



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Vimbai Vhondo

Surrey and Borders Partnership
NHS Foundation Trust

Heard at: Watford by CVP

On: 10-14 January 2022,
1 February 2022 and 24 February 2022

Before: Employment Judge Anderson

Members: Mr C Surrey
Ms J Costley

Appearances

For the Claimant: In Person

For the Respondent: Ms M Murphy (counsel)

JUDGMENT

1. The claimant's claims of direct discrimination, harassment, and victimisation on the grounds of race and sex are dismissed.
2. The claimant's claim of unfair dismissal is dismissed.
3. The claimant's claims for notice pay and loss of overtime pay are dismissed.

REASONS

Claim

1. By a claim form presented on 20 April 2020, the claimant, Vimbai Vhondo, brings a claim of constructive unfair dismissal, wrongful dismissal, loss of overtime, sex discrimination and race discrimination against the respondent. The respondent, Surrey and Borders NHS Partnership Foundation Trust, filed a response on 9 December 2020 resisting the claim. The respondent denied discrimination and said that the claimant resigned.

Issues

2. A list of issues was agreed at a hearing before EJ Hawksworth on 29 June 2021.

1 Constructive Dismissal

1.1 Did the Respondent commit a fundamental breach of the implied term of trust and confidence? The Claimant alleges that the Respondent fundamentally breached the Claimant's contract of employment by committing a series of breaches between December 2018 and August 2020. The series of breaches are set out in the Table at items 1 to 15, 30, 31, 33 and 34.

1.2 If so, did the Claimant resign in response to that fundamental breach or did the Claimant waive the right to resign?

1.3 If the Claimant was constructively dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract? The Respondent will contend that the dismissal was on the grounds of some other substantial reason.

1.4 Was it a potentially fair reason?

1.5 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

2 Direct discrimination on the grounds of sex and/or race

2.1 What are the acts or omissions of the Respondent that are alleged to constitute discrimination because of the Claimant's sex or race? The Claimant relies on the following:

2.1.1 Was the Claimant treated less favourably because of her race (black) when compared with a white comparator whose circumstances were not materially different to the Claimant's?

2.1.2 The incidents of less favourable treatment because of the Claimant's race are those set out at items 15 to 31 of the Table.

2.1.3 Was the Claimant treated less favourably because of her sex (female) when compared with a male comparator whose circumstances were not materially different to the Claimant's?

2.1.4 The incident of less favourable treatment because of the Claimant's sex is set out at item 25 of the Table.

2.2 Has the Claimant brought the claim in respect of the above allegations of discrimination within time taking into account any extension of time for taking part in Acas Early Conciliation, given that the Respondent contends that any alleged acts of discrimination pre-dating 28 May 2020 are out of time?

2.3 If not, should the allegations of discrimination be taken as a series of 'continuing acts' prior to 28 May 2020.

2.4 If not, would it be just and equitable to extend the time limit for the Claimant to do so?

2.5 If there has been less favourable treatment, was the reason for such treatment the protected characteristic of sex and/or race?

2.6 In respect of the allegations of discrimination on the grounds of the Claimant's sex and/or race, who is the relevant comparator relied on by the Claimant? The Claimant relies on the following:

2.6.1 Mark Girvan — sex and race discrimination in respect of allegation 25 in the Table.

2.6.2 Emma Higgs — race discrimination in respect of allegation 19 in the Table.

2.6.3 For all other acts of race discrimination as claimed, a hypothetical comparator will be relied upon

3 Victimisation

3.1 Did the Claimant do a protected act? The Claimant alleges that the incidents set out at items 32 to 34 in the first column of the Table were protected acts.

3.2 Insofar as the protected act relied on constitutes allegations made by the Claimant, is the Claimant prevented from relying on those allegations because they were false, and if they were false, were they made in bad faith?

3.3 Has the Respondent subjected the Claimant to a detriment because she had done a protected act? The Claimant relies on the alleged detriments set out at items 32 to 34 in the second column of the Table.

3.4 Has the Claimant brought the claim in respect of the above allegations of victimisation within time taking into account any extension of time for taking part in Acas Early Conciliation given that the Respondent contends that any alleged detriments pre-dating 28 May 2020 are out of time?

3.5 If not, should the allegations of detrimental treatment be taken as a series of 'continuing acts' prior to 28 May 2020?

3.6 If not, would it be just and equitable to extend the time limit?

4 Harassment

4.1 Did the Respondent act and/or make omissions as set out at items 1 to 14 of the Table.

4.2 If the Respondent did any or all of those things, did such action or inaction amount to unwanted conduct related to the Claimant's race?

4.3 If so, did the 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, having regard to all the circumstances and whether it is reasonable for it to have that effect?

4.4 Has the Claimant brought the claim in respect of the above allegations of harassment within time taking into account any extension of time for taking part in Acas Early Conciliation, given that the Respondent contends that any alleged harassment pre-dating 28 May 2020 is out of time?

4.5 If not, should the allegations of discrimination be taken as a series of 'continuing acts' prior to 28 May 2020?

4.6 If not, would it be just and equitable to extend the time limit?

5 Notice Pay

5.1 What is the source relied on for the Claimant's notice and what, in fact, was the Claimant's contractual (including statutory) notice? The Claimant relies on her contract of employment with the Respondent which she alleges entitles her to 5 weeks' notice of dismissal.

5.2 Was the Claimant entitled to notice pay in all the circumstances and, if so did the Respondent in fact fail to pay the Claimant's notice pay as alleged?

6 Holiday Pay

6.1 Is the Claimant entitled accrued but untaken holiday? If so, what sum is due to her (if any)? [Claimant to provide calculations in her updated schedule of loss.]

7 Other payments

7.1 Is the Claimant entitled to claim loss of the ability to work overtime shifts during the period from January 2019 until her dismissal in August 2020? If so, what sum is due to her (if any) and did the Claimant mitigate her alleged losses? [Claimant to provide further information in relation to her claim for other payments.]

3. The matter of holiday pay was resolved between the parties before the hearing.

The hearing

4. The tribunal received an agreed bundle on the first day of the hearing. There were some late additions to the bundle and a disagreement about the inclusion of a document recording minutes of a meeting dated 17 June 2021 (see final bundle p1136 onwards) but this was resolved between the parties and an updated amended bundle of 1146 pages was provided to the tribunal on the second day of the hearing. In addition, the claimant filed a witness statement and the respondent filed six witness statements from Stanley Masawi, Margaret Gairdner, Mike Cavaye, Georgina Foulds, Sharon Gregory and Heather Caudle plus a further four supplemental statements from Stanley Masawi, Margaret Gairdner, Mike Cavaye and Georgina Foulds. The respondent provided a chronology and written closing submissions with an authorities bundle.

5. The evidence and submissions were heard over four days (10-13 January 2022) and the tribunal carried out its deliberations on 14 January and 1 February 2022. The reserved judgment was delivered orally on 24 February 2022 at the request of the respondent. The claimant requested written reasons the following day.

Findings of Fact

6. The respondent is an NHS trust. The claimant is a mental health nurse. The claimant commenced employment with the respondent on 4 February 2013. On 1 June 2015 the claimant was appointed to the role of Band 6 Mental Health Practitioner for the Home Treatment Team (HTT). The HTT is community-based and supports individuals with severe mental health issues who are acutely unwell. The HTT aims to assess and treat patients in their home environment to avoid admission to hospital where possible. The HTT works with other services and organisations in pursuit of this aim including Safe Haven which is a partnership arrangement between the Respondent and a third sector organisation, which aims to provide timely access to support at the point of crisis during evenings and weekends. If an individual is in serious need, they could be referred to the HTT by Safe Haven.
7. In January 2017 a young man (the patient) under the care of the respondent died, and the patient's death was the subject of an Inquest that took place approximately two years later on 5 to 7 December 2018. On 15 January 2017, a few days before the patient harmed himself, a nurse at Safe Haven contacted the HTT to request an assessment for him. The claimant took the call from the nurse and initially concluded, on the information available to her, that the patient's condition was not such as to warrant assessment by the HTT.
8. The chronology of events of that day are complicated. The tribunal did not hear evidence on those events other than from the claimant. The events formed part of the subject of an Inquest and it is not for the tribunal in this case to make any findings on what did or did not occur in January 2017. It is necessary, in order to understand the allegations the claimant is making in this claim, to record that the claimant said that after initially refusing the assessment, she was advised by the nurse at Safe Haven that the local Specialist Registrar (psychiatrist) had advised that the patient be admitted for in-patient care, and she had a conversation with Felix Manyonga (team leader in another HTT) and the nurse from Safe Haven about this, before completing a clinical handover and leaving, as her shift finished at 19:00. The claimant worked in the North East Hants and Surrey Heath HTT and Mr Manyonga in the South West HTT. Mr Manyonga provided a written statement to the Inquest which provides a different account of that conversation.
9. The respondent carried out a 'Root Cause Analysis' Investigation into the Incident which reported on 4 May 2017. There is no criticism of the claimant in the report and a recommendation is made 'to make clear roles and responsibilities of both services where Safe Haven have assessed someone and are seeking HTT support or admission.'

10. On 21 June 2018 the claimant prepared a written statement for the coroner's Inquest. The coroner issued a witness list on 11 July 2018 which included on it the claimant and Mr Manyonga to give evidence in person. The respondent asserted and the claimant accepted in oral evidence that the respondent did not select the witnesses. The tribunal accepts that it is the role of the coroner to determine who will be called as a witness at an inquest.
11. On 15 October 2018 the claimant was appointed to an 'Acting Up' role at Band 7 as a Clinical Team Leader, to cover the secondment of Geoffrey Dimba to a Band 8 role outside of the HTT. The appointment was made by the claimant's line manager, Stanley Masawi, a black man. Geoffrey Dimba is a black man.
12. On 18 October 2018 Mr Masawi wrote to the claimant confirming an agreement to work flexible hours following an application made by the claimant on 16 October 2018.
13. On 25 October 2018 Katie Viggers, the respondent's Head of Legal Services emailed Georgina Foulds (Associate Director for the South West Locality) and Stanley Masawi to advise that the coroner had commissioned an expert nursing report in connection with the Inquest. The report concluded that the claimant's decision not to offer the services of the HTT to the patient on 15 January 2017 should not have been made on the basis of the clinical notes alone and to that extent the standard of care provided by the HTT was below that of an acceptable standard. The email concluded *'Once you have had an opportunity to review the report, I would welcome a discussion with you about how we approach Vimbai and discuss the report with her.'* From the evidence provided by Mr Masawi and Ms Foulds at the hearing the tribunal finds that no such meeting took place. Mr Masawi did not send the expert report to the claimant until 29 November 2018, the day before a pre-Inquest meeting between the witnesses and the respondent's legal team and did not discuss the report with her. In oral evidence he said he thought this would be done by the lawyers at the pre-Inquest meeting. Ms Foulds did not discuss the report with the claimant and said in written evidence that she *'may have assumed that Stanley, as Vimbai's line manager would address this with her.'* The tribunal finds that the claimant's line management did not bring to her attention in a timely manner or offer any support in relation to an expert report that was critical of her practice. Furthermore, the respondent more generally was aware that the report criticised the claimant and despite Ms Viggers raising this with three senior people, no-one took responsibility for ensuring that this was addressed in a timely manner with the claimant. The tribunal finds that this was poor practice on the part of the respondent, but there is no evidence that it was part of an attempt to pass blame for the incident to the claimant.
14. A pre-Inquest meeting was held on 30 November 2018. The claimant attended and discussed her evidence with the lawyers. She confirmed that she had seen the expert nursing report.

15. It is worth noting that up until the Inquest the claimant and Mr Masawi had a good working relationship. That is the evidence from both of them and it is evidence that the tribunal accepts.

Events at the Inquest

16. The Inquest took place from 5 to 7 December 2018. The claimant gave evidence on 5 December. The tribunal accepts that the process of giving evidence to the Inquest was a deeply upsetting experience for the claimant who was questioned directly by the patient's father. Mr Masawi, who attended the Inquest, said in his written statement that *'The family were very angry with the Trust and appeared to blame Vimbai'*. Later that day reports appeared in the local press about the Inquest. The claimant was named in these stories and account was given of her evidence. This was picked up in the national press the following day and the outcome of the Inquest was reported nationally on 7 December 2018. The claimant was named in many reports.
17. The claimant was so upset following her appearance at the Inquest that she decided not to attend the hearing on 6 December 2018. Mr Masawi gave evidence to the Inquest on 6 December. His role was to provide evidence about what the respondent had done after the incident to improve its services. At the time of the incident in January 2017 Mr Masawi was not managing either the claimant or the HTTs. The tribunal was provided with a transcript of Mr Masawi's evidence. The transcript was obtained by the Respondent at the appeal stage of the claimant's subsequent grievance process.
18. On 7 December 2018 the claimant attended the Inquest. Before the Inquest began she sat in a waiting room with the Respondent's counsel, Katie Viggers, Georgina Foulds and Stanley Masawi. The claimant alleges that there was a conversation about Mr Masawi's evidence (given to the Inquest the previous day) in which it was discussed that in his evidence Mr Masawi had said there was a policy in place at the time of the incident which set out that the patient should have been seen face to face by the HTT. Mr Masawi and Ms Foulds were unable to locate the policy and the claimant says that Ms Viggers said that the respondent could not say that Mr Masawi had lied. Ms Foulds denies in her witness evidence that such a comment was made. She says that there was confusion around exactly what changes had been made the policy and they were trying to find out which amendments had been made following the incident in January 2017. They were not able to obtain a copy of the policy at that time. In her evidence at the subsequent grievance hearing Ms Foulds refers to the policy as being one 'that had been round a long time'. She does not specify which policy she is referring to. Mr Masawi's evidence is that the focus of his evidence to the coroner was on the Safe Haven Operational Policy.
19. The claimant says that Mr Masawi lied to the Inquest in that he said there was a policy dating back to 2014 in place at the time of the incident setting out that an assessment from Safe Haven should have been accepted. She says that Georgina Foulds and Stanley Masawi colluded regarding the

existence of this policy, the Acute Care Pathway policy, requiring face-to-face assessment of all referrals received from Safe Haven. The claimant says that the conversation that took place before the Inquest on 7 December 2018 is evidence that the respondent knew Mr Masawi's witness evidence was incorrect and that the respondent was trying to implicate her in the patient's death.

20. Mr Masawi's evidence to the coroner, so far as it is relevant to this point is as follows:

SM: Yes, sorry. It would now an undertaking that should a referral be made from Safe Haven to Crisis helpline That the referral is accepted by the Home Treatment Team for a face to face assessment within 4 hours

CORONER: And is that something that, is that a, a new policy, or is that simply clarifying what the policy was before?

SM: So, so before, before 2014, April 2014 there was an arrangement in place that all crisis line referrals would be accepted by home treatment team when the safe haven came on board we also added trusted assessor on the understanding that all assessments done by the safe haven and referred to the home treatment team would be accepted as well for assessment for HTT

CORONER: So that, so just to be clear, that was the position even at the time of [the patient's], umm, attendance at Safe Haven?

SM: Yes

CORONER: Yeah, so the expectation was that somebody, that there was, because I think Nurse Vhondo was saying that she had a kind of a gate keeping role. Nurse Evdoka set out her view and then Nurse Vhondo had a kind of a gate keeping, screening role before deciding whether to attend. Umm, but is it your evidence that once Nurse Evdoka asked for an assessment then there was a duty to carry it out in any event?

SM: Yes, so, I think that it's important to be clear that umm when Nurse Vhondo received that phone call from Nurse Evdoka requesting an assessment that assessment should have been carried out.

CORONER: So, it's not that there's been a change to Trust policy, it's just that there's been a bit of clarity, people have been educated about the policy as it was.

SM: So that would have been an expectation at the time. But also now, since this umm... the incident with, we now, we now confirmed that the protocol we expect that when a referral is made from Safe Haven there is an expectation without question that an assessment will be undertaken by the Home Treatment team.

21. The respondent's policy 'The Acute Care Operational Protocol' was in place at the time of the incident and had been in place since 2014. Section 6 of the policy covers 'referrals and Access' and it is set out that *'The home treatment team is required to see all requests for assessment/ referrals for acute services within four hours from receipt of the referral. The suitable time to assess an individual is to be agreed with the referrer, and the individual and/or carers when contacted.'* Under the heading Assessment for Acute Care Services, it is set out that *'There is a requirement for the home treatment team to see all requests for an assessment within four hours.'*
22. As part of the policy, there is a slightly different approach to Trusted Assessors whereby no face-to-face assessment is required by the HTT and an assessment by the Trusted Assessor referrer is relied upon. Safe Haven was added as a Trusted Assessor after the incident in January 2017.
23. The respondent's policy 'Safe Haven Operational Policy' includes a section on referrals to the HTT. The version provided to the tribunal is dated 6.6.16 but listed as the 2018 version on the bundle index and referred to as such by Mr Masawi in evidence. This was not disputed by the claimant and the tribunal accepts that this is the 2018 version of the policy. It includes the instructions *'As a standing clinical instruction all referrals from Safe Haven to the local home treatment team will be accepted without exception if following criteria is met.'* and *'When needs have been identified as needing acute care intervention by the safe haven under referral has been made such referrals will be accepted and a plan between Safe Haven, home treatment team agreed.'*
24. At some point after the Inquest Ms Viggers wrote to the coroner, to provide clarification on two matters that the coroner had asked the respondent to clarify. Ms Viggers states in the letter that:

At the time of [the patient's] attendance at the Safe Haven cafe in January 2017 it had been discussed within the trust as good practise that if a Safe Haven nurse assessed a person and considered that involvement was required HTT would accept the referral without questioning the assessment and/or without requiring the person to undergo another full assessment by HTT. However, this was not incorporated into the Safe Haven policy at that stage.

...

The Safe Haven Operational Policy now includes a standing clinical instruction for all referrals from Safe Haven to the local HTT to be accepted...

Ms Viggers does not refer to the Acute Care Operational Protocol in that letter.
25. The tribunal finds that the likelihood is that the conversation that took place before the Inquest on the morning of 7 December was regarding updates to the Safe Haven Protocol, which had been the focus of most of Mr Masawi's evidence. The tribunal finds that there was evidently some concern as the

updated policy, referred to by Mr Masawi in evidence to the coroner could not be located. The tribunal finds that there is no evidence that Mr Masawi lied to the coroner. Mr Masawi refers to an expectation that when a referral from Safe Haven was received an assessment should be carried out and says that is now made clear in policy. The Acute Care Pathway Protocol was in existence at the time of the incident and does indicate that all referrals (which can only be made by professionals) should be assessed within four hours.

26. The tribunal finds that there is no evidence that Mr Masawi and Ms Foulds sought to implicate the claimant at the Inquest. Ms Foulds did not give evidence and Mr Masawi gave evidence on 'Preventing Future Deaths', as part of which he answered questions put to him about his understanding of policies and expectations in place at the time of the incident. The tribunal finds that he answered these questions truthfully to the best of his knowledge at the time.
27. The tribunal was not provided with a copy of the Inquest outcome, but it is noted in Mr Masawi's witness statement that the coroner found that the Trust did not cause the patient's death and in Ms Fould's statement that the coroner has the power to prepare a Preventing Future Deaths report but chose not to. Neither following the incident, the root cause analysis report or the Inquest was any disciplinary action taken against the claimant and as she stated in oral evidence, her relationship with Mr Masawi was a good professional relationship up until the Inquest.
28. The claimant claims that after the Inquest on 7 December 2018 Mr Masawi walked back to the car park with her and during that walk blamed her for the decision not to accept the patient for HTT care. In oral evidence the claimant said that Mr Masawi assessed her, as in he was concerned that she was so distressed that she might harm herself. The claimant said that she had told him 'I am not going to kill myself, I have two children.' Mr Masawi said in his statement that he tried to offer support immediately after the Inquest hearing as the claimant was upset and he sat with her until she felt able to drive home. On balance having heard evidence from Mr Masawi and the claimant that Mr Masawi offered her support, the tribunal finds that Mr Masawi did not blame the claimant for failing to admit the patient to HTT care during this conversation.
29. Following the verdict Justin Wilson, Chief Medical Officer for the Respondent released the following statement: 'Our serious investigation into the care and treatment provided to has shown that the communication between our Safe Haven service and Home Treatment Team was not clear and requires improvement. We acknowledge the findings of the coroner that there was a missed opportunity for more intensive support from our Home Treatment Team and have worked closely with the services involved to make positive changes. [The patient] was assessed by a consultant psychiatrist and his care coordinator the day after his attendance at our Safe Haven and a support plan was agreed.'

30. The claimant stated in both oral and written evidence that she believed the respondent had tried to scapegoat her over the patient's death and that it had failed to correct incorrect information in the press and given by Mr Manyonga and Mr Masawi in evidence at the Inquest. Ms Foulds said for the respondent that the respondent would not take action to respond to media reports from inquests beyond issuing a statement which aims to be balanced. As noted above the Inquest outcome was that the respondent did not cause the patient's death, the claimant agrees in her grievance letter that *'the ruling of the inquest was that there was no negligence on my behalf.'* and no action was taken against the claimant at any time in relation to any matter arising out of the incident in January 2017. The tribunal has not found that Mr Masawi gave false evidence to the Inquest about the existence of a policy dating back to 2014, and the contents of Mr Manyonga's evidence were not raised as a complaint in the grievance process which, the tribunal accepts, may be because the claimant did not see them until disclosure took place for this case. The tribunal finds that there is no evidence that the respondent tried to scapegoat the claimant in relation to the incident of January 2017 and accepts that an NHS trust will not, as a matter of practice, respond to media coverage of an Inquest.
31. Following the Inquest the claimant's level of distress was such that she took a period of sick leave from 13 December 2018 returning to work on 4 February 2019. The claimant claims that Mr Masawi called her a number of times during her sick leave, asked her to reflect on her practice and in a call on 8 January 2019 she asked him not to call her again. The claimant said that when Mr Masawi asked her to reflect on her practice, he was asking her to think about what she had done wrong in relation to the incident on 15 January 2017. Mr Masawi said that he called the claimant only once in January 2019, on 8 January. In answer to questions regarding calls on specific dates in December from the claimant he said he could not recall whether or not he had called her on those days. He said that he may have called for welfare reasons as her manager. In his witness statement he denies having any concerns about the claimant's practice that needed to be addressed. It was noted in the grievance hearing that he called the claimant in December to arrange an OH referral. The claimant stated in the grievance hearing that Mr Masawi had said to her that she should reflect on what happened, had suggested she should see a therapist and in relation to the final phone call on 8 of January she asked him twice why he had lied in court, and he said that he had not which led her to get angry and to hang up.
32. The tribunal finds that Mr Masawi called the claimant during her sickness absence on at least two occasions, one of which was in December in relation to an OH referral and the tribunal accepts that while Mr Masawi may have suggested during a call to the claimant that she should reflect on what happened, and enquired as to whether she would like to have the opportunity to see a counsellor, he did not criticise her practice in the way she suggests. The claimant's main allegation in regard to telephone calls is about criticism during a conversation that took place on 8 January 2019. The claimant's evidence in the grievance meeting was that during this

conversation she accused Mr Masawi twice of lying in court and then hung up. It was put to the claimant by Ms Murphy that she may have misconstrued a question from Mr Masawi about reflection. The claimant strongly refuted this interpretation. However, on the claimant's own evidence she was upset during that call. The tribunal does not find that there is evidence to indicate that Mr Masawi criticised the claimant in this call.

Events after the claimant returned to work on 4 February 2019

33. The claimant returned to work on 4 February 2019. On return she says that she noted that her shift pattern had changed and that this was without her consent. The tribunal was referred to an email exchange between the rostering team and Mr Masawi in relation to this matter. In that chain Mr Masawi refers to a change of shifts for the team leader in the next rostering period. On questioning by the tribunal, the claimant said that her hours did not change until after 28 February 2019, the point at which her Acting Up role ended, and at that point they reverted to the flexible hours she agreed with Mr Masawi on 18 October 2018. Mr Masawi said that he did not consult the claimant as the change did not affect the claimant, whose Acting Up role was coming to an end and who had a flexible hours agreement. As the claimant agreed with that view in oral evidence the tribunal does not find that the claimant's shift pattern was changed without her consent.
34. The claimant also alleges that a number of staff were unhappy with the rota change and blamed her for it when it was Mr Masawi who had made the changes without notification. Mr Masawi's evidence was that he was entitled to make those changes, he had reason to do so, and that he had not heard from the team that they were unhappy, nor from the claimant that she was being blamed for something for which she was not responsible. The claimant produced no evidence of these allegations and did not say that she had raised the matter with Mr Masawi. Furthermore, the tribunal notes that the allegation was that the staff blamed her, not that Mr Masawi had done anything which would have shifted blame from him to her. The tribunal does not find that there is any evidence that staff were unhappy with the rota changes or that they blamed the claimant for this, or that there was a deliberate act on the part of Mr Masawi to shift blame onto the claimant
35. The claimant emailed her team on 5 February 2019, confirming her return to work. She said: 'I have reflected, learned and grown in the time that I was off. Hopefully I can use some of this learning to support you all when faced with similar challenges or most importantly practise safely ensuring you are not caught up in the same challenges I was subjected to.' In oral evidence the claimant said that she meant here her learning around the importance of documenting everything you do on a shift and needing to see full notes on a patient before assessing. The claimant claims that Mr Masawi questioned her motives for sending that email at a return-to-work meeting on or around 5 February 2019 and she believes this to be an intimidating tactic to stop her sharing her experiences with staff. Mr Masawi recalls this meeting as taking place on 6 February 2019 and says he did ask her about it as he wanted to understand where she was coming from and what she felt she had learnt. The tribunal finds that Mr Masawi did question the claimant

about the email in a meeting on 5 or 6 February 2019 but does not find that there was any intimidatory intent and accepts that Mr Masawi, as the claimant's line manager, wanted to understand what the claimant felt she had learnt.

36. At the meeting on 6 or 7 February 2019 the claimant had a conversation with Mr Masawi about the end of her Acting Up position. The claimant's Acting Up to a Band 7 role was coming to an end on 28 February 2019, as specified in the original Acting Up agreement. Mr Masawi said in written and oral evidence that he had been advised that the substantive post holder, Mr Dimba would be returning at the end of his own secondment. The claimant did not dispute this. In the event Mr Dimba did not return but the tribunal finds that Mr Masawi was unaware of this in February 2019. Included in the bundle is an email from Mr Masawi to Emma Higgs (a white woman) dated 12 February 2019 in which he extends Ms Higgs Acting Up position to 30 September 2019. Ms Higgs was acting up to Band 6. Mr Masawi gave evidence that the team was short of Band 6 nurses and Ms Higgs was not appointed to cover a specific role of a Band 6 nurse who would be returning to the team, and therefore there were reasons for extending the Acting Up position which did not apply in the claimant's case. The tribunal finds that the claimant was advised in the meeting of 6 or 7 February 2019, that her role Acting Up to Band 7 would end, as planned from the outset, on 28 February 2019. The claimant claims that also in this meeting Mr Masawi said '*are you capable of doing this job?*' referring to the Acting Up role which had a further three weeks to run. The claimant says that he was questioning her competency. Mr Masawi said he was acting out of concern for her welfare after she returned from sick leave, that the claimant had asked him in the meeting in response to his question, whether he was questioning her ability and he tried to re-assure her that he was not. The tribunal finds that Mr Masawi's question was not an attempt to undermine the claimant but to check that she was feeling able to cope with a senior role on return from a lengthy period of sick leave.
37. The claimant alleges that on 11 February 2019 she asked Mr Masawi a question about her practice by telephone and he responded, 'Do you need me to rubber stamp your practice?' Mr Masawi said he did not recall making such a comment. The claimant said she raised it with Georgina Foulds at the informal meeting and the comment is recorded in the claimant's own notes from that meeting, though not in the official meeting notes. Georgina Foulds said she had no recollection of this. On balance, as the claimant has a clear recollection of this comment and it is recorded in her meeting notes, the tribunal finds that it was made.
38. In April 2019 Mr Masawi advertised for a Band 8a prescribing nurse. The job description attached did not specify any length of prescribing experience and the claimant refers to this in her pleadings as having been a Band 7 role. The tribunal was not provided with a copy of the job advertisement. The claimant applied. She was not short listed. Before any appointment was made the job was readvertised with amended criteria, in July 2019,

containing a requirement for any applicants to have four years prescribing experience. The claimant did not have four years prescribing experience. There was some dispute between the parties as to whether there had been a short-listing exercise and interview process as a result of the original job application. The claimant said there was a shortlisting process and she was not short listed. It is not clear how the claimant knew she was not shortlisted as she did not provide evidence, for example by way of a rejection letter, and she did not clarify this in her witness statement. In her letter of appeal against the grievance process the claimant states: *'The first advert was advertised and interviews were held. No one was appointed hence the re advertising of the post.'* The respondent does not deal with the issue of a first shortlisting process in the grievance or appeal outcomes, and it is stated in the grievance outcome letter that: *A Band 8a non-medical prescribing post was advertised which you applied for and for which you felt you had the appropriate skills, qualifications and experience. This post was subsequently substituted with a replacement advert with a job description that required four years post qualification experience. The applications for both adverts were pooled and shortlisted against the person specification that required four years' post qualification experience. You were not shortlisted for interview.* The claimant's case is that she spoke to Mr Masawi to ask why she had not been shortlisted, and this conversation led to Mr Masawi rescinding the first job advert and replacing it with one containing a criterion that he knew she could not meet.

39. The respondent's evidence on whether there was a first shortlisting exercise is unclear and Mr Masawi's oral evidence on whether he was involved in such a first shortlisting exercise was also unclear. The respondent has addressed only the shortlisting after the second advert. Mr Masawi said that he *'could have done'* the short listing, and the record that the claimant made of the conversation she had with Lee White (the person running the recruitment process) is not determinative of the issue. The claimant records Ms White's response to the question of who did the first short listing as *'...not clear who did the first short listing'*. Mr Masawi did not address the matter of shortlisting in his witness statement. In evidence at the grievance hearing, he said that he was involved in the shortlisting for the re-advertised job.
40. It was not put to Mr Masawi at the hearing that anyone was interviewed as a result of the first job advert. His position is that the applicant requirements attached to the initial job advert were incorrect. The job was at a senior grade of 8a and should have specified a number of years prescribing experience as one of the essential criteria. Mr Masawi says this was his error and it was rectified by re-advertising the job on the correct criteria. He said that to his knowledge applicants for the job as originally advertised were not advised about this. Mr Masawi was not asked if he knew why the claimant was not shortlisted on the first occasion and denies that he had a conversation with the claimant between the two adverts in which she asked why she was not shortlisted.

41. The tribunal finds that there were two shortlisting processes and Mr Masawi was involved in both. It finds that the claimant was not short listed for the position in the first short listing process. It finds that Mr Masawi made an error in relation to the first job advert which was rectified when the job was re-advertised in July 2019. The tribunal accepts that the role was senior and carried supervisory prescribing responsibilities therefore warranting a requirement for significant experience in prescribing. The tribunal finds that on balance the claimant did speak to Mr Masawi between the time of the two adverts and he denied that he shortlisted, as the tribunal found his evidence on this to the tribunal to be vague. The tribunal finds also that Mr Masawi did tell the claimant, on the claimant's own evidence, on 5 July 2019 in answer to her question as to why she was not shortlisted that she did not meet the requirements but it is not clear whether this is the same conversation the claimant referred to when cross-examining Mr Masawi.
42. The claimant had a supervision meeting with Mr Masawi on 16 May 2019 and claims that Mr Masawi said at that meeting there were no roles available at Band 7 for prescribing, a role which the claimant was seeking, but that such a position was then advertised. Mr Masawi says firstly that he does not recall making that comment and states that to his knowledge there were no such roles available in May 2019. He then states that the initial band 8a nurse prescriber role was advertised on 24 April 2019 and that he did not tell the claimant that there were no prescriber roles as she alleges. No information was supplied as to when the first job advert was withdrawn but the position was not filled until after July 2019. The claimant's evidence does not make this any clearer. She said in her witness statement that *'Stanley Masawi told me that there was no prescribing role within HTT at Band 7. The same role was advertised thereafter. I was not shortlisted. The role was re advertised again with a different job specification to exclude me from the application.'*
43. The claimant's allegation is that she was told there were no Band 7 prescribing roles and then one was advertised for which she was not shortlisted. The tribunal finds on balance that Mr Masawi did tell the claimant that there were no Band 7 roles, and this was correct because the advertised role was at Band 8a.
44. In relation to the claimant's claim that being told there was no band 7 role and not being shortlisted for the post that was advertised were acts of direct discrimination, the claimant relies on a comparator, Mark Girvan, a white male. Though the events do not fit chronologically, the tribunal will set out its findings in relation to Mark Girvan here, in so far as they are relevant to the claimant's claims. The claimant states that Mark Girvan was given a non-medical prescribing role in the claimant's team, without being interviewed for the role. She says that Mr Girvan was treated more favourably than she was. She also says that Mr Girvan was brought back from retirement to cover a prescribing role after she was told there was no prescribing role. The respondent's evidence is that Mr Girvan retired from his post as a Band 8a nurse prescriber and was brought back as bank staff to a Band 7 role in which he prescribed. This role was paid for under a different budget to the

one controlled by Mr Masawi for the HTT and Mr Girvan worked directly with the doctors. Mr Masawi said that Mr Girvan was already in post as a Band 7 prescriber working for Dr Mirza when he (Mr Masawi) returned to manage the HTT on 17 September 2018. Ms Foulds gave evidence that this was not an unusual practice for the respondent and that to deal with the problems of recruiting nurses, they can be facilitated to return after retiring. This is a practice allowed by the NHS pension scheme. She said Mr Girvan returned to his old role after retirement, though at Band 7, and as this had been agreed before he retired, the role was not advertised. The tribunal accepts the respondent's evidence as to the circumstances in which Mr Girvan was appointed as a Band 7 prescriber.

45. The claimant claims that during the period February to May 2019 Mr Masawi ignored her at work and additionally he failed to complete supervisions for the same period. Mr Masawi said that he did not work in the same building as the claimant and had been busy throughout the period February to May but had not ignored her. His recollection was that contact was no more or less frequent than previously. On supervision he said the claimant was on sick leave in December 2018 and January 2019, supervision had taken place in February and May, and thereafter supervision of the claimant had been the responsibility of Emma Higgs. The tribunal saw an incomplete supervision record and Mr Masawi said that sometimes supervisions had taken place in a venue other than where the record was stored and it had not been updated for that reason. He said that it was a joint responsibility to complete but it is accepted by the tribunal that the claimant did not have access to the record. There is evidence that Mr Masawi and the claimant met on 6 or 7 February 2019, and 15 or 16 May 2019 for supervisory purposes. Mr Masawi admitted that supervision had not taken place in March and April but that he had been very busy and the claimant was not the only person whose supervision had been missed at that time. The tribunal finds that there is no evidence that Mr Masawi ignored the claimant during the period February to May 2019. It finds that supervisions were missed in March and April due to pressure of work on Mr Masawi. It finds that the supervisory record was not updated and that this updating was the responsibility of Mr Masawi up to and including May 2019.
46. The claimant met with Mr Masawi for appraisal purposes on 31 May 2019. The claimant discussed with him her desire to have a prescribing role and noted on the appraisal form that *'until the recent advert there have not been any prescribing roles with the working age adults or home treatment team.'* While she could prescribe in her current role, it was not a dedicated prescribing role. Mr Masawi offered the opportunity for a day a week of her work to be dedicated to prescribing. The claimant did not take up this offer. Mr Masawi sent a copy of the appraisal form he had completed to the claimant on 12 June 2019. The claimant noted that it was not fully completed and asked him to rectify this. Mr Masawi signed the form and returned it to the claimant the next day. On 14 June 2019 the claimant acknowledged that it had been signed but pointed out that Mr Masawi had not commented on the claimant's progression or development plan. Mr Masawi added further comments including

1. *Vimbai can have protected time one day a week for her to prescribe within the team for the next twelve months.*
 2. *Vimbai will need to keep a log of all prescribing activities and reflective accounts and discuss this in supervision with the Supervisor.*
 3. *She can have the support of the home treatment team consultant Dr Khalid about any prescribing issues on the day she is dedicated to prescribe.*
 4. *Vimbai will need to confirm in management supervision any issues with regards to this responsibility*
 5. *The manager will provide additional staff member on the day Vimbai has protected time to prescribe for the team.*
47. Mr Masawi said that failure to complete the form properly on the first and second attempts was an oversight as it was a new form and that he had made mistakes on other employee's forms. The claimant said that there was no policy requirement for supervision for prescribing. Mr Masawi said there was a requirement for this as evidenced in the Non-Medical Prescribing Policy. The tribunal finds that Mr Masawi made a mistake in failing on two occasions to fully complete the claimant's appraisal form, which he rectified in a timely manner on request from the claimant and finds that the comments he added to the appraisal on prescribing supervision were appropriate and in line with the respondent's policy.
48. On 11 June 2019 a Band 7 Acting Up opportunity was offered to the team, including the claimant. The opportunity arose as Mr Dimba did not return to the team in March 2019 as Mr Masawi had expected. The claimant did not apply. Emma Higgs was the only applicant and was given the Acting Up role. The claimant said in oral evidence that she was discouraged from applying for the role but no evidence was provided to support this. The tribunal finds that the claimant had the same opportunity as other qualified team members to apply for the Acting Up role but chose not to do so.
49. The claimant applied to the Royal College of Nursing for funding to undertake a Masters' Degree in May 2019. There is a section on the funding application form for an applicant's manager to complete on how the study will be accommodated in the applicant's role. Mr Masawi completed the section with the brief comment: *'This links in with Vimbai's career developmental plan following recent appraisal. Vimbai wishes to further her studies and hopes to have positive impact on her practise and this would benefit service users and carers she comes across in her day to day work.'* On 14 June 2019 as part of the conversation around Mr Masawi's failure to fully complete the appraisal form the claimant said in an email that she wanted to use it for her application. The funding application was refused by the RCN. The claimant said in evidence to the subsequent grievance hearing that it was rejected because there was 'not enough support from the trust' but there was no evidence of this in the bundle. The claimant said that Mr Masawi failed to support her training application, by which the tribunal accepts she means her funding application. Mr Masawi said he had not completed this form before and noted that the claimant had not asked him to add any further information. The claimant said that he was aware that the

information was insufficient, and this was because she had said in her email of 14 June 2019 that she wanted to append her appraisal form to the application by way of further information. The tribunal finds that the comment that Mr Masawi made in the form is positive and although brief does answer the question posed. The tribunal finds that the claimant did not bring to Mr Masawi's attention that she felt the information was inadequate, and she had the opportunity to do so if that was her view. The email of 14 June 2019 refers to the application – it does not specify if this is for the funding application or the MSc application and does not indicate that this action is needed because of a paucity of information from Mr Masawi.

The grievance process

50. On 3 July 2019 the claimant contacted HR by email and said that she wished to complain about her treatment by Mr Masawi since the inquest. She said: *Since then I have been on the receiving end of a series of comments and actions that I believe are limiting to my progression and constitute bullying and harassment towards my person. She went on to say I have taken advice on this and I would like to request HR involvement to review this situation internally with me so I may consider my options for resolving informally. I would really like to arrest this situation before further escalation and explore an opportunity for mediation.*

51. It was agreed that Georgina Foulds, as Mr Masawi's line manager, would meet with the claimant to see if the matter could be resolved informally. Ms Foulds said this is the respondent's usual practice and this was not disputed by the claimant. The first meeting took place on 23 August 2019 and the claimant emailed Ms Foulds on 2 September 2019 with the plan agreed at the meeting on 23 August 2019. She said she *'... would like to explore duty of candour, the actual bullying and harassment policy in line with organisation policy on resolving this matter so that we can decide what is the best way to resolve the issues, ideally mediation as this will provide a clear action plan and hopefully clear up all the issues I have raised.* The plan included that Ms Foulds would speak to Ndaba Bhebhe about providing clinical supervision to the claimant. At a follow up meeting on 19 September 2019 Ms Foulds told the claimant that Ndaba Bhebhe did not have capacity to supervise the claimant. The claimant claims that Ms Foulds told her that Mr Bhebhe had declined to supervise her and this was a lie because on contacting Mr Bhebhe he said he did not know anything about this. Ms Foulds says that before approaching Mr Bhebhe she had approached his line manager as a courtesy to ask about his capacity and the line manager had said Mr Bhebhe would not have capacity so she did not pursue it further. She says that she did not tell the claimant he had declined, but that he did not have capacity. She says that at the meeting they discussed who would be a suitable alternative. A colleague called Duncan Sloman was agreed upon, approached and he agreed to take this on. The claimant said in an email to Ms Foulds on 28 September 2019 that she was very pleased about this. At the hearing she said that she was happy to have him as a supervisor but not in terms of competencies as he was not a prescriber. The claimant has not said this in her claim or to Ms Foulds and the evidence shows that she welcomed Mr Sloman as an appropriate substitute for Mr

Bhebhe. The tribunal finds that there is no evidence that Ms Foulds lied to the claimant on this matter and finds that the claimant made an assumption when Ms Foulds told her Mr Bhebhe could not supervise, that she was saying Mr Bhebhe had said that.

52. Following the second meeting of 19 September 2019 Ms Foulds emailed the claimant on 26 September 2019 with an update on actions she had taken in relation to further steps agreed at that meeting which included the supervision matter, sending the job description for the prescribing role to the respondent's lead on prescribing for evaluation, and speaking to Mr Masawi about mediation. She said he had agreed to mediation.
53. On 18 October 2019 HR advised that *'arrangements are being made to contract an external resource to facilitate your mediation...'* and a follow up email was sent on 8 November 2019 apologising for and explaining the delay.
54. On 11 November 2019 the claimant formally raised a grievance through HR. There are a number of versions of the grievance letter in the bundle, some undated and two with different dates. The Respondent wrote to the claimant on 27 November 2019 referring to receipt of her letter dated 11 November 2019 and no issue was taken with this by the claimant. The tribunal finds that the grievance was raised on 11 November 2019 and references to the grievance letter are to that document. The grievance is headed *'Vimbai Vhondo - Bullying and Harassment, Sex discrimination, racial discrimination and providing false information in a court of law. Formal grievance.* The claimant notes that she has an RCN Rep and begins her grievance with the words, *'I regret having to raise a formal grievance but feel I have no other option.'*
55. On 26 November 2019 Ms Foulds contacted the claimant regarding mediation. She said that she had been advised that if the claimant wished to continue with mediation then the formal proceedings would need to be put on hold while this took place. Alternatively, if the claimant still wanted to pursue a formal grievance, mediation could be an option after the grievance. The claimant responded as follows: *I would rather this matter is dealt with in a timely fashion. I have waited since we started speaking in August for the mediation with no progress. I would rather the formal proceedings go ahead. I have given ample time for the mediation to take place so would rather the grievance go ahead as soon as practicable.* The claimant says that the respondent failed to progress the mediation. Ms Foulds said that the respondent had taken the view that the claimant would have more trust in the process if the mediator was from outside of the respondent. The tribunal finds that it was agreed between the claimant and Ms Foulds at the meeting on 19 September 2019 that Ms Foulds would ask Mr Masawi about mediation and she confirmed that he had agreed on 26 September 2019. HR contacted the claimant twice between that date and 11 November when she submitted her grievance with updates on progress with mediation. Ms Foulds advised her on 26 November 2019 that the two processes could not

continue in tandem. Whilst the tribunal accepts that progress in arranging mediation was slow it finds that there was a reason for this (sourcing an external facilitator) and that the claimant chose on 26 November to pursue the grievance in preference to the mediation. The tribunal does not accept that the respondent, as claimed by the claimant, failed to offer mediation with Mr Masawi.

56. Also, on 26 November 2019 the claimant emailed Heather Caudle, copying in Mayvis Oddoye, about her complaint that her prescribing role had been blocked. The claimant said she received no response. Ms Caudle in evidence said she could not respond as it had not been brought to her attention that the claimant claimed she had not responded. This claim is not made in the claimant's pleadings or her in her witness evidence. It was raised for the first time in oral evidence.
57. On 27 November 2019 the respondent wrote to the claimant advising that the grievance hearing had been scheduled for 10 January 2020. Mike Cavaye, the respondent's Deputy Chief Information Officer, was appointed as the grievance chair with Liz Green as a panel member. The claimant had an RCN representative at the meeting and was given the opportunity to question Mr Masawi and Ms Foulds. The meeting lasted over four hours and the chair reserved his decision. He met with Ms Green for three hours to discuss the evidence before finalising his decision.
58. On 23 January 2020 Mr Cavaye wrote to the claimant setting out his decisions on her grievance. Mr Cavaye did not uphold the grievance. The claimant claims that there is evidence of bias and a lack of transparency in the grievance decision. Furthermore, the grievance panel took witness evidence at face value. The tribunal finds that the grievance panel has given a considered response to the grievance, has addressed all of the matters raised and drawn sustainable conclusions from the evidence they heard as set out in the letter of 23 January 2020.
59. The claimant also claims that there has been a failure to address issues of discrimination, bullying and harassment in the grievance outcome. The grievance outcome clearly deals with the claimant's claims of discrimination at section 4 and with claims of bullying, harassment and victimisation at section 5 and throughout the decision. The tribunal finds that these matters were dealt with by the grievance panel and notes that in her appeal letter the claimant is taking issue with the fact that the grievance panel did not decide in her favour rather than that it failed to deal with any specific complaint.
60. One of the claimant's claims in relation to the grievance letter is that the respondent did not carry out a thorough investigation. She said in oral evidence that this was a claim that the bullying and harassment procedure should have been used rather than the grievance process. As the wording of the allegation was unclear this was not a claim that the respondent understood the claimant to be making until the hearing. Nevertheless, the tribunal heard evidence on the point and makes the following findings. The respondent's grievance procedure contains the following guidance:

4.0 *What is not covered by this policy and procedure?*

...

- *Where there is a separate procedure to address complaints about the conduct of employees at work such as the bullying and harassment policy or the disciplinary policy.*

12.3 *Appeal hearing – Stage 3*

12.3.10 when the subject under consideration involves an element of harassment bullying or discrimination the panel should be construed as far as possible to include at least one member who has similar characteristics of the person bringing the grievance.

From this the tribunal finds that although the respondent has a separate bullying and harassment policy, it does also deal with cases where bullying and harassment form part of the complaint under the grievance policy. The claimant set out specifically in her letter of 11 November 2019 that she was raising a grievance. The claimant confirmed that she had taken advice and had an RCN representative at the stage 2 grievance hearing. Neither the claimant nor her representative raised at any point throughout the grievance process, including during the appeal stage, that the claimant objected to the claim being dealt with under the grievance policy. The tribunal finds that the grievance panel did carry out a thorough investigation.

61. On 31 January 2020 the claimant wrote to the respondent appealing the grievance decision. This was acknowledged by the respondent on 4 February 2020. On 10 March 2020 she was sent a copy of the management response to her appeal and advised that the appeal hearing would take place on 20 March 2020. The respondent wrote to the claimant again on 16 March 2020 noting that the hearing would have to be cancelled due to Covid contingency planning. The claimant was absent through sickness due to Covid from 4 April to 31 May 2020. On her return she asked for a hearing to be rescheduled on Teams. The respondent scheduled a hearing for 21 July 2020 which was the first date upon which the chair and all relevant people could attend.
62. On 3 July 2020 the claimant wrote to Fiona Edwards, the respondent's Chief Executive setting out that she believed she had been scapegoated at the Inquest and since then had been bullied, harassed, discriminated against and victimised. Fiona Edwards replied on 6 July 2020 stating that she wished to share the letter with Heather Caudle, Chief Nurse and lead for the Trust's BAME Network who could look into it. Fiona Edwards sent the letter to Heather Caudle on 8 July 2020 and Ms Caudle did not respond. Ms Caudle said that she was new in the job, had inadequate administrative support and was, in addition to her other roles, the respondent's Executive Director of Infection, Prevention and Control so playing a key role in the respondent's response to Covid guidance. Her evidence was that as a result

of this, by oversight, responding to the claimant's letter was not added to her 'to do' list. The tribunal finds that a failure to respond to an allegation of discrimination by the lead of the respondent's BAME network is very poor practice, but the tribunal accepts the evidence that this was a genuine oversight due to the circumstances described.

63. The grievance appeal was held on 21 July 2020 and the claimant attended with a work colleague. The appeal was heard by a panel consisting of Sharon Gregory, the Director of Older People and Specialist Services, Andy Doran a staff representative and Jo Barnett an HR representative. The hearing lasted for over four hours. The claimant put her case to the panel, Mr Cavaye defended his decision and the two were able to ask questions of each other. Ms Gregory agreed to try and obtain a transcript of Mr Masawi's evidence to the Inquest in relation to the claimant's claims that he had lied at the Inquest.
64. Due to restrictions on the use of the Inquest recording, on 4 August 2020 Ms Gregory was able to receive from a member of the respondent's legal team a precis of his understanding of Mr Masawi's evidence, having listened to the recording. HR contacted the claimant on 5 August 2020 stating that the panel was acquiring further documents.
65. On 20 August 2020 the claimant wrote to the respondent complaining that the appeal outcome was overdue. HR contacted Ms Gregory and asked for the decision urgently. The decision was sent to the claimant the same day. The panel partially upheld two of the claimant's grounds of appeal. It found that the respondent's processes for supporting staff through an Inquest were not sufficiently robust and it had not provided sufficient support, and that the grievance manager should have obtained a copy of Mr Masawi's evidence to the Inquest in order to disprove or corroborate his evidence to the grievance hearing. All other aspects of the appeal were dismissed. The tribunal finds that the appeal was upheld in two respects and otherwise dismissed. It finds that this was a decision that the appeal panel, which included as the chair a black woman, as prescribed in the grievance policy at paragraph 12.3.10, was entitled to make having carried out a thorough consideration of the evidence.
66. Ms Gregory told the claimant that she would provide a decision within 10 days of the hearing. The decision was not provided until 20 August 2020. Ms Gregory said that information on the Inquest evidence was not received until 4 August 2020, the panel needed to carefully consider the evidence, thereafter Jo Barnett drafted a response for her to consider and she then had to find time within a considerable workload that was still impacted by the pandemic in order to review and amend it. The tribunal finds that there was a delay in providing the appeal outcome to the claimant and this was due to the complexity of the appeal and pressure of work during the pandemic.

The claimant's resignation

67. On 28 August 2020 the claimant sent a letter of resignation to the respondent's Director of Workforce, Victoria Bishop. She said: *'In light of the*

grievance and appeal, I no longer have trust in you as an employer. I believe that the grievance process is therefore effectively a constructive dismissal. I feel I have no other alternative but to resign from my position.' Ms Bishop responded that she wanted to offer the claimant the opportunity to talk to the respondent's Divisional Director of Adult Mental Health Services, Maggie Gairdner, and also wished to pause on processing the resignation until the claimant had considered this offer.

68. A meeting took place on 14 September 2020 and Ms Gairdner wrote to the claimant on 18 September 2020 acknowledging the matters raised by the claimant in the meeting, noting that the claimant had decided to continue with her resignation and offering personal support (counselling) despite the resignation.

The Law

69. The discrimination claims are brought under sections 13, 26 and 27 of the Equality Act 2010. Those sections are reproduced below.

13 Direct discrimination

(1) 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.

26 Harassment

(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;*

• ...

• *sex;*

• ...

27 Victimisation

(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.*

(3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

70. For all the Equality Act 2010 claims the burden of proof provisions as set out in section 136 apply. Section 136 reads:

136 Burden of proof

(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.*

(4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

71. The tribunal must make findings of fact and apply the legal tests to those facts. The tests for direct discrimination were discussed in *Igen v Wong [2005] ICR 931* and it is clear that all evidence before the tribunal can be taken into account, not just that put forward by the claimant. The test is: is the tribunal satisfied, on the balance of probabilities that this respondent treated this claimant less favourably than they treated or would have treated a male or white employee.
72. If the tribunal is satisfied that the primary facts show less favourable treatment because of sex and race, the tribunal proceeds to the second stage. At this stage, the tribunal looks to the employer for a credible, non-discriminatory explanation or reason for such less favourable treatment as has been proved. In the absence of such an explanation, proved to the tribunal's satisfaction on the balance of probabilities, the tribunal will conclude that the less favourable or unfavourable treatment occurred because of sex or race discrimination.
73. The claimant also claims constructive unfair dismissal under s95 (1) c) Employment Rights Act 1996 (ERA). The tribunal is concerned to decide whether there has been a dismissal in accordance with that section which states

95 Circumstances in which an employee is dismissed

(1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)....only if ...*

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct.

This is what has become known as “constructive dismissal”. The leading case of Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 makes it clear that the employer’s conduct has to amount to a repudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.

Submissions

74. A summary of the parties closing submissions is as follows:
75. For the respondent, Ms Murphy relied on her written submissions and said the following. In relation to the termination of the acting up position that if the motivation was race then it was surprising that this had not manifested earlier when the claimant was appointed and noted that the claimant did not apply for the second acting up position. Emma Higgs was the only person to apply. Ms Murphy noted that no evidence had been produced at the inquest to support the claim that Georgina Foulds implicated the claimant at the Inquest and there was no evidence to substantiate the claim that Mr Masawi had lied to the coroner. Furthermore, it had not been put to Mr Masawi that if he had made a mistake in his evidence to the coroner that it was deliberate rather than not. Ms Murphy said that the meeting minutes from the governors’ meeting that took place after the claimant resigned was not in itself enough to support an inference of race discrimination on the facts.
76. The claimant said that in conclusion she wanted to tell the tribunal that she spoke the truth and wanted to highlight what happened in order to stop it happening again. She said that Georgina Foulds and Stanley Masawi colluded in relation to Mr Masawi’s evidence to the tribunal. The claimant said that she had adhered to the NMC code of conduct in her work for the respondent. She said that it had become more apparent to her during the tribunal process that discrimination, bullying and harassment by the respondent was unwarranted and the whole of the respondent’s senior management ignored her pleas by actively dismissing her complaints without investigating her claims. The claimant said she had been scapegoated by the respondent due to her colour, the respondent had failed to follow its own policies and had vilified her and discriminated against her in order to protect its own reputation. The claimant said the acts of the respondent were such that they had destroyed her mental health, her career, and her family. She said that she had been constructively dismissed.

Conclusions and reasons

77. The claimant relies on 17 alleged acts of discrimination in relation to her claim of direct discrimination and harassment. Fourteen of these are common to the claims of both discrimination and harassment. She relies on a further three alleged acts to support her claim of victimisation.
78. In direct discrimination it is for the claimant to establish, on the balance of probabilities, the factual basis of their claim including facts from which a tribunal could conclude, in the absence of any other explanation, that the employer has acted in breach of the Equality Act 2010. It is only once this is

established that the burden of proof switches to the respondent, i.e., the respondent then has the responsibility of providing a reason for its act or omission which is not discriminatory. Harassment occurs where a person engages in unwanted conduct which is related to a protected characteristic and which has the purpose or effect of:- (a) violating the employee's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee (section 26 of the 2010 Act). Victimisation occurs when a person subjects another person to detriment because that person has done a protected act. A protected act would include making an allegation that a person had contravened the 2010 Act.

The allegation that Georgina Foulds and Stanley Masawi implicated the claimant in the Inquest into the death of an individual referred to the HTT (direct discrimination).

79. The tribunal found on considering evidence from the claimant, Mr Masawi and Ms Foulds, and reviewing the documents, that Mr Masawi and Ms Foulds did not implicate the claimant at the Inquest. It therefore concludes that no act of discrimination can be supported by this allegation.

The allegation that Stanley Masawi blamed the claimant on 7 December 2018 for the decision not to admit the patient to the HTT (harassment and direct discrimination).

80. The tribunal found on hearing evidence from the claimant and Mr Masawi that Mr Masawi did not blame the claimant for the decision. It therefore concludes that no act of discrimination can be supported by this allegation.

The allegation that Mr Masawi made numerous criticisms of the claimant's practice on 8 January 2019 (harassment and direct discrimination).

81. The tribunal found on hearing evidence from the claimant and Mr Masawi that Mr Masawi did not criticise the claimant during the telephone call of 8 January 2019. It therefore concludes that no act of discrimination can be supported by this allegation.

The allegation that the claimant's shift pattern was changed without her consent in February 2019 (harassment and direct discrimination).

82. The claimant accepted in the hearing that her shift pattern did not change in February 2019 and thereafter (at the end of her Acting Up role) reverted to hours she had worked before taking on an Acting Up role. It therefore concludes that no act of discrimination can be supported by this allegation.

The allegation that Mr Masawi queried the claimant's motives for sending an email on 5 February 2019 (harassment and direct discrimination).

83. The tribunal found that Mr Masawi asked the claimant to explain what she believed she had learnt from the incident in January 2017, as she referred to it in the email of 5 February 2019 that she had sent to the team, including

him. On a consideration of the evidence the tribunal does not accept that this was an act of harassment as there is no evidence that the act was related to the protected characteristic of race, nor does it find that it is an act from which it could be inferred, in the absence of another explanation, that Mr Masawi's actions were discriminatory on the grounds of race.

The allegation that Mr Masawi told the claimant in a meeting on 6 or 7 February 2019 that she was no longer carrying out her interim role as clinical team leader (harassment and direct discrimination).

84. The tribunal accepts that the claimant was told at the meeting that her Acting Up role would end, as per the Acting Up contract, on 28 February 2019. The claimant accepted in the hearing that this was correct. This was because Mr Masawi had been advised that the substantive post holder was returning to his role. The tribunal does not accept that this was an act of harassment, as there is no evidence that the act was related to the protected characteristic of race, nor does it find that it is an act from which it could be inferred, in the absence of another explanation, that Mr Masawi's actions were discriminatory on the grounds of race.

The allegation that Mr Masawi questioned whether the claimant was capable of doing her interim role as clinical team leader and said to the claimant 'are you capable of doing this job?' on her return from sickness absence (harassment and direct discrimination).

85. The tribunal found that Mr Masawi had asked the claimant whether, in light of her recent sickness absence, she felt able to continue in the Acting Up role until it ended. In so far as it accepts that the comment was made, though does not accept that it was phrased as the claimant suggests, the tribunal does not accept that this was an act of harassment, as there is no evidence that the act was related to the protected characteristic of race, nor does it find that it is an act from which it could be inferred, in the absence of another explanation, that Mr Masawi's actions were discriminatory on the grounds of race.

The allegation that Mr Masawi changed the team rota without consent, the team were unhappy, and Mr Masawi blamed the claimant for the changes on 7 February 2019 (harassment and direct discrimination).

86. The tribunal found there was no evidence that staff were unhappy with the changes or that Mr Masawi had blamed the claimant for the changes. It therefore concludes that no act of discrimination can be supported by this allegation.

The allegation that Mr Masawi commented 'do you need me to rubber stamp your practice?' on 11 February 2019 (harassment and direct discrimination).

87. The tribunal found on hearing evidence from the claimant and Mr Masawi that Mr Masawi did make this comment when the claimant telephoned to

ask a question about her practice. The tribunal does not accept that this was an act of harassment, as there is no evidence that the act was related to the protected characteristic of race, nor does it find that it is an act from which it could be inferred, in the absence of another explanation, that Mr Masawi's actions were discriminatory on the grounds of race.

The allegation that Mr Masawi ignored the claimant at work from February to May 2019 (harassment and direct discrimination).

88. The tribunal found there was no evidence that Mr Masawi ignored the claimant at work during this period. It therefore concludes that no act of discrimination can be supported by this allegation.

The allegation that Mr Masawi told the claimant there was no prescribing role within the HTT when a role was advertised, and that the claimant was not shortlisted for the advertised role (harassment and direct discrimination).

89. The tribunal found that this allegation was confusingly worded and have broken it down into three sections when considering whether there is a discrimination case made out:
- a. Was the claimant told that there was no prescribing role at Band 7 within the HTT on 16 May 2019, when one was then advertised? The tribunal accepts that the claimant was told that there was no prescribing role at Band 7 and found that there was no prescribing role advertised at Band 7. The role that was advertised in April 2019 was at 8a, although the job description may have been of a Band 7 role. The role that was then advertised again at Band 8a, in July 2019, with the requirement for four years prescribing experience. As the tribunal found that no Band 7 position was advertised, no act of discrimination can be supported by this allegation.
 - b. Is it correct that the claimant was not shortlisted for the first role advertised? The tribunal accepts that the claimant was not shortlisted for the role that was advertised in April 2019. The tribunal does not accept that this was an act of harassment, as there is no evidence that the act was related to the protected characteristics of race or sex, nor does it find that it is an act from which it could be inferred, in the absence of another explanation, that Mr Masawi's actions were discriminatory on the grounds of race or sex.
 - c. Is it correct that the claimant was not shortlisted for the second role advertised? The tribunal accepts that the claimant was not shortlisted for the role that was advertised in July. The tribunal does not accept that this was an act of harassment, as there is no evidence that the act was related to the protected characteristics of race or sex, nor does it find that it is an act from which it could be inferred, in the absence of another explanation, that Mr Masawi's actions were discriminatory on the grounds of race or sex.

The allegation that Mr Masawi did not properly record details of the appraisal meeting on 31 May 2019 on the appraisal form (harassment and direct discrimination).

90. Mr Masawi admitted that he had failed to fully complete the form on the first two attempts but said this was a mistake and he rectified the errors quickly. The tribunal does not accept that this was an act of harassment, as there is no evidence that the act was related to the protected characteristic of race, nor does it find that it is an act from which it could be inferred, in the absence of another explanation, that Mr Masawi's actions were discriminatory on the grounds of race.

The allegation that Mr Masawi did not support the claimant's training application in June 2018 (harassment and direct discrimination).

91. The tribunal found that Mr Masawi did support the funding application and that the claimant did not bring to his attention that more comprehensive information was required when completing the application form. It therefore concludes that no act of discrimination can be supported by this allegation.

The allegation that Mr Masawi wrote on the claimant's appraisal form that the claimant needed to prescribe under supervision (harassment and direct discrimination).

92. Mr Masawi wrote comments about supervision requirements for prescribing on the appraisal form. The tribunal found that these were in line with the respondent's policy on non-medical prescribing. The tribunal does not accept that this was an act of harassment, as there is no evidence that the act was related to the protected characteristic of race, nor does it find that it is an act from which it could be inferred, in the absence of another explanation, that Mr Masawi's actions were discriminatory on the grounds of race.

The allegation that Georgina Foulds told the claimant that Ndaba Bhebhe had declined to offer her supervision when this was untrue, in September 2019 (harassment and direct discrimination).

93. The tribunal found that Ms Foulds had not told the claimant that Ndaba Bhebhe declined to supervise, but that she had said that he did not have capacity to supervise. It therefore concludes that no act of discrimination can be supported by this allegation.

The allegation that HR and Stanley Masawi failed to offer mediation with Stanley Masawi in September 2019 (direct discrimination).

94. The tribunal found that Stanley Masawi did agree to mediation and HR did offer and try to facilitate mediation, though it had not managed to put it into place by the time the claimant issued her grievance. It therefore concludes that no act of discrimination can be supported by this allegation

The allegation that the grievance panel and Georgina Foulds failed to uphold the claimant's grievances in November 2019 and there was evidence of bias/lack of transparency (direct discrimination).

95. Georgina Foulds did not make the decision on the grievance. She represented the management position at the hearing. The tribunal accept that the respondent did not uphold the grievances. This in itself is not evidence of a discriminatory act. The tribunal does not accept that there was evidence of bias and a lack of transparency in the decision though it accepts that the appeal panel found that an attempt to source the Inquest transcript should have been made. The tribunal does not accept that this was an act from which it could be inferred, in the absence of another explanation, that the respondent's actions were discriminatory on the grounds of race.

Direct Discrimination claim – consideration of acts cumulatively

96. The tribunal considered, in relation to direct discrimination, whether looking cumulatively at those acts relied upon which the tribunal found had occurred, the acts complained of were done on discriminatory grounds. In seven of these eight acts the perpetrator was Mr Masawi. Whilst it was noted by the tribunal that Mr Masawi had not completed all relevant supervisions with the claimant, made an unhelpful comment when she asked for his opinion on 11 February 2019 and was not clear about his role in the first shortlisting process, no evidence was provided by the claimant which would lead the tribunal to conclude that in the absence of any other explanation the actions of Mr Masawi, a colleague whom the claimant said she had a good professional relationship with prior to the Inquest, were carried out on racial and/or sex discrimination grounds. Furthermore, the tribunal notes that Mr Masawi was apprised of the root cause analysis report in 2017 as he played a part in implementing the changes that resulted from it. He was therefore aware of all of the findings in relation to that incident over a year before he appointed the claimant to an Acting Up role. The tribunal does not accept that following the Inquest he suddenly began treating the claimant in a discriminatory manner on the grounds of her race or sex, in all of his dealings with her.

The allegation that, because the Claimant raised bullying, harassment and discrimination at the grievance hearing on 11 November 2019 she suffered the following detriments: 1. The grievance outcome was biased, 2. The respondent failed to address bullying, harassment and discrimination, 3. There was a failure to progress mediation, 4. The respondent did not carry out a thorough investigation, 5. The respondent took witness evidence at face value (victimisation).

97. (1)The tribunal does not accept that there was any evidence of bias in the grievance decision. The grievance panel, on considering the evidence, did not find in the claimant's favour, and it was entitled to do so. The claimant provided no evidence that the decision was biased or that it was biased because she had raised bullying, harassment and discrimination.

98. (2)The tribunal found that bullying, harassment and discrimination was addressed in the grievance decision.
99. (3)The tribunal found that mediation was progressed, although progress was slow, and the claimant was advised that mediation could not take place in tandem with the grievance.
100. (4)The claimant explained that she meant by this that her grievances had not been considered under the bullying and harassment policy. The tribunal found that the claimant had raised a formal grievance and had not requested that her complaints be dealt with under the bullying and harassment policy, furthermore that the respondent had acted within its policies in dealing with the complaints under the grievance policy. The claimant did not provide any evidence as to why it was that having her complaint dealt with under the grievance policy as opposed to the bullying and harassment policy constituted a detriment.
101. (5)The tribunal found that the grievance panel had made a thorough and balanced evaluation of the evidence. Many allegations concerned events during which only two people were present. The appeal panel found that in relation to Mr Masawi's evidence to the Inquest the grievance panel should have tried to obtain a transcript. The appeal panel did obtain it and used that information in reaching its decision. The claimant has not explained why taking witness evidence at face value is a detriment that resulted from raising a grievance that included complaints of discrimination. The tribunal does not accept that the claimant was victimised because she raised bullying, harassment and discrimination in her grievance.

The allegation that, because the Claimant wrote a letter to Fiona Edwards, Chief Executive of the Respondent, raising systemic racial discrimination within the Respondent on 3 July 2019, she suffered the detriment of not having her letter responded to and her concerns were ignored (victimisation).

102. The tribunal found that although it showed poor practice on the part of the respondent, the failure to answer the claimant's letter was an oversight by someone new to the job, with inadequate administration systems in place, during the first months of the pandemic. The tribunal does not find that the failure to answer the letter was an act of victimisation, as it does not accept that the failure to answer the letter was because within it the claimant did a protected act (raised that she believed she had suffered discrimination).

The allegation that because the claimant raised discrimination in her appeal letter of 31 January 2020, she suffered the detriments of 1.a delay in responding to the appeal, and 2. a failure to uphold the appeal (victimisation)

103. The tribunal found that there was a delay in providing the appeal outcome to the claimant and this was due to the complexity of the appeal and pressure

of work during the pandemic. The tribunal does not accept that the delay was because the claimant had raised discrimination.

104. The tribunal finds that the claimant's appeal was upheld on two points and that the decision it reached was based on a thorough evaluation of the evidence. The tribunal does not accept that where the appeal was not upheld, that was because the claimant had raised discrimination in her appeal letter.

The discrimination claim

105. The claimant provided no evidence from which it could be inferred or concluded that the respondent's actions as described in her allegations were discriminatory on the grounds of race or sex. Where the allegations were about acts carried out or not carried out by Mr Masawi, the tribunal noted that Mr Masawi is a black man, who had in October 2018 appointed the claimant, a black woman, to an Acting Up role and, on the evidence, appointed another (white) woman to two Acting Up roles during the period October 2018 to July 2019. Whilst it is accepted that simply because some of a person's actions are not discriminatory, that does not preclude others from being so, the claimant did not point to anything which would indicate that the allegations she raised were due to discrimination. In fact, she has said on two occasions in evidence (once in relation to Mr Masawi and the other in relation Mr Masawi and Ms Foulds together), that their alleged actions at the Inquest were about protecting their own interests and the respondents, and also that Mr Masawi's attitude to her changed after the Inquest. The claimant puts forward reasons for the actions she has complained of which are not to do with discrimination. Ms Caudle (to whom the claimant wrote in July 2019) and Ms Gregory (chair of the appeal panel) are black women with very senior roles in the respondent organisation. The claimant said in witness evidence that she had not understood the pattern of events to have had a racist grounding until she had reflected afterwards and alleges systemic discrimination in the respondent organisation. Minutes of a public governors meeting held on 17 June 2021 that refer to the respondents' staff survey and results indicating that BAME and disabled staff experienced more bullying and harassment were pointed to by the claimant as proof of systemic racism. The tribunal does not accept on the basis of a single line in the minutes of a meeting that took place a year after her resignation, that the claimant has shown systemic racism within the respondent organisation and she has not provided evidence or reasons that would lead to an inference or conclusion that the acts that she alleges were discriminatory were as a result of systemic racism. The evidence before the tribunal is of a culturally diverse workforce within the respondent, with a robust and thorough process of investigating grievances that takes into account the particular issues around investigating claims of discrimination. Mistakes have been made, as the tribunal has noted, for example missed supervisions, a badly handled recruitment process for a non-medical prescriber and the failure of Ms Caudle to respond to the claimant's letter. The tribunal does not find that there is any evidence to infer or on which it

could conclude that these matters arose because the claimant is black or a woman, or because she did a protected act.

Constructive Unfair Dismissal

- 106. In order to succeed in a case of constructive unfair dismissal the claimant must show that a fundamental breach of the employment contract took place and that she resigned because of that breach without delay. The claimant relies on the breach of the implied term of trust and confidence. In support of her case, she relies on all of the allegations set out above on which she rests her discrimination case, except the allegations of victimisation in relation to the stage 2 grievance.

- 107. In her letter of resignation, the claimant refers specifically to the grievance and appeal outcomes being the reasons for her resignation. The tribunal has found that the grievance process involved thorough consideration of the evidence at Stage 2 and at the Stage 3 Appeal, and that the decision makers were entitled to reach the decisions they did on the evidence. Furthermore, the appeal panel upheld two aspects of the claimant’s appeal. In so far as the claimant seeks to rely on a series of acts amounting to a fundamental breach or that the appeal was the last straw act, following a series of breaches, the tribunal has found that there is only one allegation where poor practice by the respondent was evident, and this was in the failure of Heather Caudle to respond to the claimant’s letter of 3 July 2019. However, the tribunal notes that this letter was not referred to in the resignation letter, and also was not referred to in the meeting between Margaret Gairdner, Victoria Bishop and the claimant on 14 September 2020. The tribunal finds that although poor practice, the failure to answer the letter does not constitute a breach of the duty of trust and confidence. Furthermore the tribunal finds that, even it had been a breach, that was not the reason for the claimant’s resignation.

- 108. The tribunal has no doubt that the claimant is a dedicated and effective nurse, and it is very unfortunate that her employment relationship with the respondent ended in this way, however, for the reasons set out above, the claimant’s claims of direct discrimination, harassment, victimisation and constructive unfair dismissal are dismissed. The claim for notice pay which rested on the claim for unfair dismissal is also dismissed. The claim for loss of ability to work overtime shifts was not pursued before the tribunal and is dismissed.

Employment Judge Anderson
Date: 11 March 2022
Sent to the parties on:
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For the Tribunal Office