EMPLOYMENT TRIBUNALS

Claimant: Mrs C Sawyers

Respondent: East Suffolk and North Essex NHS Foundation Trust

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 12, 13, 17 August 2021 and 28 September 2021

Before: Employment Judge Russell
Members: Mr M Rowe
Ms J Houzer

Representation:
For the Claimant: In Person
For the Respondent: Ms M Murphy (Counsel)

JUDGMENT

1. **The claim of unfair dismissal is dismissed on withdrawal.**

2. **The claim of harassment related to age succeeds in respect of:**

   (a) **Managing the grievance poorly, taking months to start the grievance process;**
   (b) **Ms Macey's comments at the meeting on 29 July 2019.**

3. **It is just and equitable to extend time in respect of these acts of harassment related to age.**

4. **All other claims of harassment related to age and all claims of direct discrimination because of age fail and are dismissed.**

5. **The claim of race discrimination and/or harassment related to race fails and is dismissed.**

6. **The claim of victimisation fails and is dismissed.**

7. **The claim of unauthorised deduction from wages and/or breach of contract succeeds in the sum of £110.10 due in respect of travel expenses.**

REASONS

1. By a claim form with a 113-page attachment presented on 9 June 2020, the Claimant brought complaints of discrimination because of age and/or race, harassment related to age and/or race and for unauthorised deduction from wages. Box 8 on the claim form did not indicate a claim of unfair dismissal. The Respondent resisted all claims.

2. At a Preliminary Hearing on 12 October 2020, Employment Judge McLaren identified complaints of direct discrimination on grounds of race, age, harassment and victimisation. A definitive list of issues could not be agreed in the time available for the hearing largely due to the length of the claim form and the fact that the Respondent had not appreciated that there were victimisation and harassment claims. Judge McLaren directed that there should be a draft list of issues produced once the pleadings were more clear. There was a discussion about whether the Tribunal had jurisdiction to hear certain complaints, including breach of contract, but no mention of a constructive dismissal claim. Judge McLaren was able to identify and set out in the Summary the claims of direct discrimination because of age and/or race but further information was required for harassment and victimisation.

3. A further Case Management Hearing was conducted by Regional Employment Judge Taylor on 8 April 2021. By this date, the Claimant had prepared a document comprising of some 72 pages and over 200 paragraphs in response to the Orders made by Judge McLaren at the previous Preliminary Hearing. Judge Taylor noted that the central event giving rise to the claims took place in one day and over a very short period of time and yet the Claimant had prepared very lengthy documents which had caused difficulty and complication in dealing with this case. Nevertheless, Judge Taylor was able to finalise the list of issues, a copy of which is attached to this Judgment.

4. Regional Employment Judge Taylor declined the invitation of the Respondent to impose a page or word count limit on the witness statements for use at the final hearing. In the event, the Claimant has submitted a witness statement running to some 180 pages with attached exhibits. The statement was particularly unhelpful as it included within it a series of references to other documents with references in those documents to yet further documents.

5. The Tribunal heard evidence from the Claimant on her own behalf and from Mr R Edmonton, the Claimant's husband. On behalf of the Respondent we heard evidence from Ms B Lynn (Clinical Specialist Midwife), Ms L Moroney (Ultrasound Manager), Ms C Gordon-Clement (X-ray Manager), Ms P Eves (Assistant General Manager in Medical Imaging), Ms D Macey (Head of Midwifery), Ms C Porter (Senior HR Adviser). The Claimant submitted a supplementary witness statement in advance of the reconvened hearing. The Tribunal was provided with an agreed bundle and we referred to those pages to which we were taken during the course of evidence.

6. Shortly before the first day of the hearing, the Claimant indicated in correspondence that she also brought a complaint of constructive dismissal and sought to include dismissal as a further act of discrimination, harassment or victimisation. She repeated her intention at the outset of this hearing and said that she sought leave to amend if the Tribunal found that no constructive dismissal claim was included in the original claim form.

The Respondent objected on grounds that there had been two Preliminary Hearings at which no constructive dismissal complaint or discrimination claims arising from resignation had been mentioned and it would be prejudiced if such claims were allowed now as it would need to amend its Response and call additional witnesses with the inevitable postponement of this final hearing.

7. The Tribunal carefully considered the contents of the claim form and attached particulars of claim. The attachment although lengthy lacks clarity and makes it difficult to understand the Claimant's case. As the unfair dismissal box was not ticked it is not surprising that the claim was not identified before. However, on balance, the Tribunal was satisfied that the Claimant had pleaded complaints which led to her resignation and had referred to constructive dismissal in the attachment. As a constructive dismissal complaint and resignation-related Equality Act claims were pleaded, although well-hidden in the attachment, the Tribunal informed the Claimant that we would be minded to allow her to make such complaints. However, we made clear that it would require a postponement as the Respondent was understandably not prepared today to respond to the same. Given that the Claimant only identified the claims herself at a very late stage in proceedings, a postponement may give rise to an application for costs and, if postponed, the case could not be relisted until 2023.

8. The Tribunal made it clear that costs would not necessarily be ordered but that we would need to consider the Respondent's application in light of the Claimant's conduct of proceedings. The Tribunal gave the Claimant further time to consider her position. At about 13:00, the Claimant indicated that she wished to withdraw the claim but seemed uncertain as to the consequences of doing so. The Tribunal again explained that this was an important decision. If she were to withdraw, then all issues arising from her resignation (whether as a constructive dismissal claim under the Employment Rights Act or as an act of discrimination, harassment or victimisation under the Equality Act) would no longer be part of the issues before the Tribunal. We gave her until 14:30 to consider her position further. At 14:30, the Claimant unequivocally indicated that she wished to withdraw the constructive dismissal claim and understood that she could not rely on her resignation in her Equality Act claims either.

9. After the evidence had concluded but before submissions were made, the Respondent conceded that the Claimant was entitled to travel expenses in the sum of £110.10 and that the Claimant had made the protected acts dated 10 April 2019, 20 June 2019, 24 June 2019 and 25 June 2019. The protected acts alleged on 25 and 26 March 2019 remained in dispute.

Findings of Fact

10. The Respondent is an NHS Trust. It has an Ultrasound Department which employs Sonographers to perform routine and non-routine antenatal scans. Non-routine scans are undertaken where there is a specific need, for example concern about the baby's growth. In March 2019 there was no Ultrasound Manager. Ms Clarissa Gordon-Clement, the X-ray Manager, was providing interim managerial cover until Ms Polly Eves took up the permanent post on 1 April 2019. The Respondent has a generally racially diverse workforce, BAME employees comprised 17% of the Ultrasound Department.

11. The Claimant was employed by the Respondent as a Band 7 Sonographer from 3 January 2018. She was 33 years old at the material time. Ms Beverly Lynn was

employed by the Respondent as a Clinical Specialist Midwife and had worked for the Respondent for 34 years at the material time. Ms Moroney was a midwife sonographer and had been employed by the Respondent for 12 years at the material time.

12. On 25 March 2019 the Claimant was due to work in the Alpha Department but was asked instead to work in the Constable Department. The Claimant had no problem with agreeing to what was a relatively routine request. There were two other Sonographers working in Constable that day, one of whom was Ms Moroney.

13. Each sonographer in Constable had their own room with a list of patients allocated to the room for that day. The list was not set in stone and could vary as the day progressed, for example, if one patient was late and the next patient had arrived early, then the latter would be seen first. If a sonographer in one room was running behind schedule, patients listed for their room may be swapped to another room if there was capacity in that list. On arrival, a patient is checked in by reception and a copy of her appointment letter is put in the box for the room to which she has been allocated. Usually, the sonographer collects the appointment letter before the patient is taken into the room for the scan but this is not required as the relevant information is available on the computer CRIS programme.

14. On 25 March 2019, the Claimant was working in room 11C and had been allocated patient "MG" for an appointment at 9:40am for a non-routine scan. MG was the daughter-in-law of Ms Lynn, a midwife employed by the Respondent but not working that day, who was going to attend the scan with MG as a source of support. The Tribunal accepts as truthful and plausible the evidence of Ms Moroney that Ms Lynn was running late and she phoned the Ultrasound Department to advise them of the same. Ms Moroney answered her call. Ms Lynn knew Ms Moroney and asked her to conduct MG's scan. Ms Moroney agreed and wrote on top of the appointment letter "**Lorraine to scan**"; the CRIS was not updated to show the change.

15. That morning, the Claimant's scheduled appointment was running late and MG arrived early for her appointment. The Claimant decided to scan MG rather than wait for her late-running appointment so as not to delay her list. The Claimant sent her Radiology Support Officer to get MG's appointment letter whilst she started the scan. The Tribunal consider that it makes no difference whether or not Ms Moroney told MG to wait for Ms Lynn or whether or not she told the Claimant's assistant that she would scan MG. The key point is not in dispute - nobody told the Claimant that Ms Moroney was going to scan MG or that she should wait for Ms Lynn. The Claimant did not have the appointment letter when she began MG's scan, CRIS had not been updated and MG did not ask the Claimant to wait for Ms Lynn to arrive.

16. When Ms Lynn arrived in the Ultrasound Department, she was unhappy not to find MG waiting for her in reception. The Claimant's student knocked on her door and asked her if she had MG. The Claimant said she did. Very shortly afterwards Ms Moroney knocked on the Claimant's door and opened it with the Claimant's permission. There was a brief exchange about who the patient was, whether the scan had been done and whether the report was produced whilst Ms Moroney was standing in the doorway. Up to this point, the Tribunal finds that nothing untoward or unusual took had taken place.

17. There are three versions of what followed next. The Tribunal had particular regard to the contemporaneous accounts given by the Claimant, Ms Moroney and Ms Lynn in making our findings of fact on the balance of probabilities as to what actually happened.

Some of the differences in evidence, such as who entered first and whether there was a child with Ms Lynn are not material, what mattered was her conduct.

18. The Tribunal finds that Ms Lynn was angry when she entered the room and shouted and pointed towards the Claimant. Her manner and tone were direct and rude. Ms Lynn told the Claimant that she should have been present for the scan. She then asked MG why she had not waited for her. This is consistent with Ms Moroney's account that Ms Lynn was upset that the scan was complete and had taken place without her. There was no physical assault but this was a deeply unpleasant and disturbing situation for the Claimant, being subjected to an angry tirade for simply doing her job. Indeed, Ms Moroney was so unsettled by Ms Lynn's conduct that she considered calling security but ultimately did not do so. The Claimant was startled into silence. Ms Lynn continued to shout and point at the Claimant saying words to the effect of "**I am a midwife**"; that Ms Moroney was to do the scan and "**can you not read?**".

19. The Tribunal found Ms Lynn to be an unsatisfactory witness. In cross-examination her manner towards the Claimant was abrasive, sarcastic and, at times, hostile. She displayed a sense of entitlement that she should have been in control of arrangements for the scan. On her own account, Ms Lynn was furious that things had not gone according to her plan and appeared to regard herself as the wronged party despite accepting that she had made the "can you not read" statement and being, in her words, emotionally upset with the Claimant.

20. It was a very difficult situation. Ms Moroney's first professional concern was for MG's wellbeing. MG had been present during the shouting, was also the target of Ms Lynn's expressed displeasure and still did not know the results of the scan. On balance, the Tribunal finds that born of a desire to defuse the situation and to reassure the patient, Ms Moroney asked the Claimant about how the baby was growing. The Claimant accepted in evidence that Ms Moroney asked her questions in a normal voice and tone. The Tribunal finds this consistent with the genuine attempt to smooth a very difficult situation caused by Ms Lynn rather than to risk escalating the situation by confronting or challenging Ms Lynn's behaviour.

21. The Claimant did not reply. She was embarrassed, shocked and intimidated at being shouted at by an experienced healthcare professional when she had done nothing wrong. The Tribunal does not accept that Ms Moroney subjected the Claimant to persistent questioning designed to make her appear stupid. Quite the opposite, the intention was to give the Claimant an opportunity to respond and to reassure MG. When Ms Moroney realised that the Claimant was not able to do so, she calmly asked MG and Ms Lynn to go to the next room where she would perform a further scan on MG. This is consistent, we find, with Ms Moroney's desire to defuse the tension and remove Ms Lynn from a conflict situation which was traumatic for MG and for the Claimant.

22. The Tribunal accepts that the Claimant genuinely perceived Ms Moroney's conduct as condoning Ms Lynn's behaviour. Ms Moroney candidly accepted that it could be perceived that way but the Tribunal accepted as truthful and plausible her evidence that she had no intention of re-doing the Claimant's measurement scan. She offered a scan so that MG and Ms Lynn could see the baby as a way of defusing Ms Lynn's anger and bring an end to an uncomfortable situation for all concerned. Whilst the Claimant understandably wanted Ms Moroney to challenge Ms Lynn's behaviour as unacceptable, we bear in mind that this was a confrontational scene with the patient put in a difficult

position at the centre of it. The method chosen by Ms Moroney was to get Ms Lynn out of the room by agreeing to show her the baby. This was objectively reasonable exercise of her professional judgment which had nothing to do with the Claimant's age or race.

23. The Claimant produced the growth report for the scan she had performed on MG. Although she was finding it hard to concentrate by reason of what had just happened, she continued to work as usual. Later in the morning, Ms Moroney went to the Claimant's room because the student had told her that the Claimant was very upset and felt undermined. Ms Moroney tried to reassure the Claimant that she should not take things personally. We find plausible in the circumstances, and accept the Claimant's evidence, that Ms Moroney told her that it was basically Ms Lynn's mannerism, that she was mother in law to MG, that she was "high up" in midwifery and had been her mentor. The Tribunal did not accept, however, that Ms Moroney told the Claimant that Ms Lynn called her the night before to do the scan or that she or the students were afraid of Ms Lynn. Neither is consistent with Ms Moroney's contemporaneous statement in response to the Datix complaint nor is it consistent with MG remaining in the Claimant's list for room 11C that day. Ms Moroney's denial of these comments was significant as she had made material concessions on other points, for example agreeing that Ms Lynn had said words to the effect of "can you not read" at some point, had been angry and rude and that her behaviour was unacceptable. On balance, and given the effect that the incident had on the Claimant and her profound sense of being unsupported by Ms Moroney, the Tribunal finds that she is mistaken in her recollection and that these comments were not made.

24. Ms Moroney offered to arrange cover if the Claimant did not feel able to continue. The Claimant made clear that Ms Lynn's conduct was not acceptable and that action needed to be taken. Ms Moroney apologised twice for taking MG and Ms Lynn next door to see the baby and explained to the Claimant that she was simply trying to defuse the situation; she said that she was sorry if it came across differently to the Claimant. The Claimant accepted in cross-examination that Ms Moroney had apologised, and it had appeared to be an effort to reduce the negative impact upon her but she did not think the apology was genuine. The Tribunal does not accept that the Claimant was provided with no support or apology from Ms Moroney or that the apology was not sincere or genuine. The Claimant was not being set up by Ms Moroney, rather the latter was genuinely attempting to support and reassure the Claimant.

25. At about midday, the Claimant was still upset and told Ms Gordon-Clement as cover manager about what had happened but did not suggest that there had been any discrimination. Ms Gordon-Clement encouraged the Claimant to make a Datix complaint and told her to call if she needed anything. Ms Gordon-Clement did not advise the Claimant that she could make a formal grievance. The Tribunal accepts Ms Gordon-Clements' evidence that it was not clear to her that this was an issue between members of staff which would be dealt with under the grievance or disciplinary policy. On the information known to Ms Gordon-Clement, this incident concerned a patient's relative displaying inappropriate behaviour to the Claimant as she was delivering frontline healthcare. Equally, the Claimant was aware that there were policies but was not sure which applied in the circumstances.

26. The Claimant submitted a Datix complaint on 26 March 2019 in which she referred to Ms Lynn as being a member of NHS staff but did not state that Ms Lynn was employed by the Respondent. The Claimant did not allege discrimination. In the details provided, she mentioned being asked questions by Ms Moroney but the Tribunal find on balance that it

was not a clear complaint which would fall within the grievance procedure. Ms Gordon-Clement had contacted HR after the Datix was filed because she was aware that another staff member had been involved. This is consistent with the coding of the Datix as "staff conduct – inappropriate behaviour". A comment entered at 07:45 on 28 March 2019 makes clear that HR regarded this as a potential disciplinary matter and appreciated that the Claimant wanted it to be treated as an official complaint.

27. On 28 March 2019 Ms Macey was appointed as investigator. Ms Macey had a discussion with Ms Lynn and took a statement from her the following day. Ms Macey also obtained a statement from Ms Moroney but did not interview the Claimant. There are material inaccuracies in Ms Macey's entries onto the Datix record. It is not correct to say that the Claimant had not responded twice to suggestions of a facilitated conversation. The Claimant had clearly refused the option of a facilitated conversation on two occasions. Ms Macey closed the Datix complaint on 6 June 2019. She incorrectly recorded that this was because three months had passed when in fact only just over two months had elapsed.

28. There are different versions of the Datix complaint in the bundle: the one bearing the name of "Martin Evans" runs to 7 pages, the version bearing the name "Clare Adams" runs to only 6 pages. There are some differences between the different versions: for example the Adams version includes "Current approval status: Finally approved" where the Evans version does not; there is less text on completing a RIDDOR report in the Adams version than in the Evans version. There are differences in the order of some of the sections and the formatting. Overall, the Tribunal concludes that none of the differences between the two versions are material to the issues in this case: the record of the Claimant's complaint, HR's comments, Ms Macey's entries and the reasons for closing the Datix are all the same.

29. The Tribunal finds that Ms Macey's investigation was woefully inadequate and her decision was biased. Ms Macey's evidence that it was not clear to her that the Claimant wished to raise a complaint is simply not credible. The Claimant had stated expressly in her additional information that she wanted the matter to be dealt with formally, as HR had taken on board. Nor do we find credible her evidence that she was appointed as an intermediary, not as the investigator. HR were relying on Ms Macey to conduct an investigation into the Datix complaint with a view to deciding whether grievance or disciplinary procedures were required. Ms Macey failed even to interview the Claimant and recorded materially inaccurate reasons for closing the investigation. These were not minor flaws; they were fundamental. Ms Macey knew Ms Lynn well as a longstanding colleague, referring to her repeatedly in evidence as "Bev". Ms Macey did not know the Claimant, a more junior and younger employee. Ms Macey's belief that there was fault on both sides was based upon an unquestioning acceptance of Ms Lynn's statement without interviewing the Claimant and despite Ms Moroney's statement that at the very least Ms Lynn had been "**direct and rude in manner**" and that the Claimant had been very upset. In her evidence, Ms Macey could not remember why she believed this complaint to be capable of informal resolution or why she concluded that it had been mere miscommunication. In the circumstances, the Tribunal infers that Ms Macey wanted to shut down the complaint in order to protect Ms Lynn from the consequences of her conduct towards a younger member of staff.

30. On 26 March 2019, Ms Gordon-Clement referred the Claimant to Wellbeing Support outlining her main concern as:

> **"Cebonie was verbally attacked by a patient's relative. She has been very upset by the event and I feel lost a little confident (sic) and she was very hesitate (sic) returning to work. It affected her that she feel (sic) at this current time she does not want to work in the area where the event has occurred. An official complaint is being made against the relative as she does work in the trust."**

31. Ms Eves commenced employment with the Respondent on 1 April 2019. It was her first managerial role and she was not given any induction training about the Respondent's internal policies and procedures. Ms Eves was informed about the incident and the Datix complaint but was not directly involved in its investigation. She did not receive training on Datix until August and did not have access to the Claimant's Datix complaint.

32. As her line manager, Ms Eves was aware that the Claimant was very upset about what had happened. Ms Eves changed the Claimant's rota so that she could attend the wellbeing appointment. She tried to empathise with the Claimant but her role was little more in practice than as a go-between between the Claimant and HR. The Tribunal found Ms Eves to be a straightforward witness who frankly accepted that she may have dealt with things differently with hindsight, taking HR advice and pushing things along more quickly. The Tribunal find that Ms Eves was doing her best to help the Claimant, only days into her first managerial job, new to the Respondent and unfamiliar with its policies.

33. The Claimant was absent from work at the beginning of April 2019. On her return to work Ms Eves was sympathetic and maintained regular telephone and email contact, asking whether or not there was anything that could be done to help. Ms Eves offered the Claimant practical support, for example suggesting that she attend counselling sessions in the afternoon as it may benefit the Claimant more to be able to go straight home without worrying about coming into work afterwards.

34. On 10 April 2019, the Claimant submitted an 8-page complaint to Ms Eves and Ms Gordon-Clement. It was very detailed and covered both the incident itself and the Claimant's belief that Ms Moroney had undermined her and failed to provide appropriate support. It referred to indirect discrimination but did not mention race or age. Whilst expressed in emotive terms it is a clear expression of the Claimant's complaint, the profound effect of the incident and her desired outcome namely:

> "**I hope this incident will be resolved as soon as possible with the necessary training and requisite disciplinary actions are taken to prevent horrendous incidents like these from reoccurring and interrupting the routine daily processes of the ultrasound department located in Constable. I also hope that a reminder of the relevant NHS policies and operational standards including those related to abuse in the work place are provided to staff members; staff members are reminded how to treat their fellow colleagues when a colleague experiences abuse at work and staff members are reminded not to encourage, facilitate or be silent on matters of abuse in the work environment. I hope to be informed of the outcome of this incident in writing.**"

35. On 25 April 2019, the Claimant advised Ms Eves both orally and by email that she did not want to meet with Ms Lynn. The same day, Ms Eves passed the information to Ms Gordon-Claimant, expressly stating that the Claimant wanted to continue with her Datix complaint.

36. On 28 May 2019, the Claimant asked for the name of Ms Lynn. This is consistent with the Claimant not having been provided with a copy of Ms Lynn's statement which was said to have been attached to the record of the Datix complaint.

37. In an email to Ms Gordon-Clement the following day, Ms Porter said that she needed to "prod" further to ascertain whether any action had been taken. Even if Ms Porter was originally not aware of the details of the complaint and the Datix investigation, she was aware of the fact of the complaint and the Claimant's desire to see disciplinary action as a result of what she described as abuse in the work environment. As Ms Porter accepted in cross-examination, the Datix process is very similar to the disciplinary process and the Claimant's Datix complaint needed to be investigated properly. At the very least, this would require a statement from the Claimant as well as Ms Lynn and Ms Moroney. Ms Porter incorrectly stated in her evidence that the Claimant had twice refused an interview with Ms Macey, in fact Ms Macey had not contacted the Claimant at all.

38. Ms Eves provided Ms Lynn's name to Ms Porter and Ms Gordon-Clement on 31 May 2019 and expressed a desire for the case to be closed, asking what the next steps would be. Ms Gordon-Clement accepted in cross-examination that she was aware by this date that the Claimant still wanted her formal complaint to be investigated because there had been no resolution at that time.

39. Ms Porter copied Ms Macey into the email chain, stating that the latter was keen to set up a meeting between the Claimant and Ms Lynn to apologise for any miscommunication in what she termed **"an extreme case of crossed wires".** The Tribunal infers from Ms Porter's questions that she had not seen the Datix complaint and had not been directly involved in the process. It is, however, hard to understand the reference to a meeting between the Claimant and Ms Lynn when contemporaneous emails from Ms Eves make clear that Ms Porter was aware from at least 10 May 2019 that the Claimant had already refused. Nevertheless, Ms Porter recognised that if a written complaint had been made, they may need to ask the Claimant if she wished to raise a formal grievance.

40. On 31 May 2019, Ms Eves double-checked with the Claimant whether she remained unhappy to meet with Ms Lynn and receive an apology for any miscommunication. She also stated that she had told Ms Porter and Ms Gordon-Clement that the Claimant wished to make a formal complaint/grievance and, if so, asked against whom.

41. In the event, there was no meeting and no request to the Claimant about whether she wished to raise a grievance. Instead, the Datix complaint was closed on 3 June 2019 for the incorrect reason that the Claimant had been approached twice by Ms Eves but was yet to respond and over three months had elapsed since the complaint. The Tribunal did not accept as reliable or plausible the evidence of Ms Macey that she had closed the Datix because Ms Eves had said that the matter had been resolved. This is entirely inconsistent with Ms Eves' email to Ms Porter on 31 May 2019.

42. On 5 June 2019 the Claimant commenced a two-week period of sickness absence. In an email sent to Ms Eves, forwarded in turn to Ms Gordon-Clement and Ms Porter, dated 20 June 2019, the Claimant set out at length her ongoing concerns and the effect of the incident upon her health. The Claimant reacted badly to the email from Ms Eves relaying the conclusion that the incident had been a miscommunication, as can be seen from the following extract:

> "**I find the contents of your email quite disturbing, devastating and distressing with regards to how an act of violence and aggression against me a NHS staff member while doing my job is strongly euphemised and expressed as a mere miscommunication. Your email does not show any sympathy, empathy nor remorse over the abuse I experienced. I have been through a lot of pain and suffering over this horrendous incident and is still experiencing this up to present date. I must say that after reading this email, I do not have any confidence that this matter will be treated with the level of seriousness it deserves and I do not believe I will get justice in this matter through the Trust.**"

43. In her email on 20 June 2019 Ms Eves suggested to the Claimant, Ms Porter and that there should be a meeting. Although the Datix complaint had been closed on 6 June 2019, Ms Eves referred to it as ongoing. The Tribunal finds this consistent with Ms Eves' lack of involvement with the investigation into the Datix complaint.

44. On 24 June 2019, the Claimant made a further complaint with the opening line: "**formal complaint, grievance**", in which she also complained about the failure to provide her with information and about delay. This complaint extended over 23 pages and was supported with 66 pages of supplementary information. The Tribunal finds that the Claimant believed that nobody was taking her complaint seriously and was generating ever increasing amounts of documentation to try to get her points across. This is consistent with the steady growth of her written complaints from the initial brief Datix complaint, the April further information, this June 2019 complaint, the attachment to the subsequent ET1 and culminating in her 180-page witness statement.

45. On 25 June 2019 there was a meeting held between the Claimant, Ms Porter and Ms Eves in which the Claimant clearly stated that she believed that it was necessary that disciplinary action be taken. It is not in dispute that Ms Porter asked the Claimant when she started working for the Trust; Ms Porter says that it was intended as an icebreaker, the Claimant disagrees as the question was put at the end of the meeting. On balance, the Tribunal accepts as accurate the Claimant's contemporaneous note and finds that the question was asked at the end of the meeting. It was nevertheless, we find, a routine question when meeting an employee for the first time and the Tribunal does not infer any more sinister reason for the question. The meeting concluded with Ms Porter saying that she would proceed with the Claimant's formal complaint and that the response time is usually between 5 and 30 days. The Claimant sent a copy of her formal complaint to Ms Porter later the same day.

46. On 27 June 2019, Ms Porter suggested that the Claimant meet with Ms Macey who had been appointed as commissioning manager for the investigation. The Claimant objected to Ms Macey's appointment as she was in midwifery and had previously suggested a meeting with Ms Lynn; she asked instead that somebody with no prior involvement be appointed. Ms Porter sought to reassure her that even if Ms Macey were the commissioning manager, a completely independent investigator would be appointed.

47. The Claimant's detailed email on 2 July 2019 set out her concerns about the lack of information provided to her, the failure of Ms Macey to meet her before suggesting an informal resolution by way of apology for "miscommunication" as well as her belief that her complaint was being "**swept under the rug, not taken seriously and ignored**". Whilst the tone and some of the language used was intemperate, there could be no reasonable doubt that the Claimant did not want an informal resolution to the incident with Ms Lynn.

48. Ms Porter invited the Claimant to attend a meeting on 29 July 2019 with herself, Ms Eves and Ms Macey as commissioning manager. The meeting was expressly stated to be informal and to draw up terms of reference for the investigation, it was not actually part of the investigation. In a separate email, Ms Porter informed the Claimant that the investigator was in the process of being recruited and would be totally independent and from a non-involved area of the Trust.

49. The meeting on 29 July 2019 started with an explanation that the delay had been caused by the fact that the initial complaint was raised on Datix and a suggestion that Ms Macey had not seen the Claimant's letter of complaint until 27 June 2019; neither she nor Ms Porter had been made aware that the earlier complaint had been attached to the Datix. The Claimant was told that it was necessary to start with an informal approach in cases of alleged bullying or harassment and that the Claimant had twice refused to meet Ms Lynn. Again, Ms Macey sought to resolve the matter informally by Ms Lynn giving a verbal or possibly written apology. The Claimant said that this was not appropriate and questioned whether it would be genuine after such a long time. Ms Macey said that required management action had been undertaken, suggesting that she had been told that Ms Lynn that her behaviour was inappropriate and that Ms Lynn had apologised in her Datix statement. In bold, the notes state that the Claimant did not declare what she wanted as a final outcome to her complaint but noted some of the particular comments which the Claimant regarded as discriminatory. In conclusion, the Claimant was told that in order to progress her complaint further, she would have to complete a formal grievance complaint form.

50. The Tribunal find the content of this meeting, on the Respondent's own notes, troubling. The tone of the meeting is dismissive of the Claimant's concerns and, at times, appears to blame her for the delay, both by the use of Datix and the refusal of an informal resolution. Although stated to be a meeting to agree terms of reference for an investigation (for which it was said that the independent investigator was already being recruited), the Claimant was again pressed to accept an informal resolution by way of apology. Further, she was required to complete a grievance complaint form which was not required by the grievance procedure then in force, which provided that it was sufficient for an employee to submit a written statement or to complete the grievance complaint form. The Tribunal infers from this that the Respondent was seeking to discourage the Claimant from proceeding with a formal complaint and instead to accept the informal resolution preferred by Ms Macey. Whilst the grievance procedure says that it is better to resolve matters informally, it also says that if the complainant wishes it to be a formal complaint that this should be respected and that there may be a disciplinary requirement.

51. Although not recorded in the Respondent's notes, in circumstances in which we have inferred that Ms Macey was seeking to avoid a formal complaint against Ms Lynn, the Tribunal finds credible and plausible the Claimant's evidence that Ms Macey said words to the effect that Ms Lynn had worked for the Respondent for years, that this was the first time a complaint had been raised against her, asked the Claimant how long she had worked for the Respondent and what did she have to gain from a formal complaint. This is consistent with the contents of the Claimant's email to Ms Porter on 6 August 2019 in which she quoted the comments and the absence of disagreement by Ms Porter in reply. It is also consistent with our finding that Ms Macey was trying to dissuade the Claimant from proceeding formally and putting pressure upon her to deal with Ms Lynn's conduct informally.

52. There are two sets of notes of the meeting on 29 July 2019 included in the bundle, both produced by the Respondent. The material difference between the two is that one states that the Claimant was provided with a copy of Ms Lynn's Datix statement whereas the other does not. The Claimant's evidence is that she was given the notes without the reference and denies that Ms Lynn's statement was provided to her. Having regard to the Claimant's subsequent emails about the progress of the grievance, and given her tendency to comment at length on the incident and how she had been treated by Ms Lynn, the Tribunal find it implausible that the Claimant would not have taken issue with the contents of Ms Lynn's Datix statement if she had been given it. On balance, we find that Ms Lynn's statement was not given to her.

53. The bundle contained contemporaneous emails between the Claimant and Ms Eves and Ms Peck (about potential coaching support) about matters unrelated to her complaint. In both exchanges, Ms Eves and Ms Peck were trying to support the Claimant but the Claimant misinterpreted their actions. Ms Peck's innocuous question about arranging a meeting to "**discuss if I can help you at all?**" led the Claimant to reply stating that she found the tone of the email to be very unwelcoming and insensitive, reflecting negativity and unwillingness sincerely to assist in her recovery. Ms Eves was concerned that an unknown Registrar had turned up to scan with the Claimant at Clacton and asked whether the Claimant had arranged this or whether he had just turned up. From the apology offered by Ms Eves to the Claimant in the same email it is clear that she was not criticising the Claimant but was concerned that the Claimant may have been required to work with somebody she did not know. The Claimant's overly lengthy reply and her statement that she found Ms Eves' email "**quite strange and suspicious**" show the extent to which the original incident and failure to deal with her complaint had caused her to lose trust in the Respondent.

54. There followed a series of emails between Ms Porter and the Claimant about the need for a formal grievance complaint form. On 6 August 2019, the Claimant set out her account of the meeting on 29 July 2019 and conclusion that management did not intend fully to investigate or take seriously her complaint. In her email, the Claimant stated:

> "**the necessary disciplinary actions need to be taken so as to prevent incidents of this nature from reoccurring on the job and for respective persons in management to take reported incidents of abuse/assault on the job seriously.**
> **…**
> **As it relates to the terms of reference for the formal complaint these are: incident of violence and aggression which occurred on 25/03/2019 (what was happening before, during and after), procedures and polices relating to incident is not disclosed to me the victim, work practices and the working environment which results in health and safety issues (what breaches took place) and discrimination (various types of discrimination is to be looked at). The investigator is to received (sic) the formal complaint/grievance of 89 pages which I emailed to you."**

55. A grievance meeting was scheduled for 13 September 2019. On 6 September 2019, it was cancelled by Ms Porter. On 10 September 2019, Ms Porter emailed the Claimant to say that she needed to complete the formal grievance complaint form as they needed to know the specific points about which she was unhappy and the outcome she required, failing which they would assume that she no longer wished to proceed. The Claimant did not reply and on 17 September 2019, the Claimant's grievance was closed. In cross-examination, Ms Porter accepted that the Claimant's complaint should have been treated formally. The Tribunal agrees.

56. Since August 2019, the Claimant had been looking for employment elsewhere. Ms Eves provided supportive references for the Claimant upon request. On 7 October 2019 the Claimant resigned. In her resignation letter, the Claimant referred to the incident on 25 March 2019 and the subsequent failure to deal with her formal complaints, leading to the closure of her grievance whilst she was on leave. Ms Eves replied that she would not accept the resignation and asked for a meeting with the Claimant to discuss her concerns. The Claimant declined a meeting and the Respondent accepted her resignation. Her last day of service was 5 January 2020.

57. In addition to her work for the Respondent, the Claimant had a second job with an organisation providing private antenatal ultrasounds. This was known to the Respondent and was permitted; it was not a breach of the Claimant's contract of employment. Ms Eves became aware that the Claimant had been working for this other company whilst off sick from the Respondent's employment. She took advice and referred the matter to the HCPC for an investigation into suspected fraud. The concern was not that the Claimant had a second job but whether or not she should have been undertaking work in that second job whilst she was off sick with the Respondent. Even though we accept the Claimant's explanation as valid, we also accept that there was the need for an investigation.

58. The Tribunal finds that Ms Eves was supportive of the Claimant during her employment, she provided supportive references and even after the resignation of the Claimant sought a meeting to see if there was some way of addressing the Claimant's concerns so that she could stay. In the circumstances, the Tribunal accepts as credible and reliable Ms Eves' evidence that she was not making an accusation, simply following the correct process to investigate whether or not there was a case to answer in respect of the Claimant working for another employer whilst off sick from the Respondent. The HCPC referral was entirely because Ms Eves believed that she had a professional duty to refer the matter for further investigation.

59. In her witness statement, the Claimant refers to her ongoing ill-health due to stress, anxiety and depression which she attributes to the incident on 25 March 2019. Her GP records show entries for stress from April 2019 and multiple entries in November and December 2019. Throughout her correspondence and in her witness statement, the Claimant sets out the effect on her mental health of her perception of the discrimination and unfairness which had happened in the Respondent workplace, with increased anxiety and depression after returning to work in November 2019 which led to her being signed off sick at the Respondent. The Claimant continued to work for her other employer as she perceived the workplace to be supportive and beneficial to her mental health.

60. Further, as she sets out in her witness statement, the Claimant did not have the funds to instruct a lawyer in respect of a claim against the Respondent. The Claimant joined UNISON in June 2019 but was told that they could not assist her as the conduct about which she was complaining occurred prior to her membership and the subsequent issues were all linked to that pre-membership incident. The Claimant genuinely believed that the conduct extended over a period up to and including the termination of her employment, describing it as a chain reaction of adverse negative events part of treatment extending over a period of time and being interlinked.

Law

61. Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **"(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."**

62. In **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn: (i) the alleged conduct, (ii) whether it was unwanted, (iii) its purpose or effect and (iv) whether it related to a protected characteristic. As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

63. In **Pemberton v Inwood** [2018] EWCA Civ 564, Underhill LJ revisited **Dhaliwal** in light of the introduction of s.26 and the difference in language to the predecessor harassment legislative provisions. Underhill LJ made clear that in considering whether conduct had the proscribed effect, the Tribunal must consider both the subjective perception of the complainant and whether it was objectively reasonable for that conduct to be regarded as having that effect taking into account all other circumstances.

64. In **Tees Esk and Wear Valley NHS Foundation Trust v Aslam** [2020] IRLR 495, the EAT held that section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be. There must be some part of the factual matrix which properly leads to the conclusion that the conduct is related to the particular characteristic.

65. Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Disability is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

66. Section 27 of the Equality Act 2010 prohibits victimisation. The Claimant does not need to show a comparator but she must prove that she did a protected act and that she was subjected to a detriment because she had done that protected act. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome.

67. In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

68. In considering whether the burden of proof has shifted, the Tribunal should not adopt an overly mechanistic approach but rather consider whether discrimination can properly and fairly be inferred from the evidence, **Laing v Manchester City Council** [2006] IRLR 748. A Tribunal will be setting an impermissibly high hurdle, however, if it asks if discrimination is the only inference which could be drawn from the facts, **Pnaiser v NHS England and Coventry City Council** [2016] IRLR 170, EAT.

69. Section 123 of the Equality Act 2010 provides that no complaint may be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. For the purposes of this section conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

70. An act will be regarded as extending over a period if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant. The concepts of 'policy, rule, practice, scheme or regime' should not be applied too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period, **Hendricks v Metropolitan Police Comr.** [2003] IRLR 96, CA at paras 51-52. Where there are numerous allegations of discriminatory acts or omissions, the complainant must prove that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus should be on the substance of the complaints to determine whether there was an ongoing situation or continuing state of affairs as distinct from a succession of unconnected or isolated specific acts.

71. If the claim is presented outside the primary limitation period (that is, after the relevant three months), the tribunal may still have jurisdiction if, in all the circumstances, it is just and equitable to extend time. This is essentially an exercise in assessing the balance of prejudice between the parties, using the following principles:

- The claimant bears the burden of persuading the tribunal that it is just and equitable to extend time. There is no presumption that time will be extended but nor is there any magic to that phrase and it should not be applied too vigorously as an additional threshold or barrier.

- The tribunal takes into account anything which it judges to be relevant and may form a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for a respondent to be put to defending a late, weak claim and less prejudicial for a claimant to be deprived of such a claim;

- This is the exercise of a wide, general discretion and may include the date from which a claimant first became aware of the right to present a complaint. The existence of other, timeously presented claims will be relevant because it will mean, on the one hand, that the claimant is not entirely unable to assert his rights and, on the other, that the very facts upon which he seeks to rely may already fall to be determined. Consideration here is likely to include whether it is possible to have a fair trial of the issues. This will involve an assessment of two types of prejudice as referred to in the authorities. The first is the general prejudice that inherently follows from being required to respond to a claim which is presented out of time (the prejudice of meeting the claim). The second is the effect upon the evidence of the delay (sometimes referred to as forensic prejudice).

- There is no requirement to go through all the matters listed in section 33(3) Limitation Act 1980, provided no significant factor has been left out of account, **British Coal Corporation v Keeble** (length and reason for delay, effect on cogency of evidence, cooperation, steps taken once knew of the possibility of action).

72. The best approach for a Tribunal considering the exercise of its discretion to extend time is to assess all the factors in the particular case. These will include the public interest in the enforcement of time limits and the undesirability in principle of investigating stale issues, **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23.

Conclusions

Harassment/Direct Discrimination – race and age

73. Issues 1.1.1 and 1.1.2 both relate to Ms Moroney's decisions on 25 March 2019 in the face of Ms Lynn's conduct, namely arranging to conduct the scan on MG instead of the Claimant, asking the Claimant questions during the incident with Ms Lynn, in conducting a second scan on MG and, finally, in allowing the Claimant to be subject to abuse by Ms Lynn.

74. The Tribunal has not accepted the Claimant's case that Ms Moroney agreed with Ms Lynn the night before that she would conduct the scan on 25 March 2019. It was an arrangement made on the day. It was a private arrangement to the extent that MG was allocated to the Claimant's list but Ms Moroney agreed to carry out the scan instead at the request of Ms Lynn. This was a non-routine scan to which MG was entitled as part of her antenatal healthcare. As for the second scan, it was not a measurement scan but was a decision made by Ms Moroney to defuse a difficult situation. The Claimant does not agree

that it was the right thing to do but, in all of the circumstances, the Tribunal does not accept her submission that it was an improper benefit in breach of the Nolan standards or of the Nursing and Midwifery Council Conflict of Interest joint statement. Moreover, it had nothing whatsoever to do with the Claimant's race or age.

75. Ms Moroney's agreement to carry out the initial scan and subsequent offer to show Ms Lynn and MG the baby on a second scan in another room was not, we have found, conduct which had the purpose or effect of facilitating or allowing the abuse. Patients were routinely swapped between sonographers and the agreement of Ms Moroney to scan MG was not the reason why the unpleasant situation unfolded. Ms Lynn's anger and inappropriate behaviour were because she had not been present during the scan, not that it had been undertaken by the Claimant rather than Ms Moroney. Her reaction would have been the same even if a sonographer of a different race or age (or even Ms Moroney) had performed the scan in her absence.

76. The Tribunal has found that Ms Moroney's questions to the Claimant during the incident were born of a desire to defuse the situation and reassure MG. The questions were asked in a normal voice and tone and were neither persistent nor designed to make the Claimant appear stupid, they were intended to give the Claimant a voice and calm the situation. We do not accept the Claimant's case that they facilitated or allowed the Claimant to be subjected to abuse by Ms Lynn.

77. As for the re-scan, whilst the Tribunal can understand the Claimant's genuine perception that this approach essentially rewarded Ms Lynn's inappropriate behaviour, it could not be said to have facilitated the abuse as it came afterwards and not before. Indeed, it was offered as a way of putting an end to the upsetting situation in which the Claimant had been placed. In the same circumstances, the Tribunal concludes that Ms Moroney would have acted in the same way irrespective of the age or race of the sonographer being subjected to Ms Lynn's inappropriate behaviour.

78. The Claimant submitted that the "can you not read" was a microaggression related to a stereotypical assumption based upon her race. The Tribunal do not agree; it was because "Lorraine to scan" had been written on the appointment letter and would have been said to any sonographer regardless of race. Furthermore, Ms Lynn's conduct was not included in the list of issues as an act of harassment or direct discrimination whether because of race or age. Ms Moroney is not a proper comparator for the direct discrimination claim as she did not perform a scan in the absence of Ms Lynn and therefore her circumstances were materially different.

79. As in **Tees Esk & Wear Valley**, no matter how unwanted the conduct of Ms Moroney in agreeing to do the first scan, asking the Claimant questions about the measurements and then offering to do another scan to show Ms Lynn and MG the baby there is nothing in the factual matrix which could properly lead us to conclude that either was related to or because of the Claimant's race or age.

80. The remaining issues in the claims of direct discrimination because of race or age and of harassment related to race or age all arise from the handling of the Claimant's complaints about Ms Lynn and Ms Moroney's conduct on 25 March 2019.

81. The Tribunal has found that Ms Gordon-Clement encouraged the Claimant to make a Datix complaint but did not advise her that it could be raised as a grievance. The Tribunal

has found that it was not clear to her that this was an issue between members of staff which would be dealt with under the grievance or disciplinary policy. That uncertainty was shared by the Claimant. Based on our findings of fact, the Tribunal does not agree that Ms Gordon-Clement did not advise the Claimant on how to raise a complaint, she did but as a Datix complaint and not as a grievance. Ms Gordon-Clement would have acted in the same way to any employee in the same or materially similar circumstances; her advice and failure to suggest raising a grievance had nothing to do with the Claimant's race or age.

82. As for the general issue of managing the grievance poorly and taking months to start it, the Respondent accepted that with hindsight they should have acted more quickly and that mistakes were made. Ms Murphy submitted, however, that this was a very long way from being sufficient evidence for the Tribunal to safely conclude that there had been any act of discrimination. The Claimant's case is that there was subconscious motivation; her complaints were about Ms Lynn and Ms Moroney who were older and of a different race and she submits that these were contributing factors in why her grievance was managed poorly.

83. Having regard to our findings of fact, the Tribunal has concluded that Ms Macey wanted to shut down the Claimant's Datix complaint by way of an informal outcome in order to protect Ms Lynn from the consequences of her conduct towards a younger member of staff. The Claimant had repeatedly and clearly stated that she wanted to make a formal complaint. HR understood from the Datix complaint that there could be potential disciplinary action required. Ms Gordon-Clement knew that the Claimant wanted to make a formal complaint, as did Ms Eves. By the end of May 2019 at the very latest, Ms Porter knew that she needed to prod further to see whether action had been taken and that the Claimant wanted to pursue a formal complaint, with a proper investigation and disciplinary action to be taken.

84. Despite all of this, and the Claimant's further complaint in June 2019, an investigator for the grievance was not appointed and the Claimant was incorrectly told that she needed to put her grievance onto the form appended to the grievance procedure. Having heard all of the evidence, the Tribunal concludes that nobody was taking ownership to explain to the Claimant the process, to ensure that the complaints were formally investigated and a conclusion reached. Throughout, we conclude, the focus of the Respondent and in particular Ms Macey was to press for an informal resolution to protect Ms Lynn, a more senior and older employee, and not to accede to the Claimant's repeated requests for a formal investigation. This culminated in the closure of the grievance on 17 September 2019 on the incorrect basis that the Claimant had not completed a form which was not required by the grievance policy then in force.

85. The poor handling of the grievance (delay, lack of information, no formal process, no independent investigation) was conduct unwanted by the Claimant. It is evident from her contemporaneous emails and written complaints that the failure to act upon her complaint both violated her dignity and was creating an intimidating and offensive environment for her subjectively. Over time, and particularly from 20 June 2019, the Tribunal concludes that the Claimant lost objectivity due to her frustration at the mismanagement of the investigation of her complaint and began to perceive as harassment or ill-treatment anything with which she disagreed (for example her response to Ms Eves about the unknown radiographer and to Ms Peck). However, in deciding whether it was objectively reasonable for the mishandling of the grievance to have the prescribed effect the Tribunal

focused on the effect of the lack of progress, transparency or independent investigation into the grievance. We conclude that it was also objectively reasonable for that conduct to have the proscribed effect and agree with the Claimant's view that her complaint about very serious misconduct had been "**swept under the rug, not taken seriously and ignored**".

86. In deciding whether the conduct was related to a protected characteristic, the Tribunal concludes that the relevant part of the factual matrix is the respective seniority of the Claimant and Ms Lynn; given that Ms Lynn had been working for the Respondent since before the Claimant had been born, seniority was related to age. There was an attitude that the Claimant was overreacting and should just accept the apology pressed upon her. There was an evident reluctance by all concerned to treat this as a formal complaint or to subject Ms Lynn to possible disciplinary action for her inappropriate behaviour towards the Claimant. The Tribunal concludes that this was because of the Claimant's more junior and younger position by reference to an older and more senior member of staff, Ms Lynn. There is, however, nothing in the factual matrix from which we could conclude that race was also a reason for the poor handling of the grievance.

87. For this reason, the Tribunal concludes that the poor management of the Claimant's grievance was harassment related to her age but not to her race.

88. In addition to the general issue of poor management and delay in dealing with the grievance, the Claimant has also raised specific issues in respect of the question posed by Ms Porter in the meeting on 25 June 2019 and Ms Macey's comments in the meeting on 29 July 2019. Dealing with Ms Porter's question, the Tribunal has found as a fact that the question was asked but that it was a routine question when meeting an employee for the first time. In context, it could not reasonably have the proscribed effect. Nor does the Tribunal consider it safe to draw an adverse inference that simply because the question related to length of service that it was also related to age given the particular context in which it was asked.

89. The Tribunal has found as a fact that Ms Macey did say words to the effect that Ms Lynn had worked for the Respondent for years, that this was the first time a complaint had been raised against her, asked the Claimant how long she had worked for the Respondent and what did she have to gain from a formal complaint. These were not routine or introductory questions or comments. The Tribunal concludes that it was unwanted conduct for the Claimant as it sought to dissuade her from proceeding formally and was pressure placed upon her to deal with Ms Lynn's conduct informally.

90. Ms Macey's comments had the subjective effect of violating the Claimant's dignity and creating the proscribed environment. The Tribunal can see objectively why the Claimant felt this way – after four months and despite being told that an independent investigator was being recruited and that this meeting was to decide the terms of reference for an independent investigation, she was again being pushed for an informal meeting which she had said repeatedly that she did not want. Moreover, the Claimant was effectively being criticised for not being clear as to the outcome she desired and being told to deal with matters informally, when she had made it perfectly clear that she had expected disciplinary action to be taken. Procedural obstacles were being put in the way of the complaint which, we infer, were designed to press the Claimant to accept informal resolution and the gravity of the complaint and the effect of what had happened were not being taken seriously.

91. In deciding whether the conduct was related to the protected characteristic of age, as with the general criticism of the handling of the grievance, the Tribunal concludes that the relevant part of the factual matrix is the respective seniority of the Claimant and Ms Lynn; given that Ms Lynn had been working for the Respondent since before the Claimant had been born, seniority was related to age. Ms Macey's comments overtly contrasted the length of service of the Claimant and Ms Lynn. The comments related to the Claimant's position as a younger and more junior employee by contrast with the older, more senior Ms Lynn. Again there is, however, nothing in the factual matrix from which we could conclude that race was also a reason for the poor handling of the grievance.

92. Insofar as the comments are also relied upon as acts of direct discrimination because of age, they cannot be a detriment as we have already found them to be an act of harassment. In any event, however, the Tribunal concludes that the comments were not part of the ordinary course of questions to investigate the Claimant's complaint. Quite the contrary, they were intended to dissuade the Claimant from proceeding with her formal complaint. This is not a legitimate aim.

93. For this reason, the Tribunal concludes that Ms Macey's comments on 29 July 2019 were harassment related to the Claimant's age but not to her race.

94. The final act of harassment identified in the list of issues is the HCPC referral on 27 January 2020. The Tribunal has found as a fact that the HCPC referral was entirely because Ms Eves believed that she had a professional duty to refer the matter for further investigation. Although undoubtedly unwanted conduct by the Claimant, this was a legitimate cause for enquiry and which could not reasonably have the proscribed effect. Furthermore, it was not in any way related to age or to race.

Victimisation

95. The Respondent has not conceded that the Claimant's report to Ms Gordon-Clement on 25 March 2019 or her Datix complaint on 26 March 2019 are protected acts. The Tribunal has found as a fact that in neither did the Claimant allege discrimination of any sort. Nor was there anything within those complaints which would have caused the Respondent to believe that she may be intending to assert her rights under the Equality Act. The Claimant first referred to discrimination on 10 April 2019 and this, we conclude, was the first protected act with further protected acts made on 20, 24 and 25 June 2019.

96. The sole detriment relied upon in the victimisation claim is the referral to the HCPC on 27 January 2020. For the same reasons set out above in rejecting the harassment claim, the Tribunal concludes that the referral was in no way because of the protected acts. The HCPC referral was entirely because Ms Eves believed that she had a professional duty to refer the matter for further investigation and would have happened in the same way with or without the protected acts.

Time Limits

97. In respect of the two acts of harassment found by the Tribunal, one is the comments by Ms Macey on 29 July 2019 and the other is the poor management of the Claimant's grievance. The Tribunal finds them to be part of a continuing course of conduct as each relates to the same subject matter (the Claimant's complaint). The mishandling of the grievance and the obstacles to a formal grievance and Ms Macey's comments were all

related to age in the same way and were a continuing state of affairs until 17 September 2019 when the grievance was closed. The Tribunal concludes that time to present a claim started from that date.

98. The Claimant commenced early conciliation on 27 March 2020, a date when she was already three-months late to present a complaint. The issue is therefore whether it is just and equitable to extend time.

99. The Tribunal has been able to hear all of the evidence in this case and make appropriate findings of fact following a fair trial. The delay in bringing the claim has had no effect on the cogency of the evidence; witnesses did not suggest that they could not recall the key matters in dispute and much of the evidence was set out in contemporaneous documents. Having heard the evidence, the Tribunal has concluded that the two particular matters complained about did amount to harassment as defined in section 26. If, therefore, the extension of time is not granted the Claimant will suffer the injustice of being deprived of a remedy for what would otherwise have been unlawful harassment. Whilst there is a public interest in the enforcement of time limits, there is an equal public interest in allegations of harassment contrary to the Equality Act being heard and giving rise to a remedy where well-founded on the merits.

100. The merits of the claim following a full hearing is a strong factor in favour of finding it just and equitable to extend time, but it is not a determinative factor. The Tribunal must look at all the circumstances of the case. We consider it relevant that during this period the Claimant was suffering from stress, anxiety and depression which was specific to her workplace problems. She did not have access to legal advice as she was unable to afford it and UNISON declined to assist her as she joined after the incident occurred. As a litigant in person, the Claimant believed that the conduct extended over a period up to and including the termination of her employment on 5 January 2020 (and even the HCPC referral afterwards). The Tribunal has not concluded that it was treatment continuing until 5 January 2020 as the closure of the grievance occurred on 17 September 2020, however we do consider that the Claimant's genuine belief that she was still in time is a further relevant factor in favour of extending time.

101. Having regard to all the circumstances of the case, the Tribunal consider that it is just and equitable to extend time for the two complaints of harassment related to age.

R*emedy*

102. To the extent that the claims of harassment related to age have succeeded, the Claimant will be entitled to a remedy. She seeks compensation and recommendations, although given that she is no longer employed it may be that recommendations are not within the jurisdiction of the Tribunal. The following steps must be taken:

> (1) By **29 April 2022** the Claimant must send to the Respondent a revised schedule of loss, setting out the financial losses which she says were caused by the harassment, any claim for injury to feelings and/or personal injury and the precise wording of the recommendations sought.
>
> (2) By **29 April 2022** the parties will send to each other a list and copies of any documents relevant to remedy.

(3) By **27 May 2022** the parties will agree the contents of a bundle of documents for use at the remedy hearing. The Respondent is responsible for producing sufficient copies for the Tribunal and the witness table.

(4) By **1 July 2022** the parties shall exchange witness statements containing any further evidence which they wish to give relevant to the issues on remedy.

(5) The remedy hearing will be listed for one day, as soon as possible after **1 August 2022.**

Employment Judge Russell
Dated: 25 March 2022