EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals
"This has been a remote hearing as requested by the parties for reasons set out below. The form of remote hearing was V – by video, CVP. A face to face hearing was not held because it was not practicable and the purposes of the hearing could be achieved at a remote hearing."

Claimant: Ms A Z Kweyama

Respondent: Central and North West London NHS Foundation Trust

Heard at: Watford (by CVP) **On:** 20 to 24 June 2022

Before: Employment Judge George: Mr T Poil; Mr A Kapur

Representation
Claimant: Mr O Onibokun, legal representative
Respondent: Ms N Motraghi, counsel

RESERVED JUDGMENT

1. The claim of unauthorised deduction from wages is dismissed upon withdrawal by the claimant.

2. The respondent subjected the claimant to race-related harassment by the following unwanted conduct:

   a. On 9 February 2019 by a nurse saying to the claimant. "You need to get a pool of bleach and bleach your skin so that you come back tomorrow white and the patients will be nice to you";

   b. On 10 February 2019 by the same nurse who was overheard saying "I do not care let her go into bleach her skin, I am sick and tired of people coming to work and said they are not well";

   c. On 22 February 2019 by the deputy lead nurse for offender care saying that she was concerned about the claimant's mental health because some of the words used in her statement to complain of the above race related harassment were worrying.

3. The complaint of direct race discrimination is not well founded and is dismissed.

4. The respondent victimised the claimant by subjecting her to the following detriments:

   a. the comments of the nurse in charge, as set out in paragraph 2.a. and b. of the judgement, above;

   b. by the comment of the deputy lead nurse for offender care set out in paragraph 2.c. of the judgment, above;

   c. by the deputy lead nurse for offender care telling the claimant on 21 February 2019 that her agency role was being terminated.

REASONS

1. Following a period of conciliation that started on 7 May 2019 and ended on 6 May 2019, the claimant presented a complaint on 21 June 2019 of unlawful treatment contrary to s.41 of the Equality Act 2010 (hereafter referred to as the EQA) on the part of the respondent Trust where she had worked as an agency nurse between 15 November 2017 and 21 February 2019. The respondent accepted that the claimant was a contract worker within the meaning of s.41 but denied that the events had taken place in the way alleged by her and denied liability for race discrimination, race-related harassment and victimisation in their response dated 13 August 2019. Initially the claim included a complaint of unauthorised deduction from wages based on the claimant's allegation that she was paid as a Band 5 nurse when it had been agreed that she should be paid as a Band 6 nurse because of supervisory responsibilities. This complaint was withdrawn and we dismiss it by this judgement.

2. The claim was case managed at a preliminary hearing in private on 26 July 2021 by Employment Judge Milner Moore. The record of that hearing does not include a list of issues but it was agreed by the representatives that the issues to be determined by the tribunal at the final hearing before us were clear from the pleadings. In particular, it was agreed that paragraphs within the amended particulars of claim (pages 62 to 65 of the document bundle), set out the specific allegations which are said to be unlawful acts contrary to ss.13, 26 and 27 of the EQA. It was agreed that the tribunal would deal with issues relating to liability in the first instance only and see whether there was time for matters concerning remedy to be addressed thereafter.

3. We had the benefit of an agreed bundle of documents which ran to 288 pages. There were a few inserts in the bundle and those were inserted in chronological order so that the numbering actually runs from pages 1 to 279. These reasons use the page numbers that appear on the pages themselves. These reasons do not use the page numbers from the PDF/electronic bundle.

4. Ms Motraghi prepared a written skeleton argument on behalf of the respondent which was a helpful summary of the respondent's arguments although we had said that it was not necessary for skeleton argument or written submissions to be exchanged. There is, therefore, no criticism of Mr Onibokun that he made purely oral submissions. Ms Motraghi supplemented her written skeleton with oral submissions.

5. The hearing was listed to take place as a hybrid hearing because some of the witnesses were not available to attend at the hearing centre. On Day one the tribunal converted the hearing to take place solely by CVP. There was a nationwide rail strike taking place during the week of this hearing and the Tribunal and other participants were concerned about transport arrangements.

6. There was an application by the respondent for one of their witnesses Marta Pitarch to give evidence remotely from Spain. This application was refused. Our reading of the Upper Tribunal case of Agbabiaka (Evidence from Abroad) UKTU 286 and the Presidential Guidance on taking evidence by video of telephone from persons located abroad is that the Foreign, Commonwealth and Development Office (the FCDO) considers there to be a risk of an impact on diplomatic relations if evidence is given from another state without permission of that state. On Day two, the respondent forwarded to us an email that they had received confirming that the FCDO had not yet received a response to their enquiry as to whether the Government of Spain would consent to such evidence been given. Absence of an objection was not permission, in our view, and we considered that it was necessary for us to refuse the application for MP to give evidence remotely from Spain. She travelled to the jurisdiction and gave evidence remotely within it.

7. The availability of judicial resources meant that the case was allocated to this Tribunal although the Tribunal was unable to sit on the morning of Day two because of a part heard commitment. This was regrettable but necessary to enable the claim to be heard. As a consequence, there needed to be some adjustment of the provisional timetable that had been outlined by Judge Milner Moore. Broadly speaking, the timings were otherwise adhered to, but one or two technical difficulties meant that in the end it was necessary to reserve our decision and list a provisional remedy hearing. In the light of our judgement this hearing will be confirmed and the parties will be asked whether the a provisional time allocation of one day is necessary or whether the time estimate can be reduced.

8. All of the witnesses had approved written witness statements which they adopted in evidence with some alterations. In addition to the claimant giving evidence on her own account, she relied on the supporting evidence of Amanda Gillett – then Head of Healthcare at the Heathrow Immigration Removal Centre (hereafter referred to as Heathrow IRC) who was not present during the 2019 incidents because she was absent on sick leave but gave evidence about the 2018 incident; and Patricia Walter - employed by the respondent as the Band 6 clinical nurse manager at Heathrow IRC until

March 2019. Mrs Walter retired in March 2019, but her last day of work was in fact the end of February. The respondent called five witnesses: Kerry Martin - the deputy lead nurse for offender care; Loretta Suboniene - then a Band 5 nurse who was nurse in charge on Saturday, 9 February 2019; Diane Williams - a healthcare assistant; Marta Pitarch - then interim regional operations manager; and Angela Knee, HR business partner for Diggory division within which Heathrow IRC sits. In general, we refer to relevant individuals by their initials for ease of reference and no disrespect is meant thereby.

9. It is a feature of the conduct of this hearing that several of the witnesses were doing their public duty to give relevant evidence to this tribunal, despite their challenging personal circumstances. We pay tribute to that unsurprising sense of duty. We say unsurprising, since all of those concerned were healthcare workers or formally healthcare workers and, regardless of the conclusions we set out below, we thank them for helping us to determine the issues in the case despite the personal inconvenience and difficulty that that may have caused them. This underlines the importance of the matters in dispute to all concerned.

The Issues

10. As set out above, it was common ground that the legal and factual issues were well defined in the professionally pleaded amended particulars of claim; in particular paragraphs 38 to 49 set out the allegations of direct race discrimination, race related harassment, victimization and unauthorized deduction from wages. The unauthorized deduction from wages claim was withdrawn and the remaining issues, those which it was necessary for us to decide, are found in paragraphs 39 to 43. We set them out below, retaining the original paragraph numbering for ease of reference.

"Direct Race Discrimination

38. The Claimant relies on her race as a black person.

39. The Claimant was subjected to the following less favourable treatment

a. On 9 February 2019, [LS's] comments to the Claimant regarding skin bleaching. The comparator is a hypothetical non-black (or white person) in the same role.
b. On 10 February 2019, [LS's] comments to [DW] regarding skin bleaching, overheard by the Claimant. The comparator is a hypothetical non-black or white person in the same role
c. on 22 February 2019, [KM] criticising the Claimant's response to her racial abuse. In addition to being victimisation, this shows a contempt for black people when they experience racism. The comparator is a hypothetical non-black or white person in the same role.

40. It is submitted that the comments are of a self-evidently race-based nature. The Claimant also relies on the background information [in her amended particulars of claim] to demonstrate a causal link between the less favourable treatment and the claimant's race.

Harassment (Race)

41. It is submitted that the claimant has been subjected to the following conduct amounting to harassment, contrary to section 26 Equality Act 2010:

a. On 9 February 2019, [LS's] comments to the Claimant regarding skin bleaching.
b. On 10 February 2019 [LS's]'s comments to [DW] regarding skin bleaching, overheard by the Claimant.
c. On 22 February 2019, [KM] criticising the Claimant's response to her racial abuse. In addition to being victimisation, this shows a contempt for black people when they experience racism.

42. The Claimant made the following protected acts:

a. Datix in respect of racist abuse from patients on 19 January 2019;
b. verbally to [LS] on 9 February 2019 in respect of abuse from the patient;
c. Verbally to [JJ] on nine February in respect of [LS's] remarks on 9 February 2019;
d. Verbally to [MM] on 9 February 2019 in respect of [LS's] remarks on 9 February 2019;
e. Via a Datix on 9 February 2019 in respect of [LS's] remarks on 9 February 2019;
f. [*No longer relied on by the Claimant*];
g. Verbally to [PW] on 13 February 2019 in respect of [LS's] remarks on 9 and 10 February 2019;
h. In writing to [PW] on 13 February 2019 in respect of [LS'] remarks on 9 and 10 February 2019;
i. In an email to [KM] on 19 February 2019 where the Claimant cites her need for a break;
j. In an email to [ND] on 19 February 2019 where the Claimant cites her need for a break following racial abuse;
k. In a telephone call with [ND] on 20 February 2019, where the complaint of race discrimination was discussed;
l. Via a grievance on 7 March 2019; and
m. Via a grievance on 29 March 2019.

43. It is submitted that the Claimant has suffered the following detriments because of one or more of the protected acts;

a. Having the 19 January 2019 complaint ignored;
b. In addition to, or in the alternative to harassment and discrimination, [LS's] remarks concerning skin bleaching on 9 February 2019;
c. The Claimant suffering a panic attack on 10 February 2019, following [LS's] remarks on 9 February 2019;
d. In addition to, or in the alternative to harassment and discrimination, [LS's] remarks concerning skin bleaching on 10 February 2019;
e. The Claimant needing to take a break on 19-20 February 2019 due to how she was made to feel at work (resulting in a loss of income);
f. On 21 February 2019, being told by [KM] that her reaction to being racially abused was excessive;

g. On 21 February 2019, being told by [KM] that her role was being terminated; and
h. The Respondent conducting no (or no adequate) investigation into the Claimant's race discrimination complaints or grievances (in March 2019) following [LS's] remarks on 9 February 2019."

The Law relevant to the issues

11. The claimant complains of a number of breaches of the EQA. Section 136, which applies to all claims brought before the Employment Tribunal under the EQA, reads (so far as material):

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

12. By s.41(1) EQA a principal (which the respondent accepts it was in relation to the claimant) must not discriminate against a contract worker as to the terms on which the principal allows the worker to do the work, by not allowing them to do or to continue to do the work or by subjecting them to any other detriment. The prohibition on harassment is found in s.41(2) EQA and s.41(3) makes it unlawful for a principal a contract worker, including by not allowing them to continue to do the work or by subjecting them to any other detriment.

13. Section 13 (1) of the EQA reads:

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

14. The Claimant complains that she has suffered direct discrimination on grounds of the protected characteristic of race. In the alternative, the claimant complains of race related harassment. The definition of harassment is contained in section 26 of the Act and, so far as relevant, 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.
> (2) …
> (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."

15. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> "We accept that 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 (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

16. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

17. Furthermore, in Weeks v Newham College of Further Education [2012] EqLR 788 EAT, Langstaff P said:

> "17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.
> ...
> 21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staffroom concerned."

18. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of

> the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

19. The EAT provided guidance on ways in which actions might be "related to" the protected characteristic relied on in Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As [counsel] submitted, "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

20. Furthermore, although the law anticipates a two-stage test to discrimination, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

21. Although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

22. Victimisation is defined in s.27 EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. A protected act is defined in the section which reads, in full:

> **"27 Victimisation**

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

23. The then applicable provision of the Race Relations Act 1976 was considered by the House of Lords in The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition has changed somewhat between the RRA and the Equality Act. However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done "because of" a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

> "The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"

24. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

25. When deciding whether or not the claimant has been the victim of direct race discrimination, the Employment Tribunal must consider whether she has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of race. Section 136 of the EQA applies to victimisation cases as well as to discrimination cases. If we find facts proved

that are sufficient that the tribunal could decide, in the absence of any other explanation, that the respondents acted as alleged by the claimant and did so because he had done a protected act then we must hold that the contravention occurred.

26. We bear in mind that there is rarely evidence of overt or deliberate discrimination or victimisation. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination and victimization can be unconscious but that for us to be able to infer that the alleged wrongdoer's actions were subconsciously motivated by race or by the protected act we must have a sound evidential basis for that inference.

27. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of, in the present case, race or a protected act. The burden of proof provisions may be of assistance if there are considerations of subconscious wrongdoing but the Tribunal needs to take care that findings of subconscious wrongdoing are evidence based.

28. The unlawful motivation, whether (in the case of discrimination) that of race or (in the case of victimisation) the protected act does not have to be the sole or even the principal cause of the act complained of, so long as it was a more than trivial part of the respondent's reasons. However, dismissal (or any other detrimental act) in response to a complaint of discrimination does not constitute victimisation for the purposes of s.27 EQA if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable: Martin v Devonshires Solicitors [2011] ICR 352, EAT; Page v Lord Chancellor [2021] ICR 912, CA.

29. In order to find that an act complained of was to the detriment of an employee, the Tribunal must find that, by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work: De Souza v Automobile Association [1986] IRLR 103, CA. This was explained in Shamoon to mean that the test should be applied from the point of view of the victim: if their opinion that the treatment was to their detriment was a reasonable one to hold, that ought to suffice, but an unjustified sense of grievance was insufficient for the claimant to have suffered a detriment.

30. The EHRC Code of Practice on Employment (2011) advises in para 9.8 that a detriment is "anything which the individual concerned might reasonably

consider changed their position for the worse or put them at a disadvantage."

Findings of Fact

31. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

32. Ms Knee gave some helpful background information about the respondent trust, which we accept. It has three divisions: Diggory, Jamieson and Goodall. The trust employs approximately 7000 people. Although Ms Knee did not feel able to commit to specific evidence about the numbers of agency staff engaged at any one time in addition to directly employed staff, it seems uncontroversial to say that at the relevant time there were a sizeable number. Diggory division operates some specialist services: Health & Justice, Sexual Health and Addictions. Health & Justice was described as being the biggest part of Diggory division. We got a very vivid impression from Ms Knee's evidence that the Trust not only covers a wide geographical area, but a very diverse variety of healthcare settings.

33. At the time of the relevant events the claimant had been regularly carrying out shifts as an agency nurse at Band 5 at Heathrow IRC. There are two facilities at the Heathrow IRC: Harmondsworth and Colnbrook. These house immigration detainees from a wide range of countries pending their removal from the UK. We can well imagine that these are challenging places to work. LS explained in her paragraph 4 that they have approximately 600 male detainees who receive medical treatment from the Trust staff prior to being deported. The facilities are not run by the Trust but by Mitie. MP, in her paragraph 4, also describes receiving verbal abuse from male detainees. She is a lead pharmacist of the trust and, at the relevant period, she was interim regional operations manager.

34. It is also part of the relevant background that the IRC had had a Care Quality Commission (hereafter CQC) inspection in early December 2018 and had been issued with an improvement notice on 2 January 2019. Ms Knee explained that the Turs had six weeks in which to improve and address the CQC's concerns. Further, during that period of significant change, 3 of the most senior professionals (the regional operational manager, the head of healthcare and primary care lead) were not on site due to sickness absence. KM had only joined the trust in November 2018 and she was asked to support MP as part of the senior leadership team to implement the changes to address the failings identified in the security report. We take full account of

the pressures that must have been on the IRC at the relevant time, and on those two individuals in particular, when judging the actions of which they are accused.

35. Before focusing on the events of January and February 2019 that are the subject of the claimant's complaints to the tribunal, we need to record something about an incident which happened in June 2018. It is not necessary in order to understand our decision in this matter for us to record any details about the 2018 incident which is described by the claimant in her paragraphs 9 to 13 and also in AG's evidence. The only findings that it is necessary for us to make about it are that the claimant's then line management did investigate the reports at the time and decided to take no action. They decided that the incident did not cause concerns about the claimant's nursing practice and that was a matter of their judgement and did not result from a lack of investigation. There is documentation that supports their conclusion in the bundle. Although it was for the Trust and the Trust alone to decide whether the 2018 incident caused any concerns about the claimant's nursing practice, it appears that Mitie were of the view that the incident had not been properly managed.

36. We move forward to 19 January 2019. There was an incident on that date when the claimant was racially abused by a group of detainees who were waiting for their medication to be administered. The claimant is black and originally from South Africa. In her report of the incident, she said that she told the detainees to come one by one for their medication and to close the door, but that they "started calling me nigger, monkey, and started making monkey noises and dog noises, demanding to come in at the same time."

37. The officer on duty, who was employed by or engaged by Mitie, managed to send the detainees out. It does not now seem to seriously be suggested that this incident did not happen. PW, in her statement evidence, supports - in general terms - that such a an incident occurred which involved loud racist chanting directed towards the claimant (PW paragraph 8).

38. PW asked the claimant to complete incident forms and that the claimant declined, saying that it was what staff put up with all the time.

39. Despite this, the claimant raised a Datix. It is at page 108 and reports that the action taken at the time was that the detainees were removed from the area.

40. A Datix report is an electronic method used within the NHS for recording clinical incidents but which can also be used for inter-personnel reports. They are sent automatically to a number of relevant specialists across the Trust and include a description of the incident as given by the reporter. They also include what action has been taken, the impact on the reporter or anyone else involved, and the potential impact on the service.

41. Notifications that a Datix has been made happen automatically, depending upon the area of responsibility of each individual recipient. It is not the case

that merely by being a recipient there is an expectation that that individual should act upon it. We were signposted to reviewers who are tasked with ensuring that the report is acted upon.

42. It initially looks as though ED was the person tasked with reviewing this particular Datix (page 114). However, we have heard that ED was on sick leave at the time of this report. According to page 112, the action taken upon the investigation was "member of staff to meet with primary care lead to review how so many detainees were in the same area at the same time, so that we can review systems and processes." In addition, lessons learned are recorded to be "discussions to be had at local delivery board to request Mitie supervise the area more robustly. Posters regarding not tolerating this behaviour to be refreshed and displayed prominently." It is difficult to tell when that entry was put on the living record.

43. We have heard that KJ is the quality manager for the Trust who has overall responsibility for Datix reports. She sent an email on 21 January 2019 (page 114) the contents of which are included in the Datix. It was sent to ED and asked her to review the 19 January 2019 incident, confirm if moderate was a true reflection of the incident and asked for more information from the reporter.

44. We accept the claimant's evidence that ED did not approach her for more information. As we say, it appears that ED was on sick leave at this point. A follow-up email was sent by KJ on 29 January, which was copied not only to ED but also to others describing the Datix as an overdue incident. We have not heard any evidence from the respondent to explain how it was concluded. The claimant says that she received no feedback and the respondent told us that the reporter would only be informed of the action taken if they had requested it through clicking on a tick box at the time of making the Datix request. This is consistent with the statement under the heading investigation on page 112 "staff who had requested feedback on the incident report will be sent the information from this field, when the incident is finally closed."

45. There was considerable and inconclusive evidence presented to the Tribunal about the suitability of the Datix reporting system as a method for agency staff to report matters of concern to them. It was suggested to the claimant in cross-examination that typically the Datix was for patient-related and clinical concerns but she said that they were also about staff. It is common ground that the grievance policy does not apply to agency staff (see page 238 where its scope is that it applies to all trust employees). It is equally absolutely clear that the Dignity at Work policy does apply to agency workers since they would fall within the category "employees of other organisations who are on site" within the scope definition on page 250.

46. We accept AKn's evidence that the Dignity at Work policy applies to those who are currently in a relationship that puts them within scope of the policy and does not apply, for example, to people who had *formerly* been agency staff or *formally* employees. AKn's evidence was that if a complaint was

raised during the course of employment or engagement and then the employment or engagement stopped, then it would not automatically mean that the complaint was closed, that would depend on the circumstances of each complaint. Ms Knee seemed to suggest that the claimant had a choice about whether to make a complaint through the Dignity at Work policy.

47. While considering the Dignity at Work policy, we note the responsibilities assigned to various individuals under section 2. Among other things, the managers are tasked with:

    a. "… an obligation to prevent bullying and/or harassment and to take prompt action once it has been suggested."

    b. "to notify HR whenever an incident arises."

    c. "to resolve, as appropriate, any problems which may arise in line with this policy by taking an active interest and effort to help employees with personal issues affecting their work."

48. MP, who investigated the later Datix about the 9 and 10 February 2019 incidents, gave evidence about the level of investigation required under a Datix. If, as appeared to be the case, she was suggesting that it was normal in a Datix enquiry that the reviewer or investigator should take at face value denials (even by multiple witnesses) in the face of a serious allegation without any analysis of the weight to be given to competing claims then we find that surprising. Her evidence directly concerned her own investigation but it seemed that MP was saying that the investigation that she led on was consistent with what is required for a Datix. She said on more than one occasion that she was carrying out a fact find which was not a grievance or disciplinary investigation.

49. As we have already noted, a Datix report can be used to report clinical matters. We would think it surprising if a Datix report of a clinical matter involving accusation and counter-accusation were to be investigated without even the most cursory challenge to the veracity of competing information. Were a Datix used to report a personal concern, as in the present case, why should it not receive the same level of serious consideration? Further, we do not see that the quality of investigation should be determined by the way the concerns raised. Either the Trust takes a complaint seriously or it does not. If the Dignity at Work Policy is to be meaningful in its application to those who are not in employment relationship with the Trust - and it is clear from its terms that it does apply to them - then were it the case that it was inappropriate or potentially ineffective to raise a racism complaint through the Datix system, the first step of the reviewer or the investigator should have been to point this out. Furthermore, MP sent an initial email response to the 10 February 2019 Datix (page 136) which is copied to a large number of people including KM and PW and also JAB and ND who were responsible for allocation of shifts at Heathrow IRC. In it, MP told the senior management team that she was going to the IRC to deal with the

investigation and would "take the lead on this serious allegations (sic).". This suggests that the Datix system was an effective route for the claimant to raise her complaint. We find that Datix is a system which is intended to lead to a sufficiently thorough investigation, proportionate in the particular circumstances and we reject any evidence to the contrary.

50. That evidence about the way in which the trust initially responded to the 10 February 2019 Datix informs our findings that the Datix reporting system was an appropriate method for the claimant to use to report the racist abuse by the detainees. The claimant in her paragraph 17 said that, contrary to what was recorded as the action taken, there was no follow-up with her. She argued that Mitie could have handled it in the same way as they would have handled any other disciplinary matter among the detainees, such as by removal of privileges. Of course, the respondent did not have authority over Mitie. PW was one of the claimant's managers at this time. She stated that she raised the issue with ZN, who said that she would raise it with Mitie. The Datix records that the member of staff was to meet the primary care lead, that there was to be a review of how so many detainees are in the same area at the same time and discussions would be had with Mitie to supervise the area more robustly. There is no direct or documentary evidence from the respondent that this was ever done.

51. We consider that it was an absolute abdication of the positive responsibility on managers for there apparently to have been no follow-up with the claimant to tell her what was happening with her complaint, or what steps, if any, would or could be taken to minimise the chance of such an event happening again. We consider that it is clear in the Dignity at Work policy that there is a positive obligation on managers which means that, even if the complaint has not been made directly under the policy, they have an obligation to take positive action. In particular, the failure to follow this up with the claimant seems to be a failure to take "an active interest in effort to help employees with personal issues affecting their work". Although the word employees is used in that statement of responsibility, the policy applies more broadly as we have said.

52. However, we have not found any evidence from which we can infer that the failure to follow up on the claimant's report is because the report itself was about racist abuse. It seems to us that from the evidence we have heard the reasons included that the claimant was an agency worker and had made a Datix report with an rather than one directly under the dignity at work complaint, possibly because she had not ticked the box saying that she wanted to be notified of the outcome, and because the facility was managed by Mitie and it was too hard for the Trust to influence their actions (see PW paragraph 9). Further, it is possible that the absence of key personnel at the relevant time also had an influence on the failure to action matters in a reasonable time.

53. The central incident in the case involves events of 9 and 10 February 2019. The claimant alleges, in particular in her para.21 onwards (as amended in oral evidence) that on 9 February 2019 she was on the 07.00 to 19.30 shift

when, just before 16.00, she was triaging a detainee who was racially abusive to her and pretended that he could not speak or understand English. She decided to call the nurse in charge who was LS. In her Datix reporting the event the next day (page 120) she entered the time as shortly before 16.00. The entry in the Datix continues.

> "I had to stop the triage […]. I went to nurse L and asked how the patient was, she was in admin with two staff members. Nurse L said 'the patient was fine. He wanted sleeping tablets only and he can speak English'. I said 'if the patient was fine with you. Maybe he was amongst the group of Albanians who racially abused me two weeks ago, maybe he was not happy to be triage by a black nurse'. Nurse L said 'You need to get a pool of bleach to bleach your skin so that you come back tomorrow white and the patient will be nice to you'."

54. It is implicit in the wording and sentence structure, that the occasion when she went to LS and asked how the patient was must have been subsequent to the time she called LS to intervene and in the absence of the patient. This is made clear by the statement provided when her RCN officer wrote a grievance to the Trust on 7 March 2019 (page 172 at 176) where she says that she *later* went to LS.

55. In that revised statement with the 7 March 2019 grievance the claimant went on to say that, after the comment made in the admin room, she went to the staffroom and JJ, who was standing there, told her that he was very proud of the way that she had stood up to LS's comments. She also said that, on her way out from the end of the shift, she told registered nurse MM about LS's comments.

56. After describing the 9 February 2019 incident in the Datix, the claimant then says, that the following day, she had arrived at work and swapped with a nurse from Colnbrook, as authorised by the manager on duty. She had returned to Harmondsworth to get her cups and overheard LS talking to another colleague and saying "I do not care, let her go and bleach her skin, I am sick and tired of people coming to work and said they are not well". In her grievance of 7 March 2019 she stated that the person that LS was talking to was DW. That 7 March 2019 grievance was retracted, by the RCN on 12 March 2019 apparently on the claimant's instructions (page 179).

57. A further statement of the events is at page 184 and is connected with later grievance presented on the claimant's behalf by the Independent Democratic Union (page 182). The account in that grievance is essentially the same as in the first.

58. Ms Motraghi, on behalf of the respondent, has drawn our attention to differences in the account given at different times by the claimant but more specifically with her oral evidence. Her overall submission was that in certain respects the claimant's account of this incident and of that on 21 February have become significantly more detailed.

a. One detail was said to be that the claimant said there was something wrong with the door to the staff corridor which meant that her approach on 10 February had not been observed and that was how she was able to overhear the comment said to have been made on that date.

b. She claimed to remember looking at a clock in order to time the meeting that took place between her and KM, but had not previously having mentioned that.

c. The claimant referred to 2 individuals having been present with her on 21 February 2019 when KM came to get her and they had not previously been mentioned.

d. Her oral evidence was that she had spoken to nurse MM regarding the incident while they were having tea whereas when she first mentioned it, she said the conversation had happened at the end of the shift.

e. When asked why DW and JJ would not have told the truth, the claimant had added in a description of hearing DW and LS coming through the corridor, giggling, on 9 February 2019, carrying condoms and placing them in the bag of JJ.

f. She said that MM had said that it was a hate crime.

g. On two occasions the claimant referred to individuals as being best friends to seek to explain consistency between their statements that contradicted her statement in some relevant way: she said this of JJ, DW and another and also of DS and KM.

59. Overall, the argument of the respondent was that these details are belated additions seeking to add to make credible account which has the central difficulty, say the respondent, that it is contradicted by all the other witnesses.

60. It should be noted however that one of the later additions, about LS and DW putting a condom in JJ's bag, was accepted by the respondent to be factually accurate. A condom had been put in his bag.

61. Our assessment is that the claimant’s additional evidence was very much in the nature of additional detail and not necessarily something that you would put in the statement as key to the allegation in the first place, particularly in a Datix. We do not consider that the question of whether her conversation with MM was at the end of the shift or during a tea break was a sufficiently stark contradiction to undermine the evidence. The claimant may be presenting as fact conclusions that she has reached after the event that certain individuals are best friends which are based on very little evidence. If that relationship had been important to her argument and based on more than supposition, surely she would have mentioned it sooner. Nevertheless, the core of the allegation made by the claimant has remained the stay the same throughout and if she has jumped to conclusions about relationships between individuals since the relevant time that does not mean that her original report

was a falsehood. We consider that such additional matters were not necessarily something that one would expect to have been mentioned at the time and in general the inconsistencies were about peripheral elements of the story.

62. That said, it is the case that, when investigated by the respondent, not only were the objectionable comments denied to have been made by LS but those named by the claimant as witnesses to it appeared not to support her allegation. That has remained the case in the oral evidence before us of DW.

63. PW was tasked with obtaining written statements from DW and LS. PW said that she had had initial conversations with the two witnesses and spoke to them informally: see her paragraph 11. Although in that paragraph. PW stated that she was surprised to read the written statements that DW and LS had denied any conversation to take place in the admin office, she did not give the full account that she gave in oral testimony namely that, in those informal conversations before the written statements were made, both DW and LS had said that there had been a conversation in the admin office. This is a potentially important detail that one would have expected PW to have included in her statement at the outset.

64. DW's original written statement of 12 February 2019 is at page 140. In it she describes the claimant calling LS for help on 9 February 2019.

> "Loretta did go, she then came into the admin office and said she didn't know what her problem was the detainee was fine, he didn't know what he had done wrong, the Loretta tree are Tim and as far as I know he went back to his wing."

65. DW then reports LS repeating this several times until she herself said that, as they haven't been in the room and didn't know what had been said to the claimant, they didn't know what the situation had been for the claimant. She then said that as far as she was aware the rest of the day was okay.

66. DW's account in February 2019 about 10 February 2019, was that the claimant had come in and said she wasn't well and wanted to go home; that she had slept badly and had a lot of her mind because her sister was unwell. DW suggested speaking to the manager at Colnbrook to see if someone could swap shifts with her so that she could go there and she did. DW then added that,

> "Loretta was in the admin office and I told that she did go over the top the previous day, then she then said she wasn't going to work with Adelaide any more and if Adelaide was on shift with her she was going to go home."

67. It appears from page 140 that LS was also under some strain at the time because of her husband's illness, which we have been told had covered this whole period. He had undergone surgery in 2018 and 2019.

68. In her witness statement, DW said that she was sitting in the admin room with LS when the claimant called for help by telephone. Where DW was

sitting and the method of calling for help was not information that appeared in the 2019 email. Ms Williams's statement was signed on the 26 March 2021. Again, it is striking that in DW's account of the day the only conversation that took place about the incident between the claimant and the detainee was between herself and LS with no one else present. This contrasts not only with the claimant's account but with JJ's account and with one of the accounts given by LS (that in the 2020 statement). The gist of paragraphs 9 and 10 of DW's witness statement of 2021 is that the incident happened before lunch and that, at lunch, everybody had been together having a normal conversation with no friction or negative atmosphere. DW's account in her 2021 statement of what happened on 10 February 2019 is in more detail to that 2019 email but does not contradict it in any significant respect.

69. LS provided her written statement to the investigation on 13 February 2019 (page 144 to 145). Key points are that she was in the phlebotomy room when the claimant had called to her and she had come straight away to find the claimant with the detainee whom the claimant said was abusing her. She, LS, had taken the detainee to another room and continued his triage. So far as any other interaction was concerned, she said. "I don't have any more conversation with nurse Adelaide the rest of the day, I didn't talk to her, don't know where she been the rest of the day the next I spoke to her was later in the evening when I asked her to do paracetamol"

70. The first account received by the respondent from JJ was not directly from him. It was an account relayed through his management. MP was told indirectly that he denied that any racist comment had been made but was not, apparently, provided with any detail about what relevant interactions there had been. Eventually, after the Datix had been closed on 4 March 2019, he provided an email (page 167). We have not heard from JJ and he has not been cross-examined on this account. As to 9 February 2019, he said,

> "During the lunch break, Loretta asked Adelaide why she kept calling her to the nurses clinic. Adelaide replied that the Albanians tend to be racist and always give her a hard time. Loretta said in reply that they seem okay with her. Adelaide replied that is because you are white, and they will be okay with you."

71. He did give an account of having a conversation with the claimant about experiencing racism but it differs from hers in that he said that on 10 February 2019 in the morning rather than at the end of 9 February 2019. He states that he saw the claimant and asked where she was going and she said that she had had enough was going home. The essence being that she was unable to put up with the racism at work.

72. Finally, there is the account given in LS's witness statement for these proceedings dated 16 December 2020. It is found in paragraph 5 to 7 and then in paragraph 8 LS deals with the 10 February 2019 account. It is noteworthy that, in paragraph 5, LS states that, when she was called by the

claimant, she herself was in the admin room (whereas in the 2019 statement she said she was in the phlebotomy room). These rooms are not near each other; the admin room is in an area to which the detainees have no access – the phlemotomy room and treatment room are near each other in the area to which detainees do have access. LS states in the 2020 statement that, after treating the patient, she went back to the admin room and told DW that the patient had been fine with her and that the claimant had not been in the room at that point. She then describes (paragraph 6) going to the staffroom to eat her lunch and there being about seven people in the room, including DW and the claimant.

> "Adelaide and I spoke about the incident with the detainee that morning. I said to Adelaide that I have not experienced a problem with the detainee. Adelaide said something about us having different skin. I did not comment. Nothing else in particular happened during the lunch break."

She concludes that she saw claimant later in the afternoon asked to do the medication and all seemed fine with the staff having their dinner together at about 17.00.

73. In her oral evidence, the claimant denied contacting LS by phone and said that the patient had grabbed the phone. She said that LS had been in the phlebotomy room doing blood and fluids, as LS had originally stated, and that she had just stood up and called out because she couldn't leave the patient in the treatment room on his own. LS had come to her immediately. The claimant was adamant that the incident happened after lunch when she was triaging her last patient. She described entering the admin room and seeing LS and DW there, as well as JJ.

74. LS plausibly said that JJ would not have been in the admin room because it contained confidential information. The claimant accepted that she had never previously heard LS say anything racist. Indeed, it seems to be common ground that the claimant and LS had a good working relationship prior to this incident.

75. LS was in the position when giving oral evidence that her 2019 statement was starkly different in some respects to her 2020 statement. She said orally that she thought now that the evidence she had provided closer in time to the events (i.e. in the 2019 statement) was likely to be more accurate because events would have been more recent and fresh in her mind. In particular, in her oral evidence, she concurred with the claimant's account that she was on her own in the phlebotomy room when the claimant called out to her. There is particularly stark difference between the two statements between 2019 - where LS said that she had no more conversation with the claimant for the rest of the day after the incident - and paragraph 6 of the 2020 statement - where she describes in some detail a conversation about the incident concerning the detainee, which she says happened at lunchtime.

76. LS gave oral evidence to the tribunal only two months after she has been widowed. She has suffered particularly challenging personal circumstances throughout the relevant period and throughout the period of preparation for the case of a kind which can affect detailed recollection of events. English is not her first language, although she is clearly fluent in English and there was no request for an interpreter. She confirmed that when she signed the 2020 statement she knew that it was going to be used in a Tribunal hearing. She therefore knew it was important that it accurately reflected her recollection.

77. We take full account of the fact that the 2020 statement was not presented to LS in her first language although the respondent or their representatives could be expected to be alert to any risk that it did not represent her instructions. It resulted from the telephone interview with the respondent's solicitors. Although this case may well have been a source of anxiety for LS and we do not suggest that she failed to take it seriously, she has had particularly trying personal circumstances to contend with.

78. That might explain to some extent a witness's failure to identify inaccuracies in their witness statement put to them for their approval or a failure to identify that a particular matter is important at the time that you are asked about events in general. However, we consider that there is a significant difference between including detail that you have subsequently remembered and including a paragraph in your statement to explain a conversation that, within days of the relevant events, you previously said did not happen at all.

79. LS's oral evidence only made her true position more confusing because she sought in blanket terms to prefer the 2019 statement but then was unable to explain how she had signed the 2020 statement which included paragraph 6. In cross-examination she said that "maybe it was discussed at lunchtime". She was at pains to stress the relationship she had had with the claimant and said she had had a good relationship that they had shared lunch together. The claimant had loved Lithuanian food and she didn't understand why the claimant had made the allegation that she had. She was adamant that she had never said the claimant that she should go and bleach her skin and that the claimant had never been in the admin room at all; it had just been herself and DW.

80. When she was asked in examination-in-chief why, in 2020, she had not corrected and made changes to her witness statement to remove paragraph 6 she said the following,

> "because I just tell [you] it's been two years ago. And when start talking you can change minds - you talking to staff, and every staff talking it happen like this and start thinking it happened like this or like that. I want to tell truth and the claimant can be a witness that I'm not lying."

81. This was the closest the LS came to an explanation and it made it sound as though, over time, there had been conversations with staff working at the IRC, presumably between her and DW or her and JJ that caused her to start

thinking that the event had happened in a particular way. While there is some frankness in that it makes it difficult to rely upon her evidence.

82. In making our findings on this, we give weight to the fact that the claimant has been broadly consistent about the essentials of the events that she described. The claimant, JJ and LS (in her 2020 statement) say that a conversation of some kind about the incident concerning the detainee and the claimant calling for help took place when those three and DW were present. DW's evidence was that no conversation took place at which the claimant was present; no conversation at all, let alone a conversation at which the offensive comment was made. DW says that she and LS alone had a conversation about the incident which was focused upon the reasonableness or otherwise of LS expressing the view that the claimant was complaining without good cause.

83. It seems to us LS has been willing, consciously or unconsciously, to try to fit her evidence to the accounts of which she is aware or may be aware that others are giving. We are mindful that some of the details given by the claimant to not make sense - such as the allegation that the conversation took place in the admin room with JJ present. In some respects the claimant and LS accounts concur. In particular, their accounts of the precursor where the claimant sought help are essentially the same as each other's and different to DW's.

84. We are of the view that something must have occurred to cause the claimant to make a complaint against someone with whom she had a previously good working relationship. The claimant complained about this alleged comment so quickly in terms that have remained essentially consistent throughout. We do not think that this is a case where it is possible to explain the alleged comment as the complainant being mistaken.

85. Although we consider all of the above factors in making our finding about the central incidents, we give particular weight to the claimant's essential consistency about the core elements of her complaint. We contrast that with the stark inconsistency between the two accounts given by LS about whether she had any further conversation with the claimant about this incident on 9 February 2019 and her inability to explain why she had signed to certify as true that a conversation took place that she didn't mention at all in 2019. On balance, we think it is probable that the claimant's account represents what happened and that it is probable that LS did say what she is alleged to have said. It is possible, based upon DW's evidence, that LS had a level of frustration with the claimant's requests for help and did not herself see either the behaviour which caused the claimant to be so upset or the seriousness with which the claimant viewed the detainees' behaviour. Maybe the comment was made in the evening break. Maybe it was in the staff room rather than the admin room. We think it probable that it did not come just out of the blue, but was a continuation of a conversation about skin colour arising out of the claimant's struggles with detainees earlier in the shift. It is possible that LS was not deliberately intending to be hurtful but objectively what she said most certainly was.

86. We also accept the claimant's allegations that the alleged comments by LS were made at the end of the shift and on the balance of probabilities accept that that comment was made on 10 February 2019 as well. Exasperation expressed at the claimant's reaction of being "sick" chimes with DW's evidence. In making our findings, we have in mind that DW's evidence that no such comment was made. This is not a case in which it is going to be possible to resolve all of the conflicting evidence. For reasons we have given above, we prefer the claimant's account of the incidents of 9 and 10 February 2019. We are satisfied that the claimant's account of the "skin bleaching" comments on those dates is made out.

87. The claimant's written statement to the investigation is dated 12 February 2019 (page 142) and is identical to the Datix. LS provided an email response to a request for a statement about the events of 9 February 2019 on 13 February (page 144) as we have already said. PW did not provide the claimant with feedback from this second Datix and did not tell the claimant that the alleged witnesses had not supported her allegations. She was tasked with obtaining statements from the relevant employees and MP was the investigator.

88. On 21 February 2019, the claimant reported a conversation she said she had had on 17 February with an HCA whom she said had pressed her to discuss the incident between herself and LS and had then commented that it could not be serious because LS was still working and had not been suspended. However, we accept that steps had been taken to ensure that the claimant and LS worked separately while the investigation was being carried out.

89. Two days after that conversation with the HCA, the claimant wrote to her agency, Athona in an email (page 150) which has the subject heading "shift cancellation". In it she stated "I am unable to work at Heathrow IRC" an expression which covers both Harmondsworth and Colnbrook detention centres. The explanation given includes that the claimant had become very depressed after doing the last shifts the previous week and needed time to recover psychologically and emotionally.

90. On the same day, the claimant also wrote to the manager, ND, asking for the link for bank work and said that she wanted to apply for RMN bank work. This led to a conversation between them and the claimant concluded that she felt able to work at Colnbrook where there were shifts available. On 20 February 2019 she wrote to ND and said "thank you very much for talking to me this morning. May I please work in Colnbrook only till my bank application is through then I will join MHT substance misuse with your permission." She provided dates of her availability.

91. KM had written shortly before 07.00 on 20 February 2019 to a number of people, including the claimant, asking for a copy of their ILS certificate so that it could be kept locally in their agency file. The claimant responded at 23.15 the same day to say that she would be going for ILS training on 25

February 2019 and would submit her certificate after that. In the meantime, at 08.50, PW had forwarded the claimant's email headed "shift cancellation" to KM.

92. The claimant's email to ND asking to work in Colnbrook is timed after the email to her agency saying she wishes to cancel her shifts was forwarded to KM. There is no reason to think that KM was aware of the communication between the claimant and ND. The claimant signed up for shifts on 21 and 22 February 2019.

93. Also on 21 February 2019 MP informed a number of managers including Ms Knee that the Datix investigation into the claimant's complaint against LS was closed because the initial investigation was inconclusive and all parties denied the comments report. MP recorded that the claimant had decided that she did not wish to work at "this establishment any more" (page 157). When asked about the comment that all parties denied the comments reported, MP said she had read the written statements as providing no corroboration of the central allegation. There was no written statement from JJ at that point.

94. We remind ourselves that both MP and KM were recent arrivals on the senior management team who had been tasked with dealing with serious problems identified in a C2C report.

95. There are clear failings in the investigation and the decision to close it so quickly. We recognize that these probably had to do with the fact that it was made by an agency worker rather than employee. We do not consider this to be a good reason and it appears to be a limitation of the Trust's policies which the respondent may wish to address. It probably also has to do with the claimant having been believed by KM and MP to have definitively stated that she no longer wanted to work there. However, if MP was of the view that she did not need to investigate further, given that the claimant appeared to have left, this is contrary to AKn's evidence which was that an investigation into such a complaint would be concluded even if the agency worker had left.

96. Our view is that MP took a very superficial approach to the task of investigation. She seemed to think denials were sufficient without consider whether inconsistencies between the accounts meant that employees' accounts were unreliable. The fact that she closed the investigation without having obtained JJ's written statement is at odds with her evidence that it was important to have the statements in writing. At the time she closed the investigation, she had not had any direct communication with JJ and simply had a second hand statement from the Mitie manager that JJ did not support what the claimant said.

97. We also note that that Mitie manager had provided pejorative information about the 2018 incident. MP did not look into the circumstances of that incident and, if she had, she would have found that, contrary to what she says in her statement at para.12, it had been dealt with by the manager at the time who had accepted the claimant's explanation.

98. MP denied that the 2018 incident had any influence on her investigation. However, we found MP's explanation of her reasons for putting a reference to the 2018 incident in her statement to be unconvincing. There is nothing known to MP about that which had anything to do with race or a racial complaint but it does adversely affect MP's credibility in general that in oral evidence she appeared to ascribe to the Mitie manager the opinion which she was willing to state in her statement was her own namely

> "I did not think this was acceptable standard of behaviour but it had not been dealt with appropriately by the manager at the time and I was not going to undertake any action about it at this late stage."

99. As we say, MP was willing to state that despite having taken no steps to find out what action was taken by the manager at the time. That was PW, who gave evidence in support of the claimant about 2018 incident and to explain her own judgement that no action was necessary. If MP did not take this incident into account then it is difficult to know why she thought it necessary to raise it in her witness statement.

100. Our view is that MP closed the investigation into the claimant's complaint against LS summarily because the claimant, an agency nurse, appeared to have left and she was probably influenced by information provided to her by Mitie about the 2018 incident. She was wrong not to have waited until she had all of the written statements; wrong to have been influenced by an historic matter which she did check against the claimant's version of events and which was irrelevant to her investigation; she was wrong to have been influenced by her belief that the claimant had left. However this does not appear to us to be something from which we could infer that MP failed in her duty to investigate the claimant's complaint because it was a complaint of race discrimination. Indeed, her initial email suggests that she regarded that aspect as needing serious investigation.

101. The claimant attended for her first evening shift at Colnbrook on 21 February 2019 and met KM. The latter's description of the circumstances of that encounter is in her paragraph 4 & 5 where she said that she went to speak to the claimant in Colnbrook to check on her welfare and see if there was anything she could do to help. Her recollection was that it was a short conversation of less than five minutes in the coffee room where the claimant said she was fine that she had the support of her church, hugged KM and thanked her for her own support.

102. However just before 17.00 KM had emailed ND to check whether he had booked the claimant to work the next two days expressing confusion because she had understood that the claimant did not want to work "here" again. She accepted in oral evidence that she had gone to Colnbrook after sending this email. For KM to carry out a welfare visit on an agency nurse is inconsistent with the way that agency nurses otherwise appear to be treated, for example by not been covered by the grievance policy. It is also at odds with the failure thoroughly to investigate the claimant's to Datix's that KM,

given all that she had on her plate at the time, would make time to go to Colnbrook for a welfare meeting with an agency nurse. Although she expressed confusion in that email, she claimed in oral evidence that she wasn't confused "per se" because the claimant had said that she didn't want to work there (implying that the confusion referred to was about ND's actions). However she also said that she wanted to clarify that the person who was booked would turn up and yet did not, on her own account, ask the claimant whether she was willing to work shifts at Colnbrook and would be reliable claiming that, in hindsight, she could have asked this but that her training was not to mix welfare and management together. We found this explanation to be confused and confusing.

103. The claimant's account is in her paragraph 29 where she says she was invited to a meeting with KM and her recollection is set out in the email she sent to ND the following day (page 160). According to that, the claimant was told by KM not to talk to anyone other than her because she was the manager and that she had terminated the contract and was concerned about the claimant's mental health because some words used in her statement were worrying. She continued "she told me not to continue with my bank application and today to be my last day."

104. We think that this is more plausible. We think that KM went to see the claimant to make sure that she did not work at the IRC again. We reject her evidence that she was carrying out a welfare visit and her denials that she told ND not to book the claimant in the future.

105. It is argued by the respondent that since KM's husband is West Indian she is more likely than most to be well acquainted with the effect of racial abuse in the workplace and in wider society. However this was not the evidence she gave about the relevance she attaches to her family circumstances. She did not say that she went to see the claimant because she had an understanding about what the claimant had gone through. In KM's paragraph 9 she said that she found accusations of racism to be very distasteful "as well as belittling of legitimate racism claims" in the context of her own circumstances. We can understand that KM has been distressed to be accused of treating the claimant unfavourably because she made a race discrimination complaint and of subjecting her to less favourable treatment on grounds of race. However we do not think that KM's own race or that of her husband or children are relevant.

106. We also consider that the fact that the claimant did not turn up for the shift she had volunteered for on 22 February 2019 support her evidence that she had been told not to. This was denied by KM who said

> "I don't accept that. She made very clear that she was very distressed by incident she had raised. She said didn't want to be there. I never told her not to come. I would never tell her she's terminated. I couldn't do that. I can't terminate agency member. If [there is] an issue [it is] raised with the agency and [it is] for them to decide whether work there again. We can put our concerns in. You cant just terminate somebody."

107. Not only did the claimant send the near contemporaneous email (09.27 on 22 February 2019) to ND to which we have already referred (page 165) but JAB, a senior primary care nurse who was another of the managers, told the claimant that he had been instructed that morning that she was not allowed back for now in an email timed at 10.23 on 22 February 2019 (page 159.1).

108. The failure of the claimant to attend for the shift on 22 February, her own email, that of JAB and our rejection of KM's explanation for her visit to Colnbrook to see the claimant's lead us to conclude that it is more likely than not that KM did tell the claimant that she was terminating the claimant's contract, that she should not speak to anyone other than her, KM, and that she should not continue with her bank application. All of those matters fit with the picture we have of KM taking steps to make sure that the claimant did not work at Heathrow IRC in the future.

109. The claimant also alleges that KM said that she was concerned about the claimant's mental health. We remind ourselves of the evidence of PW and her allegation that she had been told by KM that she did not want the claimant on site because she had serious mental health problems. It came across in EW's evidence very clearly that she disliked KM and we are bound to take that into account when deciding whether her evidence about something that KM said is reliable. PW was someone who had been part of the management team criticised in the CQC report and KM was part of the management team brought in to make transformative changes in response. It is understandable if PW found her to be abrasive and we consider whether that made PW an unreliable witness about statements she attributes to KM.

110. The comments (paragraph 16 of PW's statement) were denied by KM. PW was blunt in her evidence that KM had backed up her stated opinion with reference to the 2018 incident recognizing that she, PW, did not have evidence to prove that what had been said. However, she stood by her account. We do not think that this was something which was invented because of PW's personal dislike of KM. We accept that, broadly speaking, PW's account of this conversation with KM is true.

111. That supports the claimant's evidence that KM also made a comment about her mental health in their conversation on 21 February 2019; it increases the probability that that comment to the claimant was made. In general we found the claimant to be a credible witness. On balance we accept that KM said that she was concerned about the claimant's mental health because some of the words used in the statement had been worrying and thereby linked her concerns to the words used by the claimant in her statements.

112. When the claimant sent her email account to ND he advised her to speak with KM again because he believed there to have been a misunderstanding. However, he also said that it had been communicated to him that, until he was told otherwise, he should not book the claimant in for shifts at Heathrow IRC.

113. The fact that both ND at page 165 and JAB (page 159.1) both say that they have been told not the claimant in full shifts and both refer to an instruction is inconsistent with the respondent not having influence over which agency staff are booked. It appears from ND's email that he had a conversation with KM and she must have said something which led him to say that it had been communicated that he was not to book the claimant into work shifts and we reject her denials. So far as we have been told, other than one incident on 10 February 2019 when the claimant attended for work and asked to swap shifts to work at Colnbrook, there was no history of unreliability on her part. The justification put forward by KM in her paragraph 6 that there was a risk that the claimant would not turn up appears to us to be something she seeks to rely on in hindsight.

114. It is argued on behalf of the respondent that the claimant should have sought to clarify the position with KM as suggested by ND. We do not think the claimant was unreasonable not to do so. It is understandable that she considered that nothing was likely to change. She had found KM unapproachable and ND had confirmed that he had been told not to offer her shifts.

115. The claimant reported KM to the NMC and she submitted the statement to their investigation (page 211). In that KM said

> "I had a brief chat with Kweyema on the 21st February with regards to a welfare check after she completed Datix report with regard to racism. I wanted to check she was okay, and during the five minutes chat she assured me that she was getting support from her church and she needed nothing further from myself. I then left the room. We did not discuss anything further."

116. She did not mention in that account that she knew at the time of her visit that the claimant was leaving the Trust or that she thought that the claimant should not be booked in for shifts because there was a risk she would be unreliable. She accepted that she set out to visit the claimant after hearing that she did not wish to work at Heathrow IRC any more but also had been booked in for shifts. Our conclusion that KM set out to dissuade the claimant from working at the Trust fits the sequence of events as appears from the emails. Furthermore, KM's account does not include any attempt on her part to understand whether the claimant wished to work there or not. Had she been genuinely confused, surely that would have been something she would have raised.

117. We have already referred to the written statement by JJ about the events of 9 February 2019 was provided on 4 March 2019 (page 167).

118. On 14 March 2019 KJ, in her role having oversight of Datix's, messaged a number of recipients about the claimant's Datix of 21 February 2019 concerning the comment alleged to have been made by the HCA (page 130). KJ asked DS, to review the incident and asked questions.

119. The claimant presented a grievance through the RCN on 7 March 2019 (page 172) which was withdrawn on her behalf and another through the Independent Democratic Union on 29 March 2019 (page 182) by which she complained in broad terms that she had suffered racial abuse, that the Trust had done nothing to support her and that she had suffered a withdrawal of employment as a result. We have found that the Grievance Policy does not apply to former agency workers. Neither does the Dignity at Work policy applying to former, rather than existing, agency workers. We accept that it is not Trust practice to formally investigate such grievances and that is a complete answer to the complaint about the failure to investigate the grievance at page 182.

120. It appears that no response to the second grievance was ever sent by the Trust to the claimant and that the Service Director sought advice on how to respond left the Trust on 13 June 2020. We accept that that and probable work pressures explain why the complaint was not responded to.

121. In April and May 2019 respectively the claimant complained to the NMC about LS and KM. The cases were closed in 2020.

Conclusions on the issues

122. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

Race -related harassment and direct race discrimination

123. We consider first whether any of the aspects which the claimant has shown to have taken place were race related harassment contrary to s.26 EQA. If we conclude that any matters alleged to have been both race related harassment and direct race discrimination in the alternative meet the test of harassment set out in s.26 then that conduct is not included in the definition of detriment for the purposes of s.41(1)(d): see section 212 (1) of the EQA.

124. The first alleged act of unwanted conduct is that of LS's comments to the claimant on 9 February 2019 regarding skin bleaching. The second is that of comments by LS to DW the following day which were overheard by the claimant. See LOI paragraph 41.a and b. We have found that those comments were made. They were clearly unwanted conduct.

125. The comments made by LS to the claimant and overheard by the claimant were obviously likely to cause distress and hurt. The comment made to DW which were overheard by the claimant were not intended to be overheard by her and we do not think that LS's purpose was to intimidate the claimant onto creates a hostile degrading humiliating or offensive environment for her. We think that LS did not understand that the claimant was suffering the abuse and intimidation from the detainees because she herself did not

experience the same difficulties. However any reasonable person would be offended and humiliated by these comments by LS. We accept that in all the circumstances including the perception of the claimant these comments meet the statutory test for harassment.

126. They are overtly connected with skin colour because the implication of what was said was that in order not to receive abuse from the detainees the claimant should lighten the colour of her skin and colour is an aspect of race.

127. The allegations of race related harassment are made out in relation to LOI.41.a and b.

128. It is next alleged (LOI.41.c) that KM's comments to the claimant on 22 February 2019 were race related harassment in that she criticised the claimant's response to suffering racial abuse. We have found (see paras.109 to 111) that KM said words to the effect that she was concerned about the claimant's mental health because of some of the words used in statement, this referring to the claimant's Datix by which she complained about racial abuse and/or the statement for MP's investigation. These words were unwanted.

129. There is no overt connection between race and the comments made by KM but there is a connection in that KM expressed concerns about the claimant's mental health because of the phrasing of her complaint about race related harassment. Although a more indirect connection it is, we consider, sufficient to mean that this unwanted comment was related to race as alleged.

130. We accept that for a manager to say that the way that someone has complained about race racial abuse causes that manager not merely to be concerned about a nurse's mental well-being but to have concerns that she is mentally unwell could reasonably be regarded by that individual as violating their dignity or creating a humiliating atmosphere for them. It is absolutely clear from her oral evidence that the claimant considered the suggestion that she had mental health problems to offend her professionalism.

131. That being the case, not only has the claimant shown that the incident took place as alleged but we are satisfied that it was unwanted conduct related to race that had the prescribed effect of harassment, taking into account all of the circumstances including the claimant's perception and whether it was reasonable for the conduct to have that effect. The allegation of race related harassment is made out in relation to LOI.41.c.

132. In the light of our findings on LOI.41.a to c, the race discrimination complaint is dismissed because the acts of unwanted conduct are excluded from the definition of detriment by reason of section 212 (2) of the EQA.

133. Had we not found allegations a. and b. to be acts of race related harassment we would have found them to be less favourable treatment on grounds of

race. However in relation to allegation c., the appropriate comparator would be a white person who had made an identically worded Datix. We do not think that there is evidence from which it could be inferred that KM treated the claimant less favourably than she would have treated such a comparator on grounds of race. However, as we say, the allegations of race related harassment made out.

Victimisation

134. We accept that the communication set out at LOI.42.a was a protected act. So far as the alleged comments to LS on 9 February 2019 are concerned (LOI.42.b) the claimant did tell LS that the patient she was treating was abusive towards her and that is accepted by LS. The claimant's evidence suggests that she said it was possibly because he was Albanian and this seems to us to be sufficient to amount to a complaint that the detainee was acting in a way towards the claimant that was race discrimination. This would amount to an allegation that someone other than the respondent had been racist. The detainee is not in a position to contravene the Equality Act 2010 but the allegation is capable of being an allegation that the Trust was responsible for third party racism, even though that is not a claim the claimant has pursued..

135. The comments and conversation with JJ on 9 February 2019 about LS's remarks (LOI.42.c.) did, we find, involve some kind of discussion about racism on her part and an allegation that an employee for whom the respondent was responsible had contravene the EQA. It therefore falls within section 27(2)(d) EQA and was a protected act

136. As far as LOI.42.d. is concerned, although the claimant provided some information about her conversation with MM on 9 February 2019 there is nothing to suggest that MM told anyone about that herself and it seems improbable that that conversation had any impact on any decision with which we have been concerned or any act of the respondent with which we have been concerned. Whether or not technically this conversation amounted to a protected act, therefore, we do not think it played any part in causing the act complained of.

137. It is agreed by the respondent that the Datix on 9 February 2019 was a protected act (LOI.42.e.). The claimant no longer relies on the alleged remarks to DW and JAB on 10 February 2019 and we do not need to make a decision about them (LOI.42.f).

138. The claimant has shown that her oral communication PW on 11 February 2019 took place (LOI.42.g) but there is no evidence that PW told anyone about it and therefore although it was a protected act it has no relevance to the claim. There is no evidence from which it could be inferred that any of the respondent's managers were influenced by.

139. The communication in writing by the claimant to PW on 13 February 2019 (LOI.42.h – page 142) setting out her recollection of for the purposes of

PW's initial investigation was a protected act since she made allegations of race related harassment against LS within it.

140. The email referred to in LOI 42.i dated 19 February 2019 was not sent to KM. It is at page 115 and was to the agency. It does not refer to any racial incidents. This was not a protected act.

141. Although the email from the claimant to ND on 19 February 2019 and telephone conversation the same day may well have involved the claimant discussing the racially motivated comments, there is no evidence that this information was passed onto any of those responsible for the acts complained of. That was not the case put forward by the claimant. Even if they were protected acts, we see no evidence from which it is right to infer that the acts complained of were done because of these communications with ND (those set out in LOI para.42.j and k.).

142. The grievance of 7 March 2019 presented by the RCN on the claimant behalf (page 172) was a protected act as was the grievance of 29 March 2019 presented by the IDU (page 182).

143. The first alleged act of victimization (LOI para.43.a), that of ignoring her complaint we have concluded is not made out. There was a clear failure of management in the failure to give the claimant feedback from the report or, apparently, to follow up the recommendations with Mitie (see paragraph – but not unlawful under the EQA. See our conclusions at paras.51 & 52 above.

144. We have accepted that LS did make the comments about skin bleaching (LOI.43.b). She did so in response to the claimant's verbal complaint that she may have been treated differently by the Albanian detainee she had seen that morning than LS had been because she is black or because LS is white. We conclude that this comment by the claimant, that she was suffering race discrimination from a third party at work, was part of the reason why LS made the skin bleaching comment. This allegation of victimization is made out.

145. By the same reasoning, we conclude that when, on 10 February 2019, LS repeated the skin bleaching comments to DW (comments which were overheard by the claimant) this was a detrimental act the reasons for which included the claimant's complaint the previous day of less favourable treatment. This allegation of victimization contrary to s.27 EQA is made out.

146. The matters referred to in LOI para.43.c and e. are not detrimental acts of the respondent in themselves but alleged consequences of them and are therefore issues which should be decided at the remedy stage.

147. In LOI para.43.f and g. the claimant complains that KM's comment that she was concerned about the claimant's mental health was made, in part, because of the claimant's Datix and the statement to the investigation of that Datix (which are protected acts – LOI.42.e and h). We have found that the

comment was made (paras.109 to 111 above). The comment in full includes that KM's concerns were due to some of the wording of those statements. That wording causes us to conclude that the reasons why the comment was made included the claimant's written complaints about the actions of LS. The allegation of victimization is made out in respect of KM's comments.

148. As part of the same conversation, KM told the claimant that she had terminated the contract with her agency. We do not think it possible to separate out KM's motives for doing so or for taking steps to ensure that the claimant did not work in the IRC in the immediate future from her motives for saying she was concerned about the claimant's mental health. What the claimant had reported in the Datix probably was at least part of the reason why KM took these steps because it was part of the reasons why KM was concerned about the claimant working at the IRC. The allegation that this was an act of victimization is made out.

149. In respect of LOI para.43.h. we have found that the investigation into the claimant's Datix report about LS's comments by MP was not adequate and set out our specific criticisms in paras.95 to 100. However, as we explain in those paragraphs, despite the unsatisfactory nature of the respondent's investigation, we are persuaded by the evidence as a whole that the reasons for that did not include that it was a complaint of race discrimination (see, in particular, para.100). This allegation of victimization is not made out.

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Employment Judge George

Date: 12 October 2022

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RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

13 October 2022

FOR EMPLOYMENT TRIBUNALS