EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4113844/2021

Held at Edinburgh on 28, 29 and 30 September and 3 and 4 October 2022

Employment Judge W A Meiklejohn
Tribunal Member Ms M Watt
Tribunal Member Ms G Powell

Ms P Sanson	**Claimant** **In person**
Forth Valley Health Board	**Respondent** **Represented by:** **Mr R Davies – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that the claims brought by the claimant under section 13 (**Direct discrimination**) of the Equality Act 2010 ("EqA") and section 26 (**Harassment**) EqA do not succeed and are dismissed.

REASONS

1. This case came before us for a final hearing to determine both liability and, if appropriate, remedy on the dates set out above. We took 27 September 2022 as a reading day. The claimant appeared in person and Mr Davies represented the respondent.

Procedural history

2. There had been three preliminary hearings – on 3 May 2022 (before Employment Judge Cowen), 28 June 2022 (before EJ Doherty) and 26 August 2022 (before me). In the Note I issued following the preliminary hearing on 26 August 2022 I summarised what took place at the first two preliminary hearings and I will not repeat that here. Suffice it to say that the claim was originally brought against the University of Stirling (the "University") as well as the respondent, and it was decided that the Tribunal did not have jurisdiction to consider the claim against the University.

3. The principal outcomes of the preliminary hearing on 26 August 2022 were as follows –

(a) I allowed the claimant's unopposed application to amend dated 4 May 2022. The main themes of this were (i) the claimant's removal from her nursing degree course by the University following a fitness to practice ("FTP") hearing on 25 April 2022 and (ii) the allegation that the respondent's staff (and also the University) had created a "*false narrative*" about the claimant.

(b) It was agreed that the document submitted by the claimant on or around 27 May 2022 headed "ET1 Further details" should be treated as the definitive statement of the claims brought by the claimant, save that the references in that document to indirect discrimination were to be disregarded.

(c) The claims brought by the claimant were agreed to be as described below.

(d) The respondent was to send to the claimant a list of questions designed to obtain from the claimant information said to be missing from her response to the Additional Information Order dated 14 June 2022, and the claimant

was to use all reasonable endeavours to provide the information requested. The parties duly complied.

(e) It was confirmed that the claimant would lead at the final hearing. Details of the respondent's witnesses were provided. The claimant was to provide details of her proposed witnesses within 7 days and to apply for Witness Orders if required. I subsequently dealt with various case management issues including granting Witness Orders for each of the claimant's witnesses.

(f) I undertook to enquire whether it would be possible to record the final hearing. As the hearing room was suitable equipped (for hybrid CVP/in person hearings) the proceedings were recorded.

4. The claimant confirmed at the preliminary hearing on 26 August 2022 that she proposed to raise proceedings in the Sheriff Court against the University. She advised us that she had not yet done so.

Nature of claims and list of issues

5. The claimant brought complaints under section 13 (**Direct discrimination**) and section 26 (**Harassment**) EqA.

6. The parties had agreed a brief list of issues (61), as follows –

(i) Whether the claimant was directly discriminated against on the grounds of her Canadian nationality.

(ii) Whether the claimant was harassed, the relevant protected characteristic being her Canadian nationality.

Evidence

7. We heard oral evidence from the following people –

(a) For the claimant –

- The claimant herself

- Mr S Watt, a Charge Nurse in the DOT team based at Airth Health Centre.

- Dr S Affleck, a Consultant in Older Adult Psychiatry based mainly at the Clackmannanshire Community Healthcare Centre ("CCHC") in Sauchie.

- Ms G McIntosh, a Senior Lecturer in the Faculty of Health Sciences and Sport at the University.

(b) For the respondent –

- Ms E Graham, Community Mental Health Nurse (Band 7) based at CCHC.

- Ms L Gibb, Community Mental Health Nurse (Band 6) based at CCHC.

- Ms M Young, Practice Education Facilitator ("PEF").

- Ms L Robertson, Head of Mental Health Nursing and Prison Healthcare and Chief Nurse for Clackmannanshire and Stirling Health and Social Care Partnership.

8. We had a joint bundle of documents extending to 1250 pages. We refer to this above and below by page number.

Findings in fact

9. The respondent is a regional NHS Health Board located in central Scotland and covering Stirlingshire, Clackmannanshire and part of Perthshire. Within its region there is one acute hospital, Forth Valley Royal Hospital in Larbert, supported by four community hospitals – Stirling Health & Care Village, Falkirk Community Hospital, CCHC and Bo'ness Hospital. There are also Bellsdyke Hospital in Larbert and two day hospitals – Livilands Resource Centre located at Stirling Health & Care Village and Woodlands Resource Centre located at Falkirk Community Hospital.

10. The claimant was born in the UK and moved to Canada when she was four years of age. She said that she became a Canadian citizen around the age of seven and therefore had dual nationality (UK and Canada). She attended the University of Alberta, graduating with a degree in Sociology and Psychology in 2005. She had a variety of work experience including working in a Women's Shelter in British Columbia. She moved to England in 2012 and then to Stirling in 2014.

11. In 2016 the claimant enrolled as a student at the University. Her degree course was BSc Nursing. She wanted to become a Mental Health Nurse. This was supposed to be a three year course with students undertaking two placements in each year. A placement would typically last for twelve to fourteen weeks, and would be within a setting in the region covered by the respondent.

12. The claimant clearly had a negative view of her time as a student at the University. She described it as a "*horrible experience*" and said that *"the entire course was a nightmare".* She referred to student nurses as a *"cheap labour pool"*. She said that she had been *"bullied"* and "*treated like a piece of crap".*

13. The claimant was also employed by the respondent as a Bank Healthcare Assistant. She undertook this work concurrently with her degree course and, at the time of our hearing, she remained so employed. During the period of

her final placement, to which we refer below, the claimant was undertaking shifts in a vaccination centre located within CCHC.

Previous claim

14. The claimant's progress through her degree course was interrupted for some time as a consequence of her having brought a previous Employment Tribunal claim against the respondent (case no 4105339/2020) in which she alleged detriment for having made public interest disclosures. A copy of the Tribunal's Judgment dated 14 October 2021 dismissing this claim was in the joint bundle (546-581).

Final placement

15. The claimant commenced the final placement of her degree course on 20 September 2021. This was within the Older Adult Community Mental Health Team which was based at CCHC. Successful completion of this would have enabled the claimant to graduate.

16. The staff within the Older Adult Community Mental Health Team at CCHC comprised three Nurses (including Ms Graham and Ms Gibb), a Charge Nurse, a Healthcare Assistant and an Administrative Assistant. The nursing staff carried out home visits to assess patients. The claimant participated in these visits. Dr Affleck conducted clinics at CCHC and elsewhere. He also did home visits.

17. Within CCHC there were two mental health wards for elderly patients. The staff who worked on these wards were separate from the staff detailed above.

18. The claimant was assigned two mentors, Ms Graham and Ms Gibb. Both were experienced nurses – Ms Graham had been a nurse for 24 years and Ms Gibb for over 30 years. For almost all of their respective time as nurses, both had mentored student nurses. These included students from a variety of national and racial backgrounds.

19. The mentor's role was to support, evaluate and supervise the student nurse. Ms Graham was the claimant's sign-off mentor. As sign-off mentor, Ms Graham would be confirming that the claimant had met all requirements to qualify as a nurse, and that all necessary skills had been demonstrated. As co-mentor Ms Gibb was expected to support Ms Graham in her role as sign-off mentor. Mentors were supported by a PEF, in this case Ms Young.

20. Students were required to maintain an Ongoing Achievement Record ("OAR") during their degree course. The claimant's OAR was produced to us (603-879). There was a conflict in the evidence as to whether the claimant had provided her OAR to her mentors at the start of the final placement. We understood (a) the claimant's position to be that she did so and (b) the mentors' position to be that she had not done so; she had provided parts of her OAR but not the full document. While we did not regard this conflict as material, we preferred the mentors' evidence for which we found support in the email sent by Ms Graham to Ms McIntosh on 15 November 2021 (902-903) from which we quote below.

21. The claimant had a desk in the office shared by Ms Graham and Ms Gibb. From their conversations with her, Ms Graham and Ms Gibb understood the claimant to be Canadian. The claimant described her dialogue with Ms Graham and Ms Gibb during the first couple of weeks of her placement as *"too personal"* but voiced no objection at the time. For the first few weeks of the placement the relationship between the claimant and her mentors was, or at least appeared to be, good.

Workload

22. During her placement the claimant was expected to undertake homework. She was not required to attend at CCHC on a Friday as this was her allocated study day. In addition to the homework expected of her the claimant undertook online study courses. She asserted that Ms Graham and

Ms Gibb had overloaded her with work. This was denied by Ms Graham and Ms Gibb. We found that the claimant had not been treated by Ms Graham and Ms Gibb any differently than they would treat any other student on placement. We also found that the claimant had not been given an excessive workload, preferring the evidence of Ms Graham and Ms Gibb to that of the claimant. We accepted the evidence of Ms Graham who said that the claimant went "*above and beyond"* and "*did a lot more than we asked her to do".*

23. The claimant was questioned by Ms Graham and Ms Gibb on the homework they had allocated to her. The claimant's evidence about this was *"I was grilled. They made me sit in front of them, not behind a desk"* and "*They got a kick out of grilling me….They would grab a piece of cake and watch me like a TV show".*

24. Ms Graham and Ms Gibb denied that they had *"grilled"* the claimant. We were told that the claimant's desk faced a wall in the room she shared with Ms Graham and Ms Gibb. This indicated that the claimant would need to turn round to face Ms Graham and Ms Gibb when being questioned about her homework. We did not understand the claimant to suggest that Ms Graham and Ms Gibb should not have questioned her on the homework assigned to her.

25. Our view was that while the claimant may have felt uncomfortable when she had to face her mentors and be questioned by them, it was (a) reasonable for Ms Graham and Ms Gibb to ask the claimant about her homework and (b) unreasonable for the claimant to describe this as being *"grilled".* Having given the claimant homework to do, it would have been surprising if Ms Graham and Ms Gibb did not take steps to check that the claimant had done it. We found no significance in the claimant having to turn round and face her mentors while being questioned by them. She was not *"grilled"* as she contended.

Drug pronunciation

26. The claimant asserted that from around 13 October 2021, Ms Graham and Ms Gibb began to correct her Canadian accent. Ms Graham's and Ms Gibb's position was that they were not correcting the claimant's accent but her pronunciation of certain medications. These included a commonly used anti-depressant called Venlafaxine. Ms Graham's evidence was that the claimant was mispronouncing this as "*Venapraxin"*. Ms Graham highlighted this by spelling out the correct pronunciation and the claimant's erroneous version. Ms Graham's evidence about this (ie her specific mispronunciation of Venlafaxine) was not challenged by the claimant.

27. The evidence of Ms Graham and Ms Gibb, which we accepted, was that it was not unusual for students to have difficulty with the pronunciation of medications. It was important for reasons of patient safety that medication names were pronounced correctly. If a student mispronounced medication names, they would be corrected. This applied regardless of the student's nationality or race.

28. On or around 27/28 October 2021, the claimant played a recording to Ms Graham and Ms Gibb of her (the claimant) pronouncing the names of three medications. This indicated that the claimant believed that her pronunciations continued to be corrected. Ms Graham's evidence was that she would correct a student's pronunciation of a medication name if it was said wrongly, and that she did so in a supportive way. She denied that she had corrected the claimant's accent.

29. Ms Gibb's evidence was to the same effect, under reference to the statement dated 7 February 2022 (1001) she had prepared to answer allegations made against her in a referral to the Nursing and Midwifery Council ("NMC") made by the claimant. In that statement Ms Gibb wrote –

"*….I was not correcting her accent but simply her pronunciation of certain medications in order to prioritise patient safety and clear communication with regards to safe administration of medications. This is not an unusual*

experience, and many students need supported or require practice of the pronunciation of these medications."

30. The claimant took exception to Ms Gibb stating in an email dated 12 November 2021 (888) *"If I can help with anything even just at reading out the drug names please let me know."* She (the claimant) described this as *"humiliating"* and "*very rude".* We did not share that view. We believed that Ms Gibb's email meant what it said. It was an offer to help the claimant.

"Snarling"

31. The claimant alleged that Ms Graham snarled at her. According to the claimant Ms Graham "*bared her teeth like a dog".* The claimant said that she asked Ms Graham at one point why she was snarling. According to the claimant, Ms Graham said that it was her buck teeth.

32. Ms Graham did not accept this when it was put to her during cross-examination. Ms Graham said that no-one else had accused her of snarling. She did not bare her teeth.

33. The dictionary definitions of *"snarl"* are (a) in the case of an animal, to make an aggressive growl with bared teeth and (b) in the case of a person, to say something in an angry, bad-tempered voice. Our view was that the claimant used the word "*snarl"* in the former sense to be uncomplimentary towards Ms Graham. We did not believe that Ms Graham had snarled at the claimant in either sense of the word.

Interim review

34. On 3 November 2021 Ms Graham met with the claimant to conduct an interim review. This was normal practice around the mid-point of a placement. It involved completion of a form by both the mentor and the student (587).

35. Based on what Ms Graham and the claimant wrote on the form, it was confirmatory of the fact that the claimant's placement had been going well up to that point. Ms Graham's comments about the claimant were positive –

- *"has displayed professionalism"*
- *"has been respectful towards staff and patients"*
- *"communicates well with staff and has been developing her communication with patients"*
- *"is self reflective and able to make/question decisions appropriately"*
- *"able to work as part of a team"*
- *"able to work autonomously on a task when she feels confident in what she is doing"*

36. The claimant's comments were equally positive –

"*I have really enjoyed this placement and working with the team. I have been given many learning opportunities to maintain & develop further nursing skills"*

37. There was a conflict in the evidence about whether the claimant had completed her section of the form at the time of her meeting with Ms Graham (Mrs Graham's version), or had taken the form away and returned it later (the claimant's version). We were unable to resolve this, but did not regard it as material.

38. The claimant told us that what she had written was "*probably"* not true. She said "*Sometimes you have to be polite. I could not say I could not stand being around these people."* Our view of this was that the claimant had formed a negative disposition towards the degree course she was undertaking but still at this point wanted to complete her degree and become

a nurse. On previous placements the claimant had experienced some difficulties, the details of which we do not need to recount as they were not relevant to the issues we had to decide. We could therefore accept that the claimant's views about her final placement were probably not as positive as she expressed on the review form.

39. We did not have similar reservations about Ms Graham's comments. She chose to highlight positive aspects of the claimant's performance. However, there was a negative which was not mentioned on the form. Ms Graham said that she *"felt at that point we could support Ms Sanson with the gaps in her knowledge and move forward to her passing".* The *"gaps"* came to be an issue not long after the interim review. Ms Graham said that *"there were concerns which we had already discussed"* and "*learning gaps were discussed at the review but not documented".*

40. Ms Graham said that it was her job to identify gaps in knowledge and to support the student. She would *"try to be positive"* and would not "*focus on the negative".* Accordingly we were satisfied that what Ms Graham wrote was reflective of her views about the claimant's performance to date on placement, but did not tell the whole story. We were also satisfied that Ms Graham had not, as alleged by the claimant, refused to sign off skills within her OAR.

41. There was also a conflict in the evidence as to whether Ms Graham spoke during the meeting on 3 November 2021 about a friend whose young son had recently died. According to the claimant, Ms Graham said that the friend phoned her often when upset, that she (Ms Graham) was getting tired of it and that her (Ms Graham's) son had said "*why don't you tell her to fuck off*" when the friend phoned.

42. Ms Graham told us that she could not recall any such conversation with the claimant. She said that during the claimant's time at CCHC she did not have a friend whose son had died. She also asserted that her son would not speak in that way.

43. Our view of this was that the discussion between Ms Graham and the claimant could well have strayed off course. The claimant's recollection of what was alleged to have been said by Ms Graham was sufficiently vivid that it was more probable than not that something of that, or similar, nature was said.

Claimant approaches past mentors

44. On or around 3 November 2021 the claimant emailed two of her previous mentors with a view to having them sign off parts of her OAR. One of these mentors was Mr Watt. Prior to his current role he had been a Staff Nurse in ward 2 at the community hospital in Stirling. The claimant had undertaken a placement there in May/June 2017.

45. Mr Watt told us that he had not had a chance to sign off any of the skills he had done with the claimant at the time of her placement. He said it was not unusual for a student to get back in touch to have signed off parts of the OAR where that had not been done at the time. He had when requested to do so by the claimant signed off on her medication skills when she was in ward 2. This was done on 9 November 2021 during an interprofessional visit undertaken by the claimant at Mr Watt's workplace in Airth.

Insight visits

46. In the course of her placement the claimant was expected to undertake insight (or interprofessional) visits to other locations. Some of these would be organised by the claimant herself while others would be suggested by her mentors as being relevant to her placement. These visits were documented and the documentation formed part of the claimant's OAR.

47. The claimant alleged that she had been denied learning opportunities. The evidence we heard disclosed that one insight visit arranged by the claimant had been cancelled by Ms Graham. The claimant asked to visit the Dementia

Outreach Team at the community hospital in Stirling, and this was agreed. Ms Graham then discovered that the claimant had contacted the wrong team. Ms Graham cancelled this, and told the claimant that she had done so. The claimant then contacted the correct team. We did not consider this to be the denial of a learning opportunity.

Isolation

48. The claimant complained that she had been isolated by Ms Graham in a number of ways. She referred to being sent to another room to do her work, and not being allowed to return to the shared office. Ms Graham denied that the claimant had been excluded but confirmed that the claimant had on occasions been asked to work in another office if she (Ms Graham) and Ms Gibb were discussing something confidential. Ms Graham also said that the claimant had herself asked to work in another office.

49. The claimant referred to an occasion when the Charge Nurse came into the shared office and Ms Graham asked the claimant to leave. The claimant described this as *"so rude"* and "*demoralising".* The claimant said that it was *"degrading"* to have to go outside to eat her lunch. Ms Graham had then asked the claimant back into the room. The claimant declined but eventually went back.

50. The claimant said that her isolation included not getting positive feedback. This was denied by Ms Graham and Ms Gibb. Ms Graham described the feedback given to the claimant as "*constructive".*

51. The claimant said she had heard a rumour that students on placement at CCHC were locked in a room. This was denied by the respondent's witnesses. It seemed to us improbable that this had occurred. In any event, it did not happen to the claimant.

52. Our view was that the claimant had not been subjected to any treatment which could fairly be described as being isolated. The claimant being asked

to use another room when Ms Graham and Ms Gibb wanted to have a confidential discussion, or to speak to another member of staff, seemed to us to be perfectly normal.

Meeting on 11 November 2021

53. On 11 November 2021 Ms Graham and Ms Gibb met with the claimant in their office. They asked the Healthcare Assistant to leave the room, so that no-one else was present during this meeting. Ms Graham and Ms Gibb spoke to the claimant about undertaking three shifts in ward 2 at CCHC *"to consolidate her learning around medications".* The purpose of this was to give the claimant experience in administering medications to older patients under supervision.

54. The claimant was immediately resistant to this. According to Ms Graham, the claimant said *"I was waiting on this happening, something is off, this is the University messing with my head".* Ms Gibb's version was similar – *"I've been waiting for this, it's the University messing with my head".* We were satisfied that these accounts were reflective of the claimant's angry reaction to being asked to undertake the shifts in ward 2.

55. There was an initial inconsistency between the evidence of Ms Graham and Ms Gibb as to whether (a) the claimant packed her bag, left the room and then returned (Ms Graham's version) or (b) the claimant stood up and at one point looked like she might walk out (Ms Gibb's version). Ms Gibb later agreed that the claimant left the meeting then came back. Both confirmed that the discussion with the claimant continued, and that it moved to another office when the Healthcare Assistant returned.

56. Ms Graham and Ms Gibb tried to explain to the claimant the rationale for doing the shifts in ward 2. Ms Gibb referred to the claimant possibly applying for care home jobs and that it had been a significant time since she (the claimant) had dispensed medication. Ms Gibb explained to us that as a

community placement they (Ms Graham and Ms Gibb) were unable to offer this opportunity.

57. The claimant expressed a concern about how she might be treated in ward 2, making reference to *"bullying"* towards students. Ms Graham encouraged the claimant to try one shift, and to revert to her and Ms Gibb if any difficulties arose. At the end of the meeting on 11 November 2021 Ms Graham understood that the claimant was willing to undertake the three shifts. However, on 12 November 2021 the claimant emailed Ms Graham (901) stating –

"*Just wanted to update you, I am waiting on confirmation from Uni, RCN and NMC regarding the shifts. If I am told I don't need to complete them as those skills have been demonstrated and signed off I won't attend the ward shifts….*

If you could please write your position and expectations re ward 2 in a email and if the decline of the shifts will result in a fail or any other penalty that would be great."

58. Ms Graham told us that she felt *"threatened"* by the claimant's email. She did not respond but instead forwarded it to Ms Young on 12 November 2021 (900-901). Ms Young in turn forwarded it to Ms McIntosh (also on 12 November 2021- 900) suggesting a meeting on 15 November 2021.

59. Both Ms Graham and Ms Gibb prepared a written statement (933-938 in the case of Ms Graham and 939-942 in the case of Ms Gibb) after the meeting on 15 November 2021 to which we refer below. Both of these statements referred to the meeting on 11 November 2021. Given that these statements were prepared while the events of 11 November 2021 would have been reasonably fresh in the minds of Ms Graham and Ms Gibb, we found them persuasive that events had occurred as Ms Graham and Ms Gibb described.

60. Ms Graham's recollection of the discussion with the claimant on 11 November 2021 was also supported by an email which she (Ms Graham)

sent to Ms McIntosh on 15 November 2021 (902-903). In this email Ms Graham stated as follows –

"….We did make it clear that the visits to the wards were about consolidating the learning that she has done here. We had noticed that she did not seem familiar with some of the commonly used medications (which happens sometimes with other students, and we would respond in exactly the same way). I have asked her again to see her folder, but she did not bring this today. She has said that she plans to bring it tomorrow. I have not as yet seen her folder at all. She did bring it in once, but it was on a day that I did not have time to have a look. She has been photocopying bits, and pulling other bits out for signing.

She has not dispensed medications sine her placement in wards 4/5 which would have been 2019 and we acknowledge and support the fact she will have some gaps in knowledge as she has told us that other placements had broken down in the past. I have given her a lot of reassurance that our requests have been purely to support her and that we need to be satisfied that she is continuing to demonstrate skills before being signed off. It seemed natural following the study that she has done to have the opportunity for her to then dispense these medications, given that there is such a gap of time since she has done this and to familiarise herself with them again (and the doses that we might use in older adults with physical frailty, ward 2 is a dementia ward, and so would be a good environment to do this).

I was more concerned about her response to this with myself and my colleague. When we were trying to discuss with her around older adult doses for medications (in a supportive way), she came back saying "I have looked it up and you are wrong, I am right". I am obviously concerned that she is perceiving any support and advice as criticism, which of course, we do not want. When I first raised with her the option of going to the ward (which was suggested also as a good plan by the PEF Michelle Young), she became angry and upset and stated "this is the university trying to mess with my head" "I've been waiting on this happening". She went away, and came back

saying that she felt calmer. However, at this point stated "I don't believe you that my knowledge is any less than any other student at my stage" "I'm standing my ground and I'm not going to the wards where people could be unkind to me".

Our aims were very clear of going to the Ward 2, it would allow her to dispense medications after a gap in time prior to qualifying, and demonstrate continued competence here (as we do not have the opportunity to do this in the community). Also, it would allow her to dispense medications in an older adult setting to consolidate the learning that she has been doing here and on her study days."

"Sent home early"

61. The claimant alleged that she was not allowed to finish work at 5pm but was sent home early. She said of Ms Graham and Ms Gibb *"They wanted me to go because they brought cake, which I refused, and gossiped".* The claimant raised the matter of finishing at 5pm in her email to Ms Gibb of 12 November 2021 (888) where she said –

"*Quick question. Would it be possible to stay at placement until 5pm everyday to maximise learning opportunities?"*

62. Ms Gibb replied on the same date (888) –

"*your working hours are 9-5pm, we have been giving you the opportunity to leave 15 mins early from placement as we wanted to give you the chance to get something to eat and to change uniform before your bank shift at 5pm."*

63. The claimant disputed that she needed time to have something to eat but accepted that she had to change out of her uniform before starting work in the vaccination clinic at 5pm. Our view of this was that the claimant was not "*sent home early"* as she alleged in her email to Ms McIntosh earlier on 12

November 2021 (889) but rather she was allowed to finish before 5pm to enable her to start her shift in the vaccination clinic on time.

Meeting on 15 November 2021

64. There was an exchange of emails between the claimant and Ms McIntosh on 11/12 November 2021 (889-892). It was apparent from Ms McIntosh's email to the claimant of 12 November 2021 that this covered –

- The claimant's requirement to have two matters relating to maternity signed off in her OAR.
- The three shifts in ward 2 which the claimant had been asked to work.
- The claimant's request for a meeting.

65. Having received the claimant's email of 12 November 2021 (901 – see paragraph 57 above), Ms Graham emailed Ms Young on the same date (900) –

"*I have received a further email (below) from Pauline Sanson our student. I have already replied to one this morning outlining our reasons for asking her to work in ward 2 for a couple of shifts. She has contacted union, university and NMC. I do not feel comfortable continuing with this email correspondence with her and hoping that you can advise."*

66. Following emails between Ms Young and Ms McIntosh on 12 and 15 November 2021 (899-900) a meeting was arranged for 4pm on 15 November 2021. In attendance were Ms McIntosh, Ms Young, Ms Graham, Ms Gibb and the claimant (Ms McIntosh and Ms Young participating remotely via Microsoft Teams).

67. The claimant's account of this meeting was reflected in the following answers she gave under cross-examination –

"*It was not explained to me why I needed to practice administration of medication on a ward. Maybe generally but not specifically."*

"I was not rude to Eve. She did not go off sick because of that. She had other problems in her life."

"Any grown woman would not go off sick due to one 1 hour meeting. I don't cause misery to people. I'm the victim."

"Eve was not drinking at work. She said she drank at weekends. I did not raise the issue of drinking at work. I would know if she was drunk in that office."

"I don't know if Eve was genuinely upset at the meeting. She seemed to be bullying me and snarling at me."

68. Ms McIntosh's evidence about the meeting on 15 November 2021 included the following –

"*Pauline showed a lack of respect and awareness of her impact on others at the meeting. Her descriptions were clearly upsetting to others. She spoke over people and did not allow them to contribute."*

"Eve looked very surprised at things being said by Pauline, for example being pressured into giving personal information about her family. And the mention of drinking – Eve was shocked. Also when Pauline referred to racism due to her Canadian accent, Eve looked shocked and upset. She rubbed her hands across her face. She tried to respond but could not get her words out."

69. Ms Graham's evidence about the meeting on 15 November 2021 was given largely by reference to the written statement she had prepared after the meeting (933-938) and the separate statement she prepared to answer the

allegations made by the claimant in her referral to the NMC (1180-1182). These included the following –

"*Pauline's behaviour was appalling towards me. She randomly brought up a comment that I had said alongside everyone else in my office joking about wanting to drink wine on a stressful day (office banter which of course was in humour, and Pauline had laughed with us about at the time). She stated in the meeting "I mean, I'm not suggesting that Eve drinks alcohol at work but….she joked about it". Her tirade of abuse continued throughout the meeting…."*

"The meeting felt like a barrage of personal attacks on me with unfounded allegations and comments taken out of context in an attempt to slander me. She was not willing to listen to all opinions, there was no professionalism or courtesy, she spoke over everyone…."

70. Ms Gibb's evidence about the meeting on 15 November 2021 was also given by reference to the written statement she had prepared after the meeting (939-942) which included –

"*During the Teams meeting with University and PEF….I was disgusted at her behaviour which quickly deteriorated into a personal attack on C/N Graham. After 30 years in nursing and having been a mentor and sign off mentor to many students I have never witnessed such an aggressive and personal attack…."*

71. Ms Gibb also told us that it was the claimant who made reference to drink, and drinking at work. She (Ms Gibb) said that the claimant had made the comment "*I'm not saying she drinks at work but….".* Ms Gibb did not recall Ms Graham bringing this up first.

72. Ms Young had prepared a statement (914-916) about the meeting on 15 November 2021. She told us that she had done this a couple of days after the meeting. Her reasons for doing so were (a) it had been a *"distressing*

event to witness" and (b) she thought there might be repercussions and wanted to write it up shortly after the event.

73. Ms Young's statement contained a narrative of the discussion at the meeting, covering –

- The claimant's concerns about going to ward 2 and the explanation she was given as to the rationale for this request, and why this was a reasonable request.

- The claimant's reference to Ms Graham and Ms Gibb being critical of her homework, and the response from Ms Graham and Ms Gibb that their feedback was given to support further learning in relation to the placement client group.

- The claimant's statement that Ms Graham "*had corrected her pronunciation of drug names, as these were incorrect(ly) said due to her accent and anxiety"* and Ms Graham's apology *"for any perceived criticism".*

- The claimant's statement that "*bullying and harassment are endemic in the wards"* and Ms Graham's response that she would ensure the claimant only worked with one mentor who would oversee the experience.

- The claimant's description of an incident saying "*I'm not suggesting you (Eve) were drinking on duty, but…."*, and Ms Graham appearing "*shocked".*

- Ms Graham appearing distressed as the meeting progressed, and stating to the claimant that her wish was only to support the claimant during her sign-off placement.

74. Ms Young denied that she had said the claimant had wasted an hour of everyone's time. Our view of this was something might have been said near the end of the meeting which reflected frustration on the part of the other attendees that they had repeatedly told the claimant what was expected of her. We were not however persuaded that Ms Young had referred to the claimant wasting everyone's time.

75. We found Ms Young's statement to be a fair and balanced account of the matters discussed at the meeting on 15 November 2021. She did not focus on the claimant's behaviour at the meeting but was sufficiently concerned about how Ms Graham had been impacted that she (Ms Young) telephoned Ms Graham the following day. Ms Graham broke down during this call. Ms Young referred to Ms Graham being "*genuinely upset"* at some of the comments made by the claimant.

76. Shortly after the meeting on 15 November 2021 ended Ms McIntosh sent an email to the claimant and other attendees (917) setting out the purpose and intended outcome of the three shifts –

"*The purpose of the three shifts in the identified ward will be an opportunity for Pauline to:*

- *Practice medication administration with a population of people that are similar to that of her current placement.*

- *Gain confidence in the recognition and administration of medication used for this population.*

The outcome of this learning opportunity is:

- *That Pauline completes the three shifts and gains experience of the application of medication knowledge through the practical experience of medication administration."*

Events following meeting on 15 November 2021

77. On 16 November 2021 the claimant completed an online training module "*Medication Awareness for Nurses Working in Mental Health".* She received a certificate confirming this (918). She emailed this to Ms McIntosh and Ms Graham on the same date (921). Ms Graham did not respond to this email. When the claimant asked Ms Graham if she had received the emailed certificate, Ms Graham replied briefly "*Yep".*

78. In relation to this Ms Graham said that she was not feeling good on 16 November 2021. She felt threatened by the claimant both personally and professionally. She said that she did not feel comfortable being around the claimant at that point.

79. On 17 November 2021 Ms Gibb emailed Ms S McConachie, Clinical Nurse Manager (and as such Ms Graham's and Ms Gibb's line manager) (924). Ms Gibb's email included the following –

"*I know you are aware of the current situation with the team and wondered if there was any advise (sic) yet?*

The atmosphere in the team is strained and everyone feeling very uncomfortable. I suggested that she work in the single office but she declined and has stated she is happy in the main office.

Eve has a GP appointment this morning and I am waiting to hear from her."

80. The outcome of Ms Graham's GP appointment was that she was issued with a Fit Note and commenced a period of medically certified absence due to stress. Ms Graham attributed this to anxiety caused by the claimant.

81. In the written statement she prepared after the meeting on 15 November 2021 (933-938) Ms Graham described the claimant's behaviour since the meeting on 11 November 2021 and concluded –

"….Her behaviour towards me has been unacceptable, unprofessional and shows a disregard for the impact her actions have on others. She seems unwilling to receive constructive feedback. The ability for her behaviour to change like this so rapidly towards us concerns me….We had been nothing but nice and supportive to her and have taken her as we found her (as we do with all students) and I am not willing to be on the receiving end of her bullying and coercive behaviour any longer, or for her behaviour to continue to impact on me or my team. She has made numerous allegations and comments against me which have been professionally and personally slanderous and as such, I would not feel able to sign her onto the nursing register."

82. Ms Gibb expressed similar sentiments in her written statement (939-942). She concluded –

"*Her lack of professional integrity, her bullying and coercive behaviour is a concern. She shows an inability or unwillingness to recognise her own limitations and accept or seek support without becoming defensive. She shows an inability to work collaboratively during discussions and is unable to allow others to speak.*

I am not prepared to work with her, I have never said that about any student or member of staff despite having worked with a range of difficult situations and people over the years."

83. Two consequences for the claimant resulted from the meeting on 15 November 2021 and its immediate aftermath. Ms McIntosh decided to make a FTP referral. She also decided to cancel the claimant's placement. Ms McIntosh emailed the claimant at 11.30am on 19 November 2021 (944-945) to advise her of the cancellation of the placement –

"*Unfortunately, due to the impact of the meeting on Monday and the subsequent absence of your sign-off mentor, your current placement cannot continue…."*

84. The claimant initiated Early Conciliation by contacting ACAS at 7.39pm on 19 November 2021, naming the parties against whom she wished to claim as the University (946-947) and the respondent (958-959). It was apparent from the respective timings of Ms McIntosh's email to the claimant and the claimant's notification to ACAS that the decision to cancel the placement was taken before the University and the respondent became aware of the claimant's intention to bring a Tribunal claim.

FTP process

85. The claimant's ET1 claim form was submitted on 30 December 2021. It follows that, unless added by amendment, anything which occurred after that date cannot form part of the claims before us. The claimant's amendment dated 4 May 2022 contained the following paragraphs –

"*I feel as the victim of discrimination, to avoid any accountability of discriminatory attitudes and behaviour to me, that both NHS staff and equally Stirling University (equally) created a false narrative that I caused them stress to end my placement with Eve's absence and then refer me to FTP.*

Furthermore Gwenne McIntosh who was my tutor at Stirling University also supported and enforced this false narrative by making the FTP referral with agreement and support of both NHS and Stirling University staff."

86. It was clear from the evidence of Ms Graham, Ms Gibb, Ms McIntosh and Ms Young that the claimant behaved badly at the meeting on 15 November 2021. Ms Graham and Ms Gibb used emotive language to describe this – see paragraphs 69 and 70 above. Ms McIntosh's language was more restrained – see paragraph 68 above – but her references to showing "*a lack of respect and awareness of her impact on others"* and being *"clearly*

upsetting to others" were indicative of bad behaviour on the claimant's part. Ms Young's recollection of the meeting was, as we said at paragraph 75 above, a *"fair and balanced"* account, but she also confirmed that the claimant had caused Ms Graham to be *"genuinely upset".* There was no *"false narrative".*

87. That senior personnel within the respondent were involved in discussions about the claimant's behaviour was confirmed in an email Ms Robertson sent to Ms McIntosh on 2 December 2021 (968-969) –

"*Can I just clarify that I acknowledge the discussions I had around this individual's behaviour and the impact that this had on the team, however I was not involved in the actual decision making to remove this person. I was asked to find an alternative placement which I have supported."*

However, as recorded above (see paragraph 83), we found that the decisions to cancel the claimant's placement and make the FTP referral were made by Ms McIntosh (and were therefore decisions of the University and not the respondent).

88. Ms Robertson told us that, following contact from Ms Young on 16 November 2021 expressing concern for Ms Graham's wellbeing following the meeting on 15 November 2021, a meeting to discuss continuation of the placement took place on 18 November 2021. However, if Ms Robertson as the respondent's Head of Mental Health Nursing was not involved in the *"actual decision making",* we believed that this to be confirmatory of our view that the final decision was made by Ms McIntosh. Indeed Ms Robertson's evidence to us included the statement that –

"*The decision to end the current placement was taken by the University of Stirling."*

89. Ms Robertson identified an alternative placement for the claimant. This would have been at Livilands Mental Health Resource Centre. This did not proceed due to the FTP process. In an email to Ms Robertson dated 21

December 2021 (989) Dr A Shepherd, Head of Health Sciences within the University's Faculty of Health Sciences and Sport, stated –

"*I don't imagine the FTP investigation will start now till after Christmas and the student is aware that no further placement can commence until the outcome of the panel is decided."*

90. Provision for the FTP process is made in the University's Faculty of Health Sciences and Sport – Fitness to Practice Policy and Procedure (Students) 2020. Ms McIntosh's referral was made on 1 December 2021 (1168-1174) and was screened by Mrs JA Scott, Associate Dean for Learning and Teaching. Mrs Scott decided (a) that there was a case to answer, (b) that the matter would be referred for investigation and (c) to impose a temporary suspension order on the claimant. She confirmed these matters in her letter to the claimant of 8 December 2021 (973-974).

91. The claimant thereafter made a referral to the NMC in respect of Ms Graham, Ms Gibb and Ms McIntosh (1230-1235).

92. Mr I Gallagher, Lecturer in the University's Faculty of Health Sciences and Sport, was appointed to conduct an investigation. In the course of this investigation Ms Graham and Ms Gibb provided the statements referred to above (although we understood these were prepared principally to answer the claimant's allegations in the NMC referrals). Mr Gallagher conducted interviews with Ms Graham, Ms Gibb, Ms McIntosh, Ms Young and the claimant. Mr Gallagher then produced an Investigation Report dated 12 April 2022 (1045-1174). His recommendation was referral to a FTP Panel.

93. The FTP Panel was chaired by Mrs M Fairley-Murdoch, Senior Lecturer and FTP Lead at the University. The FTP hearing took place on 25 April 2022. The allegations were expressed in these terms –

"That you, a student nurse, whilst enrolled on the BSc Nursing (Mental Health) programme, failed to demonstrate the standards of practice expected in relation to the following:

1. *Failed to establish effective working relationships with placement mentors/assessors and professional colleagues on various occasions over the course of your study*

2. *Caused emotional distress to placement mentors/assessors and professional colleagues on various occasions over the course of your study*

3. *Has made vexatious Fitness to Practice referrals to the NMC against professional colleagues*

4. *Has exhibited unprofessional conduct during each of your final placements, and meetings held to support you, which has led to a failure to meet the requirements for final sign off*

5. *Has an inability to accept feedback in a constructive manner and respond appropriately to this on various occasions over the course of your study*

and, in light of the above, your fitness to practice as a student nurse is impaired by reason of your misconduct."

94. The FTP Panel found all of the allegations to be proved. Their decision was communicated to the claimant by Mrs Fairley-Murdoch's letter of 3 May 2022 (1183). The Panel's decision was to recommend the claimant's withdrawal from the BSc Nursing programme.

95. There was no evidence before us which suggested that, beyond the participation of three of its employees in providing witness statements, the respondent had been involved in or had influenced (a) Mr Gallagher's

decision to recommend the claimant's referral to a FTP Panel and (b) the decision of that Panel.

Other matters

96. We touch here on a number of other matters which came up in the course of evidence. The claimant did not identify a comparator for the purpose of her direct discrimination claim. However, she referred to a Nigerian student undertaking the same course of study who had been removed and detained by immigration authorities, and subsequently convicted of an offence. The claimant said that this student had been supported to complete her course whereas she (the claimant) had been kicked out.

97. Section 23 EqA (**Comparison by reference to circumstances**) provides –

(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case…."

98. While the claimant may have perceived injustice in her removal from her degree course when the Nigerian student was not removed, our view was that the circumstances of the Nigerian student were materially different from those of the claimant. The claimant was not removed and detained by immigration authorities and subsequently convicted. We heard no evidence to suggest that the Nigerian student was referred to a FTP Panel. The Nigerian student would not have been an appropriate comparator for the purpose of the claimant's direct discrimination claim.

99. The claimant alleged that her Canadian accent had been *"mocked"* by Ms Graham and Ms Gibb. She said that they *"would correct my accent and laugh about it".* Ms Graham denied this and said that she *"never mimicked the claimant's accent"*. She (Ms Graham) said that she did not think the claimant had a strong accent. The point was not put to Ms Gibb. The claimant provided no details of specific occasions when her Canadian accent

was allegedly mocked. Our view of this was that the claimant's accent was neither corrected nor mocked. It was the claimant who reacted negatively to having her pronunciation of certain medications corrected, and it was she (the claimant) who attributed this to her Canadian accent.

100. The claimant alleged that there had been repeated criticism by Ms Graham of her academic level including her past degree from the University of Alberta. According to the claimant Ms Graham "*did not like it that I had this previous degree".* Ms Graham's evidence was that she had never criticised the claimant's academic level, and that she "*did not make sarcastic comments about her degree from the University of Alberta. That's not something I would do."* We did not understand the claimant to make a similar allegation against Ms Gibb, but the point was put to her and she stated "*I have no recollection of ever judging the claimant's academic achievement. It's highly unlikely I did that."*

101. The claimant's past academic record was not relevant to her student nurse placement and it seemed to us improbable that it would have been criticised at all, let alone repeatedly, by Ms Graham. We found Ms Graham's denial more credible than the claimant's assertion on this point.

102. The claimant alleged that her access to the office photocopier had been restricted. She referred to her email to Ms Graham of 26 October 2021 (584) requesting copies of a document. The claimant said *"They made me wait till the next day while they sat there eating cakes and discussing people".*

103. Ms Graham said that the claimant had access to the photocopier, but rarely asked for items to be printed. She (the claimant) had not been denied access to the photocopier. Ms Graham referred to an occasion when the claimant had asked a colleague to print off something she (the claimant) had already emailed, so there was no need to print it. Our view of this was (a) we were not persuaded that the claimant had been denied access to the office photocopier and (b) if the claimant's access to the photocopier had been

restricted, it was because the proposed use was thought unnecessary and had nothing to do with her nationality.

104. The claimant alleged that she had been excluded by being discouraged from contributing to a retirement party for the administrative assistant. Ms Gibb's evidence was that she did not consider there was any need for the claimant to contribute – she was on a short placement and it was not normal for students to contribute, as they tended to have limited finances. We did not find any connection between the claimant being discouraged from contributing and her Canadian nationality.

105. Towards the end of the claimant's evidence in chief, I noted that she had not referred to many of the documents in the joint bundle (the bulk of which, according to Mr Davies, had been provided by the claimant). We adjourned the hearing for 20 minutes to allow the claimant to identify those documents which she considered to be most relevant to her case.

106. When the hearing resumed the claimant referred us to around 20 documents. Some, such as the claimant's OAR and the email of 26 October 2021, we have mentioned above. Others, such as the claimant's academic record while enrolled as a student at the University of Alberta (89-92) and an email exchange with her union representative on 3 December 2021 (971-972) were not obviously relevant to the claims she brought.

Comments on the evidence

107. It is not the function of the Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have sought to focus on those parts of the evidence which we considered to have the closest bearing on the issues we had to decide.

108. Our brief observations about the witnesses (apart from the claimant) are as follows –

(a) Ms Graham - a good witness who answered questions put to her in a straightforward way. She was clearly offended by some of the questions put to her by the claimant, but not without cause.

(b) Ms Gibb – took responsibility only for her own actions, but we had no real criticism of her as a witness.

(c) Ms Young – our comments are similar to those for Ms Gibb.

(d) Ms Robertson – gave her evidence with an air of authority commensurate with her seniority. We sensed a degree of caution perhaps reflective of the fact that she had been a witness in the previous case brought by the claimant against the respondent.

(e) Mr Watt – our comments are similar to those for Ms Gibb. He added little to the claimant's case.

(f) Dr Aflleck – a truthful witness but his evidence was not really helpful to us in relation to the issues we had to decide.

(g) Ms McIntosh – a good witness who took ownership for her own decisions.

We found all of these witnesses to be credible. Where their evidence was in conflict with that of the claimant, we found that the evidence of these witnesses was to be preferred, for the reasons given in the next paragraph.

109. The claimant was a less satisfactory witness. She gave her evidence through the prism of her negative perception of her experience as a student at the University in general and the respondent's witnesses in particular. She appeared to regard those witnesses (and Ms McIntosh) as conspiring against her when that was simply not supported by the evidence we heard. She demonstrated hostility towards Ms Graham, Ms Gibb, Ms McIntosh and Ms Robertson when questioning them.

110. We also had some concerns about the claimant's behaviour during the hearing. She was inclined from time to time to interrupt or speak over the witness. She was discourteous to Mr Davies during her cross-examination of Ms Graham on the fourth day of the hearing, referring to him as "*this little man"* when he objected to her line of questioning. We took a short break at this point and, in fairness to the claimant, she apologised when the hearing resumed.

111. At the start of the fourth day of the hearing, the claimant expressed a concern about being *"shut down"* during her cross-examination of Ms Graham on the third day. I explained to the claimant that while she was entitled to test the credibility of the respondent's witnesses, the general thrust of her questions should be focussed on the issues which the Tribunal had to decide. My interventions up to that point had been intended to keep the claimant within the bounds of relevancy.

112. The claimant also expressed a concern about the observers in the hearing room. She referred to what she had perceived as interactions between Ms Graham and an observer, and also to being distracted by an observer looking at her phone. I explained that it was a public hearing which observers were entitled to attend. While I had not seen any interaction between Ms Graham and an observer, I stressed that such interactions must not occur, and that parties/witnesses should not be distracted.

113. We took short breaks at regular intervals during the hearing, particularly between witnesses. We believed that it was consistent with the Tribunal's overriding objective, to deal with cases fairly and justly, to do so.

Submisssions

114. Both the claimant and Mr Davies provided us with written submissions. It was agreed that we would hear oral submissions from Mr Davies first, and matters proceeded in that way after a break following conclusion of the evidence.

Respondent

115. Mr Davies, under reference to ***Chandhok v Tirkey UKEAT/0190/14***, stressed the primacy of the claimant's pled case. She had not offered to prove the essential elements to discharge the burden of proof on her so as to make out a potentially successful discrimination claim.

116. Mr Davies argued that the claimant had failed to make out a prima facie case in that –

(a) For many of her allegations, it was unclear that they took place at all.

(b) For her direct discrimination claim, she had not proved that the alleged less favourable treatment was because of her Canadian accent.

(c) For her harassment claim, she had not proved that the alleged unwanted conduct was related to her nationality.

117. Mr Davies submitted that, if we found sufficient evidence had been given to make out potentially competent claims, the evidence clearly showed that discrimination did not occur. This was because –

(a) For the direct discrimination allegations, nationality was not the reason.

(b) What happened did not amount to harassment under the EqA.

118. Mr Davies contended that the claimant's only allegation which had a pled connection to the protected characteristic of nationality, and therefore gave fair notice of a potentially successful claim, was that in respect of her

Canadian accent. In relation to this, Mr Davies set out his position in these terms –

- The claimant's case was that this was separate from having her pronunciation corrected, which she appeared to accept was legitimate.

- The claimant failed in her evidence-in-chief to explain how correction of accent was factually distinct from correction of pronunciation.

- The claimant did not have anything other than a mild accent, so it seemed unlikely that it would require correction at all.

- The respondent's witnesses credibly denied that the claimant's accent was corrected.

- The Tribunal should find that the claimant's accent as a distinct element was not corrected.

- Even if the Tribunal found that the claimant's accent (as distinct from pronunciation or somehow as an aspect of pronunciation) was corrected, this did not amount to harassment under section 26 EqA because –

  (1) There was a student/mentor relationship in place, and it was reasonable for a student nurse to be corrected on important matters such as pronunciation of medications by her mentors.

  (2) The clinical safety requirement to have the names of medications pronounced correctly.

Mr Davies submitted that the claimant's evidence that the correction was done in a hostile way was not credible.

119. Mr Davies argued, in respect of correction of accent as direct discrimination, the claimant had not given notice of a competent claim because –

(1) There was no reference to a comparator.

(2) There was no pled basis on which the claimant said that the reason for any difference in treatment was her nationality.

120. Mr Davies contended that the claimant's accent was mild, which made it less likely that it would require correction, and the evidence did not show that her accent was corrected. Even if the Tribunal were to find that the claimant's accent was corrected, there was no evidence to suggest that this was less favourable treatment on the grounds of her nationality. The evidence of the respondent's witnesses was clear – correction of pronunciation of names of medications would be done for any student of any nationality. It was a patient safety issue.

121. Mr Davies argued that the claimant had not made out a prima facie case that her removal from her placement and her degree course was on the grounds of her nationality. In any event, these were decisions of the University, not the respondent.

122. Mr Davies made a series of submissions about particular aspects of the claimant's pled case which we will not rehearse here as they are addressed in our discussion below.

123. In his oral submissions, Mr Davies criticised the credibility of the claimant's evidence under reference to two matters –

(a) Her evidence that her student's comments on the interim review form (587) were not true indicated that either (i) she had lied when she wrote those comments or (ii) she had lied to the Tribunal when she said those comments were not accurate.

(b) The question of who first raised the issue of drinking at work during the meeting on 15 November 2021. The claimant's denial that she had done so was not credible. That this had been raised by the claimant was confirmed in the evidence of all of the other attendees at the meeting and also in Ms Young's notes made shortly after the meeting.

Claimant

124. Addressing the credibility issues raised by Mr Davies, the claimant said –

(a) She admitted that she lied in her student's comments on the interim review form. It was *"a bit of sucking up to get through the placement. It would have been weird to write negative comments."*

(b) Ms Graham had wanted to make her (the claimant) look bad and to cover up her own bad behaviour. She (Ms Graham) was capable of saying that the claimant would accuse her of drinking, but it was not possible to drink in the small shared office. The claimant would have reported it if Ms Graham had been drinking and driving. It was another form of exclusion – don't mention drinking at work in front of the claimant.

125. The claimant argued that it made no difference whether her Canadian accent was mild or strong. Ms Graham and Ms Gibb were trying to focus on it. Even after the claimant played her recording, it remained an issue. The claimant argued that this was the reason behind her being excluded to another room, continuing to have her accent corrected and being told to do the three extra shifts.

126. Referring to the evidence of Ms Robertson about finding an alternative placement at Livilands, the claimant argued that no such placement had existed. Ms Robertson had no intention of sending her there. It was a case of those involved *"covering each other's tracks".*

127. The claimant then spoke at some length about her anxiety and how this affected her. Mr Davies complained that this amounted to fresh evidence rather than submission.

Applicable law

128. In terms of section 4 EqA, race is a protected characteristic.

129. Section 9 EqA (**Race**) provides –

(1) Race includes –

(a) colour;

(b) nationality;

(c) ethnic or national origins….

130. Section 13 EqA (**Direct discrimination**) provides –

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

(2) ….

(3) ….

(4) ….

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others….

131. Section 26 EqA (**Harassment**) provides –

(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) ….

(3) ….

(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….

132. In relation to direct discrimination, in ***Madarassy v Nomura International plc [2007] EWCA Civ 33*** the Court of Appeal (per Mummery LJ at paragraph 56) said –

"….The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient

material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

133. In his written submissions Mr Davies captured this neatly in these terms –

"For direct discrimination the Claimant has to prove:

- *some kind of treatment*
- *less favourable than a comparator*
- *"something more" which supports the argument that it was because of race"*

134. Mr Davies provided a similar analysis in relation to harassment –

"*For harassment, the Claimant has to prove:*

- *unwanted conduct*
- *related to race*
- *purpose or effect of violating dignity or creating an unpleasant atmosphere"*

Discussion

135. We reminded ourselves of the agreed issues and repeat them here for ease of reference –

(1) Whether the claimant was directly discriminated against on the grounds of her Canadian nationality.

(2) Whether the claimant was harassed, the relevant protected characteristic being her Canadian nationality.

136. We considered that, to address the issues as thus expressed, we had to break them down into a number of constituent parts, much as Mr Davies had done as set out in paragraphs 133 and 134 above. We approached this by looking at each *"kind of treatment"* and "*unwanted conduct"* alleged by the claimant, working from her *"ET1 Further details"* (52-59) which it had been agreed should be treated as the definitive statement of her claims (disregarding the references to indirect discrimination – see paragraph 3(b) above).

Correction of Canadian accent

137. The claimant has a discernible, but not strong, Canadian accent. Ms Graham and Ms Gibb believed that she was Canadian. This was based partly on the claimant's accent and partly on their conversations with the claimant from which her having lived in Canada for a significant portion of her life became apparent.

138. The claimant's pronunciation of certain medications was incorrect. This was highlighted in Ms Graham's evidence when she spelt out *"Venlafaxine"* and the claimant's mispronunciation of it (see paragraph 26 above). It was the responsibility of Ms Graham and Ms Gibb as the claimant's mentors to correct this. It was properly considered by them to be an issue of patient safety.

139. While the claimant may have perceived that her accent was being corrected, we accepted the evidence of Ms Graham and Ms Gibb that it was the claimant's pronunciation of the medications, and not her accent, which was incorrect and needed to be corrected. We were satisfied that Ms Graham

and Ms Gibb had corrected mispronunciation by students in the past, regardless of nationality. We found this had nothing to do with the claimant being perceived to be Canadian and/or her speaking with a Canadian accent.

140. In relation to the claim of direct discrimination, we noted Mr Davies' argument that the claimant had not referred to a comparator in her claim as pled. While that was true in the literal sense, it was apparent from questions put to Ms Graham and Ms Gibb during examination-in-chief that the respondent understood the claimant to be asserting a difference in treatment compared with other students. In his written submissions Mr Davies said "*A hypothetical comparator could be someone of a different nationality, with an accent, whose accent was not corrected when pronouncing names of medication".*

141. Our view of this was that it was not fatal to the claim of direct discrimination that the claimant had not stated expressly that she was relying on a hypothetical comparator. We considered that it was implicit in the claimant's case as pled that she was asserting that a student nurse who did not have a Canadian accent would have been treated differently, ie more favourably, than she was. We agreed with Mr Davies' description of the hypothetical comparator.

142. We identified two problems for the claimant in her direct discrimination claim based on her Canadian accent. The first was that the treatment was not correction of her Canadian accent, but correction of her mispronunciation. The second was that the treatment was not <u>because of</u> a protected characteristic, but rather because mispronunciation of medication was a patient safety issue. This meant that the direct discrimination claim relating to the claimant's Canadian accent could not succeed.

143. Turning to harassment, the unwanted conduct was the correction of the claimant's mispronunciation of medications. We found that this was not related to race, ie the claimant's perceived Canadian nationality. It was related to patient safety. Accordingly, the harassment claim fell at the first

hurdle – in terms of section 26(1)(a) EqA, the unwanted conduct was not related to a relevant protected characteristic.

144. Having so found, we did not require to consider whether the unwanted conduct had the proscribed purpose or effect in terms of section 26(1)(b) EqA, and section 26(4) EqA was not engaged. The harassment claim relating to the claimant's Canadian accent did not succeed.

Criticism of the claimant's academic level

145. The claimant's position was that this had occurred and was direct discrimination. Mr Davies invited us to find that it did not happen. We were with Mr Davies on this – see paragraphs 100 and 101 above. On that basis we found no discrimination here.

Ending placement and expulsion from nursing degree

146. The claimant asserted that these were acts of direct discrimination. Mr Davies argued that the claimant had not made out a prima facie case that this treatment was on the grounds of her nationality. Our view of this was that the claimant's treatment – having her placement cancelled and being withdrawn for her degree course - was at the hands of the University and not the respondent (see paragraphs 83 and 94/95 above). It could not form the basis of a discrimination claim against the respondent.

Interim review

147. The complaints made by the claimant in her pled case were that Ms Graham was refusing to sign off her skills *"as a control method"* and was "*dangling this like a carrot as she continued to taunt and bully me over my accent".* The evidence did not support these assertions – see paragraph 40 above. Ms Graham told us (in relation to the interim review) *"I felt at that point we could support [the claimant] with the gaps in her knowledge and move forward to passing".* We believed this to be true. We found that the

unfavourable treatment alleged here by the claimant simply did not occur, and there was therefore no discrimination.

Ms Gibb's offer of help

148. This related to Ms Gibb's email to the claimant of 12 November 2021 (888). Our findings in relation to this are set out at paragraph 30 above. It was a genuine offer of help by Ms Gibb.

149. The claimant has sought to characterise this email as harassment and direct discrimination. In relation to direct discrimination, and assuming the hypothetical comparator to be as identified by Mr Davies – see paragraph 140 above, we found that the claimant was not treated less favourably. The same language in an email by Ms Gibb to the comparator in the same circumstances would equally have been a genuine offer of help. It was in no sense treatment of the claimant because of her Canadian nationality. This was not direct discrimination.

150. In relation to harassment, even if Ms Gibb's email was perceived by the claimant as unwanted conduct –

(a) We did not believe it could be said to relate to the claimant's Canadian nationality per section 26(1)(a) EqA. It related to the claimant's difficulty with the pronunciation of certain medications and the potential impact on patient safety.

(b) It was not reasonable for the conduct to have the proscribed effect, per section 26(4)(c) EqA. We regarded that conclusion as inevitable given our finding that it was a genuine offer of help.

There was no harassment here.

Claimant's email of 12 November 2021

151. The claimant's assertion in her pled case (in which she erroneously refers to this email being dated 13 November 2021) was that she "*did not receive a clear answer and was told it would be discussed at the meeting which it never was"* and that this was direct discrimination. The claimant's assertion that the matters raised in her email of 12 November 2021 (901) were not discussed at the meeting held on 15 November 2021 was contradicted by the email Ms McIntosh sent shortly after the meeting ended (917). This provided the *"clear answer"* the claimant alleged she had not received and confirmed that matters were discussed at the meeting.

152. We found nothing here which amounted to less favourable treatment than a hypothetical comparator, and nothing upon which the treatment could be said to be because of the claimant's Canadian nationality. A comparator who was thought to require practical experience of medication administration would have been treated in the same way. The reason for the treatment was to allow the claimant to gain that experience and was unrelated to her Canadian nationality. There was no discrimination.

Cancellation of insight visit

153. Our findings about this are at paragraph 47 above. We accepted Ms Graham's evidence that she cancelled one insight visit organised by the claimant because the claimant had arranged to visit the wrong team. That treatment of the claimant had nothing to do with her Canadian nationality, and was not discriminatory.

Snarling

154. Our finding (at paragraph 33 above) that Ms Graham did not snarl at the claimant was sufficient to deal with this point. The alleged treatment did not occur.

155. We would add that the claimant appeared to use the word "*snarl"* quite frequently. It seemed to us that when someone told the claimant something which she did not like, she tended to accuse them of snarling at her. She used the word as a form of retaliation.

Being made to sit in another office

156. We have made our findings about this under *"Isolation"* above. Our view of the evidence is set out at paragraph 52 above. The claimant was not, as she has alleged, made to sit in another office alone for most of her shifts. She was asked to go to another office for valid reasons of confidentiality and/or privacy. This had nothing to do with her Canadian nationality. We found no discrimination here.

Fridays/Being overloaded with work/Being "grilled"

157. It is convenient to deal with these three points together because we did the same in our findings in fact – see above under *"Workload".*

158. It was clear from the evidence that the claimant was given Friday as a study day. It appeared that there might have been some past variation in practice in terms of giving students a study day. That did not however mean that there was anything wrong with the claimant being given Friday as a study day.

159. We did not find that the claimant was given an excessive workload. We accepted the evidence of Ms Graham that the claimant chose to do more work than she was asked to do – see paragraph 22 above. Similarly, we did not find that the claimant had been "*grilled"* by Ms Graham and Ms Gibb – see paragraph 25 above.

160. In short, we found that the treatment said by the claimant to be discriminatory did not occur (in the cases of being overloaded with work and being *"grilled"*).

Being given Friday as a study day was unrelated to the claimant's Canadian nationality and was not discriminatory.

161. The claimant also alleged that being overloaded with work and being *"grilled"* was unwanted conduct in terms of section 26 EqA (**Harassment**). Our finding that the alleged unwanted conduct did not occur was sufficient to dispose of this point. We would add that these matters were unrelated to the claimant's Canadian nationality.

Ms Graham saying "Yep"

162. We have recorded our findings in fact about this at paragraphs 77-78 above. Ms Graham's reasons for her brief response to the claimant were that she was not feeling good at the time, and felt threatened by the claimant personally and professionally. We found this to be credible evidence which demonstrated that the treatment complained of by the claimant had nothing to do with the claimant's nationality, and was not discriminatory.

Meeting on 15 November 2021

163. The claimant made two points here –

(1) She said that once she proved she was competent in medications, and her mentors had no reason to fail her, she was told that it was not about her competency in medications but her attitude towards learning.

(2) She referred to being accused by Ms Young of wasting an hour of everyone's time at the end of the meeting.

164. In relation to point (1), we found it concerning that the claimant believed that she had *"proved she was competent in medications".* This seemed to us to indicate that she had missed the point of being asked to do the three ward shifts. Ms McIntosh's email of 15 November 2021 (917) could not have been clearer – it was about gaining practical experience of the application of

medication knowledge. The claimant said on a number of occasions that she had a *"humble"* attitude to learning. Her assertion that she had proved her competence in medications demonstrated exactly the opposite.

165. We found there was no less favourable treatment of the claimant compared with a hypothetical comparator. Any student nurse thought to need practical experience of the application of medication knowledge would have been treated in the same way. There was no connection between the treatment and the claimant's Canadian nationality.

166. There was also no harassment here. If receiving an explanation of why being asked to do the three ward shifts was reasonable amounted to unwanted conduct, then (a) it was not related to the claimant's nationality but rather to the need for her to demonstrate competence in the application of her medication knowledge, which in turn related to patient safety and (b) it was not reasonable for the conduct to have that effect. There was a valid reason for the claimant being asked to the three ward shifts, as described by Ms McIntosh in her email of 15 November 2021 (917).

167. In relation to point (2), our finding that we were not persuaded that Ms Young had accused the claimant of wasting an hour of everyone's time (see paragraph 74 above) effectively dealt with this. It was neither direct discrimination nor harassment.

False narrative

168. The claimant's allegation was that the respondent's staff and the University created a *"false narrative"* that she caused them stress to end her placement and then refer her to FTP. We found no substance in this. We found that the evidence demonstrated that the claimant did behave badly at the meeting on 15 November 2021 and that her behaviour resulted in Ms Graham being absent from work following a diagnosis of stress. Further and in any event, ending the claimant's placement was a decision of the University, not the respondent.

Disposal

169. For the reasons set out above, we decided that the claimant's claims of direct race discrimination and harassment did not succeed and required to be dismissed.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 28 October 2022
Entered in register: 02 November 2022
and copied to parties