly this claim is now dismissed.
97. Finally, I turn to the claim for accrued but unpaid holiday pay. The claimant agreed in her contract of employment that her hourly rate was to be increased by 12.07%, and this was included in the contract in order to discharge the respondent's obligation to pay statutory holiday pay. This is usually referred to as "rolled up holiday pay". It is clear from the relevant payslips that this sum was paid, and the payslips record: "your hourly rate includes 12.07% WTR" which I take to mean a payment to meet the obligations under the Working Time Regulations 1998. The claimant asserts that paying her holiday entitlement as rolled up holiday pay in this way is illegal. Applying Robinson-Steele v RD Retail Services Ltd [2006] IRLR 386 ECJ, in my judgment the claimant is correct to the extent that the relevant Directive requires holiday pay to be an amount in addition to existing pay, but also in a way which precludes the payment of holiday pay in the form of part payments staggered over the corresponding annual period of work. The way in which the claimant was paid appears to offend this principle. However, it is also clear that where an employer has in fact made rolled up holiday payments, the employer is entitled to set off those payments against any later claim by the worker for holiday pay provided that the rolled up holiday pay has been paid "transparently and comprehensively" (see for instance Lyddon v Englefield Brickworks Ltd).
98. In this case I find that the claimant's holiday pay has already been paid, and in a way which was transparent and comprehensive, and accordingly I dismiss the claimant's claim for accrued but unpaid holiday pay.
99. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 44; a concise identification of the relevant law is at paragraphs 47 to 57; how that law has been applied to those findings in order to decide the issues is at paragraphs 58 to 98.

Employment Judge N J Roper
Dated: 15 December 2021

Judgment & reasons sent to parties: 11 January 2022

FOR THE TRIBUNAL OFFICE