Case No: 1601782/2019

EMPLOYMENT TRIBUNALS

Claimant:	**XY**
Respondent:	**Ludlow Street Healthcare Limited**
Heard at:	**Cardiff and by video (CVP)**
On:	**7, 8, 9 and 17 March 2022**
Chambers Day:	**17 April 2022**
Before:	**Employment Judge Brace**
	Non legal members: Mrs A Fine
	Mr M Pearson

Representation

Claimant:	In person
Respondent:	Mr D Bheemah (Counsel)

RESERVED JUDGMENT

IT IS THE UNANIMOUS JUDGMENT OF THE TRIBUNAL THAT:

The complaints of harassment related to disability (s.26 Equality Act 2010) and direct disability discrimination (s.13 Equality Act 2010) are not well founded and are dismissed.

The complaints of harassment related to race and sexual harassment (s.26 Equality Act 2010) and direct race discrimination (s.13 Equality Act 2010) are out of time, time is not extended and the complaints are dismissed.

The compliant of unfair dismissal (s98 Employment Rights Act 1996) is not well founded and is dismissed.

RESERVED REASONS

Claims and List of Issues

1. The Claimant is a 33 year old black African woman who was diagnosed as HIV+ in 2008. She is therefore a disabled person by reason of that HIV status under s.6 Equality Act 2010.

2. She was employed as a Support Worker with the Respondent from 6 June 2016 until the termination of her employment on 4 July 2019. The Claimant was dismissed by the Respondent following a disciplinary hearing on allegations of misconduct in relation to use of threatening, rude and abusive language towards another member of staff.

3. On 19 August 2019 the Claimant contacted ACAS and early conciliation commenced. Early conciliation ended on 28 August 2019.

4. On 4 October 2019, the Claimant issued her ET1 and attached particulars ("ET1 Particulars",) a document that the Claimant had herself drafted [1]. In those ET1 Particulars the Claimant asserted that she had been dismissed because of her medical condition (HIV+) but that the Respondent had used her conduct as an excuse.

5. She further asserted that who had disclosed her HIV status was '*not a big deal'* to her, but that the allegations giving rise to the October 2018 and July 2019 disciplinary hearings had been fabricated. She asserted that the Respondent had found out that another nurse, Zewili Nkomo, had disclosed her HIV status and that the Respondent had fabricated lies to get rid of her including allegations that had given rise to a final written warning in 2018 as well as the allegations which gave rise to her dismissal in 2019. She admitted that she had not disclosed her HIV status to the Respondent when she had joined employment, but asserted that management knew as a former co-worker, Brighton Mlambo had told her who had disclosed it and that management knew.

6. She claimed unfair dismissal and disability discrimination (harassment) both in the ET1 form at Box 8.1 and in the attached ET1 Particulars. She made no claim or reference to a claim for sex or race discrimination.

7. After issuing her claim, the Claimant sought legal advice and was represented at the first case management hearing on 2 January 2020 before Judge Ryan. At that hearing, it was confirmed that the Claimant had prepared her own claim form and had only recently instructed her representative. The Claimant was ordered to supply further and better particulars of her disability discrimination claim confirming comparators, the less favourable treatment alleged and the words/conduct in relation to her harassment claim ("Further Particulars"). A copy of that case management order was not within the Bundle and there is no reference within that order to there being a discussion at that stage that the Claimant was seeking to bring complaints of sex and/or race discrimination.

8. The Further Particulars were provided on 17 January 2020 [34] and in those Further Particulars, the Claimant asserted that she had been subjected to harassment from the middle of August 2018 and that this had been ongoing until her dismissal, on the basis that staff had been told to be '*mindful of the Claimant because she is sick'.*

9. She also sought to bring new claims of sexual harassment and race discrimination.

a. She asserted that Enias Chawana had said to her the words that now form the basis of her sexual harassment claim (an issue that she had referred to in her ET1 Particulars) [36].

'do you want to fuck. I can lick you from behind'

b. She also asserted that Nick Robinson had said the words she now relies on to bring her complaint of race discrimination (again, an issue that she had referred to in her ET1 Particulars)

"You guys are black, go sort yourselves out…… I won't bother with the management, they don't give a "F" about anyone but their money "

10. At case management on 3 April 2020, Judge Ryan set out a draft list of issues, subject to permission being granted to the Claimant to amend her claim to include the complaints of race discrimination and sexual harassment [46]. Whilst the comments from Enias Chawana of a sexual nature are included, wider conduct asserted, including trying to tell the Claimant to touch his penis and/or pressing her hand towards his penis or otherwise, are not. A separate case management preliminary hearing was listed to consider the Claimant's amendment application.

11. At the preliminary hearing on 17 July 2020, Judge Philip Davies gave permission to the Claimant to amend her claim to include a claim of race discrimination and/or harassment and harassment of a sexual nature as set out in the order of Judge Ryan of 3 April 2020 [72] i.e. in relation to the comments of :

a. The comments of 5 February 2019 of David Robinson: *"You guys are black, go sort yourselves out. I won't bother with the management, they don't give a "F" about anyone but their money".*

b. The comments of 5 February 2019 of Enias Chawana*: 'do you want to fuck. I can lick you from behind'*

12. Judge Davies made clear that the applicability of time limits could be considered by him but that it was not necessary to do so in order to grant an amendment specifically referring to **Galilee v Commissioner of Police of the Metropolis** 2018 ICR 634, EAT**.**

13. The parties were also directed by Judge Davies to agree a list of issues. This had not taken place by this final merits hearing and the Respondent's representative indicated that the draft List of Issues, as prepared in draft by Judge Ryan at the case management preliminary hearing on 3 April 2020, could stand as the issues to be determined following the Claimant's successful amendment application.

14. After reviewing that list of issues, and following further discussion with the parties, it was confirmed by the Claimant that there was an error in the draft list of issues, that she had not emailed management regarding David Robinson and and she was not relying on treatment of:

By not responding to the Claimant on 05 February 2019 when the Claimant emailed the Respondent management regarding NIC David Robinson'

15. She confirmed that she was happy that the remaining issues did reflect the claims being brought but she also raised that she wanted to bring additional claims of direct race discrimination in relation to:

    a. Her dismissal on 5 July 2019;

    b. The escalation of the investigation regarding her misconduct to a disciplinary hearing on 1 July 2019; and

    c. The investigation into her on 8 October 2018 regarding failure to follow safeguarding.

16. These were not issues reflected in the draft list of issues and the Respondent considered that these complaints amounted to an amendment of the claim, not just an amendment to the list of issues.

17. After submissions from the both parties, the Tribunal confirmed that it considered that this was an application to amend the claim rather than just an amendment of the list of issues. Submissions from both parties were made on whether the Claimant should be given permission to amend her claim. The Claimant's application to amend her claim to bring these further complaints was also refused and oral reasons were provided but in broad terms we took into account:

    a. That these were new complaints that were not evident when one read the ET1 claim form as a whole;
    b. the timing and manner of application i.e. a discussion on the list of issues (as opposed to a formal application to amend) on the morning of the final merits hearing, and after a number of previous case management hearings including a hearing that had considered the Claimant's amendment application to include a claim for race discrimination;
    c. that the claims were not made in time and the Tribunal did not consider it just and equitable to extend time;
    d. the balance of hardship and the relative injustice and hardship caused to the Respondent if the claims were permitted, which the Tribunal considered outweighed the prejudice to the Claimant in refusing the application in that the defence differed in relation to the disability discrimination claim than it did to the race discrimination claim and the Respondent witnesses would not adequately be able to deal with them.

18. The final List of Issues for determination by this Tribunal were therefore finalised and as set out in Judge Ryan's order as amended as follows (and, so as not to confuse the parties, using the same numbering adopted by Judge Ryan in his case management order).

List of Issues

(ii) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA").

Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period and whether time should be extended on a just and equitable basis.

(iii) Disability

a. The parties agreed that the claimant was a disabled person (under s6 EQA) at all relevant times by reason of her HIV status; under EqA 2010, Sch 1 para 6.
b. Was the Respondent aware at all relevant times, of the Claimant's HIV status?

(iv) EQA, section 26: harassment related to disability.

a. Did the respondent engage in unwanted conduct as follows?

(a) By the Respondent staff informing agency staff to be mindful of the Claimant because she is sick, on or around the following dates;
(b) August 2018;
(c) On an ongoing basis towards the end of 2018;
(d) On an ongoing basis from the beginning of 2019 onwards.

b. If so was that conduct unwanted?
c. If so, did it relate to the protected characteristic of disability?
d. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(v) EQA, section 13: direct discrimination because of disability

a. Has the respondent subjected the claimant to the following treatment: namely;

(a) Dismissing the Claimant on 05.07.2019;

(b) Escalating the investigation regarding the Claimant's misconduct to a disciplinary hearing, on 01.07.2019;

(c) By investigating the Claimant on 08 of October 2018 regarding failure to follow Safeguarding;

(d) By the Respondent staff informing agency staff to be mindful of the Claimant because she is sick, on or around August 2018.

b. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it

treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparator of a work colleague without HIV facing allegations of similar misconduct, and/or hypothetical work colleague comparators in not materially different circumstances.

c. If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

(vi) EQA, section 26: harassment related to race;

a. Did the respondent engage in conduct as follows?

   On the 05 February 2019 the NIC David Robinson said to the Claimant; *"You guys are black, go sort yourselves out"*

b. If so was that conduct unwanted?

c. If so, did it relate to the protected characteristic of race?

d. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(vii) EQA, section 13: direct discrimination because of race

a. The claimant is of black African ethnicity.

b. Has the respondent subjected the claimant to the following treatment?

   On 05 February 2019 the NIC David Robinson said to the Claimant; *"You guys are black, go sort yourselves out, I won't bother with the management, they don't give a "F" about anyone but their money".*

c. Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

d. The claimant relies on the hypothetical comparator of a white British worker at the Respondent Company.

e. If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

(viii) EQA, section 26: harassment of a sexual nature

a. Did the respondent engage in conduct as follows?

On the 05 February 2019 *Enias Chawana harassed the Claimant, in stating;*

'do you want to fuck. I can lick you from behind'

b. If so was that conduct unwanted?

c. If so, was it of a sexual nature?

d. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(ix) Unfair dismissal

a. Did the Respondent follow the relevant Acas Code of Practice relating to the Claimant's disciplinary?
b. Did the respondent fail to deal with the claimant's issue fairly?
c. If the Respondent did fail to follow the ACAS Code, was it an unreasonable failure to follow the relevant procedure in the Code by the respondent?
d. The Claimant alleges that the Respondent did not provide details (time, date and incident) to the Claimant on the specific allegations regarding co-workers who had complained about her being aggressive, at the investigation meeting on Wednesday 19th June 2019, or the disciplinary hearing on 05 July 2019.
e. In particular;
    i. Did the respondent treat employees consistently in their treatment of the claimant?
    ii. Did the respondent carry out any necessary investigations in order to establish the facts?
    iii. Did the respondent give the claimant the opportunity to put her case before any decisions were taken?

(x) If necessary to consider UD remedy:

a. To what extent should any award be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and any procedural errors would have made no difference to the outcome?
b. Did the Claimant's own behaviour contribute towards her dismissal
c. If so, should that contributory fault cause a reduction in any award of compensation?
d. If found, was the respondent's failure to follow the Acas Code unreasonable?
e. If so, should that unreasonable failure cause an increase in any award of compensation?

The evidence

Witness evidence

19. A bundle of witness statements was provided which included:

    a. The Claimant's witness statement, which ran to some 6 pages and which also attached an updated Schedule of Loss; and

    b. Statements from the Respondent's witnesses, from:

        i. Hazel Orr, Operational Director (retired) and Disciplinary Officer;
        ii. Helen Leigh, Area Manager and Appeal Officer;
        iii. Sarah House, Operations Director.

20. All witnesses relied on those witness statements which were taken as read. The witnesses were subject to cross-examination, the Tribunal's questions and re-examination.

21. The Respondent's counsel confirmed in response to clarification sought by the Tribunal that:

    a. neither Enias Chawana nor David Robinson were being called to give evidence;
    b. that both were still in the Respondent's employment; and
    c. the Respondent was not relying on the statutory defence under s.109(4) Equality Act 2010.

22. At case management discussions on the morning of the first day and prior to hearing evidence from the witnesses, the Claimant had referred to some final written submissions that she stated she had sent in to the Employment Tribunal in August 2021 in anticipation of the final merits hearing that had been originally listed for August 2021 ("Written Submissions"). These Written Submissions were not included in the Bundle, had not been uploaded into the DUC by the Respondent along with the witness statements and Bundle. Neither party had a hard or electronic copy of the Written Submissions with them at the hearing.

23. At the end of initial cross-examination of the Claimant, and because the Claimant had referred again to these Written Submissions in her cross-examination evidence, the Tribunal again sought to and did manage to locate a copy of these Written Submissions from the Tribunal file and, at that point, re-considered with the Claimant and the Respondent's counsel the status of these Written Submissions in conjunction with additional correspondence from the Tribunal file, correspondence which had not been included in the Bundle but which included:

    a. An email that the Claimant had sent to the Tribunal and to the Respondent on 8 August 2021 (prior to the original listed final merits hearing) enclosing the Claimant's Written Submissions;
    b. An email that the Respondent's solicitor had sent to the Tribunal on 4 February 2022 regarding these Written Submissions;
    c. The direction of Judge Jenkins of 7 February 2022; and
    d. The Claimant's response of 14 February 2022.

24. After discussions with the parties and considering the oral submissions from both, it was determined that these Written Submissions were in reality a further and original statement of the witness evidence that the Claimant relied on, that in order to comply with the overriding objective deal with cases fairly and justly, the Claimant should have permission to rely on the Written Submissions as part of her evidence, but that to ensure a fair and just hearing and in accordance with the overriding objective, the Claimant should be recalled for the Respondent's representative and Tribunal to be able to ask questions of her regarding that evidence, before hearing the Respondent's evidence. The Respondent's representative did not object to this proposal and the case continued on this basis.

Bundle

25. The Tribunal had been provided with an agreed bundle of documents of some 282 pages ("Bundle").

26. An application was made by the Claimant for specific disclosure of:

    a. time sheets for Enias Chawana. She considered these relevant to support her case that Enias Chawana should have been looking after a service user on 29 May 2019 and, as he was not, this justified her behaviour in swearing and shouting at him; and
    b. an email of 5 February 2019 from the Claimant relating to a misunderstanding between the Claimant and a female agency worker resulting in a rumour that the Claimant had threatened to beat up the agency worker.

27. After considering submissions from the parties, an order for specific disclosure was not made as the Tribunal was not persuaded that the documents were either relevant or necessary for the fair disposal of the proceedings. A copy of the 5 February 2019 email was later provided by the Respondent on a voluntary basis and included in the Bundle in any event.

28. Throughout the hearing, further additional documents were provided by both the Claimant and the Respondent. No objections were raised by either party and these were included in the Bundle which ran to some 296 pages. References to the hearing Bundle appear in square brackets [ ] below.

29. The Tribunal informed the parties that unless we were taken to a document in the Bundle we would not read it and both parties confirmed that no reasonable adjustments were required.

Timetabling

30. The Tribunal confirmed to the parties that the hearing would be split: liability first and then remedy if the Claimant was successful on all or any of her claims.

31. Timetabling was discussed and it had initially been agreed that the cross-examination of the Claimant would be completed within one day and that cross-examination of the Respondent witnesses would be completed within one day, with a view to completing the evidence and hearing submissions by the end of the third day.

32. Due to the further case management, and in particular the issues relating to the Claimant's Written Submissions being admitted as a further statement of evidence from the Claimant, the cross-examination of the Claimant was not completed until the end of the third day. A fourth day was therefore listed for the Respondent's evidence and submissions.

Anonymity Order

33. Of her own initiative, Judge Brace raised the issue of whether a form of anonymisation of the Claimant or restricted reporting order under rule 50 Employment Tribunal Rules of Procedure 2013, was appropriate in this case due to the Claimant's own disability and the concerns held regarding the impact that disclosure of the Claimant's HIV status might have on both the Claimant and her child, in particular their rights under Article 8 European Convention on Human Rights.

34. The Claimant had indicated at the outset of the final merits hearing that she did not want any form of privacy order as she had discussed with her child her HIV status and it was now more known. This was raised again on Wednesday 9 March 2022 by Judge Brace however as, despite maintaining that she wished for written reasons to be published online which included her name, the Claimant also became extremely upset during questioning, expressing concern it would become known that she was HIV+ more widely and that her child could be treated unfairly as a result.

35. The parties were asked to make submissions again on a privacy order in advance of the hearing on 17 March 2022 and Judge Brace wrote to the parties on 11 March 2022 indicating that any submissions should be copied to the other party. In her written submissions, the Claimant subsequently sought to have her name anonymised, as well as her specific diagnosis.

36. Following those submissions from both the Claimant and the Respondent, an anonymity order in respect of the Claimant's identity but not her diagnosis, together with a restricted reporting order. Oral reasons were provided on the day.

Schedule of Loss

37. Whilst a Schedule of Loss appeared in the Bundle [29], in which the Claimant indicated that she had almost fully mitigated her financial losses to 4 January 2020 and was claiming £25,200 for injury to feelings, the Claimant had also submitted a further Schedule of Loss with her witness statement, in which she claimed the sum of around £11,697,800 in respect award for financial losses for 32 years and injury to feelings.

Facts

Background

38. The Tribunal made findings of fact based on the balance of probabilities on the evidence before it.

39. The Respondent is a company that provides residential care, supported living and domiciliary care services to adults with a range of disabilities. It employs approximately 1,000 employees across around 19-20 different sites in the UK.

40. The Claimant is a black African woman. She is also a disabled person by reason of her HIV status, having been diagnosed as HIV+ in 2008.

41. The Claimant started her employment with the Respondent on 6 June 2016 and, at the time of her dismissal, was employed as a Support Worker, looking after service users, or clients as they have been referred to in these proceedings, of the Respondent's care services who had been detained under the mental health legislation due to their autism, ADHD or learning disabilities and behaviours which include verbal and physical aggression where physical restraint is required. She was located at the Pinetree Court Hospital site ("Pinetree").

42. The Registered Manager for Pintetree during the period of the Claimant's employment was Sarah House and, as Registered Manager, Sarah House was responsible for the overall management of the service at that location.

Contractual terms and policies

43. The Claimant was employed on terms and conditions set out in a written contract of employment [88] which included terms that:

    a. the contract had to be read in conjunction with the Respondent's handbook (the "Handbook"); and
    b. that the employee must comply with guidelines, policies and procedures set out in that Handbook which was stated to be non-contractual.

44. The contract of employment also included reference to the Respondent's disciplinary and grievance procedures.

45. At clause 15 of the contract of employment, a clause entitled '*Positive work environment',* there was provision that employees were expected to report to their line manager or HR, any incidents or suspected incidents of discrimination or harassment of which they became aware by any means.

46. The Claimant signed the contract of employment on 6 June 2016 signifying her acceptance of the terms and acknowledging that she had access to the HR policies and that she had taken time to read such policies. Policies referred to included:

    a. A Whistleblowing Policy [96], which included provision that the Respondent would expect all employees to report on certain matters, including any endangerment of an individual's health and safety, and set out its procedure for doing so. It also included a helpline for employees if they had a concern or were unsure about the procedure;

    b. A Confidentiality Policy [102] which indicated that all employees were bound by a legal duty of confidence to protect personal information;

c. A Safeguarding Policy [126] including provision that all staff had a legal duty to report adults at risk and raised a process for doing so which included making their manager aware of concerns, or a Senior manager if a complaint or allegation of abuse was alleged and retaining records;

d. A Disciplinary Policy [282-296] which provided for three stages, including final written warning and dismissal and that first line management would be responsible for conducting disciplinary investigations and completing an investigation report. It also included as examples of gross misconduct:

   i. Use of rude or abusive language, intimidating behaviour at the workplace;
   ii. Bullying, harassment or sexual or racial or any other act of discrimination or harassment towards fellow employees; and

e. A Code of Conduct which set out that, at the commencement of employment an employee had to provide the Respondent with accurate information for completion of the employee records [177]. It also included the following regarding health [178]

   'All employees must be fit to carry out the role they have been employed to do and this will generally involve the completion of a pre-employment medical questionnaire to ascertain this. In some cases, a medical examination by an Occupational Health Doctor nominated by the Company may be required.

   Please note: Failure to declare any medical conditions during your employment, or a condition on your medical questionnaire which could put the health and wellbeing of any person, including yourself, at risk, could result in an investigation which may lead to disciplinary action being considered against you.'

f. The following was included in the Code of Conduct in relation to Bad Language [184]:

   Bad language of any kind is unacceptable and will not be tolerated. Bad language can be any verbal word or non- verbal action that is found to be offensive to another person. You are obliged to report to your manager when incidences of bad language occur.'

47. The Handbook also listed examples of Gross Misconduct which included 'Bullying, harassment or sexual, racial or any other act of discrimination or harassment towards fellow employees/service users/students'

Medical Questionnaire

48. At the commencement of her employment, the Claimant was asked to complete a medical questionnaire [82]. In that document, the Claimant was asked if she had at any time suffered from certain conditions. HIV was not one of the conditions listed.

49. At question 14 of the medical questionnaire, the Claimant was asked if she was aware of any other medical condition and/or treatment and/or medication currently being taken that may impact on her ability to work with individuals that display challenging behaviour taking into consideration the high level of physicality involved during physical interventions. The Claimant circled 'No', she did not.

50. The Claimant was questioned on why did not disclose her HIV diagnosis to the Respondent on commencement of employment. She gave evidence that she did not consider that she was required to disclose this, as she was healthy and had never been admitted to hospital for the condition. She did not accept that if she had disclosed her diagnosis to the Respondent, that they would have kept such information confidential. She also did not accept that she presented a risk to service users.

51. Evidence was given by Hazell Orr, in response to a question from the Tribunal, on how the Respondent managed staff or clients who had disclosed that they were HIV+. Her evidence, which we accepted, was that there was no specific risk assessment within the Respondent for staff or indeed clients who lived with HIV. She confirmed that they would be referred to an independent General Practitioner who would undertake the assessment. She confirmed that another member of staff who was HIV+, continued in their Support Worker role within the Respondent but within a different setting following such a risk assessment as a result of the prevalent risk when interacting with service users displaying aggressive physical behaviour. She also confirmed that the Respondent had looked after service users who also were HIV+.

52. We therefore found that being of HIV+ status would not have been a preventative in working in the Respondent's care home setting and there was no evidence to indicate that this was a diagnosis that was either a problem or issue in itself for the Respondent. Rather it was a diagnosis that the Respondent would want to know about and manage appropriately in its care setting.

Claimant's concerns - 2018 .

53. The Claimant commenced a period of maternity leave in July 2017 which continued to June 2018. Shortly after her return, Sarah House was informed by the HR department that the Claimant had contacted them to indicate that she was having some 'issues' in work.

54. At that time the Claimant was working nights, Sarah House, working days. As a consequence, Sarah House emailed the Claimant on 25 June 2018 to confirm that she had been contacted by HR and that she was willing to meet the Claimant one morning before the Claimant finished work to discuss matters further [218].

55. The Claimant responded by email later that day making reference to how she wanted to '*believe that Discrimination, Breach of Confidentiality, Stigmatisation and Bully are some of the things Ludlow Street Health Care is not…'* but stated that there had been occasions in the past where staff encouraged clients to say '*nasty things'* about her and that this had happened the previous week. She wrote of matters that had arisen

including patients hitting her and throwing faeces at her and when matters discussed in her supervision session had been not kept private.

56. Sarah House emailed by return asking the Claimant to let her know what the issue was and exactly who had been bullying the Claimant. She asked for examples to be able to deal with the situation and confirmed again that she would come in early to discuss in further detail [217].

57. A meeting was arranged but was rescheduled at the Claimant's request as she wanted to bring her trade union representative.

58. Whilst Sarah House was aware that the Claimant had been concerned that some staff members had been inciting patients to say things about her, the Claimant did not let Sarah House know who. We accepted that this had been the case, not least as the Claimant accepted this in cross examination. Sarah House also gave evidence that when she had spoken to the Claimant, the Claimant had told her that these comments had been made before she had gone on maternity leave and that she did not wish to take things any further and that as a result, no action was taken at that time.

Disclosure of the Claimant's HIV Status

59. Following her return to work from maternity leave, the Claimant had also discovered that her HIV diagnosis had become more widely known in the community in which she lived and the Claimant gave evidence that she believed that the wife of the pastor of her church, an agency nurse herself, had disclosed her HIV status more widely to those she worked with.

60. In her Written Submissions, the Claimant says that Zwelibanzi or Zweli Nkomo (also known as Zweli Banzi) '*shared the information'* about her status at work and in her ET1 Particulars had asserted that she had been told by of this by a previous co-worker, Brighton Mlambo. She gave no witness evidence of how, when or to whom he shared this information despite a detailed statement from her. We found that the Claimant did not know that this had been disclosed by Zweli Nkomo, simply that she held a belief that he had.

61. The Claimant did give evidence that she became aware that a co-worker, a support worker known as Enias Chawana, also knew that she was HIV+. But she gave no evidence that either Zweli Nkomo or indeed others, told staff '*to be mindful of the Claimant because she was sick'* or words to that effect.

62. The Claimant had not given any clear evidence that she had raised any concern to management that her personal information had been disclosed and/or discussed at this time. We found that she did not.

63. Whilst the Claimant spoke in her Written Statement of the stigma that comes with a HIV+ diagnosis, of the negative attitudes towards those living with HIV, particularly amongst some communities in and from African countries, and of how she believed black women had been oppressed by

black men for generations, she also gave evidence of how she herself '*was also vocal'* about her HIV status at the unit, and that '*everyone knew'*[1].

64. We were not persuaded that staff, whether Zweli Nkomo, Enias Chawana or indeed any of the Respondent staff, told agency staff '*to be mindful'* of the Claimant because she was sick, whether in August 2018 or indeed at any other time.

October 2018 – Disciplinary Action

65. On 9 October 2018, the Claimant received a final written warning that would remain on her file for a period of 12 months from the date of the letter [219] as a consequence of allegations that she had:

    a. Failed to follow a client's Positive Behaviour Support Plan, which potentially risked the patient, the Claimant and colleagues;
    b. Failed to complete an incident form following a statement from the Claimant that she had been attacked by a patient when she had been verbally abused; and
    c. Caused upset and offence to colleagues as a result of her conduct and attitude due to allegations from the Claimant that they had been discriminatory towards her. Staff had alleged the Claimant had been rude and dismissive towards them and a number had commented on the Claimant's attitude, being abrupt, rude and making racial comments

66. The Claimant did not appeal that final written warning considering the process too stressful following her return from maternity leave.

67. None of the Respondent's witnesses dealt with the final written warning within their written evidence, despite it forming part of the Claimant's direct discrimination complaint.

68. Hazell Orr was cross examined by the Claimant and, in relation to the third allegation, gave evidence that the Claimant had not challenged the evidence against her at that time, had not asserted discrimination during this process and that at that time a number of staff had made allegations regarding the Claimant's attitude, behaviour and how she spoke to them. She also confirmed that the staff that had complained about the Claimant at that time did not include Enias Chawana.

69. When the Claimant was questioned by the Respondent's representative in relation to this disciplinary process, she considered that the allegations that had been made by her co-workers at the time had been false; that she had only been 'playful' towards other employees.

70. She accepted that neither the investigatory process which led to that warning, nor the warning itself was connected to her HIV+ status. We accepted that evidence as reflecting the Claimant's true belief and did not consider that her responses were confused or that she misunderstood what had been asked of her in cross-examination.

[1] Claimant written submissions [para 13 XIX c)]

May 2019 Incident

71. On 29 May 2019, an incident arose during a shift worked by the Claimant and Enias Chawana, resulting in Enias Chawana providing a written complaint about the Claimant to the Unit Manager, Abbie Allen [221].

72. In that written complaint, he complained that the Claimant had told him to look after a particular client and had shouted at him, calling him a '*fucking old man'* and had repeatedly told him to '*fucking shut up'.* He also alleged she had called him a '*fucking idiot'* and stated that the incident had been distressing for him. He ended the complaint by indicating that he was not comfortable working with the Claimant, felt intimidated and targeted by her and asked management to intervene.

73. In the complaint, Enias Chawana also referred to an earlier incident that he said had taken place '*a couple of months'* previously, in which he accused the Claimant of shutting a door in his face, shouting at him and walking out of the office after he had asked her for a pen to write with. He asserted that when he had complained to her about her attitude, she had shouted insults at him calling him *'a puppet of a white* man', that she had threatened to put a curse on his children, saying to him '*don't fuck with me, you and your brothers are gossiping about me',* referring to Zweli Nkomo. He indicated that the nurse in charge, David Robinson and Senior Support Worker, Katie D'Andrade, had been informed, that the incident had been '*dealt with'* by David Robinson and that he had not felt the need to take that matter further at that time. He also stated that the Claimant had told him that she thought that he and Zweli Nkomo were always gossiping about her.

74. Abbie Allen escalated the complaint to Sarah House and HR and in turn, Abbie Allen was appointed to investigate the complaints. A series of interviewed were arranged following an initial grievance meeting with Enias Chawana.

Grievance Meeting

75. That took place on 3 June 2019 and notes of that meeting were provided in the Bundle which the Tribunal accepted as an accurate record of the matters discussed albeit not a word for word transcript necessarily [223].

76. In that meeting,:

    a. Enias Chawana explained with regard to the incident on 29 May 2019, that an alert buzzer had been sounding for a client whose support worker, Katie D'Andrade, had gone home sick and that he and the Claimant had a discussion regarding who was to attend the client.

    b. He accused the Claimant of shouting at him and telling him to '*fucking shut your mouth'* and '*fucking shut up.* He spoke of how the Claimant had apologised once she had realised that he was making a written complaint and when asked, stated that he had spoken to the Claimant previously about her behaviour and attitude to others;

    c. He gave more detail of the earlier incident in which he alleged that the Claimant had referred to him as a '*puppet of a white man'* and

explained that this meant to him that she was telling him that he should not listen to a white person. He indicated that a client had overheard and the client had informed David Robinson and Katie D'Andrade who had intervened to diffuse the interaction as the Claimant was by that time shouting at him. He indicated that from then on he and the Claimant had stopped talking to each other.

Investigation

77. Further interviews took place on 12 June 2019 with:

    a. Brighton Mlambo – support worker [235], who confirmed that the Claimant ignored him and that he had heard both the Claimant and Enias Chawana shouting at each other on 29 May 2019;

    b. Katie D'Andrade – support worker [236], in which she reported witnessing the Claimant shouting at Enias Chawana, saying *'don't fuck with me'* and threatening to curse his children. She reported that the Claimant had thrown a observation sheet at her in the past for which the Claimant had apologised; and

    c. Abbey Kasajja – support worker [238], who reported that after the Claimant had returned from maternity leave, she had told him that she did not like him;

78. An agency nurse who had witnessed the interaction, Abosede Irewunimi, appears to have been asked to prepare a 'reflective account'. Although a copy of that account is not contained in the Bundle, included within the final report [244] is reference to the following:

    '***Abosede Irewunimi reflective account***
    Confirmed that Edith approached Enias by pointing and shouting after he had just walked in from attending another patient, MP. AI suggests that Edith wasn't respectful and feels that her approach was unacceptable'.

79. A written statement was also given by David Robinson [234] dated 11 June 2019, who had commented on his recall of the events earlier in the year and his working relationship with the Claimant. In that statement, he confirmed that the Claimant had refused to discuss with him any issues with Enias Chawana, how he found the Claimant difficult to work with and manage, how her attitude could be negative and that he considered her a difficult character.

80. In cross examination, the Claimant gave evidence that she considered that all witnesses that had been questioned during the investigation had lied about her..

Investigation meeting with Claimant

81. On 17 June 2019, the Claimant was invited to an investigation meeting and was informed of her right to be accompanied [239]. Again, notes are provided in the Bundle, which we considered represented an accurate summary of the matters discussed [228]. The Claimant was unaccompanied but confirmed that she was happy to attend. She was informed that

grievance had been submitted by Enias Chawana and she was asked for her version of events.

82. In that meeting:

    a. the Claimant asserted that Enias Chawana had accused her of being rude after she had said to him '*you are not paid to go to sleep you are paid to work ok?'* and that he had threatened to report her. She had in response told Enias Chawana '*please just shut the fuck up, don't talk, be quiet, ssh.'* She had then repeated this;

    b. She indicated that as she was leaving her shift Enias Chawana had asked to speak to her and told her that he needed to '*put her in [her] place'* and had said to her '*you think you are special you are nothing'.* The Claimant said that she had already apologised and told him that if he wanted to report it to feel '*more like a man'*, to go and report the matter.

    c. She denied that she had raised her voice at him or that she had made any threats towards his children.

83. She also confirmed that prior to this incident, her relationship with Enias Chawana had not been good and when asked why, stated the following

    '*if we are going to be honest Abbie, they bully me in this place, you know this Abbie, they bully me, they intimidate me, they stigmatise me, the way they treat me in this place. Enias has put me through hell in this place but I can show hell, so nothing can shake me, but what Enias has done to me in the place…'*

84. The Claimant was asked to give some examples and responded as follows:

    'Let me start from when I returned back from maternity were he gave information about me, to the Nurse Zwelli, let me repeat that Zwelli, the qualified nurse. The Nurse told people about me, which was meant to be confidential and put me in danger.'

85. The Grievance Manager indicated to the Claimant that she was '*completely unaware' of this'* and that the Claimant had never brought this to her attention. The Claimant appears to have made it clear that she did not accept this but at the same time said *'I wasn't ready before, but now I am ready'*. The Claimant told her that Zwelli Nkomo had told people information about her, that she was sick and that if he denied it she would go to court. The Claimant was later questioned again by Abbie Allen on what she meant by the term 'sick'. The Claimant did not disclose her diagnosis only repeating that he had told 'someone' that she was 'sick'.

86. In relation to the earlier incident that Enias Chawana had referred to in his grievance, the Claimant asserted that:

    a. David Robinson had not wanted to hear the Claimant's version of events at the time and that he just didn't want the clients awoken. The Claimant made no reference to the comments relied on as having been made by David Robinson;

b. That Enias Chawana had told her to '*shut the fuck up';*
c. She denied telling Enias Chawana that he was the '*puppet of a white man';* and
d. She denied that she told him that she was going to '*JuJu'* on him, a reference to a voodoo curse; that if she was going to do so, she would not have told him.

87. The Claimant also alleged that Enias Chawana had assaulted a client but that she had not raised it with management. She rejected the suggestion that the Respondent took safeguarding concerns seriously.

88. The meeting ended with the Claimant maintaining that men in general lie and questioning whether Enias Chawana was angry suggesting that there had been gossip regarding the state of his marriage.

89. She was informed that if she wanted to raise a formal complaint about the issues she had raised about Enias Chawana she should follow the grievance procedure.

90. The Claimant was cross-examined on the exchange in this meeting between her and Abbie Allen. The Claimant insisted that the unit in which she worked was aware of her HIV status and that this '*wasn't a problem'* but that she was bullied.

Investigation Report

91. On 29 June 2019, Abbie Allen completed her investigation report ("Investigation Report") [240]. The Investigation Report indicated that the terms of reference were as follows:

It is alleged that on the 29th May 2019 [XY] used threatening, rude and abusive language towards a member of staff which left the employee feeling intimidated and uncomfortable. This is contrary to the Company Conduct and Bullying and Harassment Policy and if proven may be deemed as gross misconduct, namely:

a) Acts of violence (including fighting, physical assault), the use of rude or abusive language, intimidating behaviour, and immoral or obscene conduct committed in connection with employment and/or at the workplace

b) Bullying, harassment or sexual, racial or any other act of discrimination or harassment towards fellow employees/clients/students

92. The Investigation Report set out facts established including that the Claimant:

a. had shouted at Enias Chawana on 29 May 2019, had made threats towards his family, had been rude and used abusive language towards him on two occasions and had pointed at him whilst shouting;
b. did not have a good relationship with staff and had been rude to staff members not just Enias Chawana, and was difficult to work with and manage; that she was not a team player.

93. The Investigation Report indicated that there were no mitigating factors but within the section 'Other Relevant Information' four matters were raised that:

    a. the Claimant had witnessed a safeguarding concern that Enias Chawana had physically assaulted a patient some 8-9 months previously;
    b. she had felt bullied by staff but had not disclosed detail; and
    c. had been advised of the process if she wished to raise a grievance against Enias;

94. It was also noted that the Claimant already was on a final written warning and the Investigation Report concluded that formal action be taken against the Claimant.

Invite to Disciplinary Hearing

95. By way of letter dated 1 July 2019, the Claimant was invited to a disciplinary hearing and was informed that Hazell Orr, Operations Director would attend with HR [249].

96. The letter informed the Claimant that the allegation against her was as follows:

It is alleged that on the 29th May 2019 you used threatening, rude and abusive language towards a member of staff which left the employee feeling intimidated and uncomfortable. This is contrary to the Company Conduct and Bullying and Harassment Policy and if proven may be deemed as gross misconduct, namely:

a) Acts of violence (including fighting, physical assault), the use of rude or abusive language, intimidating behaviour, and immoral or obscene conduct committed in connection with employment and/or at the workplace

b) Bullying, harassment or sexual, racial or any other act of discrimination or harassment towards fellow employees/clients/students

97. A copy of the investigation notes and Investigation Report were included together with a copy of the Conduct Policy. The Claimant was warned that dismissal was within the range of possible sanctions and the Claimant was informed that she could be accompanied.

Disciplinary Hearing

98. The Claimant attended the meeting, which was taped by the Respondent to ensure an accurate record of what was discussed. No copy of the recording had been provided within the Bundle, but we accepted that the document provided was an accurate transcript of the meeting [254]. The Claimant was unaccompanied but confirmed that she was happy to proceed.

99. The Claimant was informed that the meeting was an opportunity to tell Hazell Orr about any further matters she wished to raise or any circumstances of mitigation before a decision was made about the allegation raised against her. The Claimant confirmed she understood.

100. She admitted that whilst she had been rude to Enias Chawana. She gave a reason for why she had been rude, stating that *'it came from a place of anger and frustration because three nights in a row a client was neglected…. during those nights I was the one who had to go in there'.*

101. She asserted that the client had been neglected as someone should have been with him, but stated that she had not raised this as a safeguarding concern as she did not consider the client had been in danger.

102. The Claimant explained that she had apologised immediately to Enias Chawana on 29 May 2019, but denied she had apologised because she was scared that he was going to report her, or that she was going to lose her job.

103. She admitted that she had said '*shut the fuck up'*. She did not assert or allege that Enias Chawana bullied or harassed but stated that she and Enias Chawana had both spoken to each other in this manner, that they ate together, had breaks together and that they *'laugh together'* and that she had '*nothing against him'.*

104. When the Claimant was asked why other employees had complained about her conduct, she responded that David Robinson was *'one of the most amazing nurses'.* She made no complaint about David Robinson and did not assert or allege that he had made any comment that she considered to be discriminatory because of her race or colour.

105. The meeting adjourned and after the adjournment, Hazell Orr reconvened the meeting and confirmed that given that the Claimant already had a final written warning for a similar issue, she had decided to dismiss the Claimant. The Claimant was informed that she had 5 days to appeal and that the appeal would be considered on the basis of any new information.

106. A letter dated 11 July 2019, confirmed that summary dismissal on the basis of her conduct on 29 May 2019 [262]. The letter also confirmed Hazell Orr's belief that she had no option other than to dismiss the Claimant, believing that the conduct had undermined the Respondent's trust and confidence in her. She was provided with a right to appeal and that she had to inform the HR Department within 5 days.

107. The Tribunal heard evidence from Hazell Orr, who answered questions in relation to her decision to dismiss the Claimant in 2019 as well as her decision to issue a final written warning to the Claimant in 2018. She gave evidence, which we accepted, that the group of individuals that had been involved in the Claimant's disciplinary that had resulted in her receiving a final written warning in 2018, was a different pool of co-workers to those involved in the disciplinary leading to the Claimant's dismissal in 2019.

108. She also confirmed that having read the Investigation Report, she considered that the investigation had been '*comprehensive'.* She confirmed that in reaching her decision:

    a. she did not consider that she needed to ask further questions of the investigator or witnesses that had been questioned;

b. that she was satisfied that those who had been on duty had been questioned and that she did not consider it necessary to question those who had not been on duty;
c. the Claimant had admitted to her that she had used what she termed 'foul language'; and
d. that such language had been heard by a service user.

109. Hazell Orr also confirmed that she accepted that the Claimant was good with service users/clients and that she did not consider the Claimant's mitigating factors, that she was upset that a service user had been left unattended was credible and was concerned that this had not been reported. Despite the Investigation Report flagging that the Claimant had said that she felt bullied, the Claimant provided her with no information regarding the allegations she had made during the investigation that she had been bullied. Taking into account that the Claimant was already on a final written warning she determined that dismissal was appropriate.

110. We accepted that evidence and found that Hazell Orr dismissed the Claimant for her conduct on 29 May 2019, which she concluded was misconduct, and in the context of the Claimant already having received a final written warning.

111. We did not find that the Claimant was HIV+ played any part in Hazell Orr's decision-making nor did we find that there was any causative link between the Claimant's HIV status and any interaction between the Claimant and Enias Chawana on 29 May 2019. The Claimant had said during the disciplinary investigation that she had sworn at Enias Chawana as he was not looking after service users whilst on duty and had reinforced this at the disciplinary hearing saying that she had been concerned that a client had been repeatedly neglected,

Appeal

112. By way of email, the Claimant appealed her dismissal [264]. In that email she asserted that she had not been given opportunity to explain her mitigation or alternatively, that her mitigation had not been taken into account and:

a. that the 'F Word' was '*everyday language for us';*
b. That she was frustrated that a resident had not been supported; and
c. She had a long history of being harassed by Enias Chawana and that a particular incident had been raised by her to David Robinson, who had done nothing.

113. She referred to the email she had sent in June 2018 in which she had complained of being bullied.

114. On 18 July 2019, the Claimant was sent an invite to an appeal hearing before the Area Manager, Helen Leigh and was informed of her right to be accompanied [265].

115. The Claimant attended and was accompanied by her trade union representative. We have been provided with handwritten notes of that

meeting which again we accepted as an accurate note, although not verbatim transcript, of the matters discussed [266].

116. The letter of appeal was discussed, with each of the three points raised in turn.

    a. The Claimant repeated that the language used was commonplace between her and Enias Chawana, but that she knew it was unacceptable.

    b. Again there was a discussion as to why the Claimant had not reported her concerns that Enias Chawana had left a client unsupported for three nights in a row. The Claimant explained that she did mention it on handover and that she was going to send an email, but had not.

    c. In relation to the third issue, the Claimant was asked if she had followed up with David Robinson. She confirmed she had '*just left it*'. The Claimant was questioned why she had not reported her concerns and a discussion took place about how concerns on safeguarding could be raised. She did not raise any concerns as to what had been said by David Robinson.

117. The Claimant was asked if there was anything else she wished to say. At that point the Claimant said that whilst Enias Chawana had complained that she had bullied him, that it was the other way around.

118. The Claimant also said that when she came back from maternity leave, Zweli Nkomo had said that she was HIV+. The Claimant was asked why she had not told the Respondent of her diagnosis earlier. The Claimant explained that it was because she had a 10 year old son who went to school with children of some staff. She explained that she had not raised this in her earlier email, or raised this when Sarah House had asked her to be specific about her concerns when she had raised them in 2018 as she had a 10 year' old child to protect. Her representative asked if consideration could be given to a final written warning.

119. We found that this was the first time that the Claimant had informed the Respondent of her HIV+ status or that others and that management were not aware of her HIV+ status, and in turn disability, this prior to the Claimant's disclosure during the appeal meeting.

120. Whilst we accepted that the Claimant was deeply distressed that knowledge of her HIV+ status might impact on her child and may genuinely have held a belief that management was aware of her HIV status as she and her co-workers had discussed this during worktime, that it was more likely than not that neither Abbie Allen nor other management were so aware until this point on the basis that:

    a. This was an organisation that did employ staff who were HIV+ and looked after residents who were also HIV+. It was improbable that if the Respondent had been aware that they would not have taken steps earlier to undertake a risk assessment for the Claimant, her co-workers and residents;

b. The Claimant admitted on cross-examination that the first time she informed management of her HIV status was at her appeal against dismissal meeting.

121. The meeting adjourned and Helen Leigh confirmed that she would need to consider the information.

122. Helen Orr was questioned by the Claimant and challenged on her dismissal decision. She confirmed that the Claimant had informed her that Zweli Nkomo had disclosed her HIV+ status to others but had not investigated that particular matter as she did not consider that there was any link between that assertion and the Claimant's conduct including swearing at Enias Chawana in front of a service user that day. She was also of the view that the Claimant had now changed her mitigation from that of feeling that a service user had been left unsupported by Enias Chawana; a safeguarding concern to one of Enias Chawana bullying her, despite failing to provide any detail to support that assertion.

123. Helen Leigh had also given evidence that her attempts to explore the Claimant's mitigating factors rebuked and that the Claimant had jumped from one mitigating factor to another without supporting evidence or demonstrable link between them and the allegations for which the disciplinary hearing was being conducted. She also considered the Claimant's failure to report safeguarding incident '*deeply troubling'.* We accepted that evidence.

124. By way of letter from Helen Leigh dated 6 August 2019, the Claimant was informed that her appeal had been unsuccessful [274]. In that letter, she explained her rationale which was:

a. That the Claimant admitted using language that was unacceptable;
b. That whilst the Claimant had stated that she had been frustrated as a client had been unsupported, she had failed to report this.
c. In relation to the complaint she had previously made to David Robinson, she was reminded that she could have obtained support from others including management and the 'speak up guardian', an individual appointed as part of safeguarding.

125. Whilst a copy of the Claimant's early conciliation form was not included in the Bundle, a copy was on the Tribunal file and it was agreed with the parties that on 19 August 2109 early conciliation commenced and ended on 28 August 2019. On 4 October 2019, the Claimant filed her ET1.

126. Whilst the original claim and focus of the Claimant's claim related to her unfair dismissal and disability discrimination complaints, the Claimant had brought claims of sexual harassment in relation to a comment she claimed had been made by Enias Chawana in February 2019 and claims of harassment because of race and harassment related to race in relation to a comment she claimed had been made by David Robinson.

Sex Discrimination: Comment of Enias Chawana in February 2019

127. The complaint of sexual harassment was that Enias Chawana had said to the Claimant on or around 5 February 2019, '*Do you want to fuck? I can lick you from behind'.*

128. We have been invited to find as a matter of fact by the Respondent that this did not happen as:

    a. it is difficult to believe, as there were no witnesses;

    b. that the Claimant's evidence was contradictory as:

        i. on one hand, the Claimant gave evidence that Enias Chawana had told the Claimant that no one liked her;
        ii. yet on the other gave evidence that Enias commented that he wanted to be sexually intimate with her;

    c. that it was unlikely that he would want to be sexually intimate with a person he knew to be HIV positive;

    d. that despite the Claimant extending her allegations to ones of physical contact, the Claimant had failed to report these allegations despite being aware that Sarah House was available to discuss her concerns; and

    e. the Claimant did not mention these incidents at all, despite being asked if she wished to raise a formal grievance against:

        i. during the investigation or disciplinary hearing;
        ii. in her appeal letter; or
        iii. at her appeal hearing hearings.

129. We focussed our deliberations on whether the Claimant had proven that Enias Chawana had said to her, or had said words to the effect: '*Do you want to fuck? I can lick you from behind',* words that are explicitly and inherently sexual in nature.

130. We took into account the following:

    a. Despite the Respondent's representative asserting that the Claimant's evidence was difficult to believe as there were no witnesses, that was not strictly correct. Enias Chawana was a potential witness and it was confirmed to us by the Respondent that Enias Chawana still remained in the Respondent's employment. The Respondent had not called Enias Chawana to give evidence to rebut the Claimant's evidence on this issue. We draw an adverse inference from that;

    b. Neither had the Respondent adduced any evidence that at any time had they investigated with Enias Chawana as to whether he had made such a comment to support the Respondent's denial that this had happened despite this not being a new allegation arising late or during the course of the hearing. We also drew an adverse inference from that;

c. We did not consider it necessarily contradictory for the Claimant to be told that no one liked her, yet at the same time be the recipient of such sexual remarks. Likewise, that the Claimant was known to be HIV+ would not necessarily prevent sexual comments being made to her. As the Claimant had evidenced on cross-examination, she had not taken Enias Chawana literally that he wished to have sex with her in the workplace.

131. We did not accept the evidence, given by the Claimant given in cross examination, that she had informed Abbie Allen of the sexual harassment during her investigation. We found that the Claimant had not raised such allegations at all, either during or after her employment and that this was relevant to our conclusions both on whether:

i. the comments had been made at all; or, in the alternative,
ii. if they had been made, what had been the purpose or effect of the comments (which we deal with within the conclusions).

132. Despite concerns that the Claimant had not raised generally or at all sexual harassment as an issue during her employment, we were not persuaded that it would follow that the Claimant's evidence on this specific allegation was inherently not genuine or improbable despite the Respondent challenging the credibility and reliability of the Claimant's evidence.

133. We accepted the Claimant's evidence on the issue of the specific comment she asserts Enias Chawana had made and found that such a comment had been made to the Claimant at some point. It was a comment that she had consistently asserted throughout the life of this case and, despite the Respondent's general denial, we did draw an adverse inference the Respondent's failure to provide any evidence from Enias Chawana that this had not been said, (or indeed any evidence that the matter had been investigation). We were persuaded that on balance of probabilities that this comment was more likely than not to have been said to the Claimant by him.

134. With regard to the other conduct, this had not been pleaded or referred to in the ET1 Particulars, or referenced in the agreed List of Issues, but had been referred to in the Further Particulars in which she asserted that Enias Chawana had '*taken her hand and pressed it towards his penis*' [36]. She had also set out in her Written Submissions that she had told others that her '*hand has just touched someone's penis and it is so small'.*

135. In contrast to the comment relied on, we did not find on balance of probabilities that the other conduct of touching had been proven. Her allegation that Enias Chawana had placed her hand on his penis had not been referred to in the ET1, nor indeed by her representative as forming part of the issues for determination at the April 2020 case management hearing.

136. Whilst we accept that those who are subject to sexual harassment do not always in their demeanour show upset, on cross examination the Claimant was dismissive when challenged on the specific allegation that he had placed her hand on her penis and sexually harassed her, responding that he had and was the same man who had told her where to get cheap food and helped his wife lose weight in the gym, but also 'could be mean' and sometimes could 'be nice'.

137. Despite being pressed on cross-examination on what she was alleging was the other conduct of Enias Chawana that she relied on, responding that her evidence would run to a '100 pages' if she had recorded them, she had not given any evidence of any other specific examples. We were not satisfied on balance of probabilities that the Claimant had proven any further allegations against Enias Chawana, of either touching or other conduct. We did not find on balance of probabilities that Enias Chawana '*constantly harassed her'* as the Claimant had asserted.

Race Discrimination: Comments of David Robinson

138. Within the particulars of claim, the Claimant also asserted that David Robinson in February 2019 had said to the Claimant:

> '*You guys are black, go sort yourselves out. I wont bother with the management, they don't give a 'F' about anyone but their money' [16].*

139. Whilst during the cross-examination there was a suggestion that this had been said by him when the Claimant and Enias Chawana had a verbal altercation in February 2019, the Claimant had given evidence in her Written Submissions (§11f)) that the comment had been made by David Robinson after a dispute between the Claimant and another agency nurse who, the Claimant believed, had been telling staff that the Claimant was going to '*beat her up'.* The Claimant's position had been that this was not true; that she had just said *'If you want us to be friends, just keep bringing food to work'.* She had wanted David Robinson to record her version of events in the matter which David Robinson had been reluctant to do and had then said the words relied on.

140. Again however, it was of significance to us that whilst the Claimant had referred in her ET1 Particulars to this comment from David Robinson, the Claimant had not mentioned this comment at the time to any manager, in her investigation hearing, disciplinary hearing, in her appeal letter or her appeal hearing.

141. We also took into account that at the investigation she had instead complimented David Robinson saying that he was '*an amazing nurse'.* Whilst the Tribunal accept that it does not follow that being 'an amazing nurse' would mean it inherently not likely that David Robinson would have made such a comment, we did find such a comment and indeed a failure to complain about any comment at that time, would and did impact on our view of whether it was more likely than not he had made such a comment .

142. Again, despite concerns that Claimant had not raised this as an issue during her employment, however we did not consider that this undermined the Claimant's evidence, which we accepted, that David Robinson had made such a comment. Again, whilst the Claimant was challenged on this on cross examination:

a. David Robinson was not called by the Respondent to give evidence on the point, despite also still being in the Respondent's employment and despite this being known to the Respondent to have been a live issue in these proceedings since the inception of the claim; and

b. No evidence was adduced by the Respondent that this had been investigated by them at any time and no other Respondent witness gave evidence on the point.

143. Again, we drew an adverse inference from that.

144. On that basis we found that it was more likely than not that David Robinson had made such a comment to the Claimant in the context of the Claimant having a misunderstanding about her own conduct towards another agency nurse.

Limitation

145. The Claimant did not deal with limitation in her written evidence but gave evidence on cross-examination that she had not raised her concerns regarding the various claims of discrimination during her employment as she did not want trouble and was not able to speak up.

146. She spoke of historically black women being oppressed by black men and that both the church and how she considered the workplace were the best places to perpetuate such an oppression; that Zweli Nkomo had a good relationship with management and the Claimant feared retribution from management.

147. The Claimant had been in a union from at the latest her return from maternity leave – she had confirmed that she had wanted union representation in her meeting with Sarah House. It appears that she had not sought union support or advice until she obtained representation by UNISON for her disciplinary appeal on 26 July 2019.

148. In terms of why she had not brought her claim sooner, specifically when she says she was sexually harassed, and why she had not gone to her trade union at the time. The Claimant explained that she had just returned from maternity leave and decided to 'let things go'. She could not explain why. did not approach her trade union representative at that time as she just wanted to go to work and did not want any trouble.

149. When questioned why she did not bring a complaint at that time she explained that she did not do so as she believed that she would be reinstated and could 'do a deal' with the Respondent and that after that hearing her union representative 'just dropped her'.

150. She said that it was only after the Respondent refused to provide her with a reference after her dismissal did she decide to submit a claim. At that stage she went to the Job Centre heard about ACAS, went online and found out how to make a claim. She explained that she had just been dismissed and was confused.

151. Whilst the Claimant also gave evidence at length, both within her Written Submissions and orally on cross examination, of what she considered to be an orchestrated campaign by the Respondent impacting on her personal safety and that of her children, we did not find that this was relevant to the issue of limitation being more of a contemporaneous account of how the

Claimant considered her employment with the Respondent had impacting on her life.

Submissions

152. The Respondent's counsel presented written submissions compromising 33 pages (151 paragraphs). The Tribunal will not attempt to summarise those submissions, but incorporates them by reference.

153. In supplementary oral submissions, Mr Bheemah addressed the Tribunal on breaches of ACAS, Polkey and contributory fault submitting that the Respondent had carried out a reasonable investigation and argued that the Claimant's behaviour was so egregious that a 100% reduction in any compensation was justified.

154. The Claimant relied on her Written Submissions which are also incorporated by reference. She also made supplementary oral submissions that:

a. For the first time in the hearing she suggested that Abbie Allen hated her and was reminded that the Tribunal would not consider new evidence at this stage.

b. She submitted that Abbie Allen had done a bad job at the investigation and also criticised both Hazell Orr and Helen Leigh in their review of the evidence against her.

c. The Claimant reminded the Tribunal that she and Enias Chawana used to be close and that him now saying she was unbearable to work with was untrue and spent some time reminding us of her challenge to his version of events of the night of 29 May 2019.

d. She asserted that there had been no need to have given her the final written warning in October 2018.

e. She suggested that the Respondent had tried to kill her once she had moved to Sheffield and had attacked her children in school. She believed she had been treated like a criminal as she was a woman of colour and because of her HIV status.

Issues and Law

Unfair Dismissal

155. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the Respondent under section 95.

156. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

157. In this case the Respondent asserts that it dismissed the Claimant because it believed they were guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). In this regard, the Respondent bears the burden of proving on balance of probabilities, that the Claimant was dismissed for a reason that related to one the potentially fair reasons set out in section 98(2) Employment Rights Act 1996 (ERA 1996).

158. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

159. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827**. When considering the fairness of the disciplinary process as a whole, the Tribunal also consider the employer's reason for dismissal as the two impact on each other (**Taylor v OCS Group Ltd 2006 ICR 1602 CA**).

160. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited** v **Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

161. If the Tribunal concluded that the dismissal was procedurally unfair, it should consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey** v **AE Dayton Services Ltd** [1987] UKHL 8; **Software 2000 Ltd** v **Andrews** [2007] ICR 825; **W Devis & Sons Ltd** v **Atkins** [1977] 3 All ER 40; and **Crédit Agricole Corporate and Investment Bank** v **Wardle** [2011] IRLR.

162. It was also agreed with the parties that if the Claimant had been unfairly dismissed, the Tribunal would address the issue of contributory fault, which inevitably arises on the facts of this case. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996. Section 122(2) provides as follows:

> *Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.*

163. Section 123(6) then provides that: Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

<u>s.13 EqA 2010 Direct Discrimination (Disability and Race)</u>

164. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

> (1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

165. Disability and Race are protected characteristics. That the Claimant is a disabled person by reason of her HIV+ status is conceded by the Respondent.

166. The provisions are designed to combat discrimination and it is not possible to infer unlawful discrimination merely from the fact that an employer has acted unreasonably: **Glasgow City Council v Zafar** [1998] ICR 120

167. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "*there must be no material difference between the circumstances related to each case*."

168. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 Lord Scott noted that this means, in most cases, the Tribunal should consider how the Claimant would have been treated if they had not had the protected characteristic. This is often referred to as the hypothetical comparator. Exact comparators within s.23 EqA 2010 are rare and it may be appropriate to draw inferences from the actual treatment of a near-comparator to decide how an employer would have treated a hypothetical comparator (see **CP Regents Park Two Ltd v Ilyas** [2015] All ER (D) 196. The courts have long been aware of the difficulties that face Claimants in bringing discrimination claims and the importance of drawing inferences : **King v The Great Britain-China Centre** [1992] ICR 516.

169. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; **Bahl v Law Society 2004 IRLR 799.**

s.26 EqA 2010 - Harassment

170. Section 26 of the Equality Act defines harassment under the Act as follows:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic [which includes the protected characteristic of disability and race], 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

(2) A also harasses B if –

(c) A engages in unwanted conduct of a sexual nature, and

(d) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if –

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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 circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

171. In **Richmond Pharmacology** v **Dhaliwal** [2009] IRLR 336 the Employment Appeal Tribunal set out a three step test for establishing whether harassment has occurred:

a. was there unwanted conduct;

b. did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and

c. was it related to a protected characteristic.

172. It was also said that the Tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The Tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for her, then it should be found to have done so.

173. In **Grant** v **HM Land Registry** 2011 IRLR 748 the Court of Appeal again reiterated that when assessing the effect of a remark, the context in which it is given is highly material. An Employment Tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment.

S.123 Equality Act 2010

174. s. 123(1) EA 2010 provides that a claim must be presented to the Tribunal before the end of the period of three months starting with the date of the act to which the complaint relates.

175. That time limit is modified if there is a course of conduct extending of a period and the claim is brought within three months of that period: s. 123(3); or if the Tribunal considers it just and equitable to extend time.

176. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment Tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

177. This does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

178. In exercising their discretion to allow out-of-time claims to proceed, the checklist contained in S.33 of the Limitation Act 1980 is a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and Tribunals do not need to consider all the factors in each and every case. Section 33 (as modified by EAT in **British Coal Corporation v Keeble**) requires the court to

a. consider the prejudice that each party would suffer as a result of the decision reached and

b. have regard to all the circumstances of the case — in particular,

   i. the length of, and reasons for, the delay;

   ii. the extent to which the cogency of the evidence is likely to be affected by the delay;

   iii. the extent to which the party sued has cooperated with any requests for information;

   iv. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and

   v. the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

179. Other relevant factors are:

   a. Prejudice to the respondent (beside the claim itself);

   b. Any other remedy for the claimant (e.g negligence);

   c. Conduct of the parties since the relevant act;

   d. Claimant's medical situation,

180. The burden is on the Claimant to show that it is just and equitable to extend time **ABMU Local Health Board** v **Morgan_** [2018] IRLR 1050 (CA) - Absence of an explanation for any delay will not on its own be determinative against the granting of an extension. A failure to explain is a factor in the matrix and in **Miller and ors** v **Ministry of Justice and ors** (UKEAT /0003/15/LA) per Laing J (para 13) - If there is an explanation and it is believed, an absence of 'forensic prejudice' to the Respondent, will not automatically mean that it is just and equitable to extend time.

Conclusions

181. The Tribunal appreciates that this has been a difficult case for the Claimant to bring and that she holds wider concerns regarding the status of those who live with HIV and the stigma that she feels that this brings to her life. However the Tribunal has to draw conclusions based on the evidence before it.

Disability

182. The parties agreed that the Claimant was a disabled person (under s6 EQA) at all relevant times by reason of her HIV status (Equality Act 2010, Sch 1 para 6).

183. We deal with harassment related to disability under s.26 Equality Act 2010 before moving to direct discrimination because of disability under s.13 Equality Act 2010 and have dealt with the issue of knowledge of disability within our conclusions below.

Jurisdiction: Time - Disability discrimination complaints

184. We were satisfied that all claims of disability discrimination could properly be viewed as continuing acts of discrimination; the allegations of harassment and direct discrimination in relation to the comments to be mindful of the Claimant as a result of her health were, by their very nature, continuing acts in that the Claimant complained of comments being made about her from August 2018 and on an ongoing basis. We were satisfied that such complaints had been brought in time and the Tribunal had jurisdiction to consider those complaints.

185. In relation to the remaining direct disability discrimination complaints, her complaint in relation to the 2018 disciplinary and 2019 dismissal involved the same alleged perpetrator, Hazell Orr, being the disciplinary officer on both occasions and the Tribunal accepted that the same could be said to form a continuing state of affairs.

186. The Tribunal were satisfied that such complaints had also been brought in time and the Tribunal had jurisdiction to consider the remaining direct disability complaints also.

<u>EqA, section 26: harassment related to disability</u>

187. We had found as a matter of fact, based on our assessment of the evidence and balance of probabilities, whilst we accepted that staff working with the Claimant may very well have been made aware that the Claimant was HIV+, that agency staff had not been informed to be mindful of the Claimant because she was sick, on or around August 2018, on an ongoing basis towards the end of 2018 and/or on an ongoing basis from the beginning of 2019 onwards, or even words to that effect.

188. On that basis, the Claimant has not proven facts from which we could find or infer discrimination claims.

189. The complaints of harassment related to disability are not well-founded and are dismissed.

<u>EqA, section 13: direct discrimination because of disability</u>

190. We deal with the specific complaints in reverse order to how they appear in the List of Issues.

191. We found that the Respondent had subjected the Claimant to the following treatment: that the Claimant had been:

a. investigated on 8 October 2018 regarding failure to follow safeguarding;
b. subjected to a disciplinary hearing on 1 July 2019; and
c. Dismissed her on 5 July 2019.

192. However, we did not conclude that this treatment was “less favourable treatment”, i.e. we did not conclude that the Respondent treated the Claimant as alleged less favourably than it treated or would have treated

others in not materially different circumstances, i.e. a work colleague without HIV, facing allegations of similar misconduct.

193. We had made no findings that would lead us to find or infer that the treatment complained of was because of the Claimant's disability by reason of her HIV+ status. We had made findings that the Claimant was both subject to disciplinary investigation and disciplinary in 2018 and again subject to a disciplinary hearing and dismissal because of her own conduct, conduct we concluded which was entirely unrelated to her disability.

194. We had also made findings that at all material times, the Respondent's management was unaware that the Claimant was HIV+. We were also not persuaded that the Respondent ought to have known about the Claimant's disability at any point up to and including the point in time that the decision to dismiss was made. We did not conclude that it followed that because some of the Claimant's colleagues were aware that she was HIV+ that the Respondent's management did.

195. We also concluded that simply because Enias Chawana may very well have known that the Claimant was HIV+, it did not mean that there was a link between his knowledge of that diagnosis, the Claimant's conduct on 29 May 2019 or indeed Enias Chawana's complaint about her behaviour such that the Claimant's disability could be said to have caused her being subjected to the disciplinary hearing and/or dismissal in 2019.

196. Those direct discrimination complaints are therefore not well-founded.

197. In addition, and for the avoidance of doubt, the claim in relation to informing staff to be 'mindful' of the Claimant as she was sick, on or around August 2018, as a complaint of less favourable treatment under s.13 Equality Act 2010 also fails for the same reasons that have been given in relation to the Claimant's s.26 Equality Act 2010 harassment related to disability claim i.e. the Claimant has not proven facts from which a finding of discrimination could be made in respect of that specific complaint.

198. The claims of direct disability discrimination under s.13 Equality Act 2010 are therefore not well-founded and are dismissed.

<u>EQA, section 26: harassment of a sexual nature</u>

Jurisdiction: Time

199. The act complained of, that the Tribunal had found to have been proven on balance of probabilities, was the one comment made by Enias Chawana to the Claimant on 5 February 2019.

200. We concluded that such a comment did not form part of a continuing act but was a discrete act as:

a. The allegation was very different to the allegations of race and disability brought by the Claimant more generally which she relied on as supporting her complaints in relation to her dismissal;

b. The Claimant had not raised any argument that such a comment was linked to her eventual disciplinary and/or dismissal.

199. The specific complaint was therefore out of time.

200. We were not persuaded that it was just and equitable to extend time either as:

a. She had been a member of the trade union from, at the latest her return from maternity leave and had sought and had been provided with union support whilst in employment. She had not raised this as a complaint during her employment;
b. She had not raised this as a discrete complaint in her ET1 claim, complaining only of disability discrimination; and
c. She had not persuaded us that her return from maternity leave some months previously was a relevant factor in any delay

201. We were also not persuaded that the Claimant held any real concerns that her employment was at risk if she did raise a complaint and was not a factor which had prevented the Claimant bringing a complaint earlier. Neither were persuaded that the Claimant had any real concerns regarding retaining her role if she raised such a matter – rather the Claimant chose not to. She said as much on cross-examination.

202. This was not a case whereby the Claimant was ignorant of her rights, nor were there internal proceedings pending. Rather this was a case we concluded in which the Claimant did not consider making a complaint and only raised concerns about Enias Chawana after she had been questioned on her own misconduct.

203. We took into account that whilst making reference to the comment in her ET1 Particulars, filed some eight months after the comment had been made, the Claimant included no claim of sexual harassment at that stage.

204. She was represented at the first case management hearing in January 2020 and no indication was given at that point that the Claimant was bringing a complaint of sexual harassment. She was at that point also aware of time limits. An amendment to bring a complaint of sexual harassment was not raised as an issue until the preliminary hearing on 3 April 2020, no application for formal amendment having been made on the Claimant's behalf despite her receiving legal advice and representation following submission of her ET1. Permission for that amendment was not given until July 2020, some 17 months after the act complained of and a year after the Claimant's dismissal.

205. We concluded that the Claimant had deliberately chosen not to tell the Respondent of the conduct that she now complains about, suggesting only that she would tell them when her case got to court.

206. In those circumstances, we concluded that it was not just and equitable in those circumstances to extend time and the complaint was dismissed as the Tribunal lacks jurisdiction.

The act complained of: Comments of Enias Chawana

207. However if the Tribunal was wrong in not exercising its discretion to extend time, we further concluded that the complaint was likely to not be well-founded in any event as even though the comment was inherently and explicitly sexual in nature, whilst we were satisfied that the comment had been made, we were not persuaded that the Claimant had proven that the comment was necessarily unwanted and/or had the proscribed statutory purpose or effect for her sexual harassment complaint to succeed.

208. Whilst the Tribunal accepts that victims of sexual harassment might be unwilling to speak up, and accept that statistically many women are harassed in the workplace and do not speak about it until later, the Claimant gave no evidence that she was upset by the comment or reluctant to complain because of the nature of the allegations. The Tribunal considered that the Claimant was genuinely upset when giving evidence in relation to her disability, but she was dismissive when responding to questions in relation to this allegation. Whilst the Tribunal was cautious about taking such demeanour into account, we concluded that the focus of the Claimant's upset in this claim related to her disability, which we found was not linked to this specific comment. The Claimant confirmed that she did not even consider complaining until after the Respondent refused to provide her with a reference after her employment terminated.

209. More particularly the Claimant had not complained about Enias Chawana during her employment at all – even when her employment had ended and she accepted on cross-examination that she had refused to provide detail of such allegations against Enias Chawana during the internal proceedings.

210. This was a one off comment that had been made in the context of a relationship which by the Claimant's account was a mixed one – where they did joke and use certain language. We also noted reluctance of victims to report their harassment. However, we did not draw a conclusion in this case that the Claimant was a person who had been reluctant to report for fear of reprisals or because of the nature of the conduct. Rather, we concluded that the Claimant had not reported the matter as she had not been upset by the comment; that it had not violated her dignity or had created the environment set out in s.26 Equality Act 2010. We therefore did not conclude that the comment had the requisite statutory effect on the Claimant.

211. We had no evidence as to the purpose of such a comment, Enias Chawana not being called to give evidence. We therefore looked to the context in which the comment had been made. The Claimant had provided little context other than a brief conversation when she had responded '*Don't you think you should focus on your own family*'. The Claimant had also said in cross-examination that he hadn't said the comment because he literally wanted to have sex with her. Whilst objectively we concluded such a comment could have been said for the purpose of harassing the Claimant, we had also found that the Claimant

had a mixed relationship with Enias Chawana, had been friends and did joke and use flippant bad language with each other and it was possible that the requisite purpose would not have been established either.

212. We would have concluded that the complaint was not well founded and would be dismissed.

EqA, section 26: harassment related to race
EqA section 13: direct discrimination because of race

213. The Tribunal had found on balance of probabilities that on or around 5 February 2019 David Robinson had said to the Claimant, in the context of a misunderstanding between the Claimant and another agency nurse who had believed that the Claimant had threatened to beat her up, "*You guys are black, go sort yourselves out. I wont bother with management, they don't give a fuck about anyone but their money".*

Jurisdiction: Time

214. We concluded that such a comment did not form part of a continuing act, but was a distinct act as:

a. This was the only allegation levelled at and involving David Robinson;
b. The allegation of race discrimination was very different to the allegations of sex and disability brought by the Claimant more generally; and
c. The Claimant had not raised any argument that such a comment was linked to her eventual disciplinary and/or dismissal.

215. The specific complaint was therefore out of time.

216. We considered whether it were not persuaded that it was just and equitable to extend time under s.123 Equality Act 2010. The Tribunal repeats its our conclusions at §200-206 of these reasons in relation to the jurisdictional issues on the sexual harassment claim, as they applied equally to this complaint.

217. In addition we considered the following:

a. This was a one-off comment that had been made in February 2019;
b. there had been no conduct of David Robinson before or after this comment that the Claimant had complained of.

218. We considered that the Claimant had not persuaded us to exercise its discretion and extend time. The Tribunal therefore lacked jurisdiction to consider the complaints of race discrimination in any event which were also dismissed.

The act complained of: Comments of Nick Robinson

219. However, if the Tribunal was wrong in not exercising its discretion to extend time, we further concluded that the complaint of harassment was likely to not be well-founded in any event.

220. We concluded that the words themselves demonstrated an intrinsic link with race, but we were not persuaded that even if the comment was unwanted that there had been the requisite proscribed statutory purpose or effect on the Claimant. We drew this conclusion based on the reasons that the Respondent sought to persuade us that the comment had not been made at all, in particular:

a. She did not raise any complaint against David Robinson or report this matter whilst she was in employment in the specific context of the comments he is said to have made;
b. Rather, within the disciplinary hearing the Claimant proactively praised him and whilst we accepted the Claimant's comment on cross examination that this was in the context of his job as a nurse, she did not at any time raise any concerns despite having the opportunity to do so at the differing internal stages
c. The Claimant did not give any evidence that it had upset her, instead giving evidence in general terms of the need to eradicate systemic racism.

221. Again, as we had no evidence from David Robinson, conclusions on whether the comments had been made with the statutory purpose was less clear. The Claimant had included in her Written Submissions (§11f)) evidence that the comment had been made by David Robinson after a dispute between the Claimant and another black agency nurse who, the Claimant believed, had been telling staff that the Claimant was going to '*beat her up'.* The Claimant's position had been that this was not true; that she had just said *'If you want us to be friends, just keep bringing food to work'.* She had wanted David Robinson to record her version of events in the matter which David Robinson had been reluctant to do and had then said the words relied on and the purpose was likely to have been to encourage the Claimant to resolve the issue rather than escalate it.

222. With regard to the claim of direct discrimination, whilst we concluded that the words clearly related to and referenced the protected characteristic of race, we then considered whether the words themselves were inherently discriminatory in the context in which they were used. On the same basis that we did not conclude that the comments amounted to harassment, we did not consider that such a comment, albeit unreasonable was sufficient to demonstrate a prima facie case of direct discrimination and the complaint of direct race discrimination would also not be well-founded.

<u>Unfair dismissal</u>

223. In applying our findings to the issues we needed to initially consider the reason for dismissal and whether it was potentially a fair reason for dismissal. The Respondent has asserted that the reason for the dismissal was conduct.

224. We had found that the Respondent had no knowledge of the Claimant's disability at the point that the decision to dismiss was made, and therefore discrimination played no part in the decision to dismiss and the clear documented chain of evidence demonstrating and detailed investigation and disciplinary process leading to conclusions on the Claimant's conduct by Hazell Orr.

225. On all the evidence available to this Tribunal, including the witness evidence of Hazell Orr, we readily reached the conclusion and were satisfied that the reason for dismissing the Claimant was her conduct, which is a potentially fair reason for dismissal.

Overall Fairness

226. Moving on to assessment of overall fairness, in considering the section 98(4) test in the context of BHS v Burchell requirements outlined earlier, we deal with these in reverse order, dealing first with the investigation before moving on to the grounds and the belief

Investigation

227. With regard to the investigation, the range of reasonable responses test applies to the scope of the investigation undertaken by the employer, as it does to the dismissal decision as established in **Sainsbury plc** v **Hitt**.

228. We were ultimately satisfied that the investigation, in terms of the overall processes adopted by the Respondent, fell within the range of reasonable responses and was a sufficient independent investigation for the following reasons:

a. As part of the investigation into the complaint raised by Enias Chawana, Abbie Allen did identify and interview appropriate witnesses in terms of those who had witnessed or heard the altercation between the Claimant and Enias Chawana and those who had been on duty that night. She also interviewed those who had generally worked with the Claimant. Her decision not to interview all those who worked with the Claimant was not an unreasonable one taking into account they had not witnessed the alleged incident. Her approach did not lead to unfairness;

b. Her investigation set out the methodology of her investigation as well as the evidence she had collated. She set out her findings and highlighted other relevant matters which included the Claimant's concerns regarding Enias Chawana's conduct to her, in as much detail as the Claimant chose to provide at that time.

c. Whilst it may be of some regret to the Claimant that she did not at the time provide more detail to the investigating officer – simply saying that she would only provide this *'in court'*, we found that she did not. Where the Claimant does not provide detail of her allegations at all, despite being asked repeatedly, we fail to see what the employer in those circumstances could reasonably be expected to do. That Abbie Allen did not investigate such matters further of her own accord at that stage did not lead to unfairness and in those circumstances, the Tribunal did

not consider that the investigating officer was obligated to 'leave no stone unturned', nor did we conclude that it was unreasonable not to have undertaken a wider investigation without more information from the Claimant, information which was not forthcoming;

d. The Claimant was informed of the disciplinary allegations that were then brought against her as a result of that investigation, and the Claimant was given the opportunity to answer those allegations at a disciplinary hearing before an independent manager.

229. We did hold a concern that the investigation that had been conducted, was in response to a grievance complaint from Enias Chawana, and the Claimant had not been invited to a further separate disciplinary investigation. We did not however consider that this was in breach of any specific policy or indeed the ACAS Code as whilst best practice might have led to some employers adopting such an approach, we considered that the approach that this Respondent took in these circumstances was a reasonable one. Further, we did not consider that if they had held a further investigation under the disciplinary policy that this would have made any difference to the outcome in any event.

230. The Claimant alleges that the Respondent did not provide details (time, date and incident) to her on the specific allegations regarding co-workers who had complained about her being aggressive, at the investigation meeting on Wednesday 19th June 2019, or the disciplinary hearing on 5 July 2019. We do not consider that this failure was in breach of any policy held by the Respondent or indeed the ACAS Code of Practice and any such failure did not result in any unfairness to the Claimant.

231. We had no evidence before us to support a finding or conclusion that the transcripts or minutes of the meetings were altered and did not consider there had been any unfairness in this regard.

232. The Claimant has also asserted that Hazell Orr did not take time to consult before her decision to dismiss. Taking into account the factual matrix of the allegations against the Claimant, the admission she had made of swearing and the fact that the Claimant was already on a final written warning, we were satisfied that the lack of significant adjournment, before deciding to dismiss, was not unreasonable in the circumstances and did not lead to unfairness.

233. We also considered that the Claimant had been provided with an opportunity to appeal and had done so and had been provided with an opportunity to attend that hearing accompanied with her trade union representative. The appeal process therefore formed part of the reasonable investigation.

234. In conclusion the Tribunal did conclude that the Respondent had carried out a fair and reasonable investigation which would reach the standard required of a reasonable employer.

Reasonable grounds

235. Turning to the issue of whether the Respondent's belief was held on reasonable grounds, the Tribunal finds that it was.

a. The dismissing officer had evidence in the form of a detailed Investigation Report;

b. The Claimant had admitted swearing before a service user.

236. In those circumstances the Tribunal was satisfied that reasonable grounds had been made out for the belief in the gross misconduct.

Genuine Belief

237. Finally, on the issue of genuineness of the Respondent's belief, did the Respondent reasonably believe that the Claimant committed the misconduct, we find that they did.

238. The Tribunal was therefore satisfied in overall terms that the **BHS** v **Burchell** test was made out and that there were grounds following a reasonable investigation to lead to a genuine belief that the Claimant had been guilty of the gross misconduct alleged.

239. As regards procedure generally, the Tribunal finds that the procedure followed was reasonable. The Claimant was notified in a letter in advance of the allegations against her; she was advised she could bring a companion; a hearing was held at which she was able to put her case and any mitigation that she wished to rely on and she was informed of the outcome and her right of appeal.

240. Finally the question is whether dismissal was a fair sanction. Could a reasonable employer have decided to dismiss for such misconduct. Again, we found that they could. This was a Claimant who was already working under the shadow of a final written warning. Such conduct was noted in the disciplinary procedure as gross misconduct. As a provider of care, the Respondent being able to rely on and trust its support workers is a very important part of the Respondent's operation and turning to the issue of sanction, and the need to consider the range of reasonable responses test as set out in **Iceland Frozen Foods** v **Jones**, it could not be said that dismissal was outside the range of reasonable responses.

241. In overall terms therefore the Tribunal's conclusion was that the dismissal was not unfair and the Claimant's claim for unfair dismissal should be dismissed.

Employment Judge Brace

Date 24 May 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 27 May 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche