



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs L Chauke

v

Midlands Partnership NHS Foundation Trust

FINAL MERITS HEARING

(CONDUCTED IN PERSON AND AS A HYBRID HEARING VIA THE CLOUD VIDEO PLATFORM)

Heard at: **Birmingham** On: **8-15 June 2022 and in chambers 16, 17 & 20 June 2022**

Before: **Employment Judge Perry, Mrs S Bannister & Mrs L Evans**

Appearances

For the Claimant: Ms R Chauke (daughter)
For the Respondent: Mr J Walters (counsel)

JUDGMENT

- 1 The claimant was not discriminated against in contravention of part 5 of the Equality Act 2010. Her complaints of race related harassment, direct race discrimination and victimisation are dismissed.

REASONS

References below in circular brackets are to the paragraph of these reasons. Those in square brackets to the page of the bundle or where preceded by a document reference or the initials of a witness, that document or witness statement. A number after a paragraph mark symbol '¶' refers to the paragraph number of a witness statement or document.

The background, issues and evidence

1. This claim was presented on 8 July 2020 following early conciliation starting on 14 May and ending on 9 June 2020.
2. This claim has been the subject of considerable case management including hearings on 20 January 2021 before Employment Judge Cookson, 5 May 2021 before Employment Judge Coghlin QC, 20 February 2022 before Employment Judge Broughton and an ADR hearing on 5 May 2022 before Employment Judge Dean. The first three of those hearings were principally required to identify the issues. Given they are set out in the bundle [98-103] and we address them in turn below, we do not propose to list them in full at this point. Suffice to say the claim includes complaints of harassment (issues 5(a)-(g)), direct discrimination (2(a)-(i)) and victimisation; the protected act is identified at issue 9 (Mrs Chauke's grievance dated 12



December 2019/ 28 February 2020) and the detriments at (10(a) & (b)) (of which detriment 10(a) duplicates the less favourable treatment complained of for direct discrimination complaint 2(h)). The protected characteristic relied upon is race. Mrs Chauke described herself before us as a black African lady.

3. The acts complained about range over the period 12 September 2019 to 17 April 2020. A timing point is raised in relation to earlier acts of discrimination. Any conduct that occurred prior to 15 February 2020 (three months less a day prior to the start of early conciliation) will be out of time unless it extended beyond that date, or the Tribunal exercises its jurisdiction to extend time.
4. We had before us a bundle of 1694 pages, an organisation chart for the team in which Mrs Chauke worked, a chronology and cast list from the respondent that were not agreed, together with a proposed timetable for the hearing.
5. We also had before us witness statements from Mrs Chauke and from the Trust, as we shall refer to the respondent, Mr Kevin Greaves, Ms Jo Riley, Mr Daniel Boyd, Mrs Amanda Finney, Miss Debbie Birks, Ms Sarah Orme, Mr Kurt Moxley, Ms Victoria Barker, Mrs Sarah Guy, Mrs Wendy Colclough, Miss Pam Burton and Miss Lisa Birks. We will refer to both Miss Birks using their given names to distinguish the two.
6. We gave parties the option to provide written and/or oral closing submissions. Both parties elected to provide written submissions. Mrs Chauke asked for more time to do so. We gave her more time than she requested.
7. Mrs Chauke told us her first language was not English and told us it was her second. Her daughter whom we shall refer to as Miss Chauke told us it was Mrs Chauke's third. Those matters being so we offered to make any adjustments required including providing an interpreter, but she declined. She did ask for a number of adjustments including to allow her to provide care for her husband at a certain time each day and for flexibility over who asked questions on her behalf as her daughter was representing her and needed to attend meetings. We accommodated those requests.
8. We explained how the hearing would proceed, the need to set out her position in her witness statement, challenge disputed matters by asking questions of witnesses and referring them to relevant documents and summarise her case at the end.



9. At the start of giving her evidence when we checked how she was feeling. Mrs Chauke told us she was ill. Given there was no medical evidence provided to support that and no mention of it had been made before we made further enquiries of her. She assured us she was able to continue explaining that the claim had gone on too long already. Notwithstanding we sought to clarify why she was ill. She told us stress, which it became apparent was due to the claim and matters leading to it. We explained that normally until the issues were resolved the stress would not go away with which she agreed. In the absence of medical evidence to the contrary we decided on that basis to proceed.
10. We constantly checked her understanding We return to this below (320) following.
11. At several points during the hearing Miss Chauke asked witnesses if it was accepted that Mrs Chauke was the only Black member of her team. The question was put, however, solely in terms of numbers of white and black colleagues. During the course of those enquiries, it became apparent that it was accepted that Mrs Chauke had other colleagues who fitted neither categorisation. Given the way those questions were put we felt it necessary to observe that the colour of an individual's skin is not determinative in relation to how they may identify in considerations of race, nationality, ethnicity etc. As a result, we requested that care should be taken not to make assumptions or draw stereotypes, not least because such assumptions could be deemed offensive to others. The issue of self-identification is, of course, becoming more widely understood in relation to other protected characteristics. That said in closing Miss Chauke sought to repeat the point she was making, namely that an individual who identified as Black might not be treated in the same way as an individual who identified as Black.

The Law

12. We do not intend to refer to all the authorities to which we were referred to; but instead focus on the principles that apply. Further, to avoid repetition we address some in our conclusions below.
13. At the outset Miss Chauke referred us to a report by the Runnymede Trust "Broken Ladders" (<https://www.runnymedetrust.org/publications/broken-ladders>). We referred her to the Equality and Human Rights Commission Code of Practice on Employment (<https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>).

Race

14. Section 9(1) Equality Act 2010 ("EqA") sets out a definition of race that is not exhaustive and includes—



- “(a) colour;
- (b) nationality;
- (c) ethnic or national origins.”

Given how Mrs Chauke described herself the way the claim of race discrimination was put before us was by reference to not only race generally but colour and/or ethnicity.

Harassment

15. Harassment is prohibited by s.40 EqA. It is defined in s.26 EqA. Where relevant, s.26 provides as follows:

- “(1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of
- (i) violating B’s dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- ...
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- (a) the perception of B;?
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.¹
- (5) The relevant protected characteristics are— age; disability; ...”

16. The matters referred to in (1)(b)(i) and (ii) are sometimes referred to as the “*proscribed consequences*”. We adopt that phrase as a shorthand below.
17. Following a decision of Burton J sitting in the Administrative Court² the use of “*grounds of*” as a requirement for harassment was replaced with “*related to*” which has a broader meaning in that the conduct does not have to be “*because of*” the protected characteristic (EHRC Code ¶7.9) and

¹ The predecessor provisions were slightly differently worded hence s. 3A(2) of the Race Relations Act 1976 provided “*Conduct shall be regarded as having the effect specified in paragraph (a) or (b) of subsection (1) only if, having regard to all the circumstances, including in particular the perception of that other person, it should reasonably be considered as having that effect.*”

² [Equal Opportunities Commission v Secretary of State for Trade & Industry](#) [2007] IRLR 327



will include someone who is wrongly perceived as having a protected characteristic when in fact they do not³.

18. When assessing the effect of a remark, the context in which it is given is always highly material and whether conduct is “related to” a disability has to be judged by assessing the evidence as a whole⁴. A humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. Whilst:

“22. ... not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”⁵

19. Elias LJ in [Grant v HM Land Registry](#)⁶ reinforced that point stating that

“47 ... Tribunals must not cheapen the significance of these words [“violating dignity”, “intimidating, hostile, degrading, humiliating, offensive”]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”

20. Langstaff P adopted a similar view in [Betsi Cadwaladr University Health Board v Hughes](#)⁷:-

“12. The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.”

21. It will also be relevant to deciding whether the response of the alleged victim is reasonable.

Langstaff P also in [Betsi Cadwaladr](#) said this:-

“9. Whether [the conduct] has that effect is a matter of fact is to be judged by a Tribunal ... objectively. In determining that, the subjective perception of the Claimant is relevant, as are the other circumstances of the case. But, as was pointed out in [Dhalival](#) it should be reasonable that the actual effect upon the Claimant has occurred.”

22. That was also the view of Elias LJ in [Grant](#):-

“13 ... When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept

³ as highlighted by Laws and Sedley LJ in [English v Thomas Sanderson Ltd](#) [2009] IRLR 206 CA

⁴ [Hartley v Foreign and Commonwealth Office Services](#) UKEAT/0033/15

⁵ [Richmond Pharmacology v Dhalival](#) [2009] UKEAT 0458/08, [2009] ICR 724

⁶ [2011] IRLR 748 CA

⁷ [Betsi Cadwaladr University Health Board v Hughes](#) [2014] UKEAT/0179/13



of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.”

Direct discrimination

23. Direct discrimination (like all other forms of discrimination other than harassment) is prohibited by s.39 EqA. Section 13 EqA provides that direct discrimination occurs where because, of a protected characteristic, a person is treated less favourably than another person has been or would be treated. That involves a comparison and for that comparison there must be no material difference in the circumstances of the case (save for the protected characteristic) ⁸. ‘*Would treat*’ allows for a hypothetical comparator in addition to an actual comparator.
24. Thus, it is not sufficient merely for a claimant to have a protected characteristic and to be treated less favourably; for a respondent to be guilty of direct discrimination the less favourable treatment must be done ‘*because of*’ the protected characteristic. The protected characteristic also need not be the sole or even principal reason for the treatment so long as it has significantly influenced (that is *one which is more than trivial*) the reason for the treatment ⁹.
25. In cases where the difference in treatment is based on a criterion which is a protected characteristic or that cannot be disassociated from it (and thus the category of those suffering the disadvantage coincides exactly with the category of people with the particular protected characteristic) ¹⁰ the application of the criterion will constitute the reason or ground for the treatment complained of, this constitutes direct discrimination and there is no need to look any further :-

“... By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic.” ¹¹

26. In other cases, ¹² the question to be asked is why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? ¹³ Unlike causation, which is a legal conclusion, the reason why a person acted as s/he did is a subjective question and one of fact ¹⁴.

⁸ s.23 EqA

⁹ [Nagarajan v London Regional Transport](#) 1999 IRLR 572 HL as applied in [Igen v Wong](#) [2005] IRLR 258 at [37]

¹⁰ [Bressol v Gouvernement de la Communauté Française](#) at [56] and per Lady Hale in [Bull v Hall](#) [2013] UKSC 73 [19]

¹¹ Elias P in [London Borough of Islington v Ladele](#) [2009] ICR 387, [2008] UKEAT/0453/08, [2009] IRLR 154 at [32]

¹² An example is [Nagarajan](#) (see above)

¹³ An example is that of the shop keeper given by Lord Phillips in [Governing Body of JES](#) [2010] 2 AC 728 at [21] “A fat black man goes into a shop to make a purchase. The shop-keeper says ‘I do not serve people like you’. To appraise his conduct it is necessary to know what was the fact that determined his refusal. Was it the fact that the man was fat or the fact that he was black? In the former case the ground of his refusal was not racial; in the latter it was. The reason why the particular fact triggered his reaction is not relevant to the question of the ground upon which he discriminated.”

¹⁴ [Chief Constable of West Yorkshire Police v Khan](#) [2001] UKHL 48 at [29]



27. The one (subjective) question the tribunal must not concern itself with is “*if the discriminator treated the complainant less favourably on racial grounds, why did he do so?*” That question is irrelevant¹⁵. Discrimination is not negated by the discriminator’s motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds.

“... Parliament did not consider that an intention to discriminate on racial grounds was a necessary component of either direct or indirect discrimination. One can act in a discriminatory manner without meaning to do so or realising that one is.”¹⁶

Victimisation

28. Section 27 EqA provides:

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because:-

(a) B does a protected act, or

(b) A believes that B has done, or may do a protected act.”

29. Detriment has been given a wide meaning by the courts¹⁷. Brandon LJ in *Ministry of Defence v Jeremiah* [1979] IRLR 436 CA, a case involving the interpretation of the 1975 Sex Discrimination Act, stated “... I do not regard the expression 'subjecting to any other detriment', as used in s.6(2)(b), as meaning anything more than 'putting under a disadvantage' ” and went on to say that was a question of fact for the Tribunal¹⁸.

30. Detriment is assessed objectively. Namely, how it would have been perceived by a reasonable litigant¹⁹. In making that assessment we must bear in mind that an unjustified sense of grievance cannot constitute detriment²⁰, and whilst it is not a defence per se that the employer behaved honestly and reasonably, save in the most unusual circumstances, it will not be objectively reasonable for an employee to view distress and worry caused by honest and reasonable conduct of the employer as a detriment²¹. A person may be treated less favourably and yet suffer no detriment.

¹⁵ [R. v Birmingham City Council, ex p. Equal Opportunities Commission](#) [1989] AC 1155, see Lord Goff at p. 1194.

¹⁶ As Lady Hale put it in *JES* at [57]

¹⁷ Lord Hoffman in *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830 at [53].

¹⁸ adopted and approved by the HL in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 which in turn referred often to another HL decision in *Chief Constable of West Yorkshire Police v Khan* (as above)

¹⁹ *Ministry of Defence v Jeremiah* (as above) [31] per Brightman LJ approved in *Chief Constable of West Yorkshire Police v Khan* (as above)

²⁰ *Shamoon v Chief Constable of Royal Ulster Constabulary* (as above) per Lord Hope [35].

²¹ *Pothecary Witham Weld (a firm) & Anor v. Bullimore & Anor* [2010] IRLR 572, [2010] ICR 1008, [2010] UKEAT 0158/09 at [19(3)] applying *Derbyshire v. St. Helens Metropolitan Borough Council* [2001] ICR 841



The burden of proof

31. Direct evidence of discrimination is rare and section 136 EqA provides that if there are facts from which the court could decide, in the absence of any other explanation, that there has been a contravention of the Equality Act the tribunal must hold that the contravention occurred unless the alleged perpetrator shows that the contravention did not occur.

32. Mr Walters referred us his closing submissions [¶11] to [Royal Mail Group Ltd v Efofi](#) [2021] UKSC 3 which discussed the legal principles applicable to the application of s.136 [¶13-34]. He then highlighted from the judgment of Lord Leggatt the following:-

“30. ... it follows from the application of this basic rule of evidence that an employment tribunal may only find that “there are facts” for the purpose of s 136(2) of the 2010 Act if the tribunal concludes that it is more likely than not that the relevant assertions are true. This means that the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under s 136(2) of the 2010 Act just as under the old provisions, the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent.”

33. Thus, the first stage is to establish if there are facts found on the balance of probabilities from which a Tribunal could conclude in the absence of an adequate explanation if an act of discrimination had taken place, if there are not, the claim will be bound to fail. In doing so the ET has to consider all the primary facts, not just those advanced by the complainant; save in one respect the total picture has to be looked at²². It is only the explanation which cannot be considered at the first stage of the analysis. Whereas evidence adduced by a respondent can properly be taken into account at the first stage when a tribunal is deciding what the “facts” are in order to see if a *prima facie* case of discrimination has been established by the claimant²³.

34. A difference in treatment alone is not sufficient to establish that discrimination could have occurred and the burden of proof passes to a Respondent, similarly unreasonable conduct without more is not enough either. The protected characteristic need not be the sole or even principal reason for the treatment so long as it has significantly influenced²⁴ the reason for the

²² see [Henage](#) at [31], and [Laing v Manchester City Council](#) [2006] ICR 1519 at [56 to 59]. “Typically this will involve identifying an actual comparator treated differently or, in the absence of such a comparator, a hypothetical one who would have been treated more favourably. That involves a consideration of all material facts (as opposed to any explanation).” per Elias P in [Laing](#) at [65]. Discrimination complaints “rarely deal with facts which exist in a vacuum and to understand them, a Tribunal has to place them in the context revealed by the whole of the evidence. ... one cannot understand a scene in act III of a play without first having understood what has happened in acts I and II ... since these both provide the context for and cast light on the overall picture.” (see [Kansal v Tulleys Prebon Plc](#) UKEAT/0147/16 at [31] where Langstaff J also referred to [Qureshi v Victoria University of Manchester](#) [2001] ICR 863 and [X v Y](#) [2013] a decision of the EAT (UKEAT/0322/12/GE)

²³ [Ayodele v Citylink Ltd](#) [2017] EWCA Civ 1913 per Singh LJ [67]

²⁴ “A ‘significant’ influence is an influence which is more than trivial.



treatment²⁵. That said, it is unusual to find evidence of discrimination and accordingly it is for the Tribunal to draw appropriate inferences from primary facts. Context is important and adverse inferences may be drawn where appropriate from the surrounding circumstances of the Respondent's conduct. The Tribunal can also consider the relevant codes of practice and draw inferences from non-compliance with them.

35. Where there are allegations of discrimination over a substantial period of time, a fragmented approach looking at the individual incidents in isolation from one another should be avoided as it omits a consideration of the wider picture ²⁶.
36. Where facts are proved from which inferences of less favourable treatment because of protected characteristics can be drawn, then the burden of proof moves to the respondent and it is then for the respondent to prove on the balance of probabilities that it did not commit or are not to be treated as having committed the alleged discriminatory act or that treatment was in no sense whatsoever on the ground of protected characteristic ²⁷. That requires a consideration of the subjective reasons which cause the employer to act as it did ²⁸:-

“At the second stage, the ET must ‘assess not merely whether the [Respondent] has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities.’ ” ²⁹

37. Discrimination complaints *“rarely deal with facts which exist in a vacuum. To understand them, a Tribunal has to place them in the context revealed by the whole of the evidence. It might be said, for instance, that one cannot understand a scene in act III of a play without first having understood what has happened in acts I and II and, it may be, having understood what happens in later scenes too, since these both provide the context for and cast light on the overall picture.”* ³⁰. Thus, when considering whether a protected characteristic was a ground for less favourable treatment, the total picture has to be looked at and where there are allegations of discrimination over a substantial period of time, a fragmented approach looking at the individual incidents in isolation should be avoided as it omits a consideration of the wider picture ³¹.
38. It was made clear in *Hewage v Grampian Health Board* [2012] UK SC 37, by Lord Hope (approving dicta of the Employment Appeal Tribunal in *Martin v Devonshires Solicitors* [2011] ICR 352

²⁵ *Nagarajan* as applied in *Igen v Wong* at [37]

²⁶ *London Borough of Ealing v Rihal* [2004] IRLR 642 CA applied in *Laing* [59] and endorsed in *Madarassy v Nomura International* [2007] IRLR 246 also CA

²⁷ *Ayodele v Citylink Ltd & Another* [2017] EWCA Civ 1913.

²⁸ see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, 341, para. 7, per Lord Nicholls.

²⁹ see the *Igen* guidance at Annex paragraph 12 and *Laing* [51]

³⁰ see *Kansal v Tullett Prebon Plc*, UKEAT/0147/16 at [31] where Langstaff J also referred to *Qureshi v Victoria University of Manchester* [2001] ICR 863 and *X v Y* [2013] a decision of the EAT (UKEAT/0322/12/GE

³¹ *London Borough of Ealing v Rihal* [2004] IRLR 642 CA applied in *Laing* [59] and endorsed in *Madarassy v Nomura International* [2007] IRLR 246 also CA



(Underhill P as he then was)) that whilst the burden of proof provision in s.136 EqA is a tool to be used in a case where a tribunal cannot make clear findings about the reason for impugned treatment. If the tribunal is in a position to make positive findings on the evidence one way or the other that is an end to the matter³².

“... it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other. ...”

Timing

39. Section 123 EqA provides so far as is relevant:-

“(1) ... Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

...

(3) For the purposes of this section—

(a) conduct extending over a period 33 is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

40. The Court of Appeal gave guidance on the exercise of the just and equitable discretion in [Abertawe Bro Morgannwg University Local Health Board v Morgan](#) [2018] EWCA Civ 640 per Leggatt LJ

“18. ... it is plain from the language used (“such other period as the employment tribunal thinks just and equitable”) that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 34, the

³² [Henvage](#) at [32]

³³ The wording differs to that in s.76(1)(b) SDA 1975 “...any act extending over a period shall be treated as ...”

³⁴ [British Coal v Keeble](#) [1997] IRLR 336



Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account 35. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998 36.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay 37 and (b) whether the delay has prejudiced the respondent 38 (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). ”

41. Thus, the exercise of the broad discretion involves a multi-factoral approach taking into account all of the circumstances of the case ³⁹ in which no single factor is determinative ⁴⁰. In addition to the length and reason for delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the merits and balance of prejudice, other factors which may be relevant are the extent to which the respondent has cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate legal advice once the possibility of taking action is known.

42. The CA in [Robertson v Bexley Community Centre](#) ⁴¹ said this:-

“25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds 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 complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

³⁵ [London Borough of Southwark v Afolabi](#) [2003] EWCA Civ 15; [2003] ICR 800 at [33]. That principle was more recently reinforced in a different context in [Neary v St Albans School](#) [2010] IRLR 124, (CA) per Smith LJ where, it was held that where a line of EAT authority requiring a Tribunal to consider the then factors in CPR 3.9(1), to decide whether or not to grant relief from sanction following non-compliance with an unless order, was incorrect.

³⁶ [Dunn v Parole Board](#) [2008] EWCA Civ 374; [2009] 1 WLR 728 at [30-32, 43, 48] and [Rabone v Pennine Care NHS Trust](#) [2012] UKSC 2; [2012] 2 AC 72, at [75]

³⁷ A failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused, the tribunal must weigh in the balance the prejudice and potential merit of the claim ([Rathakrishnan v Pizza Express \(Restaurants\) Ltd](#) UKEAT/0073/15 per HHJ Peter Clark disapproved the reasoning of the then President of the EAT Mr Justice Langstaff in [Habinteg Housing Association Limited v Holleran](#) UKEAT/0274/14 (which was at odds with two EAT decisions, [Pathan v South London Islamic Centre](#) UKEAT/0312/13 HHJ Shanks presiding at [17 to 18], and [Szmidt v AC Produce Imports Limited](#) UKEAT/0291/14 HHJ Peter Clark presiding at [4 to 6] and neither of which appear to have been cited to the President in [Habinteg](#)). Authority for the need to consider the merits and the balance of hardship dates back to [Dale v British Coal Corporation](#) [1992] WL 12678386.

³⁸ See also [Hale v Brighton and Sussex University Hospitals NHS Trust](#) [2017] UKEAT/0342/16 at [49] where the current president of the EAT Mr Justice Choudhury (albeit prior to his appointment as president) approved the reasoning in [Bahous v Pizza Express Restaurant Ltd](#) UKEAT/0029/11 at [19-21] that the question of the balance of prejudice is a material factor and the merits should not be treated as a separate consideration but as part of that prejudice balancing exercise. Concluding the Tribunal's failure to take this into account was an error of law, see [Baynton v South West Trains Ltd](#) [2005] UKEAT/0848/04, HHJ Burke QC presiding (see particularly [59]).

³⁹ [Hutchison v Westward Television Ltd](#) [1977] IRLR 69

⁴⁰ see also [Rathakrishnan v Pizza Express \(Restaurants\) Ltd](#) UKEAT/0073/15 per HHJ Peter Clark

⁴¹ [Robertson v Bexley Community Centre](#) (CA) [2003] IRLR 434.



43. In cases involving adjustments the position is more nuanced as they involve the failure to do something, an omission. Again, this was addressed by Leggatt J in [Abertawe v Morgan](#):-

“14. Section 123(3) and (4) determine when time begins to run in relation to acts or omissions which extend over a period. In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20(3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to address the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired.

15. This analysis of the mischief which section 123(4) is addressing indicates that the period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time. This is further supported by the decision of the Court of Appeal in [Kingston upon Hull City Council v Matuszowicz](#) [2009] EWHC Civ 22; [2009] ICR 1170. In that case the Court of Appeal considered the effect of the predecessor provision (which was in materially identical terms) to section 123(4) of the Equality Act in relation to a claim based on failure to make reasonable adjustments by finding alternative employment for the claimant. On the facts, the duty (and hence the failure to comply with it) was said to have arisen by, at the latest, August 2005 and to have continued until 1 August 2006, when the claimant's employment ended (see para 25). Although the Court of Appeal did not find it necessary to reach any conclusion about the date on which time began to run, Lloyd LJ (with whose judgment the other members of the court agreed) considered that the relevant date may have been 28 July 2006 – observing that, at any rate during the period of April to July 2006, the employer was representing to the claimant that the question of his possible redeployment was being taken seriously (see paras 28-29). This illustrates, first of all, that the date by which the employer might reasonably have been expected to comply with a duty to make reasonable adjustments for the purpose of the test in what is now section 123(4)(b) of the Equality Act may be different from the date when the breach of duty began. Secondly, the approach of Lloyd LJ supports the view that the date by which the employer might reasonably have been expected to comply with the duty should be determined in the light of the facts as they would reasonably have appeared to the claimant – including in that case what the claimant was told by his employer.

16. In the present case, although its reasoning might have been more clearly expressed, I think it apparent that the employment tribunal approached the matter correctly in asking itself at what point it became clear or should have become clear to the claimant that the Board was not complying with its duty to make reasonable adjustments by looking for alternative suitable roles to which she could be redeployed. The tribunal found that this would probably have become clear to the claimant by June/July 2011. Although it was generous in those circumstances to find that the time for bringing a claim did not begin to run until 1 August 2011, it cannot be said that this was not a judgment which on the facts was open to the tribunal. Nor is there any inconsistency between that finding and the tribunal's conclusion that the claim based on failure to make reasonable adjustments was well-founded. Although the tribunal did not identify the earliest date by which the Board could and should have offered to redeploy the claimant to a suitable alternative post, it found that on the balance of probabilities it is likely that there would have been a suitable role to which the claimant could have been redeployed during the period from April to the beginning of August 2011. Indeed, the tribunal's



discussion of the date by which the Board might reasonably have been expected to comply with its duty presupposes that the Board was failing to comply with its duty during the period under consideration. I therefore consider that the first ground of appeal is misconceived.”

Our findings

44. We make the following primary findings of fact on the balance of probabilities and from the information before us. It is not our role to attempt to resolve every disputed issue that has emerged during this hearing. What follow are our findings relevant to the principal issues in the claim.
45. Mrs Chauke was latterly employed as a band 6 nurse in the Diabetes Education and Self-Management for Ongoing and Newly Diagnosed (“DESMOND”) service based at the Trust’s Honeywall site in Stoke on Trent.
46. Mrs Chauke has been continuously employed by the Trust and its predecessors since 2013, the DESMOND service having become part of the Trust in 2018 and Mrs Chauke’s employment having transferred to it. She remains in employment.
47. Prior to February 2020, Mrs Chauke’s acting line manager was Kevin Greaves, a Band 7 Advanced Physiotherapist. He was line managed by Joanne Riley.
48. By the time the claim came before us some earlier matters referred to in the claim form did not form part of the issues and nor were they led in evidence by Mrs Chauke. For the reasons we give above we do not address them here.
49. On 4 July 2019 Mrs Chauke attended a Stage 1 Formal Sickness Absence Meeting with Mr Greaves [141]. Although a letter confirming the outcome was incorrectly dated it is clear and not in dispute that the meeting occurred on 4 July 2019. The Trust’s managing attendance policy identified the triggers [1518-19]

“The following periods of sickness absence in a rolling 12-month period will trigger the formal sickness absence procedure as set out below:

Short Term

- *3 or more episodes of sickness absence*
- *15 calendar days or more in total (cumulative) and/ or*
- *Where a particular pattern can be identified*

Long term



- *Periods of 4 calendar weeks or more”*

50. At no point did Mrs Chauke argue the triggers had not been met for the stage 1 attendance warning. The Trust’s managing attendance policy indicated that she would be monitored for 6 months [1520] and any further sickness absence, cause for concern or failure to improve and sustain any improvement would make her liable to a stage 2.

12 September 2019

51. At 1:00pm on 12 September 2019 Mrs Chauke alleges [LC/27] that she asked Mr Greaves if she could go home as she was not feeling well. He stated he would only allow her to go home on condition that she pay back the hours. It was common ground that she did not go home, she alleges that was because of what she was told. She complains she explained that in a follow-up email which was neither acknowledged nor responded to [866].

“Hello Kev

I didn’t go home after learning that I had to pay back the hours. I honestly thought when one works half the day it is taken as worked. I have never done this before but was my first time to work and leave. However, I had a little read on the sickness policy and does not come clear [sic] that one should pay back the hours but its states that it can happen.

Thank you anyway.”

52. She argues:-

- 52.1. the Sickness Policy states that a day shift will be counted as a normal working day (see (53)) and/or
- 52.2. other staff members like Mrs Victoria Barker had gone home without paying back the hours.

so, she *“began to question why again I was being treated differently”* [our emphasis].

53. In an annotation to a document [147] Mrs Chauke gives an extract from the Trust’s managing sickness absence policy (that can also be found at [1356]. That policy starts at [1352])

“5.3.9 If a member of staff attends for duty and leaves straight away this counts as sickness. If an employee attends for duty and carries out any work but is not fit to stay at work, this day/ shift will be counted as a normal working day. Part day absences will not normally be counted towards triggers but will be recorded. If a pattern of part day absences emerges then the manager will arrange to meet with the individual to discuss and this may lead to a formal sickness review”

54. That forms allegation 2(a):-



2(a) On 12 September 2019, did Kevin Greaves deny the Claimant's request to take sickness leave from 13:00 onwards and would be permitted only if the Claimant paid the hours back?

The comparator Mrs Chauke relies upon is Victoria Barker.

55. Mr Greaves struggled to recall the conversation but accepted he may have said that but he told us he would only have asked Mrs Chauke to do that as an alternative to her taking sick leave which would count towards her sickness absence triggers. He accepted that was not in keeping with the Trust's absence management policy as absence due to sickness should be formally recorded as sick leave but that he did so to be supportive.

56. The first time this was raised as an issue was 12 December 2019 when Mrs Chauke raised this pursuant to the Trust's dignity and respect policy [1396 following]. That was an overarching policy and required complaints to be addressed through one of its other policies, those of relevance here were its grievance policy [1540 following] or as bullying and harassment complaint [1529 following]. The Trust's grievance policy required grievances to be raised at the earliest opportunity and no later than 8 weeks after the event that gave rise to the grievance [¶3.8]. The bullying and harassment policy makes the position even clearer [¶7]

"Complaints should be made as soon as possible after the event or circumstances giving rise to the complaint and in any event within 8 weeks of their occurrence. Complaints made outside this time period will be more difficult to address because of the time that has elapsed."

57. An investigatory interview with Mr Greaves eventually took place on 30 September 2020, twelve months after the incident concerned took place. It was minuted [568-575]. Whilst there was an initial delay of three months on Mrs Chauke's part before she raised the complaint, then a further delay in her confirming she wished to pursue that formally, COVID then intervened. There was a further delay when a variety of internal investigators were appointed and then had to step aside due to not having the capacity to deal with her grievance which by that stage had escalated to not only to a complaint by Mrs Chauke against a number of staff, but also one by her line manager about her (294) following.

58. Given that delay on both parties' parts it is unsurprising that by the time Mr Greaves came to be interviewed he had no recollection of the specifics of the incident.

59. Mr Greaves was not challenged specifically about ¶5.3.9 of the managing sickness absence policy in cross examination. Nor does Mrs Chauke's evidence suggest she did so until her subsequent email. The absence of push back at the time, and complaints being raised only some time later, formed a common theme amongst Mrs Chauke's earlier complaints.



60. As Mrs Chauke stated in her witness statement she only later *“began to question why again I was being treated differently”*. Whilst that is a common theme in discrimination complaints, and one of the reasons why the law provides for conduct extending over a period; neutral acts can start to build and show a common thread, an alternative view is that having dwelled on them she inferred a reason for the treatment for which there was no basis.
61. Those points aside we need to consider is whether Mr Greaves was aware of ¶5.3.9 the Trust’s managing sickness absence policy. He referred us [KG/13] to a statement of a former report of his, Mrs Nina Bentley provided well after these events on 30 March 2022 [1648] that suggests that offering staff the opportunity to work their hours back was an approach he adopted to all of the staff he line managed. Mr Greaves was not challenged about that.
62. When the comparator put forward by Mrs Chauke, Mrs Barker, was asked about this she did not recall any informal arrangements about people leaving early having to pay back hours or any group discussion about it. However, Mrs Barker was not asked if she had been on an attendance and management process. Indeed she told us she had an agreed flexible working pattern (for childcare) and was permitted to record any additional hours worked and take time off in lieu. Thus we would not have expected her to be required to do so. Accordingly, for both reasons (her flexible working pattern and/or that she was not on a stage 1 process) Mrs Barker was not an appropriate comparator.
63. Mrs Chauke makes valid points about there being good reasons for the Trust’s staff including Mr Greaves following the rules, and they are there for consistency. However, the Trust adopting a degree of discretion also benefitted staff, her included. One such example is where it accepting her subsequent grievance late and notwithstanding its failure to followed the prescribed form. If the Trust had not adopted that flexible approach it would have been entitled on its face to reject her grievance and as out of time. This is an example where Mrs Chauke required the Trust to follow its rules but where she was not required to do so.
64. Mrs Chauke did not indicate when she had started work on the day concerned, and thus whether she had worked half a day and thus if ¶5.3.9 was engaged. Mrs Chauke did not say she had pointed that out to him at the time and thus he made that offer in full knowledge of having been reminded of that provision. We find that whilst Mr Greaves did offer Mrs Chauke the opportunity if she went home early to pay back the hours he did not refuse permission for her to go home unless she agreed to do so. We find given what Mrs Bentley stated, Mr Greaves was not aware or mindful of ¶5.3.9 at the time and would have treated anyone in that position the same way. We heard when the Mrs Chauke later failed to attended work because of a delayed



flight Mrs Orme referred to her having made no proposals in relation to the missed hours. Those matters lead us to conclude that making up time was a general concern for managers that was particularly the case as the staffing of the part of the service Ms Orme managed was below complement.

65. Unlike Mrs Chauke, it was not alleged Mrs Bentley was on a stage 1 attendance process. Mrs Bentley had taken emergency time off to collect her son from school. Mrs Chauke has not shown ¶5.3.9 was engaged. That being so an absence could have pushed Mrs Chauke onto a stage 2 warning. We find that whilst Mr Greaves was not following procedure we find he was trying to be supportive; Mrs Bentley was grateful for the offer. Mrs Chauke perceived it as discriminatory. Given Mrs Chauke has not shown that ¶5.3.9 applied Mr Greaves's treatment of Mrs Chauke was arguably more favourable treatment than someone on a stage 1 should have received, had he followed policy Mrs Chauke would have been escalated to a stage 2 warning.
66. Whether Mrs Chauke showed that ¶5.3.9 applied or not, we find, as Mrs Bentley demonstrated that Mr Greaves would have treated any member of staff, stage 1 or not, in the same way. We find Mrs Chauke's race, colour or ethnicity played no part in that decision.

31 October – Request to extend leave - Issue 2(b)

67. On 29 October 2019 [156] Mrs Chauke emailed Ms Riley asking if she could extend the leave of 15 days she had already approved over the following Christmas and New Year period (Thursday 19 December 2019 – Friday 3 January 2020). Mrs Chauke sought to extend that to 16 – 18 December 2019. We were told an informal policy was that only 2 weeks leave could be booked at a time. We were not taken to any policy or practice that set that out.
68. Mrs Chauke told us that on 31 October 2019 she (again) asked Ms Riley if she could extend her leave [LC/41]. Mrs Chauke stated that no one else had booked any annual leave on those dates and there were no clinics so Ms Riley agreed to her request however, Ms Riley then went back to Mrs Chauke and said that she couldn't confirm the leave until Ms Mandy Snape (a Band 5 Staff Nurse who reported to Mrs Chauke) had agreed to look after the team. Mrs Chauke went on to say [LC/46] that Ms Riley subsequently said she could take the extra 3 days leave.
69. That forms the basis for issue 2(b):-

On 31 October 2019, did Jo Riley agree the Claimant's request to take annual leave and then declined to authorise the annual leave unless Mandy Snape confirmed she could cover the Claimant's absence?

The comparators relied upon are Margaret Coxon, Liz Booker and Lucy Lloyd;



70. Ms Riley told us that on the morning of 31 October 2019, Mrs Chauke telephoned Ms Riley to discuss her leave request. Ms Riley told us that she said she did not envisage it would be a problem. Having then discussed performance with Mrs Chauke, Ms Riley checked the Trust's "e-roster" system to see if Ms Snape was on annual leave and noted that according to the system she was not. She asked Mrs Chauke to check with Ms Snape in any event because the e-roster was not always up to date and because staff may not have had the opportunity to formally submit the request [157].

71. On 31 October at 09:18 Ms Riley emailed Mrs Chauke copying Mr Greaves in [157]:-

"Hi Linab

I'm emailing following on from our conversation this morning to confirm that it would be possible for you to move the start of your annual leave to w/c 16th December but please can you discuss this with Mandy to confirm that she is happy to cover the service during your annual leave.

If you can let me know as soon as you've spoken to her then I can approve the request on the system

Hope this makes sense

Jo"

72. Mrs Chauke did not respond until 3 days later, 4 November, thanking Ms Riley for her email and suggestions before saying [157]:-

"However, since you checked and noted that she had not booked or requested for any annual then I found this a bit untoward. I had lots of questions which made reluctant to ask fearing of being humiliated if she turns around and say no then it meant me not travelling therefore I decided to cancel the journey to save my skin. Maybe I need an HR document that explicitly state how vacations should be managed to avoid further confusion. Maybe, since it is a new Trust, maybe that is what is required of me but before I have been left alone as long as our requests did not clash and do not recall a day when I was ever approached and asked if it was ok for me to look after the Desmond in order for my Band 6 to go on annual leave. I was left alone when Liz left but no one approached me and asked if it was alright for me to carry on working alone until the post was filled."

73. Ms Riley told us that was because there were only two members of staff who could lead DESMOND sessions, Mrs Chauke and Ms Snape, and she wanted to ensure that one was present to prevent her having to arrange cover (which by then was only about 6 weeks away). We find as Ms Riley's email and her evidence demonstrates was that the leave would be approved but that Ms Riley wanted to know what the position was first.

74. Mrs Chauke argued that checking with Ms Snape was not relevant because no sessions had been booked in that week because in previous years there had been low attendances. We were not taken to evidence supporting or refuting that.



75. Both for the reasons we will go onto but also because of what immediately follows that in our view was a side issue.
76. Mrs Chauke suggested in her email of 4 November that she would be cancelling some of the days which is what she did. Thus, the complaint she as making was not that she had been refused the leave. We thus sought to clarify how this complaint was pursued. Mrs Chauke explained that she argued this was discrimination because she was asked to check with a subordinate whereas when she had previously been a subordinate her superiors had never checked with her:-
- [LC/50] As a Nurse Band 5 I ran the Department independently (assisted by Vicky Barker the Lay Educator (Band 3) throughout) from July 2019 when post was vacant. No one ever asked me before or after if I was alright doing the job alone and no higher grade asked me if it was ok for them to take their leave. However, it now has been so because the higher grade person is black and in no way can she take her leave without asking a band 5 who now happens to be white.*
77. Mrs Chauke had already booked 2½ weeks leave over the Christmas and New Year period thus the issue of that preventing Ms Snape from taking leave herself aside, the approval of Mrs Chauke's earlier request for leave left Ms Snape running a service without her manager for 2½ weeks already. Irrespective whether the Trust had an informal policy that leave up to 2 weeks would be granted and longer if it could be accommodated/depending on the circumstances the grant of leave for 3 weeks in what was a two person service would place a burden on anyone whether it had included the Christmas/New Year period or not.
78. The appropriate comparators were thus colleagues in what was essentially a two person service seeking to extend leave from two and a half weeks to three (or arguably take three weeks leave).
79. Mrs Chauke gave little or no detail of the circumstances of the comparators she relied upon, Margaret Coxon, Liz Booker and Lucy Lloyd. Whilst we were told Ms Coxon was the former Band 6 Lead Nurse of the Desmond team and Ms Booker was a Band 6 Programme Lead based in the DESMOND Team, we were not told who Ms Lloyd was. That aside Mrs Chauke specifically did not say they had sought to take leave of that length. Nor given the changes to the service that Ms Riley was their manager at the time of those requests.
80. Nor was there any suggestion that even if Ms Snape had objected Ms Riley would have refused the request. Indeed, Mrs Chauke's evidence was that she approved it. What Ms Riley wanted to know in our view was whether that would cause an issue with cover, so she had time to address it in a relatively short period. That was an entirely reasonable request.



81. As a matter of courtesy to colleagues in those circumstances we would have expected Mrs Chauke to have checked first if that would have caused a problem for Ms Snape (and in turn for Ms Riley). She made no suggestion to us, nor given Ms Riley's request to her, that she had. Thus, in our view it was reasonable for Ms Riley to ask Ms Chauke to check not least if that would have created an undue burden on Ms Snape.
82. In our view Ms Riley would have asked any member of staff to have checked with their colleague on what was essentially a two person service where a leave request of two and a half weeks was being sought to be extended to three (and that our view would have been so whether it had included the Christmas/New Year period with the competition it created for leave or not) and her request was in no sense connected to Mrs Chauke's race, colour or ethnicity.

12 December 2019 – Grievance

83. It was not in dispute that on 12 December Mrs Chauke via her RCN union representative, Ms Spinetto raised an issue with the Trust's then Band 8C Interim Head of Social Care and Area Manager, Ms Christine Wheeler. It was unclear if that was at a meeting or by telephone. There was no minute taken. It formed the basis of issue 9:-

The Claimant relies on her grievance dated 12 December 2019/28 February 2020 as a Protected Act.

84. The Trust accepts Mrs Chauke raised a grievance under the Trust's Dignity and Respect Policy on 12 December 2019 and that that related to her requests for annual leave and the sickness issue we refer to above ([107] - revised ET3 ¶10). It was also conceded that they were protected acts ([122] - revised ET3 ¶50).
85. During her evidence Mrs Chauke in response to a direct question expressly stated that she did not refer to racism to Ms Wheeler. The respondent thus sought to withdraw its concession that it was a protected act. We return to that at (87).
86. There was a dispute before us if that grievance was documented in writing until 24 February 2020. If a document relating the grievance had been provided two documents before us could have fitted the bill [149-153] & [216-17]. Neither was dated nor in the prescribed form for grievances or bullying and harassment complaints (although neither specimen pro forma was before us). The former document refers at two to micro-aggressions, a lack of respect and professionalism that Mrs Chauke linked to her being from a black ethnic minority. The latter refers to institutional racism, Mrs Chauke's treatment being because she was not white and bullying and intimidating tactics. Whilst both potential documents did not refer to racism per se



they did refer to matters linked to discrimination based on race. The latter document as we say is not dated but sits in the bundle behind an email of 4 March from Mrs Chauke to Ms Wheeler that was copied to Ms Spinetto [215]. That email of 4 March referred to an attached report “... as promised when we had a talk over the phone”. We return to that (152 & 163) below.

87. Irrespective of whether Mrs Chauke/Ms Spinetto (on her behalf) documented in writing those complaints on 12 December 2019 (which we address at (91)) for the reasons we give ((89) following) by the 14 January 2020 we find the Trust was aware that she had raised a Dignity and Respect complaint but that that was based on individuals not respecting her and treating her differently to others because of her race (and specifically that she was a black woman). Whilst racism may not have been expressly mentioned, the fact it was a dignity at work complaint and the colour of Mrs Chauke’s skin was referenced leads us to conclude the Trust should not be permitted to withdraw its concession that the protected acts were such.
88. Mrs Chauke was then on holiday between Thursday 19 December 2019 and Friday 3 January 2020
89. Following Mrs Chauke’s return from holiday she met with Ms Wheeler and Ms Spinetto on 14 January. Again, no minute was taken. One of the documented records of that meeting was Ms Wheeler’s email to Miss Pam Burton (a Senior Human Resources Advisor for the Trust’s Planned Care Directorate) six weeks later on 6 March [218]:-

“Please see attached the electronic version of LC’s concerns

I met with LC and her RCN rep on 14th Jan 2020 to explore concerns that she first raised with me on 12/12/19. There was a delay in the meeting due to LC having some sick leave and finding a mutual date to meet.

At this meeting she raised a number of concerns:

- *How the team viewed her*
- *Specific concerns regards:*

o Jo Rile

o Mandie Snape

o Kevin Greaves

The underpinning view was that the team and these individuals did not respect her and treated her differently to others possibly due to her race (LC is a black woman)

We agreed that she would have further discussions about the concerns raised and that I would share them with Ms Orme as her new line manager and ask that Sarah support by addressing



the issues linked to the team dynamic. I spoke to Sarah on 28th Jan and advised of the outcome of the discussion.

LC then confirmed that she did want to pursue the concerns raised about the named individuals and provided a written statement supported by her RCN rep on 24th Feb. I had a further conversation with Ms Orme on 28th Feb to advise that I had now received this statement and that this would be shared with HR

LC also phoned me earlier in the w/e 28th Feb in a distressed state following a team meeting and a conversation with Sarah.

I think we need to investigate these concerns formally”

90. That in our judgment was a fair record of the meeting because one issue aside, it was supported by Ms Spinetto’s letters of 24 February and 29 June 2020, see (150 following & 224 following).
91. One issue that remains in dispute is Mrs Chauke’s repeated suggestion before us that there was a document lodged on 12 December. That appears to be supported by what Ms Spinetto said on 24 February (150) that Mrs Chauke had sent an initial letter of concerns on 12 December 2019. However, Ms Spinetto made no reference to a grievance document of 12 December in her letters of 8 & 29 June 2020 ((219) and (224) following).
92. Ms Wheeler’s email to Miss Burton indicated she had attempted to resolve Mrs Chauke’s concerns informally but had also been waiting on a statement from Mrs Chauke. That statement was not received until 24 February when Mrs Chauke indicated that she wished to proceed formally with her complaint. Good practice, as exemplified in the ACAS code and guidance, and the Trust’s own policy identify that grievances should be addressed informally, if possible. We find the Trust and Mrs Chauke were duty bound to try to address the matter in that way if possible and the Trust was entitled to deal with it in that way until then.
93. Ms Wheeler’s email to Miss Burton also recorded that Ms Orme who was due to take over as Mrs Chauke’s line manager (which we turn to next (95) following) had been made aware of the race complaint on 28 January by Ms Wheeler. Ms Orme does not address (and thus refute) this in her statement. That being so, she was not challenged about it.
94. In addition to the matters raised on 12 December and 24 February further complaints were raised by Mrs Chauke on 4 March, 13 May and 8 June 2020 [215, 375 & 416-17] ((163), (217) and (219)).



Changes to the Service and Ms Orme replacing Mr Greaves

95. It did not appear to be in dispute that a “*Management of Change*” process took place between Autumn 2019 and the start of 2021. As a result, the North, South and Diabetes Education and DESMOND teams were consolidated, and Ms Orme became operationally responsible for all three teams. The establishment for all three teams was around 40 members of staff.

96. In what appeared to be an outlook calendar appointment dated 27 January 2020 for the DESMOND team [175] Ms Orme added the following text to the meeting invitation:-

“The new management structure does not formally commence until the 31 Jan so we are currently in the transition phase. In preparation for us working together I have arranged the above meeting to discuss the way forward with DESMOND across Staffordshire.

Linah please can you ensure we have DESMOND I Bites size figures for the last 12 months to discuss. Also DNA rates, referral numbers, and all planned sessions for the next 12 months”

97. It appears that meeting was postponed because the minute that followed the invitation in the bundle 176-177 & 859-860] was dated “2/4/2020”, suggesting it was held on 2 April. Ms Orme told us that the minutes were in what we will describe as *American date format* (MM/DD/YY) and that instead it took place on 4 February. Mrs Chauke did not challenge that. That is also supported by the new management structure commencing at the start of February.

98. For reasons that are relevant later Ms Orme complained about Mrs Chauke’s behaviour at that meeting and also that that was part of a pattern that continued thereafter:-

“[SO/27] The first occasion was at a team meeting on the 4th February 2020. The Claimant arrived late, did not lead the meeting (which she was expected to do) and came to the meeting unprepared. She did not bring the requested information to the meeting and when I asked her to collect it from the office, the Claimant stormed out of the meeting and slammed the door behind her. The staff in attendance all looked at me and said “that’s Linah”. I was surprised by this behaviour. It was reported to me at a later date by Victoria Barker that the Claimant had returned to the office after the meeting, suggested to the team that I had not made eye contact with her and slammed around the office in a bad mood for the remainder of the day. However, she did not raise this me and in any event I deny that I behaved in that way towards her or anyone else. ”

99. Whilst the minutes did not record that Mrs Chauke was late, failed to provide the information Ms Orme had sought of her within the invitation or stormed out of the meeting and slammed the door behind her, the unchallenged evidence of Ms Orme but also that of Ms Emma Mason that we turn to next, in our judgment leads us to conclude that was how Mrs Chauke behaved that day.

100. A fact finding meeting with Ms Mason took place on 31 March 2021 (i.e. a year later) [1113 following]. By that time she was an ex employee. That formed part of an investigation by an



external appointee, Mr Boyd. The following is an extract from the minutes of that meeting [1114 following]:-

DB: *In what way do you feel you had a lack of support? [kmf?]*

EM: *Both from SO and the organisation as a whole. I had a bit of an issue with SO, as I had put a grievance in about a colleague with my previous manager. SO came in all guns blazing and wanted to show her authority. We felt unsupported anyway, there were massive issues in the teams. Lack of management, felt unsupported, too much gossiping which led to no trust. I always got on with Linah although I knew she could be a nasty piece of work from what previous colleagues had said from how her behaviour has been, management previously have never acted on the concerns of previous staff so therefore effectively Linah been able to get away with her behaviour, as stated she was lovely to me, I could work with her and we had a laugh together but lots of people could not, for example I am [redacted by Tribunal], I told her privately however she decided to embarrass me in front of a whole class of people and stormed out the room. It was battle of wits between SO and LC, the approach from both was 'nobody messes with me'. It was all a bit childish.*

DB: *Did you attend an introductory team meeting with SO on 4 February 2020?*

EM: *Yes*

DB: *Did LC arrive late for the meeting?*

EM: *Yes*

DB: *Did anything of note happen during the meeting?*

EM: *As a team we had never been managed properly, we were left to our own devices. SO came in full throttle and had a way in which she wanted it delivered. We had it set up in our own way and we did get good results. Linah was a very good educator, but I am not sure she was a band 6. She struggled with other people and was always a bit of a victim, she was always playing the race card*

DB: *Do you have any examples of this?*

EM: *She was always saying people didn't like her because she was black. This was always a bit of a concern. (any specific examples or detail regarding this?)*

DB: *Did she say this about many people or just SO?*

EM: *She said it about many people, she fell out with numerous individuals. She should never have been given the band 6 role.*

DB: *Is she required to manage/supervise within this role?*

EM: *Yes, she was required to manage us, but she didn't really have a clue what she was doing or saying. We were able to do the job and manage. Mandy wanted to take the role of managing us so there was a bit of a battle there. I just wanted to do my job.*

SO came in and wanted to do things her way and LC was like 'whoah, it is my way or the highway'.

DB: *Was there anything of note that happened during the meeting?*



EM: *I think LC may have walked out — I can recall a meeting she walked out on and doors being slammed, it was really childish.*

DB: *It has been stated that during the meeting IC was asked to provide performance data and that she left the room to access this. Do you recall SO requesting this during the meeting?*

EM: *Yes I can recall her asking for [this]. It's a reasonable request. LC wasn't competent to do the role and hadn't provided the data SO had requested. She felt the information should be accessed by SO on Rio. We always had issues with the data anyway as it never seemed to be a true reflection. We did take notes on people that were attending etc. We needed to get bums on seats to get the money. Our role wasn't delivering the education it was the promotion of it and raising of awareness.*

DB *What was LC's reaction?*

EM: *I think she was probably quite angry knowing Linah. She was very argumentative. She had an issue from the start with SO. She had an issue with lots of people."*

101. This supports Ms Orme's account not only of that meeting but of Ms Orme's subsequent assessment that the service was dysfunctional (196). What Ms Mason told Mr Boyd was certainly support for the proposition. Whilst the meeting minutes did not record what either alleges about the way Mrs Chauke behaved we would not necessarily have expected the minutes to have done so. Firstly, that was outwith the purpose of the meeting. Secondly, that conduct would if true have been highly unprofessional Mrs Chauke *'totally disagreed'* when was asked if she accepted that was accurate. Yet elsewhere where Ms Mason supported Mrs Chauke's account of events, Mr Chauke relied upon Ms Mason's account [LC/81 - Mrs Chauke's assertion that Ms Orme had been a bit dismissive of Mrs Chauke's request to isolate on 17 March 2020]. When asked if she relied upon Ms Mason as a supportive witness for her, Mrs Chauke stated that she did. Whereas, when she was asked if Ms Mason's account of 4 February was accurate Mrs Chauke *"totally disagreed"* stating *"she is not consistent"*.
102. Mrs Barker the only other witness present at the meeting did not address what happened on 4 February in her witness statement. That may have been because it was not listed as one of the issues. That aside she was asked about that by Mr Boyd on 1 April 2021 [1119-1124]. Despite that she was not asked about it in cross examination.
103. In the interview with Mr Boyd Mrs Barker confirmed Mrs Chauke had arrived late, not provided the data requests and when asked for it, abruptly left the meeting. When asked to describe what she meant by abruptly Mrs Barker stated Mrs Chauke was very theatrical, standing up, stomping, storming out and slamming the door. She was asked if it was an intentional slam and replied that it was. When asked if any comments were made about this she could not recall that stated *"we were all a bit stunned and tried to carry on with discussions"*. Mrs Barker was asked if Mrs Chauke returned and provided the data. She replied that Mrs Chauke came



back in with wads of paper and was also trying to sort a laptop. Mrs Barker explained to Mr Boyd that she was not sure if Mrs Chauke had the data required, had prepared it or whether she had had problems accessing it. Mrs Barker was also asked by Mr Boyd about comments that Mrs Chauke had allegedly made in the office about Ms Orme following the meeting. Mrs Barker responded [1120] *“She was very unhappy with what happened at the meeting-she was saying it was because I am a black woman. She had taken umbrage to what had happened. She was very upset in the office. She really felt it was due to the colour of her skin rather than it being because she was not prepared for the meeting.”*

104. Ms Mason was critical of both Ms Orme and Mrs Chauke, had left the service and appeared to us to be objective. Given her account and that of Mrs Barker provide support for that of Ms Orme, despite the absence of any reference in the minutes to Mrs Chauke’s behaviour we accept there may have been good reasons why that was so and accept that what they say was a fair reflection of Mrs Chauke’s behaviour at the meeting.

24 February - recruitment process for a Band 4 post - Issue 2(c)

105. Mrs Chauke told us [LC/55] that on 22.02.2020 Ms Mason texted her to say that a new position of a band 4 support worker in DESMOND had been advertised on NHS jobsite. Mrs Chauke stated that she had not been told about this by any managers and given she was the Lead Nurse running the team that should have happened. That gave rise to issue 2(c)

On / around 24 February 2020, did Ms Orme exclude the Claimant from being involved in the recruitment process for a Band 4 post in the Claimant’s team?

The comparators relied upon are Liz Booker and Lucy Lloyd.

106. Mrs Barker told us [VB/2] that she joined the DESMOND team as a part-time band 4 accredited Lay Educator in January 2018 but also worked part-time in the “My Diabetes” team. In early 2020 she was placed at risk of redundancy as part of a management of change process in relation to the latter role. She along with others expressed an interest in the band 4 support worker post.
107. An email chain of 4 & 11 February 2020 [178-184] between Ms Orme and Kylie Ekin, a Workforce and Redeployment Officer at the Trust, confirmed Mrs Barker was at risk of redundancy and that she and others had expressed an interest in the vacancy, although the other interested employees did not pursue that further.



108. As a result, the Trust allege that post was ring-fenced for redeployment and Mrs Barker was subsequently slotted into the full time Band 4 Lay Educator role in DESMOND from January 2020.
109. Ms Orme told us [SO/9] that Mrs Chauke emailed her on 24 February 2020 [194] at 11:01 am asking why the advertisement had been removed and that she had responded a few minutes later stating that it had been advertised in error as the post had been ring-fenced for redeployment and would be filled by Ms Barker [195]. Mrs Chauke thanked her for the explanation at 11:14 [196]. At just before 11:20 am Ms Orme sent Mrs Chauke an email offering to discuss the matter with her on a confidential basis if it would assist [197]. At 11:24 Mrs Chauke responded *“Thank you very much but would not be in a position to discuss it further. I was just surprised by the disappearance of the job from the NHS website hence lead me into finding out.”* [198].
110. It was put to Mrs Chauke that the email chain [178-184] having been provided to her as part of disclosure, she knew or ought to have known from that point on that Mrs Barker had been slotted in to a role as part of the management of change process and that being so, she was asked how she continued to argue that she did not know the true situation. Mrs Chauke acknowledged that she now knew that that was the position but argued that she should have been told that at the time.
111. Mrs Chauke did not lead any evidence to say that her role included any responsibility for recruitment. At best therefore this was an argument that as a matter of courtesy she should have been told after Mrs Barker’s redeployment by slotting in was confirmed but before Mrs Barker took up her role within the DESMOND team. Having been pressed in cross examination as to how she maintained that position she told us *“I am not dropping it – there was still discrimination there, I was not part of the decision-making with regards to her appointment to post”*. When it was suggested to her that Mrs Barker was slotted in as part of the management of change process Mrs Chauke disagreed. When asked how that was so she maintained that Mrs Barker was a band 3 not a band 4 role and she was not told that Mrs Barker had been upgraded. Mrs Barker told us as we stated above that she was and was not challenged about that. Again, Mrs Chauke maintained that she had not been told.
112. Thus, the way the issue was put was about not being told about it in advance and that she was excluded from the recruitment process. When she maintained that she had not been included in the process having been warned about pursuing allegations that she knew either were not factually correct or issues which were different to those which had been very carefully identified as part of the protracted case management process she stated she still felt discriminated against.



113. Whilst we understand as a litigant in person Mrs Chauke may have felt aggrieved that as a matter of courtesy she was not informed of those changes when they came to her attention, as Ms Orme's email [197] at 11:18 124 February demonstrates "*any discussion at that point had to be a confidential one and was not the sharing within the office*" Mrs Barker's "*slotting in*" at that point had not been formally announced. We find there were sensitivities still at play in that being announced at that point. As part of the restructuring the roles of staff were at risk, and we saw other staff had also expressed an interest. We find that it was also certain that Mrs Chauke would have been informed prior to Mrs Barker taking up her new role.
114. Had Mrs Chauke considered those matters in the light of the disclosure given we find she should or ought to have come to the view that Mrs Barker was indeed slotted in, the advertisement was an error, Mrs Barker's appointment had not formally been announced and it was inappropriate at that point for any announcement to be made to Mrs Chauke or any other members of staff.
115. We find that there was no recruitment process and anyone in her post whatever the colour of their skin would have been treated in the same way. Accordingly, there was no less favourable treatment.

24 February - Multi-Disciplinary Team (MDT) meeting – issue 2(d)

116. Ms Orme [SO/12 & 13] requested that the members of the DESMOND team including Mrs Chauke attend a regular Multi-Disciplinary Team ("MDT") meeting at 14:00 on 24 February 2020 [1649]. The DESMOND team had not previously attended MDT meetings, as the discussions were not necessarily considered of benefit to them. Ms Orme states her reason for seeking their attendance was that part of her role was to bring the North and South teams across the Planned Care Division together, to work more collaboratively and therefore requested the attendance of all North and South teams, including DESMOND.
117. It is not in dispute that at 14:18 on 24 February 2020 (18 mins after the scheduled start of the meeting) Ms Orme received an email from Mrs Chauke stating that she would not be attending MDT meetings in the future, as another staff member (Amanda Finney) "*... shouted across the room if I knew it was an MDT meeting and implied it was not appropriate for me citing the previous team meeting.*" [200]. In her claim form [36] Mr Chauke stated "*g) ... when I got there Amanda Finney (a Band 3) told me that I should not attend this meeting as it is not applicable for my nursing role and it is for Diabetes specialist nurses only. Amanda then told me to leave the meeting.*" She repeated that in her witness statement [¶63] and maintained before us she had been told to leave by Mrs Finney. This formed issue 2(d):-



On / around 24 February 2020, did the Respondent do the following:

(i) Did Ms Orme request the Claimant to attend an MDT meeting on 24 February at 1400hrs?

(ii) Did Amanda Finney shout at the Claimant that she was not expected to attend the MDT Meeting?

In respect of this allegation a hypothetical comparator is relied upon.

118. Whilst Mrs Chauke was invited to the MDT meeting it was not contended by Mrs Chauke that the remainder of the DESMOND team were not. Indeed, in cross examination Mrs Chauke stated, *"I am not saying being invited was a discrimination"*. She was asked if she understood the impact of making race complaints that were hopeless to which she answered that the context was wrong in list of issues, and having sought to drill down into what she meant it became apparent that she was alleging that was the precursor to discrimination and it was what Mrs Finney had done that she alleged to be discrimination. As to the invitation element (2(d)(i)) that complaint must therefore fail; Mrs Chauke was thus treated no differently to the rest of her team. Accordingly, that claim is not made out.
119. Mrs Finney was a Band 3 member of staff and thus 3 grades junior to Mrs Chauke. Despite that Mrs Chauke gave no account in her witness statement or the documents created at the time if she had attempted to respond to the way Mrs Finney had spoken to her. As a senior member of staff if she had been spoken to in the way she suggests we would have expected her to have been able to address that simply and courteously by stating that she had been instructed to attend by Ms Orme. She gave no account that provided a reason why it would not have been expedient for her not to do so, for example, that she had experienced issues with Mrs Finney before that might have meant that would have been a problem. In contrast to the contents of her claim form and witness statement in cross examination Mrs Chauke told us she did just that she had explained to Mrs Finney why she was supposed to be there, but Mrs Finney had repeated she should not be there. Mrs Chauke did not go on to say how that fitted with her earlier account; instead of addressing the issue with Mrs Finney her email identifies she apologised and left. She did not explain why she apologised given she had been instructed to attend.
120. In contrast to the apology, a few minutes later Mrs Chauke complained by email about her treatment to Ms Orme. In her witness statement [LC/63] Mrs Chauke said this of Mrs Finney:-

"... She was totally outside her remit. Amanda added salt to my injury by telling to leave the meeting in the presence of many professionals and invited guests who had just finished their Diabetes Presentation. I found this a very disrespectful way for her to speak to a Lead nurse in that manner."



121. Elsewhere in her witness statement [LC/58] Mrs Chauke stated Mrs Finney had chased her from meeting. She was challenged about that, and accepted Mrs Finney had told her to leave. Mrs Chauke was asked if she understood the difference. She told us they were the same thing. Throughout the hearing the panel were at great pains to ensure that Mrs Chauke understood the questions posed and where she did not answer the question or gave an answer that suggested she had not understood the question we repeated it to her, so she understood. Where she gave a response such as that to issue 2(c) we explained as we say the consequences of that.
122. In contrast to Mrs Chauke's account the other witnesses told us that when the incident occurred about which Mrs Chauke complains, the only persons present were Mrs Chauke, Mrs Finney and Debbie Birks and again contrary to what she alleged there was no meeting that immediately preceded the MDT team meeting that day.
123. Ms Orme replied to Mrs Chauke by email 6 minutes later [199] to say that she would discuss the matter with Mrs Finney, but that she felt Mrs Chauke should continue to attend MDT meetings, as it was *"an excellent opportunity for her to develop knowledge that would be applicable for the educational sessions"*.
124. At 2:42pm Mrs Chauke replied to Ms Orme that she could discuss this with Mrs Finney, but she would not be attending MDT meetings in any event, as she would not be subject to *"humiliation", "undermined", or "demeaned"* [199]. At this point Ms Orme told us that rather than sending back and forth emails, she decided to go and speak to Mrs Chauke as she worked in an office down the corridor from Ms Orme. Mrs Chauke disputes that Ms Orme came to see her at all that afternoon.
125. Ms Orme's version of that conversation and the events that followed is thus:-

"18. When I entered the office, the Claimant was sitting down with her head on the table and crying. I asked if she was okay and she mentioned the MDT meeting amongst other matters. However, most of what she was saying was incoherent and I was struggling to follow her and make sense of it all. She was waving her hands around and repeatedly pointed to her hand and said, "it's because I am black." She was clearly distressed but her statements were so general and broad and I was unable to get her to articulate her complaints. However, for the best course of an hour I listened to her and tried to call her down and reassure her. When I left the Claimant, she had calmed down and seemed better and less distressed.

19. Having spoken to the Claimant, I went to find Ms Finney. I knew she was in the room that the MDT was being taking place and made my way there. I approached Ms Finney and had a confidential chat outside of the room. I explained that the Claimant had alleged that Ms Finney had shouted at her for attending the MDT meeting. Ms Finney was concerned and denied shouting at the Claimant. She asked me if she should apologise and I suggested that this was not necessary if she had



not shouted at the Claimant but she may want to say that she was sorry that she had upset her as this was not her intention.”

126. Various inconsistencies in Ms Orme’s account of her description of Mrs Chauke’s posture were put to her in cross examination:-

126.1. At the investigation meeting with Ms Unwin on 30 September 2020 starting at [546] where at [549]

“I went round to the office and she was shouting and screaming lying across the table, throwing her hands in the air saying it’s because I am black, it’s because I am black, and then she kept putting her hands on the side of her face. I have never seen anything like it in my whole time of managing in the last 8 years, she was literally lying across the table, throwing her arms around and crying and shouting. I said I would have a word with colleague A, which I did and I spoke to her and said what’s just happened with you and Linah and she said what do you mean and I said well she’s down there saying that you shouted at her across the room, colleague A said that all she said to her was did she know its MDT today.”

126.2. Ms Orme said she stood by that

126.3. Ms Orme’s investigation meeting with Mr Boyd on 17 November 2020 [662] following where at [666]

“SO: ... On the ... 24 February 2020 around 2.30 pm ... I received an email from LC to say she had been to a meeting and at the start of the meeting Amanda Finney shouted to ask Linah if she knew it was an MDT meeting. Linah said that Amanda Finney indicated that she shouldn’t be there, so she left. Linah said to me that she would only be attending team meetings from now on.

I responded to say I would speak to Amanda and I said I felt it was important that she attended these meetings as she would find it helpful. She replied that she may find it helpful but she wouldn’t be attending (emails to be provided).

She didn’t wait for me to respond. she then bombarded me with emails — I said that I felt it would be easier if we spoke, rather than battling emails back and forth. I then went to her office, she was crying and lying across the table, pointing at her hand saying ‘It is because of this’ referring to the colour of her skin. She was doing a praying signs and saying ‘it is because I am black, It is because I am black’

DB: How did you react to this? Were there any other witnesses?

SO: I just listened and tried to reassure her that she was to attend the meetings also Annette Morell also witnessed this.

I met with her with Annette Morell (asked LCs permission for her to be there)

Afterwards I spoke to Amanda and explained that she had just said to Linah “do you know it is an MDT meeting”. Later on Amanda came and asked if she needed to apologise. I said I didn’t feel she needed to. but she may wish to apologise for how it had made LC feel, which she did.

Next day, I was in London — RCN event, diabetes forum. The behaviour I had seen had played on my mind and I was conscious I wasn’t around in work whilst at the event. I told Maureen I had some



concerns about the behaviour that had been displayed I am not normally a reflective person so it obviously had a big impact on me Maureen said that LC was going on holiday the following week and that we could take some time to reflect. She advised that I supported her to stay in work until her annual leave.

I sent Linah an email having reflected on conversation. Within the email I offered her the opportunity to be referred to Occupational Health as well as Care First Employee Assistance Scheme). She came back and said people get upset and it is a natural.

She said she was extremely upset. She said she was concerned about OH referral. ...”

126.4. Again, Ms Orme confirmed that the reference to crying and lying across the table was correct.

126.5. In her witness statement at [16-21] Ms Orme described the events following the MDT meeting. Given the focus of cross examination was on the description of posture in paragraph 18 and there were no additional underlying inconsistencies from which we draw any conclusions we focus on that:-

“When I entered the office, the Claimant was sitting down with her head on the table and crying. I asked if she was okay and she mentioned the MDT meeting amongst other matters. However, most of what she was saying was incoherent and I was struggling to follow her and make sense of it all. She was waving her hands around and repeatedly pointed to her hand and said, “it’s because I am black.” She was clearly distressed but her statements were so general and broad and I was unable to get her to articulate her complaints. However, for the best course of an hour I listened to her and tried to call her down and reassure her. When I left the Claimant, she had calmed down and seemed better and less distressed.”

126.6. That her account was inconsistent was again put. Ms Orme told us that she didn’t agree, lying across the table meant the top half of Mrs Chauke’s body and that she was explaining to clarify.

127. In cross examination Mrs Chauke made clear her reading of “*lying across the table*”, she told us “*I couldn’t have climbed on the table*”. Mrs Chauke suggests that if she had been in the state of distress Ms Orme alleges she would not have allowed her to continue working. That is the reverse of what Ms Orme states, she asserts she stayed with Mrs Chauke until she calmed down. The exchange with Ms Spinetto also addresses Ms Orme’s concerns for the wellbeing of both Mrs Chauke and patients as does Ms Orme’s later attempt at an OH referral.

128. That aside Mrs Chauke’s account of whether she was told to leave (as opposed to being told it was an MDT meeting and/or it being implied or expressed that as a result she was not supposed to be there), her being “chased” from the meeting, and if and how she responded to Mrs Finney all changed over time.



129. As to the dispute between Ms Orme and Mrs Chauke about whether Ms Orme went to see her that afternoon and Mrs Chauke's state of distress, Ms Wheeler's email of 6 March (89) also suggests that she, like Ms Orme, had identified from a telephone call she had received from Mrs Chauke where Mrs Chauke was "*in a distressed state*" (although Ms Wheeler does not describe the degree). In that email [218] Ms Wheeler states that the telephone call from Mrs Chauke was in the week ending Friday 28 February. The MDT meeting had taken place on the afternoon of Monday 24 February. That being so we concluded that was a reference to Mrs Chauke being in a distressed state following the MDT meeting and based on the way Mrs Chauke presented to Ms Wheeler and/or the way Mrs Chauke described events during that conversation rather than Ms Wheeler having been told that by Ms Orme. Mrs Finney provided further support for that stating Ms Orme had told her Mrs Chauke was upset. Both provide support for Ms Orme's basic account that Mrs Chauke was distressed and that she would not have known that unless she had been to see Mrs Chauke that afternoon.
130. It is clear from the note of Ms Orme's investigation meeting with Mr Boyd there was an exchange of emails but not that Mrs Chauke bombarded Ms Orme with emails. That is an exaggeration. There is also an absence of arm waving in the description given by Ms Orme to Mr Boyd that was given to Ms Unwin. That inconsistent account about arm waving leads us to conclude that was also an exaggeration.
131. Nor did Ms Orme statement make any mention of a colleague, Annette Morrell, who she told the subsequent investigation had been present (Ms Morrell had not been interviewed as any part of the investigation as she had significant health issues).
132. Despite that exaggeration and inconsistencies in Ms Orme's account given the support for the other aspects of her account and general findings we make below with regard to Mrs Chauke ((317) following) following we prefer her evidence to that of Mrs Chauke find Ms Orme did go to see Mrs Chauke and Mrs Chauke was face down with her upper torso and head on her desk.
133. Mrs Finney told us that she did not shout at Mrs Chauke. She stated she and Debbie Birks walked into the room finding Mrs Chauke sitting there alone. They went and sat on the opposite side of the room. She states she was surprised to see Mrs Chauke there and so asked why she was in attendance. The Trust points to Debbie Birks who was with Mrs Finney when she entered the meeting room who confirms Mrs Finney's account. In contrast Mrs Chauke told us "*Amanda added salt to my injury by telling to leave the meeting in the presence of many professionals and invited guests who had just finished their Diabetes Presentation. I found this a very disrespectful way for her*



to speak to a Lead nurse in that manner.” The Trust asserts there was no diabetes presentation that day.

134. Whilst it is understandable that Mrs Finney was surprised to find Mrs Chauke present given she had not attended previous MDT meetings, Ms Orme told us Mrs Finney should have been aware from the invitation list that the DESMOND team had been asked to attend. A screenshot was provided [209] showing Mrs Chauke was invited but not the full invitation list for that meeting⁴². Thus, we could not identify if Mrs Finney and Miss Debbie Birks had been invited. Although even if they had and the invitation provided a separate issue arises whether Mrs Finney and Debbie Birks had looked at that and would have seen that the DESMOND team were invited to the MDT meeting.
135. Debbie Birks told us orally that at a meeting a week previously she had been told that the DESMOND team was not going to attend MDT meetings Mrs Finney told us that Ms Orme had said the DESMOND team would not be attending MDT meetings but would be invited to “Ops” meetings but could not recall when. It was put to Ms Orme that was at a small meeting which she denied. That could not have been the meeting on 4 February because having checked the invitation list neither Mrs Finney nor Debbie Birks were present.
136. Those matters aside we accept the DESMOND team not having attended MDT meetings before it was a fair question to ask.
137. That aside there were various anomalies with Mrs Finney’s account. Mrs Finney told us orally Ms Orme came to find her before the MDT meeting started and whilst she was eating her lunch.
138. On the basis of the email from Ms Orme stating she would speak to Mrs Finney being timed at 2:25 alone it was unlikely the meeting had not started and/or Mrs Finney was still eating her lunch. Ms Orme’s albeit disputed account that she spent an hour with Mrs Chauke after the 2:42 pm email from Mrs Chauke before speaking to Mrs Finney only reinforces that.
139. It was common ground that Mrs Finney spoke to Mrs Chauke. Mrs Finney orally told us she apologised to Mrs Chauke. The judge’s note was *“I went down and said I was sorry if I hurt her feeling it was not my intention. I’m not nasty. We were colleagues and worked together one-to-one previously. I didn’t want to effect the relationship.”* In her witness statement [AF/13] she said *“I explained to the Claimant that I was sorry if I had upset her, but by no means did I mean to. She seemed to dismiss the alleged event and told me*

⁴² An invitation list was provided [1649] for a meeting scheduled starting on 8 April 2019 including Mrs Chauke, Debbie Birks and Ms Finney



not to worry, and said that she was ‘just having a particularly bad day.’ She did not expand further and she did not appear upset with me at all or accuse of me shouting at her.”

140. Miss Debbie Birks ¶14 told us she was there when that happened but could not recall events other than an apology was offered and the comment about Mrs Chauke having a bad day. Mrs Chauke states that it was not an apology. When deciding what weight to attach to the support Debbie Birks provides for Mrs Chauke we have considered that she and Mrs Finney are friends outside of work.
141. Ms Orme told us she went to find Mrs Chauke later that day to check that she was okay, but she had left work. Ms Orme told us orally that was between 4:30 and 5:00pm.
142. Turning to the four main issues in her account whether she shouted, who was present, when she was spoken to by Ms Orme and if she apologised. As to the disparity in the timings between what Mrs Finney and Ms Orme say about when they spoke the emails support Ms Orme’s version. We put the anomaly down to the length of time before Mrs Finney was asked to give her account in the investigation. That casts doubt on the weight we should give to Mrs Finney’s account.
143. Even taking into account our concern as to the weight we should attach to the account of Mrs Finney about timings, the accounts of Mrs Finney, Miss Debbie Birks and Mrs Chauke all say there was a discussion with Mrs Chauke. We find Mrs Chauke was right to consider Mrs Finney had not apologised for shouting because Mrs Finney did not consider she had shouted and so Mrs Finney was of the view an apology for doing so was not warranted. We find that despite Mrs Finney having considered that an apology was not warranted had not wanted to cause any upset to Mrs Chauke and thus went to check on her to see if she was okay. We come to that view because there was a straight dispute between what Mrs Finney and Miss Debbie Birks say on the one hand and what Mrs Chauke said on the other.
144. It was common ground that Mrs Finney asked Mrs Chauke why she was in attendance. As we say that was a fair question to ask given Mrs Chauke and the DESMOND team had not previously attended MDT meetings and neither Mrs Finney nor Miss Debbie Birks being asked if they had read email invite list. Mrs Finney and Miss Debbie Birks also say there was no one else in the room when they arrived, and they say opposite. Mrs Chauke makes no reference to where they sat but said others were present as a diabetes presentation was breaking up. Given Mrs Chauke makes no reference to where Mrs Finney and Debbie Birks sat we accept their account that they did sit opposite. None of the witnesses give any description of the size of the room. But that may also explain why Mrs Chauke perceived they “shouted” given her



description about being chased from the room that we address at (146) below. Given Mrs Chauke confirming the invitation was not an act of discrimination, our findings about Mrs Chauke exaggerating when she said she was chased from the room, the changes to her claim and account concerning being told to leave or it being implied, her response if any to Mrs Finney, the contrast between her and Ms Orme whether Ms Orme went to see her that afternoon and our general findings about her below ((317) following), we prefer the accounts of Ms Orme, Mrs Finney and Miss Debbie Birks notwithstanding the friendship outside of work of Mrs Finney and Miss Debbie Birks, that Mrs Finney did speak to her from across the room and thus that may explain why Mrs Chauke describes that as shouting but no others were present. We further find that Mrs Finney did check if Mrs Chauke was okay.

145. Mrs Finney was asked about the comment she made in her witness statement [¶10] that Mrs Chauke left the meeting room without appearing to be upset or angry. She was asked if she had ever seen Mrs Chauke angry before? She said not previously. She was then asked if she had heard about the racial social trope that labelled black women as angry. The Judge asked at this point given Mrs Finney had said Mrs Chauke was not angry how that was relevant. Miss Chauke indicated that was because Mrs Finney had expected Mrs Chauke to be angry and the expected outburst had not happened. The Judge reminded the parties that the only person who said he/she was upset was Mrs Chauke and that required an assumption on the part of the observer that Mrs Finney was applying that trope. The issue here is that Mrs Chauke did not lead evidence suggesting Mrs Finney applied that trope and Miss Chauke did not follow that assertion with a question suggesting that Mrs Finney thought that way. The evidence before us was that Mrs Chauke's subsequent behaviour identified they had a good working relationship. She was asked about an exchange of messages where on 1 June 2021 Mrs Chauke responded to Mrs Finney saying, "*Thanks my love*". She said she was trying not to be impolite. It was suggested that went beyond professional to which she agreed. The same applies to courtesy. The response "*my love*" goes beyond a neutral or courteous response and indicates friendliness.
146. As to Mrs Chauke's assertion that so far as she understood it the allegation that Mrs Finney chased her from the meeting was the same as asking her to leave we find that Mrs Chauke knew there was a difference and what it was, and she was seeking to exaggerate to place Ms Orme in a bad light. Whilst we note that Mrs Chauke was a diabetes educator and part of her role was to communicate to the general public we would have come to the view we came to irrespective of that and it that forms no part of our rationale in relation to that issue.
147. As to 2(d)(i) it was not in dispute that Ms Orme requested Mrs Chauke attend an MDT meeting. As we say at (118) it was not contended by Mrs Chauke that the remainder of the



DESMOND team were not. As to the invitation Mrs Chauke was thus treated no differently to the rest of her team. Accordingly, that claim is not made out.

148. As to 2(d)(ii) we did not accept this occurred in the way it was alleged. We find Mrs Finney asked Mrs Chauke from across the room if she knew it was an MDT meeting, that was due to her surprise given the previous non attendance of the DESMOND team at such meetings previously. We find Mrs Finney would have asked that question in that way of any member of the DESMOND team whatever the race, colour or ethnicity (including anyone in Mrs Chauke's role as a band 6 member of that team). We find Mrs Chauke has not shown that Mrs Finney stated that Mrs Chauke was not expected to attend, that was something Mrs Chauke implied into Mrs Finney's question. Mrs Chauke should or ought to have known it was not Mrs Finney's place as a junior member of staff to tell her what to do, but neither was there any basis for that implication from the question. Accordingly issue 2(d)(ii) is not made out.

149. Given those findings, other than Mrs Chauke being a black African woman the facts before us lead us to conclude there was no racial link to those events. That is reinforced by the absence of either of the alleged perpetrators in any previous acts, the lack of a specific allegation they were acting in concert, any subsequent allegations being made against Mrs Finney (indeed Mrs Chauke's subsequent exchange of messages with her (145) points the opposite way) and that whilst Ms Orme was aware of Mrs Chauke's grievances against colleagues by then we found she had good reasons for inviting the DESMOND team to the MDT meeting because that was part of her remit and that was the reason she did so. Accordingly, we decline to draw any inferences of discrimination from those matters.

Mrs Chauke's Grievance of 24 February

150. Also, on 24 February Ms Spinetto emailed Ms Wheeler, copying in Mrs Chauke [219]

Please find attached the final version of the above RCN member's written grievance and an accompanying letter from me. I have arranged for a hard copy of each to be posted to you today.

151. That email attached a letter also dated 24 February [202]. It said

"I apologise for the slight delay in getting this correspondence to you, this is due to my unforeseen sick leave. Please find enclosed the final version of our member's written grievance concerns, which have been reviewed following her initial letter of concerns sent on 12th December 2019 and our meeting on 14 January 2020 and at your request.

You will note that Linah has now requested that you formally investigate her concerns and I will be representing and supporting her through this process"



152. As we state above (86) we did not have a letter before us of that date and the document attached was not with the email and letter. We did have the two undated documents we refer to. We find based on Ms Spinetto's earlier letter of 24 February that it did and that the document at [149-153] is in general terms in accordance with what Ms Wheeler had recorded Mrs Chauke's December 2019 complaint was about. The document at [216-217] appears to relate to a Mrs Chauke's later complaint following Ms Orme having expressed concern about Mrs Chauke's psychological wellbeing (which appears to have first been raised on Mrs Chauke's account on 25 February [LC/64]). Whilst as we say that was not dated, in the bundle it sits behind an email of 4 March from Mrs Chauke to Ms Wheeler that was copied to Ms Spinetto [215] that referred to an attached report "... *as promised when we had a talk over the phone*". In contrast the document at [149-153] address both the two issues and was in the form of a letter addressing the points which Ms Wheeler identified Mrs Chauke had raised with her.
153. Further contrary to the Trust's position that thus referenced an initial letter of concerns sent on 12 December 2019.
154. In an email of 6 March (a fortnight later) see (89) Ms Wheeler stated Mrs Chauke contacted her direct in the week ending 28 February. Mrs Chauke makes no mention in her witness statement of contacting Ms Wheeler.

25 February 2020 - Issue 2(e)

155. At 10:33 on 25 February [210] Ms Orme sent an email to Mrs Chauke

"Hi Linah

Having reflected on our conversation yesterday I am increasingly concerned regarding your psychological well-being and wondered if you would be happy for me to make a referral to occupational Health?

You can also contact care first the staff counselling service — you will find the information on the intranet

Let me know your thought"

156. Mrs Chauke sent two emails in response both around half an hour later

People get upset and it is a natural reaction. I was frustrated upstairs by the Band 3 DCT and now you turn around and say it is my wellbeing. What an insult? [210]

the second said this

I am even more upset now and can tell that I cannot express my inner feelings ever to you in case they are misconstrued. I am very much concerned about the below statement and wonder what will be done of people like Amanda. [211]



157. That gave rise to issue 2(e):-

On the 25 February 2020, after the Claimant reported the incidents referred to in paragraph 2(c) and (d) above to Ms Orme, did Ms Orme email the Claimant to state that she was becoming increasingly concerned for the Claimant's psychological wellbeing?

In respect of this allegation a hypothetical comparator only is relied upon.

158. Within a few minutes at 11:15 Ms Orme sent that response to Ms Rowley a HR advisor [212]. We find Ms Orme was genuinely shocked at Mrs Chauke's response she told us that she had never come across behaviours like that in all her time with the Trust and that despite being on a train journey to London at 08:33 the next day she emailed Ms Spinetto

I did see LC yesterday and have to say am I increasing concerned regarding her mental wellbeing — Have you spoken to her recently?

159. Ms Orme was by then aware of Mrs Chauke's grievances against others by 28 January (see (89)). No grievance had been made against Ms Orme at that point (see (89) and (152)) and no suggestion was advanced before us that Ms Orme was aware of the content of the grievance Mrs Chauke had lodged the previous day. That aside we considered if Ms Orme's comments to Ms Spinetto were an attempt to discredit Mrs Chauke with her union representative or more generally in the context of that grievance and complaints. We do so because on 4 March [215-17] that was exactly what Mrs Chauke alleged Ms Orme was doing (see (163)).

160. Aside from Ms Orme raising that with Ms Spinetto her union representative, disputing that being a basis for such a view and the fact Mrs Chauke is black no other tangible basis for Ms Orme attempting to discredit Mrs Chauke was advanced.

161. Mrs Chauke complains that Ms Orme asking her RCN representative about those matters was inappropriate. Whilst the question about her wellbeing was unsolicited, Ms Orme was responding to an email a few minutes earlier from Ms Spinetto requesting Ms Orme's availability because they were trying to arrange the meeting about the claimant's grievances that Ms Wheeler had referred to, see (89) above. We have no detail how if at all Ms Spinetto responded other than the account Ms Orme gave to Mr Boyd on 17 November 2020 see (126.3). What we do not have is a subsequent response from Ms Spinetto, rejecting that as inappropriate. That suggests Ms Spinetto did not view it in that way.

162. In the document [216-217] that we refer to at (86, 152 & 163) Mrs Chauke stated that she had only spoken to Ms Orme once and interacted with her professionally a handful of times and thus Ms Orme was not in a position to come to the view she came to. Yet as Mrs Chauke points out if she did appear upset Ms Orme had duties both to Mrs Chauke and to patients.



Mrs Chauke's reaction at the meetings on 4 and 24 February as evidenced by the accounts of Ms Mason, Mrs Barker and Ms Orme led us to conclude there were grounds for Ms Orme to come to that view. Ms Wheeler's email that identified Ms Chauke was upset (89) is yet further support for that. As were Ms Orme's OH referral and comments to Ms Spinetto. We find Ms Orme's concerns for Mrs Chauke's psychological wellbeing were genuinely held.

163. As we state above (86 & 152) we find that on 4 March [215-17] Mrs Chauke emailed Ms Wheeler a complaint that Ms Orme had questioned her re psychological wellbeing. She argued that by doing so Ms Orme was being offensive and unprofessional and was not qualified to diagnose her. Within the email she asserted this was a thinly veiled attempt to discredit, intimidate and silence her [216].
164. Between 5 and 15 March 2020 Mrs Chauke went on holiday to Cuba.
165. On 6 March whilst Mrs Chauke was on holiday, Ms Wheeler emailed Ms Burton [218] the contents of which we set out at (89) above.
166. Mr Moxley told us he has worked for the Trust since 13 January 2020. He initially underwent an induction before going on prearranged leave so started his role proper as Deputy Head of Operations/Countywide General Manager from 24 February 2020. On 21 October 2020, his title changed to Head of Countywide Services, but his role remained the same. He is currently Head of Transformation – Planned Care, Staffordshire and Stoke-on-Trent Care Group and has held that post since 10 January 2022.
167. He also told us [KM/6-8] that he received an email from Ms Burton on 10 March 2020 informing him that a grievance had been submitted by Mrs Chauke and that it had been informally reviewed by Ms Wheeler and asking him to nominate someone to act as Investigating Officer for the grievance [1621–1622].
168. That leads us to issue 2(i)(i) :-

2(i) Did Kurt Moxley (Band 8C Deputy Head of Operations and General Manager Countrywide Services / Head of Transformation Planned Care Witness for the Respondent) do the following:

2(i)(i) Fail to deal with the Claimant's grievance in a timely fashion and manner (from Dec 2019 and Feb 2020)?

In respect of the allegation at paragraph 2(i), the comparator relied upon is Ms Orme.

169. We find that the ACAS code and Trust's own policies required that dignity and respect complaints should be dealt with informally if possible. The documents show that until 24



February that was how Mrs Chauke's dignity and respect complaint was being dealt with until then. That it was actioned by Ms Wheeler on 6 March and Ms Burton on the 10th.. It was only on the 10 March that Mr Moxley became involved. That aside we heard in the context of the pandemic the country went into lockdown on 23rd March and as we say below (207) all employee relations cases were to be placed on hold due to the coronavirus pandemic on 31 March. In the context of the forthcoming lockdown and the pressures on NHS we find that was a reasonable stance to take as Ms Spinetto's failure to dispute that until 8 June (219) supports. At that point given the delays on Mrs Chauke's part initially bringing forward the complaint and in the circumstances of the pandemic a delay of a couple of weeks we find were neither here nor there. In any event we find any delays thereafter were due to pressure of work in the context of the pandemic.

16/17 March 2020 – Mrs Chauke's return from holiday - issues 2(f) & (g)

170. Mrs Chauke's account of the events of those days is thus:-

"66 I left on a delayed flight 15.03.2020 before Canada went into lockdown and closed its borders. I sent an email and a text at 23.31hrs whilst at the Airport in Canada to Sarah Orme advising her that because of the delay I am going to arrive on Monday 16 March 2020 at midday instead of 08.00am. [1623-1624]

...

69. I was supposed to start work on 16 March 2020 at 11.30am⁴³ but because of the delay I did not arrive on time. On arrival I rang my manager Sarah Orme between 13.30 and 1400 hours to inform her of my concerns; ... I was also worried as I am Diabetic and the mild symptoms I had developed.

..."

171. Before we continue the way Ms Orme describes that call is thus

"33. I then received a call from the Claimant upon her landing at around 2pm, 16 March 2020, and she explained that her daughter in Canada had been required to self-isolate for 14 days by her employer [page 227]. I explained to the Claimant on the phone that unless she was experiencing a continuous cough and a high temperature, then she would not be required to self-isolate under UK government guidance.

34. I exchanged a number of emails with the Claimant over the course of 16/17 March 2020, in which we discussed her return to work [pages 238 – 242]. 35. At 16:15 on 16 March 2020, the Claimant emailed recounting our discussion over the phone earlier that day. The Claimant stated that she had informed me she was experiencing flu like symptoms, but as her cough was not continuous and

⁴³ 3½ hours between the scheduled arrival and her start of shift gave very little time for her to collect her bags and clear passport and customs controls, for her to get from the airport to her place of work in Stoke (the nearest international airports are Manchester and Birmingham), let alone leeway for delays on the flight and did not allow any time for sleep although Mrs Chauke told us she slept on the flight



she was not experiencing a high temperature, she would be returning to work on 17 March 2020 [page 242].

...”

172. Returning to Mrs Chauke’s account:-

“...

74. On 17/03/2020 at 9 am, I got to work but there were no people at work. Later on Emma Mason (Support Worker Bitesize Band 4) arrived. Meetings were cancelled following Government guidelines. Victoria Barker, the Desmond Lay Educator I was scheduled to work with was not in so I rang her. On answering the phone Victoria Barker remarked ‘you are sounding awful, you have come from abroad why have you come to work.’

75. Victoria Barker told me she was working from home because she was self-isolating. She mentioned that on the radio around 9am WHO advised that if you are from abroad isolate for 14 days. Like me she had travelled for her honeymoon and was back and started work on 9 March. Victoria Barker told Sarah Orme that she was self-isolating and working from home because of symptoms and Sarah Orme said that was fine. Yet in an interview between Victoria Barker and DB/SU she stated that she had covid 19 yet there was no testing methods at the time, on the other hand she states that she did not know whether she had covid 19 or flu but was still allowed to isolate with work and I was declined. I remember Victoria Barker even advised me saying, ‘Phone Sarah Orme and tell her that you can’t be there.’

76. 2f iv) Claimant advise to SARAH ORME, Operations Manager and Clinical Lead re exacerbated symptoms (LOI 2f-iv Bundle page)

77. I phoned Sarah Orme on March 17 told her that I was at work and my cough had changed to continuous and was exhibiting COVID19 related symptoms (SO diagnosed me as falsifying my symptoms as she stated that I could finish a sentence whilst talking).

78. I mentioned to Sarah Orme that I had spoken to Victoria Barker whom she had allowed to isolate and she replied saying ‘Don’t compare yourself with her, you are different.’

79. This was a clearly disparate experience from mine and there was direct discrimination as Victoria Barker is white and I am black.

80. 2f v) SARAH ORME, Operations Manager and Clinical Lead second denial to self isolate (LOI 2f-v Bundle page)

81. Fortunately when I was on the call with Sarah Orme that morning of 17/03/2020 when she declined me to isolate for the second time round Emma Mason was present and according to her report with Daniel Boyd (External Investigator, Capsticks HR) where she stated ‘SO was a bit dismissive’

82. At that juncture, I said. ‘Goodbye.’ And ended the call because I didn[’]t want to argue. Meanwhile Jo Riley acting Band 8 was standing by the door listening to what I was saying to SO.

83. Joanne Riley explained that Victoria Barker was actually working but from home. She suggested that I go home, saying, ‘As you are coughing continuously, go home’. She did not say she was sending me off sick but to self-isolate with work like Victoria Barker.



84. *I was of the opinion the two of them Sarah Orme and Jo Riley were going to discuss the issue regarding my isolating not being off sick.”*

173. Ms Orme described those events thus:-

“39. The Claimant attended work on the 17th March 2020. I was working from home although I was also self-isolating with COVID. The Claimant called me just after 9am and was coughing profusely; she said that Victoria Barker was allowed to isolate at home because she had COVID symptoms. The Claimant began to cough continuously over the phone, I asked her whether she now had a continuous cough and a temperature. She would not answer my questions and I told her if she was not well then she should go home. The Claimant terminated the call.

40. Joanne Riley (Interim Neighbourhood Manager and Long Term Conditions Team Leader), advised me that on 17 March 2020, the Claimant was coughing and appeared to be unwell. Ms Riley said that she had therefore advised the Claimant that if she felt too unwell to work, she should go home [page 243] as per my previous suggestion on 16 March 2020.”

174. Ms Riley’s email at [243] said this

“... When I saw Linah at Stoke Health Centre yesterday morning; she was coughing continuously and appeared to be unwell. I reiterate[d] the advice that Sarah had given her to go home as she was unwell, also explained to Linah that working from home was an option if she was well, however at that time she appeared to be unwell due to the cough; I advised her that I was sure that Sarah would be in touch later that morning- which I am aware is what happened. ...”

175. That was in response to an email from Mrs Chauke timed at 10:33 on 18 March [244]. By then Mrs Chauke had already documented her account of what occurred in her email of 00:45 on 18 March 2019 [253];-

“I travelled to Cuba and Toronto and came back yesterday midday. I called my manager and expressed my concerns to protect myself and others by requesting to self isolate since I had mild symptoms such as cough which at the time was not continuous, dry throat and headache, flu like symptoms.

My concern on self was because I am over 60 and diabetic coupled by having been in heavy crowds and went to express that in Toronto my daughter had been quarantined for 14 days straight away because she had been out of the country. With all these concerns my manager was adamant that these weren’t symptoms for self isolation hence had to go to work or call in sick. I did not call in sick because I just wanted to self isolate hence I went to work today. My cough was getting a bit more frequent whilst at work and I called her to see if I could go home, after a few shouting on the phone being asked to confirm that yesterday at 12pm I had said the cough was not continuous she indicated that I was forcing the cough as I spoke to her and she expected the coughs to occur during the conversation but to her there weren’t. Eventually I went home after another manager who passed by overheard the conversation and also witnessed the cough suggested same.

I am very distressed right now as I received a call from the Manager late in the afternoon telling me that she was putting me as off sick due to a cough not self isolation. The conversations left me very much distressed.



My question [is] to the Trust is are they really serious about their slogan protect yourself and others. Did I have to fight for my safety and for others, does staff have to go through cough assessments by managers.”

[Our emphasis]

176. By an email at 04:28 on 17 March 2020 to Mrs Chauke under the subject Coronavirus symptoms having referred Mrs Chauke to the current government advice on the Trust’s intranet Ms Orme stated [238]

“... your current symptoms (identified by yourself) are not in line with those the government are suggesting require self-isolation. You have stated you do not have a continuous cough or a high temperature.

Currently the fact that you have been in large crowds does not constitute a reason to self-isolate. However it is recommended that this is avoided moving forward.

...”

177. Ms Orme also told us this

“46. I called the Claimant on her personal mobile telephone on 17 March 2020 around 10.30am. The Claimant answered with a very jolly greeting and said “hello” Her friendly tone changed when she heard my voice. The purpose of my call was to update the Claimant on the HR advice of self-isolating after travel which I had agreed that I look into the day before and to ask her to let me know when she was feeling well enough to work. The Claimant took exception with me contacting her on her personal landline telephone; she was shouting and ranting down the phone. I could not make any sense of what she was saying and after 30 minutes (during which she did not cough at all) I advised that I was terminating the call.”

178. Mrs Chauke’s response to Ms Orme was via an email of 10:15 the following day (18 March 2020) [238]

“Sarah

I called 111 and was assessed and was told to self-isolate for 7 days and I will advise you any changes. Called Team Prevent and spoke to Adam who also confirmed that I was doing the right thing to self-isolate.

I called the HR as well yesterday to get clarification between being put on as sick and self-isolation, and their impact on me.

Linah”

179. The way Ms Orme viewed those matters at the time is also set out in an email of 17 March at 11:02 to Mr Moxley and Ms Burton [237] where having stated that Mrs Chauke’s behavioural concerns escalated yesterday with her shouting at Ms Orme on the telephone she continued:-

“...”



LC persistently spoke over me reporting that I was [bullying] and harassing her. I requested that LC advise me when she is well enough for work and advised I would continue with the referral and ended the call due to the persistent shouting, LC behaviour has been increasingly difficult historically, her behaviours are not in line with the trust policy and this seems to be a repetitive pattern with all staff and managers.

Members of the team have raised concerns that she is bullying them and I think we need to address this behaviour sooner rather than later.

Kurt — there is already a grievance in against previous managers (FY10

Please can you advise

...”

180. Ms Burton responded to Ms Orme half an hour later [236]

“Further to our discussion this morning, the behaviours being displayed are unacceptable, this is not a one [off] situation (I too have had the phone put down on me from IC) and these behaviours are historic and they have been displayed on numerous occasions, unfortunately it appears they have not been managed previously, hence they have continued and become the norm.

[I] think there needs to be some boundaries and structure in place and I have sent you across a PIP and guidance for informal disciplinary counselling. It may be worth asking about any underlying concerns she may have with a referral to team prevent.

I think moving forwards, you need to stop contact with her after a reasonable time in the evening ‘challenging emails until 1130’ is not acceptable.

Hope this helps.”

181. The raised voices Mrs Chauke referred to in paragraph one of her emails suggest both parties had raised voices whereas Ms Orme reported that was only Mrs Chauke’s side. That aside Mrs Chauke’s comment acknowledges her own voice was raised as Ms Orme alleged. Ms Orme’s email also suggests she had raised her concerns previously.

182. As to issue 2(f):-

On 16/17 March 2020, did Ms Orme deny the Claimant’s request(s) to self-isolate when the Claimant was presenting with Covid-19 symptoms and had returned home from being abroad?

In respect of this allegation the comparator relied upon is Victoria [Barker].

183. Ms Orme’s account in her witness statement of the discussions on the 16th [¶33] was that unless Ms Chauke was experiencing a continuous cough and a high temperature, then she would not be required to self-isolate under UK government guidance. Mrs Chauke’s email just after midnight on 18 March 2019 records she expressly told Ms Orme “*the cough was not continuous*”.



That was supported by what she said to us orally. That being so and based on the guidance at the time Mrs Chauke was not required to self isolate.

184. We find the concerns Mrs Chauke's email of 00:45 on 18 March 2019 identified (175) appear to confuse her vulnerability, whether she had been exposed and the personal risk she and her family were thus at, with whether she was showing symptoms and the risks to others that gave rise to. In our judgment that was because Mrs Chauke was legitimately concerned about going into work because of her own and her husband's vulnerability. In her call to Ms Orme what she was seeking was to be permitted to self isolate because of those concerns and that it not be treated as sick leave because that would have triggered a further absence management process. Ms Orme gave her the choice of taking sick leave or coming in. That was something she was entitled to do as a manager. When Mrs Chauke spoke to Mrs Barker and discovered Mrs Barker was self isolating she considered Mrs Barker was being treated differently. That was so, she was but that was because Mrs Barker had covid symptoms and was therefore required to self isolate.
185. Mrs Chauke told us she had a slight continuous cough before she went into work that day. We asked what she meant by that. Either she had a continuous cough, or she did not. She told us she had a continuous cough. As we say above that is not what her email of early on 18 March stated which accords with when she told us she told Ms Orme. We warned her that she was on oath, and she might wish to consider carefully what she was telling us, reminding her that it was mandatory to self isolate at that time. She told us having just returned from Canada she was not aware of what the position was in relation to self isolation. Given what she told Ms Orme about her concerns for her own welfare and her desire to self isolate, and her position as a medical professional we find it staggering that she did not check what the position was. She had a laptop and could have accessed the Trust's intranet, the Trust's internal team or called 111. She did not do so until later.
186. It is not for us to determine if she committed an offence. Nor whether if she did so that places her in breach of the NMC's professional standards. However, the diametrically opposed accounts she adopts – on the one hand asserting she told Ms Orme she had a continuous cough and in her email and to us that she did not – together with her failure to appraise herself of the position both as a nurse and given her own vulnerability concerns lead us to conclude her account on those matters cannot be believed.
187. We acknowledge symptoms can change over time but what Mrs Chauke told us orally was that she knew before she went into work on 16th that she had a slight persistent cough before confirming that was a continuous cough and a reason to self isolate and her email and account



to us was that she did not tell Ms Orme of that. Having discovered Mrs Barker was isolating and not got the answer from Ms Orme that she was seeking we find Mrs Chauke then went to another manager (Ms Riley) who having witnessed the cough sent her home. Mrs Riley gave no detail in her witness statement of that, nor was she questioned about it.

188. Having spoken to Mrs Barker and Ms Orme Mrs Chauke would have been aware of the requirement to self isolate if she had a continuous cough. Even then she did not do so and on her own account had to be sent home by a manager. She should have taken that action herself she did not do so. We find that her failure to do so and her contradictory accounts, lead us to conclude that she was prepared to say whatever was required to be permitted to self isolate, to attempt to portray a different version of events and to seek to blame Ms Orme and accuse her of racism. It is rare for a tribunal to make a finding such as the one we are about to make, and we have given very careful consideration before doing so, that rarity aside, we find she was a not a truthful witness.

189. We find Mrs Chauke was not presenting with Covid-19 symptoms when she first asked Ms Orme to agree to self-isolation and when she repeated the request she refused to answer if she had a continuous cough. We find she was not treated less favourably than Mrs Barker, Mrs Barker did present with symptoms as recognised at the time and was obliged to self isolate whereas Mrs Chauke did not.

190. We next turn to issue 2(g):-

On 16/17 March 2020, did Ms Orme email and record the Claimant as being on sickness leave (for 7 days) despite 111 advising Claimant as being required to self-isolate?

In respect of this allegation again the comparator relied upon is Victoria [Barker]

191. Mrs Chauke's absence record had the following relevant entries. Under an entry timed at 10:50 on 18 March 2020 it was noted "*Linah has recently returned from travel abroad. On return she wanted to self isolate however stated she did not have a continuous cough or high temperature. Came to work and was coughing in a way that was deemed sickness and unable to work form [sic.] home*". That is what Ms Orme had believed was the case the previous day. Mrs Chauke told us in cross examination that she informed Ms Orme that she had been instructed to self isolate at 10:15 on 18 March [245]. Ms Orme was not asked if she had picked up Mrs Chauke's email of 10:15 when she made that entry at 10:50. The following day the record was amended to show it was a Covid related absence and backdated at 17:35 on 19 March [1342].

192. Ms Orme told us [¶31] when the pandemic was declared by WHO on 11 March 2020



“At this time I had 41 direct reports and doing the role of three people in working the clinical lead role, operational lead role and operational manager. Normally, there would be three people carrying out these roles including an operational lead available to provide support. However, I did not have the benefit of any additional support and was carrying the workload during very challenging and uncertain times. I managed the best that I could in the circumstances.”

193. Whilst Mrs Chauke was initially recorded on sick leave that record was only made the day after she was sent home sick having refused to indicate whether she had a continuous cough to Ms Orme. We find that because of the pressures of the situation she found herself in, Ms Orme was working a day behind. Whilst she had been sent a notification via email that Mrs Chauke had been instructed to self isolate approximately 30 minutes before the initial entry had been made Ms Orme was not asked if she had seen and processed it (and if necessary taken advice upon it). That Mrs Chauke’s absence record was subsequently amended suggests in our view that Ms Orme had not and that instead due to pressure of work she was processing absence entries the day after they came to her attention.
194. We find the entry was updated to record Ms Orme’s understanding of the reasons for Mrs Chauke’s absence as time went by and that Mrs Chauke was treated no differently to any other member of staff including Mrs Barker was or would have been. We come to that view because when Mrs Barker had been instructed to self isolate her sickness record was noted to reflect that. When Mrs Chauke identified symptoms her sickness record was amended to reflect that Mrs Chauke and she was treated no less favourably as a result.

The first Occupational Health referral

195. The first OH referral we were pointed to [262-266] was made on 18 March 2020. As we say at (226) Ms Orme wrote to Ms Spinetto on 3 July [429-30] a number of issues Ms Spinetto had raised in her letter of 12 June about the stage 1 process and referrals including Mrs Chauke’s complaint that she had not consented and the inability of the Trust to provide a copy of the referral to the employee before it was sent. In that letter Ms Orme summarised the dates of the two referrals at that point and the reason given to Mrs Chauke for the referral. The first related to *“Concerns regarding her reactions in the workplace, her stress levels and her emotional wellbeing”* and it referred to the first conversation regarding it with Mrs Chauke as being on 17 March 2020.

196. The referral stated amongst other matters:-

“... during a conversation yesterday ... continually suggested myself and staff are bullying and harassing her. Linah feels this is due to the colour of her skin. I have advised her that I am concerned for her psychological health however she has declined support from care first.

This is not new behaviour and having seen her personnel file this has been a pattern within her employment history within the trust commencing in 2013.



...

Linah has currently raised a grievance against three members of staff

...

I am increasingly concerned regarding Linah's emotional well-being. Her behaviour at work is erratic, she shouts, cries sends inappropriate emails and feels all staff are racially abusing her.

I do have performance concerns which have been raised with HR and will be addressed online is return to work.

...

She is currently responsible for leading a team however the team is dysfunctional, staff are threatening each other and there is infighting. Linah does not demonstrate leadership behaviours and is not adequately managing the team. She is repeatedly advises she should not be in work because of the stress".

197. We explain (162) how in February we considered Ms Orme's concerns were genuine. Since then, the incident of 17 March had occurred that we reference at (177).

19 March 2020 – Issues 2(h) and the duplicate victimisation complaint 10(a)

198. A risk assessment form [280-282] was sent to Mrs Chauke on 19 March by Ms Orme. The covering email [279] stated "*We will need to disc and complete this on your return to work*". Whilst it gave Mrs Chauke's name in the space provided at the top of the form and included some medical information concerning Mrs Chauke, it omitted other matters and also gave the name of a colleague whom we shall refer to as MY in the signature box (but not elsewhere).

199. On 23 March Mrs Chauke emailed the Trust's Information Governance team:-

"Hello Alison,

Attached below if the form received from Manager Sarah Orme

[Unfortunately] my Manager Sarah Orme attached this form to them I will forward to as well which happens to have been pre completed and at the same has another nurse at the bottom. As this is a breach of confidentiality I have sought your advice(spoke to Alison for IG). Please as part of being open policy kindly ask Manager to kindly inform the other nurse that I am receipt of this information. As a professional I will not divulge this information to anyone other than this IG department.

I am very much concerned about myself now as I do not whether my medical information is not being accessed without my consent and distributed [sic]. Very worried". [280]

200. Mrs Chauke told us ¶[55] that Ms Lesley Baddley (the Trust's Information Governance Officer) confirmed to her on 23 March 2020 that it was not considered to be a serious error, as the error was contained to the Trust's workforce. Ms Baddley's email confirming the outcome was dated the same day (23 March) [296].



201. That gave rise to issues 2(h) & 10(a) (the latter being allegations of detriment for Mrs Chauke's victimisation complaints):-

On 19 March 2020, did Ms Orme do the following:

(i) Email the Claimant a Covid-19 risk assessment form with MY's name, information and her part 4 declaration completed?

(ii) Did Ms Orme complete the Covid-19 risk assessment form without the Claimant being in attendance when she did so?

In respect of the discrimination allegation at issue 2(h), the comparator relied upon is MY

202. Mrs Chauke sought to suggest that the form sent to her was a completed document and it had been authorised by MY because her name was stated on it.

203. She was taken to another risk assessment form that Ms Orme had sent out to a different colleague (Mrs Barker) the same day as that sent to Mrs Chauke (19 March). The form sent to Mrs Barker also had MY's name in the signature box [1627-1628]. That document like the one sent to Mrs Chauke stated at the top of the first page the name of the individual it was intended to reference and identified covid risks that were different to those stated on Mrs Chauke's form. The covering email [1626] stated "*Can you contact me to review once you are back in*".

204. It was suggested to Mrs Chauke that the covering email sent to her made it clear it was not a completed document. She maintained it was. It was put to her in cross examination that was ludicrous suggestion, to which she responded, "*I wouldn't say it's a draft*". It was then suggested to her it beggared belief that she persist with that allegation as she knew about the other documents for some time. She accepted she had known about them. It was put that demonstrated intransigence and unwillingness to be reasonable on her part to which she disagreed.

205. Further, she was asked how MY could consent on her behalf. She stated her name on the form indicated that MY had done so.

206. We find that both were not completed documents but drafts to be discussed at a later point as the contents of the covering emails demonstrate. We find Ms Yelland's name was included in error. That is reinforced by the subsequent meeting between Mrs Chauke and Ms Orme at which the risk assessment was completed see (231) below.

207. On 30 March 2020 the Trust wrote to Mrs Chauke to inform her that all employee relations cases were to be placed on hold due to the coronavirus pandemic [331].



208. On 1 April 2020 Mrs Chauke was redeployed to General District Nursing [306]. The same day she called in sick citing work related stress [335-336]. She remained off sick until 1 September 2020.
209. Mrs Chauke states that absence triggered a stage 1 absence on 2 April. The only reference we have for that is an email from Ms Spinetto of 29 June 2020 ((224) following and in particular (225). Mrs Chauke states that was because of her absence between 17 and 23 March [LC/117]. We found that was not so because by then that absence had been amended to a COVID19 absence. Nor can we find any trace of that being triggered on 2 April. Mrs Chauke does not refer to it.
210. Ms Orme told us [¶99-100] that Mrs Chauke called her on 6 April 2020 to discuss her wellbeing. That followed a request from her for an update [352]. Her note of the call was made in a return to work meeting form [352 – 353] (sent via an email of 17:55 on 7 April [349]) and that of Mrs Chauke [338 – 340] (sent via an email of 18:21 on 7 April [350-351]) were in dispute. Ms Orme recorded a stage 1 meeting had been triggered, that it was booked for 16 April although Mrs Chauke had declined to answer if she would be attending. The following day having copied Ms Burton in and having made it clear Mrs Chauke’s note of the conversation did not reflect what was said, she continued [349]:-

“Pam - I would now like to raise a grievance / disciplinary procedure around Linah’s behaviours towards both myself and members of the team.

Please could you advise me how I go about this? I will contact my union representative for ongoing advice and support.”

17 April 2020 - Referral to OH – Issue 10(b)

211. On 16 April Mrs Chauke was referred to Occupational Health [356-360]. The extract that follows was at [359]:-

“I am referring Linah Chauke, a Band 6 Diabetes Educator based at Stoke Health Centre who has been in this role since 6th August 2018 to occupational health for assessment due to her current period of sickness absence which commenced on 01 April 2020 with work related stress. Linah has a medical certificate to cover her absence from work until 12th May 2020. In addition Linah has had the following periods of absence in a rolling 12 month period.

<i>Episode & Reason</i>	<i>Dates absent</i>	<i>No. of days</i>
<i>1 Pulled muscle</i>	<i>2-12th April 2019</i>	<i>11</i>
<i>2 Hypertension</i>	<i>10th June 2019-2nd July 2019</i>	<i>23</i>



Not counted Covid symptoms 17th-23rd March 2020 7 days followed by a further 7 days isolation working from home

3 Work related stress April 1st 2020-present 16 to date

Current total is 50 days to date

Linah has expressed concerns around myself as her manager citing the reason for her work related stress, however, I have tried on numerous occasions since becoming Linah's manager on the 1st February 2020 to ascertain her whereabouts, her day to day work plan and to implement reporting procedures for annual leave and sickness absence which have not been followed despite acknowledgement via email. This has resulted in an impact on the day to day running of service delivery and Impacted on my duty of care both towards Linah and other staff in the Diabetes team

The reporting of sickness absence is clearly outlined under the employee's responsibility in the Trust's Managing Attendance policy and as a manager I would expect any member of staff to follow the reporting procedure in line with local arrangements.

Linah appeared to display symptoms of stress both prior to and following a period of annual leave between the 5th and 13th March. Linah did not attend work on the 14th March due to a delayed flight but as yet has not confirmed her plans to accommodate this. She subsequently did not attend work for the following 14 days due to the belief that she needed to self-isolate following her period of travel.

Signs of stress have been evident in both face to face meetings and telephone calls to and from myself. I have offered Linah the support of both earlier appointments with occupational health which she has declined and information from Care First. All support has been resisted and has resulted in both verbal outbursts and unprofessional emails from Linah to myself citing various accusations. From reviewing Linah's personal file it is evident that she has had difficult relationships both with her previous managers where similar issues have been highlighted and with her colleagues. Linah currently has a live grievance against 2 previous managers and one of her colleagues. Linah is of the opinion that she is treated differently to other people due to her ethnicity.

I have increased supervision support for Linah via the wider Diabetes Team and encouraged the development of team relationships through joined MDT and operational meetings.

In [your] assessment of Linah, please could you determine if there are any underlying causes which may be having an impact on either Linah's mental and/or physical wellbeing and what if any temporary reasonable adjustment can be made to support Linah in the workplace. There are currently both conduct and capability concerns in respect of Linah's behaviours.

I would be grateful if you could offer Linah a face to face appointment as I do not feel Linah engages well via telephone and do not feel this type of assessment would fully assess Linah's health requirements."

212. That gave rise to the next issue:-

10(b) On 17 April 2020, did Ms Orme make a second referral to Occupational Health which Occupational Health/the Claimant considered to contain numerous inappropriate and inconsistent statements?



213. Given it was alleged this referral contained inaccurate and insensitive statements Mrs Chauke's complaint about it to Mr Moxley on 13 May 2020 shortly after she received a copy requesting that they be added to her grievance [375] suggests that was her view at the time.
214. Whilst the referral needed to relay the matters to be addressed, the factual background and concerns Ms Orme had, the tone was far from neutral and given it referred to allegations against Mrs Orme and colleagues we consider below (366-368) if the referral was made to undermine or discredit Mrs Chauke or its contents were as a result of Mrs Chauke's grievance.
215. By 17 April Mrs Chauke had been signed off for two weeks with stress. had been signed off for two weeks with stress. we found by 25 February were Ms Orme's legitimate and genuine grounds for concern about Mrs Chauke's behaviour (162 & 197), as supported by Ms Orme seeking to canvass them with Ms Spinetto (155 following and specifically 158), what we found about the events of 16/17 March (170 following) we find Ms Orme was right to refer Mrs Chauke to OH. Ms Orme's legitimate and genuine grounds for concern about Mrs Chauke's behaviour (162 & 197), as supported by Ms Orme seeking to canvass them with Ms Spinetto), and that those concerns were reinforced by the events of 16/17 March we find Ms Orme was right to refer Mrs Chauke to OH.
216. The content of that referral was unfortunately worded. We find that Ms Orme would have been well advised to have sought that HR make or at least advise on the content of the referral. This is particularly true in circumstances where as here the form stated *"It is essential you provide as much background information ... including knowledge of any underlying medical reason why this person is being referred."* and elsewhere contributory factors such as on ongoing disciplinary processes or non work matters such as family bereavement [391]. Indeed, it is surprising that there was no procedure in place for a member of HR staff to review the referral before it was submitted.
217. It was not until 12 May 2020 that a copy of the referral (password protected for security) was forwarded to Mrs Chauke [393]. The next day, 13 May 2020 Mrs Chauke emailed Mr Moxley to raise concerns about her Occupational Health Referrals and requested that they be added to her grievance [375].
218. On 21 May 2020 Mrs Chauke attended a Stage 1 Formal Sickness Absence Review Meeting. It took place via Microsoft teams, and she was accompanied by Mrs Spinetto. Ms Orme set out her record of the meeting via a letter of 1 June [402-403]. That incorrectly referred to the date of the meeting as being 27 May. We address a dispute that arose about that at (304) following.
219. On 8 June [416-17] Ms Spinetto wrote to Mr Moxley



“I am writing on behalf of the above RCN member to formally request that her grievances which are lodged with the Trust and which have been acknowledged by you are progressed in accordance with the Trust’s Employee Disputes and Grievance policy without further delay, acknowledging the Trust’s position in progressing formal procedures due to the Covid-19 Pandemic. However our member is now off sick with work related stress since 1st April 2020 and needs her grievances to be heard as they remain unresolved and are impacting upon her recovery and protracting her absence. ...”.

220. It is clear that there had been a preceding conversation because Ms Spinetto continued “... I understand you have asked for this to be progressed.” She attached the documents that recorded the grievances:-

24th February 2020 Letter and emails, sent by cover from the RCN,

4th March 2020 email to Christine Wheeler, with attached concerns

13th May 2020 email to you expressing concerns related to the management of her sickness absence.

and sought that the management of Mrs Chauke’s sickness absence be dealt with as part of the grievance process. She gave a number of dates when the grievance could be heard.

221. On 12 June Ms Spinetto wrote direct to Ms Orme concerning inaccuracies in relation to the letter she had sent on 1 June regarding the sickness absence meeting of 21 May 2020 [420-21].
222. On 19 June 2020 Mr Moxley wrote to Mrs Chauke to inform her of his decision to consider her complaints under the Respondent’s Bullying and Harassment Policy [424].
223. Mrs Chauke complains [¶154] about the actions of Ms Spinetto, Mr Moxley and Ms Sarah Guy (of the Trust) whereby they “*decided to change my Internal Grievance unbeknownst to me (up until aforementioned email from KM 25 June)and place it under a different category and populate it erroneously with snippets manipulated from her original grievance”.*
224. On 29 June 2020 Ms Spinetto responded to Mr Moxley regarding the terms of reference for Bullying and Harassment complaints [427-428]. She made no complaint that the complaint was being dealt with under the Trust’s bullying and harassment policy. She identified that she had

“... sent all of the relevant correspondence and some initial compelling evidence which recorded our member’s concerns by way of an emailed letter and attachments on 8th June 2020. The specific concerns are within the documents –

24th February 2020 Letter and emails, sent by cover from the RCN

4th March 2020 email to Christine Wheeler, with attached concerns which do not appear to be represented in the terms of reference as presented. I am aware that this correspondence was sent to you by way of Christine Wheeler and the RCN. Our member and the RCN formally request this information is reviewed and included in a revised terms of reference. I am attaching these again with this letter for the avoidance of doubt.



13th May 2020 email to you from our member expressing concerns related to the management of her sickness absence.”

225. Ms Spinetto went on to say that further concerns have been expressed by Mrs Chauke and the RCN about *“the broader management of our member’s ill health and sickness/absence due to work related stress”* and accordingly she sought the broadening of the terms of reference to include a number of matters –

“● Management of the situation when our member returned from annual leave in March 2020 and was advised by NHS 111 to self isolate as she was displaying Covid-19 symptoms. She advised the Trust’s ICC and Christine Wheeler, but she was challenged by Sarah Orme as to the authenticity of her health status at this time

● Due to the increased pressure placed on her, Linah commenced sick leave on 1st April 2020 and was invited to a stage one sickness meeting by way of a letter from Sarah Orme dated 2nd April 2020, one day after going on sick leave⁴⁴, which left our member feeling further harassed and treated unfairly and inconsistently and this has continued to date.

● Challenges by the RCN on the Trust to remove Sarah Orme from the management of our member’s sickness/absence were refused with little or no regard for the issues our member had been raising about the way in which her line manager was conducting this process and the negative impact on our member’s wellbeing.”

226. Ms Orme wrote to Ms Spinetto on 3 July [429-30] addressing a number of issues Ms Spinetto had raised in her letter of 12 June (221) about the stage 1 process and referrals including with regards to the latter that Mrs Chauke complained that she had not consented to this. She also addressed Mrs Chauke’s complaint that the Trust had not provided a copy of the referral to her before it was sent explaining that it was not possible to do so.

227. We find that is a defect in the Trust’s systems. Short of completing a referral with the employee present which in many cases is not possible for an employee to give an informed consent (if one is being sought) the terms of the referral need to be provided first. Nor however did it appear to be the Trust’s practice to forward the form of the referral to the employee after it had been made, as the failure of the Trust to provide that until 12 May (see (217)) demonstrates.

228. Mr Moxley wrote to the Claimant on 13 July 2020 setting out how he intended to address the issues raised regarding the terms of reference and confirmed the appointment of Ms Emma Lambert as the Investigating Officer [432-433].

229. On 15 July Mrs Chauke was invited to another stage 1 meeting on 27 July via Microsoft teams [435-36]. That took place as scheduled and Ms Spinetto accompanied Mrs Chauke at the meeting. Ms Orme recorded the outcome of that meeting by a letter dated 6 August [455-56].

⁴⁴ We can find no trace of that invitation in the bundle see (209)



Amongst other matters it was agreed notwithstanding Mrs Chauke's absence a Stage 1 (review) meeting would be held on Thursday 20 August 2020 to continue their discussions as by then an OH appointment had been arranged for 4 August 2020.

230. On 4 August 2020 Occupational Health reported in relation to the referral of Mrs Chauke [452-454].
231. On 20 August 2020 Mrs Chauke attended an absence review meeting with Ms Orme and completed a risk assessment [599-601]. It is clear from an exchange of emails [470-72] that redeployment was discussed that day because Mrs Chauke enquired what the role entailed and if it was uniformed. The following day her redeployment to the Jackfield Ward from 7 September onwards was confirmed, that it was uniformed, and a job description attached within that same chain.

Mrs Chauke's return to work from 7 September 2020

232. On 7 September Mrs Chauke told us [¶159] that she was informed by Mr Moxley that the investigating officer for her grievance had been changed from Ms Emma Lambert to Ms Sue Unwin.
233. Mr Moxley told us Ms Lambert having initially indicated she could undertake the investigation due to the additional issues raised by Mrs Chauke and the delay caused by then due to her sick leave due to work related stress by August she no longer had the capacity in her workload to carry out the investigation. He approached Ms Sue Unwin to see if she had capacity to do so.
234. Mrs Chauke states she was told on 7 September that the investigator of her grievance had been changed from Ms Lambert to Ms Sue Unwin [LC/157]. The same day Mrs Chauke was invited to an interview with Ms Unwin on 22 September [492-93]. We return to that investigation at (291) following.
235. Following her redeployment Ms Colclough emailed Ms Orme to tell her that were had been expressed via the ward sister at Jackfield Ward that Mrs Chauke was deskilled and required supervision [489].
236. Ms Lisa Birks was the Senior Sister/Ward Manager at Jackfield Ward. She worked for the Trust from July 2016 until 2 January 2022. She told us this:-

[LB/07] On 16 September 2020, the Claimant provided personal care to a patient on the Jackfield Ward. On 17 September 2020, that same patient tested positive, and everyone on the Jackfield Ward (including the Claimant) was informed of this. In line with the Trust's protocols, the patient was



immediately removed from the Jackfield Ward, however the Claimant was distressed, tearful and panicking upon hearing the news. I understood that the Claimant's distress was because she had expressed a preference not to work in a COVID environment and she had verbally told me that her husband was awaiting surgery and was a high risk and vulnerable. Therefore, I believe the Claimant was anxious about being in contact with the virus and potentially taking it home to her husband. On this basis, I sent the Claimant home, and advised her to contact Infection Control for advice.

237. Understandably due to her own and her family vulnerability Mrs Chauke was upset and was sent home. Prior to that point the only symptoms Mrs Chauke told us about were that she had a sore throat and a headache on 15 September 2020 [¶163] and that she had expressed she had a sore throat on 16 September [¶164].

238. On 17 September Ms Orme emailed Infection Control and Mrs Chauke confirming a test had been booked for Mrs Chauke at 10:40 on Friday 18 September [494]. That test returned a negative result and at 21:49 on 20 September 2020 Mrs Chauke emailed Ms Orme [494]

"Just to let you know that the results came out and Infection Nurse told me that it was negative.

However, she wanted me to pass a message regarding the testing and its results which I was reluctant to get deeply involved with, the reason being that I felt it was not within my remit.

My view is that I will be more comfortable with you discussing with them the ramifications, if any."

239. Mrs Chauke's account was this :-

169. 21.09.2020 I called Wendy (one of my 3 managers) to enquire about my 1230 to 2030hrs shift because I was still experiencing symptoms which included loss of smell but was told I should still go back to work. I was hesitant to do so based on not knowing definitively if I was communicable or not especially due to the ICC advice. Wendy instructed me to go back to work because I had tested negative.

170. SO decided to diagnose me over the phone when I called to inform her I was still experiencing symptoms. She stated "Your test was negative so go to work, or else I will put you down as off sick." I was quite concerned and distressed because we were in a pandemic. Contrary to NHS guidelines, any sickness absence related to Covid 19 for medical staff must be recorded separately on the electronic staff record and not counted for the purpose of any sickness triggers or sickness management policies. The Health and Safety Executive (HSE) updated the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR) to include reporting related to COVID 19.

171. PB initially inaccurately stated in her email that the patient exhibited Covid symptoms and I immediately began presenting- that was false. She then confirmed that I could go back as the patient was since removed and offered support if I felt unsafe and unable to return to work with a period of annual leave or unpaid leave and was asked to get in touch with SO if that was the case. If not and I remain absent from work it will be recorded as an unauthorised period of absence. This is not procedural.

172. When my BAME manager (Baz Kaur) called I let her know the current situation and ultimatums from HR represented by PB and my line manager SO. She asked me the names of my HR, Manager and the Infection Control Team Nurse as well as to tell the ward manager that I still



had symptoms. The Ward Manager asked me to go home and she was surprised to learn that I had already been tested for Covid 19. The BAME manager then sent a text instructing me to go home ASAP and isolate following her conversations with Infection Control and HR (Pam Burton). This incident demonstrates how awkward being managed by 3 managers is, a situation I didn't wish for at all and I felt I was being treated unfairly as a result. These behaviours show I don't matter at all to them.

173. Based on my experience with SO, Wendy and PB I would be hard pressed to argue that there isn't a direct correlation between Trust managerial covid response and infection spread.

240. Mrs Chauke asserts that when she spoke to Ms Colclough she had a loss of smell. Her witness statement makes it clear that was prior to her going into work that day because she was enquiring what to do about her shift.

241. The accounts of the three people Mrs Chauke mentioned were thus.

242. Ms Colclough said this:-

“12. On Monday 21 September, the Claimant spoke with Ms Orme and Pam Burton (Senior Human Resources Advisor). I understand that the Claimant advised them that her test had returned negative, but she was still experiencing a sore throat and headaches. I understand Ms Orme advised the Claimant that a sore throat and headaches were not symptoms of Covid-19 and therefore there was no requirement for self-isolation, and the Claimant could return to work.”

243. Accordingly, she made no mention of speaking to Mrs Chauke. That is supported by Ms Burton. Her account was :-

“10. On the morning of 21 September 2020, the Claimant corresponded with Ms Orme and myself in respect of returning to work [page 515, 523 - 524]. The Claimant advised that she was suffering from a sore throat and headache. At the time (September 2020), sore throats and headaches were not symptoms associated with Covid-19. The Claimant was therefore advised by Ms Orme that as she was not displaying the symptoms attributed to COVID-19 that she could return to work and if she was not well enough to attend work any time taken off would be counted as sick leave, and not leave for self-isolation for COVID-19 [page 520]. Wendy Colclough (Nurse Consultant and Manager of the Walk-in Centre) was also updated [on] this discussion, as she was line managing the Claimant whilst on the Jackfield Ward.

11. At 11:22 on 21 September 2020, I emailed the Claimant reiterating that there was no reason why she could not return to work with appropriate PPE in place, as her sore throat was not a symptom of Covid-19 and she had returned a negative test. I also stated to the Claimant that I had been assured the patient that had tested positive for Covid-19 had been moved from the Jackfield Ward. I further clarified that if the Claimant felt she was unable to return to work, then the Trust could support her with a period of annual leave or unpaid leave, but if she remained absent from work then this would be recorded as unauthorised absence [page 515]. Whilst not mentioned in my email, I understand Ms Orme explained to the Claimant that if she did not feel well enough as a result of her sore throat, she could take sick leave, however the Claimant did not wish to do this.

12. Later that day, the Claimant reported to Ms Orme that she had lost her sense of smell. The Claimant then proceeded to contact Infection Control, and after explaining to them that she was experiencing loss of smell, they advised that this was a symptom of Covid-19, and the Claimant was



told she would need to self-isolate. The Claimant then reported to Lisa Birks (Ward Manager) at 12:40, and explained to her that she had a sore throat, and although she had returned a negative Covid-19 test, Infection Control had advised her not to go to work as it could be a false negative. Ms Birks therefore sent the Claimant home, and sent an email to Ms Orme detailing what she had discussed with the Claimant, and why she had sent her home [page 521].”

244. In one of the emails Ms Burton referenced she sent to Mrs Chauke on 21 September [515] at 11:22 [515] she too recorded the only symptom Mrs Chauke had given [our emphasis] and gave an explanation why she was being asked to return to work:-

“... It transpired that a patient presented with positive COVID symptoms and shortly afterwards you presented with a sore throat.

Sarah Orme was proactive in getting a test for you immediately you reported these symptoms which has returned negative. Therefore there is no reason why you cannot return to work as normal with the appropriate PPE in place and I have been given assurance that the patient presenting with COVID symptoms is no longer on the ward. ...”

245. That email was sent at 11:22 just over an hour before Mrs Chauke told us her shift was due to start at 12:30 (239 ¶169).

246. Ms Orme said this

“72. After speaking to myself, Ms Burton and Ms Colclough on 21 September 2020, the Claimant reported to Infection Control that she had lost her sense of smell, and she was subsequently advised to self-isolate. This information was presented after she had been advised to work or to take sick leave as her symptoms were not consistent with government guidance for COVID-19 symptoms.”

247. Thus, like Mrs Chauke, but contrary to what Ms Burton and Ms Colclough said Ms Orme told us Ms Colclough was involved in the conversations with Mrs Chauke as opposed to being updated on them as Ms Burton had said.

248. Mrs Chauke told us orally the first time she made Ms Orme aware that she had lost her sense of smell was just before 9:00 pm on 21 September. Ms Orme’s account in her witness statement suggests that the first time Mrs Chauke told her that she had lost her sense of smell was later in the day on the 21st after Mrs Chauke had spoken to Infection Control. Ms Burton also states that later that day Mrs Chauke told Ms Orme, that she had lost her sense of smell. In the email Ms Orme sent later that afternoon at 15:15 (250) she suggests that it was only after the initial discussions that Mrs Chauke reported a loss of smell to Ms Orme but does not state if that was before or after infection control were told.

249. What does not appear in dispute is that Mrs Chauke then attended work. She was sent home by Miss Lisa Birks who gave an update to Ms Orme, Mrs Colclough and Balwinder Kaur the Trust’s Band 8C Head of Equality and Inclusion about Mrs Chauke at 14:33 [521]:-



“She turned up for work today at approx. 12.40 and wanted to speak to me

She told me that she had been screened for COVID and that the swab result had returned as negative, however she was still showing symptoms of a sore throat.

She said that she had been told by Infection Control that she should not go to work as the test could be a false negative and that potentially she could still be positive to COVID

At this point I then asked Linah why she had come to work against their advice?

She told me that she had been told that she needed to come to work by her boss and that she was frightened to go home as her boss would not be happy

Unfortunately I have had to send her home as I feel that she should not [have] come to work if she was told not to do so

I also feel that this is not the correct place for Linah as her anxiety from COVID is intense and this is so apparent in her practice

I have been advised by Balvinder she will be re-screened on Wednesday”

250. Ms Orme responded at 15:15 [520]

“... I would like to highlight that Linah only advised of a loss of smell after I advised her if she was not well enough to attend work this would be sick leave and not isolation. This was reiterated by myself, Wendy and HR.

Please be assured that Linah was in no way unhappy with this information, advised she wasn't sick and would be attending work.

I appreciate that you have had to send Linah home — many thanks for letting me know.”

251. On the 21 September 2020 at 20:51 Mrs Chauke emailed Ms Orme and others [522] stating she was eventually sent home, was told another COVID test was to be arranged for her and asked for the details and stated “... just to confirm I still have symptoms of a sore throat and loss of smell as I indicated this morning” [522].

252. Mrs Chauke's email of 20:51 not only contradicts what she told us orally, namely that the first time she made Ms Orme aware that she had lost her sense of smell was just before 9:00 pm on 21 September but also contradicts what Lisa Birks stated at 14:43 where she only mentioned a sore throat, Ms Burton's witness statement and email of 11:22 which both refer to only a sore throat and Ms Colclough who refers to a sore throat and at odds with the others, headaches. None mention a loss of smell.

253. At 11:37 on Tuesday 22 September 2020 Ms Orme emailed Mrs Chauke setting out the background as she understood it [523-24]



"I have spoken in depth with infection control and would like to correct the information that has been provided and caused myself significant work load over the last 24 hours.

The following information has been provided by infection control:

- *You did not in fact require the initial test as sore throat is not a symptom of COVID-19.*
- *The test returned negative on Saturday.*
- *You were advised by infection control that as you were wearing PPE during your time on the ward there was no PPE breach and that you were able to return to work as the risk of infection was low due to you wearing PPE, despite exposure.*
- *The test may have been taken too early but due to the above you were able to return to work. This was taken on day 4 of symptoms which is considered perfect for virology.*
- *Sore throat is not a symptom of COVID-19.*
- *You contacted infection control at lunch time yesterday after speaking to myself, Wendy and Pam yesterday morning whereby we requested that you return to work as your test was negative and your symptoms were not associated with COVID. These as advised by yourself to me were headache and sore throat. **When I advised you that any additional leave would be sickness and not isolation you then advised me that you had lost your sense of smell,***
- *You subsequently contacted infection control and advised them that you had lost your sense of smell and on this basis only they advised you to isolate as did Lisa when you reported to the ward.*

*Please can you arrange to have a further test on the basis that you advise you lost your sense of smell since yesterday as a **matter of urgency** if you have not already done so on 0300 124 0354*

Infection control have advised that this test, as the last will be taken at the optimum time between day 3 and 5 and that should it return negative you will be able to return to work.

Please ensure that you are fully isolating in line with national guidance until you results are returned."

[Our emphasis]

254. Those matters gave rise to issues 5(a) & (b):-

5(a) On 21 September 2020, did Sarah Orme and Wendy [Colclough] tell the Claimant to return to work due to Claimant's negative covid test status despite the Claimant allegedly saying she was exhibiting symptoms after being in contact with a patient who subsequently tested positive for covid-19 the previous day and infection control advice to self-isolate for 10 days?

5(b) Around 21 September 2020, did Pam Burton do the following:

i. Inform the Claimant that she should return to work as the patient, who tested positive for covid-19 has since been moved;

ii. Inform the Claimant that if she felt unsafe or unable to return to work, she could take either annual leave or unpaid leave and would need to contact Sarah Orme to facilitate this



iii. Informed the Claimant that if she did not contact Sarah Orme to facilitate unpaid leave or annual leave, her absence from work would be recorded as an unauthorised period of absence.

255. We find that contrary to the implication in Mrs Chauke's witness statement [¶169] the advice from Infection Control prior to 21 September was that Mrs Chauke was not required to self isolate because she was not displaying symptoms and had been wearing PPE when she had come into contact with the patient who subsequently tested positive.
256. Based on the contemporaneous emails and evidence from her managers when set against the inconsistency of Mrs Chauke's account, we prefer the evidence of the respondent's witnesses and find that Mrs Chauke did not initially report a symptom (loss of smell) but instead a sore throat and headache. The symptoms Mrs Chauke initially relayed to Ms Orme and Ms Colclough that morning did not require her to self isolate and thus she was rightly told to return to work. We find she was rightly told what is alleged in allegations 5(b)(i)-(iii). That was the correct advice, and the Trust was entitled to do so.
257. We find that only after being told what was asserted at 5(b)(i)-(iii) and in particular that she would need to take unpaid or annual leave otherwise her absence from work would be recorded as an unauthorised absence that Mrs Chauke subsequently asserted she had lost her sense of smell.
258. We find that Infection Control were only contacted after those earlier calls to Ms Orme, Ms Colclough and Ms Burton. Notwithstanding the advice from infection control to go home and isolate she reported to the ward. In her statement Mrs Chauke implies that she personally did not contact infection control, but that Ms Kaur did on her behalf. Nor did she state in her witness statement that having contacted infection control on 21st and having been told to self isolate that she was told to return to work by her managers.
259. Whilst we accept symptoms can change, that is not what Mrs Chauke told us had happened. Mrs Chauke told us that she had lost her sense of smell the previous day and she had not slept well the previous night, she knew that loss of smell was a symptom of COVID and required her to self isolate. If so she should have reported that to Ms Orme, Ms Burton and Ms Colclough before the start of her shift. We find she did not. She told us she could not recall when she told Mrs Orme but stated she did so having been told to do so by infection control and referred us to her email. That was only sent just before 9:00 pm on 21 September after she had gone home and at odds with the premise behind these two allegations. Ms Orme's account in conflict she accepts she was told that by Mrs Chauke. Her change of account casts doubt on the reliability of her evidence in either regard. That was a repeated theme of her evidence.



260. The issue of when she told her managers of the loss of smell given what she told us she knew about symptoms, as a practitioner she should not have gone to work when her shift started that afternoon. We considered whether she attended work because she had been told to and had been put under pressure to do so because of the previous attendance management process. We find had she told her managers she had a loss of smell or contacted infection control or 111 then she would have been told to self isolate. We find she was not told to do so because she did not tell her managers of that fact and only did so later. That was a failing on her part. Even when on her own account she states she was told to self isolate by infection control she returned to the ward. Again, she should not have done so. We find on her own account she showed no regard to the COVID rules in place at the time. That does her no credit.
261. We make those findings in isolation from our findings (188) above. They merely reinforce our view.
262. Ms Orme told us [¶79] on the basis of the advice from Infection Control that we refer to at (253) the earliest date for optimum testing was 3 to 5 days from the date someone started experiencing symptoms and therefore here 23 September 2020. That was because Mrs Chauke lost her sense of smell on 21 September 2020.
263. Thus at 8:48 am on Tuesday 22 September Ms Orme responded to Mrs Chauke's email of 20:51 the previous evening (see (251)) and asked Mrs Chauke to book her test by contacting infection control [529]. She asked Mrs Chauke to clarify given she had mentioned she had a headache that was not mentioned in Mrs Chauke's email to confirm so she could correctly report her symptoms and also stated that the given advice that Mrs Chauke's sore throat "*commenced last Tuesday [15 September] was that the isolation period of 10 days will end on Thursday this week [24 September]*".
264. At 13:11 on Tuesday 22 September Mrs Chauke emailed Ms Orme to say her test was booked for Friday 25 September [526]. At 13:22 Ms Orme emailed Mrs Chauke saying she had spoken to Infection Control, there was availability the following day and asked her to contact them and reschedule [527]. A few minutes later Infection Control emailed Mrs Chauke stating her manager (Ms Orme) had called to say she needed a test the following day Wednesday 23 September, so a test had been booked for 11:30 [528]. Mrs Chauke suggests that was arranged by Ms Orme.
265. Mrs Chauke informed Ms Orme at approx. 2pm on 22nd that she had made arrangements to be tested on for Friday at 09.30am and that due to transport issues and her not being able to use



public transport she could not take the Wednesday test slot and instead settled for Friday. She referred to still having a loss of smell [529]. She told us her car was not working, that she had had to have a push start to get to her test on 17th, but a neighbour took the car to a garage, and it was resolved by the Friday.

266. It transpires Ms Orme sought to clarify the position with Infection Control via a MS conversation on 22 September. Infection Control replied at 17:06 on 23 September [535-36]. Ms Orme sought to clarify the guidance from Infection Control further on 23 September [534]:-

“Can I just clarify as I am unclear. Prior to the loss of smell which was only confirmed on Monday LC was in a position to return to work despite the contact based on the fact there was no PPE breach?”

267. Infection Control replied at 09:13 the following day 24 September [534]:-

“Dear Sarah I can clarify that as per national guidelines the Staff [sic.] member could resume work as long as they remained asymptomatic and is 48 hours clear of high temperature. However in relation to staff members who has loss their sense of taste or smell as these two symptoms can affect individuals for a long period of time we would advise as per MPFT and national guidelines the staff member would need to complete their full 10 days of isolation first and then if on day 11 day the member of staff they not have a temperature or fever and have not taken any medication to assist with treating any feverish symptom, if they are medically fit, they can return to work.

We know that some individuals may be affected for a period of time with persistent cough , loss of smell or loss of taste, therefore seeing that it is one of the covid symptoms we would ask the member of staff to isolate for 10 days and once 48hrs with no temperature and not taken any medication to treat any feverish symptoms then we can advise is if the staff is medically fit, they can return to work.

If I can be of anymore assistant please do get in contact with myself.

Kind regards Kyana”

268. Thus, the critical issue that led to the instruction to self isolate was Mrs Chauke’s loss of the sense of smell. The 10 day isolation period thus started from when Mrs Chauke first experienced symptoms of COVID, namely the sense of smell.

269. As to :-

5(c) Did Sarah Orme do the following:

(i) Book a Covid test for the Claimant on Wednesday 23 September 2020 in full knowledge of the Claimant allegedly experiencing symptoms.

(ii) fail to respond to the Claimant’s email explaining why she could not undertake a Covid-19 test on a Wednesday?



270. Whilst Ms Orme did not book a covid test for Mrs Chauke. Ms Orme's email of 8:48 am on 22 September [529] makes clear Ms Orme had contacted Infection Control but that Mrs Chauke still needed to do so. Based on what we heard Infection Control took matters into their own hands and as a result they arranged one for her. That accorded with the advice Infection Control gave to Ms Orme as to the optimum time for a test. Mrs Chauke had responded to Ms Orme's request to her to book that test with a date three days later and after her isolation period ended. It was for understandable reasons following the lockdown and the pressures the NHS was facing that Ms Orme and the Trust wanted Mrs Chauke back at work as soon as possible.
271. As to issue 5(c)(ii) it is not in dispute that Mrs Orme did not respond to Mrs Chauke's email. We address the reasons why she did not do so below (358).

Late September – issues 5(d)-(f)

272. On 23 September Mrs Colclough emailed Mr Steve Martin (the Trust's Associate Chief Nurse), Dr Turner (the Trust's Deputy Chief Nurse/Director of Infection Prevention & Control), Ms Orme and Lisa Birks to say that having been asked to support Mrs Chauke's redeployment at the Haywood Hospital that was not working out as planned. Mrs Chauke having been offered WFC had declined this as she felt it was unsafe because patients had unknown Covid status, and she was at high risk. Mrs Colclough then went on to relay what she said had occurred in relation to the Covid positive patient on the Jackfield Ward. She continued "*We are unable to guarantee a Covid free workplace at the head despite all best efforts, and support and we feel this is not the place for [Mrs Chauke] to be continuing to work*" [533].
273. Dr Turner replied about 20 minutes later [532] to say "*Thanks Wendy — I am afraid it is very difficult to guarantee Covid free status in any clinical area within the Trust so makes clinical placement of an RN very difficult in any clinical area. The non clinical options will also be difficult so risk reduction measures through risk assessment would be the preferred option but best guided by HR on this.*"
274. Mr Moxley states [¶27 & 28] that during the last week of September 2020, there was an ongoing discussion between him, Ms Orme, and Mr Martin about finding Mrs Chauke an alternative role within the Trust and also around that time in consultation with Mr Moxley and Ms Burton Ms Orme made the decision to remove herself from Mrs Chauke's line management because having made a complaint about Mrs Chauke (and vice versa) it was decided it was no longer appropriate for Ms Orme to continue managing Mrs Chauke.



275. On 24 September the Trust's Associate Chief Nurse in an email to Mr Moxley referred to a conversation he had had with Ms Orme where Ms Orme had raised concerns about Ms Chauke's performance and behaviour that had continued after her redeployment to the Haywood Hospital. He recommended a number of steps that should be taken. In our judgment they centred about Mrs Chauke's concerns about the risks to her from COVID, how those risks could be avoided and the next steps if all redeployment options had been explored [537].
276. Whilst the document itself was undated we were told that on 26 September 2020 Ms Orme raised a bullying and harassment complaint against Mrs Chauke [538-541]. That was 3 days after she had received the email from infection control setting out what Mrs Chauke had told them. That complaint referenced that Ms Orme had first informally raised a complaint on 17 March [541].
277. On Friday 25 September 2020 Mrs Chauke took a Covid-19 test that returned a negative result. [529]
278. It is common ground that Mrs Chauke returned to work on Tuesday 29 September 2020 and reported to the Jackfield Ward. Mr Moxley states [¶29] he spoke to her, and she told him that she would not work somewhere where the Trust could not guarantee that she would not be exposed to Covid-19 patient(s). That was a repeat of what Mrs Colclough had reported on 23 September.
279. The Trust state that due to her vulnerability and personal circumstances, she asserted she could not work in any facility unless the Trust could guarantee that there was no risk she would come into contact with Covid-19 positive patients. Given it could not provide that assurance Mrs Chauke was asked by Ms Colclough and Ms Orme to report to the Barker Building, where there were no patients, that she should catch up on any mandatory training, and await further instructions from Ms Orme.
280. Mrs Chauke states [¶182] that she was sent away from the Jackfield Ward by Miss Lisa Birks and Mrs Colclough, told to go to the Barker Unit and to call HR for what to do next as her duties had been relieved and no reasons given. She alleges Ms Burton (HR) was off when she called and so she called Ms Orme. She described her as her manager. It was during that call she found out that Ms Orme was removed as her Line Manager. Mrs Chauke alleges she felt "... insignificant as they ought to have told me one of my 3 managers was no longer my manager. I then got an instruction from a clerk (name not known) saying that Mr Kurt [Moxley] (I had never heard of) had said I should go home. At this point my grievance had still not been dealt with."



281. Mr Moxley states [¶29] it was not a clerk who made that call but him personally and we address what he said at (278). Mr Moxley went on to explain the rationale for sending Mrs Chauke home:-

“30. The Trust could not make any guarantee that the Claimant would not be exposed to Covid-19. The airborne nature of the virus meant that the Claimant could be exposed to the virus whether in a clinical, non-clinical or a home environment. The Claimant was understandably concerned about Covid-19 given her own personal circumstances, therefore the decision was made with her that it would be safest for her to return home, until a plan could be put in place for her.

31. I therefore requested that the Claimant make her way home on 29 September 2020, and she did so without raising any objections. This was intended as a supportive measure. I had taken on-board the Claimant’s concerns in respect of her vulnerability to Covid-19, and I felt that whilst we were determining where best to redeploy her, the safest place for her was at home. The Claimant was in full agreement with this course of action. ...”

282. As to Ms Orme she said this:-

“85. The Claimant alleges that on 29 September 2020, I informed her that I was no longer managing her.

86. Whilst the Claimant was self-isolating, the Trust were actively looking into where she could be redeployed, as she stated she could no longer work on the Jackfield Ward. The Claimant was clear that she could not work in any setting unless the Trust could guarantee she would not come into contact with the virus. Given the airborne nature of the virus, that was not a possibility.

87. I was also really struggling with managing the Claimant at this point. The services were stretched and everyone was under immense pressure trying to maintain services that were increasingly in demand and high staff levels of sickness absence. I was also receiving numerous emails from the Claimant on a daily basis, and some days when I would log into my computer, there were around 30 or so emails, some of which had been sent in the late hours of the evening, and early hours of the following morning from the Claimant.”

283. That leads to issues 5(d)-(f)

5(d) On 29 September 2020, did Lisa Birks and Wendy Colclough send the Claimant away from the [Jackfield] Ward and ask her to report to the Barker Unit Building and call HR to ask what to do next?

5(e) On 29 September 2020, did Ms Orme inform the Claimant that she was no longer managing her?

5(f) On 29 September 2020, did the Claimant receive an instruction made on behalf of Kurt Moxley to go home?

284. In cross examination Mrs Chauke accepted that she had concerns about working on the Barker Unit, when asked what they were she explained that her redeployment was not done properly and there was no job for her there. When it was suggested the role was temporary while the Trust found somewhere where she could work she disagreed. Similarly, she disagreed that she



had concerns relating to Jackfield and the Barker unit was not client facing. She accepted she was told to complete mandatory training until arrangements could be made for her redeployment.

285. The factual basis for those complaints is not in dispute. What is disputed is that it had any relationship to Mrs Chauke's race.
286. As to issues 5(d) & (f) this was in response to Mrs Chauke expressing concerns about the risk to her because of her vulnerability. The removal of the risk to her again was not unwanted. Again, Mrs Chauke made no suggestion Miss Lisa Birks Mrs Colclough or Mr Moxley were rude, impolite, raised their voices or otherwise somehow behaved in a way that would create the proscribed consequences. Mrs Chauke's complaint was that she was asked to attend the Barker Unit and having attended asked for assurance she was at no risk and that could not be given was sent home. At that point other alternatives had previously been tried and that being so the Trust was at a loss as to what roles were available for her. There was in our view as the internal emails demonstrate little alternative until a post could be found.
287. Mr Moxley told us [¶32] Mrs Chauke was redeployed to the Provider Improvement Response Team ("PIRT") on 12 October 2020, and she was able to work from home in this role, as she had requested. She has worked from home since that date with no complaint. Based on the evidence we were referred to we find that was not unwanted. .
288. As to issue 5(e) it is not disputed that on Tuesday 29 September 2020 Ms Orme was asked by Mrs Chauke if she was her line manager and she told her she was not. Previously Mrs Chauke complained that Ms Orme should have been removed as her line manager [LC¶134 & 156] so she was asked how this was unwanted. Her response did not address the question and instead evolved firstly into a complaint about the way that Mrs Chauke was told of this by Ms Orme and secondly that Mrs Chauke would not have been told had she not called Ms Orme. That being so we find the decision itself was not unwanted.
289. As to the former Mrs Chauke made no suggestion in her witness statement that Ms Orme was rude, impolite, raised her voice or otherwise somehow behaved in a way that would create the proscribed consequences. She simply stated this was done unceremoniously and she felt insignificant. That solely appears to be a complaint that Mrs Chauke had not had the courtesy of being told that previously. We find it was the responsibility of the Trust to inform Mrs Chauke of that change. The context in which this arose was Ms Orme's bullying and harassment complaint against Mrs Chauke on Saturday 26 September 2020. The discussion that



is complained about took place on the second working day after Ms Orme had lodged her complaint. Whilst the Trust should have informed Mrs Chauke who her new line manager was to be we accept difficult as it was searching for a role for her (and line manager for her) as the emails with the Trust's Associate Chief Nurse and Deputy Chief Nurse (272-275) confirm. Hence Mr Moxley was the person who had sent her home. It was that search that caused the delay and that arose for good reasons. Again, we find it cannot be said that the prescribed consequences could flow from unless Ms Orme was rude, impolite, raised her voice or otherwise behaved in a similar way which was not what was alleged. It was difficult to see what else Ms Orme could have done having been asked the question. The proximity of Ms Orme's complaint and the search for a new role and line manager were the reasons Mrs Chauke was not told of that change previously.

290. The investigation of Mrs Chauke's complaints and those of Ms Orme - Issues 2(i)(ii)-(iv)
291. As we say above (234) on 7 September Mrs Chauke states she was told that the investigator of her grievance had been changed from Ms Lambert to Ms Sue Unwin. The same day she was invited to an interview with Ms Unwin on 22 September [492-93]
292. Whilst that did not form one of the discrimination complaints before us Mrs Chauke complained that she had not been interviewed in relation to the internal grievance whereas others had. For instance, Ms Orme was interviewed by Ms Unwin on 30 September 2020 [546] following. That was after the date we saw Ms Unwin had offered to interview Mrs Chauke.
293. Mrs Chauke's union representative had by this time changed to Ms Nina Hambleton and her availability had to be taken into account when arranging such a meeting. We saw a number of emails referring to attempts to schedule meetings to investigate Mrs Chauke's concerns between late September and mid October [492-93, 495-97, 500-01, 531, 589-590 & 596-98].
294. The last of those meetings appears to have been scheduled for 13 October. It was not in dispute that it was cancelled and instead a teams meeting was conducted by Mr Moxley on 14 October 2020. The contents of the discussion were confirmed by him in a letter to Mrs Chauke of 22 October 2020 [621-24]:-

As you are aware, the complaint you raised on June 2020 was being investigated by Sue Unwin, as the Investigating Officer, following failed attempts to be able to resolve this matter informally. As you are aware there has been a development and therefore a change in the process will be followed. On 26th September 2020, a complaint was submitted from Sarah Orme in relation to concerns about your behaviour towards her and after consideration of the content of this, I have made the decision to investigate both matters jointly in accordance with the Trust Bullying & Harassment policy. I am



therefore standing down the investigation that Sue had recently begun and have instead commissioned an external investigator to review the concerns raised by both parties.

295. Mr Moxley had determined on 19 June see (222) that Mrs Chauke's complaints should be addressed under the Trust's Bullying and Harassment policy. Mr Moxley's letter the went on to document to terms of reference for the complaints of Mrs Chauke and Ms Orme.

296. Whilst Mrs Chauke was thus not interviewed prior to the appointment of the internal investigator we find it was through no want of trying on the Trust's part.

297. Mr Moxley's decision that we refer to at (294) led to issue 2(i)(ii)-(iv):-

2(i) Did Kurt Moxley (Band 8C Deputy Head of Operations and General Manager Countrywide Services / Head of Transformation Planned Care Witness for the Respondent) do the following:

...

2(i)(ii) Did he combine the Claimant's grievance with Sarah Orme's bullying and harassment complaint against the Claimant and decline to deal with the Claimant's complaint separately?

2(i)(iii) Decide to change the procedure for handling the Claimant's complaint from under the Respondent's Grievance Policy to the Respondent's Bullying and Harassment Policy without obtaining the Claimant's consent and without communicating his intent or reasoning for doing so to the Claimant

2(i)(iv) Did he appoint the same firm of solicitors to undertake the bullying and harassment investigation against the Claimant despite the Trust engaging them earlier to represent the Respondent in the Tribunal process?

In respect of the allegation at paragraph 2(i), the comparator relied upon is Ms Orme.

298. We find that whilst Mr Moxley instructed Mr Boyd, to investigate Mrs Chauke's grievance and Ms Orme's bullying and harassment complaint they were not combined. As some of the instances overlapped and related to similar allegations in practical terms they needed to be addressed at the same time and by the same person to avoid duplication and to ensure consistency. However, as the terms of reference for each make it clear they were to be addressed separately. We find issue 2(i)(ii) did not occur as alleged.

299. On receipt of Mr Chauke's formalisation of her grievance complaint we find Mr Moxley decided to address Mrs Chauke's company under the Respondent's Bullying and Harassment Policy. Prior to then it had been dealt with informally so there was no change of procedure as is alleged. We find he did so because he considered that was the most appropriate procedure for doing so. Ms Spinetto concurrence with that decision supports that conclusion. We find Mr Moxley was entitled to assume Ms Spinetto's failure to object to that approach despite taking issue with other elements (seeking a widening of the terms of reference and see (224-225)) was



with her consent and implicitly, that of Mrs Chauke. Further, given the content of his letter of 19 June [424] to Mrs Chauke, in her full knowledge, which is contrary to what she subsequently sought to suggest Issue 2(i)(iii) did not occur as alleged.

300. Whilst it was unclear precisely when Mr Moxley appointed Capsticks Business Solutions (“CBS”) to undertake the investigations of the bullying and harassment allegations made by Mrs Chauke and Ms Orme that was not until around 14 October (294), two months after the response to this claim was lodged by Capsticks on 17 August 2020 [31].
301. It is accepted that CBS is part of the Trust’s solicitors, Capsticks. We were told it is a separate arm of the business and there are systems in place to avoid any issues arising with regards to independence or seepage of information. The regulatory framework governing solicitors such as Capsticks require that to be so. That the regulatory framework of solicitors provides for that, shows that subject to those provisions being put in place that that is generally accepted that can take place. No specific examples were put to the witnesses about any evidence that could have suggested a breach of those rules. Absent evidence of such a breach we find those rules were in place, were followed and the Trust was entitled to instruct CBS to undertake the investigations of the bullying and harassment allegations made by Mrs Chauke and Ms Orme.
302. We found Mr Moxley appointed CBS because the two internal investigators previously instructed did not have the capacity to deal with what had become by that time two formal complaints. That was understandable given the pressure of work on the NHS and those individuals at that time. It was a reasonable decision for him. The complaints needing to be investigated as quickly as possible, one of Mrs Chauke’s complaints being about the delay to that point. Those pressures on capacity were reinforced when Ms Orme’s bullying and harassment complaint was received. Capsticks by that point were representing the Respondent in this Tribunal claim. The appointment of CBS in those circumstances was a matter for it to determine which it did.

15 February 2021 – Issue 5(g)

303. Following Mr Boyd’s appointment Mr Moxley told us [¶7] that Mrs Chauke refused to engage in any meaningful verbal discussion with him as part of his investigation and so it was agreed that she would be presented with written questions and be permitted to submit written responses.
304. One of the terms of reference for Mr Boyd’s investigation was whether Mrs Chauke had *“Displayed hostile/inappropriate behaviour towards [Sarah Orme], including refusing to address her by her*



name both in writing and verbally” [583]. Mr Boyd states that Ms Orme had alleged that during a sickness absence review meeting on 1 June 2020 Mrs Chauke had refused to address her by name.

305. Mrs Chauke provided her written responses on 1 March 2021 [843 – 858] providing evidence that the Meeting had actually taken place on 21 May 2020 [857].

306. Ms Orme also confirmed that meeting had taken place on 21 May 2020, and the date of 1 June 2020 was a mistake. As a result, Mr Boyd told Mrs Chauke of this on 4 March 2021 [903] and amended the date on the written questions posed to her, so that it was clear the Meeting took place on 21 May 2020 and gave her with an opportunity to make any amendments to her written responses in light of the Meeting having actually taken place on 21 May 2020.

307. Mrs Chauke suggested on Friday 5 March 2020 that she would prefer to work with the original question (the one which stated the Meeting took place on 1 June 2020), and she would look over her responses on the weekend [903].

308. On Monday 8 March 2021, Mrs Chauke emailed Mr Boyd [906], stating that

“... the set of questions you ask me are similar to the ones I have already provided answers to. The questions seem to have been amended in some aspects, notably the dates and times. At whose behest have you amended them.

I would like to know what exactly prompted these changes so that I can have a contextual background for me to make well informed responses”.

309. She indicated she was tracking any changes and asked for them to be provided.

310. Mr Boyd responded later that day [912] explaining events, that he had highlighted the amendments made (but also attached them with track changes) and repeated the opportunity for her to respond to the allegations [928-30].

311. That led to issue 5(g):-

From the 15 February 2021 onwards, did Daniel Boyd [a Human Resources Consultant, Capsticks Business Solutions]:

i. amend the terms of reference provided by Ms Orme for her counter claim in the bullying and harassment investigation, based on the responses provided by the Claimant in that investigation.

ii. As a result, were the counter claims of Ms Orme presented to the Claimant as if they were Ms Orme’s original claims (Document 2 Harassment Allegation 4)



312. We find that the terms of reference [584] did not identify the detail of Ms Orme's allegation including its date so Mr Boyd was not seeking to amend the terms of reference. He was trying to investigate the matters within the terms of reference. Accordingly, 5(g)(i) did not occur as alleged.
313. Whilst Mrs Chauke had been asked if she had chosen not to address Ms Orme by her name, Mrs Chauke had not been asked about a meeting on 21 May 2020 and given in her responses [856-57] she repeatedly stated there had not been a meeting that day without addressing the substance of the allegation in order to investigate as he had been appointed to do so he was duty bound to allow her an opportunity to comment on it.
314. His revisions made clear the change (albeit they were not originally tracked changed, only highlighted). That being so he did not attempt to hide Ms Orme's change of account from the original, the doubt that cast doubt on remainder of her account and the weight to attach to it.
315. We find there was no attempt to hide the change by Mr Boyd, indeed if anything the reverse was true, the change was highlighted and thus they were not presented as if they were Ms Orme's original claims. Accordingly, 5(g)(ii) did not occur as alleged.

Outcome

316. Mr Boyd's eventual outcome report into Mrs Chauke's concerns [1176-1211] and Ms Orme's concerns [1212-1259] were imprecisely dated as April 2021.

Credibility

317. We address issues concerning the credibility of other witnesses as they arise above but with regards to Mrs Chauke and Ms Orme they warrant closer comment.
318. Firstly, whilst giving evidence Mrs Chauke repeatedly had to be asked to answer questions rather than making submissions despite the questions having been repeated so there was no doubt in our mind that Mrs Chauke understood them. At other points she stated she disagreed but refused to expand despite being invited to do so.
319. Beyond that we found that Mrs Chauke was not a truthful witness on issue 2(f). Mrs Chauke gave diametrically opposing accounts in relation to the events of 16 March, on the one hand asserting that she told Ms Orme she had a continuous cough and in her email and to us that she did not. That is not a finding any Tribunal makes lightly particularly in a case involving a professional or a case concerning discrimination. We were forced to that conclusion because she gave wholly different accounts that we could not reconcile by other means.



320. Firstly, whilst giving evidence Mrs Chauke repeatedly had to be asked to answer questions rather than making submissions. Given those questions had been repeated and clarified there was no doubt in our mind that Mrs Chauke understood them. At other points she stated she disagreed with questions put but refused to expand despite being invited to do so.
321. Beyond that we found that Mrs Chauke was not a truthful witness. That is not a finding any Tribunal makes lightly particularly in a case involving a professional and/or a case concerning discrimination. We were forced to that conclusion because she gave wholly different accounts that we could not reconcile by other means. As to issue 2(f) Mrs Chauke gave diametrically opposing accounts in relation to the events of 16 March, on the one hand asserting that she told Ms Orme she had a continuous cough and in her email and to us that she did not. As to 5(a) & (b) her accounts in her witness statement and before us differed as to the fundamental basis of the complaint; if she had told her managers she had a loss of smell before she was advised to return to work, or that she would have to take leave or if she decided not to attend it would be treated as an unauthorised absence. Further, and inexplicably in our view, she attended work knowing she had symptoms and then reported to a ward having been told to self isolate.
322. Mrs Chauke suggests that where Ms Mason's account is inconsistent with her own or was critical of her we should give that no weight but accept it where it supports her own account. We found that Mrs Barker provided support for Ms Mason's view of Mrs Chauke's behaviour both at the meeting on 4 February 2020 and more generally and for that matter both provided support for that of Ms Orme.
323. Whilst Ms Orme's account of Mrs Chauke lying on her desk changed, ordinarily the words she used in the context she said them could and in our judgment most like meant exactly what she later clarified they meant namely they referred to the top half of her body rather than the whole of it.
324. Ms Orme's account was for the most part supported by others and the contemporaneous documents.
325. Whilst doubt was cast on the recollection of Mrs Finney and Miss Debbie Birks we place greater weight on them rather than that of Mrs Chauke given what we found was her exaggeration about being chased from the room, shouted at (when we found the conversation was taking place across the room), told to leave and the concerns we expressed how about she



interpreted not just that event but events more generally. The completion of the risk assessment being another.

326. A further example concerns the appointment/slotting in of Mrs Barker. The email chain [178-184] having been provided to her as part of disclosure, Mrs Chauke knew or ought to have known from that point on that Mrs Barker had been slotted in to a role as part of the management of change process and that being so was asked how she continued to argue that she did not know the true situation. Mrs Chauke acknowledged that she now knew that that was the position but argued that she should have been told that at the time.
327. Mrs Chauke did not lead any evidence to say that her role included any responsibility for recruitment. At best therefore this was an argument that as a matter of courtesy she should have been told after Mrs Barker's redeployment by slotting in was confirmed but before Mrs Barker took up her role within the DESMOND team. Having been pressed as to how she maintained that position she told us *"I am not dropping it – there was still discrimination there, I was not part of the decision-making with regards to her appointment to post"*. When it was suggested to her therefore that Mrs Barker was slotted in as part of the management of change process Mrs Chauke disagreed. When asked how that was so she maintained that Mrs Barker was a band 3 not a band 4 role and she was not told that Mrs Barker had been upgraded. Mrs Barker told us as we stated above that she was and was not challenged about that. Again, Mrs Chauke maintained that she had not been told.
328. It was explained to Mrs Chauke that the way the issue was put was not about being told about it in advance but instead that she was excluded from the recruitment process. She maintained that she had not been included in the process and when warned about pursuing allegations that she knew either were not factually correct or issues which were different to those which had been very carefully identified as part of the protracted case management process she stated she still felt discriminated against.
329. Whilst we understand as a litigant in person Mrs Chauke may have felt aggrieved that as a matter of courtesy she was not informed of those changes when they came to her attention, as Ms Orme's email [197] at 11:18 124 February demonstrates *"any discussion at that point had to be a confidential one and was not the sharing within the office"* Mrs Barker's *"slotting in"* at that point had not been formally announced. Had Mrs Chauke considered those matters in the light of the disclosure given we find she should or ought to have come to the view that Mrs Barker was indeed slotted in, the advertisement was an error, Mrs Barker's appointment had not formally



been announced and thus it was inappropriate at that point for any announcement to be made to Mrs Chauke or any other members of staff.

330. We find based upon our consideration of the evidence as a whole of Mrs Chauke was so focused on her being discriminated against for reasons related to race that she could not see the bigger picture or view matters in an objective way.
331. Indeed, we find those matters and other suggest that Mrs Chauke was seeking to assert discrimination when she knew that was not so and that casts doubt on her account as a whole..
332. Issue 2(d)(i) was an example of that. Having clarified the nature of her claims as discrimination Mrs Chauke then told the tribunal she did not pursue that issue as discrimination despite Mrs Chauke having made clear prior to the hearing that it was supports that view. Her allegation that Mr Boyd had changed the terms of reference, the risk assessment and her assertion about being sent home was discriminatory despite her having raised a concern about feeling unsafe are others.
333. Mrs Chauke did not to us appear able to see anything from other than her own point of view or the effect of her actions on others. The issue of the request to extend her leave is a case in point. She gave no consideration to the effect that would have on a colleague – not only potentially preventing the colleague from taking leave but leaving them unsupported over an extended period. If she felt she had been wronged then she had irrespective of the other participant’s perspective or feelings. Yet the reverse was not so.
334. Across her account as a whole, her inconsistency, failure to respond to questions, unfocused responses, pursuing matters as discrimination when she knew they were not and on the certain elements her failure to tell the truth as to issue 2(f) and to imply that her managers’ instructions about her loss of smell (issue 5(b)) followed her relaying that information to her when it did not led us to conclude that save where supported elsewhere she was an unreliable witness.

Our further findings and conclusions

335. Having made our findings generally we have stepped back and looked at matters in the round. Given the number of persons Mrs Chauke was complaining about we have considered if individually or collectively there are facts from which inferences of discrimination can be drawn.
336. We found issue 2(a) did not occur as alleged; Mr Greaves offered Mrs Chauke the opportunity to make up the hours (given she was on stage 1 of the managing attendance policy) but did not



refuse permission for her to do so. We found that Mr Greaves was doing so to be supportive and did so to others whether or not they were on stage 1 of the managing attendance policy. She was treated no differently to the way they were.

337. We found with regards to issue 2(b) that Ms Riley did not refuse the leave request and she merely wished to know whether given the relatively limited time before the dates requested, what difficulties (if any) approving the additional leave would cause. The evidence on balance suggested that she would have approved it. We found she did ask Ms Chauke to check with Ms Snape if that was an issue before approving it. We found Ms Riley would have asked any member of staff to have checked with their colleagues on what was essentially a two person service where a leave request of two and a half weeks was being sought to be extended to three, particularly where that was relatively close to the dates concerned and when they were. We found that it was reasonable for Ms Riley to do so.
338. We found no facts from which we consider we should draw any inferences of discrimination in relation to the allegations against Mr Greaves or Ms Riley. Mrs Chauke's perception of those matters was different. Following those first two issues Mrs Chauke had lodged her dignity and respect complaint. We consider by that point she considered her race was the reason she was being treated in the way she was. That finding of her perception is supported by evidence from witnesses such as Ms Mason (100). When asked in the subsequent investigation about the meeting on 4 February Ms Mason said that Mrs Chauke's view of any treatment she considered to be negative toward her was that her race was the reason she was being treated in the way she was. We find that Mrs Chauke's perception of the earlier complaints was thus misconceived.
339. As to issue 2(c) despite our determination that following disclosure that Mrs Chauke either knew or ought to have known from that point on that Mrs Barker had been slotted in to a role as part of the management of change process Mrs Chauke told us that is how she perceived matters at that time and maintained that position. In cross examination she stated, *"I am not dropping it – there was still discrimination there, I was not part of the decision-making with regards to her appointment to post"*. Mrs Chauke's response and her failure to lead evidence that recruitment formed part of her role mean her complaint as formed part of the list of issues must fail. There was no recruitment process as such but in any event that did not form part of her role.
340. Whilst we understand as a litigant in person Mrs Chauke may have felt aggrieved that as a matter of courtesy she was not informed of those changes before they came to her attention, we find those arrangements were still confidential at that point. We find the advert had been placed in error and any member of staff in Mrs Chauke's position would have been treated in



the same way whatever their race, colour or ethnicity and it is more likely than not Mrs Chauke would have been informed prior to Mrs Barker taking up her new role but once that appointment process had been concluded. That the advert was posted in error and no slight intended is supported by Ms Orme offering to speak to her to Mrs Chauke.

341. It was put to her she was being unreasonable and intransigent in pursuing that complaint and indeed by attempting to argue the matter in an entirely different way. We find she was.
342. Similarly in relation to issue 2(d)(i). Mrs Chauke told us that complaint was not brought as discrimination but as a precursor to the claim in issue 2(d)(ii). Despite the fact she acts in person, she is a highly intelligent professional woman with a degree and either knew of should have known from the extensive case management in this case that one of the purposes of that case management was to identify the claims and amongst them the discrimination complaints the Tribunal had to determine, and the respondent had to meet. Again, she had identified and pursued to trial a complaint that she accepted there was no basis for.
343. As to issue 2(d)(ii) again we found this did not occur as alleged. We find Mrs Finney asked Mrs Chauke from across the room if she knew it was an MDT meeting. That was due to Mrs Finney's surprise given the previous non-attendance of the DESMOND team at such meetings. We find Mrs Finney would have asked that question in that way of any member of the DESMOND team whatever their race, colour or ethnicity (including anyone in Mrs Chauke's role as a band 6 member of that team). We find that Mrs Finney did not state that Mrs Chauke was not expected to attend, that was something Mrs Chauke implied into Mrs Finney's question. Mrs Chauke should or ought to have known it was not Mrs Finney's place as a junior member of staff to tell her what to do, but neither was there any basis for that implication from the question. Accordingly issue 2(d)(ii) was not made out.
344. Given Ms Orme was aware of Mrs Chauke's earlier grievances by 25 February and Ms Orme's comments to Ms Spinetto could have undermined or discredited Mrs Chauke with her union representative in the context of the grievance she had lodged we gave very careful consideration to issue 2(e) and whether Ms Orme was genuinely concerned about Mrs Chauke's welfare. We found she was and there were good reasons for that; the issues Ms Orme identified concerning Mrs Chauke's behaviours having been supported by other witnesses, we find they did occur. We found Ms Orme's email to Ms Spinetto in the context of a wider discussion supported rather than questioned than that. We find that not only was Ms Orme genuinely concerned about Mrs Chauke's welfare but that Ms Orme's concerns had nothing to do with Mrs Chauke's



race and Ms Orme would have behaved in the same way to any member of staff who had behaved in the way Mrs Chauke had, irrespective of their race, colour or ethnicity.

345. On issue 2(f) we found Mrs Chauke's account was not to be believed and she was not a truthful witness. Further, we found that when Mrs Chauke initially asked Ms Orme to agree to self-isolation Mrs Chauke did not set out Covid-19 symptoms. Instead that was *a request* to allow Mrs Chauke to self isolate. When Mrs Chauke repeated the request, when asked by Ms Orme if she had a continuous cough, she refused to answer. We find Ms Orme would have treated any member of staff in those circumstances in the same way. Mrs Chauke was not treated less favourably than Mrs Barker or for that matter less favourably than the way any other member of staff would have been. Mrs Barker had presented with symptoms as recognised at the time and was obliged to self isolate whereas Mrs Chauke did not and was not.
346. As to issue 2(g) whilst Mrs Chauke was initially recorded as on sick leave that record was made the day after she was sent home sick. We note the pressures and administrative and substantive that Ms Orme relayed (192) were upon her at the time. Whilst Ms Orme had been sent an email identifying that Mrs Chauke had been instructed to self isolate by the time she made the initial sick leave entry it was unclear if that had been seen by her when the sickness entry was logged just over half an hour after that email. The short time between the two and the absence of any suggestion or challenge to Ms Orme that she had seen that notification when she made that entry, together with the pressure she told us she was under at the time led us to conclude she had not. That was supported by the day's delay in that entry being logged. That delay and the day's delay in the subsequent revision of Mrs Chauke's sickness record led us to find that Ms Orme was working a day behind with those types of administrative matters at that point.
347. We found Mrs Chauke was treated no differently to the way any other member of staff would have been with the symptoms she initially identified. Mrs Barker was not an appropriate comparator because had displayed symptoms and instructed to self isolate. Mrs Chauke was not. Her sickness record reflected her initial absence of symptoms. When Mrs Chauke identified symptoms her sickness record was amended to reflect that. Mrs Chauke was treated no less favourably as a result.
348. As to issues 2(h) & 10(a) we found as to element (i) that whilst the risk assessments were emailed to Ms Chauke (and Mrs Barker) including MY's name on them, they were not completed documents but drafts to be discussed at a later point as the contents of the covering emails to Mrs Chauke and Mrs Barker both make clear. Thus, Mrs Chauke's risk assessment was not completed without Mrs Chauke in attendance (element (ii)). Indeed, the opposite is



true. The risk assessment was completed at the subsequent meeting between Mrs Chauke and Ms Orme (231).

349. Whilst Ms Baddley (the Trust's Information Governance Officer) identified that was a data protection breach she determined that it was not a serious error, as it was contained within the Trust [296].
350. Mrs Chauke's suggestion that MY could consent on her behalf we find was frankly nonsensical and her persisting with that allegation having accepted she knew about the other documents was intransigent and unreasonable.
351. As to the victimisation element of this we determined the Trust should not be permitted to withdraw its concession that there was a protected act. We also find a data protection error can be detriment.
352. Turning to the reason for the treatment Mrs Chauke led no evidence relating to MY's race and thus it was not explained how MY was an appropriate comparator. Mrs Barker elsewhere (issues 2(a), (f) & (g)) was used as a comparator. Thus, on Mrs Chauke's account Mrs Barker's racial characteristics were different to those of Mrs Chauke. Yet Mrs Barker in relation to this issue was treated in the same way as Mrs Chauke.
353. We found MY's name was included in error. We concluded that error derived from pressure of work on Ms Orme's part and as that was repeated across at least two of her reports one of whom did not have the characteristics Mrs Chauke bases this complaint upon (and also who had not raised a grievance (protected act)). We find that error was merely that and in no sense connected to race or Mrs Chauke having raised a grievance.
354. As to issue 2(i)(i) this complaint concerned Mr Moxley. We found he did not become involved until 10 March and thus he was not involved in the time period this complaint relates to and the complaint was not made out. That aside we found there were initially delays on Mrs Chauke's part initially bringing forward her dignity and respect complaint and then having done so that was dealt with informally until 24 February. We found in the circumstances of the COVID pandemic there was no undue delay in that being progressed until 31 March when all employee relations cases were placed on hold due to the pandemic (207). In the context of the forthcoming lockdown and the pressures on NHS we find that was a reasonable stance to take as Ms Spinetto's failure to dispute that until 8 June (219) supports.



355. The delays thereafter related to the appointment of two internal investigators, arranging convenient meeting dates and then the appointment of an external investigator. We found the appointment of an external investigator was appropriate because in the context of recovery from the pandemic the Trust's staff did not have capacity to investigate Mrs Chauke and Ms Orme's complaints. Those matters being so again we decline to draw any inferences of discrimination in relation to that complaint.
356. As to 5(a) & (b) we address these issues together. We found that Mrs Chauke did not initially report a symptom (loss of smell) but instead a sore throat and headache. The symptoms Mrs Chauke relayed that morning did not require her to self isolate and she was rightly told what is alleged in allegations 5(b)(i)-(iii). That was the correct advice, and the Trust was entitled to do so. We found that only after being told what was asserted at 5(b)(i)-(iii) and in particular that she would need to take unpaid or annual leave otherwise her absence from work would be recorded as an unauthorised absence that Mrs Chauke subsequently asserted she had lost her sense of smell. We find those statements were made because that was the correct advice at the time. Given that was so and no complaint was made about the way they were said merely what was said, the prescribed consequences cannot follow. However, we find what was said was said because that was the correct advice at the time based on what was reported and that was in sense related to Mrs Chauke's race, colour or ethnicity.
357. Regarding issues 5(c)(i)-(ii), Ms Orme did not book a covid test for Mrs Chauke, that was done following her call to them by Infection Control. Mrs Chauke had responded to Ms Orme's request to her to book that test with a date three days later and after her isolation period ended. It was for understandable reasons following the lockdown and the pressures the NHS was facing that Ms Orme and the Trust wanted Mrs Chauke back at work as soon as possible. We find that was done for the reasons we describe and in no sense was that related to Mrs Chauke's race, colour or ethnicity.
358. As to issue 5(c)(ii) it is not in dispute Mrs Orme did not respond to Mrs Chauke's email. The way we read Mrs Chauke's email of Tuesday 22 September [529] is that she made clear she could not attend a test earlier than the one she had arranged for Friday 25 September. The email was polite but allowed for no debate. Mrs Chauke did not request confirmation that that was acceptable nor an acknowledgement from Ms Orme. Whilst Ms Orme could have acknowledged Mrs Chauke's email. There were various other reasons why Ms Orme might have decided not to. Amongst them she was under pressure at work and given Mrs Chauke's response ran contrary to Ms Orme's request, she may alternatively have thought it best not to and address that with her in due course. We find the most likely explanation was that Ms Orme



did not consider a response was necessary but none of those explanations in our judgment were in any sense related to her race, colour or ethnicity.

359. As to issues 5(d) & (f) Mrs Chauke's complaint was that she was asked to attend the Barker Unit. Having attended she asked for assurance she was at no risk, which could not be given, so she was sent home. At that point other alternative roles had previously been tried and that being so the Trust was at a loss as to what roles were available for her. There was in our view as the internal emails demonstrate, little alternative but to send her home until a suitable alternative post could be found. We find it was Mr Moxley not a clerk who instructed her to do so. She does not say how the removal of the risk to her was unwanted. Indeed, the reverse is true, it followed her request. On 12 October 2020 Mrs Chauke was redeployed to the PIRT and has worked from home since then without objection. No suggestion was made by Mrs Chauke that Miss Lisa Birks, Mrs Colclough or Mr Moxley were rude, impolite, raised their voices or otherwise somehow behaved in a way that would create the proscribed consequences. We found the reason that was done was because that assurance she had sought could not be given and other alternative roles having previously been tried a suitable alternative post needed to be found. That was in no sense related to Mrs Chauke's race, colour or ethnicity.

360. It is accepted that issue 5(e) occurred. We found that it was not unwanted but instead followed prior requests for Ms Orme to be removed as Mrs Chauke's line manager and a direct question from her to Ms Orme. The reason Mrs Chauke was told on Tuesday 29 September 2020 that Ms Orme was no longer her manager was because that she had asked and that was so. In the circumstances of her bullying and harassment complaint against Mrs Chauke of on Saturday 26 September 2020 we find it was the responsibility of the Trust to inform Mrs Chauke of that change not Ms Orme. This was the second working day after Ms Orme had lodged her complaint and it was searching for a new post (and line manager for her) as the emails with the Trust's Associate Chief Nurse and Deputy Chief Nurse (272-275) confirm that was a difficult task. Again, no suggestion was made by Mrs Chauke that Ms Orme was rude, impolite, raised her voice or otherwise somehow behaved in a way that would create the proscribed consequences. It is difficult to see what else Ms Orme could have done having been asked the question. The proximity of Ms Orme's complaint and the search for a new role and line manager were the reasons Mrs Chauke had not previously been told of that change and that was in no sense related to Mrs Chauke's race, colour or ethnicity.

361. As to issues 2(i)(ii)-(iv) it is not disputed that Mr Moxley instructed Mr Boyd, to investigate both Mrs Chauke's dignity at work complaint/grievance and Ms Orme's bullying and harassment complaints. As some of the instances overlapped and related to similar allegations



in practical terms they needed to be addressed at the same time and by the same person to avoid duplication and to ensure consistency. The terms of reference and outcomes demonstrate, they were not combined. We found element (ii) did not occur as alleged.

362. On receipt of Mr Chauke's formalisation of her grievance complaint we find Mr Moxley decided to address Mrs Chauke's complaint under the Trust's Bullying and Harassment Policy. Prior to then it had been dealt with informally so there was no change of procedure as is alleged. We find he did so because he considered that was the most appropriate procedure for doing so. Ms Spinetto, Mrs Chauke's union official's failure to object despite raising other issues with regards to the terms of reference supports that conclusion (see (224-225 & 299)). Given the content of his letter of 19 June [424] to Mrs Chauke we find Mr Moxley was entitled to assume Ms Spinetto's agreement to that approach was with the consent of Mrs Chauke and contrary to what she subsequently sought to suggest, in her full knowledge. Issue 2(i)(iii) did not occur as alleged.
363. As to issue 2(i)(iv) we found Mr Moxley appointed CBS to undertake the investigations of the bullying and harassment allegations made by Mrs Chauke and Ms Orme after Capsticks were representing the Respondent in this Tribunal claim.
364. We found given the regulatory framework in place and no breach was identified he was entitled to do so. We found he did so because the two previous internal investigators did not have the capacity to do so. That was understandable given the pressure of work on the NHS and those individuals at that time. It was a reasonable decision for him. The complaints needing to be investigated as quickly as possible, one of Mrs Chauke's complaints being about the delay to that point. Those capacity pressures only increased when Ms Orme's bullying and harassment complaint was received. Whilst the making of Ms Orme's complaint formed part of the background why Mr Moxley decided to appoint an out of house investigator we find that was because it increased the capacity concerns because of the increased number of issues and the level of complexity, and that decision was in no sense because of Ms Orme or Mrs Chauke's race, colour or ethnicity.
365. As to issues 5(g)(i)-(ii) we found Mr Boyd did not seek to amend the terms of reference. He was trying to investigate the matters within the terms of reference and so that element did not occur as alleged. As to element (ii) we found there was no attempt to hide the change of date by Mr Boyd, indeed if anything the reverse was true, the change was highlighted and thus they were not presented as if they were Ms Orme's original claims. Again, we found element (ii) did not occur as alleged.



366. As to issue 10(b) we found that by 17 April Mrs Chauke had been signed off for two weeks with stress. In the light of the triggering of the stage 1 attendance meeting and stress being the cause of the absence, Ms Orme referred Mrs Chauke to OH. As the content of that referral was unfortunately worded, referenced the allegations made about Ms Orme and others, we considered if the referral was made to undermine or discredit Mrs Chauke, or its contents were as a result of Mrs Chauke's grievance.
367. In doing so we reminded ourselves that a tribunal is entitled to consider if an employer's reason for acting in the way it did was not the protected act itself but some other feature of it that could be treated as properly separable from the protected act⁴⁵. Such circumstances are exceptional circumstances and Employment Tribunals need to be cautious about regarding features such as a multiplicity of grievances and obsessive over-reaction by an employee as exceptional.⁴⁶
368. In considering those points we again noted the pressures, both administrative and substantive, that Ms Orme told us (see 192) were upon her at the time of these matters. We found by 25 February Ms Orme had legitimate and genuine grounds for concern about Mrs Chauke's state of health as demonstrated by her behaviour (162 & 197), as supported by Ms Orme seeking to canvass them with Ms Spinetto (155 following and specifically 158). Our finding those concerns were legitimate was evidence by them being supported by other staff both at the time and subsequently. Those concerns were reinforced by the events of 16/17 March (170 following) and various other interactions with Mrs Chauke such as their call on 6 April. By 6 April 2020 Ms Orme had informed Ms Burton that she wanted to raise a grievance / disciplinary procedure around Mrs Chauke's behaviour towards her and members of her team. For that reason alone, Ms Orme would have been well advised to have sought that HR make or at least advise on the content of the referral. The evidence before us does not suggest she did. Given this was at the start of the national covid lockdown that may have played a part in that decision. The referral form required as much background as possible to be provided. Ms Orme did just that but the referral was unfortunately worded as it manifested Ms Orme's frustrations toward Mrs Chauke. Despite it being unfortunately worded and our concerns that could have been done to undermine or discredit Mrs Chauke or as a result of Mrs Chauke's grievance we find it was not. We find the content of that referral was not related to Mrs Chauke's grievance or to

⁴⁵ [Martin v Devonshires Solicitors](#) [2011] ICR 352 applied in [Page v Lord Chancellor](#) [2019] 6 WLUK 289 both EAT

⁴⁶ [Woodhouse v West North West Homes Leeds Ltd](#) [2013] UKEAT/0007/12, [2013] IRLR 773



undermine or discredit her but instead because Mrs Chauke's behaviour towards Ms Orme and her colleagues had caused Ms Orme to become frustrated

Summary

369. Whilst we found some of the matters complained about did occur as alleged, having considered them in the round we concluded the actions of the various individuals that were complained about were not related to or because of Mrs Chauke's race, colour or ethnicity or because of her protected acts but for the reasons we give in each instance. Accordingly, Mrs Chauke was not discriminated against in breach of part 5 EqA and the complaints against her are dismissed.

signed electronically by me

Employment Judge Perry

Dated: 20 July 2022