EMPLOYMENT TRIBUNALS

Claimant:	**Ms L. Waiwaiku**
Respondent:	**Mr Mark Moss, as personal representative of the estate of Dr Paul Moss, formerly t/a North Shoebury Surgery**
Heard at:	**East London Hearing Centre**
On:	**13-16 and 20 July and 14 September 2021; and 15 and 17 September 2021 (in chambers)**
Before:	**Employment Judge Massarella** **Mrs G. Forrest** **Ms A. Berry**

Representation

Claimant:	In person
Respondent:	Mr L. Wilson (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. **by consent, the name of the Respondent in these proceedings is amended to 'Mr Mark Moss, as personal representative of the estate of Dr Paul Moss, formerly t/a North Shoebury Surgery';**

2. **the Claimant's dismissal was procedurally unfair;**

3. **had the Respondent followed a fair procedure, the Claimant would have been fairly dismissed by 21 February 2019;**

4. **the Claimant contributed to her dismissal by her own blameworthy conduct; the basic and compensatory awards will be reduced by 60%;**

5. **the Tribunal lacks jurisdiction to hear the claims, set out at Issues 14.1 to 14.8 inclusive as claims of direct race discrimination, and the associated claims of harassment related to race and victimisation, because they were presented outside the statutory time limits, and it is not just and equitable to extend time;**

6. the remaining claims of direct race discrimination, harassment related to race and victimisation are not well-founded, and are dismissed;

7. unless the parties can agree the compensation to which the Claimant is entitled in the light of the Tribunal's liability conclusions in respect of her unfair dismissal claim, there will be a remedy hearing to determine it.

REASONS

Procedural history

1. The Claimant presented her claim on 15 April 2019, after an ACAS early conciliation period between 11 and 15 March 2019. A preliminary hearing for case management took place on 29 July 2019 before EJ Crosfill, who summarised the case and confirmed the issues. The case was originally listed for a four-day final hearing to commence on 9 June 2020. This was postponed because of the Covid-19 pandemic. A preliminary hearing took place before EJ Allen on what would have been the first day of the hearing, at which further directions were given and the length of the listing increased to 5 days.

2. The parties were in a poor state of readiness at the beginning of the hearing. There was a joint bundle, running to over 1,000 pages. Contrary to the Tribunal's orders, the Respondent had not provided hard copies of the bundle for this in-person hearing; there was no copy for the witness table; the electronic version of the bundle was inaccessible for technical reasons; the Claimant had provided her own separate bundle of documents. At the beginning of the hearing, she said that all the documents in her own bundle were also in the joint bundle, and she was content for that bundle to be used, although that position changed later. The Tribunal spent the rest of the first day reading the witness statements, some core documents identified by Mr Wilson, and a document which the Claimant asked us to read called Details of Complaint. She confirmed that she did not rely on this as her witness statement; rather it was a background document which might assist the Tribunal.

3. There was an agreed list of issues, which had been prepared while the Claimant was professionally represented. Both parties confirmed at the beginning of the hearing that this was the most recent version of the list. The Tribunal spent some four hours on the second day of the hearing going through the issues in detail, clarifying with the Claimant who the alleged discriminator was in each instance, which documents she relied on in support of them, and ensuring that any additional documents from her own bundle, which were not in the main bundle, were incorporated into a supplementary bundle. It became apparent that the Claimant was unclear as to the origin of some of the issues which had been included by her previous professional representatives in the list of issues. We did not encourage her to withdraw them, in case their significance emerged during the hearing. At the end of that process she confirmed that she was content that all the relevant documents were now before the Tribunal. The final, agreed list of issues is attached as an appendix to this judgment.

4. The Tribunal reminded the Claimant that she would have an opportunity to ask questions of the Respondent's witnesses. She said that she did not have a list of her questions. The Tribunal encouraged her to write her questions down, along with any page references that she might want to take the witnesses to, although we pointed out that Mr Wilson, and indeed the Tribunal, would be able to assist her in locating pages if she could not find them.

5. On the last day of the hearing, part-way through her cross-examination of the final witness, the Claimant sought to refer to an additional document, which she said had been sent by post to the Tribunal between the two parts of the hearing. We permitted her to ask several questions in relation to it: the witness confirmed that she was not prejudiced by its late admission into evidence, because she was familiar with it.

6. Each of the Respondent's witnesses had provided witness statements. The Claimant had provided three documents: 'Claimant's Case Summary and Amended Schedule of Loss'; 'Claimant's Response to the Respondent's Witness Statements'; and 'Excerpt from Skeleton Argument'. The last of these was handed up on the morning of the first day of the hearing. The Claimant asked the Tribunal to treat these three documents together as her evidence in chief. Without objection from the Respondent, the Tribunal agreed.

7. The Claimant brings claims of unfair dismissal, wrongful dismissal, direct race discrimination, harassment related to race and victimisation. The direct discrimination and harassment claims are all founded on the same fifteen factual allegations. The victimisation claim is founded on the first twelve of those allegations. Mr Wilson confirmed that he would cross-examine the Claimant on all the issues, to give her an opportunity to comment on them, whether or not she had dealt with them specifically in her evidence in chief.

8. There was some confusion about the correct name of the Respondent, which was originally 'North Shoebury Surgery'. The GP at the time of the Claimant's employment was Dr Paul Moss. It emerged in discussion with Mr Wilson (Counsel for the Respondent) that the correct Respondent ought to have been 'Dr Paul Moss t/a North Shoebury Surgery'. Mr Wilson then informed the Tribunal that, tragically, Dr Moss had taken his own life the previous month. This was the first the Tribunal knew of this. Mr Wilson confirmed that the correct name of the Respondent in these circumstances ought to be: 'Mr Mark Moss, as personal representative of the estate of Dr Paul Moss, formerly t/a North Shoebury Surgery' (Mr Mark Moss is the late Dr Moss's brother). By consent, it was amended accordingly.

9. These preliminary discussions were concluded by lunchtime on the second day, when we were able to begin hearing evidence.

10. We heard from the Claimant. For the Respondent we heard evidence from Ms Nicola Wybrow (Senior Nurse/Clinical Administrator since 2009); Ms Tabitha Love (Advanced Nurse Practitioner/Clinical Lead since 2013); Ms Angela Dansey (HR advisor from Practical HR); Ms Justine Jobson (Practice Manager and the Claimant's line manager); Dr Haroon Siddique (a GP partner in three other local practices); and Ms Victoria Cline (Lead Nurse for Primary Care for the Mid and South Essex Clinical Commissioning Groups ('CCG')).

11. The Claimant provided a written document containing her closing submissions. Mr Wilson made oral submissions. We have taken those submissions into account when reaching our conclusions below.

12. Partly because of the time lost beginning of the hearing, and partly because the evidence proceeded at a very slow pace, it was necessary to list a further day's hearing in September to hear from the final witness, and to deal with closing submissions. At the same time, we also listed two days for the Tribunal's deliberations, when we reached our decision. We apologise to the parties for the delay in promulgating this judgement, which was due to the lack of judicial resources and the competing demands of other cases.

Findings of fact

13. North Shoebury Surgery ('the surgery') is an NHS-funded general practice. At the material time it was supported by a team of three doctors, three nurses, locum doctors, community nurses, community midwives, health care assistants and reception staff, some of whom were directly employed, some of whom were self-employed. During the period to which this case relates, Ms Wybrow and Ms Love changed to self-employed status. Ms Love also worked for other surgeries.

14. The Claimant has practised as a nurse for forty-six years, of which thirty-two have been in the NHS, and ten as a practice nurse. She describes her race as Black (of African origin).

15. In cross-examining the Claimant on the issue of time limits, Mr Wilson asked whether she had any experience of Employment Tribunal proceedings. It emerged that, before she began working for the Respondent, she worked for Kent Elms surgery. She made internal complaints about racism there, and threatened proceedings, but the matter never proceeded to Tribunal. She had assistance from a solicitor and a substantial settlement was agreed.

16. In a later email to the NMC of 19 November 2016, the Claimant wrote that one of the GPs, Dr Suresh Krishnan:

> 'had taken a very hateful racist dislike to me. The hatefulness was beginning to affect patient care and so I was very pleased I was able to leave before something critical happened.'[1]

17. This email was in the context of a referral to the NMC made by Kent Elms surgery, in relation to concerns about the Claimant's fitness to practice. That referral does not appear to have resulted in any sanctions by the NMC. The Claimant did not disclose the fact of the referral to the Respondent until shortly before she signed her contract (i.e. not at the application or interview stages, or during her short trial period). The Respondent employed her nonetheless.

18. On 23 November 2016, Ms Mistry of the NMC fitness to practice department, wrote to Ms Jobson in relation to the Kent Elms referral, making some further enquiries. She described the substance of the referral as follows:

> 'It is alleged that the registrant consulted patients on different occasions when she was informed she should not do this as it is out of her scope of

[1] In extracts from contemporaneous documents, minor amendments for sense are shown in square brackets, otherwise original format/spelling/grammar is retained.

> competence. The referrer is concerned for the lack of insight demonstrated in the nurse's conduct and potential harmful consequences for patients and despite feedback, and the lack of acceptance of responsibility for these actions.'

19. Ms Mistry made some enquiries of Ms Jobson, who replied in positive terms, stating that no complaints had been received about the Claimant, indeed that they had received positive feedback from one of their patients.

20. The Claimant commenced employment with the Respondent as a practice nurse on 19 October 2016. She was contracted to work two days a week, usually on Wednesday and Friday. Her line manager was the Practice Manager, Ms Jobson. At her initial interview, Ms Jobson said that race discrimination was not tolerated within the practice; the Claimant thought this 'an odd thing to say'.

21. The Claimant worked with Ms Wybrow and Ms Love at the surgery. Ms Wybrow's main role was to monitor and audit systems of medicine management and patient care (as required by the CQC); she audited all the clinicians in the practice, including the Claimant.

22. The Claimant regarded herself as an autonomous, independent practitioner who was not subject to direction, or even guidance, from Ms Wybrow or Ms Love, or on occasions even her employer, Dr Moss. In a number of contemporaneous documents, the Claimant described Ms Wybrow as her 'subordinate'. That reflected her view, but it was factually incorrect. Ms Wybrow was the senior nurse/clinical administrator; Ms Love was an advanced nurse practitioner and clinical lead and was the most qualified individual within the practice. That was true both during the periods when they were employed and, later, when they were self-employed.

<u>The allegations relating to instant messages/task notes from Ms Wybrow and Ms Love (Issues 14.1.1 to 14.1.5)</u>

23. In the surgery, colleagues communicated with each other in various ways: directly, through conversations in person, on the phone, or by leaving post-it notes on files; through instant messages, for example when a patient was waiting in reception; through task notes; and through patient records. These messages and notes frequently communicated what patients required or highlighted if there has been an error or something that needed to be corrected or completed. All nurses and doctors, including Ms Love and Ms Wybrow, had a responsibility to alert others if they identify issues in their practice, including errors.

24. The Claimant made a number of allegations that Ms Wybrow and Ms Love had sent her messages or task notes, reminding her that she had not completed certain tasks, or asking her to carry out tasks such as calling a patient, carrying out an assessment or referring a patient. She characterised these communications as acts of direct race discrimination and/or harassment related to race.

25. We identified messages to the Claimant on the dates listed and from the senders listed. On their face they appeared innocuous. The Claimant alleged that this was because the offensive message had been deleted and/or the messages in the bundle were fabricated. We accept the Respondent's evidence

that the system is designed specifically to prevent permanent deletion of such messages without leaving an auditable trace. Nonetheless, the Claimant pointed out that some of the messages did not make sense. It emerged during the hearing that this was because only the messages sent to the Claimant had been printed off and included in the bundle, not the messages sent from the Claimant. Once those messages had been produced, and both sides of the communication could be seen, the innocent nature of these exchanges was confirmed. The Claimant's continued insistence, in the face of this explanation, that the offensive evidence had been deleted and/or fabricated undermined her credibility in the Tribunal's eyes. We are satisfied that messages and task notes were not deleted.

26. We record below the specific instances of alleged direct discrimination/harassment relating to these messages.

27. On 11 January 2017, the following exchange took place:

> 'Mrs Waiwaiku TABITHA
>
> [*PATIENT NAME*] IS ASKING FOR HER HRT tablets. Could I print it from here or could you please print and SIGN IT FOR HER; IF IT'S OKAY FOR HER TO HAVE.
>
> Ms Love it's waiting at front desk for her x'

28. There are no messages on 12 June (Issue 14.1.2) and 4 September 2018 (Issue 14.1.3). The Claimant was not able to identify the content of the messages which she says she found offensive.

29. In order to group these allegations together, we also deal at this point with the message on 13 August 2018 relied on by the Claimant in relation to Issue 14.1.4, although it occurred the following year. It is a task message from Ms Wybrow to the Claimant, which reads as follows:

> 'Leona
>
> COPD patients will be sent a COPD assessment test with their review letter. They need to bring this with them to their appointment. Please discuss with pt [patient] and add the score to the template. Please use the surgery template on the top toolbar (pair of lungs). All the boxes that need to be ticked are on the 'follow-up/monitoring' page. I am auditing COPD and it has come to light that inhaler technique is not been checked. Please do this. Also please ask number of exacerbations in the last year. You are also entering 2 scores for MRC which is erroneous data. Any pt with moderate/severe COPD needs 6 monthly reviews or even 3 monthly. Any pt who has used rescue meds must be reviewed regardless of annual review/recall date or last seen. I will make up a COPD information folder for you. If you have any questions please ask.
>
> Thank you
>
> Nicky'

30. The template referred to above is also referred to in the documents as the 'CAT' form. When asked whether she accepted that this was a straightforward communication, intended to remind her of surgery protocol, the Claimant said that it was not, and that Ms Wybrow was 'not my supervisor'.

31. As for Issue 14.1.5, the Claimant alleged that 'Ms Wybrow during the audit gave the Claimant tasks to perform.' The Claimant relied on a letter she sent to the NMC dated 30 November 2018. She accepted that this letter did not give specific examples of the tasks.

32. Mr Wilson took the Claimant to instances of other clinicians (Dr Aderolu and Ms Dawkins) inputting requests to her. The content and the tone of the messages were similar to those sent by Ms Wybrow and Ms Love, but the Claimant did not make complaints about either of them. The Claimant refused to accept that these documents related to her and alleged that they were all either false or had been 'fiddled with'.

The meeting on 3 May 2017

33. The Claimant was invited to a meeting with Ms Jobson and Ms Love on 3 May 2017 to discuss concerns about her practice, which had been raised by clinical and administrative staff. The meeting was documented in detailed minutes, which we accept are accurate. They included: staff reporting patients waiting long periods of time to be seen when the consulting room was empty; a patient from whom bloods were taken, resulting in significant bruising; and a patient who had an appointment for asthma review and smear, whose notes did not contain sufficient information to explain the outcome of the consultation.

34. On the one hand, the Claimant denied that this meeting took place and alleged that the minutes of the meeting had been fabricated. On the other hand, she maintained that the meeting was 'part of the harassment'. Clearly, both of those things could not be true.

35. The Claimant denied in cross-examination that she knew that concerns had been raised about her practice and that Ms Jobson was liaising with her about it. In so asserting, the Claimant was denying something which was obviously true.

The meeting of 19 May 2017

36. A meeting took place between Ms Jobson and the Claimant on 19 May 2017, at which further issues relating to two specific patients were discussed. The importance of putting in as much detail as possible in the patient consultation record was emphasised. Measures were put in place with the Claimant's agreement, including her attendance at an asthma training programme to update her skills. Ms Jobson regarded the outcome of the meeting as positive and constructive.

37. The Claimant was also informed that Dr Moss had decided that prescriptions should not be done by nurses, but that they should ask GPs to do it, either by putting a note on the GP's rota or by sending a task note. Although the Claimant accepted this decision at the time, she was later critical of it.

38. Ms Jobson also took the opportunity to tell the Claimant that the practice had received positive feedback about her from both patients and colleagues.

39. The Claimant denied that this meeting happened, despite the existence of contemporaneous notes. She alleged that the notes were a cover-up because of her claims against the Respondent. She observed that she was 'a well-paid nurse. I did not need a non-professional to monitor me.'

40. After this meeting, Dr Moss and Ms Jobson agreed that he would ask Ms Love and Ms Wybrow to document any concerns that they identified in respect of the Claimant. In that respect, Ms Jobson accepted that Ms Wybrow and Ms Love had been asked to 'oversee' the Claimant's practice. Ms Wybrow was well placed to do so: she had been the senior nurse at the practice for many years and had undertaken her role with no issues; as part of her role, she oversaw other nurses and healthcare assistants; she had responsibility for the audience and governance functions at the practice. Ms Love was the practice's advanced nurse practitioner and clinical lead. She too oversaw clinical governance on behalf of practice.

<u>The protected act on 22 May 2017 (Issue 19.1)</u>

41. On 22 May 2017 the Claimant emailed Ms Jobson, raising allegations of race discrimination against Ms Love and Ms Wybrow. Ms Jobson was surprised to receive this letter, because she had understood that the preceding meeting had been concluded amicably. On Dr Moss's instruction, Ms Jobson did not tell Ms Love or Ms Wybrow about this complaint. Dr Moss hoped that that the matter could be resolved informally, which turned out to be the case (para 51).

42. Although no allegation of discrimination was pleaded against Ms Jobson, the Claimant said in cross-examination that Ms Jobson was 'undercover in all of the molestation of me'.

43. The letter contains the following references to discrimination:

> 'When I came for my interview with you, you reminded me that you would not allow any form of discrimination or racism in the workplace. That statement was very reassuring to me; until the last few weeks when this bad practice has become like a routine.
>
> […]
>
> <u>There is a definition for discrimination or racism</u>: Discrimination is something that happens to someone who is in a same/similar category as others, but that same thing does not happen to the others.'

44. In the letter the Claimant gave an account of discrimination which she said she had previously encountered at Kent Elms. She mentioned that she had reached a financial settlement of £12,000 with them (which included a non-disclosure agreement). She suggested that the problem at Kent Elms was that she had been excessively scrutinised and alleged that Ms Love and Ms Wybrow were starting to do the same thing to her. She stated that, since they were keeping a record of her, she had decided to keep a record of them and went on to identify concerns she had about their practice.

45. In one passage she wrote:

> 'I noticed Nicky is building up a profile about me. So I am also doing the same about her. How can it be right that Nicky would think it is right for her to get parents to sign a document concerning the immunisation she is giving their babies when they do not have the evidence of what she is giving them? She thinks making all these silly rules under the umbrella of 'just in case' makes her clever. She has to familiarise herself with the NICE Guidelines and Best Practice guidance.'

46. The reference to 'silly rules' was to a form which had been adopted within the surgery, in which parents were asked to consent to child immunisation and in which a health check list was to be completed. The form was introduced by the surgery after a child was given an MMR vaccine, when parents did not want them to have it. The Claimant accepted that the form asked sensible, precautionary questions about the child's history, but contended that the forms were time-consuming, and a simple conversation 'is usually quicker and better'. The Claimant said that she could not recall whether she had refused to use the form. We find that she did refuse to use it, and the Respondent continued to insist she use it.

47. She concluded the letter:

> 'I consider this action of Tabatha and Nicky very dangerous, hateful and awful. I assure you they are not better trained than me; but they have to stop molesting me.'

<u>Alleged sarcastic comments made by Ms Wybrow and Ms Love about the Claimant's consultations with patients (Issue 14.6)</u>

48. The Claimant also alleged that Ms Wybrow and Ms Love made sarcastic comments about her consultations with her patients. In clarifying this claim at the beginning of the hearing, she relied on the letter to Ms Jobson of 22 May 2017, referred to above. She acknowledged that it gave no specific examples of sarcastic comments, but she said that it shows that she made a general complaint at the time. She gave no examples of sarcastic comments in her oral evidence, nor did she put any to either witness.

<u>Alleged excessive monitoring by Ms Wybrow and Ms Love of the Claimant's work (Issue 14.7 – G)</u>

49. The Claimant alleged that Ms Wybrow and Ms Love monitored her work excessively. She did not give specific examples of the supposedly excessive nature of this monitoring, again relying on the contents of her letters (of 22 May 2017 and 27 July 2018). As we have already found (para 40), Ms Wybrow and Ms Love had been specifically asked to keep a record of any concerns in relation to the Claimant's practice, by Dr Moss and Ms Jobson. Concerns had already been raised with the Claimant about her practice in two separate meetings in May 2017 alone. In the circumstances, the Tribunal considers it would have been surprising if some form of monitoring had not been put in place. We are satisfied that it was not excessive: patient safety is paramount and the Respondent was entitled to take these steps, which we regarded as reasonable.

The alleged protected acts on 8 June 2017 (Issue 19.2) and 6 October (Issue 19.3)

50. In the list of issues, the Claimant alleged that she had done protected acts by way of a complaint to Ms Jobson on 8 June 2017 and another complaint on 6 October 2017. The Claimant could not identify either complaint during the hearing.

The meeting with Dr Siddique on 27 June 2017 (Issue 14.8.1)

51. Dr Siddique, who was assisting the practice because Dr Moss was having some health difficulties, held a grievance meeting with the Claimant on 27 June 2017. Ms Jobson was also present. The meeting was constructive. The Claimant expressed regret for the way that she had expressed herself in her letter. The content of the meeting is summarised in a letter, which includes the following:

> 'when I interviewed you, it would appear that your reply had been a, perhaps hastily made, reaction to feelings of hurt around having accusations made, especially from colleagues. It appears that you recognise that the concerns were raised in the patients', in the Practice's, and in your interests and were well-intentioned and necessary.'

52. Asked why she had alleged in these proceedings that her grievance had not been addressed, the Claimant said that she had forgotten this meeting, and only became aware of it when she saw this document in the bundle. Further, she denied that it was an accurate account of the way the discussion had gone. We reject that assertion, noting that the Claimant did not challenge the content of this letter at the time, and querying how she could now claim a clear memory of it (asserting that it was inaccurate), having previously forgotten it existed at all. We accept Dr Siddique's evidence, which is consistent with the letter, that the meeting ended amicably and positively. This was a further example of the Claimant's refusing to accept an authentic contemporaneous document because it was unhelpful to her case.

53. After the meeting, additional asthma and COPD training was arranged for the Claimant; and some routine changes were also implemented to enable her to update her IT skills.

54. Ms Wybrow's contracted post of Senior Practice Nurse finished on 20 July 2017, she took a two-week summer break and returned to the same role on a self-employed basis on 10 August 2017.

55. There is then a significant gap in the chronology of the Claimant's claims. The next allegation relates to March 2018.

The allegation that Ms Wybrow instructed the Claimant to change patient records in relation to a patient visit in March 2018, when she had seen the same patient in June 2018 (Issue 14.4.1)

56. This allegation, as we understood it, was that Ms Wybrow improperly instructed the Claimant to amend one of her clinical records. The Claimant was not able to refer us to a specific record in the bundle. In clarifying the allegation at the beginning of the hearing, the Claimant again alleged that the relevant message had been deleted by Ms Wybrow, which we reject for the reasons already given.

Instead, she referred us to her account of the matter in a complaint, dated 30 July 2018:

> 'She sent me a task few weeks/months ago concerning IH in which she claims I saw this lady in March 2018 and made a recording in her notes. She says I had recorded something wrong on that patient's notes because when she saw the same patient in June 2018 she found something different. That was a very silly conclusion especially when you consider the gap between the two encounters, the age of the patient and the medical condition we are talking about. However, it was very, very wrong for her to 'instruct' me to change my recording. It is not her place, or anybody's place to tell me to change any patient's record; these are legal documents.'

57. Ms Wybrow believes this relates to a record dated 19 July 2018. Ms Wybrow explained that she saw this record and believed that there was a wrong code for COPD on it. There was no evidence elsewhere in the patient's record of their having COPD. She asked the Claimant to review her consultation and clarify her rationale for including this.

58. The Tribunal asked the Claimant whether this was indeed the matter she was relying on; the Claimant replied: 'I don't know. This is a made-up document'. In the absence of a clear alternative explanation from the Claimant as to the basis of this allegation, we accept Ms Wybrow's account. There was nothing improper in the way she acted.

Ms Wybrow adding to a patient record on 2 May 2018 in relation to a smear test (Issue 14.5.2)

59. On 2 May 2018 the Claimant conducted a smear test on a patient and sent it off to be assessed. The Claimant did not check the Open Exeter database, which holds screening history records. If she had done so, she would have seen that the smear had been carried out too soon.

60. On 16 May 2018 the Respondent was informed that the smear had been rejected because the patient was not due for testing until November 2018. Ms Wybrow copied and pasted that information into the patient record.

61. In her letter of 30 July 2018, the Claimant wrote:

> 'You are aware of the incident concerning TD and smear. That smear was done on the 2 of May by me. If you look at the patient's notes Nicky writes in the patient's note on 2nd of May (the very day the smear was done) stating that the smear was done outside the contracted agreement. It is legally wrong for her to do so especially if she only came to know about it after 2 of May.'

62. The Claimant alleged that Ms Wybrow was 'tampering' with the patient record. When asked by the Tribunal why Ms Wybrow would have done this, the Claimant replied that she did not know why, that the patient had nothing to do with Ms Wybrow but 'she was in everything – that was harassment'. We find that Ms Wybrow was not tampering with the record; she was simply updating it. We accept the Respondent's evidence that the fact that her entry has the date 2 May 2018 attached to it (which the Claimant regarded as significant) simply

reflected that that was the date on which the original test was done. There was nothing sinister in it.

Ms Wybrow auditing the Claimant's practice in around June/July 2018 (Issue 14.7.2)

63. Ms Wybrow did 'audit' the Claimant's practice in the sense that she monitored it from time to time, as she did with other clinicians. There was no secret about this: the Claimant referred to the audit process in her complaint of 17 September 2018 (para 85).

The task message from Ms Wybrow to the Claimant on 25 July 2018 (Issue 14.3.1), Ms Wybrow interrupting the Claimant's clinic on 25 July 2018 (Issue 14.2.1) and the alleged protected act in the complaint to Ms Jobson on 30 July 2018 (Issue 19.4)

64. The Claimant alleges that, on around 25 July 2018, Ms Wybrow interrupted her clinic when she was with a patient, knocked, walked in and said: 'where is the smear?' Insofar as an incident occurred around this time, the background is as follows.

65. On 24 July 2018 Dr Moss saw a patient and recorded that she had been due a smear test the previous week. He did a test and asked for it to be sent off. Ms Jobson initially asked Ms Wybrow to send it, who was at home. Ms Wybrow suggested that the Claimant could generate the form. When Ms Wybrow came into work the next day, she noticed on Ms Jobson's desk a note from the Claimant stating that she had not sent the form off because the patient was on a five-year recall; she had documented this in the patient's records.

66. The Claimant accepted that she had seen the request from Ms Jobson to send the smear off for testing; she had decided not to do it because of the patient's age (54). Normally a woman of that age would only be due a five-yearly recall, and her last smear had been done in 2014.

67. What the Claimant had missed was that the patient had had a smear in July 2017, which was abnormal, and a letter from colposcopy had advised a twelve-month recall in August 2018.

68. In her evidence to the Tribunal she said that, because she had not done the smear, she could not fill in the form; she said that 'nurses are not secretaries to doctors'. Later in her evidence she gave a different account: that she had not refused to do it, rather she had 'put it to one side and would do it when I finished my other work'. She initially denied that she needed to check the Open Exeter screening details, but later accepted that, if she had done so, she would have seen that the recall date was August 2018. We find that the changing nature of this account affects the Claimant's credibility in relation to the other circumstances of this incident, including Ms Wybrow's part in it, about which there were two opposing accounts, which we deal with below.

69. On 25 July 2018 the Claimant wrote a short letter to Ms Jobson, complaining about Ms Wybrow monitoring her practice. It included an allegation of racism against Ms Wybrow, but it was not relied on by the Claimant as a protected act.

70. On 27 July 2018 Ms Jobson replied to the Claimant [630]:

> 'Nicky's role within the practice is to monitor and audit systems as required by CQC, Medicines Management, QOF etc., and of course patient care. Whilst carrying out these audits and quality control we not only are looking after our patients but are also learning from each other how things could have been done better or differently. Nicky has to feedback with yourself and all the clinicians in the practice, including Dr Moss, locums and Tabitha to ensure we are monitoring patients correctly. No clinician should take this as offensive. If you would like to speak to me about any issues you have I booked some time out with you on Friday lunchtime for us to try and resolve this problem.'

71. The Claimant set out her concerns at greater length in a letter of complaint to Ms Jobson dated 30 July 2018. The Claimant does rely on this as one of her protected acts. Although it contains a number of complaints, it contains no allegation of discrimination. Although the word 'harassment' is used, there was no reference to race as a factor. About the smear test incident, the Claimant wrote:

> 'In the middle of my Surgery, with a patient in the room, there was a knock on my door and Nicky opened the door. She took a deep breath and said to me 'where is the smear'. I looked at her and gave a sardonic smile and pointed to where the smear bottle was. It was very rude for Nicky to come into my room, as it was quite clear I was in Surgery.'

72. Ms Wybrow's account differed in material respects. She first sent the Claimant a task message as follows:

> 'Leona, do you still have the smear that Paul took yesterday?'

73. The Claimant alleged that a task message sent on this date was aggressive and discriminatory. The only task message before us was the one set out above. It was a perfectly ordinary, polite enquiry. The Claimant again alleged that 'the aggressive message itself has been deleted'. For the reasons we have already set out we reject that allegation.

74. Because Ms Wybrow did not receive a reply, she checked with the receptionist that the Claimant had finished with her patient and was alone; she knocked on the door and the Claimant told her to come in; Ms Wybrow asked politely if she still had the sample as it needed to be sent off; the Claimant, without speaking to her, gestured with her head to indicate where the sample was; Ms Wybrow retrieved the smear and left.

75. We accept Ms Wybrow's account which, unlike the Claimant's, remained internally consistent throughout; it was also consistent in one respect with the Claimant's own account, which was that she had indicated where the sample was without speaking to her.

76. The Claimant declined to accept in evidence that there was any error on her part in relation to this matter; her focus appeared to be entirely on her perception that it was not Ms Wybrow's place to question her in any way. We think it right to record that the Tribunal was struck by the sarcastic and condescending language the Claimant used about Ms Wybrow in her complaint of 30 July 2018 ('Nicky may not know… that was a very silly conclusion… It was very, very

wrong for her…'). Ironically, she demonstrated the very behaviour for which she criticised her colleagues - although she was unable to point us to any examples.

Alleged failure to investigate the complaint of 30 July 2018 (Issue 14.8.4)

77. Ms Jobson arranged to meet the Claimant on 3 August 2018 to discuss her complaints. She dealt with the complaint informally, in part because her previous experience had been that the Claimant would sometimes resile from complaints when they were discussed with her in person. That proved to be the case in this instance as well. Ms Jobson explained that Ms Wybrow had been auditing clinicians' practice for many years before the Claimant came to work for it. The Claimant told Ms Jobson that she understood Ms Wybrow's role within the clinic and understood that it was constructive, rather than critical. The Claimant confirmed at the meeting that all the points raised in her complaints had been dealt with satisfactorily.

78. This was confirmed in a letter to her of the same date. We find that the Claimant did not reply to Ms Jobson, taking issue either with the summary of the meeting or the process adopted. The Claimant said that she did and took the Tribunal to a document dated 14 August 2018, which did contain criticisms of the process. We find that this was a document which she created for herself (it is titled 'Recording keeping [*sic*] on my claim and racial harassment in North Shoebury Surgery abided by the Practice Manager, Justine Jobson'). We do not accept the Claimant's evidence that she gave it to Ms Jobson at the time. The document concludes:

> 'Nicky is a subordinate to me. It is not her place to find learning materials for me. Besides her general nursing registration, she does not have any other nursing experience. The level of my professional practice places me at Level 7/8 (Nurse Consultant). I know where and how to seek learning needs and do not need a subordinate to direct my learning.'

79. This document again reveals the Claimant's dismissive view of her colleagues.

The allegation that Ms Wybrow generally criticise the Claimant's work, went through her daily clinical work and made sarcastic comments (Issue 14.5.1)

80. We find that, to the extent that Ms Wybrow identified concerns about the Claimant's work, she did so properly, when there were clinical or procedural reasons for doing so. There was no evidence before us of Ms Wybrow making sarcastic comments about the Claimant's work; although her language could be direct and to the point, it was always professional and never inappropriate.

The Claimant's correspondence with the NMC in August 2018

81. On 18 August 2018, the Claimant wrote to Ms Sue Killen of the NMC, outlining training that she had attended recently and asking whether the NMC could be more flexible as to whether nurses such as herself could prescribe medication, notwithstanding the fact that she was not a qualified prescriber. In the letter she was critical of colleagues, for example referring in passing to GPs 'who most often either lack the clinical experience or are locums, and who on most occasions request the patients to book an appointment with another GP'.

82. The NMC replied on 29 August 2018:

> 'There are many courses available that nurses can undertake. Some courses lead to qualifications that are recorded as part of a nurse's entry on our register, examples of this are the teacher qualification or the prescriber qualification. Other courses are 'approved' by the NMC but are not recordable in this way. Your Postgraduate Certificate in Medical and Clinical Education, for example, is not recordable on our register. The non-recordable nature of this course was confirmed by the letter of approval for the programme sent by the NMC to the University of Exeter in April 2012. If you were led to believe by the University or any other source that successfully completing this program would lead to a recordable qualification against your entry on the register, then that information was incorrect.'

The letter continued:

> 'I appreciate that you feel that you have undertaken additional education and training to develop your practice, but that in your current role you are not able to use some of the skills you believe you have gained for the benefit of your patients. What I hope I have been able to explain is that this is not something that the NMC has influence over. The limits on your clinical practice and the way you are deployed is a matter for your employer, and you may wish to discuss this with them. I appreciate that some of these responses may not be what you are hoping to hear, however, I hope you find this information useful.'

83. The Claimant was taken to this letter in cross-examination. She initially declined to agree that its meaning was that she was not as autonomous or independent a practitioner as she believed she was, or at least ought to be, but that she was subject to guidance by her employer. She then amended her answer and acknowledged that this was correct, adding 'if I wanted to, I could do the course and be a prescriber'.

84. On 2 September 2018, the Claimant saw a patient, who had been given the CAT form, which Ms Wybrow had reminded the Claimant to use in her task note of the previous month 13 August 2018 (para 29). The Claimant said that the patient was confused by the form. She did not help him to fill it out. She denied that she did not comply with the use of the form because she had been told to do so by 'a subordinate'. Her evidence was that this was indicative of her 'working in a dictatorship because I was the only Black woman there'. This incident is dealt with in more detail below (para 136 onwards).

<u>The complaint of 17 September 2018 (Issue 19.5) and the allegation that the Respondent failed to investigate it (Issue 14.8.5)</u>

85. On 17 September 2018, the Claimant sent a further letter of complaint to Ms Jobson. She accepted that the complaint was only about Ms Wybrow (not about Ms Love) and that it was essentially about the fact that she regarded herself as an autonomous practitioner and objected to what she regarded as Ms Wybrow's interference in her practice. In the first part of the letter, she set out at some length her academic and other qualifications. She referred back to her earlier complaint on 25 July 2018, and the fact that she had 'specifically mentioned that [Ms Wybrow's] behaviour towards me was considered as racist and tinted by

jealousy'. She alleged that Ms Wybrow was using the 'umbrella of the word audit' to harass her.

86. The Claimant wrote:

> 'Nicky has absolutely no right to review my clinical practice let alone dictate how I should conduct my Consultation. If Nicky or anyone, including Tabitha, thinks a patient needs to be assessed or referred it is their professional responsibility to do so; but not tell me to do it. If they think a patient has a need and they failed to meet that need, that can be classed as neglect.'

87. The Claimant referred to specific messages which she said Ms Wybrow had sent to her which 'came across as supervisory (telling me to 'call the patient' and conducting the assessment or instructing me to refer a patient) and dictatorial.' There were no messages in the bundle relating to those dates and times. The Claimant again alleged that they had been deleted by the Respondent. For the reasons we have already given, we do not accept that. She confirmed that she regarded being asked to call a patient/conduct an assessment as harassment and contended that it was 'not Ms Wybrow's place to tell me to call'. It was put to her in cross-examination that they were a team; the Claimant disagreed.

88. Ms Jobson spoke to the Claimant about the complaint but did not speak to Ms Wybrow. She spoke to Dr Moss who again advised her against doing so because he thought it would create bad feeling and the Claimant had previously retracted allegations of discrimination after a discussion had taken place. We accept that explanation. It emerged in evidence that Ms Wybrow had raised a grievance about the Claimant's handling of the smear test incident. There was no evidence that that grievance was dealt with either; the Claimant was not aware of it. It is apparent to us that, by this stage, the working relationship between the Claimant and Ms Wybrow had broken down.

<u>The letters between Dr Moss and the Claimant on 5 and 6 October 2018</u>

89. On 5 October 2018, Dr Moss wrote a lengthy letter to the Claimant, setting out, courteously and in detail, why he wanted clinicians within the practice, including the Claimant, to use the CAT form.

90. The Claimant responded on 6 October 2018 [650], setting out in some detail why she would not use it:

> 'I would like to say, based on my training … and my personal clinical experience in assessing patients with COPD, I am satisfied and comfortable using the NICE guidelines (FEV1) and I will continue to do so.'

91. The Claimant accepted in oral evidence that she was telling Dr Moss that the practice should not be using the CAT scoring system. It was clear from her letter that she would not comply with Dr Moss's instruction.

92. She continued:

> 'I am sure you are aware since last year, that I have complained to Justine that Nicky is harassing me, and that harassment is tainted with racism. I am now making my allegation an official complaint. I am a highly trained nurse employed as an autonomous practitioner. The letter you have quite surprisingly written, has been motivated by Nicky and put forward to you by Justine. This is wrong and is affecting my ability to practice my job fully to feel comfortable to communicate freely. I am a sixty-six-year-old Black woman who has climbed the nursing professional leader [*sic*] to the very top. I qualified to be referred to as a Nurse Consultant and capable to provide consultation at any level. I am not a cleaning lady or someone to perform low-level jobs.
>
> NICKY believes that unless she does something it is not done right. In the past I complained to Justine how Nicky opened a communications I address to her [*sic*], that Nicky is so disrespectful and aggressive, that she has no hesitation interrupting my clinics, that she thinks she has a right to use the NHS Task system to speak to me as if I am her subordinate and that she has a right to dictate her intentions of my actions. I am inviting you to read the Task page on System One and see what and how instructions are given to me. I think it is very disgusting !!!!!!!!'

93. On the same day the Claimant wrote to Ms Jobson:

> 'Please find a copy of Government's Policy concerning your TASK relating to travel vaccinations (combined vaccines).
>
> I would like to repeat my argument to you few days ago. I was employed as an autonomous practitioner must be allowed to use my clinical knowledge and judgement in rendering my care and advice to patients. I must not be interrupted or must seek advice from NICKY.
>
> Concerning the initiation or continue prescribing, I want to mention that recently I contacted the Nursing and Midwifery Council concerning how I could use the knowledge and skills I have developed over the years to benefit patients and I received a favourable communication which advises me to hold a discussion with my employer.
>
> I have found it difficult to do so because currently NICKY seems to be the dominating negotiating factor in the surgery.
>
> When I work with GPs all or most of my decisions are made with their knowledge and approval. If a GP agrees that I print a script and they are willing to sign it, they must/will take responsibility for that action. Most GPs are aware of the limitations of nurses but they are also aware of their clinical abilities. It is shocking that receptions can print repeat prescriptions but not nurses'.

94. The Claimant accepted that this was a complaint about Ms Wybrow, not Ms Love.

95. In these two letters, the Claimant was effectively refusing to follow Dr Moss's instructions in two respects (the use of the CAT system and the approach to travel vaccinations) and challenging his approach in a third respect (the prohibition on nurses issuing prescriptions). Moreover, she was doing so in a

high-handed and unprofessional manner. In her letter to Dr Moss, the Claimant informed him (without evidence) that he was not, in fact, expressing his own views, but merely being manipulated by Ms Wybrow and Ms Jobson ('the letter you have quite surprisingly written, has been motivated by Nicky and put forward to you by Justine'). This was a turning point, because it gave rise to a legitimate concern that the Claimant had effectively become unmanageable.

The Respondent's contact with the local CCG and the agency for whom the Claimant worked (Issue 14.15), the referral to the NMC (Issue 14.9) and the suspension of the Claimant

96. It appeared to us that, by this point, the management team were at a loss as to how to manage the Claimant. We accept the evidence of the Respondent's witnesses that they had not previously encountered behaviour of this sort by a professional colleague. In our judgment, they were ill-equipped to deal with it. Their policies were not fit for purpose and, as a team, they lacked even the most basic experience of HR procedures. That in due course was reflected in the flawed process they adopted, of which we are highly critical later in this judgment. Dr Moss and Ms Jobson decided to seek external support.

97. On 15 October 2018 Ms Jobson approached Mid and South Essex Clinical Commissioning Groups ('the CCG'). The CCG is responsible for commissioning NHS services for the local population. She asked for advice about conducting a performance review in relation to the Claimant, as she had not previously carried one out. The CCG advised her to put in place a performance plan for the Claimant and to investigate the Claimant's allegations of discrimination. Ms Jobson accepted that she did neither of those things.

98. Dr Moss contacted the CCG in early November 2018. Ms Cline, whose role within the CCG was to assure the relevant stakeholders that primary care services were providing quality and safe services to the population, visited Dr Moss twice that month. Her evidence, which we accept, was that he was increasingly concerned about the Claimant's practice. She was shown evidence relating to the immunisation, COPD and travel vaccination issues (dealt with above and below). On the basis of what Dr Moss told her she considered that there were legitimate concerns. She advised that the concerns be dealt with in line with usual practice and in consultation with HR. It was she who advised him that, if he was sufficiently concerned, he should refer the Claimant to the NMC.

99. On 14 November 2018, the NMC contacted the Practice Manager, informing the Respondent that an anonymous complaint had been made against the Claimant about her clinical practice.

100. The Claimant alleges that the referral was made by Ms Wybrow and Ms Love. Ms Wybrow and Ms Love both vehemently deny having done so. On the balance of probabilities, we accept their evidence. Their involvement was confined to responding to requests for further information from the NMC, once the NMC formally notified the practice of the referral.

101. On the other hand, we have concluded that the referral must have come from someone within the surgery, if only because the list of concerns is very similar to those which the Respondent had identified. That cannot be a coincidence. We have concluded that it must have been made by Dr Moss: it was his surgery,

and he was ultimately responsible; moreover, that is what Ms Cline had advised him to do when she spoke to him.

The suspension on 30 November 2018 (Issue 14.10) and Ms Love telling the Claimant that her documentation put patients' lives at risk (Issue 14.11)

102. On 30 November 2018, Ms Love asked the Claimant to attend a meeting with her. She told her that she had been reported to the NMC.

103. Ms Love suspended the Claimant from her role on full pay, pending the outcome of an investigation. The letter included the following statement:

> 'Suspension is being implemented because the allegations relating to your conduct/performance may potentially put patients at risk.'

104. Ms Jobson wrote to the NMC on the same day to inform them that the Claimant had been suspended pending investigation, which she told the NMC they aimed to complete by the end of the week. They planned then to arrange a meeting with the Claimant through the Respondent's HR company (Practical HR).

105. It is apparent from attendance notes made by the NMC, which the Claimant included in her supplementary bundle, that on 30 November 2018, Ms Jobson received a call from the Claimant's agency, offering to provide someone to cover shifts. They suggested the Claimant; they did not realise that it was her own shifts which needed covering. Ms Love reported this conversation to the NMC, who advised that she tell the agency that the Claimant was suspended. Ms Jobson followed that advice; the agency did not know about the suspension (the Claimant had not told them). The NMC also offered to contact the agency itself. The NMC explained that she had been suspended because of clinical concerns. The agency informed the NMC that it would not offer the Claimant any shifts pending the NMC's decision as to whether it would investigate the Claimant.

106. In the course of her discussion telephone discussion with the NMC, Ms Love is recorded as describing the Claimant as 'a lovely lady but … very argumentative, ignorant and defensive with senior partners and staff'.

107. Dr Moss appointed Ms Love as the disciplinary officer. There was no separate investigatory officer. Ms Love effectively carried out both roles. We accept Ms Love's evidence that, when she began this process, she was not aware that the Claimant had accused her of racism, but she discovered this in the course of her investigation. Her evidence was that she asked Dr Moss and HR whether she should continue in the circumstances and they told her that she should. In our judgment, that was the wrong decision: there was an obvious conflict of interest. The Respondent should have considered appointing an external clinician, such as Dr Siddique, to conduct the disciplinary hearing.

108. There was no formal investigatory stage, at which the Claimant was interviewed and given an opportunity to understand and comment on the specific allegations against her. Nor were other witnesses formally interviewed about the allegations against the Claimant.

The Claimant's grievance of 30 November 2018 / letter of the same date to the NMC (Issue 19.6)

109. The Claimant wrote a detailed letter on 30 November 2018, which she delivered by hand, and which was opened by reception staff on 3 December 2018. She also copied the letter to the NMC. It makes explicit reference to her previous complaints of race discrimination and repeats some of the allegations. She also stated that she intended to bring Employment Tribunal proceedings. It is clearly a protected act. The focus of the grievance was about Ms Wybrow's conduct, although there is one passing reference to Ms Love.

The grievance hearing on 12 December 2018

110. Dr Moss asked Ms Angela Dansey of Practical HR to investigate the grievance. On 7 December 2018, Ms Dansey invited the Claimant to a grievance meeting.

111. That meeting took place on 12 December 2018. In the subsequent report Ms Dansey recorded how the Claimant put her case on race discrimination. She asked the Claimant to give a specific example of racist behaviour by Ms Wybrow. The Claimant gave the example of Ms Wybrow entering her room to ask for the smear test. We note that, in describing this incident, the Claimant alleged that Ms Wybrow 'burst in and shouted at LW in front of a patient'. On the Claimant's own, earlier account that was a clear exaggeration: see the letter of 30 July 2018 (para 71), in which she had written:

> 'there was a knock on my door and Nicky opened the door. She took a deep breath and said to me "where is the smear".'

112. Ms Dansey asked the Claimant to explain why she perceived this to be racist. The Claimant referred in general terms to Ms Wybrow's attitude and relied on the fact that Ms Wybrow is White. Ms Dansey agreed with the Claimant who should be interviewed in relation to the grievance (Ms Wybrow, Ms Love and Ms Jobson).

113. On 17 December 2018, the Claimant wrote to Ms Dansey, objecting to Ms Love's being involved in the disciplinary process, on the basis that she had been named 'as a Respondent in my complaint'. She also warned again that she intended to issue tribunal proceedings and to seek compensation in the amount of five years' salary.

The disciplinary allegations in the letter of 13 December 2018

114. The Respondent accepts that, insofar as it had disciplinary and grievance procedures, they were not fit for purpose.

115. Ms Love wrote to the Claimant, inviting her to a disciplinary meeting on 19 December 2018.

116. The allegations were generalised and simply identified categories of misconduct/performance 'persistent clinical errors some of which potentially put patients' health at risk', 'failure and refusal to follow clear and reasonable instructions' etc.), without identifying the specific occasions relied on

117. At the same time a pack of around two hundred pages of contemporaneous documents, mostly clinical records, was sent to the Claimant. There was no more detailed particularisation of the allegations, but the pack was tabbed by reference to the general headings contained in the covering letter. There were

comments written on some of the documents, identifying the alleged error/deficiency, but the author was not identified. It emerged in evidence before us that it was Ms Jobson.

118. There was no separate investigatory report.

The grievance outcome (Issue 14.12)

119. Ms Dansey produced a grievance report. She concluded that the auditing and checking of clinicians was part of Ms Wybrow's role. When she identified concern about the Claimant's practice it was her duty to raise them, irrespective of who the person was. She was satisfied that the Claimant's grievances had been dealt with appropriately. She found no evidence of racism by any of the Respondent managers. She concluded that all clinicians were treated in the same way; and that the only reason why the Claimant's name appeared more frequently in the records which she reviewed was because the Claimant did not follow the correct procedures and made more mistakes than others. She recommended that the grievance should not be upheld; it was passed to Dr Moss for review, as it was ultimately his decision.

120. On 19 December 2018, Dr Moss wrote to the Claimant informing her that her grievance was not upheld. He attached a copy of the report. He wrote:

> 'Taking into account the content of the investigation report and the recommendations, I am writing to confirm that I do not uphold any element of your grievance. You do have the right to appeal against this decision, and should you wish to exercise your right of appeal, you should do so in writing clearly setting out the grounds on which you are appealing.'

121. On 21 December 2018 the Claimant appealed the grievance outcome. A meeting took place on 22 January 2019, at which Fiona Howarth was present. The appeal was not upheld. The Respondent believed that an outcome letter was written but was unable to produce it, as it was no longer held on Practical HR's system. The Claimant denied that she received an outcome letter. The Claimant produced additional documents which she said showed she had not received it. In fact, it showed an exchange with her union adviser in which she complained about the delay in receiving it.

The disciplinary hearing on 21 December 2018

122. The Claimant did not attend the scheduled disciplinary hearing on 19 December 2018. Ms Love wrote to her the same day, recording that she had attempted to contact the Claimant on both her home and mobile numbers, but without success. Ms Love informed the Claimant that she had decided to rearrange the meeting, which would take place on 21 December 2018 at Practical HR's offices. She encouraged her to attend. She informed her that the failure to attend the previous meeting would be considered as a failure to follow a management instruction and, therefore, a further potential act of misconduct. She warned the Claimant that, if she failed to attend the meeting, it would continue in her absence and a decision would be made on the basis of the available information.

123. The Claimant attended the meeting but left after around ten minutes. She objected to the fact that it was conducted by Ms Love.

The dismissal (Issue 14.14)

124. On 21 December 2018, the Respondent wrote to the Claimant confirming that she had been dismissed for gross misconduct with immediate effect. The dismissal letter set out the categories of misconduct, as well as allegations relating to her failure to attend the original meeting, but with no further detail. The findings were generalised, and although they referred to the categories of misconduct/performance identified in the disciplinary charges, there was no detailed analysis. The letter referred to a right of appeal.

The NMC proceedings

125. On 15 January 2019, the NMC wrote to the Claimant [720], informing her that an interim order hearing would take place on 23 January 2019 in relation to the following in relation to the following potential regulatory matters:

- 'Failures in patient care
- Failures in medication administration and management
- Failures in record-keeping (including falsification of patient records or retrospective/amended recording without recording as such)
- Failures to follow procedures and protocol
- Acting outside of competence
- Attitudinal concerns.'

126. On 23 January 2019, the NMC held an interim hearing. The Claimant attended the hearing and was represented. At the end of the hearing the panel decided to make an interim conditions of practice order for a period of 18 months from 23 January 2019. The panels reasons were as follows:

> 'The panel considered that, based on the information before it, there would be a real risk of significant harm to patients if you are permitted to practise without restriction. The panel was aware that the alleged concerns arose at one surgery, where there were alleged issues with your working relationships with colleagues, in an otherwise lengthy nursing career without prior incident. However, it noted that at the practice, there were a number of wide-ranging concerns, related to basic nursing practice, which were allegedly repeated over a short period of time. The panel considered that there was a risk of repetition and risk to patients if you were to practice unrestricted. The panel therefore determined that an interim order is necessary on the grounds of public protection. The panel also determined that an interim order is otherwise in the public interest, in order to maintain public confidence in the nursing profession and to declare an uphold proper standards of conduct and performance'.

127. In the event, the NMC proceedings were concluded without further action against the Claimant. She was informed that there was no case to answer, It is suggested in the NMC documents that it had no alternative but to do so because it had been unable to secure the cooperation of the relevant witnesses, Ms

Jobson, Ms Wybrow and Ms Love. We find that the position was rather more complex than that.

128. By this time, Ms Jobson had left the Respondent's employment (she resigned on 15 October 2018 for unrelated reasons). She provided a statement for the NMC proceedings and told the solicitors who liaised with her that they could contact her on her mobile phone, if they needed to. She was contacted again in March 2019 for further information but explained that she had left the practice and no longer had access to emails and documents. She heard nothing further.

129. Ms Wybrow gave a statement over the phone. She was asked if she would be willing to attend a hearing. She said that she would if required but would prefer not to, because the Claimant had previously made counter-allegations against her when she had raised concerns about her practice. She heard nothing further from the NMC until she was informed that the case had been closed.

130. Ms Love was asked to provide documentation by the NMC and did so. She gave a statement to the NMC by phone, but when she reviewed it, it contained significant errors. She informed the NMC but they did not revert to her.

131. It is right that none of the three managers pushed for the process to continue. The Claimant says that is because they knew that they would be revealed as having made false allegations against her. We have no hesitation in rejecting that suggestion. All three managers were willing to attend the Employment Tribunal and gave detailed and cogent evidence as to their concerns about Claimant's conduct and practice. The Claimant then suggested that their purpose in attending the Tribunal was itself improperly motivated: to ensure that she did not receive compensation to which she was entitled. We also reject that suggestion.

Findings of fact relevant to contribution, *Polkey* and wrongful dismissal

132. In his cross-examination of the Claimant, Mr Wilson spent some considerable time exploring with her some (but by no means all) of the incidents and concerns, which formed part of the disciplinary pack, on the basis of which the Respondent dismissed her. He did so in support of a submission that, if the Tribunal found that the dismissal was unfair for any reason, the Claimant contributed to her dismissal by her own blameworthy conduct (the contribution issue) and/or that the employment relationship would inevitably have ended because the relationship of trust and confidence had broken down (the *Polkey* issue) and/or that the Respondent was entitled to dismiss the Claimant summarily, and without notice pay, for the same reasons (the wrongful dismissal claim).

133. The findings set out below are the Tribunal's own, on the balance of probabilities and on the basis of the evidence we heard at the hearing, including the Claimant's answers in cross-examination.

134. The Claimant saw a patient on 15 December 2017. She asked the GP to increase the patient's diabetes medication to three tablets daily, because the patient's blood glucose level was increasing. The GP responded that the patient was already on a dose of four tablets daily (the maximum dose). The Claimant declined to accept in cross-examination that she had not noticed this.

135. Counsel then pointed out that, having heard back from the GP, the Claimant had marked the task as 'completed', thereby closing the matter down, even though the patient needed an urgent assessment as to how the blood glucose level issue should be treated. The Claimant responded that the records had been 'tampered with by the Respondent… I cannot defend myself based on redacted records.' The Tribunal asked the Claimant whether, if this was a record relating to a different nurse, she would agree that they had done the wrong thing. The Claimant replied 'yes, I would have suggested to the doctor: can we try something else? Writing "completed" was the wrong thing to do'. However, she then added: 'these are fabricated documents.' We are satisfied that they are not.

136. The next matter continues on from the findings we have already made in relation to Ms Wybrow's email of 13th of August 2018, concerning COPD assessments (para 29), in which Ms Wybrow communicated an instruction from Dr Moss that clinicians use the CAT form for COPD monitoring. The Claimant did not respond to the task message, confirming that she had read it and understood the content, which would be normal practice.

137. On 2 September 2018, the Claimant saw a patient with chronic obstructive lung disease. The surgery had sent him the form and he had been asked to bring it in. The Claimant recorded that:

> 'Patient says he is not sure why he's called. He has a form with him which I think is poorly designed and duplicates the NICE assessment guideline; and irrelevant. He could not understand how to respond to the information.'

138. It was the Claimant's responsibility to assist the patient in completing the form, if he was having difficulty with it, in line with Dr Moss's instruction. She did not do so. Instead, she recorded her view that it was 'poorly designed' and 'irrelevant'. In cross-examination, the Claimant denied that she had been asked to use the form, which she plainly had (para 29). She asserted that she was entitled to disregard the instruction because 'that is the definition of an independent practitioner. The decision I made was the right decision'.

139. The next matter concerns the surgery's policy as to when travel vaccines should be administered. The policy was to offer vaccinations at the earliest possible opportunity, to avoid late treatment. Because they last many years, they can be administered months before travel. When the patient brought in their travel forms, the Claimant was asked to call the patient to book them in. The Claimant refused to process these forms. Indeed, she suggested that a notice be put up instructing patients who were intending to travel to book their vaccines for about 2 to 4 weeks before their travel date. Dr Moss disagreed: he wanted patients to come in sooner. The Claimant said in cross-examination that she could not remember this disagreement, that it was 'too long ago' and that she could not see why it would be a problem. She eventually accepted that Dr Moss knew what he wanted, and that what he wanted was not wrong.

140. On 12 March 2018, the Claimant was messaged about a traveller who needed a typhoid injection. She did not see him until 10 days before travel, 26 June 2018, when he was given one typhoid vaccine. She then saw him again three days before travel, by which time it was too late to provide full cover.

141. The Claimant saw another patient in September 2018, whom she advised to have vaccines two weeks before travel. He needed three courses, and so would not be sufficiently covered if he followed that advice. The Claimant accepted in cross-examination that the vaccines in question could be administered between six months and a year before travel. The Claimant consistently disregarded Dr Moss's preferred practice, considering that she knew better than him.

142. Earlier in the year, on 27 February 2018, Ms Jobson contacted the Claimant about a patient who had contacted the surgery to say that she was travelling to Gambia on 9 March 2018, and had been told by the Claimant that seeing her on 2 March 2018 would be early enough to have a typhoid injection. The patient's friends had told that she needed to have it at least two weeks before travelling. She said that she was unhappy because she had booked an appointment weeks before. Ms Jobson sent the Claimant a task message asking her to contact the patient. The Claimant did nothing but marked the task as 'completed'. In the Claimant described the contemporaneous task message as 'either deleted or made up' and 'fabricated'. She declined even to accept that it recorded that the patient was complaining.

143. On 5 March 2018 Ms Wybrow sent the Claimant a task message:

> 'You saw this patient for an asthma review in January but you have not asked relevant questions or coded annual asthma review. Please can you call the mother and check this with her so it clears from QOF. Please reset the recall. She shouldn't have to come in again. Thank you.'

144. The Claimant marked Ms Wybrow's request as 'completed', even though there was no record of her making the call to the patient's mother, as she had been asked to do. The Claimant stated in cross-examination that she had made the call. In response to a question from the Tribunal as to whether every contact with a patient is recorded in their record, the Claimant confirmed that it was and accepted that there was no record of the call on the document before us. We find that it was not made. The Claimant alleged that the Respondent had 'not provided the true patient record'.

145. The Claimant saw an asthma patient on 4 July 2018. The Claimant sent Ms Wybrow a task message:

> 'asthma review coded – please check details, recalls etc.'

146. Notwithstanding the contemporaneous document, the Claimant denied sending this message. On 10 July 2018 Ms Wybrow sent the Claimant a task message:

> 'please code this asthma review using the three questions and add a recall. Thank you'

147. The Claimant marked the task as 'completed' on 25 July 2018, even though the patient's records show that nothing was done after 10 July 2018, in other words that the task was not completed. The Claimant alleged that this was 'not a genuine document'.

148. In a task message dated 15 May 2018 Ms Jobson wrote to the Claimant:

> 'Leona, this patient you try to take blood on Friday but have not documented anything. You tried to take blood from leg also, have you been trained to do this recently as I believe we can only do the arm unless at hospital? Please can you let me know and also document what you did on patient's journal on the date it was done.'

149. The Claimant simply closed the task off, marking it as 'completed', without providing the information to Ms Jobson or updating the patient records, as Ms Jobson had asked her to do. In cross-examination, the Claimant said that it was not she, but Dr Moss, who did this procedure. We find that, if that was the case, she would have responded accordingly to Ms Jobson, but she did not, she simply marked the task as 'completed'. The Claimant then alleged that 'these are fabricated documents, they are made up, they are deleted'.

150. On 11 July 2018 the Claimant saw a diabetic patient who had recently had a stroke. He had a target blood pressure of 130/80 and was in a high-risk category. The Claimant recorded his blood pressure as 156/85 but did not do anything about it. In cross-examination the Claimant again said that the document was not genuine.

151. It is fair to say that the Tribunal found the Claimant's dismissive response when questioned about these serious matters very troubling. It appeared to us to be consistent with the attitude which her former colleagues encountered during her employment: she refused to acknowledge that she might have been at fault in any respect and was not even prepared to accept that it might have been right for her colleagues to raise these matters with her. In short, she showed no insight.

152. Another theme which emerged was that the Claimant considered her clinical knowledge to be so superior that she was entitled to disregard instructions given to her by Dr Moss, within whose practice she was working as a part-time employee. There is no doubt that she had considerable experience, many skills and was well-liked by many of her patients. However, any professional who considers themselves to be above criticism, and no longer susceptible to direction from her employer, will inevitably give rise to very serious concern.

153. We are satisfied that the majority of these matters were raised with the Claimant at the time, but in an informal way: a consistent theme of the Claimant's complaints and grievances was that managers sought (improperly, in her view) to give her guidance and instructions.

The law

Time limits in discrimination cases

154. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

155. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then

the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

156. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530 the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

157. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. That is a broad discretion. In exercising that discretion, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

158. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. These are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

159. The fact that the Claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative (*Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR 116 at [16]).

160. In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more likely that memory fade will have an impact on the cogency of the evidence (*Redhead v London Borough of Hounslow* UKEAT/0086/13/LA per Simler J at [70]).

<u>The burden of proof in discrimination cases</u>

161. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

162. The effect of these provisions was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[2] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

163. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court held that, at the first stage all the evidence had to be considered, from whatever source it had come, not just the evidence adduced by the Claimant. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

164. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9, 11] held that the Tribunal should avoid adopting a 'fragmentary approach' and should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

165. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

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[2] *Madarassy v Nomura International plc* [2007] ICR 867, CA

Direct race discrimination

166. S.13(1) EqA provides:

> **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.**

167. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

168. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

169. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan* per Lord Nicholls at 513).

170. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.

171. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not fall into that category.

172. In a case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled, the mishandling is not discriminatory simply because the grievance concerned discrimination. It is not a 'but for' test; the Tribunal must scrutinise the motivation of the alleged discriminator (*Dunn v Secretary of State for Justice* [2019] IRLR 298 CA, *per* Underhill LJ at [44]).

Harassment related to race

173. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**

> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **…**
> **race**
> **…**

174. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

175. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at [47]) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals 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.'**

176. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ (at [12]), referring to the above, stated:

> **'We wholeheartedly agree. 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. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

Victimisation

177. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**
>
> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
> **…**

178. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a

subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

179. There will be cases where an employer has subjected an employee to a detriment in response to the doing of a protected act but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. For example, where the reason relied on is the manner of the complaint (*Martin v Devonshires Solicitors* [2011] EqLR 108 EAT). Before a case could be regarded as analogous to *Martin*, it is necessary to identify some feature of the protected acts, which could properly be regarded as separable from them, as being the reason for the treatment (*Woodhouse v West North West Homes* [2013] IRLR 773).

Unfair dismissal

180. S.94 Employment Right Act 1996 ('ERA') provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

181. S.98 ERA provides so far as relevant:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it— ...**
>
> **(a) relates to the capability or qualifications of the employee for performing work of the kind for which he was employed by the employer to do,**
> **(b) relates to the conduct of the employee,**
> **[…]**
>
> **(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.**

182. In *Orr v Milton Keynes Council* [2011] ICR 704 at [78], Aikens LJ summarised the correct approach to the application of s.98 in misconduct cases, including the familiar 'band of reasonable responses' test:

> **'(6) The employment Tribunal must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The Tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.**

> **(7) A particular application of (5) and (6) is that an employment Tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.**
>
> **(8) An employment Tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice.'**

183. In *Turner v East Midlands Trains Ltd* [2013] ICR 525, Elias LJ (at paras 16–17) cited paragraphs (4) to (8) from that extract in Aikens LJ's judgment in *Orr* and added:

> **'As that extract makes clear, the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111.'**

184. In its assessment of reasonableness, the Tribunal may only take into account facts that were known to the decision-maker at the time when the decision to dismiss was made: *W Devis and Sons Ltd v Atkins* [1977] AC 931 at 952. When considering whether the employer acted reasonably, the Tribunal has to look at the question in the round and without regard to a lawyer's technicalities (*Taylor v OCS Group Limited* [2006] ICR 1602 at [48]).

185. Circumstances will dictate how extensive an investigation is required. In *Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 at [23], the Court of Appeal held (*per* Richards LJ):

> **'To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole.'**

186. Natural justice requires that decision-makers and investigators must be free of apparent, as well as actual, bias. A breach of the rules of natural justice will be an important matter when considering the fairness of a dismissal (*Slater v Leicestershire Health Authority* [1989] IRLR 16 at [33-34]).

187. In *Jinadu v Dockland Buses Ltd*, EAT 0434/14, Supperstone J. held that the fact that a disciplinary investigation was conducted by a manager against whom the employee has previously raised a grievance did not make the process unfair, in circumstances where the disciplinary hearing itself was conducted (and the decision to dismiss taken) by an independent manager who had no connection to the grievance.

188. It is an elementary principle of justice that the employee should know the case he or she has to meet. It is equally obvious that it is the employer's obligation to put that case so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. (*Sattar v Citibank NA* [2020] IRLR 104 at [56]).

189. The charge must be precisely framed and the evidence and findings must be confined to the particulars set out (*Strouthos v London Underground Ltd* [2004] IRLR 636 at [13 and 38].

190. If the investigation is defective, it is no answer to say that it made no difference to the decision (*A v B* at [86]).

Contribution

191. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it will reduce the amount of the basic and compensatory awards by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). In order for a deduction to be made, the conduct in question must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable in the circumstances (*Nelson v BBC (No.2)* [1980] ICR 110).

192. In *Robert Whiting Designs Ltd v Lamb* [1978] ICR 89 at 92, the EAT held as follows:

> **'In our view the proper approach is to decide first what was the real reason for dismissal and then to see whether the employee's conduct played any part at all in the history of events leading to dismissal. In some cases, set against the real reason, it may be apparent that the employee's conduct, even if reprehensible, was of no relevance whatsoever and made no impact on the situation. In the present case the employers made great use of the employee's conduct in the process of dismissal. They had every justification for so doing, for the conduct was extremely reprehensible. The employee's conduct certainly contributed to his dismissal in the sense that it was a factor in the minds of the employers. Put another way, the real reason for dismissal was not exclusive of all other matters and a bogus reason does not necessarily shut out the employer completely if there was material to support the reason relied upon. We conclude, therefore, that the employee's conduct ought to be considered not only with reference to incompetence but also with reference to misconduct. In our view the weight to be given to the employee's conduct ought to be decided in a broad common sense manner.'**

193. The EAT in *Warrilow v Robert Walker Ltd* [1984] IRLR 304 at [21] confirmed that the principles to be applied in considering contribution in the context of unfair dismissal are the same as those applied in the personal injury context. The apportionment of responsibility (i.e. the relative blameworthiness and causative potency of the parties' respective faults) is a matter of assessment for the Tribunal. An example of the practical effect of apportionment in the employment context is to be found in the judgment of Browne-Wilkinson J in *Gibson v British Transport Docks Board* [1982] IRLR 228 at [27-31], in which the EAT substituted a finding that the contribution of the employees to their own dismissal should be assessed at 90%, the remaining 10% being referable to a single procedural failing by the employer.

Polkey

194. Where a Tribunal finds that a dismissal was unfair, it must go on to consider the chance that the employment would have terminated in any event, had there been no unfairness (the *Polkey* issue).

195. Guidance as to the enquiry the Tribunal must undertake was provided in *Whitehead v Robertson Partnership* UKEAT [2002] 7 WLUK 539 at [22].

> **'[…] it is, we think, incumbent upon the Employment Tribunal to demonstrate their analysis of the hypothetical question by explaining their conclusions on the following sub-questions:**
>
> **1. what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?**
>
> **2. depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct even although the Employment Tribunal found as a fact that misconduct was not made out for the purposes of the contribution argument; alternatively, if for some other substantial reason, was that a sufficient reason for dismissal: similarly, capability.**
>
> **3. even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?'**

196. In *O'Donoghue v Redcar* [2001] IRLR 615 the Court of Appeal held that, if a Tribunal finds that an employee has been dismissed unfairly (whether substantively or procedurally), but concludes that the employee would have been bound to be dismissed soon thereafter, by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that compensation should be awarded on that basis. The Court upheld the Tribunal's finding that, although the Claimant had been unfairly dismissed and victimised, her divisive and antagonistic approach to her colleagues was such that she was on an inevitable course towards dismissal within six months, the Tribunal was entitled to regard that date as a cut-off point for the purposes of compensation. It was legitimate to avoid the complicated problem of some sliding scale percentage estimate of her chances of dismissal by identifying a safe date by which the Tribunal was certain that dismissal would have taken place and making an award of full compensation in respect of the period up to that date.

<u>Wrongful dismissal</u>

197. A complaint of wrongful dismissal is a common law action based on breach of contract and is quite different from a statutory complaint of unfair dismissal. The EAT considered the distinction in *Enable Care and Home Support Ltd v Pearson* EAT 0366/09, where both were claimed. In a wrongful dismissal claim the Tribunal was concerned not with the reasonableness of the employer's decision to dismiss but with the factual question: was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment, entitling the employer to summarily terminate the contract?

198. In *Neary v Westminster* [1999] IRLR 288 at [33], Lord Jauncey reviewed the authorities on the question of when summary dismissal is justified:

> **'What degree of misconduct justifies summary dismissal? I have already referred to the statement by Lord James of Hereford in *Clouston & Co Ltd v Corry*. That**

> **case was applied in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698, where Lord Evershed MR, at p.700, said: 'It follows that the question must be – if summary dismissal is claimed to be justified – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.' In *Sinclair v Neighbour*, Sellers LJ, at p.287F, said: 'The whole question is whether that conduct was of such a type that it was inconsistent, in a grave way – incompatible – with the employment in which he had been engaged as a manager.' Sachs LJ referred to the 'well established law that a servant can be instantly dismissed when his conduct is such that it not only amounts to a wrongful act inconsistent with his duty towards his master but is also inconsistent with the continuance of confidence between them'. In *Lewis v Motorworld Garages Ltd* [1985]** IRLR **465, Glidewell LJ, at 469, 38, stated the question as whether the conduct of the employer 'constituted a breach of the implied obligation of trust and confidence of sufficient gravity to justify the employee in leaving his employment ... and claiming that he had been dismissed.' This test could equally be applied to a breach by an employee. There are no doubt many other cases which could be cited on the matter, but the above four cases demonstrate clearly that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.'**

Conclusion: jurisdiction (time limits) in relation to the alleged acts of direct discrimination, harassment related to race and victimisation before October 2018

199. Because so many of the claims advanced by the Claimant are *prima facie* out of time, we think it right to address the jurisdictional question first.

200. Any act or omission, which occurred on or before 12 December 2018, is *prima facie* out of time, unless it amounts to conduct extending over a period, or the Tribunal extends time on a just and equitable basis.

201. The claim in respect of the dismissal was presented in time. We are satisfied that the process leading up to it, from November 2018 when Dr Moss contacted the CGC (Issue 14.15), is capable of amounting to 'conduct extending over a period': it is clear to us that the Respondent's contact with outside agencies (the CCG, the NMC), the initiation of an internal disciplinary process and the ultimate dismissal were all aspects of the Respondent's attempt formally to address the concerns that it had about the Claimant's conduct and practice, having failed to do so by informal means. In our judgment the same cannot be said of the pre-November 2018 acts. We deal with the dismissal claims below, where we conclude that they were not acts of discrimination. Consequently, because there is no in-time act of discrimination, to which any earlier alleged acts of discrimination could be linked to form 'conduct extending over a period', the Claimant requires an extension of time in respect of the pre-November 2018 acts.

202. We are satisfied that, at all material times, the Claimant was aware of her right to bring Tribunal proceedings, including discrimination claims. We do not accept her evidence that she only became aware of the relevant time limits when she went to see a solicitor two or three weeks after her dismissal from the surgery. We believe that she knew about time limits much earlier, before the acts complained of in these proceedings, indeed before her employment with the Respondent. She had threatened Tribunal proceedings against her previous employer, and we think it more likely than not that she familiarised herself with the process then, if not before. If we are wrong about that, we have concluded

that she ought reasonably to have made enquiries when she first made internal complaints of discrimination in 2017, while working for the Respondent: she had access to union support and could have sought advice and information, either from her union, from a solicitor or from Citizens Advice.

203. We have already noted that there is a nine-month gap between the events of June 2017 and March 2018. The Claimant explained that she did not issue her claims earlier because Ms Wybrow and Ms Love were 'away for about six months'. Although factually inaccurate, this reflects the fact that the Claimant elected not to bring proceedings in respect of the 2017 matters; she chose to put these matters behind her.

204. As for the pre-November 2018 acts, the Claimant has not given a satisfactory explanation for her delay in issuing those claims, which is very substantial (between two and nine months). She raised multiple grievances/complaints during her employment, alleging discrimination. That underscores both her awareness of her rights, and her ability to formulate and pursue complaints: if she could raise complaints internally, there was nothing to prevent her from issuing proceedings in Tribunal within the relevant time limits. Again, we have concluded that she chose not to do so. Nor can it properly be suggested that the Claimant delayed issuing proceedings pending the outcome of the grievances; that would be inconsistent with her claims that she thought the Respondent was consistently failing to address her grievances, properly or at all. If she had no confidence in the internal process, there would be all the more reason to issue Tribunal proceedings promptly.

205. Although there is prejudice to the Claimant if the Tribunal declines jurisdiction (in that she cannot seek a remedy in relation to them), that prejudice is much less than it might otherwise have been, given our assessment of the underlying merits of these claims (see below). There is also significant prejudice to the Respondent if jurisdiction is accepted, owing to the passage of time, and its inevitable effect on memory.

206. Taking into account the Claimant's awareness of her rights and of time limits, the length of the delay in issuing proceedings, the absence of a good explanation for it, our assessment of the underlying merits and our observations as to the balance of prejudice, we are not persuaded that it is just and equitable to exercise our discretion to extend time in relation to the pre-November 2018 claims. Accordingly, the Tribunal lacks jurisdiction in respect of them, and they are dismissed.

207. For completeness, we summarise our findings as to those claims below, insofar as the underlying merits are relevant to the issue of time limits, and in case they might have some relevance as background to the claims which are in time.

<u>14.1 - Ms Wybrow and Ms Love sent the Claimant messages/notes, reminding her that she had not completed certain tasks/instructing her to carry out tasks such as calling a patient, carrying out an assessment, or referring a patient</u>

208. We have already found (para 23 onwards) that the messages which the Claimant relied on in relation to these issues were entirely innocent. We have also rejected any suggestion that offensive communications had been deleted (para 25).

208.1. The message of 11 January 2017 (Issue 14.1.1) was a friendly exchange, initiated by the Claimant, and signed off with a kiss by Ms Love. The Claimant withdrew the allegation of race discrimination at the hearing (indeed she stated that she did not realise it was an allegation of discrimination).

208.2. There were no messages on 12 June and 4 September 2018 (Issues 14.1.2 and 14.1.3) and the Claimant was unable to give us any information about their allegedly offensive content.

208.3. As for the task message from Ms Wybrow of 13 August 2018 (Issue 14.1.4), it is clear, courteous and professional and deals with important processes which the surgery had adopted, and which she was clarifying for the Claimant.

208.4. Turning to Issue 14.1.5, although we have already recorded (para 31) that the Claimant did not herself identify specific examples of Ms Wybrow assigning tasks to her in an objectionable manner, we were referred by the Respondent witnesses to examples of Ms Wybrow asking the Claimant to follow up on certain patients (for example, paras 143 and 146). In our judgment there was nothing improper in her doing so.

209. There was no detriment to the Claimant in any of these messages (for the purposes of the direct discrimination and victimisation claims), nor was it unfavourable treatment (for the purposes of the Claimant's harassment claim) to send them. Most clinicians would be appreciative of a colleague picking up a potential error before harm was done. Any sense of grievance on the Claimant's part was, in our judgment, unjustified.

210. There was nothing to suggest that the sending of these messages was in any way influenced by, or related to, the Claimant's race or the fact that the she had done protected acts.

Issue 14.2.1 Ms Wybrow on or around 25 July 2018 interrupted the Claimant's clinic, when she was with a patient, knocking, walking in and stating: 'where is the smear?'

Issue 14.3.1 - On or around 25 July 2018, Ms Wybrow sent to the Claimant an aggressive TASK message relating to a patient smear test, instructing the Claimant that her conclusion was wrong.

211. This did not occur as alleged (paras 64-76). The sole reason why Ms Wybrow acted as she did was to ensure that the smear test was actioned. She conducted herself professionally. There was no detriment to the Claimant and no unfavourable treatment. The task message in question was not aggressive, or otherwise improper (para 72).

Issue 14.4.1 - Ms Wybrow instructed the Claimant to change patient records in relation to a patient visit in March 2018, when she had seen the same patient in June 2018. Ms Wybrow told the Claimant that her records were wrong and instructed her to change them

212. Ms Wybrow did not instruct the Claimant to change a patient's record; she merely identified an anomaly and asked the Claimant to review it (paras 56-58).

Issue 14.5.1 - Ms Wybrow went through the Claimant's daily clinical work and made sarcastic comments.

213. We have already found that this conduct did not occur (para 80).

Issue 14.5.2 - Ms Wybrow added to a patient record on 2 May 2018 that a smear test was done outside of the contracted agreement. The patient record is at [303A/321].

214. There was nothing improper in Ms Wybrow's amendment of this patient record, which was a simple factual update (paras 59-62). There was no detriment to the Claimant; it was not unfavourable treatment.

Issue 14.6 - Ms Wybrow and Ms Love made sarcastic comments about the Claimant's consultations with patients.

215. There was no evidence to support this allegation that Ms Wybrow or Ms Love made sarcastic comments; the Claimant did not put the allegation in cross-examination (para 48).

Issue 14.7.1 - Ms Wybrow and Ms Love excessively monitored the Claimant's work

Issue 14.7.2 - In around June/July 2018, Ms Wybrow conducted an 'audit' into the Claimant's practice.

216. We have already found that Ms Wybrow and Ms Love monitored the Claimant's work, but that it was not excessive (para 49). We have also found (para 63) that Ms Wybrow did conduct an audit into the Claimant's practice.

217. We have concluded that there were a number of reasons why they did so, none of them improper. Firstly, it was part of both their roles to monitor the work of clinicians within the practice generally, including the Claimant. Secondly, Dr Moss and Ms Jobson had specifically asked them to do so in relation to the Claimant after concerns had been identified in May 2017 (para 40). Thirdly, and most importantly, they were concerned about the number of issues which came to their attention in the Claimant's practice. In acting as they did, we have concluded that they were motivated exclusively by considerations of patient safety. It had nothing to do with the Claimant's race or the fact that she had done protected acts.

218. The Claimant, in her submissions, asserted that 'being the only Black staff member, I noticed that I was the only clinician being monitored'. as we have observed in the previous paragraph, that is factually incorrect. It is right that other clinicians were not monitored to the same extent; however, we are satisfied that the reason for this was the extent of the concerns identified in relation to the Claimant's practice and her lack of insight when matters were raised with her. We are satisfied that Ms Wybrow would have acted in the same way, had she been dealing with a White nurse, or a nurse who had not done a protected act, but who made errors, refused to follow instructions and reacted defensively when concerns were raised with her.

Issue 14.8.1 - the Respondent failed to investigate the complaint of 22 May 2017

219. The Respondent did not fail to investigate this complaint: Dr Siddique looked into it at the meeting of 27 June 2017 (paras 51-54).

Issues 14.8.2 and 14.8.3 - the Respondent failed to investigate the Claimant's complaints of 8 June and 6 October 2017

220. The Claimant failed to identify these complaints.

Issue 14.8.4: the Respondent failed to investigate the Claimant's complaint of 30 July 2018

221. The Respondent did not fail to investigate this complaint. Ms Jobson addressed it at the meeting of 3 August 2018. The Claimant said at the meeting that she was satisfied with the outcome (paras 77-79).

Issue 14.8.5: the Respondent failed to investigate the Claimant's complaint of 17 September 2018

222. This allegation is factually correct: the complaint was not dealt with (para 88). Ms Jobson did not deal with it because Dr Moss instructed her not to do so. Dr Moss also failed to deal with a grievance about the Claimant raised by Ms Wybrow, who is White and who had not done a protected act. We have concluded that the sole reason why Dr Moss did so was weak management on his part. We have concluded that, by this stage, he was simply seeking to avoid confrontation, by not dealing formally with these complaints and counter-complaints, in the hope that they would somehow resolve themselves. In retrospect that was unrealistic. However, there is no evidence that the Claimant's race, or the fact that she had done protected acts, played any part in the failure.

Conclusions: the alleged discriminatory acts leading up to the Claimant's dismissal

Victimisation: protected acts

223. Below we set out our conclusions as to whether the documents relied on by the Claimant contain protected acts.

223.1. Issue 19.1 - We consider that there is sufficient in the complaint of 22 May 2017 (para 41 onwards) to amount to a protected act. The Claimant describes a situation with a previous employer in which she considered that she had been discriminated against, she mentions discrimination and racism in her current employment and alleges that she is being treated differently, in that she is not being encouraged to monitor Ms Love and Ms Wybrow, whereas they are being encouraged to monitor her. Mr Wilson argued that, if the document did contain an allegation of race discrimination it was false and in bad faith. We disagree. We have concluded that the Claimant genuinely believed that race was a factor in her treatment. It became apparent to us in the course of her evidence that she has such a high estimation of her own abilities that she cannot accept that any criticism might be justified solely by reference to professional considerations, and is convinced that it must be improperly/unlawfully motivated. Where we do agree with Mr Wilson is that one purpose of this letter was to put the Respondent on notice that she would not be afraid to bring Tribunal proceedings against them, because she had done so before. Of course, in that respect it also satisfies the criteria for a protected act.

223.2. Issue 19.2 and 19.3 - the Claimant could not identify the documents or discussions which she said contained the protected acts (para 50).

223.3. Issue 19.4 - the complaint to Ms Jobson on 30 July 2018 did not contain a protected act (para 71).

223.4. Issue 19.5 - we concluded that the letter of 17 September 2018 (para 85) did contain a protected act it: referred back to an earlier allegation of racism and suggested that it was continuing by way of further alleged harassment.

223.5. Issue 19.6 - the letter dated 30 November 2018 to the NMC. The Claimant says that she copied this to Dr Moss, alternatively that the Respondent was aware of it. We have accepted (para 109) that it is a protected act.

224. Plainly nothing which occurred before each protected act could have been influenced by it.

<u>Issue 14.15 (direct race discrimination, harassment related to race) - Dr Moss reported the Claimant to the local CCG and the agency for whom she worked</u>

225. In determining the allegations of discrimination against the late Dr Moss, we bore in mind that we heard no direct evidence from him. Nonetheless, there was no lack of indirect evidence (in the contemporaneous documents and the statements of other witnesses) or of circumstantial evidence. With some of the allegations, including this one, we considered that we were able to reach positive conclusions on the balance of probabilities. In relation to others, we were not satisfied that the Claimant had discharged the initial burden on her to prove facts, from which the Tribunal could reasonably conclude that Dr Moss's actions were tainted by unlawful discrimination.

226. As for the first part of the allegation, we are satisfied that the sole reason why Dr Moss contacted the local CCG was because he was concerned about the Claimant's conduct and practice, especially in the light of her correspondence in October 2018 (para 89 onwards), because she indicated in it that she did not intend to follow his instructions. It was clear from the evidence of Ms Cline and others, and from the circumstances themselves, that Dr Moss needed advice as to how to proceed. It would have been surprising if he had not sought advice and guidance in these circumstances, irrespective of the race of the individual concerned: it was quite clear that senior management within the practice, including him, lacked the skills necessary to deal with this challenging situation. There is no evidence that his actions were in any way influenced by, or related to, the Claimant's race.

227. The second part of this allegation fails on its facts. Dr Moss did not 'report the Claimant to the agency'. The agency became aware of the Claimant's situation at the surgery not from him but indirectly, and as a result of the agency contacting the surgery. Ms Jobson told the agency that the Claimant had been suspended; the NMC also separately contacted the agency to inform them that there were clinical concerns about the Claimant (para 105).

Issue 14.9 (direct race discrimination, harassment related to race, victimisation) - Ms Wybrow and Ms Love reported the Claimant to the NMC; the Claimant believes that they were the 'anonymous' party who made the original complaint.

228. We have found that neither Ms Wybrow nor Ms Love referred the Claimant to the NMC; the referral was made by Dr Moss (para 101). The claims fail on their facts. For the reasons given above, had the allegation been made against Dr Moss, we would have found that the sole reason why he acted as he did was because he had serious concerns about the Claimants practice and her conduct, and he had been advised to do so by Ms Cline.

Issue 14.10 (direct race discrimination, harassment related to race, victimisation) – Ms Love suspended the Claimant on 30 November 2018 [651/677].

229. The allegation is factually correct: Ms Love did suspend the Claimant on 30 November 2018. We have concluded that the sole reason for the decision was because of the seriousness of the concerns the Respondent had identified in relation to the Claimant's practice and her conduct, in particular her refusal to follow instructions in relation to specific clinical practices. The Claimant's race played no part whatsoever in the decision; we are satisfied that Ms Love would have suspended a White nurse and/or a nurse who had not done a protected act, in circumstances where such serious concerns had been identified, and a referral to the NMC had been made; suspension was an appropriate step. The claims of direct race discrimination and harassment fail because the decision was not influenced by, or related to, race.

230. As for the victimisation claim, the last pleaded protected act before the suspension was the letter of 17 September 2018 (para 85). We are not satisfied that there is a link between that protected act and the decision to suspend the Claimant. Quite apart from the two and a half month gap, we note that in September, far from retaliating against the Claimant, Dr Moss responded by asking Ms Jobson to deal with that complaint informally, with a view to defusing the situation, as had happened before.

231. The situation was very different by the end of November: Dr Moss had referred the Claimant to the NMC. As we have already indicated (para 95) we think the turning point came with the correspondence in October.

232. It is right that the Claimant's letter of 6 October 2018 to Dr Moss (para 92) repeated the allegations of race discrimination against Ms Wybrow. However, this was not one of the Claimant's pleaded protected acts. Nonetheless, for completeness, we consider it here. As we have seen, Dr Moss had taken no retaliatory action against the Claimant when she had made similar allegations in September. What was different about the Claimant's correspondence on 6 October 2018, both in this letter and in the letter to Ms Jobson (para 93), was that the Claimant expressly signalled her refusal to follow instructions given by, or on behalf of, Dr Moss, in relation to specific clinical matters; moreover, she expressed that refusal in a manner which we have found to be high-handed and unprofessional (para 95). It is difficult to imagine how that could not have been a matter of grave concern: it strongly suggested that that Claimant was now effectively unmanageable. We have concluded that this aspect of the correspondence did play a material part in the decision to suspend the Claimant, but that it was distinct from, or 'properly separable' from, any protected act

contained within the letter to Dr Moss. Accordingly, any claim of victimisation based on the letter of 6 October 2018 would not have been well-founded and would have been dismissed.

Issue 14.11 (direct race discrimination, harassment related to race, victimisation) – Ms Love told the Claimant at the meeting when she suspended her on 30 November 2018 that her documentation put patients' lives at risk, and referred to this in the suspension letter

233. It is right that Ms Love told the Claimant on 30 November 2018, and recorded in the subsequent letter, her belief that the Claimant's record-keeping put patients' lives at risk. We have concluded that the sole reason she did so was because that was what she believed. She was aware of a number of instances where the Claimant's actions had given rise to significant risk, for example the smear test which the Claimant had not sent off (para 64 onwards). We note that, on reviewing the documents provided to it at the interim hearing, the NMC panel expressed similar concerns (para 126). We are satisfied that neither the Claimant's race, nor the fact that she had done protected acts, played any part whatsoever in the making of these remarks; Ms Love would have made them to a White nurse and/or a nurse who had not done protected acts, if she had similar concerns. Apart from anything else, it was important to make the Claimant aware of how serious these concerns were. For these reasons, these claims fail.

Issue 14.12 (direct race discrimination, harassment related to race, victimisation) – Dr Moss appointed Ms Love as the investigation and disciplinary officer

234. We are critical in our findings below as the reasonableness of Dr Moss's decision to appoint the same person to conduct both an investigatory and disciplinary procedure, and the reasonableness of appointing Ms Love to conduct these processes, given that the Claimant had made allegations against her. However, it is trite law that unreasonable treatment does not, in itself, suffice to justify an inference of unlawful discrimination to satisfy stage one of the burden of proof provisions.

235. Nor did the Claimant, in her evidence or submissions at Tribunal, identify facts which specifically suggested that Dr Moss was influenced by considerations of race, or by the fact that she had done protected acts.

236. Although the Claimant repeatedly alleged that Ms Wybrow, and to a lesser extent Ms Love, were motivated by race and/or the fact that she had done protected acts, she did not make such allegations against Dr Moss at the time. This was reflected in the way the allegations of discrimination were formulated in the original list of issues: unlike Ms Wybrow and Ms Love, Dr Moss was not specifically named. Certain allegations were expressed in the passive voice, including this one ('Ms Love being appointed as the investigation and disciplinary officer'). It was only when the Tribunal, at the beginning of the hearing, asked the Claimant to identify the alleged perpetrator, that Dr Moss came into the frame. In her closing submissions, the Claimant merely suggested in general terms that Dr Moss was 'part of the problem I faced' and was 'involved in petty gossip, which undermined my role and work'. Dealing with the decision to appoint Ms Love as investigation and disciplinary officer, the Claimant submitted only that it was 'wrong for the Respondent [Dr Moss] to have

appointed her in this role, in the first place, anyway.' There was no suggestion that the decision was in any way tainted by considerations of race or influenced by the fact that the Claimant had done protected acts.

237. We have concluded that the Claimant has not discharged the burden on her to prove facts from which the Tribunal could reasonably conclude that Dr Moss's appointment of Ms Love was discriminatory. Consequently, the burden of proof does not pass to the Respondent, and the claims are dismissed.

Issue 14.13 (direct race discrimination, harassment related to race) - On 19 December 2018 Dr Moss did not uphold the Claimant's grievance [672/701].

238. We have concluded that Dr Moss dismissed the grievance because he accepted the conclusions in the grievance report, which had been conducted by an independent person. Further, and for the reasons set out in relation to the previous issue, the Claimant has not proved facts from which we could reasonably conclude that the Claimant's race played any part in his decision.

Issue 14.14 (direct race discrimination, harassment related to race) - On 21 December 2018 Ms Love dismissed the Claimant [675/704].

239. There were serious flaws in the process Ms Love adopted in dealing with these issues at the time: they are set out below in our conclusions on unfair dismissal. They were sufficient, in our judgment, to make the dismissal unfair. However, our focus in determining the claims that the dismissal was an act of direct race discrimination or harassment related to race must be on Ms Love's mental processes.

240. In the course of the Tribunal hearing, we had ample opportunity to assess Ms Love's motivation. We found her to be a credible witness. She provided a detailed account in her witness statement as to nature of her concerns, by reference to specific incidents and relevant documents. It will be apparent from our findings of fact above that we have concluded that she had reasonable grounds for those concerns. We have no doubt whatsoever that Ms Love believed that the Claimant had made serious errors, had failed properly to document treatment and had refused to follow instructions in relation to specific clinical practices.

241. Moreover, she had no confidence that the Claimant would improve; she reacted defensively when issues were raised with her. Ms Love concluded that there was a risk to the surgery's patients if she continued to be employed.

242. Having had an opportunity to hear from, and observe, the Claimant over several days in the course of the hearing, we were unsurprised that Ms Love reached that conclusion. The Claimant showed a remarkable lack of insight throughout the hearing: she refused to accept the slightest flaw in her own practice and conduct, even in the face of documentary evidence which spoke for itself; she had no hesitation in making serious allegations of fabrication, when all else failed.

243. We have concluded that this was the sole reason why Ms Love dismissed the Claimant; we are satisfied that she would have made precisely the same decision, had the Claimant been White.

Overview

244. Although we have addressed each allegation in turn, we have done so recognising that each should be considered along with the others and in light of all our findings, so as not to lose sight of the fact that discrimination might not be apparent from an examination of a single event but might be revealed by a pattern of events.

245. We have also carefully reviewed the matters relied on by the Claimant in her 21-page written closing which, she submitted, showed that that race/the fact that she made protected disclosures were factors in her treatment. Although the Claimant consistently pursued her allegations on the basis that the alleged discrimination was overt and deliberate, we have also considered whether there might be an inference of unconscious motivation on the part of one or more of the individuals. We are aware that unconscious discrimination can and does occur and also that direct discrimination can arise when stereotypical assumptions are made that a person has characteristics associated with a protected group. But we must also ensure that we only draw inferences where it is proper to do so; discrimination can be inferred based on generalised assumptions, impressions or intuition. Insofar as they have not already been addressed in our conclusions above, we consider them in the following paragraphs,

246. The Claimant relied on the fact that, at her initial interview, Ms Jobson had said that race discrimination was not tolerated within the practice; the Claimant thought this 'an odd thing to say.' We have found that this occurred (para 20), but we have concluded that there was nothing improper, or suggestive of racial bias, in Ms Jobson's making this observation. Indeed, in her letter of 22 May 2017 to Ms Jobson, the Claimant described the statement as 'very reassuring to me' (para 43).

247. The Claimant alleged that Ms Love 'described me as a dishonest, aggressive, ignorant, argumentative person with mental health problems'. She submitted that 'these are words used in society to portray "Black women" negatively; and Tabitha Love knows of it". It is right that Ms Love was recorded as questioning the Claimant's honesty in an NMC attendance note dated 19 December 2018. She was referring to the fact that the Claimant had not disclosed a previous NMC referral until just before she signed her contract; that was factually correct (para 17). We are not satisfied that this allusion disclosed racial stereotyping on Ms Love's part.

248. In a communication with the NMC on 30 November 2018 Ms Love described the Claimant as 'a lovely lady, but she is very argumentative, ignorant and defensive with senior partners and staff'. We note that the Claimant omitted the first part of this statement from her submission. We considered carefully whether the use of the negative epithets was reflective of racial stereotyping and concluded that, in this context, it was not. Ms Love was merely stating, in unvarnished language, her own view of the Claimant's conduct. We concluded that the term 'ignorant' was probably used in this context to mean rude, rather than lacking in knowledge. Ms Love had ample grounds for describing the Claimant as argumentative and defensive. The Claimant also behaved rudely on occasions, at least in writing: see the extracts from her own correspondence, set out above (for example, para 56). We are not satisfied that these statements

disclosed racial stereotyping; they arose out of Ms Love's personal experience of working with the Claimant as an individual.

249. As for the Claimant's assertion that Ms Love described her as a person 'with mental health problems' this is at best a misreading, at worst a distortion, of an attendance note dated 19 March 2019, in which Ms Love is recorded as saying: 'I did tell the NMC, and I also stressed at the time, that she might have some memory problems. I clocked little things that made me think this was an issue'. This was an innocent observation which, if anything, had the potential to be exculpatory; it had nothing to do with the Claimant's race or the fact that she had made protected disclosures.

250. The Claimant made a generalised submission that 'Tabitha Love had no inhibition in openly expressing her negative or racist views concerning me, without fear or courtesy'. We have not found a single instance of overt racism by Ms Love.

251. The Claimant also described Ms Love's letters to her, including the suspension letter' as a 'demonstration of Tabitha Love's desire for dominating, humiliating and demoralising me' and 'had a dominant tone of "talking down to me" as if I were inferior to her, and a desire for destruction as if to satisfy her longstanding hatred of me'. We have examined those letters and we reject that characterisation. The letters are expressed in a professional manner. Clearly, the substance of the letters was unwelcome to the Claimant; that will always be the case when an employer is notifying an employee of disciplinary proceedings. There is nothing in the correspondence, however, which could justify the Claimant's hyperbolic description of them.

252. The Claimant also relies on what she describes as the decision to offer 'two vacancies' within the practice to Ms Love and Ms Wybrow, without considering her, 'based on the perception that I could not undertake either of the two jobs, [which] may be considered as perception discrimination'. As will be apparent from our earlier findings, Ms Love and Ms Wybrow performed the same roles throughout the material period (para 22); there were no vacancies.

253. The Claimant also asserted in her written closing (although this was not put in cross-examination to any witness) that 'they encouraged certain staff members to … raise a complaint against only ethnic minority doctors'. The only evidence relied on in support of this broad and serious allegation is a document written by the Claimant herself in which she recounted an incident between a member of staff called [Nikita] and an unnamed Nigerian doctor: there is no suggestion in her own account of any involvement by Ms Love or Ms Wybrow, nor of any racial aspect to the incident.

254. Taking these things together and alongside our other findings we do not draw any inference of racial or other prejudice. There was no need to consider the burden of proof provisions in the great majority of the allegations because we were satisfied that none of the individuals was motivated, consciously or unconsciously, by race or the fact that the Claimant had done protected acts.

255. Finally, the Claimant's in-time claims of harassment related to race have failed because we have concluded either that there was no unfavourable treatment, or that none of the conduct which occurred related to her race. Had the claims

not failed at that stage, we would have found that, although the Claimant subjectively perceived that the treatment she complained of created a hostile environment for her, it was not objectively reasonable for it to do so, in circumstances where the Respondent was simply attempting to follow formal procedures in an attempt to address serious concerns about an employee's conduct.

Conclusions: the Claimant's claims in relation to her dismissal

The reason for the dismissal

256. We have concluded that there were three, inter-related reasons for the Claimant's dismissal: conduct, capability (performance) and a breakdown in the employment relationship ('some other substantial reason'). Each was a potentially fair reason. We concluded that conduct, in particular the refusal to follow guidance and instructions, was the principal reason.

Procedural fairness

257. The Tribunal identified serious flaws in the procedure adopted by the Respondent in dismissing the Claimant.

257.1. The allegations against were not properly particularised; they were expressed in general terms and the Claimant was left to work out for herself what precisely she was charged with.

257.2. There was no separate investigatory stage. That was unreasonable in a case where so many allegations were being made. A reasonable employer would have interviewed the Claimant, to work through the individual allegations, before deciding which of them should be progressed. Other witnesses should have been interviewed, including the individuals who had identified the concerns, so that the Claimant could understand what was being said against her.

257.3. Given the number of allegations made against the Claimant, it was unreasonable not to produce a written investigation report, summarising those allegations and the evidence on both sides. The absence of such a report disadvantaged the Claimant: she was left to work out for herself precisely how the employer's case against her was put.

257.4. It was unreasonable to assign both the investigatory and disciplinary stages to the same person, all the more so once the Claimant had made allegations against Ms Love. The Respondent had previously brought in an external decision-maker (Dr Siddique); there was no explanation as to why it could not have done so again.

257.5. Although in some circumstances it might be reasonable for an employer to continue with a disciplinary hearing, when an employee does not attend and/or walks out of the hearing within minutes, in this case it was not. Had the Respondent conducted a proper investigatory stage, interviewed the Claimant and recorded her explanations in relation to the disciplinary matters, the position might have been different. As it was, the decision was taken without having heard the Claimant's defence to the allegations at any stage. In our view that was unreasonable.

258. For these reasons, the Tribunal concluded that the dismissal fell outside the band of reasonable responses, in relation to the procedure adopted, and was unfair.

Conclusions: *Polkey*

259. We went on to consider what would have happened, had a fair procedure been adopted. We considered that we were well-placed to make that assessment, having heard extensive cross-examination of the Claimant in relation to a number of the allegations against her, and had the opportunity to observe the Claimant's attitude to being managed and to being given instructions, and the extent to which she showed insight into the concerns raised by the Respondent.

260. We have set out our findings of fact as to the Claimant's conduct at the time above. We are satisfied that they demonstrate that: the Claimant made serious errors (paras 59-61, 64-76, 135); failed to take appropriate steps, when they were raised with her (para 135, 144 and 149); and refused to follow practices which she had been instructed to follow in relation to child immunisation (para 46), use of the CAT form (para 91 and 137), and the approach to travel vaccinations (para 93 and 139-141).

261. We considered whether the Claimant might have changed her behaviour, if given an opportunity to do so, and concluded that she would not: she refused at the time to accept even minor criticism, or to acknowledge that it was proper for colleagues to draw errors or concerns to her attention (paras 64-76 and 86); she was unable to accept that any of her colleagues might be in a position to instruct or guide her, describing them as her subordinates (para 78) and lacking experience (paras 78 and 81); and she resorted to personalised invective when complaining about them (para 47).

262. The attitudes which the Claimant displayed while in employment were, in many respects, replicated at the Tribunal hearing: she refused to accept that other clinicians had a duty to give her appropriate guidance (para 30), indeed she was dismissive about colleagues (para 39); at one point she even declined to accept that she was part of a team (para 87); she denied that things had happened, when they obviously had (paras 35, 39, 134, 139, 145), and alleged (without evidence) that documents, which were unhelpful to her case, were fabricated or had been tampered with (paras 32, 58, 135, 142, 147 and 149). Moreover, she was selective as to what she could and could not recall: when taken to a document which did not support her case, she maintained that it was not reasonable for her to be expected to remember something which happened so long ago (para 139); on the other hand she had no difficulty recalling documents which she believed assisted her (para 52). She showed no insight as to why the matters that were being raised with her were serious.

263. This not only undermined her credibility as a witness, it also led us to the conclusion that the Claimant had little ability to reflect on her own practice, to change her approach or to acknowledge responsibility for her actions. We concluded that her relations with her senior colleagues had broken down beyond repair, and that the principal responsibility for this was hers. We are satisfied that the Respondent could not continue to employ someone who had shown herself to be effectively unmanageable. Ms Jobson was asked in oral evidence whether the surgery could continue to employ someone who would

not follow practices and instructions. She replied that it could not, because the practice would not be able to function appropriately for the patients and their care.

264. We have concluded that that was a realistic assessment and that there was a 100% chance that the Claimant would have been fairly dismissed.

265. The reason for that dismissal would have been in part for conduct, and in part for capability (performance); in our judgment the principal reason would have been a complete breakdown in the employment relationship ('some other substantial reason'). For all the reasons set out above, we have concluded that the Respondent would have acted fairly in dismissing the Claimant for any of those reasons.

266. We have concluded that a fair process would have lasted two months: one month to complete the investigation stage and prepare a report; and one month to complete the disciplinary stage.

Conclusions: contribution and wrongful dismissal

267. We have concluded that the Claimant contributed to her dismissal by reason of her own blameworthy conduct. In reaching that conclusion, we had regard to all the matters summarised above at paras 260 and 261.

268. We have reminded ourselves of the authorities on apportionment in contribution. Although the extent of the Claimant's blameworthy conduct is very great indeed, the extent of the procedural unfairness was also blameworthy and contributed to a very great extent to the dismissal; we have concluded that that should be reflected in the final award. In all the circumstances, we consider that it is just and equitable to reduce both the basic and compensatory awards by 60%.

Wrongful dismissal

269. For the same reasons, we are satisfied that the Claimant's conduct, summarised above at paras 260 and 261, taken together and viewed objectively, was such that it was likely to destroy, or seriously damage, the relationship of trust and confidence between employer and employee, all the more so because of the nature of her role, which was a position of trust. Given the extent of the errors identified, the Claimant's resistance to having them pointed out to her and her refusal to follow specific instructions, we have concluded that the Respondent could no longer have confidence in her ability to discharge her duties to the standard required. Because there was a breach of the implied term of trust and confidence, the Respondent was entitled to dismiss her without notice, and her claim of wrongful dismissal must fail.

Remedy

270. The Claimant is entitled to a basic award and a compensatory award. The compensatory award will be limited to her loss of earnings for a period of two months after the date on which she was dismissed (which was 21 December 2018). Both the basic and the compensatory awards will then be reduced by 60% to reflection our conclusions as to contribution. For the avoidance of doubt, the Claimant is not entitled to any award for injury to feelings, because her discrimination claims have not succeeded.

271. In the circumstances, we consider that the parties ought to be able to agree these two sums without the need for a further hearing, and we urge them to cooperate in doing so. If agreement cannot be reached, the parties must write to the Tribunal within 28 days of the date on which this judgment is sent to them, providing their dates to avoid from March 2022 until the end of the year, for a three-hour remedy hearing. Directions will be given when the notice of hearing is sent out.

Employment Judge Massarella

10 January 2022

APPENDIX: AGREED LIST OF ISSUES

Jurisdictional issues

1. Are any of the Claimant's claims for discrimination out of time?

2. If so, do the claims amount to conduct extending over a period, with that period ending in time?

3. If not, would it be just and equitable to extend time in respect of any of the claims?

Unfair dismissal

4. Was the Claimant dismissed for a potentially fair reason, namely misconduct?

5. Did the Respondent form a genuine belief that the Claimant had committed gross misconduct?

6. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

    6.1. Did the Respondent have a genuine belief in the misconduct?

    6.2. Were there were reasonable grounds for that belief?

    6.3. At the time the belief was formed the Respondent had carried out a reasonable investigation?

    6.4. Did the Respondent otherwise act in a procedurally fair manner?

    6.5. Was the sanction of dismissal within the range of reasonable responses?

7. Did the Respondent or the Claimant unreasonably fail to comply with the ACAS code?

8. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

9. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

10. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

11. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

12. Has the Claimant failed unreasonably to mitigate her losses?

Wrongful dismissal

13. Was the Claimant guilty of gross misconduct, such that the Respondent was entitled to dismiss without notice?

Direct race discrimination

14. Did the following acts occur?

    14.1. A - Ms Wybrow and Ms Love sent the Claimant messages/notes, reminding her that she had not completed certain tasks/instructing her to carry out tasks such as calling a patient, carrying out an assessment, or referring a patient:

        14.1.1. Ms Love sent a message dated 11 January 2017 [S1];

        14.1.2. Ms Wybrow on 12 June 2018 at 12:40 [S2];

        14.1.3. Ms Wybrow on 13 August 2018 at 18:12 [S3];

        14.1.4. Ms Wybrow on 4 September 2018 at 09:48 [S4].

        The Claimant alleges that Ms Love deleted these messages.

        These incidents are referred to in the Claimant's letter to Ms Jobson of 17 September 2018 [615/641].

        The Claimant relies on the letter to Dr Moss of 6 October 2018 [624/650], and to Ms Jobson [626/652], which do not contain specific examples of the treatment, but show the Claimant raising her concerns at the time about Ms Wybrow using the NHS Task System to give instructions to the Claimant, as if the Claimant was her subordinate, and did not know what to do.

        14.1.5. Ms Wybrow, during the 'audit' gave the Claimant tasks to perform.

        The Claimant relies on her letter to the NMC dated 30 November 2018 [652/678]. She acknowledges that this letter does not give specific examples of the tasks, but she relies on it as evidence that she complained in general about this practice at the time.

    14.2. B - Ms Wybrow Interrupting the Claimant appointments with patients.

14.2.1. Ms Wybrow on or around 25 July 2018 interrupted the Claimant's clinic, when she was with a patient, knocking, walking in and stating: 'where is the smear?'

The Claimant relies on the letter from her to Ms Jobson on 25 July 2018 [602/628]

The Claimant relies on the message on [601/627]; she alleges that the rest of the messages on that page have been deleted.

The Claimant relies on her [605/631] letter of 30 July 2018 to Ms Jobson, which contains an account of the incident on 25 July 2018.

The Claimant relies on her letter of 6 October 2018 to Dr Moss [624/650]

The Claimant relies on her letter of 6 October 2018 to Ms Jobson [626/652].

14.3. C - Ms Wybrow 'talking down' to the Claimant.

14.3.1. On or around 25 July 2018, Ms Wybrow sent to the Claimant an aggressive TASK message relating to a patient smear test, instructing the Claimant that her conclusion was wrong.

The document at [601/627] shows part of the exchange, but the Claimant alleges that the aggressive message itself has been deleted.

14.4. D - Ms Wybrow instructed the Claimant to amend her entries on patient records.

14.4.1. Ms Wybrow instructed the Claimant to change patient records in relation to a patient visit in March 2018, when she had seen the same patient in June 2018. Ms Wybrow told the Claimant that her records were wrong and instructed her to change them.

The Claimant alleges that the message has been deleted by Ms Wybrow. She relies on the records at [S5 and S6].

The Claimant relies on her letter of 30 July 2018 to Ms Jobson [605/631] to show that she raised this matter at the time:

14.5. E - Ms Wybrow generally criticised the Claimant's work.

14.5.1. Ms Wybrow went through the Claimant's daily clinical work and made sarcastic comments.

The Claimant's relies on her letter to Ms Jobson dated 25 July 2018 [602/628] to show that she complained about this at the time.

14.5.2. Ms Wybrow added to a patient record on 2 May 2018 that a smear test was done outside of the contracted agreement. The patient record is at [303A/321].

The Claimant relies on the reference in her letter of 30 July 2018 [605/631] to show that she complained about this at the time.

14.6. F - Ms Wybrow and Ms Love made sarcastic comments about the Claimant's consultations with patients.

The Claimant relies on her letter to Ms Jobson of 22 May 2017 [556/578]. The Claimant acknowledges that the letter does not contain specific examples, but the Claimant relies on it to show that she made a general complaint at the time.

14.7. G - Ms Wybrow and Ms Love excessively monitored the Claimant's work.

The Claimant relies on her letter to Ms Jobson of 22 May 2017 [556/578] where the Claimant states that both Ms Love and Ms Wybrow kept a record on her practice.

The Claimant relies on Ms Jobson's letter to her dated 27 July 2018 [604/630] as showing that monitoring and audits were taking place in relation to the Claimant's practice.

The Claimant relies on para 16 of the Respondent's ET3:

14.7.1. In around June/July 2018, Ms Wybrow conducted an 'audit' into the Claimant's practice.

The Claimant relies on her letter of 30 November 2018 to the NMC as evidence that she raised this [659/679].

14.8. H - the Respondent failed to investigate the Claimant's complaints of:

14.8.1. 22 May 2017 [556/578];

14.8.2. 8 June 2017 [*the Claimant was not able to identify this document*];

14.8.3. 6 October 2017 [*the Claimant was not able to identify this document*];

14.8.4. 30 July 2018 [605/631]; and

14.8.5. 17 September 2018 [615/641].

14.9. I - Ms Wybrow and Ms Love reported the Claimant to the NMC; the Claimant believes that they were the 'anonymous' party who made the original complaint.

The Claimant relies on letter of 14 November 2018, in which Ms Jobson replies to an enquiry from the NMC [640/666].

She relies on the email from Ms Jobson of 30 November 2018 [642/668].

14.10. J – Ms Love suspended the Claimant on 30 November 2018 [651/677].

14.11. K – Ms Love told the Claimant at the meeting when she suspended her on 30 November 2018 that her documentation put patients' lives at risk, and referred to this in the suspension letter.

14.12. L – Dr Moss appointed Ms Love as the investigation and disciplinary officer.

14.13. M – On 19 December 2018 Dr Moss did not uphold the Claimant's grievance [672/701].

The grievance report is at [484/506]

14.14. N - On 21 December 2018 Ms Love dismissed the Claimant [675/704].

14.15. O - Dr Moss reported the Claimant to the local CCG and the agency for whom she worked.

The Claimant relies on a passage in the grievance report at [485/507] in relation to the CGC.

The Claimant relies on [642/668] in relation to the agency.

She also relies on the attendance notes at [S7] onwards.

15. Was that less favourable treatment?

15.1. The Tribunal will decide whether the Claimant was treated less favourably than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

15.2. Because the Claimant has not named anyone in particular who she says was treated better than she was, the Tribunal will decide whether s/he was treated worse than someone of a different race would have been treated.

The Claimant by way of background relies on the fact that she was not given an opportunity to apply for the Clinical Lead or Audit Officer positions in around July 2018.

15.3. If so, was it because of race?

15.4. Did the Respondent's treatment amount to a detriment?

Harassment related to race

16. Did the Respondent engaged in unwanted conduct, namely the matter set out above under direct race discrimination.

17. If so, did the unwanted conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant ('the proscribed environment')?

18. If so, was it reasonable for the conduct to have that effect?

Victimisation

19. Did the Claimant do a protected act. She relies on the following:

    19.1. the complaint Ms Jobson on 22 May 2017 [556/578];

    19.2. the complaint to Ms Jobson on 8 June 2017 [*the Claimant could not locate this complaint*];

    19.3. the complaint to whom on 6 October 2017 [*the Claimant could not locate this complaint*];

    19.4. the complaint to Ms Jobson on 30 July 2018 [605/631];

    19.5. the complaint by email to Ms Jobson on 17 September 2018 [615/641]; and

    19.6. the letter dated 30 November 2018 [652/678] to the NMC. The Claimant says that copies this to Dr Moss, alternatively that the Respondent was aware of it.

20. Did the Respondent subject the Claimant to a detriment, namely the matters set out above at paragraphs 14.1 to 14.12.

21. If so, was it because the Claimant did a protected act?

22. Was it because the Respondent believed the Claimant had done, or might do, a protected act?