EMPLOYMENT TRIBUNALS

Claimants: (1) Carole Bailey

(2) Maxine Campbell

Respondent: County Durham And Darlington NHS Foundation Trust

RESERVED JUDGMENT

Heard at: Teesside Justice Centre

On: **26,27,28,29,30 September; 03. 04, 05, 06 October 2022 (deliberations 07 and 24 October)**

Before: Employment Judge Sweeney

Members: Claire Hunter and Stephen Carter

Representation:

For the Claimant: Helen Hogben, counsel
For the Respondent: Bryony Clayton, counsel

The unanimous Judgment of the Tribunal is as follows:

1. **The complaints of direct discrimination on grounds of age are not well-founded and are dismissed.**

2. **The complaints of less favourable treatment in contravention of regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR') are not well-founded and are dismissed.**

3. **The complaints that the Claimants were subjected to a detriment in contravention of regulation 7(1) PTWR are not well-founded and are dismissed.**

4. **The complaints of age-related harassment are not well-founded and are dismissed.**

5. **The complaints of victimisation with the exception of the complaints in paragraphs 6 and 7 below are not well-founded and are dismissed.**

6. **The complaint of Carole Bailey that, by failing to address her grievances of 26 and 27 October 2021, the Respondent subjected her to a detriment in contravention of section 27 EqA 2010 is well-founded and succeeds.**

7. **The complaint of Maxine Campbell that, by failing to address her grievance of 26 October 2021, the Respondent subjected her to a detriment in contravention of section 27 EqA 2010 is well-founded and succeeds.**

8. **The complaint of unfair constructive dismissal by Carole Bailey is not well-founded and is dismissed.**

REASONS

The Hearing

1. The Final Hearing in these proceedings took place over a period of 10 days from **26th September 2022** to **6th October 2022**. The Tribunal reserved judgment and deliberated on **7th** and **24th October 2022**.

2. Oral evidence for the Claimants was given by:

   (1) Carole Bailey,
   (2) Gail Hodgson,
   (3) Maxine Campbell,

3. Oral evidence for the Respondent was given by:

   (1) Claire Atkinson,
   (2) Patrick Hamblin,
   (3) Linda Watson,
   (4) Kathryn Scutter,
   (5) Felicity White,
   (6) Malcolm Walker,
   (7) Tracy Wainwright

4. The parties had prepared an extensive bundle of documents, consisting of 2 lever arch files, running to 930 pages.

5. The Claimants have had joint representation throughout. Although they presented separate Claim Forms, their complaints arose out of common facts and for this

reason, the claims were combined to be heard together. There were five Claim Forms in total.

The first set of claims: Carole Bailey ('CB') [2500549/2021] and Maxine Campbell ('MC') [2500550/2021]

6. These Claim Forms were presented on **04 May 2021**. Both claimants contacted ACAS on **22 February 2021** and were issued with an ACAS EC Certificate on **05 April 2021**. The claims concerned a decision made at a meeting of **10 September 2020** to move them from General Surgery as well as comments made at that meeting and two subsequent meetings on **29 September 2020** and **22 October 2020**. They alleged that they had been treated less favourably because of age, subjected to unwanted conduct related to age, victimised, in contravention of section 27 Equality Act 2010, and subjected to detriment contrary to the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR').

The second set of claims: CB [2501459/2021] and MC [2501460/2021]

7. This was presented on **14 September 2021**. Both claimants contacted ACAS on **10 September 2021** and were issued with an ACAS EC Certificate on the same day. In these claims, they complained about the content and outcome of a report in **July 2021** prepared by Felicity White regarding grievances which had been submitted by the Claimants in **November 2020**. They alleged that they had been subjected to unwanted conduct related to race, victimised and subjected to detriments contrary to PTWR.

The third claim: CB only [2500667/2022]

8. This was presented on **12 May 2022**. **CB** contacted ACAS on **02 May 2022** and was issued with an ACAS EC Certificate on **04 May 2022**. By this stage, **CB** had resigned from her employment on **31 March 2022**. In this Claim Form, she brought additional complaints of victimisation, unfair constructive and 'discriminatory' dismissal. The subject matter related to her treatment following a return to work from sick leave in **April 2021**, the failure to uphold her grievance (which had been rejected on appeal on **21 October 2021**), the failure to address further grievances on **26 and 27 October 2021** and the making of allegations against her on **07 April 2022**.

The issues

9. The parties had agreed a list of issues. Following amendments and clarification, these were amended into a final list of issues, which is attached as an Appendix to these reasons.

10. On **04 October 2022** (the seventh day of the hearing) **MC** applied to amend her Claim to add a complaint of victimisation in respect of the grievance appeal outcome on **21 October 2021** and the failure to address her informal grievance of **26 October 2021**. These had already been pleaded in **CB's** third claim at paras 40 and 49(b) and (c) [**pages 205-206**]. Both Claimants also applied to add

complaints that, by not upholding the appeal, they had been subjected to detriment in contravention of regulation 7 PTWR. This application was to add a paragraph 8(c) to para 8 of **MC**'s particulars of complaint [**page 119**] and similarly to **CB's** particulars, [**page 136**], the words to be added being '*the failure to uphold the Claimants' grievance appeal on 21 October 2021'*. We permitted the applications and gave reasons at the time. This was on the understanding that the Respondent could continue to take the time point already raised in **CB's** case in the case of **MC**.

11. Further applications to amend were made the following day, **05 October 2022**. Ms Hogben applied to add complaints that the Respondent's failure to progress allegations made by the B7 Managers (i.e. those raised with the Claimants on **07 April 2022**) and the failure promptly to dismiss those allegations amounted to victimisation in contravention of section 27 Equality Act 2010. Ms Hogben submitted that the application in the case of **CB** was not to amend the Claim Form as such, but the list of issues, so as to properly reflect what was pleaded in her third Claim Form. She accepted that it was an application to add a new complaint in the case of **MC**. However, we concluded that the application was to add new complaints in both cases. We refused this application and gave our reasons at the time, which entailed an assessment of the balance of prejudice ultimately favouring the Respondent. This meant that paragraphs 5.2.8.2 and 5.2.8.3 of Ms Hogben's suggested revised list of issues (which she handed up on **05 October 2022** should her application have been successful) would have to be removed. However, in so far as the application also consisted of an application by **MC** to add a complaint of victimisation in respect of the making of the allegations by the B7 managers (in identical terms to paragraph 49d of **CB's** particulars of claim [**page 206**], we allowed the application to that limited extent. We asked Ms Hogben to forward the final amended list of issues to the Tribunal, which she did on **07 October 2022**. This is the version in the Appendix below.

12. Ms Clayton also made an application to call additional witnesses, namely Rhys Maybrey and Jody Robinson in respect of the complaint regarding the 'DSAR'. We refused this application and gave our reasons at the time.

Findings of fact

13. Having considered all the evidence before it (written and oral) and the submissions made by the representatives on behalf of the parties, the Tribunal finds the following facts.

14. Within the NHS, nursing staff and others, (excluding doctors and dentists) are employed on a pay and grading system known as Agenda for Change ('AFC'). Under this system, employees are graded from B1 (lowest) to B9 (highest). Healthcare Assistants ('HCAs') are employed on B2. Senior Registered Nurses (SRNs) are employed on B5 and B6. Those nurses at B6 (certainly in and for the purposes of these proceedings) are referred to as 'Team Leaders'. Theatre Managers are employed at B7.

The Respondent organisation

15. The Respondent provides hospital services from two main acute hospitals: one in Darlington, called Darlington Memorial Hospital ('DMH') and one in Durham, University Hospital. It has other smaller hospitals, including Bishop Auckland General Hospital ('BAGH').

Theatres Department

16. The Respondent's Theatres department is one department split into two teams, 'north' and 'south'. The North Team takes in Durham Hospital. The South Team takes in DMH and BAGH. The events with which we are concerned in these proceedings relate to the South Team. The Claimants were based at DMH.

17. The Theatres department consists of a number of different specialties as follows:

17.1 General Surgery
17.2 Orthopaedics
17.3 Ear Nose and Throat ('ENT')
17.4 Ophthalmology
17.5 Gynaecology
17.6 Urology

18. The Respondent must ensure that there is a sufficient and appropriate distribution of staff to cover each specialty. That job falls to the Theatre Managers. The amount of work within and the demands of each specialty varies considerably. The larger specialties, General Surgery and Orthopaedics, have bigger 'lists' with the result that they absorb more of the available staff and resources.

19. The respective sizes of the specialties can be understood by the size of the 'lists', a snapshot of which was available to the Tribunal [**page 372]**. The size of each area is depicted by the number of sessions in about **September 2020**. In rank order of size they are:

19.1 General Surgery - 125
19.2 Orthopaedics - 85
19.3 ENT - 44
19.4 Ophthalmology - 31
19.5 Gynaecology - 24
19.6 Urology - 20

20. As can be seen from this, the largest is general surgery. There is a slight caveat to the numbers, in that the figure of 125 also includes what is referred to as 'CEPOD'. As we understand it, that stands for 'Confidential Enquiry into Perioperative Deaths'. It is a byword in the NHS for emergency sessions. Essentially, all hospitals have dedicated lists for emergency cases, commonly known as CEPOD lists. All the qualified nurses in these proceedings must be able to work effectively in CEPOD lists. CEPOD or emergency surgery presents special challenge in that patients who are admitted to general surgery in an emergency, may require immediate surgical intervention. Within the Respondent Trust, the CEPOD list is used for emergency intervention in the field of general surgery, urology,

orthopaedics, ENT and so on. All nurses must be able to work safely and effectively in all those areas and to work in CEPOD. The existence of CEPOD lists does not affect the rank order, in terms of size, of the specialties as set out above.

21. When it comes to staffing the theatres, it is not simply a case of ensuring the right numbers of staff are present in each specialty. It is also necessary to ensure that there is an even spread of skilled and experienced staff among the less experienced.

Carole Bailey ('CB')

22. **CB** was employed by the Respondent as a Senior Registered Nurse from **05 November 1979** to **31 March 2022** within the Theatres department. She is a very experienced nurse. She progressed to management level at B7, working at that level for a period of about 15 years as a Senior Sister and 'Theatre' or 'Lead Coordinator'. For all intents and purposes, this was the predecessor title given to what is now within the Respondent Trust referred to as 'Theatre Manager'. She remained in that position up until **May 2016** albeit she had shared her clinical and coordinator (managerial) work with **MC** since about 2013/2014. From then she did 3 months on the clinical side whilst **MC** took care of the managerial side, after which they would swap and so on. This arrangement continued up until the summer of 2016. On **31 May 2016**, **CB** took advantage of a scheme within the NHS known as 'Retire and Return'. This is a scheme which enables NHS staff to retire – and thereby access their NHS pension – and then, after a short break, return to work where they can continue to earn a salary (albeit without accruing further pension benefits). Retire and Return benefits staff in that respect but it also benefits the National Health Service in that it facilitates the retention of skills and experience for the benefit of patients, which would otherwise be entirely lost on retirement of medical staff.

23. The precise terms and conditions of Retire and Return have changed over the years. At the time **CB** took advantage of the scheme, there was a condition that the retiring employee return on a lower grade and on fewer hours. Thus, while skills of the returning employee might be retained, there would be a reduction in, or a loss of, the availability of those skills due to the reduction in hours. To take an obvious example: if two full-time nurses retire and return on 0.5 of their previous hours, there is a 'loss' of, or reduction in the availability of the skills and experience of 1 whole time equivalent ('WTE') nurse.

24. **CB**, therefore, 'retired' as a B7 manager and on **28 June 2016** 'returned' as a B6 Team Leader. She worked part time, working **18.75 hours** a week, which in practical terms, resulted in her working two days a week. Her working days varied from week to week according to service need. Her days were identified in advance by rota. She continued to work in the Theatres Department where she was allocated to General Surgery. **CB** has spent most of her clinical time in General Surgery, although she had been a lead in ENT but not since about 2005-2006 (aside from ENT work on CEPOD lists). On **26 January 2022**, she submitted her resignation with the Respondent in circumstances which, she maintains, amounted to a constructive dismissal and direct age discrimination.

25. The matters which form the basis of **CB's** complaints in these proceedings started on **10 September 2020**.

Maxine Campbell ('MC')

26. **MC** is still employed by the Respondent as a Senior Registered Nurse. She too is a very experienced nurse who works and has worked for many years in the Respondent's Theatres department. She is a B6 Team Leader. Like **CB**, she too took advantage of the Retire and Return scheme. On **28 April 2018** she retired as a B7 Lead Coordinator and returned on **28 May 2018** as a B6 Team Leader. **MC** had hoped to return on the same grade but was told that this was not possible under the then terms of the scheme. Therefore, she returned as a B6, working 19 hours on two days a week, in general surgery. For a period of about 15 years, she and **CB** had run the Theatres department, sharing clinical and managerial duties between them. **MC** had in the past been a 'lead' in urology, although not since 2006.

Tracy Wainwright ('TW')

27. **TW** is also a very experienced nurse. She is (and during the period relevant to these proceedings, was) a Theatre Manager on grade B7. This is essentially the same role that **CB** and **MC** performed prior to their retirement and return. **TW** has been working at the level of B7 for about 20 years.

Relationships between CB, MC and TW

28. All three nurses had, for a significant period, been employed contemporaneously as B7 managers in the Theatre Department. **CB** and **MC** had been 'Leads' (i.e. Lead Coordinators) for General Surgery. **TW** had been 'Lead' for 'Orthopaedics'. The work of a B7 involved a mix of clinical and managerial work. Each had in excess of 30 years of experience working together in Theatres. They knew each other well and both **CB** and **MC** enjoyed good relationships with **TW** and she with them. Indeed, **TW** and **MC** go back even further than their working lives having gone to school together.

29. With the retirement of **MC** from her B7 role, **TW** was left as the only remaining B7 within the Theatres Department. Around that time, senior Trust management had decided to reconfigure the work which was to be done at B7 level. It was decided that B7s would not ordinarily undertake clinical work in Theatre (other than to assist in emergencies or as and when might be required for some specific reason). The Lead Coordinator role was redesignated 'Theatre Manager', and **TW** was appointed to that redesignated position on **30 April 2018**. Two other B7 Theatre Managers were subsequently appointed towards the end of **2018**, namely Rhys Maybrey and Jody Robinson. All three work across the whole of the Theatres Department. They are not allocated to any specific specialty. Although they must maintain their clinical skills, the role from **April 2018** became one that can essentially be described as 'managerial'.

30. **CB's** and **MC's** relationship with **TW** deteriorated from around this period when she was redesignated as B7 Theatre Manager. It is not in dispute that relations soured from around that time. What is in dispute is the cause of the deterioration in the personal relationship about which the Claimants and **TW** are at odds. Ordinarily, we as a tribunal would be relatively relaxed and not too concerned about what caused a change in relations. That is because, more often than not, it is sufficient to find that there was a downturn in relations and to consider, where necessary, the impact of that change on the issues before us. However, this was a case where we considered it important to make some findings on what contributed to the change.

31. We all tend to see ourselves differently to how others see us; and we see certain people differently to how others might see those very same people. We are not making any judgement on character or personality beyond what we need to make for the purposes of these proceedings.

32. The essential cause of the deterioration was due to the attitude of the Claimants towards **TW**. B6 Team Leaders should be and are expected to challenge a more senior manager appropriately about matters relevant to their work and to the department. Both **MC** and **CB** often challenged **TW** in this way. We are sure that some of their challenges were appropriate and a result of their genuine and legitimately held views on how things could be improved, for example on the subject of general surgery 'overruns'. Even legitimate challenges can be made in ways which are perceived to be disrespectful or point-scoring. People can of course incorrectly interpret things as being disrespectful or point scoring and we as a tribunal must be alert, not only to the fact that we don't see people in their day-to-day world, but to the possibility that people can misinterpret the actions of others (innocently or otherwise).

33. Whilst recognising all of these things, nevertheless, the important contextual finding which we make is that **CB** and **MC** were often critical of **TW's** abilities as a B7 Theatre Manager and had little respect for her as a manager. We are satisfied that they both regarded **TW** as a poor manager. That they held this view was apparent not only to **TW** but to others in the department. Although this was a shared view, it was more strongly held by **CB**, whom we find to have been the more outspoken and influential. A striking example of **CB's** deeply held view of **TW** is illustrated by her comment to **TW** on **10 September 2020** '*you never fail to disappoint*'. This comment, although uttered at the end of a meeting at which **CB** was upset, was a considered statement by her, intended, in our judgement, as a put down and reflected succinctly her view of **TW**. We come to the events of the **10 September 2020** in more detail below. We refer to it now, only in the context of our finding that **CB's** view of **TW's** abilities (shared by **MC**) was deep-seated and pre-dated the events of **10 September 2020** by well over two years. **TW** understood, from her interaction with **CB** and **MC** that they did not respect her managerial abilities. They were dismissive of her, believing that they were better managers. Consequently, **TW** found them both difficult to manage, but especially so **CB**. This, we find, was very stressful for **TW** and no more so than on the **10 September 2020**, which we shall come to in due course.

34. Other members of staff found both **CB** and **MC** as unapproachable at times, more so **CB**. That was certainly the case with Claire Atkinson. When Felicity White came to carry out her investigation (about which see below), similar comments were made to her by others. For example, in the interview of Jayne Forster George [**page 664**] she reported finding **CB** to be unapproachable, comparing her with **MC** who she described as more approachable. Balanced against that, Chris Lewis, in her interview, reported to Felicity White that she saw the theatres department as a '*clique and if your face fits you are fine. If your face does not fit then you have had it. MC and CB face does not fit. My face has never fit so I don't get told a great deal*.' Mr Hamblin felt more comfortable working with **MC** than with **CB**, who often left him feeling on edge. That there are such differing views go to demonstrate our earlier point that we are seen differently by different people. Much of how we see each other is driven by our personal experiences and in most cases, when it comes to human relations, there will be differently held views. There were almost certainly staff who did not regard **CB** and **MC** in the way Mr Hamblin, Ms Atkinson, **TW** and others did (such as Chris Lewis). However, doing our best from the evidence to assess relationships within the department overall, we find that, whilst at work and in terms of her relationship with others, **CB** generally presented as a formidable individual, often evoking trepidation, even on the part of the B7 managers. This was less the case for **MC**, but she too could be trenchant when expressing her views. She was very much in **CB's** 'camp' when it came to her negative view of **TW's** managerial abilities and her attitude in this respect was also palpable to others. Their demeanour and approach at work was such that they generated a sense of trepidation in many of the staff. We have formed this view from a careful reading of the documents, statements and observing and listening to oral evidence over a ten-day hearing.

Other nurses who gave evidence in the proceedings

Claire Atkinson

35. Claire Atkinson was appointed as a B6 Team Leader in about **August or September 2020**. Before this, she had worked as a B5 nurse for over 12 years. She has about 20 years' experience in theatres. By the time of her promotion to Team Leader, she was a very experienced B5 nurse. Upon gaining promotion she perceived that her relationship with both **CB** and **MC** which we find had only ever been 'workman' like, deteriorated, to the extent that neither engaged with her other than professionally. We find that **CB** and **MC** also had a dim view of Claire Atkinson's abilities and that this stemmed from their perception that she was close to **TW** who had, as they saw it, promoted her. We found Ms Atkinson to be a straightforward witness who did not seek to embellish her evidence.

Patrick Hamblin

36. Patrick Hamblin was appointed as a B6 in about **June 2018**. Prior to that he had been a B5 since **2011**. Before that he worked as a B2 Healthcare Assistant. He has worked under both **CB** and **MC**. He had a professional relationship with **CB** often felt on edge when working with her, as she made him feel he was about to do something wrong. He gets on reasonably well with **MC** and she with him, with whom he continues to work. The overall impression we formed from all of the

witnesses and from the documents was that Mr Hamblin was and is well liked within the department. We found him to be an honest witness.

Linda Watson

37. Linda Watson is employed by the Respondent as a Matron within the Theatre Department and has been since **April 2019**. We found Ms Watson overall to be an honest witness. However, in one respect, regarding the handling of the Claimants' **October 2021** grievances, we found her evidence to be inconsistent and unreliable. In that regard, she struggled to give a consistent and coherent explanation of events which we considered to be driven by a recognition that she, and the Respondent in general, had failed to address those grievances.

The job description of a B6 Team Leader [**page 249]**

38. As articulated earlier, the Claimants worked, along with other nurses and Healthcare Assistants within the Respondent's Theatre department. Within each specialty there are doctors, nurses, Healthcare Assistants (HCAs) and other technical staff working in theatres. The job description of a B6 Team Leader was drawn up deliberately to ensure that the Trust has flexibility of deployment of such workers across the department. Thus, the team leader's location is expressed to be at any location within the Trust. They are not employed to work only in a particular field of nursing. We would be surprised if it were otherwise, as this would inhibit flexibility within the NHS, making it more difficult to move nurses from one area to another. However, that is not to say that team leaders were habitually moving from specialty to specialty. They were not. However, they were moved from time to time and for various reasons. B5s and B2s were more frequently moved between specialties.

39. Nevertheless, the Respondent was entitled to move any team leader to any specialty within the theatres department. It had done this before. For example, in **2020**, Mr Hamblin moved from Gynaecology to Orthopaedics. He worked there for about 6 months and then returned to Gynaecology. There was a specific need at the time for requiring Mr Hamblin to move to orthopaedics, which was to resolve a situation which had arisen in Orthopaedics. Mr Hamblin also worked from time to time in other specialties, such as General Surgery as and when required. Prior to the move to Orthopaedics, Mr Maybrey spoke to him and explained the rationale for moving him. Mr Hamblin recognised his professional responsibilities and that he could be required to work anywhere. Mel Connolly had also moved from Gynaecology to Ophthalmology. She too had been informed of the reasons in advance of the move.

40. Therefore, B6s moved about, and although it was not common-place for them to move between specialties for long periods of time, it was expected and accepted that they could be required to move. B6s would regularly move short term to cover service needs and when on emergency lists would be required to cover any specialty. As a matter of practice, however, they tended to stay in their specialty, or their 'home', as it has been described in these proceedings. By the time we come to the events in **September 2020**, the Claimants had been working in

General Surgery for many years, an area they regarded as their 'home'. When, in her evidence to the Tribunal, **CB** was asked whether she accepted that the Respondent could reasonably ask her to move to a different specialty to cover long term sick leave, for example, for a period of three months or so, **CB** said that it could. She agreed that everyone had to be flexible. Whether common-place or not, each nurse must be able to work across any of the specialties in the Theatres department.

41. B6 Team Leaders, in addition to clinical responsibilities, have managerial responsibilities. The B6s line manage the B5s and below. By the time a nurse is appointed to a B6 position, he/she already has significant clinical skills (whether in the specialty to which they are allocated or not) acquired from their time as a B5 theatre nurse. Those clinical skills are transferable from specialty to specialty albeit with some updating required for those aspects of the theatre which require specific specialty knowledge. There was a dispute as to the extent to which skills were transferable across the theatres department. The Claimants maintained (as **MC** said in evidence) that only about 20% of skills were transferable, whereas the Respondent's witness, Claire Atkinson, displaying surprise at this, suggested that it was more like 70%. TW also maintained that the clinical skills were largely transferable.

42. We are unable to accept the evidence from **MC** that only 20% of skills are transferable from specialty to specialty. That makes no sense to the Tribunal in an environment where all the nurses must be able to act competently across all specialties and must be able to undertake work in any emergency list. We prefer and accept the evidence of Claire Atkinson that it is at least 70%. We find that **MC** was deliberately downplaying the extent of the transferability of skills. The bit that is not transferable is the up-to-date knowledge of some aspects of particular specialties. However, that is something that can be acquired on the job, with support from colleagues through up-dating. We were not overly convinced by **MC's** evidence that, after 18 months in Gynaecology, she still did not feel that she had all the skills required to do the job. Every nurse has a responsibility to say that they feel they cannot practice safely and that has never been the case here. To the extent that she felt lacking in some areas, she is and has been supported clinically by others, such as Mr Hamblin. Indeed, that was one of the benefits of moving **MC** to Gynaecology, where there was existing, experienced clinical support, which would enable her to adapt to the specialty and where she could offer Mr Hamblin the benefit of her significant managerial experience.

Shortage of B6 Team Leaders

43. Before **September 2020**, the Theatres Department did not have a full complement of B6 Team Leaders. There had been a deficit at that level for many years. This presented obvious problems in ensuring an adequate spread of seniority across the board. There were concerns within ENT, Ophthalmology, Gynaecology and Urology that B5s and B2s were missing out when it came to team leadership, especially during periods of annual leave and sickness absence. If there was an unexpected absence, the theatre managers would have to pull another B6 from elsewhere, either General Surgery or Orthopaedics, or if none was available, from another specialty. It is difficult to manage lists when there is a full complement of

B6 Team Leaders but much more difficult when the department is short of such staff in the first place. Those conditions, namely, a shortage of team leaders, made it very difficult to plan appropriate staffing arrangements, because the department was, effectively, running to stand still.

44. In **September 2020**, the Respondent appointed four new B6 Team Leaders in the Theatres Department:

    44.1 Rebecca Vallins
    44.2 Katie Harrison
    44.3 Claire Atkinson
    44.4 Billie Hayes

The position immediately before 10 September 2020

45. Rebecca Vallins (who at the time, was 39 years olf) was not allocated to any specialty – she did not have a 'home', as such. The same was the case for Katie Harrison (age 34) and Claire Atkinson (age 46). Billie Hayes (age 33) had been working in Gynaecology. Chris Lewis, who at the time was 48 years of age, was working in ENT. Mel Connolly, who at the time was 56 years of age, was in Ophthalmology. She was a relatively newly appointed B6. Cathy Sloane (age 53), and Michael Callaway (age 48) were also working in Gynaecology/Urology. Ms Sloane, like the Claimants, also worked part-time, for about 25 hours a week. General surgery consisted of **CB** (age 59), **MC** (age 57) and Simon Elliot (age 53). Of all the B6s in the Theatres Department, these three were by some margin the most experienced clinically and managerially, and **CB** and **MC** had considerable managerial experience at the higher level, B7. Orthopaedics consisted of Sarah Foster Lovejoy (age 32), George Vickers (age 36), Jill Hunter (age 56) and Patrick Hamblin (age 51). Strictly, Mr Vickers was on a secondment in Durham (temporarily at B7 level). Mr Hamblin had worked predominantly in Gynaecology and Urology, but for about 6 months or so before **September 2020**, had been working in Orthopaedics. Michael Callaway (age 48) was, in **September 2020**, on secondment.

46. **September 2020** was the first time that the department was at, or near, its full complement of Team Leaders. The B7 managers believed that some stability could be introduced at long last. They had been aware that staff generally felt frustrated by a lack of team leader support. The smaller teams, ENT, Ophthalmology, Gynaecology and Urology suffered from a lack of team leaders, especially during periods of annual leave. Cathy Sloan held another position as a surgical assistant, for which she had fixed days. This resulted in a lack of leadership on those days in the Gynaecology/Urology lists. That meant that there were times when there would not be a regular clinical lead in that area. Therefore, for the first time in many years the B7 managers, **TW**, Rhys Maybrey and Jodie Robinson, were now able to sit down and look at how the theatres should be populated (for want of a better word). Rather than running to stand still, we find that they could now, at least try to get ahead of the curve, so to speak by looking at where team leaders could be based to provide support for those below. They considered it important to give the new B6s 'a home' and to provide them – and the teams generally – with some stability. They believed it important for the inexperienced B6s to have some stability to

enable them to develop essential B6 skills, primarily 'managerial' and leadership skills.

47. The three B7 managers met to discuss how they could arrange the staffing of the theatres. Their primary aim was to support the B5s and B2s and to ensure that all theatres were adequately and properly staffed, with a good mix of knowledge, skills and experience spread across the department. They agreed that the newly appointed B6s would need stability and support from more experienced colleagues, especially in the managerial aspects of the role of Team Leader. With a view to achieving this aim, they decided to 'merge' or 'link' the smaller specialties with the bigger specialties. That is to say, Orthopaedics was to be linked to ENT and Ophthalmology to form one 'team'. General Surgery was to be linked to Gynecology and Urology & Plastics to form another team. In this way, they would have a pool of B6s within each of those two larger teams. Each B6 would be given a 'home', which meant that they would largely work in an identified specialty. However, they could expect to work in the 'linked' specialty's list as well as their usual specialty. For example, a B6 might be part of Team 1 and have General surgery as her 'home' specialty; but because that specialty was to be linked to Gynaecology, she could and should expect to be on a rota to work within that specialty as well. The same applied in reverse: a B6 assigned to Gynaecology could expect to be working from time to time in General surgery. Furthermore, if there was a shortage in Gynaecology, say, because someone called in sick, the cover would come from General Surgery, as opposed to another specialty. The B7 managers decided to hold a meeting, to explain to the team leaders their proposals to position the B6s across the specialties in this way. At the same time, they intended the meeting to be a 'welcome' for the new B6s, for whom it would be a first meeting team leader meeting.

48. On **27 August 2020**, TW emailed the B6 team leaders to say that they were arranging a meeting for **10 September 2020**, to '*discuss the new norm with our theatre environment and how we will be moving it forward*.' On **09 September 2020**, MC asked TW whether there was an agenda for the meeting. TW replied: '*we have not had an official booked senior team lead meeting for such long time and will reschedule another one at a later date but this is [sic] welcome the new band 6 to their new roles and discuss our plan to move the department forward now that we have a full complement of band 6's after all this time*' [**page 373**].

49. Although the B7 managers had not told anyone in advance which 'home' they were to be allocated to, inevitably some rumours started among some staff that, at this meeting, people were going to be told where they would be working in future. About half an hour before the meeting started, **CB** was speaking to Fiona Sanderson, HCA (B2). Ms Sanderson told **CB** that she had heard a rumour that **CB** and **MC** were to be moved to Orthopaedics. As it turned out, this was wrong and it is symptomatic of the sort of gossip that can generate in a working environment. However, the fact that Ms Sanderson said this, put the claimants on a state of heightened alert before they attended the meeting

50. Rhys Maybrey had prepared a powerpoint presentation for use at the meeting. This was something he had suggested to the other B7s and **who** agreed that it would be helpful. Of the three B7s, Mr Maybrey was technically more 'savvy'. **TW** is not

very good with I.T. Mr Maybrey prepared slides which he intended to project on to a screen from his laptop. **TW** had agreed to take the lead at the meeting, to address the Team Leaders about their proposals. The powerpoint presentation prepared by Mr Maybrey consisted of 11 slides [**pages 700-710**]. He had also prepared slide notes, which he thought **TW** might wish to follow, but which were not to be projected. However, **TW** did not, in fact, make use of or refer to the notes. She understood the proposal and intended to speak to the group generally and as and when Mr Maybrey projected a slide on to the screen, to comment about what was on the slide. She did not intend to and nor did she read from any script. It is clear to us, and we so find, that not much advance thought had been put into how the meeting was to be structured.

51. The first of the 11 slides was a title slide: *'**Operating Theatres/DMH/BAGH** Future proofing the department'*. On the 9th slide [**page 708**] there was an organisation diagram. This depicted the specialties, with names of B6s attached to each. On the left-hand side of the slide was a box with the heading: '*General/Cepod/Ophthalmology/ENT Team 1'*. On the righthand side, was a box with the heading: *'Orthopaedics/Gynaecology/Urology Team 2'*.

Names in Team 1

52. The B6s named in the Team 1 box were: Claire Atkinson, Billie Hayes, Simon Elliot, Melanie Connelly, Chris Lewis, Carole Bailey.

Names in Team 2

53. The B6s named in the Team 2 box were: Rebecca Vallins, Sarah Foster-Lovejoy, Katie Harrison (Acting post SFLJ), George Vickers, Jill Hunter (temporary 1 year), Patrick Hamblin, Cathy Sloane, Maxine Campbell.

54. Under each of the Team 1 and Team 2 boxes, were two further boxes. These boxes identified the 'leads', that is, which B6 would be team leader in which specialty. **CB** was identified as one of three Leads in Ophthalmology/ENT (along with Melanie Connelly and Chris Lewis). **MC** was identified as one of three leads in Gynaecology/Urology (along with Patrick Hamblin and Cathy Sloane). The General Surgery/CEPOD leads were identified as Simon Elliott, Claire Atkinson and Billie Hayes. The Orthopaedics leads were identified as Rebecca Vallins, Sarah Foster-Lovejoy and Katie Harrison. Ms Foster-Lovejoy was due to start a period of maternity leave and Ms Harrison was to be her maternity cover. As it subsequently transpired, Ms Foster-Lovejoy did not return and Ms Harrison became permanent, although nothing turns on this.

55. In respect of the newly appointed B6s, they already had B5 experience in the specialties to which they were to be allocated. Thus, Ms Atkinson and Ms Hayes had B5 experience in General Surgery. Ms Atkinson was the considerably more experienced of the two; Ms Hayes had some general surgery experience. They would be working alongside Mr Elliott (age 53) who had considerable experience as a B6. Mr Elliott had by then made it known that he was planning to retire at age 55 (some 18 months or so hence).

56. As far as concerned **CB**, the B7s anticipated that she would spend the first month in ENT 'getting up to speed' with the support of Chris Lewis. Ms Lewis would then spend about 3 months in Ophthalmology being trained by Mel Connolly with the ultimate aim that both Ms Lewis and Ms Connolly would be able to cover for each other in ENT and Ophthalmology after that. During Ms Lewis's period of training in Ophthalmology it was envisaged that **CB** would be able to support the B5s in ENT. She had significant previous experience in ENT, albeit some time ago. **TW**, and the other B7 managers, believed that this would result in an experienced and knowledgeable team, whereas previously, ENT and Ophthalmology had a shortage of leadership.

57. As regards **MC**, it was envisaged that, due to her significant previous experience in Urology and Gynaecology and her considerable B7 managerial experience, that she would be able to support Mr Hamblin and Ms Sloan develop that team. As referred to earlier, for about 7 years or so before she retired and returned, **MC** had been Lead Coordinator in General Surgery, which was primarily non-clinical – for about 3 of those years, she had shared that role with **CB**, swapping between managerial and clinical. She had also previously been lead in Breast and Urology. Cathy Sloan had two posts within the Trust, which took her away from theatres for two days, on Wednesday and Thursday. It was believed that Mr Hamblin alone could not cover the lists on those days and that **MC's** previous experience would fill the gap and support the team, rather than place an inexperienced B6 to work alongside Mr Hamblin.

58. Among other things, these are what **TW** had intended to explain to staff at the meeting on **10 September 2020**. As will be seen, however, that did not happen for reasons which are set out below.

The meeting of 10 September 2020

59. The meeting started at about 6pm in one of the theatres. People sat on chairs in a horse-shoe arrangement. **TW** opened by thanking those in attendance for coming to the meeting and she welcomed the new Team Leaders. She circulated a handout headed 'Current Staffing' albeit not everyone saw this, as there were not enough copies to go around. The document simply described in percentage terms the age profile of the department [**page 385]**. **TW** handed this document out for the purpose of enabling all concerned to understand the age profiles when she came to speak about 'future-proofing' the department. She made, or she tried to make, the point that the department would need to plan accordingly in the event of retirements, given the overall age profile.

60. Both claimants immediately took against any reference to age. They did so, we find, in a direct and challenging way, in keeping with their generally dismissive attitude towards **TW**. **MC** said that the document was 'ageist' and **CB** said that **TW** should not be talking about age at all. This immediate response came as a shock to the others in the room and was out of sorts with the hitherto relaxed mood in the

room, generated largely by a sense of excitement from the fact that this was the first group meeting the new B6s had attended. The Tribunal is surprised that two employees of the claimants' significant managerial experience, immediately criticised a handout which simply set out age profiles of the department. It is a matter of importance and concern to managers, particularly within the NHS, that the age profile of nursing staff is what it is. The Claimants would, and we find, did, understand perfectly well the implications of an ageing workforce for the department in terms of planning. We find that it was their lack of respect for and dismissive attitude towards **TW** that generated this immediate, unthinking, response.

61. **MC** said in oral evidence that she thought the document was personal because she was over 50 and that she knew at that point that something nice was not going to happen. She that she had a 'bad feeling'. We find that there was nothing personal in the document and it was not the document that generated this belief that 'something nice' was not going to happen. It was a combination of her perceptions of **TW** and the 'gossip' she had heard some 30 minutes earlier which planted a belief that she was to be moved to Orthopaedics. Others in the room – in the department - were over 50. As the document showed, there was quite a few. This perception that it was personal to **MC** and **CB** coloured their views from the outset. **MC** and **CB** are and were very close colleagues. They very quickly became united in their challenging of **TW**. As we shall come to, matters deteriorated further and very quickly.

62. The overreaction of the Claimants to the handout prompted a discussion about age. We emphasise that this was generated by the Claimants. In what we find was an attempt to take the heat out of the situation, **TW** said that she too was included in the figures, that she was 57 and added that '*none of us are getting any younger*' reflecting an obvious fact. **TW** said that they could not afford to find themselves in the position they had been in the past, where some 21 people had retired, albeit some had returned part time. It was in this context that she referred to the need '*future proof*' the department. At one point during this discussion, **TW** also said that **MC** could work until she was 80 if she wanted to but that she would not. There was a dispute in these proceedings as to whether this remark was gratuitously (and by implication, mockingly) volunteered by **TW** or whether it was in response to **MC** saying that she (**MC**) could work until she was 80 if she wanted. Ms Hogben put to **TW** that she was being untruthful about this, and that **TW** was distracting from the fact that she (**TW**) had offered that statement unsolicited. We reject this and we accept **TW's** evidence that she made the comment in direct response to **MC's** remark that she (**MC**) could work until she was 80. It was not said mockingly or disparagingly. It was no more than an anodyne observation. Indeed, on a re-reading of the Claim Form, **TW's** version is precisely what is pleaded by the Claimants in paragraph 15 of **CB's** Particulars of Claim [**page 37**] and paragraph 14 of **MC's** Particulars of Claim [**page 58**]. We have no doubt that **MC** prompted this particular comment by making the point (that she could work until she was 80) and she received a perfectly reasonable reply. We find that the way in which **MC** made the comment to **TW** was not reasonable. It was put by her robustly and intended to challenge **TW's** authority.

63. Sensing this deteriorating atmosphere, some people then volunteered their own ages. This was in response to **TW** saying that she was 57 years old and the reference to working to 80. We accept **TW's** evidence that Chris Lewis volunteered her age and we reject the suggestion that **TW** encouraged her or anyone by gestures or otherwise, to give their ages. We reject the evidence of the Claimants that **TW** mockingly looked round the room saying '*where is young Chris'* a number of times. The suggestion by the Claimants, and Ms Hogben on their behalf, that **TW** was laughing at the Claimants and encouraging or promoting laughter at them is at odds not only with the evidence of **TW** and Claire Atkinson and Patrick Hamblin (which we accept) but also with the reading of that situation by the Tribunal. We find that there was little laughter in the room, as Mr Hamblin said, and the little that there was, in no way was directed at the Claimants. There was at most some mild, nervous laughter generated by Chris Lewis's reference to her own age and to herself as being the 'baby of the group'. It is more likely than not that, in response to that, **TW** said something along the lines of '*well, you are young, Chris*'.

64. **CB**, in oral evidence, said "*Tracy directed people; 'she was making comments'; 'she started shaking head and looked around room for people to agree'* and that this was when people started talking about their age. **CB** then described **TW** as looking round the room, and goadingly saying '*young Chris, Chris, where is young Chris'*, which she said about 3 or 4 times." When **MC** gave evidence, she supported this and she too said that **TW** had said '*young Chris'* 3 or 4 times and had looked around for support, encouraging others to give their ages. In her evidence **CB** demonstrated how **TW** did this, nodding and gesturing to people. This differs to what is said in the Claim form (paragraph 16, **page 37**) which is that it was the reference by **TW** to her own age and to '*none of are getting any younger'* which prompted others to refer to their own ages. There is no reference to physical gestures or prompts to people. The Claimants' accounts were also very much at odds with the evidence of **TW**, Patrick Hamblin and Claire Atkinson. Both **CB** and **MC** professed to be extremely distressed and devastated during the meeting of **10 September 2020**. Yet, in evidence, they said that they recalled exactly what was said, each giving an identical account. However, we find that the Claimants have wholly exaggerated what happened in that meeting and with each replaying of it have convinced themselves of what they describe.

65. We do not accept that **TW** encouraged anyone to state their ages, or that she goaded the Claimants by saying 'young Chris' repeatedly or at all. The way in which this meeting unfolded was that the Claimants immediately challenged **TW**. Others in the meeting room were shocked by their reaction, which was felt to be disproportionate. **TW** tried, unsuccessfully, to calm things down. She found it difficult to manage the Claimants and this was a challenge for her. It is unlikely, in our assessment, that she would go on to goad the Claimants to inflame the situation. The reference to Chris Lewis being 'young' was in response to her volunteering her age and said in a light-hearted way. It was, we find, an attempt to break tension, to try and 'lighten' the mood a little. It is unsurprising that those in the room, shocked by the way the meeting was going, also tried to lighten the mood, which explains that there was some laughter. However, it was not laughter at the Claimants. It was nervous laughter.

66. As stated above, Ryhs Maybrey had prepared the slides and was in charge of operating the laptop and projecting the slides. The first slide was displayed on the projector during the time when there was a discussion about the handout. That is the slide on **page 700** which had as its title 'future proofing the department'. At some point, Mr Maybrey displayed a second slide [**page 708]**. That was supposed to have been the last slide to be displayed. The slide showed where people were to be allocated – which 'homes' they were to be in. We do not know why the last slide was displayed at this point. **TW** could not say, other than to say that Mr Maybrey was in control of the slideshow. For some reason, he went straight to that slide. There may have been a good reason for doing this but we cannot say what it was. We suspect that it had something to do with the deterioration of the meeting and that, perhaps, Mr Maybrey thought it best to show people where they would be sooner rather than later. However, we do not make any finding to that effect as it is speculation. Had that slide been shown last, as had been the intention, **TW** would have spoken about the reasoning, or at any rate would have attempted to speak about the reasoning.

67. As soon as Mr Maybrey projected the slide at **page 434** on to the screen, some got up and approached the screen to read the chart – because the font was too small to read from distance. It was at this point that the meeting really degenerated. **MB** observed that 'Plastics' had been left off the chart. Mr Maybrey apologised for the oversight. **MB** made a barbed comment that it was a pretty big oversight. More significantly, **CB** and **MC**, having seen their names on the chart, were both immediately furious that they were to be moved from General Surgery. **MC** said that she thought it disgraceful that she was being moved from General Surgery and both said that it was disgraceful that **TW** had not discussed this with them privately first. They became upset. This upset was, we find, entirely self-generated, brought on by an underlying anger that **TW** was going to move them without prior discussion. Their manner was aggressive and confrontational and created a sense of hostility in the room. **MC** accused Rhys Maybrey of turning his back on her while she was talking. They both spoke condescendingly to **TW,** who was shocked and, we find, intimidated by their reaction. Indeed, it is clear to us, and we so find, that despite **TW** being the manager, she felt intimidated by both **CB** and **MC** and found it stressful to manage them not only generally but particularly at this meeting. **CB** said that people knew what the structure was going to be in advance, that they had been talking about it and must have seen the presentation, with the implication that she and **MC** had been excluded. This was, we find, a reference to the gossip that she and **MC** had picked up 30 minutes before the meeting and which had put them on a heightened state of alert. This gossip was quickly reformulated in **CB's** mind and transformed into a certain belief on her part that others, except her and MC**,** knew about these plans. This perception, that others had known and that they had not, intensified their anger and upset. **MC** stated that she would never agree to this.

68. Others tried to placate **CB** and **MC**. Patrick Hamblin offered a placatory comment that if they did not future proof the department, they would end up in the same predicament that they had been in before, where experienced staff retired, leaving a shortfall in skilled staff to train and develop more junior staff. There was a reference to '*skills deficit'*. However, it was not said as the Claimants allege. The Claimants contend that Patrick Hamblin said at the meeting that 'they' (i.e. **CB** and

MC) had caused a skills deficit by retiring and returning. We reject this. There was An attempt to have a valid discussion (albeit brief) about the concept of 'skills deficit'. It was in that context that Mr Hamblin also volunteered his own age, to make the point that he and others could at some near point take advantage of retire and return and that this could have an impact on available skills as it had done in the past. He was talking about the past and looking to the future. Due to the fact that tensions were running very high, some other staff also became upset and one Team Leader suggested that the meeting be brought to an end, which it was. At the end of the meeting, **CB** said to **TW** '*you never fail to disappoint'*. This was symptomatic of **CB's** attitude towards **TW**. It was a considered statement by her. **CB** saw herself as being a better manager than **TW.** This comment revealed a contempt of **TW's** managerial abilities. It was meant as a very deliberate put down. **MC** stayed until others had left, to ensure that no-one would talk about her.

69. The Claimants have replayed this meeting in their minds, no doubt on countless occasions. With each replaying of it, we are satisfied that they have come to reconstruct it to fit their narrative that this was aimed at them, either because they were of a certain age, or because they were part-time or because they were '*retired and returns*'. We shall say more about this in our conclusions. However, for now, we simply state that we find they have wholly misinterpreted what was going on; have in parts misremembered what was said at that meeting and have in part exaggerated what happened. Any 'jocularity' or 'laughter' was mild and was a nervous reaction to a situation being escalated by the Claimants and any reference to age and part time status were references to factual states of affairs. Neither age nor part-time status was advanced by **TW** or anyone else at that meeting as a rationale for the new arrangements.

70. The claimants have said that they were extremely distressed by what happened at the meeting. We find that more than anything they were angry and annoyed by being moved by a manager for whom they had no respect. They did not agree with the move. They did not want to move as they were comfortable in general surgery. They were intent on challenging it from the outset. They latched on to the reference to age as being the reason when it was not. From this anger and annoyance emerged a feeling of genuine upset but it was self-inflicted. The sense the Tribunal got from that meeting was that it was a case of the Claimants thinking of **TW** '*how dare she move us*.' This, we infer from CB's comment about never failing to disappoint and **MC's** statement that she would never agree to the move.

The position after the meeting of 10 September 2020

71. The following shows where the B6 Team Leaders were placed after the **10 September** meeting:

Orthopaedics/Trauma

Sarah Foster Lovejoy
Rebecca Vallins
Jill Hunter
Katie Harrison
George Vickers

General Surgery/Cepod

Simon Elliott
Claire Atkinson
Billie Hayes

ENT/Ophthalmology

Mel Connelly
Chris Lewis
Carole Bailey

Gynaecology/Urology

Cathy Sloane
Patrick Hamblin
Maxine Campbell

72. One of the main points made by the Claimants about the lack of logic in moving them from general surgery to ENT/Ophthalmology and Gynaecology/Urology and moving others into General Surgery was that all involved would need extensive training. Ms Hogben cross-examined **TW** about this, suggesting that extensive training would be necessary and referring to evidence given by **MC** that, even after 18 months in Gynaecology, she felt that she did not have all the skills for the job and felt unsafe. Conscious that we had not heard evidence from the Claimants as to the extent or the nature of any essential training, the Tribunal asked Ms Hogben whether she could be more specific. She put to **TW** that Claire Atkinson would have needed training (although this was unspecified). **TW's** evidence was that Ms Atkinson was excellent clinically and required managerial training and experience. It was put to **TW** that Billie Hayes had little experience in general surgery and that she needed additional training. **TW's** evidence was that she had enough to practice there as a B6 albeit not as much as experience as **MC** and **CB**, but they had worked there a long time. **TW** told the tribunal that Ms Hayes did not need prompting and training, that at that level, nurses have a lot of clinical experience. Any additional support they need, they get from speaking to colleagues or if they have any developmental needs, they are supported. **TW** added that as far as **MC** was concerned, she has never asked for extensive training.

73. We accept **TW's** evidence. We also accept that insofar as clinical skills were concerned, relatively little, if any, training was required in moving the B6 nurses from specialty to specialty. Any training was more in the nature of updating the nurses on equipment and procedures in the specialty to which they were moving. As **TW** put it, and we accept, they are dealing with nurses, not surgeons. It may be that colorectal surgery is different to eyes, as Ms Hogben put it, but an experienced scrub nurse can move from one to the other, with appropriate support and with the facility to update her knowledge and familiarise herself with the different procedures and environment. This support was, we find, in place.

The Claimants' grievance

74. On **11 September 2020**, the Claimants spoke and agreed that they would challenge the decision to move them to General Surgery and complain about the meeting by submitting an informal grievance. On **15 September 2020**, **CB** emailed Joanne Benzies, HR Manager and Linda Watson, Matron, raising an informal grievance [**pages 386-387**]. On **16 September 2020**, **MC** emailed raising her informal grievance [**page 388**].

B6 meeting on 22 September 2020

75. On **14 September 2020**, Jody Robinson, B7 manager, emailed staff, including the Claimants. **JR** apologised that the meeting had been cut short. She asked everyone for feedback regarding the new team structure and to forward comments by **21 September 2020** and that a further meeting would take place at 6pm on **22 September 2020**.

76. This meeting went ahead, as per JR's email. However, the Claimants refused to attend. They said that they refused following trade union advice. However, it was, we find, their choice and their decision. The purpose of the meeting was to further consider the proposals and to afford a further opportunity to the B6s to discuss the plan and offer any alternative suggestions. Of the eight B6s who did attend there was positive support for the structure [**page 574 – 576**].

Roundtable meetings

77. On **29 September 2020**, the Claimants and their trade union representative, Mr Buckland, met with Steven Campbell, at the time, General Manager of Theatres. Also present was Linda Watson, Matron. The meeting was arranged as a roundtable discussion, a part of the Respondent's informal resolution process following receipt of the grievances lodged on **15 and 16 September**. Notes of the meeting are at **pages 399-414**. Mr Campbell understood the main thrust of the claimants' grievance to be that they were being moved from general surgery. Certainly, that is what **CB's** grievance on **page 383-384** suggests. The complaint refers to a discussion but all in the context of them being 'targeted' for moving. **Page 388** suggests the same, where **MC** said: '*The structure clearly showed that I had been moved from my specialty to a different team and that a newly appointed band 6 had taken my place. The stress that I felt was overwhelming, the public forum that this was delivered in was humiliating. I tried to defend myself as I felt that I was under attack, comments were made about my age, my retire and return status and my part time hours'*.

78. At the beginning of the meeting Mr Campbell allowed the Claimants to talk and express their concerns. He listened to what they had to say. He was right, we find, to consider that the Claimants' main concern was the move from General Surgery. **CB** was clear in her oral evidence, when asked by the tribunal, what would it have taken to resolve her grievance, when she answered keeping her in general surgery. We have no doubt that this too was the position of **MC**, from her previous statement that she would never agree to it. Only one outcome would have satisfied the

Claimants and that was for the B7s, and especially **TW**, to publicly apologise to them and to announce that they were to remain in General Surgery.

79. Mr Campbell apologised for the fact that the handout was given as he regarded it as a distraction and unnecessary to the meeting. [see notes **page 398**]. We can understand why he apologised – this was reasonable and empathetic management on his part, designed to placate and not antagonise. We also agree that the handout which showed the age profile was probably a distraction and strictly unnecessary. Nevertheless, we do not regard it as unreasonable of the B7 managers to have prepared such a document and to have had it available for discussion, as they did. We find simply that they could have conducted the meeting without reference to it. His apology was in line with what the Tribunal would consider good management: to show some empathy and to make sure that he did not antagonise the Claimants.

80. In paragraph 32 of **CB's** witness statement, she says that Linda Watson told them at this meeting that it was '*easier to move you two because you are part time'*. **MC** does not mention this in her statement. There is no reference to Linda Watson saying this in the interview notes of **CB** or **MC** by Felicity white, even though they discussed the roundtable meeting with Ms White. On **page 563**, **CB** said that Linda Watson was very quiet at the meeting and sat in the corner. Had Linda Watson said what **CB** speaks of in paragraph 32 of her witness statement, we would have expected her to have raised this with Ms White but she did not. There was no reference to it either in the formal grievance **page 430-432**. Nor is this point put by the claimants in their extensive appeal document [**pages 742-771**]. We do not accept that Ms Watson told the Claimants that their part time status was the or 'a' reason for the changes. There was a discussion on **29 September 2020** about the pattern of working-hours but it was, we find, simply in the context of trying to explain the issues regarding the placement of the team leaders and how the patterns people worked can be considered to see how they fitted with needs. We cannot be sure precisely what was said about hours because no witness went into any detail. However, we emphatically reject the suggestion that Linda Watson put it anywhere near as **CB** says she did.

MC commences period of sick leave

81. On **07 October 2020**, **MC** commenced a period of sick leave due to stress and anxiety, returning to work in **February 2021**.

82. In the meantime, there was a second informal roundtable meeting. This took place on **22 October 2020.** The outcome of both meetings was recorded in a note [**page 398**]. Mr Campbell wanted to understand what, if any resolution, could be achieved. It was agreed at that meeting that the presentation (which was to have been run on **10 September**) would be run again so that there could be discussion about it. This 'rerun' eventually took place on **24 November 2020**. It was also agreed that the Claimants, being dissatisfied with the outcome, would proceed to the formal

grievance stage. Mr Campbell acknowledged that it was their right to proceed to a formal grievance if they wished. The reason the claimants were dissatisfied with the informal resolution was because that the only outcome acceptable to them was for them to be told that they would remain in general surgery.

83. It was a feature of the Claimants' cases that the structure projected on to the screen on **10 September 2020** and more importantly the names allocated to each specialty was presented as a fait accompli. We do not agree. We find that the intention of **TW** and the other B7 managers was to consult the staff on the proposal and to consider any comments and feedback they might have before making a final decision on it. As it happened, the structure as projected was implemented before **24 November 2020** but that was because comments made on **22 September 2020** were generally positive, no alternative proposals were put to the theatre managers by anyone, including the Claimants and, in the absence of any such alternative suggestions, management could not wait until after **24 November 2020** (the date of the rerun of the presentation) or for the Claimants to return to work because of the need to ensure stability and to appropriately staff the theatres. We find that it was reasonable for the Respondent to align staff to the specialties when they did. Indeed, we find that the Claimants' purpose in presenting the grievance was to frustrate the process, to halt the 'realignment' or 'restructure' in its tracks, without offering up any alternative suggestions.

Raising of formal grievance – 09 November 2020

84. On **09 November 2020**, **CB** and **MC** submitted a joint grievance to Joanne Benzies, HR Manager [**pages 429-432**]. There was quite a delay in progressing the grievance, due to issues associated with the second wave of the Covid-19 pandemic. The Claimants did not take any issue with that delay and it was not a feature of these proceedings. We mention it only as part of the overall description of events.

The rerun of the presentation – 24 November 2020

85. As had been agreed, the presentation was done again on **24 November 2020**. The Claimants would not attend in person. Rather they attended via Teams, accompanied by their trade union representative, Mr Buckland. The Theatre Managers and others attended in person. This was the choice of the claimants and was agreed to by management. **TW** ran through the presentation. On this occasion, she did have the notes on the slides which she used as a prompt. She went through the entire presentation. This was the first time the B6s had now seen the full power-point presentation. The Claimants and Mr Buckland had an opportunity to ask questions – as did all others present. They also had the opportunity to make representations or suggest alternatives to the proposals. However, they did not suggest any alternative configuration or moves either then or subsequently that management might want to consider. Nor did **CB** ask **TW** for a rationale only, as is alleged, for none to be given. Mr Buckland asked about the process and reasoning and **TW** explained this as best she could. We accept that she may have explained

it in a fairly superficial way but she gave enough explanation to be understood, referring to the knowledge and skills of the claimants and the other B6s and to what they were seeking to achieve. We find that it was at a reasonably superficial level due to **TW's** lack of articulateness arising out of a nervousness on her part, following the events of **10 September 2020**. Whether or not she did a good job of expressing herself, given the background and experience of the Claimants, we find she gave sufficient information to enable them to understand the proposals. There is a difference between the claimants understanding and agreeing with the explanation.

86. From our assessment of the evidence and witnesses, **TW** knew what it is she was seeking to do but struggled to articulate it clearly. That was also evident during these proceedings. That is all the more likely to have been the case when explaining to the Claimants, given that she understood them to lack respect for her abilities, which we have no doubt, would have made **TW** anxious about the situation. Add to this the vitriol which **CB** directed to her at the end of the **10 September 2020** meeting, we find that she felt under pressure. However, the essence of her explanation was that they were trying to future proof the department by ensuring that the right skills and support were in place for the new B6s, which would benefit the B5s and the B2s. This exercise was not all about B6s. There are many more staff to think about. Looking at the Claimants' backgrounds, they had the knowledge, transferable skills and experience to move to support those in the smaller teams of ENT/Ophthalmology and Gynaecology/Urology respectively and that their allocations would provide greater stability throughout the department. That was the message she was endeavouring to, and we find, did convey to the B6s on **24 November 2020**. There may be different ways of achieving what the B7s wanted to achieve; and it may well have been possible for the B7s to have moved the Claimants elsewhere or even to have kept one or both of them in general surgery and moved someone else, such as Simon Elliot. However, we find that the way that was chosen was logical and reasonable and was sufficiently explained at the **24 November** rerun. Therefore, although the claimants say they did not understand **TW's** logic, we find that they did. They just did not agree with her. They had been B7 managers themselves. We would be extremely surprised if they did not understand what the current B7s were trying to achieve.

87. One of the allegations in this case was that, during this meeting Claire Atkinson said that a single full-time worker would be better for their roles than two part-time workers and that when she was challenged on this, she refused to explain. We do not accept this. Nor do we accept the meaning which Ms Hogben sought to ascribe to Claire Atkinson's words on **page 671**, where it records her as saying '*I now understand why the role needs to be full time*'. We find that **MC** and **CB** had, in the past, told Claire Atkinson not to apply for a B6 position when she was working part time. At the interview with Felicity White [**page 671**], she was endeavouring to explain that she now knew what they (the Claimants) meant by this. Although Ms Atkinson had the clinical skills to be promoted to B6, **CB** and **MC** had been of the view that she would have to be full time to learn the managerial skills. We find that

what Claire Atkinson was saying was that she had been told not to apply when part time because she did not have the managerial skills. However, Ms Atkinson was not saying that the claimants could not do the role part-time: they already had the managerial skills, acquired over many years. That the claimants were part time had absolutely no bearing on any ability of picking up managerial – or for that matter – clinical skills. What Claire Atkinson was expressing to Felicity White was that, now that she was a full time B6, she could understand what the claimants themselves had previously told her: that it would be difficult to get to B6 as part time because of the need for managerial skills. At the rerun presentation on **24 November 2020**, Mr Maybrey asked Claire Atkinson how she and others were getting on in their new posts. She remarked that staff were happy that she was working full time. Upon hearing this, **CB** interrupted and said '*are you saying that a B6 should not be part time'*. However, Ms Atkinson was not saying this. She was simply making an observation as to how she was getting on and how she perceived more junior staff to be reacting to her being full time.

CB commences period of sick leave

88. On **26 November 2020**, **CB** commenced a period of sick leave, providing a fit note citing stress and anxiety, returning **April 2021**.

89. On **07 January 2021**, **MC** and her trade union representative, Mr Buckland, met with Jody Robinson. Ms Robinson wrote to **MC** the same day [page **467-468**] to confirm arrangements for a four weeks' phased return to work, during which time she would work in general surgery, before moving on to her allocated specialty. **MC** subsequently returned to work in **February 2021**.

90. On **18 February 2021**, **CB** and Mr Buckland met with Jody Robinson. Ms Robinson wrote to **MC** the same day [page **474-475**] to confirm arrangements for her four weeks' phased return to work. **CB** then returned to work in **April 2021**.

Resumption of the Claimants' grievances in March 2021 following the second wave of Covid

91. On **17 March 2021**, Alison Laidler emailed the Claimants to say that she was requesting that a senior manager now be nominated to progress their concerns under stage 2 of the Respondent's Resolution Procedure – the formal stage [**page 480**]. The person nominated was Felicity White, Deputy Associate Director of Operations/General Manager for Theatres, Anaesthetics and Critical Care.

Data Subject Access Request ('DSAR') 23 March 2021

92. On **23 March 2021**, **MC** and **CB** submitted two largely identical DSARs [**pages 493 and 495** respectively]. The requests were sent to a centralised email address set up for those purposes and was picked up by one of the Respondent's Compliance Officers, Kathryn Scutter. She acknowledged receipt of the DSARs on

14 April 2021. She contracted **TW**, Rhys Maybrey and Jody Robinson asking for the information that was the subject of the request, making it clear what sort of information was to be provided. On **23 April 2021** she sent to **CB** and **MC** documents requested. Most of what was sent was information contained in the Claimants' personnel file and consisted of contractual documentation and information relating to sickness absences provided by **TW**. The only document **TW** had regarding the restructure was the powerpoint presentation which had been sent to her by **TW** on **19 April 2021**. Ms Scutter reviewed the presentation and considered that redactions needed to be made so that the claimants should receive only one of the slides and even then with the names of others redacted. She did this in accordance with her understanding of the Data Protection Act 2018 that they were only entitled to be sent data that was personal to them. If the data was not personal to them, they were not entitled to receive it.

93. On the fifth day of the hearing, it was conceded that there was no allegation of discrimination against Ms Scutter in her handling of the DSAR. However, the claimants were never to know who was going to handle their DSAR, so it was always going to be difficult to say who (if anyone) had discriminated against them, if indeed there had been any discrimination, by not sending them a complete set of documents requested.The Employment Judge asked which documents were said not to have been sent to the Claimants pursuant to the DSAR and which formed the subject of the complaint to this tribunal. Ms Hogben identified them as follows:

    93.1 Emails at pages **373-376**,
    93.2 The notes at page **377-379** (notes of **10 September 20**20 meeting)
    93.3 Emails at pages **380-381**,
    93.4 Email at page **382** (**14 September 2020** email asking for feedback)
    93.5 The presentation slides with notes at pages **434-450**

94. The emails at **373-376** were emails to staff, including the Claimants, meaning that the Claimants already had those emails. They were also about trivial matters. There is no mention of the Claimants at all in the email at **page 380-381**. The email on **page 382** had been sent to the Claimants at the time and was in their possession. It is the email of **14 September 2020** referred to in paragraph 75 above. Ms Hogben said that the most important ones for the purposes of the complaint were the emails at pages **380-381**, the notes at pages **377-379** and the slides with notes at pages **434-450**.

95. We find that **TW** genuinely did not fully comprehend what documents she was asked to provide. As she put it, and we accept, she believed she was being asked to look for emails about the proposed restructure and notes of meetings between the B7s, which they did not have as their meetings were conducted verbally and by writing on a white board. She understood the request for the personnel file, as it related to the Claimants and she provided this. We were satisfied that she was not deliberately withholding any documents from Ms Scutter. The slides with notes

were provided to the Claimants on **23 July 2021**, at the time of the grievance outcome by Felicity White, some four months after the request.

96. In cross examination, **CB** was taken by Ms Clayton to **page 12** (regarding what was, at that juncture, paragraph 3.1.6 of the issues – later revised as paragraph 5.2.1 in the final list). She asked **CB** whether it was her case that documents had not been provided to her because of her age. **CB** said she honestly did not know. **MC** was asked the same question and she said she assumes it was to do with her age. When asked why, she said because the documents mention age. **MC** added that all she could say was that they were not given everything that they were entitled to.

CB returns to work

97. On **14 April 2021 CB** returned to work on a phased return. **TW** conducted a return-to-work interview with her [**page 501**]. The first week was non-clinical. She was then to move on to general surgery for the next three weeks [**page 500]**. At the return-to-work meeting, **CB** mentioned her arthritis in her hands and that she did not want to work in ENT and ophthalmology because of the need to use small and fine instruments in those areas, which she said would be difficult for her to due to her arthritis. Although **TW** was aware that **CB** had arthritis from as far back as **2011**, this was the first time that **CB** had ever raised it as presenting a problem for her in theatre. There is a mix of large and finer equipment in all theatres, including general surgery and **CB** had never raised any issues regarding the use of finer equipment in all the time she worked there. Linda Watson advised **TW** that she would have to do a stress risk assessment and a musculoskeletal ('MSK') risk assessment. **TW** gave **CB** the stress risk assessment form to take away to complete her part and return it to **TW**, with the intention of catching up on Friday **16 April 2021**. **CB** was subsequently given a copy of the MSK risk assessment, as **CB** accepted in evidence. **TW** explained that after the phased return, they would want **CB** to work in ENT while being assessed so that they could understand what aspects of the work she struggled with. **CB** did not feel that she should be in ENT at all because of her arthritis, whereas **TW** wished her to be assessed whilst in ENT. The idea was that she was to be eased back into work, with support and with the assurance that she would be risk assessed while back in the working environment so that they could understand what adjustments, if any, were needed. What happened thereafter would be a matter for discussion following the risk assessment and input from occupational health. In the end, this assessment never happened as **CB** would not agree to being assessed 'on the job' so to speak.

98. By mid-**April 2021**, Felicity White had been nominated to conduct the grievance investigation and, by agreement with the trade union, it was agreed that **TW** (the main subject of the grievance) would step back during this period and that Linda Watson would manage **CB**. As **CB** described it in evidence, the baton was taken up by Linda Watson. In other words, Ms Watson was to manage the risk assessment process and manage **CB** until completion of the grievance process.

Direct management was then to revert back to **TW** after the grievance process was completed. **CB** completed her phased return to work and then moved to ENT.

Grievance Meeting

99. Felicity White met with **CB** and **MC** on **29 April 2021**. The Claimant's trade union representative, Gail Hodgson and Sue Williams, a Compliance Business Partner, joined via Microsoft Teams. This was the Claimants' opportunity to explain to Ms White what had happened and to discuss their grievances before she carried out further investigation. While discussing the move and the concept of future proofing, Ms White observed that her understanding of future-proofing, or succession planning, was that normally a manager would look at the skills required and the length of time to train and bring in new staff allowing existing staff to pass skills on. Ms White commented that Gail Hodgson's point that the exercise on **10 September 2020** did not appear to fit in with future proofing was a valid point. The Claimants have sought to capitalise on this comment by Ms White in these proceedings, contending that Ms White had accepted that the rationale of the B7 managers did not fit (or appear to fit) with future proofing the department. Ms White was cross examined about this. She said that she made that comment at the very outset based on what the Claimants were saying at the meeting but after interviews considered that the B7 managers gave her the justification and she concluded that they were in the best position to assess this. We find that, on **29 April 2021**, Ms White was doing no more than acknowledging the point that being made by Ms Hodgson and not accepting anything. It is important to understand that the Claimants' point was that there was no justification at all and that none had been given. After meeting with the Claimants, Ms White interviewed the following:

99.1 Steven Campbell,
99.2 Christine Lewis,
99.3 George Vickers,
99.4 Sarah Foster-Lovejoy,
99.5 Tracy Wainwright,
99.6 Jody Robinson,
99.7 Rhys Maybrey,
99.8 Jayne Forster-George,
99.9 Claire Atkinson,
99.10 Melanie Connelly,
99.11 Billie Hayes

100. Ms White did not interview everyone in the department. The Claimants say that her failure to interview Patrick Hamblin, Cathy Sloan and Donna Hamilton is a significant failing in her investigation. We do not agree. She interviewed sufficient people to understand and address the Claimants' grievances. Ms Sloan had been mentioned by **MC** at the **29 April 2021** meeting as being upset by having to move to ENT, and that she had been present at the meeting on **10 September 2020**. However, Ms White did not believe that she had been specifically asked to

interview her. The failure to interview Mr Hamblin was an oversight, which she subsequently acknowledged prior to the appeal. Had Mr Hamblin been interviewed he is unlikely to have altered anything in the Claimants' favour. On the contrary, from the evidence before the tribunal, which we found to be honest and balanced, he believed that the Claimants' behaviour at the meeting of **10 September 2020** was essentially the cause of the upset. The possibility of Donna Hamilton being interviewed was raised by the Claimants on **07 June 2021.** However, she was not at the meeting on **10 September** and it was considered outside the scope of the investigation. We can understand why that was as there would seem to be no apparent reason for interviewing her.

Occupational Health report

101. On **29 June 2021**, **CB** attended an occupational health assessment. OH advised an individual stress risk assessment be completed as well as an MSK risk assessment. The OH nurse, Laura Scott, was not able to say at that stage whether **CB's** condition would be affected by a change in the type of instruments handled. **CB** was given fresh copies of the risk assessment forms. **CB** did not return these forms to Linda Watson. In evidence to the tribunal, **CB** said that she completed what she could of the forms, that she kept them crumpled up in her bag, or in a locker, but she never got to sit down with Linda Watson to give them to her. We do not accept that evidence which we found to be disengenuous. In her interview with Felicity White on **29 April 2021**, **CB** referred to the stress risk assessment not being completed because it was not agreed. We infer that **CB** was reluctant to complete the form. What she did not agree with was the suggestion from **TW** that she work in ENT while the assessments were undertaken.

102. Felicity White met with the Claimants on **16 July 2021** to discuss the outcome of her investigation. The Claimants were accompanied, via Teams, by their trade union representative, Ms Hodgson. She outlined the key points of the investigation. An unchallenged summary of the discussion is set out in a letter sent to the Claimants by Ms White on **23 July 2021** [**pages 711 – 712**]. With that letter, she attached the annotated slides (the slides with notes) at pages **434-450.** Ms White [**pages 690-697**] did not uphold the formal grievances. She concluded that the Theatre Managers had outlined their rationale for the moves and that the reason for the changes were not related to age or part time status. On **page 697**, she concluded that '*this was not organisational change or a restructure but a realignment of Team Leaders to different specialties. The Team Leader roles are generic roles and it has been confirmed that this is something that has happened on a number of occasions in the past and is part of normal business*.'

103. A great deal has been said in these proceedings about the words 'realignment', 'restructure' and 'reorganisation'. Whatever the terminology, what matters is the substance, not the description of the situation. To the extent that the Claimants suggested that by moving them from General Surgery and linking teams the Respondent was undertaking a 'restructure' (requiring the full weight of consultation with trade unions in accordance with the policy at **pages 288 to 310**)

we reject this. To the extent that it is necessary for us to make a finding on it at this juncture, we find that the exercise of moving B6s from one specialty to another was nothing like a 'restructure' or an organisational change of a sort that would invoke application of that policy. Although the word 'realignment' had not been expressly used at the time to describe what was happening, and only came to be during the grievance investigation, it is a perfectly apt description of what was in substance being proposed. The move from general surgery was something that the Respondent was able to do within the Claimants' job description. Not only that, but it was a move within the same department, namely the Theatres department. The Claimants would be working in areas in respect of which they have both had experience albeit not for some time. Their skills were largely transferable from one area to the other albeit they would be provided with support to get them up to speed with anything peculiar to the specialty. There was no change to hours or terms and conditions of employment.

The Grievance report

104. Felicity White's report is the subject of a number of complaints by the Claimants. They say that she victimised them and engaged in age related harassment by the words she used and in the outcome she arrived at. We will address these complaints fully in our conclusions. We find that the Claimants were deeply dissatisfied with the outcome of the grievance. From listening to the Claimants in evidence and upon reviewing the evidence during our deliberations, we formed the strong impression that where the Claimants did not like or agree with an outcome, they attributed a discriminatory motivation to it. We were and always are alive to the notion that those who discriminate are unlikely to '*give the game away'* and that that some people may try and charm a tribunal, to lull it into a finding in their favour. However, that was not the case with Ms White, whom we found to be an impressive, measured and thoughtful witness. Even the Claimants regarded her as respectful and empathetic towards them during their interview – until that is, they saw her outcome, when their view of her changed. In her report, Ms White went through each question raised by the Claimants and responded to them one by one, starting on page **694**. She delivered a succinct conclusion from all the evidence that she had considered. It was not incumbent on her to refer to everything that she had read or heard.

105. She included a number of references to things that she had been told during interview and facts that she had found in the course of her investigation. She referred to the handout [**pages 691, 693 and 694**]. As far as we can see from the report, she addressed the handout proportionately and reasonably, putting it into context in relation to the events that unfolded on **10 September 2020** and recording that some of those interviewed recalled it but some did not, which was factually accurate. Ms White used the word 'jovial' [on **page 693**] to describe the manner in which some staff had referred to their age at the meeting on **10 September 2020.** Another way of saying this might have been 'light-hearted' but it amounts to the same thing and was simply her assessment of the evidence before her. Indeed, it is very close to this Tribunal's assessment. She referred to the

Claimants as disrupting the meeting on **10 September 2020** and how witnesses described their behaviours as unprofessional, disrespectful, confrontational and aggressive. Her finding was that the Claimants had disrupted the meeting and she alluded to how the Claimants' behaviour had been perceived. She referred to team leaders having often been moved in the past. She did so because that is how she genuinely understood the situation to be following her investigation. She referred to the experience of the Claimants in explaining the rationale for moving them. She did so because this is what she had been told and she believed what she had been told. Ms White mentioned that theatre managers had referred to concerns raised by **CB** and **MC** about 'overruns' in General Surgery and felt that moving to a smaller specialty where they don't have overruns would have been well received'. She mentioned this because that is what she had been told. The Claimants had raised concerns about overruns.

106. There had been an issue with regard to what are called 'overruns' in General Surgery (lists running over, with a knock-on effect on nurses who would end up working longer hours). The Claimants had raised this with **TW** as an issue in general surgery. This was a legitimate issue for them to have raised and they did so not just on their own behalf but on behalf of all the nurses who worked in General Surgery. Nevertheless, they had raised it. We are satisfied that this issue of overruns was not used as part of the justification for moving the Claimants. It was just that the Theatre managers believed that this was a benefit of working in a smaller specialty and **TW** raised it in interview as an additional benefit to the Claimants. It was no more than that. They considered it an additional benefit because the risk of overruns in those smaller specialties was and was known to be less than in general surgery. In any event, as far as Ms White is concerned, she was simply recording in her report what she had learned from her investigation.

107. Towards the end of her report, Ms White referred to matters which she stated as not being within the remit of her report [**page 697**], one of which was: *'inappropriate behaviours of MC and CB within the department. The General Manager will need to look into this*.' She mentioned this because of what had come out of the interviews of some of the witnesses. In evidence, she gave an example of a reference to **CB** supposedly moving names around on a white board. This came from the interview of Jayne Forster George [**page 666**]. In evidence before the Tribunal, Ms White acknowledged, however, that the General Manager, on reading this part of the report would not know what it was a reference to. She did not accept, as it was put to her by Ms Hogben, that she was 'raising the spectre of disciplinary proceedings'.

108. Ms White clearly saw that there were concerns on the part of Theatre managers and others that the attitudes and behaviours of the Claimants were challenging, whether that be right or wrong. It was clear to us as a tribunal that there were concerns regarding the Claimants' attitude to their colleagues. It would be remiss of a manager of Ms White's seniority not to pick up on these concerns and to rfail to refer to them. By saying that these were outside her remit, she was acting

properly and appropriately. We also find that it is better to highlight that this is something that needs to be looked at by the General Manager in this document, rather than going behind the Claimants' backs (so to speak) and setting it out in a document that they would not know about and had not seen. She was being transparent in raising it and reasonable in simply saying that it should be looked into. We do not accept that she was raising the spectre of disciplinary proceedings.

Appeal against Felicity White's decision

109. On **05 August 2021, CB** and **MC** submitted an appeal against the outcome of the stage 2 grievance decision [**pages 715 – 718**]. Malcolm Walker, Associate Director of Operations was appointed to hear the appeal. Among other things, the Claimants said that Felicity White should have interviewed Donna Hamilton because at her recent interview she was allegedly advised that '*it was a young person's game'*. There was no reference by the Claimants to what interview this was a reference to, or who had supposedly said this or how it related in any way to the allocation of B6 team leaders across the department.

110. When cross-examining Mr Walker Ms Hogben put it to him that he had interviewed Ms Hamilton and that he had said to her that '*it was a young person's game*'. He denied this. He said that as far as he could recall he did not interview Donna Hamilton. Ms Hogben, upon taking instructions, corrected this and suggested that he said this during feedback that he had given. However, he again denied this, adding that he would not give feedback if he did not interview someone. We accept Mr Walker's evidence that he did not say this. Further, it demonstrates the rather casual way in which the Claimants were prepared to level allegations against individuals without evidence. Had they believed at the time they submitted their appeal on **05 August 2021** that Mr Walker had said this to someone at a job interview, we have no doubt that they and their trade union representative would have objected to him hearing the appeal. Felicity White was right to conclude that Ms Hamilton had nothing to offer the investigation. Further, the Claimants had the facility to call a witness to the appeal hearing, something which their trade union representative could have advised upon if there was anything of substance for Ms Hamilton to contribute. They could also have called her as a witness in these proceedings but did not.

111. **CB** was absent on sick leave from **20 September 2021** to **08 December 2021.** She was again assessed by Occupational health on **28 September 2021**. Dr Leeds advised that **CB** had identified specific difficulty in carrying out some elements of her role where fine dexterity is required. The doctor referred to ongoing Trust processes and recommended that, on return to work, the Respondent re-examine tasks with consideration to accommodating duties that are able to support management of ongoing symptoms.

112. The stage 3 appeal hearing took place on **15 October 2021** during **CB's** period of sick leave. Before reading any of the documents, Mr Walker was wholly unaware

of the issues and allegations. The Claimants were represented by Ms Hodgson. Ms White attended to speak to her conclusions and to be asked questions. The hearing took the best part of the day, starting at 09.35am and finishing at 3.45pm. That included about an hour and a half deliberation time. Notes of the appeal hearing were available at **pages 780 – 787**. In advance of the appeal, the Claimants, with the assistance of their trade union representative, sent a comprehensive and substantial statement of case [**pages 742 – 771**] which Mr Walker read alongside all the other documents that had been sent to him. In their statement of case, the Claimants acknowledged that their behaviour at the **10 September 2020** meeting may have been disruptive and apologised for any distress, albeit they advanced as mitigation that they were singled out, discriminated against, humiliated and treated unfavourably.

113. The Tribunal was impressed by the evidence from Mr Walker. Like Ms White, he came across as balanced and measured. Having read the papers prior to the appeal, he was aware that in the grievance documents the Claimants were raising matters under the Equality Act and regarding part-time worker status. However, he did not know, until after the conclusion of the appeal, that the Claimants had commenced employment tribunal proceedings. Ms Hogben put to Mr Walker that he was never going to allow the appeal and that his assessment was cursory. We disagree. He spent a day reading the material before the appeal hearing. Having read the appeal notes, it does not warrant the characterisation of cursory. We find that he conscientiously considered the points of appeal. He did not uphold the appeal but recognised that the way that message of realignment had been delivered on **10 September 2020** had resulted in distress to the claimants and said that he would make recommendations to theatre management as to how such messages could be delivered in future. He spoke to the Claimants at the end of the appeal hearing on **15 October 2021** to inform them of the outcome of the outcome, which was then confirmed in writing on **21 October 2021** [**page 788-795**].

Grievance against Rhys Maybrey

114. On **26 October 2021**, some five days after receipt of the written appeal outcome of Mr Walker, **CB** and **MC** submitted an informal joint grievance against Rhys Maybrey. This was a complaint about a breach of confidentiality. **CB** and **MC** attached a statement from Christine Lewis regarding a conversation that was said to have taken place in the main theatre corridor between Rhys and Karen Young. The statement [**page 798**] was dated **27 July 2021** and was about a snippet of a conversation she had overheard on **19 July 2021** between Rhys Maybrey and someone else, who was not identified. The statement mentioned that Karen Young, a B5 nurse, was stood nearby. All that Ms Lewis purports to have heard was Mr Maybrey saying '*it had been a difficult year'*, that he mentioned a meeting the week before and that '*the case had been thrown out'*. From this, and because of her own knowledge of the Claimants' grievances, she took this to be a reference to **CB** and **MC**.

115. The Claimants accepted that they had been in possession of this statement from Ms Lewis for 3 months. When **CB** was asked by the tribunal why she had waited for so long before submitting it, **CB** said she thinks they were awaiting the outcome of the appeal. We infer that when the appeal did not go in their favour, the Claimants decided to present this as a grievance. Nevertheless, it was a grievance and grievances are to be addressed by employers.

Further grievance against TW

116. On **27 October 2021 CB** submitted a grievance against **TW [page 800]**. One of the things she complained of in that grievance, was that **TW** had not completed the MSK and stress risk assessments. However, as we have set out above, **TW** had given the forms to **CB** back in April for her to compete her part, but she never returned them. She then received fresh ones in June from Linda Watson and did not return those to Ms Watson. It is difficult to understand why **CB** raised a grievance against **TW** in these circumstances, other than due to a sense of animus on **CB's** part. From **June 2021** Linda Watson was responsible for the risk assessment processes during the period of the grievance process, which had just completed on **21 October 2021**. In any event – whether **TW** or Linda Watson – **CB** had not in fact done what she had been asked to do with the forms by the time she submitted this further grievance, despite being chased by Linda Watson. We infer that this grievance was submitted by **CB** for strategic reasons, to further frustrate any intended move to ENT.

117. The other matter raised in this grievance was that **TW** had not taken into consideration **CB's** concern regarding the arthritis in her hands, which **CB** said had been exacerbated since she moved to ENT following her return to work in **April 2021**.

118. On **26 October 2021**, Linda Watson acknowledged the joint grievance. She asked if the claimants wished to arrange a meeting to discuss or whether they were happy for her to speak to Chris Lewis and Rhys Mayberry **[page 799]**. They said that they were happy for her to approach Ms Lewis and Mr Maybrey.

119. On **02 November 2021**, Linda Watson received some initial advice from HR regarding these informal grievances [**page 803]**. Lee Preston advised: "*What I will need is for you to go back to Carole and ask her to complete Part 1 of the informal resolution form with more narrative to back it up and what is the desired outcome for you to make a decision"*. Mr Preston attached the informal resolution form at **page 803-805**.

120. On **05 November 2021**, Ms Watson spoke to **CB** regarding her grievance of **27 October 2021** regarding **TW** and the joint grievance with **MC** of **26 October 2021** regarding Rhys Maybrey. **CB** agreed that her grievance against **TW** could be discussed after the forthcoming welfare review meeting. On **10 November 2021**, Ms Watson then wrote to **TW** with a 'points of discussion 'letter regarding the

meeting. [**pages 815-816**]. It was agreed that they would discuss the **27 October** grievance after the welfare meeting arranged for **18 November 2021**.

121. The welfare meeting on **18 November 2021** went ahead [**page 812-813**]. However, Ms Watson did not raise the grievance with **CB** or **MC** after that meeting. Ms Watson forwarded the points of discussion letter **pages 815-816**] to Lee Preston of HR on **26 November 2021**, asking for some advice on the way forward [**page 827**]. In relation to the Rhys Maybrey grievance, Mr Preston advised that the way forward would be to get '*the apology issued whilst also reiterating to the staff members that no conversation should be made in relation to any HR process that is currently ongoing and is to remain confidential at all times'* [**page 828**]. Mr Preston advised that he is there to advise but that it is the line manager's or equivalent responsibility. He felt that the matter regarding Rhys Maybrey could be dealt with informally by an apology or at a roundtable meeting, without the need to progress to a formal grievance stage [**page 826**]. Mr Preston then met with Ms Watson on **29 November 2021 [page 821]**. He suggested that they meet with Jody Robinson and **TW** to '*bottom out the issues'* before **CB's** return to work.

122. Ms Watson spoke to Mr Maybrey on or about **30 November 2021**. This was almost a month after HR advice that the 'corridor' grievance 'would fall to be classed out of time' and that it was in her discretion whether to take forward **[page 802]**, We find that to be a reference to the grievance policy **[page 276]**. Ms Watson described this as 'a difficult conversation with Rhys Maybrey'. This conversation was, we find, prompted by Lee Preston's advice the day before. Ms Watson emailed HR to say that he could not recall the conversation, that she was aware of the depth of feeling and would welcome a meeting to discuss it. Ms Watson did not receive any advice back from HR, at least none that we have seen.

123. On **10 December 2021**, Gail Hodgson emailed Watson expressing concern that still nothing had happened with regards to the October grievances [**page 845**]. She was asked to confirm receipt. Ms Watson did confirm receipt but provided no update. That was despite having spoken to Mr Maybrey on **30 November 2021** [**page 820**]. Ms Watson never thereafter provided the Claimants or Ms Hodgson with any update on the progression of the grievances. She did take any further action in respect of **CB's** or **MC's** informal grievances. We have not seen any further advice from HR regarding the informal grievances. Ms Watson, in her evidence said that she understood that HR were dealing with grievances. However, we do not accept that evidence. The emails from HR clearly set out what was expected of her and that it was her responsibility.

124. Ms Watson spoke to Ms Lewis briefly and not until **January 2021**. She followed up in an email dated **31 January 2022**, where she asked her to confirm their discussion [**page 876**]. In evidence, she said that she spoke to Ms Lewis in January to 'close a loop'. She asked to speak to HR to discuss how to write the response to the informal grievances as she was very keen to get it right before sending out the responses. This was more than 3 months after Ms Watson had received the

grievance and was after **CB** had submitted her resignation. We have not seen any response to that email from Ms Lewis. Ms Watson did not speak to Karen Young. She said this was because Ms Young was off on long term sick and not due back until **January** or **February 2022**. Ms Young may have been but we did not accept that this was the reason for Ms Watson's failure to speak to her. We considered her evidence to be weak in this respect.

125. The Respondent's grievance policy refers to a grievance as a '*cause for concern*'. At stage one (the informal stage) the policy requires the employee to complete the first part of the Informal Resolution Form. That is the form at **pages 396-398**. The Claimants had not completed this form, but neither had they done so when submitting their informal grievance back in **September 2020** following the meeting of **10 September 2020**. More importantly, the policy requires the manager to meet with the employee, clarify the issues and establish the desired outcome and agree a strategy and action plan to resolve the situation [**page 273**] None of this was done in respect of the **October 2021** grievances, unlike the situation with the **September 2020** informal grievance.

Welfare Review Meeting 18 November 2021

126. On **18 November 2021**, **CB**, accompanied by Gail Hodgson, met with Linda Watson for a sickness absence/welfare review meeting in anticipation of her imminent return to work (her most recent fit note being due to expire on **22 November 2021**). **CB** said at the meeting she did not want to return to ENT lists. Ms Watson provided a further copy of the stress risk and MSK risk assessment forms for **CB** to take away and complete the employee part in time for her return to work and said that she would have to be risk assessed in all areas she could be required to work. She explained that this was because they would need to establish and understand where **CB's** limitations were with regards to her arthritis in her hands. The discussion was confirmed in writing to **CB** in an email dated **26 November 2021** along with the phased return to work plan commencing week beginning **06 December 2021** [**pages 812-813**] noting that **CB** would move around the specialties at DMH to facilitate the MSK risk assessment. The plan was subsequently amended to accommodate a return-to-work date of **08 December 2021** [**pages 830-831**]. Again, as with the phased return to work in **April 2021, CB** was to be eased back into work, with support and with the assurance that she would be risk assessed while back in the working environment. What happened thereafter would be a matter for discussion following the risk assessment and input from occupational health.

Uno's Restaurant, Darlington

127. On **26 November 2021**, some staff attended a restaurant called Uno's, in Darlington. Present were **MC** and her husband as well as **CB**, along with a couple of B2 Healthcare Assistants and a couple of B5 nurses, one of which was Sophie Raiseborough, a scrub nurse. This event was to become the subject of a grievance submitted against the Claimants on **10 January 2022**.

128. In or about early **December 2021**, a group of staff were travelling to London by train. This included Claire Atkinson and Sophie Raiseborough. She mentioned to Ms Atkinson that she had been at the meal at Uno's. She told Ms Atkinson that the Claimants had been talking about her and about their treatment at work by the theatre managers. Ms Atkinson then raised it with **TW** and Linda Watson.

Queries regarding CB's return to work plan and the informal grievances from CB and MC

129. On **07 December 2021**, Gail Hodgson wrote with some observations regarding CB's return to work plan [**page 838**]. The plan said that in respect of week commencing **03 January 2022** *"Lists to be confirmed via theatre scheduling. Consider Ophth, ortho 1 x AD, 1 x 6 hr shift*". Ms Hodgson and **CB** asked for orthopaedics to be avoided, due to the use of heavy equipment until the MSK assessment had been reviewed. She also asked for ophthalmology to be avoided due to the use of finer equipment which, if there is an eye emergency, she may struggle to hold equipment for long periods.

Return to work interview with CB: 08 December 2021

130. On **08 December 2021**, Linda Watson met with **CB** and had a full discussion about the return-to-work plan. **CB** had still not completed her part of the stress or MSK risk assessments. Ms Watson said she could arrange time for her to complete them during the working day. There was a discussion about the nature of the MSK risk assessment and the nature of the procedures and equipment in various theatres. Ms Watson said that the phased return would be reviewed regularly and that the risk assessment would be completed when the initial part had been completed by **CB**. A comprehensive note of what was discussed, which we find to be accurate reflection of the discussion, is at [**pages 849-851**]. We find that **CB** believed that she was being set up to fail by being risk assessed in specialties that she could be required to work in. She did not wish to be risk assessed in orthopaedics or ophthalmology and if any were to be carried out at all, she would not agree to them being done 'on the job'. At the end of the return to work meeting, Ms Watson told CB that she wanted her to be aware of 'increased chatter' within the department. Ms Watson did not reveal what this was about but added that she was raising it as a courtesy to **CB** and that she would seek to ensure that all inappropriate chatter was stopped.

131. Shortly after leaving the meeting with Linda Watson, she passed Sophie Raiseborough in the corridor. In a statement subsequently prepared by Ms Raiseborough, she alleged that **CB** asked her for a word and took her into the pharmacy cupboard. She alleged that **CB** asked '*do you know who has been shit talking*?' referring to the meal at Uno's. She said in the statement that she found this to be intimidating, so she told **TW** about it. She also said that later in the day, **CB** came and apologised for the way she had spoken to her.

132. In cross examination, **CB** accepted that she had passed Sophie Raiseborough in the corridor and that she asked to have a word with her and that they went to the pharmacy storage room. She said that she told Ms Raiseborough that Matron (Linda Watson) had brought up the fact that there had been gossip and asked whether she had said anything to her. **CB** said that Ms Raiseborough did not want to discuss it with her, so she pressed her more than once. She accepted that she had perhaps upset Ms Raiseborough and that she went back to her later to apologise. However, she denied using the phrase 'shit talking' and attributed her only knowledge of this phrase to Linda Watson, when during a telephone conversation on **07 April 2022** Ms Watson had said 'someone had been shite talking' and that Ms Watson had mentioned Sophie Raiseborough in this context. **CB** referred to the email from Linda Watson at **page 908**. We find that it is more likely than not that **CB** did ask Sophie Raiseborough 'who had been shit talking?' and that she knew she had overstepped the mark in the way she spoke to her, which is why she returned later in the day to apologise to her.

133. Ms Hodgson emailed Linda Watson on **10 December 2021**, asking for a further meeting to discuss the return-to-work plan citing patient safety and safety to **CB** as the prime concern [**page 843**]. On the same day, Ms Hodgson also emailed Linda Watson for an update regarding the two informal grievances since Ms Watson's discussion with **CB** on **05 November 2021** [**page 844**]. On **24 December 2021**, Linda Watson informed **TW** that she was meeting with **CB** again on **06 January 2022** to discuss orthopaedics and ophthalmology so it would be better to avoid those areas in the meantime [**page 853**].

134. On or shortly after **13 December 2021, TW** obtained a statement from Sophie Raiseborough referring to the night out at Uno's and the discussion with **CB** on **08 December 2021** in the pharmacy cupboard. Later that month, **TW**, Rhys Maybrey, Jody Robinson and Claire Atkinson then met with their trade union representative to discuss submitting a grievance. That is the document at **pages 865-868**. The submission of the grievance was delayed until **10 January 2022** [**page 864**] because it was approaching Christmas which is and was a very busy time for them and they did not get around to sending the grievance until pressure eased off in the new year. Ms Atkinson, **TW** and the other two managers believed that action had to be taken against the Claimants as, if what Ms Raiseborough said was correct, they believed that the Claimants had been publicly undermining them in front of colleagues and junior staff. This was, for them, the icing on the cake. **TW** and her theatre manager colleagues had already been finding it difficult to manage **CB** and **MC** and rather than lodge a grievance at the informal stage they wished the matter to be taken up formally. When they submitted the grievance they attached the statement from Sophie Raiseborough. This statement [**page 868a**] was only disclosed during the course of the tribunal hearing, after the Tribunal Judge queried the reference to the words 'statement from Sophie Raiseborough attached', on **page 866**.

Meeting of 06 January 2022

135. On **06 January 2022**, Linda Watson met with **CB** and Gail Hodgson. It was a difficult meeting. The upshot was that **CB** would not agree to being risk assessed in a number of specialties and would not agree to it being done on the job. She and Ms Hodgson cited patient safety and safety to **CB** as being the only reason they would not agree to this. This was the position that they had adopted at the return-to-work meeting on **08 December 2021**. Linda Watson explained on **06 January** what she had previously explained on 08 December, namely that she needed to perform a risk assessment for each specialty to understand **CB's** limitations and to determine what, if any controls needed to be introduced. **CB** had said that there was a risk that she could drop instruments or equipment and asked Linda Watson if she was going to take responsibility for that, which would pose a safety concern to her or a patient. Ms Watson disagreed that there was a safety risk, that she had a responsibility as a nurse to ensure that she was fit and able to carry out tasks safely.

136. During her evidence to the Tribunal, Gail Hodgson, herself an experienced nurse, accepted that if an experienced nurse, such as an experienced B6 or a B7 or the matron, were present undertaking the risk assessment, this would take away any concern regarding risk to safety to patient or to **CB**. If **CB** happened to struggle to hold a piece of equipment either at all, or for any length of time, that would be obvious, and the experienced nurse would take over. Indeed, **CB** has a professional duty to the patient to say, as regards any piece of equipment, that she was fine handling it or that she was struggling handling it. As a tribunal, we struggled to understand how **CB** and/or Ms Hodgson could have thought the risk assessment would be carried out in the absence of an experienced nurse being present. It was always going to be either Linda Watson or a B7 manager – indeed Ms Watson had explained at the meeting on **08 December 2021** that she would be doing the assessment [**page 850**].

137. We accept Linda Watson's description of the meeting of **06 January** over that given by **CB** and Gail Hodgson. We can understand why Ms Watson found it to be a difficult meeting because her request to have **CB** risk assessed in theatre (as opposed to being risk assessed in some sterile or more abstract way) was a reasonable request yet it was met with refusal. She had tried to get **CB** to understand why it had to be done in the live environment – so that they could see what support she would need in each theatre. We do not accept that, on **06 January 2022**, Ms Watson was dismissive of **CB's** suggestions or that she behaved unreasonably towards **CB**. She, as did others, found **CB** difficult to manage and she did not agree with the rigid stance she and her trade union representative were taking but it was no more than that. We find that where **CB** refers to her being dismissive, it was no more than disagreement, and reasonable disagreement at that. Even if the way in which **CB** had been asking to be assessed (which was unclear but may have been like a simulation of a theatre environment for the risk assessment) was not unreasonable, the management view that it be

done in the live environment with support was equally perfectly reasonable in the circumstances.

138. Ms Watson felt frustrated by **CB** and Ms Hodgson's resistance. She was, essentially, met with a refusal to comply with her request for the risk assessment to be done as she suggested. In Ms Hogben's cross-examination of Ms Watson on this, what came across clearly to the tribunal was that **CB** had a sense of indignation at being directed by the matron to have the risk assessments undertaken in each theatre she would be working in and as an on-the-job assessment. Thus, Ms Hogben put to Ms Watson that she had no right to 'insist' to **CB** that she undertake the risk assessment in this way. We find that **CB** was of the view that the Matron did not have the right to insist on her doing this and that, therefore, she would not agree to it. We found this a surprising position for the Claimant to adopt. We are satisfied that it was perfectly proper for Ms Watson to insist on conducting the risk assessments in the way she suggested. However, at no point did she use the word 'insist'. She tried to explain the rationale but to no avail. She could have insisted that **CB's** risk assessment be undertaken in theatre, as opposed to discussing it with a view to getting her agreement and could have been more direct than she was with **CB**. But that was not her managerial style. She would also have known, in our judgement, that **CB** would react badly to being directed. This was all part of the difficulties managers had in managing **CB**. Her steadfast resistance to being assessed as Ms Watson required was consistent with our earlier finding that she did not and would not agree to move from general surgery. Underlying **CB's** refusal was her mindset that she fundamentally disagreed with the move out of General Surgery.

139. On the same day, **06 January 2022**, shortly after the meeting, Gail Hodgson emailed Linda Watson regarding the informal grievances raised back on **26 and 27 October 2022** and asked if Ms Watson could advise of timescales for resolving them.

CB's resignation

(1) Email of 06 January 2022

140. Late in the evening of **06 January 2022**, at 23.32, **CB** emailed Linda Watson regarding the meeting earlier that morning [**page 859**]. **CB** said that Ms Watson treated her with utter disdain and was obstructive towards every suggestion that would help her to return to her job with adjustments. She said that she felt utterly distraught by the meeting and could not return to her job in theatre and that she offered no support or understanding of how the whole process had affected her. **CB** ended by saying that she had left her with no choice but to leave her post. We find that the cause of **CB's** ultimate resignation was threefold:

140.1 The decision to move her from general surgery to ENT/Ophthalmology;

140.2 The realisation that her risk assessment would be done "on the job" and not in the way she and her trade union representative asked for;

140.3 Her perception, following the meeting on **06 January 2022**, that Linda Watson was setting her up to fail and not supporting her.

141. We infer that the reason **CB** was so concerned to avoid being assessed on the job, was that this might not result in her being moved from ENT/Ophthalmology back to General Surgery and that the most that would happen would be for some adjustments to be made to her work in the smaller specialties. We do not accept, as **CB** alleged, that at the outset of the meeting on **06 January 2022**, Ms Watson told **CB** to stand at the board or that she ordered her to change her clothes. She merely mentioned that she could change her clothes as she had been wearing her outdoors clothes when she came into the room and stood near to the board. We reject the notion that **CB** was treated with utter disdain. All that Linda Watson was trying to achieve at that meeting was to make progress on a reasonable management request with regards MSK risk assessments and to implement **CB's** return to work from sick leave successfully.

142. On **09 January 2022,** Andrew Rayner, Associate Director of Nursing, wrote to **CB** asking if she would like to meet with him as he would not want her to resign in haste. He said he wanted to work out a solution to keep her with the Trust as they would not like to lose her. Mr Rayner and **CB** met for a coffee on Thursday **13 January 2022**. Mr Rayner said he would look at some possible alternative positions that might be of interest to her. On **19 January 2022**, he emailed her those options [**page 916**]. As he had not heard back from **CB**, he emailed her again on **24 January 2022** asking if she had any thoughts on the suggestions. She said she had left a message after his call regarding a preceptorship role. However. Later that afternoon **CB** emailed her letter of resignation.

143. **CB** said in re-examination that the reference in her witness statement at paragraph 61 to Mr Rayner saying he would look into things and get back to her was a reference to him looking into why the October grievances had not been progressed. We found that contradictory of earlier evidence in cross-examination where **CB** said that the very same wording in paragraph 61 was badly phrased, that it was a reference to him looking into alternative posts; that what she meant was that he did not get back to her telephone message, but that he did then get back to her by email. She accepted that Mr Rayner had tried to preserve the relationship.

144. We do not accept that the October grievances were raised by **CB** with Mr Rayner when they met on **13 January 2022** or that he told her he would look into why they had not been progressed. There was no mention of them in **CB's** first email of **06 January 2022**.

(2) Formal resignation of 24 January 2022

145. On **24 January 2022, CB** emailed Lesley Smedley attaching a notice of resignation letter addressed to Linda Watson with a termination date of **31 March 2022 [page 871].** Although one of the things referred to in that letter is that the informal grievances of 26 and 27 October 2021 had not been addressed, we find that these did not form part of **CB's** reason for leaving. She made her decision on **06 January 2022** and it was entirely because of the events of **10 September 2021**, her move from general surgery and what she regarded as Linda Watson's insistence to risk assess her in theatre. The reference to the October grievances in the resignation letter was, we find, an afterthought and referred to for the purposes of pursuing a constructive dismissal complaint as opposed to it being a genuine or effective cause of her resignation.

Grievance from B7 theatre managers and Claire Atkinson

146. On **10 January 2021**, **TW**, Rhys Maybrey, Jody Robinson and Claire Atkinson submitted their formal grievance against **CB** and **MC** [**pages 891-894**]. The grievance was largely about the meal of **26 November 2021**, at which **CB** and **MC** were alleged to be talking openly about the theatre managers' treatment of them and that they were taking the theatre management to court. It also mentioned the incident with Sophie Raiseborough on **08 December 2021**. Linda Watson forwarded the grievance to Tracy Atkinson, a Business Manager in HR [**page 864**]. She expected HR to handle the grievance as it had been submitted as a formal grievance.

147. As set out above, the statement of Sophie Raiseborough which was referred to in the grievance as 'attached' had not been disclosed by the Respondent until the Employment Judge asked about it during these proceedings. This formed the basis of one of the applications to amend the claims in that there had been a failure to progress the allegations and a failure promptly to dismiss those allegations (see paragraph 11 above).

148. On **03 February 2022**, **MC** and **CB** raised a formal grievance regarding the matters raised in their informal grievance of **26 October 2022** [**page 895**]. On **06 February 2022**, **CB** raised a formal grievance against **TW** and Linda Watson regarding the matters raised against **TW** in **CB's** informal grievance of **27 October 2021** [**page 896**]. Subsequently, and certainly by late **March 2022**, the Respondent had decided to commission an external investigator to investigate the Claimants' grievances of **October 2021** as well as the B7 managers' grievance of **10 January 2022**. They appointed Mr Terry Smith, a workplace investigator from an organisation called Workforce One. On **30 March 20**21, Mr Smith wrote to **CB** [**page 901-902**]. He mentioned only **CB's** grievance regarding Rhys Maybrey and the alleged breach of confidence and no other grievance. We have seen no similar letter to **MC**.

149. Following an email from Mr Hilary of HR on **31 March 2021**, [**page 904**], Linda Watson spoke to **MC** and **CB** on **07 April 2022** to make them aware for the first time about the formal grievance which had been submitted by the B7 managers and Claire Atkinson on **10 January 2022 [page 908]**. Following this, on **14 April 2022**, Mr Smith emailed **CB** to inform her that he had been appointed by the Respondent to investigate the formal complaint in **February** regarding breach of confidentiality (the Rhys Maybrey complaint) [**page 912-914**]. This email did not add much to the earlier letter of **30 March**.

150. As at the end of this hearing neither of the grievances first raised in **October 2021** has been heard, nor had the grievance raised by the B7 managers/Ms Atkinson in **January 2022** and which was made known to the Claimants on **07 April 2022**.

Relevant Law

Discrimination, victimisation, harassment

151. Section 39(2) Equality Act 2010 provides that an employer ('A') **must not discriminate** against an employee of A's ('B')

1.1.1. as to B's terms of employment,
1.1.2. in the way A affords B access, or by not affording access to, opportunities for promotion, transfer or training or for receiving any other benefit, facility or service,
1.1.3. by dismissing B,
1.1.4. by subjecting B to any other detriment.

152. Section 39(4) provides that A **must not victimise** B and is drafted in the same terms as section 39(4).

153. Section 40(1)(a) EqA 2010 provides that **an employer 'A' must not**, in relation to employment by 'A' **harass a person, 'B'** who is an employee of A's.

154. These three proscribed acts of discrimination, victimisation and harassment are then defined in other provisions, including section 13 (direct discrimination), section 26 (harassment) and section 27 (victimisation).

Direct discrimination – section 13 Equality Act 2010

155. Section 13 provides as follows:

(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.

156. To be treated less favourably implies some element of comparison. The complainant must have been treated differently to a comparator or comparators,

be they actual or hypothetical, who do not share the relevant protected characteristic. For the comparison to work, cases of the complainant and comparator must be such that there is no material difference between the circumstances relating to each case: section 23 Equality Act 2010.

157. The employment tribunal only has jurisdiction to consider and rule upon the act or acts of which complaint is made to it. If the claimant fails to prove that act of which complaint is made occurred, that is the end of the case. In some cases, there will be a conflict of direct oral evidence. The tribunal will have to decide who to believe. If it does not believe the claimant and his witnesses, the claimant has failed to discharge the burden of proving the act complained of and the case will fail at that point.: **Qureshi v Victoria University of Manchester** [2001] I.C.R. 863, EAT @ 852; **Chapman v Simon** [1994] IRLR 124, CA.

158. It is for a claimant to show that the comparator has been or would have been treated more favourably. In so doing the Claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal will, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of *'diminishing any eloquence the cumulative effects of the primary facts*' might have on the issue of the prohibited ground: ***Anya v University of Oxford*** [2001] I.C.R 847. The tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference.

159. When considering whether less favourable treatment was 'because of' or 'on grounds of' a protected characteristic, the question is whether it was an effective cause of the treatment, not whether it was the main or primary cause. In **Nagarajan v London Regional Transport** [1999] I.C.R. 877, the House of Lords confirmed that where a protected characteristic has had a 'significant influence on the outcome, discrimination is made out'. Tribunals should look beyond the superficial reason given by an employer for less favourable treatment. What cases like **King v Great Britain-China Centre** [1992] I.C.R. 516, CA and **Qureshi** tell tribunals and courts to look for, in order to give effect to the legislation, are indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by [racial bias]: **Anya v University of Oxford** [2001] ICR, CA @ para 11, per Sedley LJ. A Respondent will not be able to escape liability by showing an absence of intention to discriminate.

Harassment – section 26 Equality Act 2010

160. Section 26 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.
>
> (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.

161. The unwanted conduct must be related to the protected characteristic. The intention of those engaged in the unwanted conduct is not a determinative factor although it may be part of the overall objective assessment which a tribunal must undertake. It is not enough that the alleged perpetrator has acted or failed to act in the way complained of. There must be something in the conduct of the perpetrator that is related to the protected characteristic. This is wider than the phrase 'because of' used elsewhere in the legislation and requires a broader inquiry, but the necessary relationship between the conduct complained of and the protected characteristic is not established simply by the fact that the Claimant is of a particular characteristic and that the conduct has the proscribed effect.

162. Unwanted conduct is just that: conduct which is not wanted or 'welcomed' or 'invited' by the complainant (see ECHR Code of Practice on Employment, paragraph 7.8). This does not mean that express objection must be made to the conduct before it can be said to be unwanted. The Tribunal must be alive to the very real possibility that a person's circumstances may be such that they feel constrained by certain pressures whether in their personal life or in work which explains a failure to object (expressly or impliedly) to what they now say, in the course of litigation, was objectionable and unwanted conduct. Clearly, conduct by A which is by any standards, or self-evidently, offensive will almost automatically be regarded as unwanted.

163. In **Grant v HM Land Registry** [2011] IRLR 848, CA, it was held by Elias LJ (para 47) that the words 'intimidating, hostile, degrading, humiliating or offensive

environment' should not be cheapened as they are an important control to prevent trivial acts causing upset being caught by the concept of harassment.

Victimisation – section 27 Equality Act 2010

164. Section 27 provides:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because
> (2) 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
>
> (3) 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.

Protected acts

165. When considering whether a complainant has done a protected act, a wide interpretation should be given to the words of section 27(2)(b) and (c). An express reference by a complainant to the Equality act is not required. A complainant may allege that things have been done but not say that those things are contrary to the Equality Act. So long as the context is made clear, this may amount to a protected act: **Durrani v London Borough of Ealing** [2013] UKEAT/0454/2013; **Waters v Metropolitan Police Commissioner** [1997] ICR 1073. There must, then, be something sufficient about the complaint to show that it is a complaint that is, at least potentially, a complaint to which the Act applies. Whether an employee has done a protected act is a question of fact which will vary from case to case, depending on the circumstances and context, which (despite any reference to race) may make it plain that the employee has made a complaint in respect of which he or she can be victimised.

Detriment

166. When considering whether an employee has been subjected to a 'detriment' Tribunals should take their steer from the judgement of the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337, where it was held that a detriment exists *'if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment*'. It was further held in that case that 'an unjustified sense of grievance cannot amount to 'detriment'. An unjustified sense of grievance might arise where a

claimant considers himself or herself aggrieved but objectively considered there are no reasonable grounds for so thinking. Therefore, the concept of 'detriment' is broad and must be judged from the viewpoint of the worker, albeit the test is not wholly subjective.

167. In complaints of victimisation, the detriment must be because of the protected act. It is common to refer to this underlying issue as the "reason why" issue'. Therefore, if the employee has been subjected to a detriment, the question for an employment tribunal will be 'why?'. In cases where the reason is not immediately apparent, it is necessary to explore the mental processes, conscious or unconscious, of the alleged discriminator to discover what facts operated on their mind. In considering whether the necessary link has been established, it is enough that the protected act had a significant influence on the perpetrator's acts. Therefore, the protected act need not be the only reason for the treatment provided it is 'a' cause.

168. In complaints of direct discrimination, the less favourable treatment must be 'because' of the protected characteristic. In complaints of victimisation, the detriment must be because of the protected act. If an employee, who has done a protected act has been subjected to a detriment, the question for the employment tribunal will be 'why?' As in cases of discrimination, where the reason for is not immediately apparent, it is necessary to explore the mental processes, conscious or unconscious, of the alleged perpetrator to discover whether the protected act operated on their mind. In considering whether the necessary link has been established, it is enough that the protected act had a significant influence on the perpetrator's acts. Therefore, the protected act need not be the only reason for the treatment provided it is 'a' cause.

Burden of proof

169. Section 136 Equality Act 2010 provides that:

> (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

170. This lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.

171. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had treated B less favourably or had victimised B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that it did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA. If a Tribunal is satisfied that the reason given by the employer for the treatment is genuine and that it does not disclose conscious or unconscious racial discrimination that is the end of the matter.

Section 123 Equality Act: time

172. This section provides as follows:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of:
(a) The period of 3 months starting with the date of the act to which the complaint relates, or
(b) Such other period as the employment tribunal thinks just and equitable.

(2) …

(3) For the purposes of this section –
(a) Conduct extending over a period is to be treated as done at the end of the period;
(b) Failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
(c) When P does an act inconsistent with doing it, or
(d) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

173. Where there is a series of distinct acts, the time limit begins to run when each act is completed. If there is continuing discrimination, time only begins to run when the last act is completed. There is a distinction to be drawn between a continuing act and an act that has continuing consequences. For example, an employer operates a discriminatory regime or rule or practice then this will normally amount to an act extending over a period. However, where this is not the case, an act that affects an employee will not necessarily be treated as continuing simply because

it has ramifications which continue over a period of time. In **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548, the Court of Appeal confirmed that the correct test in determining whether there is a continuing act of discrimination is that set out in **Commissioner of Police of the Metropolis v Hendricks** [2003] I.C.R. 530. The employment tribunal must look at the substance of the complaint as opposed to the existence of a policy or regime, which is merely an example of a continuing act.

174. It can be difficult to determine whether an act is a continuing act. It is more difficult when the complaint is that there has been a continuing omission. Section 123(3)(b) and (4) EqA assist in determining when time starts to run in cases involving alleged discriminatory omissions.

175. The three month time limit section 123(1)(a) is not absolute. An employment tribunal has discretion to extend the time limit for presenting a complaint where it thinks it just and equitable to do so. Although this is a broader discretion than is the case in unfair dismissal claims, it is not without limits. In **Roberson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 (@ para 25), the Court of Appeal stated:

> *"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

176. There is no requirement for exceptional circumstances to exist before time may be extended, simply that it must be just and equitable to do so. In exercising the discretion, tribunals may have regard to the checklist in section 33 of the Limitation Act 1980, as modified by the EAT in **British Coal Corporation v Keeble and others** [1997] IRLR 335. This requires the tribunal to consider the prejudice to each party and to have regard to all the circumstances, including the length of and reason for the delay, the extent to which the cogency of evidence is likely to be affected by the delay. There are other factors in addition to these and their relevance depends on the facts of each individual case. A tribunal need not consider all the factors in every case: **Department of Constitutional Affairs v Jones** [2008] IRLR 128, CA. However, it must not leave a significant factor out of account. The balance of prejudice and the potential merits or demerits of the claim are relevant considerations which must be weighed in the balance before reaching a conclusion on whether to extend time: **Rathakrishnan v Pizza Express(Restaurants) Ltd** [2016] I.C.R. 283, EAT.

Constructive dismissal

177. Section 95 Employment Rights Act ('ERA') defines the circumstances in which an employee is dismissed for the purposes of the right not to be unfairly dismissed under section 94. Section 95(1)(c) provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is **entitled** to terminate it without notice by reason of the employer's conduct. This is known as 'constructive dismissal'.

178. The word 'entitled' in the definition of constructive dismissal means 'entitled according to the law of contract.' Accordingly, the 'conduct' must be conduct amounting to a repudiatory breach of contract, that is conduct which shows that the employer no longer intends to be bound by one or more of the essential terms (express or implied term) of the contract of employment: **Western Excavating (ECC Ltd) v Sharp** [1978] I.C.R. 221, CA. It is a question of fact in each case whether there has been conduct amounting to a repudiatory breach of contract: ***Woods v WM Car Services (Peterborough) Ltd*** [1982] I.C.R. 693, CA. In determining this factual question, the tribunal is *not* to apply the range of reasonable responses test (which applies instead only to the final stage of deciding whether the dismissal was unfair), but must simply consider objectively whether there was a breach of a fundamental term of the contract of employment by the employer: ***Buckland v Bournemouth University*** [2010] IRLR 445, CA.

179. In many cases, the breach of contract relied upon by the claimant is of the implied term of trust and confidence. That is expanded upon in a well-known passage from the judgment of the EAT (Browne-Wilkinson J) in **Woods v WM Car Services (Peterborough) Limited** [1981] I.C.R. 666

> *"It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee* ***Courtaulds Northern Textiles Ltd. v. Andrew*** [1979] I.R.L.R. 84. *To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it*: ***see British Aircraft Corporation Ltd. v. Austin*** [1978] I.R.L.R. 332 and ***Post Office v. Roberts*** [1980] I.R.L.R. 347. *The conduct of the parties has to be looked at as a whole and its cumulative impact assessed:* ***Post Office v. Roberts****"*

180. It is enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer. The fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation: **Meikle v Nottinghamshire County Council** [2005] ICR, CA. It follows that once a repudiatory breach is established, if the employee leaves and even if he may have

done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon: **Wright v North Ayrshire Council** UKEATS 0017/13 (27 June 2013); **Abbey Cars West Horndon Limited v Ford** UKEAT 0472/07.

181. The final incident which causes the employee to resign does not in itself need to be a repudiatory breach of contract. In other words, the final incident may not be enough in itself to justify termination of the contract by the employee. However, the resignation may still amount to a constructive dismissal it the act which triggered the resignation was an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The final incident or act is commonly referred to as the 'last straw'. The last straw must itself contribute to the previous continuing breaches by the employer. The act does not have to be of the same character as the earlier acts. When taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial**: *Omilaju v Waltham Forest London Borough Council*** *[2005] IRLR 35*.

182. The thorny issue of how the law on affirmation applies in 'last straw' cases where there has been past repudiatory conduct has recently been addressed (and resolved) by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] I.C.R. 1. The effect of the last straw is to revive the employee's right to resign in cases where arguably an employee had affirmed an earlier fundamental breach by the employer. The tribunal should consider:

182.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

182.2 Has he or she affirmed the contract since that act?

182.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

182.4 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

182.5 Did the employee resign in response (or partly in response) to that breach?

183. In a case of constructive dismissal, the reason for dismissal is the reason for which the employer fundamentally breached the contract of employment.

Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR')

184. **Regulation 5 of the PTWR** provides:

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker -

(a) As regards the terms of his contract, or
(b) By being subjected to any detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if –

(a) The treatment is on the ground that the worker is a part-time worker, and
(b) The treatment is not justified on objective grounds.

185. **Regulation 7 of the PTWR** provides:

(1) ……

(2) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on a ground specified in paragraph (3).

(3) The reasons or, as the case may be, grounds are –

(a) That the worker has –

(i) Brought proceedings against the employer under these Regulations;
(ii) Requested from his employer a written statement of reasons under regulation 6;
(iii) Given evidence or information in connection with such proceedings brought by any worker;
(iv) Otherwise done anything under these Regulations in relation to the employer or any other person;
(v) Alleged that the employer had infringed these Regulations; or
(vi) Refused (or proposed to refuse) to forgo a right conferred on him by these Regulations,

(b) That the employer believes or suspects that the worker has done or intends to do any of the things mentioned in sub-paragraph (a).

186. In considering regulation 5, the Tribunal must ask:

186.1 What is the treatment complained of?
186.2 Is that treatment less favourable?
186.3 Was it on the ground that the worker is part time?
186.4 If so, is the treatment justified?

187. Unlike the case in direct discrimination under the Equality Act 2010, the part time worker is not entitled to compare herself with a hypothetical comparator. If there has been less favourable treatment compared with a comparable full time worker, the employer must identify the ground for the less favourable treatment. The words 'on the ground of' and 'because of' mean the same thing: **Amnesty International v Ahmed** [2009] I.C.R. 1450, EAT. Therefore, the discrimination case law above is to be applied in determining the reason for the treatment.

188. What is not particularly clear is whether the part-time status of the worker must be the sole cause of the treatment or whether it is enough (as in the case of discrimination) that it is an effective cause. Scottish authorities are to the effect that the part-time status must be the sole cause of the less favourable treatment to fall within regulation 5(2): **Gibson v Scoittish Ambulance Service** EATS 0052/04 and **McMenemy v Capita Business Services Ltd** [2007] IRLR 400, Ct Sess (Inner House). There are conflicting English EAT authorities on the point: **Sharma v Manchester City Council** [2008] I.C.R. 623; **Carl v University of Sheffield** [2009] I.C.R. 1286 and **Engel v Ministry of Justice** [2017] I.C.R. 277. In **Carl**, the EAT held that the part time work had to be the effective and predominant cause of the less favourable treatment complained of and need not be the only cause. In **Engle**, the EAT agreed with the approach taken by the Scottish cases that it had to be the sole cause, drawing its conclusions from the EU Directive underpinning the UK legislation.

189. Regulation 7 affords protection from detriment, not on grounds of part time status, but on one of the grounds listed in regulation 7(3).

SUBMISSIONS

190. Both counsel provided written submissions which they supplemented in oral submissions. We mean no discourtesy in not setting out those submissions in what is an already lengthy judgement. We have had regard to the submissions and, where necessary, refer to relevant submissions in our conclusions.

DISCUSSION AND CONCLUSIONS

191. We turn now to our conclusions on the issues which we shall take in the order in which they were agreed by counsel.

Heads of complaint

192. The various complaints were categorised by counsel under headings:

192.1 The less favourable treatment allegations (age: section 13 EqA and regulation 5 PTWR),
192.2 The victimisation allegations (section 27 EqA and regulation 7 PTWR),
192.3 Age related harassment (section 26 Eqa)

192.4 Constructive unfair dismissal (section 98(4) ERA)

The Less Favourable treatment allegations

193. The matters complained of are identified in the final list of issues under paragraphs 3,1 (**age**) and 4.2 (**PTW**). The treatment complained of is summarised below (for the complete wording, see the list of issues in the Appendix). Where a complaint is said to be direct age discrimination, it is identified in brackets as '**age'**. Where it is alleged to be less favourable treatment on grounds of part-time work, it is identified as '**PTW'**. Where it is alleged to be both (or one or the other) it is identified as '**both'**. The allegations are that:

On 10 September 2020

193.1 **TW** selected the claimants to be moved and thereafter moved them from general surgery (**both**)
193.2 **TW** distributed the handout referring to age profiles (**age**).
193.3 **TW** used the words 'future proofing' as a reason for the reorganisation (**age**),
193.4 **TW** referred to a 'skills deficit' (**both**),
193.5 **TW** emphasised age by referring to 'young Chris' (**age**),
193.6 **TW** actively encouraged people to state their ages by saying 'none of us are getting any younger' and 'I am 57' (**age**),
193.7 **TW** told **MC** that she could work until she (**MC**) was 80 but she (**TW**) was not doing so (**age**),
193.8 Patrick Hamblin said that the Claimants had caused a skills deficit by retiring and returning, a comment with which others agreed (**both**)

On 29 September 2020

193.9 Linda Watson told the claimants that one of the reasons for the changes was their part time status (**PTW**)

On 22 October 2020,

193.10 Steven Campbell failed to address the claimants' concerns about the above conduct at the meeting on **10 September** (**age**).

On 24 November 2020,

193.11 By the Respondent, particularly **TW**, failing to take account of the claimants' concerns regarding the reorganisation and presenting it as a fait accompli (**age**),
193.12 By the Respondent and particularly **TW** failing to explain what was meant by 'knowledge and skills' or how knowledge and skills fed into the reorganisation proposal (**age**),
193.13 By Claire Atkinson telling the claimants that a single full time worker would be better for their roles than two part time workers (**PTW**).

Selecting the claimants to be moved and thereafter moving them from general surgery

194. As set out in paragraph 103 above, we found that the Respondent's reference to 'realignment' was closer to the substance of the situation. The moving of the B6s was nothing like a structural reorganisation of the sort contended by the Claimants. No changes were proposed to terms and conditions, to working hours or patterns. The Claimants were not being asked to move to a new department but within the same department. The Claimants had considerable experience as nurses and as managers. The move was not presented as a fait accompli but was intended to be discussed so that feedback could be obtained. The Respondent had the contractual right to require the Claimants to work in any of the specialties. The Claimants' had the knowledge and the skills to work in any of the specialties.

195. In our judgement, by proposing to move the claimants and, in due course, by effecting the move from general surgery, the Claimants were not subjected to any detriment. We bear in mind that detriment is to be considered from the employee's perspective but, as the authorities make clear, it is not a wholly subjective matter. We also have to consider how a reasonable worker would have regarded matters, in the overall circumstances. It is not enough, in our judgement, simply 'not to like' something or to feel put out by a decision for it to amount to a detriment. Although the claimants were upset at the meeting of **10 September 2020**, we have found that was self-generated and driven largely by a sense of resentment and a lack of respect for **TW** and her abilities as a manager. It was a fundamental disagreement with **TW** and a belief that she was a poor manager that, in our judgement, fueled the Claimants' distress at and from the meeting of **10 September 2020**.

196. The proposal would result in no economic disadvantage, no disadvantage in terms of status or position, no disadvantage in terms of working hours - if anything, it would probably be better due to the lower risk of 'overruns'. The move was within the same department and within scope of their job description. The only change was the nature of the work – work which they were qualified to do and in respect of which they had adequate skills, knowledge and experience. In our judgement, the Claimants liked being in general surgery and were comfortable there. There was an element of inconvenience in having to be brought up to speed on specialty specific matters, but that is not something beyond the grasp of extremely experienced nurses such as the Claimants. All nurses must expect to have to be trained or retrained or given support in some particular way in carrying out their profession. Given those circumstances, in our judgement, the proposal to move the claimants did not – even taking the broad approach which we must – amount to a detriment to the Claimants.

197. What then of the actual move – as opposed to the proposal? The Claimants were absent on sick leave from **October 2020** to **February 2021** (**MC**) and **November 2020** to **April 2021** (**CB**). Although there were ongoing grievances, that was no basis for halting work in the theatres and the Claimants returned on phased return to work prior to moving to their specialties. Of course, by this stage, **CB** had raised the issue of her arthritis in her hands. This was, in our judgement, something that differentiated her case from that of **MC**. We were conscious that a person with

arthritis who had been deployed to work in an area that might aggravate her condition would have a greater cause to contend that she had thereby been subjected to a detriment by the implementation of a proposal which had been made at a time when it was not known that the employee's health might be adversely affected by a move. Although there was no complaint of disability discrimination, nevertheless, the issue of arthritis had been raised by **CB**.

198. Therefore, we considered the Claimant's arthritis in the context of asking whether, by moving her to ENT after her phased return to work in **April 2021**, she had been subjected to a detriment. We concluded that she had not. The underlying cause of **CB's** problem with moving from General Surgery was that she simply did not agree with the decision and did not respect it. That was loud and clear to the Tribunal. Although accepting that **CB** has arthritis, and that arthritis is likely to cause more problems with age, we inferred from our findings of fact that **CB** was latching on to her arthritis as a further means to avoid moving to ENT. In particular, we noted our findings that she had been in possession of the relevant risk assessment forms for months, without completing them or handing them in and that she refused to contemplate being MSK risk assessed in the live environment despite appreciating that an experienced nurse would be present during the assessment. We had also found that there was no increased risk to her or to patients in having an experienced nurse (B7 or matron) assess what instruments she could handle and what she could handle with difficulty. We did not accept on the evidence that ENT equipment was likely to present the Claimant with any greater difficulties than she had while working in general surgery. We found that there was a mix of large and finer equipment in all theatres, including general surgery, and we infer from the absence of any expression of concern from **CB** while working in general surgery that handling equipment did not present as a significant issue for her.

199. This was not a disability discrimination complaint. However, we were satisfied that the Respondent, through **TW** and Linda Watson had tried to understand the risks associated with **CB's** arthritis so as to make adjustments for her. Such adjustments may have included using or avoiding the use of particular equipment or even, if it came to it, avoiding certain lines of work such as ENT. However, they did not get to that stage because of the impasse which had developed regarding the manner in which risk assessments were to be undertaken. The fact that **CB** has arthritis does not change our assessment that the move did not subject her to a detriment. A reasonable worker, seeing that the employer was trying its best to understand and assess her for the purposes of understanding what adjustments were required, would not regard the implementation of the earlier proposal as a detriment.

200. Although in our judgement not a detriment, we considered the submissions of Ms Hogben in paragraph 9 of her written argument. She advanced a number of arguments in support of the contention that the decision to move the Claimants was because of age. We do not accept what is said in paragraph 9c or the premise on which the argument is advanced. The Claimants did not need to have 'in depth' knowledge in order to be moved to ENT/Urology etc.. as confirmed by **TW** and Linda Watson. The Claimants had sufficient knowledge and support from others – as was the case with all B6s. If the extract from the job description relied on by Ms

Hogben were applied literally, it would make it difficult to move any nurse from one specialty to another, whether for 1 day or 3 months or longer. We think a better and contextual reading of that part of the job description is that 'specialist field' is a reference to working in theatres, as opposed, for example to wards. Theatre nursing would not be within the specialist field of say a ward team leader. In any event, even if it is a reference to the specialty in which the employee normally worked (in the Claimants' case, general surgery), this does not mean they may not be moved from one specialty to another. The job description requires the employee to have knowledge and skills to provide high quality care in other specialties. The Claimants had the knowledge and skills to provide high quality care in ENT/Ophthalmology and Gynaecology/Urology. From that base level they would be able to acquire an 'in depth' knowledge.

201. As to paragraph 9d of Ms Hogben's submissions, there was no evidence from the claimants as to what extensive training was required to enable them to work. Ms Hogben suggested (on instructions) that training was required on different processes and different equipment. However, she was not specific about any of this. We did not accept that this generalised need to train on different processes and equipment equated to 70-80% of the skills required as **MC** would have us accept. We considered that to be exaggeration on **MC's** part.

202. We do not accept that the failure to consult individually is evidence of age discrimination. There were two occasions referred to where people were told in advance that they were to be moved to a different specialty. One was Patrick Hamblin on his temporary move from gynae to orthopaedics. Another was Mel Connolly, who was moved from gynaecology to ophthalmology. The Claimants compared what happened in relation to their move with what happened in those cases, where they were told privately that they were to move. However, they are materially different scenarios. It goes without saying that they had to be told in advance, otherwise how were they to know? The claimants were also told in advance. It is just that they were told in a group scenario because it was a group exercise. It would have been absurd to gather the whole department together simply to tell Mr Hamblin for the first time that he was moving to orthopaedics. We can understand why the managers disclosed their proposals in a group scenario and we agree with Mr Walker's evidence that, if the managers had decided to tell people individually of the proposals, by the time you get to number 3, number 17 is likely to have found out what is happening. It would have been a way to generate gossip and may have compounded the problem.

203. In the case of both claimants, we conclude that as regards to being moved from general surgery, they held an unjustified sense of grievance. They were not thereby subjected to a detriment. As neither claimant was subjected to a detriment and thereby treated less favourably than others of a different age group by proposing to move them or by moving them, their claims of direct discrimination must fail.

204. Lest the move could be said to be a detriment in either or both of the Claimants' cases, we went on to consider whether it amounted to less favourable treatment on grounds of age or part-time worker status. We approached this by considering the 'reason why' question. We were satisfied that the reason the claimants were

moved from general surgery was on neither ground. Aside from the fact of a difference in age between the Claimants and others and part-time worker status, the Claimants' cases relied on comments about age and/or status in the documents and comments made at the meeting on **10 September 2020** and at a further meeting on **29 September 2020**. They also relied on a failure to explain the rationale behind the moves.

205. However, the Claimants have not established that what was said at these meetings was as they say. The comments in the documents were factual. We have also found that they were given sufficient explanation for the moves. We are of course conscious that age or part time worker status need not be the only reason or motivating factor and considered whether either could be said to have been a motivating factor or an effective cause of the decision to move the Claimants. Nevertheless, we are entirely satisfied that age or part time status played no part in the decision to move the claimants, or anyone else. The only factor operating on the mind of **TW** (and all the challenges in this respect were levelled at her) was her genuine belief as to the appropriate specialty for each of her B6 Team Leaders and her belief that the proposal was for the benefit of the staff (including the claimants), the department and the important service the Theatres offer to the public. Her focus, and that of her colleagues, was on ensuring the best allocation of skills and experience, in their managerial judgement. The new and relatively B6s were lacking, in particular, in the managerial experience. She considered that they would better fit in the larger specialties. The substantial managerial experience of the Claimants meant they were well suited to any specialty and their clinical skills and experience were such that it did not create any clinical issues for them to move to ENT or Ophthalmology because it was believed they would get up to speed without any significant issues. What **TW** and the other managers were aiming for was stability. The desire to have a stable department, where all staff were supported is the only thing that motivated them.

206. Having reached the conclusion as to the motivation, there was nothing then in the age profiles of the comparators that led us to question this further. We noted that her evidence, **MC** said that she regarded the handout to be ageist because she was over 50. She also said that her grievance was rejected because she was over 50, adding "*I believe we were discriminated against cos over 50, retired and returned and were part time*"

207. In closing submissions, Ms Hogben identified the appropriate 'age' or 'age group' as 'over 55s' compared with 'younger employees'. However, upon considering the age profiles, it could be seen that Mel Connolly was over 55 at the time and suffered no 'detriment' in the move, according to the Claimants. Jill Hunter was also over 55. Simon Elliot and Cathy Sloan were 53. Patrick Hamblin was 51. Others were in their 30s and 40s. Although the Claimants were the oldest B6s, there were two over 55s not subjected to any detriment (Connolly and Hunter); two aged 53 and another aged 51. We had always understood the claimants' cases to be that '50' was the relevant age group because it was at that age that the retire and return scheme applied. Therefore, there was a shifting of sands in closing submissions. Nevertheless, whether 50 or 55, there was nothing in the age profiles or from our findings of fact that made us doubt the conclusion we had reached on

the 'reason why'. Therefore, the complaint of direct age discrimination in respect of the move from general surgery fails and is dismissed.

208. We went on to consider (lest we be wrong on the issue of detriment) whether the proposal or the implementation of the proposal to move the Claimants was motivated consciously or unconsciously by age. We examine the discrete complaints of age discrimination below. However, we also considered them as possible evidentiary facts from which it might be legitimate to infer that the decision of **TW** and the B7 managers to move the Claimants from general surgery was motivated by age. However, from our primary findings of fact, we concluded that it was not justifiable to draw any inference of discriminatory motivation. Indeed, we were satisfied that the sole motivation of **TW** and her fellow B7 managers was to position team leaders on the basis of what they believed to be the best mix of knowledge, skills and experience which would give optimum cover in large and smaller specialties, to provide a stable environment for the newly appointed B6s to develop managerially and for those at B5 and below to have stable leadership across the department.

209. As regards the complaint of less favourable treatment under **regulation 5 PTWR** in respect of the decision to move the Claimants, Ms Hogben relied on matters set out in paragraphs 18-20 of her written submissions. As to paragraph 18(a), we note that Mr Campbell did not make the decision. His email of support merely referred to retirees/returnees as part of the factual background in which the future-proofing of the theatres department was being looked at. We do not draw the inference which Ms Hogben urges upon us in paragraph 18b of her submissions. The reference to certain people being full-time or part-time was factual. It was simply identifying what everyone already knew, namely that some people were full time and some part time. We considered whether the refences might warrant an inference that **TW** and the other B7's were motivated even partly by the fact that the Claimants were part-time in deciding to move them from General Surgery. However, we rejected this and concluded that the references were there simply to show the complete picture of the theatres' B6 staff. We did not accept paragraph 18c that part-timers were expected to make way for full timers in the larger specialties, such as general surgery. **CB** and **MC** had been working part time in the larger specialty for a few years. There was no suggestion from the Claimants that **TW** or anyone else had expressed any concern about their part-time status being an issue prior to September 2020. The desire to achieve stability in the department from September 2020 was brought about by the fact that the department had a full complement of B6s for the first time. Had the full complement been made up of part-time B6s, the theatre managers would still have been seeking to find the newly appointed ones 'homes' in order to achieve the best mix of skills and knowledge. We noted the submission in paragraph 18d and e. However, neither of the two individuals mentioned gave evidence and we weighed what was said by them by what was said by others who did not get evidence and by the live evidence of Mr Hamblin, **TW** and Claire Atkinson all of which was tested in cross-examination. We found that Linda Watson did not say that it was easier to move the Claimants because they were part time. Contrary to the written submission, Linda Watson did deny saying this both in paragraph 8 of her witness statement and in cross examination.

210. In light of our conclusions, the complaint of less favourable treatment contrary to regulation 5 PTWR in respect of the move from general surgery also fails and is dismissed.

Other complaints of discrimination concerning 10 September 2020

211. We turn now to those other matters, all of which are cited as discrete complaints of less favourable treatment discrimination. These were advanced not as 'evidence' of the core complaint about being moved from general surgery, but as unlawful acts in themselves. We took a dual approach, however. We addressed whether they amounted to discrete acts of discrimination but also considered whether our findings in relation to any of them (either alone or with the other matters complained of) indicated a discriminatory motivation on the decision to move the Claimants from general surgery.

The handout [issue 3.1.2.1] [age]

212. We reject the notion that a manager cannot refer to 'age profiles' or set out the age profiles in a document. Ms Hogben did not suggest otherwise. However, at the time, the immediate reaction of the Claimants to the handout document was that even the act of handing it out was discrimination, which on any objective analysis it is not. Similarly, a manager is entitled to talk about the scheme of retire and return and the impact that has on the workforce. How, one might ask, could it not be expected to have such a discussion? It is an obvious discussion to have. It is well understood within the NHS that an aging workforce – allied with a generous retire and return scheme – is likely to have an impact on staffing and planning. The mere talking or mentioning of such things cannot be labelled as an act of discrimination, which is precisely the stance that the Claimants took from the outset. All that the B7 managers were trying to do was to contextualise their proposals and the Claimants must have understood this, given their experience. As a tribunal we were surprised that nurses with the experience of the Claimants reacted as they did to the handout and to the proposals so immediately. We concluded that it was all related to their lack of respect for **TW**.

213. As we have said, there is nothing intrinsically wrong or concerning about preparing and disseminating a document which shows a breakdown of the age profile of a department. It may well be that many of the people in the room would have known or had a good guess of the ages of those in the room, but nowhere did the document mention anyone by name. We reject the suggestion that this document was aimed at the Claimants personally. As the document shows, there was a good number of people over 50. The motivation for providing the handout was to inform the staff and contextualise the references to future proofing the department. It also helped visualise the numbers of staff who could take advantage of the retire and return scheme, thus demonstrating the potential impact on the scheme on future staffing numbers. We could understand why Mr Campbell described the handout as a distraction. The same information could have been presented on a screen. However, as a separate document, what it did was to immediately focus the mind of the claimants on age and it thereby acted as a distraction from the main event. But the Claimants were not subjected to a

detriment in any way by dissemination of the document and no reasonable worker would, in our judgement, so conclude.

TW's use of words 'future proofing' [issue 3.1.2.2] [age]

214. There is no dispute that these words 'future proofing' were said. However, they were said in the context of moving the whole of the Theatre Department forward. The Claimants were included in that future proofing. It was envisaged that they would do their bit by helping the newly appointed B6s. There is nothing inherently discriminatory in the use of the phrase 'future proofing' (or for that matter 'skills deficit' or from the production of a 'handout') nor is the use of such a phrase something from which we could conclude (absent any explanation) that the reason for moving the Claimants from General Surgery to another specialty was on grounds of their age (or age). In our judgement this was appropriate terminology in the context of what managers were discussing and the Claimants were not subjected to any detriment by its use.

TW referring to 'skills deficit' [issue 3.1.2.3] [both]

215. The same applies in respect of this issue. The Respondent accepted that there was a reference to 'skills deficit'. However, it was not said as the Claimants allege and we have set out our findings above in paragraph 68. It is a fact that when staff retire, this can create a skills deficit. That is a major point of concern in the NHS. Similarly, if staff retire and return on fewer hours, that creates a deficit in the availability of knowledge and skills. This has been and continues to be a hot topic in the NHS for obvious reasons. We struggled to understand how the reference to this very obvious fact could in any way be said to detrimental to the claimants. It very much seemed to us that the Claimants were seeking to capitalise on any reference to age or anything incidental to age, as just as support for their argument that they were moved out of general surgery because of their age.

TW saying 'Young Chris' 3 or 4 times [issue 3.1.2.4] [age]

216. In our findings, we have also placed this comment in context. We did not accept the Claimants' evidence that **TW** was encouraging anyone to state their ages or was goading the Claimants or laughing at them. The Claimants were inclined to exaggeration in their evidence and this was a very good example of that. The Claimants have not established that this was said and insofar as this is advanced as a discrete complaint, it must fail and be dismissed.

TW saying 'none of us are getting younger' [issue 3.1.2.5] [age]

217. **TW** was simply making the point that she was in the same age bracket as the Claimants. As we have found in paragraph 62, this comment was made in response to the Claimants' overreaction to any reference to age and she was simply stating a fact of life. This can hardly be said to be detrimental to the Claimants in any way. In our judgement it was not and no reasonable employee would consider it so.

TW saying 'Campbell could work until she was 80 but she will not be' [issue 3.1.2.6] [age]

218. The submission at para 10(i) of the Claimants' written submissions is inconsistent with the pleaded case. From our findings, it is clear that it was the Claimants who initiated the discussion about age. It started with the reference to ageism by **MC** and followed by **CB** immediately supporting her by saying that the reference to age was discriminatory. **TW's** comment about working to 80 was in direct response to **MC's** comment that she could work until she was 80. It was not in any way detrimental to the Claimants and no reasonable worker would regard that response to MC's comment to amount to a detriment. The Claimants have not established the factual basis of the allegation – namely, that it was an unsolicited comment - and the reply of **TW**, either taken by itself or as part of the overall conversation did not subject the Claimants to any detriment in any event.

Patrick Hamblin saying that claimants had caused a skills deficit [issue 3.1.2.7] [both]

219. Again, we have found against the Claimants on the facts in respect of what was allegedly said by Mr Hamblin. It was their case that Mr Hamblin aimed this phrase at them, referring to them having caused a skills deficit. He did not. His reference to skills deficit was part of a wider discussion (or attempted discussion) about the general impact on skills caused by nurses retiring (whether they return part time or not at all). He was merely trying to assure the claimants that the discussion was a valid one to be had, as quite a few nurses were over 50 and could retire. However, the Claimants were not prepared to listen. As with the other comments, they were not subjected to any detriment by Mr Hamblin saying what he said in the context in which it was said and no reasonable worker would consider this to be a detriment.

Totality of the comments made and cumulative effect of the discussion on 10 September

220. As indicated above, we did not simply look at each comment in isolation. We have had to set them out individually as they were pursued as discrete complaints of discriminatory conduct. But we also considered what happened at the meeting as a whole asking whether the Claimants had been subjected to a detriment by the conduct of TW or others generally at that meeting or whether any of our findings of fact might justify an inference that the decision to move them from general surgery was motivated by age. Our conclusion is the same. In respect of the meeting of **10 September 2020**, the Claimants were not subjected to any detriment by **TW** or Mr Hamblin or anyone else at the meeting, and to the extent that each of the matters complained of is pursued as a discrete complaint of less favourable treatment on grounds of age or part time worker status, those complaints must fail. Further, there is nothing from our findings from which we might justify any inference of discrimination in relation to the decision to move the Claimants.

Complaint of less favourable treatment on grounds of part time worker status: 29 September 2020 [issue 4.2.3]

221. This is the complaint that Linda Watson told the Claimants that one reason for the changes being planned was their part time status. Having found that Linda Watson did not say that, this complaint must fail.

Complaint of direct age discrimination: 22 October 2020 [issue 3.1.3.1]

222. This was second of the roundtable meetings. As we have found, it was agreed that the whole presentation would be rerun. It was also agreed that the Claimants, being dissatisfied with the outcome, would proceed to the formal grievance stage. The reason the claimants were dissatisfied because, as **CB** confirmed in evidence, the only resolution that was acceptable to them was for them to be told that they would remain in general surgery. We refer to our findings in paragraphs 77-82.

223. Yet, the complaint against Mr Campbell here is that he failed to address their concerns. Ms Hogben said that this was not just in relation to the move but about the comments that had been made at the meeting. She went as far to suggest that Mr Campbell should or at least reasonably could have been expected to conclude at the roundtable meeting that the Claimants had been subjected to harassment at the meeting of **10 September 2020**. We cannot envisage how, at an informal roundtable discussion, Mr Campbell could be expected to conclude that anyone had been harassed at that meeting without establishing any facts. In any event, that is not the purpose of such a meeting. Something like that would require an investigation.

224. We found that Mr Campbell listened to the complaints and sought to understand them. We conclude that Mr Campbell came up with a perfectly acceptable way forward and one which we totally understand. He listened to the Claimants' concerns. He apologised that the handout had upset the Claimants. He agreed that the presentation should be re-run so that they should have an understanding of the whole picture and have an opportunity to put questions at the presentation. He acknowledged that the Claimants could and would be proceeding to a formal grievance stage, as was their right. We are entirely satisfied that the only resolution that would have satisfied the claimants at that stage was that which was set out in their formal grievance at **page 432**. There was no scope for any compromise on the part of the Claimants. Resolution 3 on the grievance document meant essentially, keeping them in general surgery, as was confirmed by **CB**. As far as not giving the Claimants the slides at that meeting, we see no reason Mr Campbell to have done so. The agreement was to re-run the presentation and the Claimants were only two of a wider team of nurses. What Mr Campbell set out in his witness statement at paragraph 8 seemed eminently sensible to the Tribunal.

225. Therefore, we conclude that the Claimants were not subjected to any detriment by Mc Campbell on **22 October 2020** or on any other date. They have not made out that he 'failed to address' the complaint. In any event, even if his failure to conclude that the Claimants had been harassed (which they had not) and that this amounted to a 'failure to address' the concerns and that this amounted to a detriment he was not in any way consciously or unconsciously motivated by age or part-time worker status. His sole motivation was informal resolution. There was

no basis whatsoever, in our judgement, for claiming that Mr Campbell was motivated by age or part-time worker status.

Complaint of direct age discrimination: 24 November 2020 [issue 3.1.4]

226. This is much the same complaint as the complaint about the changes announced at the **10 September 202**0 meeting, namely that the move was a 'fait accompli' and that no explanation regarding knowledge and skills was given. We refer to our findings in paragraphs 85 to 86 above. In light of those findings, the Claimants have failed to establish the factual basis for the complaint and it too must fail.

Complaint of Part time worker discrimination: 24 November 2020 [issue 4.2.4]

227. Having found that Claire Atkinson did not say this, therefore, this complaint must fail.

The Victimisation allegations

Section 27 EqA : protected acts

228. The Respondent accepted that the Claimants had done some protected acts We conclude that the matters identified in issues 5.1.1.1, 5.1.1.2 and 5.1.1.4 are protected acts. In reality, they constitute one protected act by both claimants. Quite why they had to be dissected as three separate protected acts is something only the Claimants' legal representatives can say. The substance is that on **10 September 2020**, both Claimants made allegations, through the words they conveyed, that the Respondent was infringing the Equality Act 2010.

229. There was no evidence in either the statement of **CB** or **MC** as to what was said at the meeting on **22 October 2020** to Mr Campbell that constituted a protected act. Para 5.1.2 of the list of issues refers to **CB** saying to Mr Campbell that the reason for the 'meeting' was age discrimination. it was not clear what this was a reference to but we make a working assumption it is to the meeting of **10 September 2020**. Having checked the notes of evidence, it was not put to Mr Campbell that **CB** had said that the reason for the meeting was age discrimination (or even words to that effect). **CB** says nothing about it in her witness statement either. In the absence of any evidence on the matter, we are unable to conclude that **CB** did a protected act as alleged in issue 5.1.3.

230. Therefore, we can conclude that the Claimants did protected acts as follows:

230.1 At the meeting on **10 September 2020**
230.2 In the submission of their formal grievance on **09 November 2020**,
230.3 In the presentation of their claim forms on **04 May 2021**

231. They then identify 12 detriments to which they allege they were subjected because they did one or more of the above protected acts.

Detriments

232. We shall take these in turn.

Claimants were not given access to meeting notes or communications concerning the reorganisation and their position in it and DSAR [issue 5.2.1]

233. The Tribunal Judge asked counsel whether they proposed in due course to make any submissions as to precisely what information a person was entitled to be provided under a DSAR. We would have found this helpful as it might have informed us on the question of 'detriment'. For example, if a worker had not been provided with documents on a DSAR which they were not entitled to be given, could that worker claim to have been subjected to a detriment? Counsel said that they were not proposing to do so and, in the end, neither took us to the law on what material should be provided on a request. The Tribunal asked Ms Hogben which emails the Claimants say should have been disclosed under the DSAR. She identified them as the documents at **pages 373-376, 380-381, 382**, the notes at page **377-379** and the slides with the notes. The slides with the notes were given to the Claimants when Ms White sent her grievance outcome on **23 July 2021**. Ms Hogben said that the most important ones were at pages **380-381**, the notes at **377-379** and the slides with notes (which were given to claimants on **23 July 2021 [pages 434-450]**.

234. Had Ms Scutter been provided with the notes of **22 September** and the annotated slides, we consider it is likely that she would have sent to the claimants pages **443-444, 447-448**. That is because she intended to and in fact did send only data that was personal to them and related to them. We know that the annotated slides were given on **23 July 2021**, with the outcome of the grievance. We infer that pages **377 – 379** were not provided until these proceedings. Therefore, there were probably documents that the Claimants would have been sent by Ms Scutter, had she received those documents from Ms Wainwright or any other B7.

235. We wished to understand the detriment here. Neither claimant in her witness statement says what the detriment was. They gave no evidence as to how or in what way they saw it as a detriment. All **MC** says is that she made a request for documents. When asked by the tribunal what the detriment was, Ms Hogben submitted that the detriment was that the failure to send the documents thwarted the Claimants' ability to pursue their grievance. We reject this. It is normal for people to pursue grievances without recourse to a DSAR, yet they are not thwarted or prevented from doing so. There was no evidence that we could see that the Claimants' ability to pursue their grievance had been thwarted and none was identified. The Claimants were intent on pursuing their grievance so and had the input of their trade union. There is nothing in the documents that we have seen that would have thwarted anything. It is also said that it would have helped them understand the rationale of the B7 managers. However, we have found that this was sufficiently explained to them in **November 2020**. That the Claimants contend it would have assisted them understand the rationale is disingenuous. They have at no point said since seeing the documents that they assist in understanding the Respondent's rationale. We conclude that they made their DSAR for the purposes

of uncovering something that would undermine the rationale which had been given to them but with which they disagreed.

236. Having considered the documents that were not provided, there is nothing, in our judgement at least, that would have enabled them to have advanced their grievance in any way they were not able to without them. They had the annotated slides from Ms White and were able to rely on them, if they wished, at the appeal. They had the slides before they prepared the document for the appeal. On **page 771**, they refer to having the full presentation of the slides. However, they do not refer to any of the content. If the slides had, as was suggested been of importance in enabling them to pursue their grievance, it is surprising that they make no reference to the content of them, having received them. They simply say that there has been a failure to comply with DSAR. We have asked whether a reasonable employee would consider that by not getting those notes of the meeting of **22 September 2022** and some of the slides, that they had been subjected to a detriment at work? We conclude not. They did not know at the time that certain documents had been omitted and this did not hinder them or affect their working life in any way.

237. An overlooked part of **Shamoon** is that the detriment must be something which a reasonable worker might consider to be a disadvantage in the circumstances in which he thereafter has to work. We infer that the timing of the March 2021 request was to aid the litigation process which was, by that date, imminent, following from ACAS early conciliation. It was to seek to undermine the Respondent's rationale that the request was made and to further imminent litigation. The failure to provide the documents had no impact on the Claimants' working circumstances nor on the grievance as demonstrated by the fact that there is no reference to the content of the slides in the grievance appeal document which was carefully prepared

238. Even if we were wrong about that, and that the very failure to provide documents that they should have received pursuant to a DSAR did, without more, amount to a detriment, we considered the reason for the Claimants not receiving them? Specifically, was it because they had made protected disclosures? We accepted the evidence of **TW** that, as far as she was concerned, she had provided Ms Scutter with everything she understood she had to. She was not motivated by the fact that the Claimants had done any of the protected acts.

The complaint that no justification given was given for the moves [issue 5.2.2]

239. We refer to our findings in paragraph 85-86 and our conclusion that the proposal and decision to move the Claimants was not discriminatory in any way. On the basis that the complaint has not been made out, this also fails.

The problems with the report [issue 5.2.3 and 7.1.2] **and the rejection of the grievance by Ms White** [issue 5.2.4]

240. In paragraph 5.2.3 of the list of issues, the claimants allege that they were subjected to detriment by Ms White because they had done protected acts and that

the detriment was the inclusion of the 7 things set out in paragraphs 7.1.2.1 to 7.1.2.7, all of which is also alleged to have amounted to age related harassment.

241. In our judgement, having read the report and made our findings, there was no 'problem' with the report as the Claimants contend. Clearly the Claimants did not like or agree with the report but that is a different matter. It is important to look at the context. The Claimants had raised the grievances. Ms White was investigating them. Upon investigation, she learned, through interviews, that there were differing accounts of the meeting of **10 September 2020**. She was also made aware of the impressions others had on the Claimants' behaviours, not only at that meeting but more widely. It is natural and understandable that people will speak more widely in those circumstances, so as to place matters under discussion in context.

242. Ms White did not invent any of the material that featured in her report, nor did she exaggerate anything. She took what people had said to her, considered it and formulated her views into a conclusion and recommendations. How it is that the Claimants came to allege that by including certain comments in the report and by rejecting her grievance, that she had subjected them to a detriment because they had done protected acts was unclear to the Tribunal. The Claimants' case here essentially comes down to this: "*Ms White has written what she has written and rejected our grievances. We do not accept what is said in the report and are offended by it. Therefore, this amounts to victimisation, age-related harassment and detriment contrary to the Part Time Worker Regulations*". In our judgement, it was no more sophisticated than that. For reasons which we go into in more detail under the harassment complaint below, we conclude that Ms White did not subject the Claimants to any detriment and even if she did, applying the widest possible interpretation of that concept, she did not do so because the Claimants had done any protected act. She was motivated only by her desire to investigate impartially and to report and make recommendations based on the information she had gathered during that investigation.

243. In paragraph 29 of her submissions, Ms Hogben submits that Ms White's conclusions were at odds with the evidence. She lists four points, all four of which our covered in our findings. We do not agree with any of those points.

244. In paragraph 29 (a), Ms Hogben submits that it would have been reasonable to have undertaken individual consultations with the Claimants to explain to them what was happening prior to the meeting of **10 September 2020**. As we have set out in paragraph 202, the Claimants sought to draw out how others who were moved from a specialty had been treated differently, namely Mr Hamblin and Ms Connolly. As set out in our findings, they moved between specialties for particular reasons and prior to moving were told spoken to about the move in private. However, those are not apt comparisons. When Mr Hamblin was moved, he was at that time, the only B6 being moved. How else could he have been told about it other than in a one-to-one basis. His move was not part of any wider reconfiguration, as was the case for Ms Connolly. The exercise of realignment that was proposed on **10 September 2020** was of a different character. It involved the whole department. At one point Ms Hogben put to Mr Walker that there should have been individual consultation prior to the meeting, and that it would have been

reasonable to have done so. Mr Walker disagreed saying that it was a judgement call. He observed that if a manager had 17 employees to speak to, if you do 17 one to ones, by the time you get to number 3, number 17 already knows what is happening. We agree with Mr Walker that it is a judgement call for managers and his point was, we believe, well made. In any event, we come back to the fundamental point that this was a matter involving the whole of the department and all B6s and that the meeting was to be the start of a discussion, not a fait accompli. It was reasonable and appropriate for the B7s to start that exercise as part of a group discussion. They could have done it differently albeit we would observe, having so many one to ones would have been inefficient. There was nothing from Ms White's findings or conclusions (or lack of any particular finding) from which we could justify an inference that her decision to reject the grievances was motivated by any protected act. Her decision to interview Donna Harrison was understandable as there was, in our judgement, nothing she could contribute to the investigation. She acknowledged that the failure to interview Patrick Hamblin was an oversight – but again, there was nothing that Mr Hamblin could have said that would have assisted the Claimants. Ms White was not clear whether the Claimants had asked for Cathy Sloan to be interviewed. Even if they had, the grievance concerned the moving of the Claimants from general surgery and the events of the **10 September 2020** meeting. Few investigations are perfect, and Ms White genuinely considered that she had interviewed sufficient individuals. In accordance with the Respondent's procedures, it was open to the Claimants to call or adduce any other evidence they considered relevant.

245. Indeed, whether or not there were 'problems' with the report, we are entirely satisfied that Ms White was not in any way motivated consciously, or unconsciously by the fact that the Claimants had done any of the protected acts in either the content of her report or its outcome. We shall address each of the complaints in paragraph 7.1.2 of the list of issues when we consider the complaint of age -related harassment below. However, we make clear at this juncture that we are satisfied that in rejecting the Claimants' grievance, Ms White was not in any way motivated consciously or unconsciously by the fact that the Claimants had done any protected act.

The treatment CB endured on her return to work in April 2021 [issue 5.2.5]

246. Four specific matters are complained of here, two of which relate to **TW** and two to Linda Watson. The first complaint, a failure to make adjustments, is rather odd given there is no complaint of disability discrimination. Rather than pursue a complaint of failure to make reasonable adjustments under sections 20-21 of the Equality Act 2010, **CB** has advanced this as a claim of victimisation. Therefore, we would have to be satisfied on the evidence and from any inferences which we could properly make, that **TW** failed to make adjustments in line with OH recommendations and failed to complete the MSK and stress risk assessment and that she did so because **CB** did a protected act. However, we have found that **CB** failed to complete and return the assessments, which was the precursor to **TW** completing them. Further and in any event, the responsibility for this had passed to Linda Watson, by agreement. **CB** did not return the forms to her either. **TW** had therefore started out on the road of making adjustments, by taking the first steps,

but **CB** did not cooperate. If **TW** failed at all, it had nothing whatsoever to do with **CB's** age or any of the identified protected act but was due to **CB's** failure to do her bit and due to the passing over of the 'baton' to Linda Watson. **TW** did not fail to consider **CB'** arthritis as alleged. That was the very thing that led her to give the MSK assessment form to **CB**. The Claimant has not established that **TW** did what is alleged or that she subjected her to any detriment here.

247. As regards Linda Watson, the phased return to work proposal did not subject **CB** to a detriment. As we have found, as regards both the **April** and **December 2021** phased returns, **CB** was to be eased back into work, with support and with the assurance that she would be risk assessed while back in the working environment. What happened thereafter would be a matter for discussion following the risk assessment and input from occupational health. On our findings, no reasonable worker would consider this to be a detriment, and we conclude that **CB** has not established that she has been subjected to any in this regard. Even if we were wrong about that, we are satisfied that the proposed phased return and the requirement for risk to be assessed on the job in a supportive environment was in no way related to the Claimant's complaints or protected acts, or for that matter to her age or part time status, but was entirely to do with the situation that confronted Linda Watson at the material time, namely, that the Claimant had raised an issue with arthritis and the use of equipment in the theatre, and Linda Watson – as did occupational health – believed this needed to be assessed. The question of how that risk assessment was then to be carried out was a matter for the judgement of the managers, and it is one which the Tribunal can readily understand. We are not saying that it was necessarily the only way a risk assessment could have been undertaken but the tribunal could see the benefits of it. Further, as Ms Hodgson acknowledged, if undertaken by an experienced B7 or the Matron (as it was always going to be), there was no risk to patients or to **CB**. For these reasons this complaint fails.

The failure to uphold the claimants' grievance appeal on 21 October 2021 [issue 5.2.6]

248. This complaint is against Mr Walker, who heard the appeal. As in the case of Felicity White, the Claimants allege that Mr Walker victimised them because they had done protected acts. The basis for asserting this (other than that he did not uphold the appeal) was equally unclear to the tribunal, as from our assessment he very much appeared to approach matters impartially. It was ultimately put on the basis that his assessment on appeal appeared to be a cursory one. As always, we must remind ourselves of the possibility of underlying, hidden, or unconscious biases but we could not detect any in Mr Walker and from our findings could not justify an inference of such bias. It seemed to us that this was another example of the Claimants disliking an outcome and making an allegation of discrimination. This has been their reaction to most, if not all decisions and comments that they have disagreed with from **10 September 2020** and stems, in our assessment, from the Claimants' underlying feelings of indignation and resentment from that day.

249. In a case where there has been no genuine consideration given to the issues or some glaring error in procedure or decision making, then yes, we have no doubt

that a reasonable worker could regard a rejection of a grievance as a detriment. This might also allow for a justifiable inference of discrimination to be made. However, it is debatable whether the rejection of a grievance, which has no procedural flaws and which has been genuinely and conscientiously considered but rejected is a detriment. We are inclined to conclude that the Claimants were not subjected to a detriment by Mr Walker in rejecting the appeal. However, to an extent that is academic as we are satisfied that, in rejecting it, he was in no way motivated by the fact that the Claimants had complained of discrimination or done a protected act. He concluded, as we did, that it was reasonable for Felicity White to have reached the outcome she did. Although his outcome was succinct, it was not in our judgement arrived at cursorily.

The failure to address CB's grievances on 26 and 27 October 2021 [issue 5.2.7]

250. We refer to our findings in paragraphs 114 to 125, 133, 139, 148 and 150 above. It is not in dispute that an employee who presents a grievance which is not addressed in a timely manner is thereby subjected to a detriment. It is unarguably the case that the **October 2021** grievances were not addressed in a timely manner. We were unable to make positive findings as to why that was so. We did not feel that based on our findings that the Claimants had established a clear case of victimisation. However, nor could we see that the Respondent had provided a clear explanation for not progressing the grievances. Had it done so we would have been able to make positive findings as to the reason why. Therefore, we turned to the burden of proof provision under section 136 EqA. We considered whether there were facts from which we could properly conclude, in the absence of any other explanation, that the Respondent had subjected the Claimants to a detriment (the failure to address the grievances) because they had complained of discrimination in their ET1s. In our judgement there were such facts, which we set out in the following paragraph.

251. By the time of the October grievances, it was clearly understood by Linda Watson and others that the Claimants had been complaining for some time that their treatment was discriminatory. They had by then submitted ET1s, on **04 May 2021** and again on **14 September 2021**. The October grievances were submitted shortly after the Respondent served its amended response of **19 October 2021**. It was clear from our findings of fact that Ms Watson was the person allocated to deal with the grievances yet in evidence said she believed it to have been the responsibility of HR. She was advised by HR to speak to the Claimants and get them to get them to complete the internal resolution form, but she did not do this. On more than one occasion, Ms Watson was asked for an update by Ms Hodgson on the progress of the grievances but she failed to provide any. Ms Watson had not complied with the Respondent's policy which required her to sit down with **MC** and **CB** to discuss the issues and clarify the desired outcome. In her evidence, Ms Watson accepted that, once raised, it should take no more than a couple of months to determine a grievance and that this was well outside that timeframe. In the absence of any explanation for failing to address the grievances, we consider these to be facts from which we could conclude that section 27 EqA had been contravened, namely, that the grievances were not progressed because the Claimants had complained of discrimination in their ET1s and were proceeding to

an employment tribunal (i.e. that they had done a 'protected act'). There was a 'prima facie' case, so to speak.

252. Therefore, we turned to the next stage of the test, which provides that the Tribunal must hold that the contravention occurred unless the Respondent satisfies it otherwise. At this stage, it is for the Respondent to show that it did not breach the statutory provision in question. We were required to carefully consider the Respondent's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA

253. The Respondent set out its response to this complaint in paragraph 26 of its Amended Grounds of Response [**page 215**]. It rests on three things: the unavailability of key witnesses, including the subject of the grievances; that Ms Watson was very busy and that management of the Claimants had changed on many occasions contributing to delays and miscommunications. Ms Watson talks about these grievances in paragraphs 21 to 24, 28 to 29 and 39 to 40 of her witness statement. However, nowhere does she given an explanation for her failure to progress the informal grievances. She says nothing about why she did not meet with the Claimants (as Mr Campbell did) or get them to complete the informal resolution document. She did not give evidence that the burden of work overwhelmed her to such an extent that she was unable to deal with the grievances at the informal stage. She did not give evidence about management changing many times. From our findings we established that management moved from **TW** to her much earlier than **October 2021**. Ms Watson says nothing, in any event, about how that contributed to miscommunications. We did not accept that Ms Watson was unable to progress matters because of the long-term absence of any individual. As far as we could ascertain, Ms Young was the only person absent on sick leave and she was incidental. In any event, the purpose at stage one is to try and resolve the matters informally. In respect of both grievances the key people were Rhys Maybrey and **TW**. Further, there was no evidence of attempting to speak to Karen Young, had it been necessary to do so. Being absent on sick leave does not mean, in and of itself, that a person can not have a brief discussion.

254. The Respondent submits it outsourced the investigations into the grievances in 2022 and this also serves to explain why they were not addressed. However, that was about 4 months after the grievances were lodged. Ms Watson was not able to explain to our satisfaction the reason for the failure between **October 2021** and the decision to outsource all investigations in **March 2022**. We have heard nothing from anyone in HR in these proceedings. The grievance against Rhys Maybrey is the simplest of matters. It did not require much investigation. In any event, the outsourcing in **March 2022** does not explain why even the basics were not done at stage one. We do not accept Ms Clayton's submission in paragraph 53 of her written submissions that the delay was due to work pressures or the absence of relevant witnesses. The oral evidence of Ms Watson on these matters was in our judgement unconvincing. We do not accept that the delay was due to a desire to get HR support. The evidence showed that HR had advised Ms Watson that it was for her to deal with the grievances. She had support from HR all along.

255. As the Respondent has not satisfied us that it did not contravene section 27 EqA 2010, the Tribunal has no option but to uphold the complaints of victimisation in respect of the failure to address the grievances of **26 and 27 October 2021**. That is the effect of section 136 of the Act. Therefore, subject only to the question of time limits, these complaints must succeed. We deal with the time point issue below. Before we do so, there are further complaints to determine.

The allegations made against the Claimants on 07 April 2022 by the B7s and Claire Atkinson [issue 5.2.8]

256. The complaint here was that the by submitting a grievance against the Claimants, the B7 managers subjected them to a detriment because they had done protected acts. Although the Claimants had not been made aware of the grievance until **April 2022**, the grievance was submitted on **10 January 2022**.

257. Claire Atkinson and **TW** both gave evidence about why they submitted the grievance. The fact that the grievance was not progressed was out of their hands and not down to them. Nevertheless, it is the making of the grievance which is said to be the act of victimisation. If a person 'A' submits a grievance against a colleague, 'B', we are satisfied that this amounts to subjecting 'B' to a detriment. We do not accept Ms Clayton's submission in paragraph 54 that by submitting a grievance borne out of genuine concern, the Claimants cannot be said to have been subjected to a detriment. We believe that any reasonable worker would believe otherwise. The Genuine complainant may be wrong – especially when the genuine complainant was not present to hear the things that form the basis of the complaint. It is of no comfort to the reasonable worker that an as yet unestablished but genuine grievance has been submitted against them and in our judgement a reasonable worker would be entitled to consider that they had been subjected to a detriment.

258. The important question is whether the grievance was submitted by the B7 managers and Ms Atkinson because the Claimants had done a protected act or acts. We are satisfied from Ms Atkinson's and **TW's** evidence that it was not. It was palpably clear to the Tribunal that **TW** found the Claimants difficult to manage and to a very large extent we concluded that **TW** was rather intimidated by both. Ms Atkinson was also very clearly of the view that the Claimants lacked respect for her and she found them both to be difficult and strong personalities. The interviews of Rhys Maybrey and Jody Robinson are also in a similar vein and all are consistent with each other on that subject. We conclude that the only motivating factor in the minds of the B7 managers and Ms Atkinson was their sense of frustration and upset by what they perceived to be the Claimants' attitudes towards them, culminating in what they were given to believe had taken place at the Uno's restaurant in **November 2021**. Whether **CB** or **MC** did conduct themselves as alleged on that night is a different matter. But we are satisfied that the grievance was not motivated consciously or unconsciously by their complaints of discrimination, which is something they had first raised some 14 months earlier in **September 2020**. Ms Hogben sought to undermine the complaint (as set out in the statement of Sophie Raiseborough) in relation to **MC** by submitting that there was nothing said in that statement that could be attributed to her. We do not agree with

that criticism. Ms Hogben emphasised that Ms Raisebourugh referred to **MC's** husband as making comments, not her and that this disclosed no arguable complaint against **MC**. We make clear that we are not suggesting that **MC** did anything wrong at that restaurant. That was not for us to determine and we express no view on it. However, it is overly simplistic to say that because certain comments were alleged to be made by her husband, that no valid complaint could be made against her.

259. Whatever the truth of what happened at Uno's, we are entirely satisfied that the grievance of **10 January 2022**, made known to the Claimants on **07 April 2022**, was genuinely raised because of a genuine concern regarding what was believed to be unacceptable behaviour of the Claimants and was not in any way motivated by the Claimants' protected acts. Therefore, the complaint of victimisation also fails and must be dismissed.

Inaccurate and/or insincere responses Inaccurate and/or insincere responses and suggestions that they committed misconduct within Felicity White's investigation report [issue 6.2.1]

260. We refer to our earlier findings and conclusions in relation to Ms White's report. In our judgement, there was nothing inaccurate or insincere in Ms White saying what she did at the end of her report [**page 697**]. We do not accept that she was suggesting any misconduct or raising the prospect of disciplinary action against the Claimants. Therefore, to the extent that the purported detriment is in the inaccuracy or insincerity in suggesting that the Claimants had committed misconduct, they have not established the factual basis of the complaint or that they were subjected to any detriment and this complaint must fail. In any event, whether detriment or not, the essential question is whether Ms White, in writing what she did, was motivated consciously or unconsciously by any of the matters listed in regulation 7(3) PTWR. Ms Hogben's cross examination on this was very 'light touch'. She merely put to Ms White that she wrote this because the Claimants had been asserting their rights as part time workers by bringing proceedings under the Part Time Worker Regulations. She did not delve any deeper into Ms White's motivations.

261. It was not clear to us why it should be alleged that Ms White referred to inappropriate behaviours because the Claimants had asserted their rights as part time workers, as opposed to complaining of age discrimination. It was specifically pleaded as part time worker 'discrimination' as opposed to 'age'. In any event, we are entirely satisfied that nothing that Ms White said in her report, including the reference to inappropriate behaviours of the Claimants, was motivated consciously or unconsciously by the fact that the Claimants were part time workers, or that they had asserted their rights by doing any of the things referred to in regulation 7(3) of the Regulations, or that they had done anything under the Equality Act 2010. Therefore, this complaint fails and must be dismissed.

Age related harassment comments and rejection of grievance [issue 7.1]

262. There are 8 complaints of age-related harassment. We considered each of them in turn and then looked at the report as a whole, considering the nature of and potential effect of the comments individually and cumulatively.

Characterising the discussion of ages as 'jovial'

263. We have found that this was a reference to what Ms White understood was happening when there was the occasional laugh during the meeting on **10 September 2020**. It might have been the wrong choice of word but it adequately conveyed what she was trying to put across. It is clear to us that what was meant was that any references to age were light-hearted references. In doing so, although the context of what she was writing was 'age', her conduct in reporting her conclusions was not related to age in the sense meant by section 26 EqA. There has to be some, however, loose, connection between the unwanted conduct and the protected characteristic. The fact that the context is a complaint about age discrimination is insufficient. Otherwise, any investigator genuinely reporting findings on a complaint of discrimination and with which an employee disagreed would be liable to be accused of harassment.

Downplaying the handout

264. Ms White did not downplay the handout. She placed it in context.

Inaccurately describing claimants as disrupting the meeting' and 'unprofessional'

265. The reference to disruptive was not inaccurate. Even the claimants acknowledged that their behaviour might be seen as disruptive and on our findings of fact, it was disruptive (paragraph 112 above). Ms White was accurately reporting on information gained from interviews.

Inaccurately stating that team leaders were 'often moved'

266. That was Ms White's genuine assessment and belief based on what she understood at the time. We have found that longer term B6 moves were not common-place. Ms White believed that it was not unusual for B6 team leaders to be moved. She based this view on what she had been told and was given examples: Patrick Hamblin's move was one. Mr Maybrey told her that team leaders had been moved before [**page 653**]. Jayne Forster George said that team leaders were moved 'all the time' [**page 666**]. As far as Ms White was concerned it was relatively common-place. The fact that we have found that it was not so common-place (but that it did happen) is something that we considered in asking whether it was justifiable to draw any inference against Ms White. However, we conclude that it would not be proper to draw such an inference from the fact of a disagreement on whether it was 'common place'. Our conclusion was reached after a forensic analysis following detailed cross examination of witnesses and a close consideration of the documents. She was, in our judgement, a measured, impartial and credible witness who arrived at a genuine conclusion. In the circumstances,

we are satisfied that she was not motivated by anything improper. Further, her conduct was not related to age.

Highlighting claimants' experience from some time ago as justification for move

267. This was part of the rationale and thinking as was explained to Ms White.

Referring to complaints about overruns as justifying moves

268. This was also referred to by the theatre managers. We do not believe it was a significant part of the theatre managers' thinking and was probably more along the lines that the Claimants, at least, would not be concerned by the risk of overruns in the new specialities and would, if anything, benefit from this. Indeed, the way in which Ms White expressed it in her report was that it was felt by theatre managers that moving to a smaller specialty where they do not have overruns would have been well received [**page 696**]. This was not, in our judgement, conduct related to age. It related only to one of the perceived benefits to the Claimants of moving to a smaller specialty.

Failure to mention elements of witness accounts which supported claimants' version

269. It is right that the Ms White did not refer to extracts from the interviews of Ms Lewis or Ms Lovejoy-Foster. However, she does not refer to extracts from other interviews either. What she did was to set out her impressions and overall conclusions from all of the evidence that she had obtained. She went through each question raised by the Claimants and responded to them one by one, starting on page **694**. It is clear that she is giving a succinct conclusion from all the evidence that she has obtained. She was not drafting a judgment. We do not accept that this 'failure' can be regarded as unwanted conduct related to age. Once again, the only thing that the Claimants can point to is that their grievance complained of age discrimination.

Rejecting the grievance

270. Ms White was entitled to reject the grievance based on her conclusions. She did not reject it on the grounds that the claimants had complained of discrimination or on grounds of age or part time status or that they had done anything in regulation 7(3) PTWR. In our judgement, having considered the evidence and listened to the arguments on the various forms of alleged discrimination, Ms White was right to reject the grievance. The complaint here is one of age related harassment.

271. In any harassment case, the Tribunal must ask whether the conduct complained of was 'unwanted'. The conduct complained of here is the content and outcome of the report. The act of investigating and reporting on complaints is not unwanted conduct. If anything, it is the very thing that is wanted. In this case, we are satisfied that it was simply the case that the content was unpalatable to the Claimants. They did not agree with and did not like what the report contained. Ms

White did not know the claimants. According to the Claimants she was respectful and empathetic towards them and listened to them when she interviewed them. Ms White was simply fulfilling her role as investigator. Ms White was simply fulfilling her role as investigator. The 'conduct' she engaged in – investigating and reporting – was not unwanted conduct. The content may have been unpalatable to the Claimants, and in that sense, 'unwanted' but that does not mean she engaged in unwanted conduct in her own right.

272. Even if it is legitimate to say that the content of the report amounted to 'unwanted conduct' for the purposes of section 26 EqA, that is insufficient in itself to establish harassment. The conduct must relate to age. We do not accept that by reporting the content as she did, which was based on what Ms White had been told and what she had gleaned in her investigation, or by rejecting the grievance that her conduct related to age (even applying the looser connection test of 'related to'). The context of the grievances may have been age, but that does not render Ms White's conduct in reporting the words as being related to age. Otherwise, in any grievance where age is the context, any actions or comments included in a report in relation to the grievance would be 'age related' conduct.

273. Even if all that is wrong, the essential question remains whether the unwanted conduct related to age had the purpose or effect of violating dignity or creating the proscribed environment as set out in section 26 EqA. There is no suggestion that this was Ms White's purpose, and we are entirely satisfied that it was not.

274. Therefore, that leaves the question of 'effect'. If the content of the report (and rejection of the grievance) did amount to unwanted conduct related to age, did it have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment? We have regard to the perception of the Claimants in this regard. They would say that it did create a humiliating and intimidating environment. That is their perception. Indeed, their perception all along from **10 September 2020** is that they had suffered a wrong, that they were humiliated and intimidated. However, we must also have regard to all the circumstances including the fact that they brought the grievance and must be prepared for different views and opinions of their behaviours to be expressed, provided of course, those are genuinely held views, which we found them to be. Whilst having regard to the Claimants' perceptions, we are satisfied that the report was not such as to have the proscribed effect in section 26. We must consider whether it is reasonable for the conduct (Ms White's report) to have that effect. It is not reasonable to conclude that it had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment. Any reasonable observer and worker would see that she was merely doing what was expected of a manager in her position, which was to report impartially on a matter which she had reasonably investigated and making a decision, which could then be taken further on appeal if necessary. We bear in mind the words of Elias J, as he was, in **Grant v HM Land Registry** that the words in section 26 should not be cheapened. In circumstances where an investigator has acted genuinely and impartially and reached conclusions which were open to

her, it would in our judgement cheapen the words of section 26 and indeed undermine the credibility of the statutory provision were we to conclude that such conduct amounted to harassment.

275. There is nothing in the report or from the evidence of Ms White to this Tribunal that would give rise to any inference of harassment or indeed any other form of discrimination or contravention of the Equality Act 2010. It is simply that the Claimants did not like her outcome. Ms White did not engage in unwanted conduct related to age which had the proscribed effect. The age-related harassment claims therefore fail and must be dismissed.

Time point

276. The Respondent submitted that the complaint of victimisation in respect of the **October 2021** grievances was presented out of time.

Carole Bailey's complaint

277. The complaint was brought in **CB's** third Claim Form, which was presented on **12 May 2022**. She contacted ACAS on **02 May 2022** and an EC Certificate was issued on **04 May 2022**.

278. In considering any time point, it is important first to determine the date of the act complained of. In this case, **CB** complains of an omission or failure to act in relation to grievances submitted on **26 and 27 October 2022**. She contends that there was a continuing omission or failure to act and that this continued right up to the date of the termination of her employment on **31 March 2022** (notice having been given on **24 January 2022**). On that basis, **CB** submits that her claim is in time. As set out above under 'relevant law', section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of that period. Section 123(3)(b) makes provision for determining when a failure to do something is to be treated as happening. There was no evidence in this case of anyone deciding not to address **CB's** grievances, nor could we detect any act inconsistent with a decision to progress or address the grievance. Therefore, we must determine the period within which the Respondent might reasonably have been expected to address the grievance.

279. **TW** accepted that a reasonable period would have been two months to address the October grievances. Indeed that was what was put to her by Ms Hogben. That would have taken the Respondent to the end of the 2021. Allowing for the pressures of Christmas, we conclude that the period within which the Respondent might reasonably have been expected to address the grievance was 3 months, which would take it to **26 January 2022**, which was two days after **CB** submitted her resignation.

280. We conclude, therefore, that time in respect of the victimisation complaint in respect of the October grievances started running on **26 January 2022**. As the ACAS early conciliation process was commenced after expiry of the primary limitation date of **25 April 2022**, **CB** can obtain no extension of time. In her written

and oral submissions, Ms Clayton submitted that this ACAS certificate was not a 'mandatory' certificate (see paragraph 9 of Ms Clayton's submissions) for the purposes of section 18A(1) Employment Tribunals Act 1996 as **CB** had already engaged ACAS on the same matter. She referred to the case of **Romero v Nottingham City Council** UKEAT/0303/17. However, as we have found that the date of the discriminatory omission is **26 January 2022**, any analysis of **Romero** is academic as it is only relevant if **CB** were seeking the benefit of an extension of time by virtue of the early conciliation exercise. Given our conclusion no such extension is available.

281. That means that we must consider whether the complaint was presented within such other period as the employment tribunal thinks is just and equitable – otherwise known as the 'just and equitable extension'. We reminded ourselves of the relevant law as set out above. In paragraphs 6 and 7 of her written submissions, Ms Clayton set out some of the factors which a tribunal may take into account. In oral submissions, she submitted that the Claimants gave no evidence as to why it is just and equitable to extend time. However, we agree with Ms Hogben that it is not necessary for there to be direct witness evidence on the question of just and equitable extension and that the Tribunal must look at the evidence as a whole when exercising its broad discretion.

282. Ms Hogben's primary contention was that the complaint was in time. We do not accept that. However, we infer that **CB's** legal representatives believed that the failure to address the grievance was a continuing act that continued up to the date of termination on **31 March 2022** and that the complaint, when presented on **04 May 2022**, was within the statutory period of three months. Although that was an incorrect understanding of how section 123(3)(b) operates, it is, in our judgement the most likely explanation for the late presentation of the complaint. Had **CB** been unrepresented that might have amounted to a good explanation (as the subtleties of section 123 EqA 2010 are unknown to her). However, she had legal representation by then. Although in those circumstances we cannot say that there was a **good** reason for not presenting the complaint earlier (and that is a factor in favour of the Respondent) nevertheless it is **a** reason and, in our judgement explains the late presentation.

283. We considered the length of time by which the complaint was presented out of time. Time having expired on **25 April 2022** and the Claim Form having been presented on **04 May 2022**, the period is nine days.

284. We then considered the presence or absence of any prejudice to the Respondent if the complaint were allowed to proceed, weighed against the prejudice to the Claimant, were we to refuse to extend time. The only prejudice to the Respondent was in having to defend the proceedings. The delay of nine days did not inhibit its ability to do that. The delay had no adverse practical effect on its ability to call relevant evidence. The Respondent was able to call witnesses to explain the failures and it was a matter for the Respondent as to which witnesses to call and what evidence to adduce. Ms Clayton did not identify any prejudice other than the potential risk of a finding on liability which it would not otherwise face if the

claim was out of time and no extension granted. She relied on her submission that the complaint was presented outside the statutory timeframe and that it was for the Claimant(s) to satisfy the Tribunal that time should be extended.

285. Ms Hogben has satisfied us that it is just and equitable to extend time to **12 May 2022** in respect of **CB's** complaint of victimisation regarding the October grievances. We have regard to the fact that the claim is of merit. The prejudice to the Respondent is in having to meet the Claim, is outweighed by the obvious prejudice to **CB**, in that she would be left without a remedy in respect of what we have found to be a meritorious complaint. In the circumstances, the balance of prejudice favours **CB.** We extend time to **04 May 2022** in her case.

Maxine Campbell's complaint

286. The timeframe is different in **MC's** case. The same primary time limit of **25 April 2022** applies. However, unlike **CB**, she did not present a further complaint on **04 May 2022**. Her application to amend to add the identical complaint in respect of the **26 October 2021** grievance was not made until **04 October 2022**, in the course of the final hearing. In her case that is over 5 months after the expiry of the primary time limit on **25 April 2022**. However, her case on the October grievance has always mirrored that of **CB** in identical terms. Although the parties have referred to the **26 October 2021** grievance as being submitted by **CB**, it was not in dispute that it was a joint grievance. It was submitted on behalf of both. Unlike **CB, MC** did not present a third Claim Form in **May 2022**. However, she continued to run her case against the Respondent in this respect as if, for all intents and purposes, she had pleaded a complaint in respect of the October grievance. However, she had not. Her second claim was presented before she submitted that grievance and had never been amended and no application had been made to amend. This we conclude was the fault of her legal representatives, who ought to have noticed long before the final hearing, that it had not in fact been pleaded as a complaint in her case. Thus, we consider the explanation for not bringing the complaint in her case to be that her solicitors and/or trade union were at fault. That is not a good explanation but it is the explanation and it is not the fault of **MC**.

287. We have concluded that it is just and equitable to extend time to **04 October 2022** in respect of **MC's** complaint of victimisation regarding the **26 October 2021** grievance. The upshot is that, as a matter of justice (an integral part of the 'just and equitable' test) we are unable to separate her claim from that of **CB**. We apply the same reasoning in her case as in **CB's**. The only difference between the two is the date of the complaint. However, that is a difference without any additional practical consequence. The Respondent's position in relation to the failure to progress her grievance is precisely the same as in **CB's** case because it was one grievance on behalf of both. We have concluded that the delay of nine days in presenting **CB's** complaint caused no prejudice to the Respondent – or at least that any prejudice was outweighed by that suffered by **CB**. It is no different in **MC's** case because the Respondent would be calling precisely the same evidence.

288. If we were to allow **CB's** extension of time but not **MC's** in circumstances where we have found her to have a meritorious claim in an identical situation, that would result in a real sense of injustice to her. The prejudice to her, in those circumstances, outweighs any prejudice to the Respondent in having to face liability for what would otherwise be an out of time albeit meritorious claim. For these reasons we extend time to **04 October 2022** on the basis that it is just and equitable to do so.

Constructive Unfair Dismissal – Carole Bailey

289. This claim concerned **CB** only. In Ms Hogben's written submissions she relied on the events of the meeting of **06 January 2022** as being the final act relied upon in support of **CB's** contention that the Respondent had repudiated her contract of employment by breaching the term of mutual trust and confidence. It was submitted that what happened on **06 January 2022** was, in itself sufficient to amount to repudiatory conduct, or if not, taken cumulatively with other actions there was a repudiatory breach. Ms Hogben made no specific reference to the October grievances as forming a part of **CB's** decision to resign. Her submission on the October grievances was limited to the victimisation complaint to the effect that there had been no explanation for the failure to address those grievances which should have been resolved within a couple of months. When asked about paragraph 45 of her written submissions what other specific acts were relied on Ms Hogben referred the Tribunal to the pleaded case on **page 206**. She highlighted Ms Watson's conduct and said that it included the way the Respondent behaved from **10 September 2021**, including the move from general surgery.

290. The pleaded case in the third Claim Form, paragraphs 49c, 50 and 51 [**page 206**] relies on the failure to progress the October grievances as (whether in its own right or cumulatively) as repudiatory conduct justifying the Claimant in resigning her employment.

291. The first question for us was whether **CB** had established that by failing to address those grievances the Respondent*,* without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. We were satisfied that she had established this. We were conscious of our finding that **CB** had held on to the Rhys Maybrey grievance for strategic reasons and that, as regards the **27 October** grievance against **TW**, there was, on our findings, no proper basis for any complaint against **TW.** We also had regard to our finding that the grievance regarding Linda Watson was submitted for strategic reasons, to further frustrate any intended move to ENT. Those findings did not on the face of things tend to suggest that any failure to respond to such grievances, looked at objectively, was likely to seriously damage the relationship of trust and confidence. However, it is the conduct of the Respondent which is under the spotlight here, not **CB's** conduct. Her conduct would be something the Tribunal could legitimately take into account when considering whether the failure to progress the grievances played a part in her decision to resign or when considering any remedy. We also took into account our conclusion that the failure to progress or address the informal grievances was an act of victimisation. Therefore, our conclusion is that, by failing

to address her grievances, the Respondent repudiated **CB's** contract of employment and that she was entitled to terminate her contract without notice.

292. We then considered the question of acceptance of the repudiation and causation. The essential question for us was whether this failure was an effective cause of the resignation. As observed by Elias J, as he then was, in **Wright v North Ayrshire Council** [2014] I.C.R. 77, EAT: '*the crucial question is whether the repudiatory breach played a part in the dismissal'*.

293. The first insight into **CB's** thinking as to what caused her to resign is found in the email of **06 January 2022** at **page 859.** There is no reference there to the failure to progress the October grievances. However, it is referred to in the letter of resignation of **24 January 2022** [**page 871**]. In cross examination asked specifically what caused her to resign. **CB** said that what caused her to resign was the unfair treatment from Linda Watson and her unwillingness to adjust to enable her to work in her post or another post, which made her feel worthless and left her distraught.

294. We conclude that the Respondent's failure to progress the October grievances, in fact, played no part in her decision to resign. Even though it is referred to in the letter of resignation, we conclude that the failure to address the grievances was not a genuine part of the Claimant's reason for resigning. We refer back to our findings as to what caused **CB** to resign (paragraph 140 above). **CB** was, in our judgement not so concerned by the alleged breach of confidence by Rhys Maybrey. Had she been, she would have presented the grievance in **July 2021**, when she first became aware of the matter. Nor did she have any genuine complaint about **TW's** handling of her. She knew that Linda Watson had taken over line management of her (as had been agreed with **CB's** union representative) and she knew that she had not completed the risk assessments as she had been asked to do. **CB** had the experience of Mr Campbell's handling of the **15 September 2020** grievance. He had arranged an informal resolution meeting within two weeks. Therefore, she was aware from that just how quickly the first steps in resolving the grievance could and should be taken. Had a similar timeframe applied to the 26 and 27 October grievances, she could have expected a first meeting by **09 or 10 November 2021**. Yet she did not submit her resignation until **24 January 2022**. Whilst that delay was not sufficient to indicate affirmation nevertheless, it was a further indication to the Tribunal, alongside our finding that the grievances were strategic in nature, that the repudiatory breach was not an effective cause of her resignation. The October grievances were referred to in the letter of resignation, we infer, only for the purposes of advancing a complaint of unfair dismissal in the tribunal. They did not, in reality, play a part in her decision to resign. The underlying and sole reasons for resignation were as we have set out in paragraph 140 above. We have no doubt that, had the Respondent addressed the grievance in a timely manner and had it found in **CB's** favour in relation to the **26 October 2021** grievance, she would have resigned in any event.

295. For the above reasons, the complaint of unfair constructive dismissal fails and must be dismissed. It follows that the complaint that the Claimant's constructive dismissal was an act of victimisation also fails and must be dismissed.

Regulation 6(1) PTWR

296. For the sake of completeness, insofar as there was a pleaded claim that the Respondent had contravened regulation 6 PTWR, we must address this. Regulation 6(1) confers an entitlement to be provided with a written statement from the employer where (a) the employee considers the employer may have infringed regulation 5 PTWR and (b) has asked for a written statement giving particulars of the reason for the treatment. This was initially advanced as a free-standing complaint. However, regulation 6 does not confer any cause of action. It provides for the admissibility of a statement provided by the employer and for the drawing of adverse inferences where the circumstances in regulation 6(3) exist. This point has, in our judgement, been abandoned by the Claimants. They have given no evidence in relation to any request in writing for a written statement. Ms Hogben made no submissions on it and asked no questions in cross examination. It does not feature in the final list of issues. It seems to us that this was a 'lawyer's point' taken at the point of drafting the Claim Form and no more than that. As pleaded, the formal grievance of **09 November 2020** is said to amount to the request in writing under regulation 6(1). We are satisfied, in any event, that it does not amount to such a request and that no-one, neither the Claimants nor the Respondent regarded it as such. Even if, through some convoluted reading of the grievance, it could be said to amount to a request under regulation 6(1), we are satisfied that there was no deliberate omission to provide a written statement. However, as we have said, the matter was not pursued in any event.

Summary of conclusions

297. All complaints of direct discrimination on grounds of age are not well-founded and are dismissed.

298. All complaints of less favourable treatment in contravention of regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR') are not well-founded and are dismissed.

299. All complaints that the Claimants were subjected to a detriment in contravention of regulation 7(1) PTWR are not well-founded and are dismissed.

300. All complaints of harassment related to age are not well-founded and are dismissed.

301. All complaints of victimisation with the exception of the complaints regarding to the October 2021 grievances are not well-founded and are dismissed.

302. The complaint of **Carole Bailey** that, by failing to address her grievances **of 26 and 27 October 2021**, the Respondent subjected her to a detriment in contravention of section 27 EqA 2010 is well-founded and succeeds.

303. The complaint of **Maxine Campbell** that, by failing to address her grievance of **26 October 2021**, the Respondent subjected her to a detriment in contravention of section 27 EqA 2010 is well-founded and succeeds.

304. Carole Bailey's complaint of unfair constructive dismissal is not well-founded and is dismissed.

Remedy

305. In light of our conclusions a remedy hearing will be necessary. We would encourage the parties to try to reach a resolution without the need for a remedy hearing as these proceedings will have taken their toll on all concerned. However, if that is not possible, they must jointly write to the Tribunal within 28 days of receipt of this reserved judgment with agreed directions for the listing of such a hearing.

306. We recognise that this has been a difficult case for the participants. We have made findings of fact adverse to the Claimants in many respects and we understand they will be disappointed by this. However, it was clear to the Tribunal that the Claimants have worked tirelessly with dedication and commitment and compassion to their patients. Our findings are not to be taken as any wider indicator of behaviour or conduct beyond that which was necessary for determining the issues in these proceedings.

Employment Judge Sweeney

21 December 2022

APPENDIX

IN NEWCASTLE EMPLOYMENT TRIBUNAL

Case Nos: 2500549/2021, 2500550/2021, 2501459/2021, 2501460/2021 & 2500667/2022

BETWEEN:

(1) CAROLE BAILEY
(2) MAXINE CAMPBELL

Claimants

- and -

COUNTY DURHAM & DARLINGTON NHS FOUNDATION TRUST

Respondent

AMENDED LIST OF ISSUES

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1. THE CLAIMANTS' CLAIMS

1.1. The Claimants bring the following claims:

1.1.1. Direct discrimination on the grounds of age, contrary to s13(1) Equality Act 2010 (**EqA**).

1.1.2. Harassment on the grounds of age, contrary to s26(1) EqA.

1.1.3. Victimisation, contrary to s27(1) EqA.

1.1.4. Less favourable treatment on the grounds of part-time status, contrary to reg 5(1) Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (**PTWR**).

1.1.5. Detriment contrary to reg 7(2) and (3) of the PTWR.

1.1.6. Constructive unfair dismissal (section 95(1)(c) and section 98 Employment Rights Act 1996 (ERA)).

2. JURISDICTION

2.1. Have the Cs' claims been brought within the relevant time limits?

2.2. If any or all of the Cs' claims were not brought in time, is it just and equitable to extend time for bringing those claims?

2.3. Do all of C's claims benefit from the Acas Early Conciliation extension of time, or only the first of each?

THE LESS FAVOURABLE TREATMENT ALLEGATIONS

The Claimants allege that they were subjected to less favourable treatment because of age (s13 EqA) and/or on the grounds that they were part-time workers (Reg 5 PTWR)

3. DIRECT DISCRIMINATION BECAUSE OF AGE – S13(1) EQA

3.1. Were the Claimants subjected to the following treatment?

3.1.1.1. The Claimants were selected for being moved in the reorganisation[1] proposed as outlined in the meetings of 10 September 2020 and 24 November 2020, and thereafter were in fact moved [Carole Bailey in May 2021 and Maxine Campbell in March 2021];

3.1.2. Concerning the 10 September 2020 meeting:

3.1.2.1. A handout focused on the age profile of the group of which the Claimants formed part.

3.1.2.2. Both in the slides shown and in comments by the presenter, Ms Wainwright, the words "future-proofing" were used as a reason for the reorganisation.

[1] The Claimants use the word "restructuring" in their pleadings; the Respondent has preferred the term "re-alignment". The word "reorganisation" is chosen as a neutral alternative.

3.1.2.3. Ms Wainwright referred to the likelihood of older staff leaving or retiring as creating a "skills deficit".

3.1.2.4. Ms Wainwright sought to emphasis different ages by referring to another colleague as "young Chris" (the colleague pointed out that she was, in fact, 49).

3.1.2.5. Ms Wainwright commented that "none of us are getting any younger" and "I am 57" which actively encouraged some of those in the meeting to state their ages.

3.1.2.6. When challenged by Ms Campbell about assumptions she was making about when staff would leave or retire, Ms Wainwright replied that Ms Campbell could work until she was 80, but she would not be doing so, prompting laughter from other staff members.

3.1.2.7. Patrick Hamblin commented words to the effect that as the claimants had retired and returned part time, they caused a skills deficit.

3.1.3. Concerning the 22 October 2020 meeting:

3.1.3.1. Mr Campbell failed to address the concerns about the conduct of earlier meetings which the Claimants had raised, specifically the conduct complained of at paragraph 3.1.2 above.

3.1.4. Concerning the 24 November 2020 meeting:

3.1.4.1. No account was taken of the Claimants' concerns about the proposed reorganisation, and it was presented as a fait accompli.

3.1.4.2. There were several references to the reorganisation being based on "knowledge and skills", but no explanation was provided as to how that might have fed into the reorganisation proposals or what, in fact, it meant.

3.2. Were the Claimants treated less favourably than an actual or hypothetical comparator?

3.2.1. The Claimants say the comparator is the Claimants' colleagues in their department who were younger but at a similar banding, including:

3.2.1.1. Patrick Hamblin

3.2.1.2. Catherine Sloan

3.2.1.3. Christine Lewis

3.2.1.4. Rebecca Vallins

3.2.1.5. George Vickers

3.2.1.6. Melanie Connolly

3.2.1.7. Simon Elliott

3.2.1.8. Sarah Foster-Lovejoy

3.2.1.9. Jill Hunter

3.2.1.10. Katie Harrison

3.3. Was the treatment because of the Claimants' age?

3.4. If the Respondent is found to have treated the Claimant(s) less favourably because of their age, was this treatment a proportionate means of achieving a legitimate aim?

3.4.1. R says the proportionate and legitimate aim was:

3.4.1.1. To ensure that the service model adopted by the Respondent was sustainable in the present and in the future to ensure appropriate skill mixing of all team members across different specialities in order to maintain safe levels of service delivery and care to the Respondents patients;

3.4.1.2. To allow for appropriate and effective succession planning; and

3.4.1.3. To reconfigure the Team Leads in line with the proportion of the department lists by speciality, skills and ability in order to ensure that service need could be met.

4. LESS FAVOURABLE TREATMENT BECAUSE OF PART-TIME STATUS – REG 5(1) PTWR

4.1. Were the Claimants part-time workers?

4.1.1. It is agreed that the Claimants were part-time workers at the relevant time.

4.2. What treatments were the Claimants subjected to?

The Claimants say they were subjected to the following treatments:

4.2.1. The reorganisation proposals outlined in the 10 September 2020 and 24 November 2020 meetings and later implemented saw the Claimants moved from their posts in favour of full-time colleagues.

4.2.2. In the 10 September 2020 meeting, the Claimants were told by Mr Hamblin that their retirement and return as part-time workers caused a "skills deficit". Meeting leader Ms Wainwright agreed with Mr Hamblin, saying: "We can't let that happen again." Other attendees, Melanie Connelly, George Vickers, Jane Foster George and Jody Robinson also agreed, either orally or by nodding.

4.2.3. In the 29 September meeting, the Claimants were told by Ms Watson that their part-time status was one reason for the changes being planned.

4.2.4. In the 24 November 2020 meeting, the Claimants were told by Ms Atkinson that a single full-time worker would be better for their roles than two part-time workers.

4.3. Was that treatment less favourable than would have been the case were the Claimants full-time workers?

4.4. Were any of the above treatments done on the ground that the Claimants were part-time workers?

4.5. Were the treatments justified on objective grounds?

The Respondent says the objective grounds were:-

4.5.1.1. To ensure that the service model adopted by the Respondent was sustainable in the present and in the future to ensure appropriate skill mixing of all team members across different specialities in order to maintain safe levels of service delivery and care to the Respondents patients;

4.5.1.2. To allow for appropriate and effective succession planning; and

4.5.1.3. To reconfigure the Team Leads in line with the proportion of the department lists by speciality, skills and ability in order to ensure that service need could be met.

THE VICTIMISATION ALLEGATIONS

THE CLAIMANTS ALLEGE THAT THEY WERE SUBJECTED TO DETRIMENT BECAUSE THEY DID A PROTECTED ACT (S27 EQA) AND/OR THAT THEY ALLEGED THAT THE RESPONDENT HAD INFRINGED THE PTWR REGULATIONS (REG 7 PTWR)

5. VICTIMISATION – S27(1) EQA

5.1. Did the Claimants do any protected acts?

The Claimants say their protected acts were as follows:

5.1.1. At the 10 September 2020 meeting:

5.1.1.1. Ms Campbell telling Ms Wainwright that she was being ageist.

5.1.1.2. Ms Bailey telling Ms Wainwright that she should not be talking about age in the context of the reorganisation or of the meeting more generally.

5.1.1.3. Ms Campbell challenging Ms Wainwright's assumptions about age and retirement.

5.1.2. At the 22 October 2020 meeting, Ms Bailey telling Mr Campbell that the reason for the meeting was age discrimination.

5.1.3. On 9 November 2020, both Claimants asserting in their grievances that they had "been discriminated against on the grounds of age".

5.1.4. The submission by both Claimants of their claims to the Tribunal in May 2021.

5.2. Were the Claimants subjected to a detriment?

The Claimants say they were subjected to the following detriments:

5.2.1. Despite their requests, the Claimants were not given access to meeting notes or communications concerning the reorganisation and their position in it, The Claimants made data subject access requests (**DSARs**) in March 2021 for meeting minutes and communications concerning their roles and the reorganisation. They have received neither.

5.2.2. They were told that the reorganisation was about "knowledge and skills", but (despite their requests) were never given any indication of how that, rather than age discrimination, justified their moves.

5.2.3. The problems with the report into their alleged misconduct, as particularised at 7.1.2 below.

5.2.4. The rejection of their grievance on 23 July 2021.

5.2.5. The treatment that Carole Bailey endured following her return to work in April 2021, specifically:-

5.2.5.1. The failure of Tracy Wainwright to make adjustments to her role in line with occupational health recommendations, to complete a MSK risk assessment and a stress risk assessment

5.2.5.2. The failure of Tracy Wainwright to take into consideration the Claimant's concerns regarding arthritis in her hands which had been exacerbated since moving to the ENT Team

5.2.5.3. Linda Watson's proposal on 1 December 2021 for the Claimant's phased return to work which included placement on ENT during w/c 27 December 2021 and Orthopaedics and Opthalmology during w/c 3rd January 2022

5.2.5.4. Linda Watson's insistence on 8 December 2021 and 06 January 2022 that a MSK risk assessment and stress risk assessment must be carried out whilst working in theatre

5.2.6. The failure to uphold the Claimants' grievance appeal on 21 October 2021.

5.2.7. The failure to address Carole Bailey's grievances on 26 and 27 October 2021 either at all or in a timely manner.

5.2.8. The allegations raised on 7 April 2022 specifically:-

5.2.8.1. The grievance brought by Tracy Wainwright, Rhys Maybery, Jody Robinson and Claire Atkinson of 10 January 2022

5.3. Were any of those detriments done because of any of the protected acts?

6. DETRIMENT CONTRARY TO REG 7(2) AND (3) OF THE PTWR

6.1. It is not in dispute that the Claimants did one or more of the acts set out in Regulation 7(3) of the PTWR

6.2. Were the Claimants subjected to one or more of the following alleged detriments:-

6.2.1. The inaccurate and/or insincere responses and suggestion that they committed misconduct, all within the investigation report of 15 July 2021

6.2.2. The rejection of the Claimants' grievances by Felicity White

6.2.3. The rejection of the Claimants' appeal by Malcolm Walker

6.3. If so, were any of those detriments because of the reasons set out in Regulation 7(3)?

7. HARASSMENT ON THE GROUNDS OF AGE – S26(1) EQA

7.1. What conduct do the Claimants alleged they were subjected to by the Respondent or its staff?

7.1.1. The Claimants say the conduct they were subjected to is that particularised at paragraph 3.1 above.

7.1.2. Concerning the investigation report into allegations concerning the Claimants' conduct:

7.1.2.1. On page 3, the discussion in the 10 September meeting of people's ages was characterised as "jovial", despite the fact that witnesses had described the Claimants being visibly upset by it.

7.1.2.2. On page 3-4, the report sought to downplay the handout highlighting the ages of staff, stating (despite the fact that its production during the 10 September meeting was accepted) that "some [colleagues] stated they had no recollection of it".

7.1.2.3. On page 4, the report inaccurately described the Claimants as "disrupting the [10 September] meeting"; as being "unprofessional, disrespectful and confrontational", as displaying "aggressive behaviours, raised voices and heckling-type behaviours".

7.1.2.4. On page 5, the report inaccurately said that team leaders were "often moved". Of the two examples given, one was temporary and only on the promise that she could return to her original team. The other was the result of intra-team problems. Neither was part of a reorganisation or "re-alignment".

7.1.2.5. On page 6, the Claimants' previous experience from "some time ago" was highlighted as a justification for the move. In fact, the previous experience was almost two decades ago.

7.1.2.6. On page 6, the report said that the Claimants' complaints about overruns justified their moves; when in fact steps had been taken to deal with those overrun issues and overruns were common to all specialities, including those to which the Claimants were moved.

7.1.2.7. Generally, no reference was made to elements of witness accounts which supported the Claimants' version of events, such as those of Sarah Lovelace-Foster or Christine Lewis.

7.1.3. The rejection of the Claimants' grievances.

7.2. Was the conduct related to their age?

7.3. Was the conduct unwanted?

7.4. Did the conduct in question have the purpose of violating the Claimants' dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them?

7.5. If so, was it reasonable for the conduct to have the proscribed effect?

8. CONSTRUCTIVE UNFAIR DISMISSAL

8.1. Was there a fundamental breach of Carole Bailey's contract by the Respondent express or implied?

8.1.1. if so, was that breach of contract an act of discrimination?

8.2. Was that breach sufficiently important to justify Carole Bailey resigning, or else was it the last in a series of incidents which justified her leaving?

8.3. The final act which Carole Bailey relies upon is the meeting on 6th January 2022 as set out at paragraph 43 Particulars of Claim in which the Claimant was told by Linda Watson that she had to return to the Eyes and ENT Team without any risk assessment in respect of the same.

8.4. Did she resign in response to the breach and not for some other, unconnected reason?

8.5. Did she delay and therefore waive the breach?

9. REMEDY

9.1. If either or both Claimants are successful, what compensation should the Tribunal award them?

9.1.1. The Claimants seek an award for injury to feelings in respect of their claims (other than the claim under Reg 6(1) PTWR which only gives rise to the potential drawing of inferences).

9.2. Should the Tribunal also (or instead) make a recommendation?

9.2.1. The Claimants seek a recommendation that they are moved back to their original roles, i.e. the roles they were carrying out prior to the reorganisation.

9.3. What, if any, is the appropriate interest calculation the Tribunal should make?