EMPLOYMENT TRIBUNALS

Claimant: Ms A Cox

Respondent NHS Commissioning Board
[operating as NHS England/NHS Improvement]

HELD AT: Manchester **ON:** 12-16 September and 20,21 September 2022 [and in chambers on 12-14 December 2022]

BEFORE: Employment Judge Batten
I Frame
I Taylor

REPRESENTATION:
For the claimant: N Kaiden, Counsel
For the respondent: P Gilroy, one of His Majesty's Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. the complaints of race discrimination succeed; and

2. the complaint of whistleblowing detriment succeeds.

REASONS

1. By a claim form presented on 28 September 2020 and a second claim form presented on 27 January 2021, the claimant presented complaints of direct race discrimination, harassment and victimisation, and detriment for

whistleblowing. On 8 February 2020 and on 26 March 2021, the respondent submitted its responses to the claim.

2. A case management preliminary hearing took place on 22 February 2021 before Employment Judge Benson at which the claims were clarified and a list of issues drawn up.

Evidence

3. A bundle of documents comprising a full lever-arch file, 968 pages, was presented at the commencement of the hearing in accordance with the case management Orders. A number of further documents were added to the bundle in the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the bundle.

4. The claimant gave evidence herself and called Cheryl-Ann Chandler, a former colleague in support. Both gave evidence by reference to a written witness statement. The claimant also tendered 2 further witness statements, from Chrissy Luff and Dr Joan Myers. These 2 witnesses were not called to give oral evidence and, whilst the Tribunal read their statements, little weight was attached to their evidence in the absence of cross-examination.

5. The respondent called 3 witnesses, being: Gill Paxton, the claimant's line manager and, at the material time, the respondent's regional Head of Continuing Healthcare; Tracey Grainger, the respondent's regional Director of Intensive Support; and Marie Boles, the respondent's former Director of Nursing and Deputy Chief Nurse. All of the witnesses in attendance at the hearing gave evidence from written witness statements and were subject to cross-examination.

6. In addition, the Tribunal was provided with a cast list and an agreed chronology.

7. The oral evidence and submissions were completed only late in the afternoon of the seventh day and the Tribunal reserved its decision, meeting in chambers to complete its deliberations.

Issues to be determined

8. A draft list of issues had been presented at the case management preliminary hearing on 22 February 2021. At the outset of the final hearing, the Tribunal discussed the draft list of issues with the parties. After amendment, it was agreed that the complaints and issues to be determined by the Tribunal were as follows:

(i) DIRECT RACE/HARASSMENT DISCRIMINATION

1. **Whether, as defined by s.13(1) of the Equality Act 2010 ("EqA") and contrary to ss.39(2)(d) EqA, the Respondent directly discriminated against the Claimant because of her race? This requires consideration of the following:**

   (1) Did the Respondent treat the Claimant less favourably than others?

   (2) If so, was this because of her Black or Non-White race?

   The claimant relies on a hypothetical comparator only and asserts that a relevant comparator would be "non-Black" or "White".

2. **With respect to the less favourable treatment alleged, paragraph 1(1) above, the Claimant relies on the following:**

   (i) **the exclusion of the Claimant from team events by scheduling them initially for times when the Claimant could not attend, namely: 13 May 2019 (Team Away Day) and/or 4 October 2019 (Team Event);**

   (ii) **around September 2019, not being informed that one of the Claimant's team members had been promoted and/or was acting up as a Band 8B;**

   (iii) **in October 2019, Ms Paxton discussing the Claimant's mental health with one of the Claimant's own team members Ms Luff (during which it is alleged she encouraged Ms Luff to report concerns she had regarding the Claimant);**

   (iv) **in January 2020, excluding the Claimant from the recruitment for the new Band 8A posts that would have been part of her team;**

   (v) **on 1 July 2020, the findings of the grievance outcome;**

   (vi) **on 2 November 2020, failing to uphold the Claimant's grievance despite the underlying findings made?**

   The Respondent indicated at the start of the hearing that the above facts are not disputed albeit the respondent denies that the above facts amount to less favourable treatment.

(ii) HARASSMENT RELATED TO RACE

3. **Whether, contrary to s.26(1) EqA and s.40(1)(a) EqA, the Respondent subjected the Claimant to harassment related to race, having regard to the following:**

   (1) Did the Respondent subject the Claimant to unwanted conduct that had the purpose or effect of violating her dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her;

   (2) If so, was this related to the Claimant's Black or Non-White race?

4. **With respect to the unwanted conduct alleged, paragraph 3(1) above, the Claimant relies upon all the matters set at paragraphs 2(i)-2(vi) above (the claim being in the alternative to the extent that any alleged act of direct discrimination is not made out).**

(iii) VICTIMISATION

5. **Whether, as defined by 27(1) EqA and contrary to s.39(4)(d) EqA, the Respondent victimised the Claimant, having regard to the following:**

   (1) Did the Claimant do a protected act?

   (2) If so, was she subjected to any detriment by the Respondent because of this? This necessitates only that the protected act materially (in the sense of more than trivially) influences the Respondents' treatment of the Claimant.

6. **As regard to paragraph 5(1), the protected acts all relate to making an allegation (whether or not express) that the Respondent has contravened the EqA (s.27(2)(d) EqA). These protected acts are alleged to have occurred on:**

   (i) **in August 2019, during a conversation with Ms Paxton at which a desire to promote/act up a colleague was labelled by the Claimant as being something that was contrary to anti-discrimination recruitment practices;**

   (ii) **the facilitative discussion on 14 November 2019;**

   (iii) **the formal grievance lodged on 30 January 2020;**

   (iv) **the grievance appeal lodged on 6 July 2020;**

   (v) **the claim presented on 28 September 2020.**

   The Respondent agreed that the above are protected acts.

7. **In relation to the detriments allegedly suffered, paragraph 5(2) above, these are all the matters set at paragraphs 2(i)-2(vi) above.**

(iv) WHISTLEBLOWING DETRIMENT

8. **The claim of whistleblowing detriment concerns the issue of whether contrary to s.47B(1) of the Employment Rights Act 1996 ("ERA"), the Claimant was subjected to any detriment by any act, or any deliberate failure to act by the Respondent on the ground that she made a protected disclosure, having regard to the following:**

   (1) Has the Claimant made a "protected disclosure", as defined by s.43A ERA;

   (2) if so, has the Claimant been subjected to a detriment post disclosure, namely the matters set out at paragraphs 2(ii)-2(vi) above;

   (3) if so, did that detriment (or detriments) arise from an act or deliberate failure to act by the Respondent; and

(4) if so, was this done on the ground that the Claimant had made a protected disclosure?

9. **In relation to the alleged protected disclosures, these are:**

(i) **in August 2019, the Claimant telling Ms Paxton that she could not promote a staff member from Band 8A to 8B, as this was outside of the recruitment process, breached principles of fairness and anti-discriminatory practices. The Claimant relies upon this falling within ;**

(ii) **on 28 August 2019, the Claimant in a one-to-one meeting telling Ms Paxton that her team members were sitting on CHC independent review panels and that this was a breach of independence and legal obligations;**

(iii) **repetition of the above disclosure on:**

a) 14 November 2019, as part of the informal grievance process;

b) 30 January 2020, in the grievance;

c) 24 June 2020, in the grievance investigation meeting;

d) 6 July 2020, in the appeal.

The Respondent agreed that the above are protected disclosures.

(v) JURISDICTION - TIME LIMIT ISSUE

10. **The Respondents raises the issue of whether the claims are in time. In light of ACAS Early Conciliation being between 16 August - 28 September 2020, any acts/omissions which pre-date 17 May 2020 (so the allegations contained in paragraphs 2(i)-2(iv) above) may be out of time, unless:**

(i) **such acts are part of conduct extending over a period past 17 April 2020 and so rendered in time (for the EqA claims), *or* where that act or failure is part of a series of similar acts or failures, the last of them (for the ERA claim);**

(ii) **if not, should time be extending under s.123 EqA on the grounds that it is just and equitable to do so; *or* within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months s.48(3)(b) ERA?**

Findings of fact

9. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

10. Having made findings of primary fact, the Tribunal considered what inferences it should draw from them for the purpose of making further findings of fact. The Tribunal have not simply considered each particular allegation, but have also stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

11. The findings of fact relevant to the issues in the claim are as follows.

12. The claimant has been employed by the respondent, from 1 May 2017, as a Continuing Healthcare Manager at Band 8B and at the material time was the deputy to her line manager, Gill Paxton, who was the respondent's regional Head of Continuing Healthcare. The claimant remains in the respondent's employment.

13. The claimant describes herself as a black woman or non-white and, for the purposes of her direct discrimination complaints, the claimant relies upon a hypothetical comparator. In 2018, the claimant was the only black nurse in the respondent's north region.

14. In 2018, the claimant was appointed to the Chief Nursing Officers' Black Minority Ethnic Strategic Advisory Group as the North West region lead. The structure and functions of this group are set out in the bundle at pages 756 – 757 and includes an aim of being "… proactive in influencing, supporting and advising on the implementation and delivery of policies and practice that impact BME communities and staff."

Awayday on 13 May 2019

15. On 1 April 2019, the claimant was signed off work for 12 weeks, for knee-replacement surgery and for her subsequent recovery from the operation. She was not "ill" in the usual sense and there was no assessment of what the claimant could or could not do whilst recuperating.

16. Ms Paxton arranged a team awayday to take place on 13 May 2019, during the claimant's sickness absence. The awayday was an important planning event in light of a large reorganisation and those absent would be 'out of the loop' at a critical time. The claimant wanted to attend but Ms Paxton refused to countenance this, rejecting the suggestion that the claimant might obtain a medical fit note to cover her attendance. Ms Paxton was rigid in her view and unwilling to compromise. She took the view that the claimant was signed off sick and so could not attend under any circumstances.

Staff uplifts

17. During 2019, 2 employees, Sue Fletcher and Natasha Hurree, had been undertaking additional work for the respondent, working together in an effort to reduce the backlog of cases before the respondent's Independent Review Panels ("IRP"). Ms Fletcher was working at band 8A and Ms Hurree was working at Band 6.

18. On 25 July 2019, Marie Boles, the respondent's Director of Nursing, emailed Ms Paxton about giving Ms Fletcher "*additional recognition i.e. 8B*". There was a discussion between Ms Boles and Ms Paxton. There was no mention of any recognition for Ms Hurree. Ms Fletcher, a white employee, was junior to the claimant and was a member of the claimant's team. Nevertheless, Ms Paxton did not inform the claimant nor consult her about the proposal for an uplift, her reason being "because I [Ms Paxton] didn't want to have a difficult conversation with [the claimant]." The proposal was then developed to include an uplift/additional money for Ms Paxton also.

19. On 1 August 2019, Ms Hurree, a black employee, put in a request about her pay, seeking regrading from Band 6 to Band 7 due to the additional work. Ms Paxton forwarded Ms Hurree's email to Ms Boles and they had a discussion about the matter. Eventually, Ms Boles agreed to support the regrade for Ms Hurree as well. As a result, in September 2019, both employees were given a temporary re-grade and, at the same time, Ms Paxton received an uplift for overseeing the work of the upgraded employees. In evidence, the respondent's witnesses sought at first to suggest that the upgrades of Ms Fletcher and Ms Hurree were proposed at the same time. However, the Tribunal concluded, from contemporaneous documents and the witness evidence that the original proposal had been for the managers, Ms Fletcher and Ms Paxton to be given upgrades. Ms Hurree was only included in the proposal later, when and because she formally requested a review. The claimant was not informed of the proposal despite that it affected one of her team.

20. The respondent's witnesses sought to explain the exclusion of the claimant in terms of matters of pay being confidential. However, the Tribunal takes account of the fact that the NHS is a public sector employer, with agreed and published pay bands. There was no mention of the amount of money involved for any individual and managers ordinarily are expected to know the banding of the staff they manage. In those circumstances, the Tribunal considered that the suggestion of confidentiality amounted to an excuse, given with hindsight, for the actions of Ms Paxton and Ms Boles in excluding the claimant from discussions.

21. Importantly for the claimant, this development meant that Ms Fletcher, whom the claimant managed, was placed on the same grade as the

claimant. When the claimant eventually learned of the matter, she told Ms Paxton that the desire to promote/upgrade Ms Fletcher fell outside of the respondent's recruitment processes, breached principles of fairness and was contrary to anti-discrimination recruitment practices. The respondent has accepted that this conversation constituted a protected act for the purposes of the Victimisation complaint (see the list of issues, 6(i)) and also a protected disclosure for the purposes of the whistleblowing complaint (see list of issues 9(i)). The Tribunal considered that the conversation between the claimant and Ms Paxton was an example of the claimant fulfilling her brief as regional lead for BME employees and noted that Ms Paxton described this and other interactions with the claimant as "difficult".

Use of the respondent's staff on IRPs

22. On 28 August 2019, at a monthly 1-2-1 meeting with Ms Paxton, the claimant raised an issue about the respondent's staff who were sitting on IRP panels. The claimant told Ms Paxton that her team members sitting on IRPs was a breach of independence and legal obligations. The respondent has accepted that this conversation constituted a protected disclosure for the purposes of the whistleblowing complaint (see list of issues 9(ii)). Employees of the respondent had raised the issue with the claimant and some had declined to sit on the panels due to a conflict. Ms Paxton dismissed the claimant's concern. When another employee queried the practice, Ms Paxton told them that she had "cleared it with legal". There was no evidence that Ms Paxton had in fact done so.

23. In May 2022, the claimant submitted a Freedom of Information Act request to the respondent about the IRP panels. The response she received is clear, namely that paragraph 25 of the Standing Rules for IRPs states that "*a person is disqualified for appointment as a chair (of a review panel) if that person is an employee of an NHS body".* The response goes on to say that there would be no occasion when an employee of the respondent would sit as a panel member (bundle pages 705-706). The respondent did not address this in evidence and did not investigate the matter at the grievance appeal. In cross-examination, Ms Paxton sought to suggest that her staff were only involved with the IRPs on an advisory basis but the evidence did not support this.

Awayday on 4 October 2019

24. On 4 October 2019, Ms Paxton arranged a team awayday with the theme of "Mindfulness". It was to be a treat for staff. The claimant had been invited along with all team members by email – see bundle page 103. The awayday was booked to take place on the same day as the National Nursing BME conference. Ms Paxton described this as a scheduling error

but admitted that all diaries had not been checked and the team had not been asked about their availability over a range of dates, as was usual practice. The Tribunal considered it inconceivable that Ms Paxton would not be aware of the National Nursing BAME conference, an important and high-profile national event, which took place annually, particularly when she worked closely with the claimant and was fully aware of the claimant's remit and commitments. The 'scheduling error' was careless and unnecessary. As result the claimant and other BAME employees were unable to attend the awayday treat or were faced with a choice. Ms Paxton suggested to the claimant that the date of the awayday could be changed. In this regard, the Tribunal accepted the claimant's view that to change the date, late on, would be inconvenient for other team members and may lead to further clashes. The claimant was made to feel that she would be causing trouble if she pushed the matter and, in consequence, she felt excluded.

25. Despite the evidence about arrangements for the Mindfulness awayday, Ms Paxton sought to suggest in cross-examination that the claimant had not in fact been invited at all and, when challenged about this suggestion, she contended that what she meant was that the awayday had been funded out of a budget that did not cover the claimant's attendance. There was no evidence to support such a suggestion and, if budget had been an issue, it begged the question as to why the claimant had been invited in the first place and why Ms Paxton had said to the claimant that the date could be changed due to her clash. There was no mention of any budget issue at the time nor did Ms Paxton raise budgetary constraints as an explanation at any time during the grievance and appeal processes. The Tribunal considered the budget to be a "red herring" and another example of an excuse being given, after the event, and which does not fit with contemporaneous documentation on the matter.

Ms Paxton's conversation with Chrissy Luff

26. On 7 October 2019, while the claimant was on annual leave, Ms Paxton had a conversation with Chrissy Luff, a junior member of the team, about the claimant. Ms Paxton said to Ms Luff that she was concerned about the claimant and asked Ms Luff, "is [the claimant] OK?" In evidence, Ms Paxton was adamant that this was not a question about the claimant's state of health or mental health and that she did not mention health. However, when asked by the Tribunal to explain what it was about, if not the claimant's health, Ms Paxton admitted that she was referring to the claimant's health. In the course of the conversation, Ms Paxton reminded Ms Luff of her status as a nurse, and encouraged Ms Luff to report any concerns she might have about the claimant. Despite this, Ms Paxton, herself a registered nurse, took no action about her own concerns and did not report them nor did she refer the claimant to occupational health. The

respondent's grievance appeal found this to be an inappropriate conversation between a manager and junior staff. The Tribunal agreed with that view. In evidence, Ms Paxton sought to play the matter down, framing her approach to Ms Luff as a general enquiry as to whether the claimant was alright, but the Tribunal considered it was more than that and concluded on a balance of probabilities that Ms Paxton was seeking an opportunity to encourage a member of staff to report the claimant.

The claimant's first complaint

27. On 30 September 2019, the claimant raised a formal complaint about Ms Paxton's behaviour towards her, with reference to unfair recruitment practices in the award of Ms Fletcher's uplift, the mindfulness awayday, and being undermined within the team by Ms Paxton. The complaint appears in the bundle at pages 145-148.

28. On 14 November 2019, a facilitated discussion meeting took place between Ms Paxton and the claimant on an informal basis. Ms Paxton described it in her witness statement as "a mediation." The respondent has accepted that, in the course of the meeting, the claimant made statements which constituted a protected act for the purposes of the Victimisation complaint (see the list of issues, 6(ii)) and also a protected disclosure for the purposes of the whistleblowing complaint (see list of issues 9(iii)(a)). The attempt at the mediation to resolve issues between the claimant and Ms Paxton was unsuccessful.

The Band 8A recruitment process

29. On 20 January 2020, two Band 8A vacancies for CHC Programme Managers were advertised. The closing date for applications was publicised as 26 January 2020 with interviews to take place on or after 3 February 2020. The vacancies fell within the claimant's team. Nevertheless, Ms Paxton failed to include the claimant in any of the preparatory steps nor to inform her that the recruitment process had in fact been launched. Ms Paxton handled all communications with the recruitment administrator, Nicola Pollard, and failed even to copy the claimant into email traffic about the recruitment exercise.

30. From 20 January 2020 to 30 January 2020, the claimant was on leave.

31. On 20 January 2020, Ms Paxton approached Ms Chandler, a black employee on secondment to the respondent, and sought to arrange to interview her on 28 January 2020. At the time of this approach, the Band 8A job advert had just been published, it was not apparent that Ms Chandler had submitted an application, no shortlisting process had been agreed nor undertaken, and the interview panel had not been appointed.

Ms Chandler was understandably surprised at the apparent rush to interview her. In any event, Ms Chandler was travelling to London on 28 January 2020 and therefore unavailable and so her interview had to be postponed until mid- February 2020, when other candidates were also interviewed. The purpose and timing of the attempt to interview Ms Chandler on 28 January 2020 has not been explained by the respondent.

32. It is apparent from the evidence before the Tribunal that Ms Paxton was at all times aware of the Band 8A recruitment process as it progressed although, in evidence, she sought to deny this was the case. On 29 January 2020, Ms Pollard asked for details from Ms Paxton about who would be doing the shortlisting and who would be on the interview panel. In respect of the interview panel, Ms Paxton had told Ms Chandler that the panel would comprise herself and 2 external interviewers. There was no mention of the claimant who, as direct line manager of the appointee, would ordinarily have been involved throughout the respondent's process.

33. Ms Paxton is a senior and experienced manager who had undertaken recruitment before. She was questioned about her handling of the recruitment process and the Tribunal observed that she was unable or unwilling to answer a number of questions about it, often resorting to vague and evasive answers, for example, suggesting that she was not kept informed of the stages of the process at the material time. This was despite that she had the benefit of administrative support and the process was recorded on the respondent's TRAC system so she could have checked. Her suggestion that she was not aware of matters was inconsistent with the fact that, on 20 January 2020 (the go-live date), she took it upon herself to seek to arrange at least one interview with inordinate haste. This was whilst the claimant was away from work. In her witness statement, Ms Paxton points to the fact that she had approached the claimant to see if she wanted to be involved in the recruitment process and that the claimant had said she did want to be involved. However, the email referred to by Ms Paxton is dated 5 February 2020, some time after the process commenced and after key aspects had been decided without the claimant's input.

Grievance

34. On 30 January 2020, the claimant sent the respondent a formal letter of grievance complaining about her exclusion from events. The grievance appears in the bundle at pages 426-428. The respondent has accepted that the claimant's grievance constituted a protected act for the purposes of the Victimisation complaint (see the list of issues, 6(iii)) and also a protected disclosure for the purposes of the whistleblowing complaint (see the list of issues 9(iii)(b)). The thrust of the grievance was that the claimant

considered she had been undermined, marginalised and ignored. At the end of her grievance, the claimant wrote,

"*As a senior BME nurse, I have a role in supporting the organisation in understanding the issues impacting on BME staff and particularly BME nurses. It has been acknowledged by the CNO and [the respondent]'s Senior BME Managers Group, that there are specific issues pertaining to recruitment, retention, career pathway and staff experience of BME staff. I am expected as a member of these groups to be honest, open and transparent in these matters. How can I do this when I am aware that the very issues that I speak publicly about, trying to eradicate poor practices, are currently happening to myself within my team with a potential to impact on my professional reputation and as a registrant."*

35. On 11 February 2020, the claimant's trade union was told that the grievance would be investigated under the respondent's Respect at Work policy and procedure and, on 26 February 2020, the claimant was interviewed about her grievance.

36. On 28 February 2020, the Band 8A interviews commenced. The claimant had by then been included as a member of the interview panel.

37. On 11 March 2020, Ms Paxton was interviewed for the grievance investigation, by Dr Khan

Ms Fletcher's email signature and job title

38. On 20 March 2020, Ms Fletcher emailed the team using a new format and job title in the sign-off of her email. This did not go unnoticed by team members who brought it to the claimant's attention – bundle page 317. The claimant was unaware of the change and felt undermined by it. The respondent's witnesses were unable to explain to the Tribunal how the change in Ms Fletcher's job title had come about, suggesting that they had no involvement and implying that Ms Fletcher may have adopted the new title unilaterally. The Tribunal rejected this suggestion, noting here that the grievance appeal had looked at this matter and concluded that Ms Paxton, as line manager, had responsibility for staff email signatures (see bundle page 373). It was clear from the documents that Ms Paxton must have seen the new signature/job title as she was included in the email from Ms Fletcher to the team. The claimant raised the matter with Ms Paxton, on 20 March 2020, about authorising Ms Fletcher's change of job title/email signature as a further instance of the claimant being undermined. In Ms Paxton's witness statement, paragraph 61, she simply denies that she had done so to 'upset' the claimant, without specifically denying that she had authorised the change. The Tribunal concluded on a balance of probabilities that Ms Paxton was at all times aware of and approved of the

change but later, in the face of criticism she sought to deflect attention from herself, and in evidence she sought to avoid responsibility for it.

39. On 26 March 2020, Ms Boles was interviewed by Dr Khan and Ms Handsley for the grievance investigation.

40. On 6 April 2020, Ms Paxton was interviewed by about the email signature complaint by Dr Khan. The conclusion reached by the grievance investigation was that there was no evidence that Ms Paxton had authorised the change in email signature/job title and no evidence that she had any intent to undermine the claimant. The Tribunal considered this to be a woefully inadequate conclusion to reach and one which was in any event contradicted by the appeal findings.

41. In April 2020, during the first COVID Lockdown, the claimant undertook a COVID secondment.

42. On 28 April 2020, Ms Boles pointed out to Dr Khan and Ms Handsley that a Band 8B role was about to be advertised. Ms Boles was mindful of the fact that the claimant had been seeking redeployment by this time and intended that this information should be passed on to the claimant.

43. The Tribunal was told that the report from Dr Khan's investigation was compiled by the respondent's HR, due to Dr Khan's busyness at the time. The investigation report was passed to a newly appointed case manager to review, Alison Smith, Director of Nursing – Leadership and Quality.

The grievance outcome

44. On 24 June 2020, the claimant met with Ms Smith. The purpose of the meeting was for Ms Smith to feedback to the claimant on the outcome of the investigation and to discuss next steps. The respondent has accepted that this conversation constituted a protected disclosure for the purposes of the whistleblowing complaint (see list of issues 9(iii)(c)) in that the claimant repeated previous protected disclosures, in the list of issues at 9(i) and (ii), at this meeting.

45. On 1 July 2020, Ms Smith sent the claimant a grievance outcome letter which appears in the bundle at pages 378-383. The Tribunal considered the contents of the outcome letter and considered that the letter failed to deal with all the material issues raised nor set out its reasoning and instead was superficial. The Tribunal found that Ms Smith's letter simply reproduced large parts of the investigation report and then stated that a "case management review" had agreed with a number of conclusions. Comments are made about certain points of the claimant's grievance in terms of "learning opportunities" and "improving communications between

staff." Despite that the claimant and Ms Paxton had been through an unsuccessful mediation the previous year, the report recommends another mediation.

46. In essence, the grievance outcome does not address the underlying issue of race discrimination which the claimant had specifically raised. Nor does the letter specifically state whether the grievance has been upheld or not.

47. The conclusions acknowledge that the relationship between the claimant and Ms Paxton had broken down and refers to the claimant having perceived certain behaviours to be deliberate attempts to undermine and exclude her. That, in effect, was what the grievance was about. However, beyond a suggestion that Ms Paxton had made some poor management decisions which had compromised and upset the claimant, the issue of any possibility of race discrimination is not addressed beyond a short statement to the effect that there was no evidence of any actions or behaviours having been deliberate or a deliberate attempt to discriminate against the claimant on grounds of race. The Tribunal considered this conclusion to be woefully inadequate – it fails to consider or address whether certain actions may have been subconscious bias or racially motivated. Despite the number of events about which the claimant complained, there was no attempt to examine whether there was any pattern of behaviour at play or actions which, taken together, might suggest something more at work than poor management decisions. Nor did the grievance outcome draw any inferences from the material before it, instead setting a high bar, namely that it needed to see "deliberate" discrimination. The respondent called no witnesses on this important aspect of the claimant's case, even though it constituted a separate allegation of discrimination and harassment. In those circumstances, the Tribunal drew an inference, from the material before it, that by not adopting a critical approach, the panel did not want to find any discrimination, harassment or other unlawful behaviour and did not properly apply its mind to matters, instead setting a high bar which would never be reached.

Grievance appeal

48. On 6 July 2020, the claimant submitted an appeal against the grievance outcome. Her appeal appears in the bundle at pages 384-386. The respondent has accepted that the appeal constituted a protected act for the purposes of the Victimisation complaint (see the list of issues, 6(iv)) and also a protected disclosure for the purposes of the whistleblowing complaint (see list of issues 9(iii)(d)).

49. In her appeal letter, the claimant contends that the investigation had failed to consider discrimination under race, equality or inclusion, that her

evidence had not been considered and that the investigation had diverted away from the questions she had raised. The claimant also points out that "The use of the words 'not deliberate and not intentional' throughout the report would indicate that the investigation panel are not aware that an act does not have to be deliberate or require a motive to be discriminatory, it is the impact that counts" and in respect of the outcome letter's failure to state that the grievance had not been upheld, the claimant said she "fail[ed] to understand when the report states explicitly throughout that there is learning for Gill Paxton and learning for the organisation, why [the] grievance is not upheld." Lastly, the claimant raises an issue with the first version of the report, in which the surnames of the only 2 black nurses in the respondent were mixed up, a matter which the claimant cites as disappointing, hurtful and humiliating further evidence of her experience in the workplace.

50. On 16 August 2020, the claimant commenced ACAS early conciliation.

51. On 24 September 2020, the claimant attended a grievance appeal meeting. The grievance appeal panel was chaired by Tracey Grainger, the respondent's Director of Intensive Support in the North East and Yorkshire region, and Byron Currie, a Strategic HR Business Partner who was himself a black manager in HR.

52. Following the meeting, Ms Grainger drew up and Mr Currie added to a 'key list of issues' arising from the grievance appeal.

53. On 28 September 2020, the claimant presented her first claim to the Tribunal. The respondent has accepted that this constituted a protected act for the purposes of the Victimisation complaint (see the list of issues, 6(v)).

54. On 13 October 2020, Ms Paxton was interviewed by Ms Grainger and Mr Currie about the claimant's appeal. An email chain in the bundle at pages 672-673 shows that Ms Paxton had been provided with the key list of issues and questions on 8 October 2020, prior to her interview.

55. After her interview, Ms Paxton emailed Ms Grainger and Mr Currie to set out what she said she knew and when about the Band 8A recruitment process in a timeline. Attached was a selective number of emails to illustrate her knowledge – bundle page 675. Importantly, the selective emails provided by Ms Paxton stand in stark contrast to the emails and information provided to the appeal on 22 October 2020 – bundle page 679 - by Ms Pollard, the administrator supporting the Band 8A recruitment process. These show a very different knowledge and times of knowledge to that suggested by Ms Paxton. The Tribunal noted and agreed with the

appeal's conclusions on the matter (bundle page 695) that the episode showed evidence of Paxton being misleading and untruthful.

56. On 23 October 2020, Ms Boles approached the claimant to point out a Band 8B Nurse Fellow role which was vacant, because she thought the claimant might be interested in it. This would have been a sideways move for the claimant who was already on Band 8B.

57. On 2 November 2020, the claimant emailed Ms Grainger and Mr Currie with additional information, pointing out the fact that her grievance was about discrimination and that she had asked for the respondent's Equality Diversion and Inclusion in the Workplace policy to be used, whereas the respondent had decided to investigate it under the Respect at Work policy despite that the claimant had been clear that race discrimination was a factor in her complaint – see bundle page 686.

Grievance appeal outcome

58. On 4 November 2020, the grievance appeal outcome was issued in the form of a report which appears in the bundle at pages 689-697. The claimant's case is that this outcome, in failing to uphold her grievance despite the underlying findings, constituted a detriment for the purposes of the direct discrimination, harassment and victimisation complaints (see the list of issues, 2(vi)) and is the last act complained of by the claimant. In evidence, Ms Grainger suggested that the claimant's grievance had been "upheld in part" but this is nowhere stated in the contents of the report nor in its covering letter.

59. The Tribunal considered that, at best, the conclusions say that the claimant has been negatively impacted by poor management and behaviour decisions. There is then no attempt to examine the behaviour concerns identified or the reasons for it. Under cross-examination, Ms Grainger accepted that discrimination is rarely admitted and thus the function of the appeal was to see what inferences could be drawn. The Tribunal found that the appeal identified a number of instances of what it variously described as "poor" behaviour towards the claimant yet failed to address why this poor behaviour had taken place nor was the respondent able to explain why this was somehow unimportant. For example, at point 4.2, it concluded that an "unsound decision" had been made in respect of the acting up in September 2019 but did not go on to consider why such a decision was made; at 4.3, it did not deal with why the claimant did not attend the awayday in May 2019 even though she had indicated that she had wanted to; at 4.4, it did not consider whether Ms Paxton knew of the BAME conference and did not explain why diaries were not checked nor why the claimant was not consulted before a date was set; at 4.6-4.7 in respect of the IRP panels, it did not address the issue of disclosing the

legal advice even though the Freedom of Information request showed that the claimant was correct, and did not engage on the lawfulness point; at 4.9, the appeal stated it did not agree with the original investigation's finding that there was "no intention to undermine" the claimant, but then did not consider why this had happened; at 4.22, it points out the unusual lack of involvement of the claimant in the Band 8A recruitment without determining why the lack of involvement had happened, suggesting it had not evidence to support any reason why.

60. On 7 November 2020, the claimant sent an email to the appeal panel setting out her disagreement with aspects of the outcome of the appeal. This appears in the bundle at page 702.

61. Whilst the grievance outcome was communicated to the claimant, the Tribunal were concerned to learn that it was never shared with Ms Paxton, the subject of the grievance, despite Ms Grainger telling the claimant, and the Tribunal, that the grievance had been upheld "in part." The Tribunal considered that, as a result, the grievance outcome was not effectively actioned and this failure by the respondent negated the purpose of the grievance process. When asked to explain this omission, Ms Grainger told the Tribunal that it was not within her remit and that feedback to Ms Paxton was the responsibility of HR. It was apparent from the evidence that such feedback had never taken place. In those circumstances, the apology sent to the claimant by the regional chief executive, Bill McCarthy, couched in terms of "work[ing] closely with … HR to make sure that lessons are learned" rings hollow - there was no evidence as to how this suggestion had been put into effect either with Ms Paxton or in terms of the wider organisation. The Tribunal noted that Ms Paxton had left the respondent in November 2020 and now works in another part of the NHS. Despite this, the Tribunal were unable to establish what mechanism(s) exist, if any, for a grievance outcome to be communicated to another part of the NHS or placed on an individual's record, once that individual has moved on, but remain employed within the NHS.

62. On 27 January 2021, the claimant presented her second claim to the Tribunal, adding complaints about the grievance and appeal.

The applicable law

63. A concise statement of the applicable law is as follows.

Race discrimination

64. The complaint of race discrimination was brought under the Equality Act 2010 ("EqA"). Race is a relevant protected characteristic as set out in section 9 EqA.

65. Section 39(2) EqA prohibits discrimination by an employer against an employee by subjecting her to a detriment. By section 109(1) EqA an employer is liable for the actions of its employees in the course of employment.

66. The EqA provides for a shifting burden of proof. Section 136(2) and (3) so far as is material provides as follows:

> *(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.*

67. Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the EqA. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

68. In *Hewage v Grampian Health Board [2012] IRLR 870* the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in *Igen Limited v Wong [2005] ICR 931* and was supplemented in *Madarassy v Nomura International plc [2007] ICR 867*. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct discrimination

69. Section 13 EqA provides that 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. The relevant protected characteristics include race.

70. Section 23 EqA provides that on a comparison for the purposes of establishing less favourable treatment between B and others in a direct discrimination claim, there must be no material difference between the circumstances of B and of the comparator(s).

71. The effect of section 23 EqA as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person not of the claimant's race. In analysing whether an act or decision is tainted by discrimination, an Employment Tribunal may avoid disputes about the appropriate comparator by concentrating primarily on why the claimant was treated as she was, known as the "reason why" approach, in *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*. Addressing the "reason why" involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race) had any material influence on the decision, the treatment is "because of" that characteristic.

72. Very little direct discrimination is overt or even deliberate. In *Anya v University of Oxford [2001] IRLR 377 CA* guidance was given that Tribunals shall look for indicators from a time before or after the particular act which may demonstrate that an ostensibly fair-minded decision was or was not tainted by bias, in *Anya* racial bias. Discriminatory factors will, in general, emerge not from the act in question but from the surrounding circumstances and the previous history.

Harassment

73. Section 26 EqA provides:

> *(1) A person (A) harasses another (B) if-*
>
> *(a) A engages in unwanted conduct related to the relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of -*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B*
>
> *(2) A also harasses B if-*
>
> *(a) A engages in unwanted behaviour of a sexual nature, and*

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

74. The concept of harassment under the previous equality legislation was the subject of judicial interpretation and guidance by Mr. Justice Underhill in *Richmond Pharmacology and Dhaliwal [2009] IRLR 336*. The Tribunal has applied that guidance, namely:

"*There are three elements of liability (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's [protected characteristic].*"

Victimisation

75. Section 27 EqA provides that 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 B has done or may do a protected act*

76. A protected act includes making an allegation (whether or not express) that A or another person has contravened the Act.

77. In *Martin v Devonshires Solicitors UKEAT/0086/10* Mr. Justice Underhill analysed the previous similar provisions as follows:

"The question in any claim of victimisation is what was the "reason" that the respondent did the act complained of: If it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not

the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint."

78. A claim of victimisation does not require any comparison. Answering the question of the 'reason why' involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator to see whether the protected act had any material influence on the detrimental treatment; see for example *Amnesty International v Ahmed [2009] IRLR 884*.

Whistle-blowing detriment

79. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure.

80. Section 47(1A) to (1E) ERA provides that an employer can be vicariously liable for the detrimental acts of its workers unless the employer has taken all reasonable steps to prevent the detriment. It is immaterial whether the act of detriment or deliberate failure to act was done with the knowledge or approval of the employer.

81. A "protected disclosure" means a disclosure of information, but not mere allegations, to the employer or to a prescribed person which, in the reasonable belief of the worker is in the public interest and tends to show one or more matters including a failure to comply with a legal obligation, that the health or safety of any individual has been endangered, or that a criminal act has been committed.

82. The Tribunal has jurisdiction to consider complaints of public interest disclosure detriments by section 48(1A) ERA. Section 48(2) stipulates that on such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

83. A 'detriment' arises in the context of employment where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see for example, *Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL*.

84. In *Fecitt v NHS Manchester [2012] IRLR 64* the Court of Appeal held that for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the protected disclosure materially influenced the employer's action. The test is the same as that in discrimination law and separates detriment claims from complaints of unfair dismissal under

section 103A ERA, where the question is whether the making of the protected disclosure is the reason, or at least the principal reason, for dismissal.

Time limits

85. The time limit for complaints of unlawful discrimination is found in section 123 EqA, which provides that such complaints may not be brought after the end of: -

    (a) the period of three 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.

86. Conduct extending over a period of time is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it*, or does an act inconsistent with doing it,* or on the expiry of the period in which that person might reasonably have been expected to do it. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question.

87. In *Robertson –v- Bexley Community Centre (T/A Leisure Link) [2003] IRLR 434* the Court of Appeal considered the application of the "just and equitable" extension and the extent of the discretion and concluded that the Employment Tribunal has a "wide ambit".

88. The time limit for complaints of whistleblowing detriment is found in section 48(3) ERA which provides that such complaints shall be presented to the Tribunal:

    (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

    (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

89. Two issues may therefore arise: whether it was not reasonably practicable for the claimant to present the complaint within time; and, if not, whether it was presented within such further period as is reasonable.

90. Something is "reasonably practicable" if it is "reasonably feasible" (see *Palmer v Southend-on-Sea Borough Council [1984] ICR 372, Court of Appeal)*.

91. In *University Hospitals Bristol NHS Foundation Trust v Williams UKEAT/0291/12* the EAT upheld a Tribunal decision that a late claim was "in time" even though the medical evidence "did not entirely support the Judge's findings about the Claimant's mental health" (EAT judgment paragraph 12) and even though the claimant had been able to move home and find a new school for her child during the period when the Tribunal found it had not been reasonably practicable to have presented a claim.

92. In *Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293* the Court of Appeal reviewed some of the authorities and confirmed in paragraph 20 that a liberal approach in favour of the employee was still appropriate. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal.

93. In the course of submissions, the Tribunal was referred to a number of cases by the parties' Counsel, as follows:

Orphanos v Queen Mary College [1985] IRLR 249 HL
Calder v James Finlay Corpn Ltd [1989] IRLR 55
Barclays Bank v Kapur [1991] 2 AC 355
Littlewoods Organisation plc v Traynor [1993] IRLR 154
Chapman v Simon [1994] IRLR 124
O'Neill v Governors of St Thomas More Roman Catholic Upper School [1996] IRLR 372
Glasgow City Council v Zafar [1998] IRLR 36
Cast v Croydon College [1998] IRLR 318
Martins v Marks & Spencer plc [1998] IRLR 326
Nagarajan v London Regional Transport [1999] IRLR 572
Driscoll v Peninsula Business Services Ltd [2000] IRLR 151
Khan v Chief Constable of West Yorkshire [2001] UKHL 48
O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701
Qureshi v Victoria University of Manchester [2001] ICR 863
Hendricks v Commissioner of the Metropolitan Police [2002] EWCA Civ 1686
Inland Revenue v Morgan [2002] IRLR 776
Barton v Investec Henderson Crosthwaite Securities [2003] IRLR 332
Law Society and others v Bahl [2004] IRLR 799 CA
Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358
Villalba v Merrill Lynch [2006] IRLR 437

R v Rogers [2007] UKHL 8
Hunwicks v Royal Mail [2007] All ER (D) 68
Kuzel v Roche Products Ltd [2008] IRLR 530
Wright v Wolverhampton City Council [2009] All ER (D) 179
Chandok v Tirkey [2015] ICR 527
Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust [2016] UKEAT 0269/15
Talbot v Costain Oil, Gas & Process Ltd and others UKEAT/0283/16
Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979
Serco Ltd v Dahou [2017] IRLR 18
Malik v Cenkos Securities plc UKEAT/0101/17
Eiger Securities LLP v Korshunova [2017] IRLR 115
Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050
Pemberton v Inwood [2018] EWCA Civ 564
Kilrain v London Borough of Wandsworth [2018] EWCA Civ 1436
Lowri Beck Services Ltd v Brophy UKEAT/0277/18
Simpson v Cantor Fitzgerald Europe [2020] ICR 236
Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495

The Tribunal took these cases as guidance but not in substitution for the statutory provisions.

Submissions

94. Counsel for the claimant made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full here. In essence the Tribunal was asked to step back to see what was submitted to be: a repeated pattern of incorrect behaviour by the claimant's line manager, Ms Paxton, towards the clamant and no one else; that such behaviour was for the claimed prohibited reasons, namely direct race discrimination harassment related to race, victimisation and whistleblowing; this was a case founded on sub-conscious bias; it was behaviour for which the respondent would be liable given its failure to show that the prohibited reasons were in no sense whatsoever the reason why the claimant's line manager behaved incorrectly repeatedly; the behaviour complained of from Ms Paxton was compounded by the respondent through a process to deal with the facts of the claim but which turned a 'blind eye' to it all, by not dealing with the grievance complaint properly and ultimately failing to send the grievance appeal outcome to the person it found had acted improperly; and so in turn the respondent continued with the same incorrect behaviour for the prohibited reasons.

95. Counsel for the respondent also made a number of detailed submissions which the Tribunal has considered with care but do not rehearse in full

here. In essence it was asserted that:- Any acts or omissions pre-dating 17 May 2020 were out of time, namely all complaints about Ms Paxton and that the later matters complained of were against the respondent and had no connection to the acts of Ms Paxton; the claimant made no whistleblowing claim in her first claim form such that only one of the alleged protected disclosure-related detriments is within the Tribunal's jurisdiction (issue 2(vi)); the claimant had set the bar high because her case was that the respondent and Ms Paxton had knowingly and deliberately subjected her to unlawful treatment, and that a campaign of discrimination is not mounted or pursued without the initiator having a conscious intent; the Tribunal cannot draw inferences from the mere fact that an employer has treated an employee unreasonably; the Tribunal should not aggregate the multiple alleged protected disclosures relied upon by the claimant; the claimant abandoned 2 matters complained of as unlawful treatment only in August 2022 having vigorously pursued them through the grievance/appeal process and in both claims; the respondent's case focusses on causation and whether the treatment complained of arose from the protected acts or protected disclosures; the uplift for Ms Fletcher was a temporary uplift and not a recruitment process, and that arguably a total of 5 people had been undermined, not just the claimant; the claimant had not been included in emails between Ms Paxton and Ms Boles on the subject of the uplift because matters of pay are confidential; in conversing with Ms Luff, there was no actual mention of the claimant's *mental* health; the context of the Band 8 recruitment is important - the Tribunal should accept Ms Paxton's evidence that she did not know the position had been advertised nor did she know when the job advert would close and then she wanted to get Ms Chandler's interview done prior to her leave; it is not understood how it can be said that the findings of the grievance outcome or appeal can themselves amount to race discrimination let alone racial harassment particularly the failure by the respondent to provide feedback to Ms Paxton; and that the Tribunal was invited to dismiss the claims on jurisdictional grounds and time limits, alternatively for lack of substantive merits.

Conclusions (including where appropriate any additional findings of fact)

96. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way, by reference to the agreed list of issues. The burden is on the claimant to prove the facts on which her complaints were based. If those facts were proven the Tribunal then has to apply the law to them. In considering each allegation, the Tribunal also had regard to the evidence overall rather than just looking at each act or event in isolation.

97. Where a conflict of evidence arose, this was resolved on a balance of probabilities, in that the Tribunal preferred the evidence of the claimant to

that of the respondent's witnesses. The Tribunal found that the evidence of the claimant's line manager, Ms Paxton, was less than credible. Her responses to cross-examination were often unhelpful, evasive or defensive. At times, she sought to avoid answering questions from Counsel for the claimant, or did not explain her evidence despite it being probed. A number of explanations were given with the benefit of hindsight and differed from contemporaneous evidence or conflicted with it. The Tribunal considered that Ms Paxton's continued evasion when challenged, and her failure to explain her conduct at the material time, on occasion providing new excuses not mentioned before or to the grievance appeal, led the Tribunal to view her as an unreliable witness.

98. In contrast, the Tribunal considered that the evidence of the claimant was measured and stood up to proof. Matters were explained by reference to events and correspondence at the relevant time or by reference to the respondent's procedures. Despite robust cross-examination from the respondent's Counsel, the claimant remained calm although she became visibly distressed on a couple of occasions and the Tribunal took breaks in the hearing where appropriate.

Factual allegations of less favourable treatment/harassment/detriment

99. The Tribunal first considered each of the factual allegations in the list of issues, items 2(i) to (vi).

100. In respect of the exclusion of the claimant from the team away day, on 13 May 2019, the Tribunal heard that this was an important planning event for the whole team in light of a reorganisation. The claimant was Ms Paxton's deputy and had a managerial role within the team. She was recovering from a knee operation 6 weeks beforehand and wished to attend and/or participate in some way but Ms Paxton simply refused to consider it. Ms Paxton was asked to explain her position and repeated her intransigence without being able to explain why she took such a stance, beyond the fact that she had decided that "the claimant was ill". However, Ms Paxton had not been prepared to seek medical advice from the claimant's doctors as to the claimant's capability to attend or participate. She was not prepared to allow any form of attendance for the claimant. In her witness statement, Ms Paxton says she did not feel it was appropriate for the claimant to tender a fit note for one day and then return to sick leave, and she refused to consider it as a form of "keeping in touch" day. The Tribunal considered on balance of probabilities that the claimant could have attended if some thought had been given to arrangements, for example, by video or attendance for part of the day only and Ms Paxton's refused to countenance such or make any reasonable enquiries led to the Tribunal's conclusion that Ms Paxton did not want the claimant to attend.

101. The Tribunal found there was no apparent need to hold the team event on 4 October 2019. The date clashed with the respondent's National Nursing BME conference and the Tribunal considered that it was inconceivable that a senior manager like Ms Paxton would not be aware of this national event, held in October, which is Black History Month each year, for the respondent's BME staff. Such a professed lack of awareness was particularly concerning as the claimant, who was Ms Paxton's deputy and managed by Ms Paxton, had a high-profile regional advisory role on BME matters and would be expected to attend the national BME conference. If Ms Paxton was not aware of the event, she certainly should have been. Ms Paxton's evidence was that she simply failed to ensure that diaries were checked and failed to consult staff despite that having been the usual practice when arranging previous team events. However, the evidence was that certain diaries were in fact checked. Ms Paxton dismissed her failings as a "scheduling error" without being able to explain why she had forged ahead, on her own evidence apparently regardless of the commitments of any members of the team when she was arranging a "treat" for them all. The Tribunal rejected Ms Paxton's explanation that it has been a scheduling error, noting that the chosen venue had a number of available dates in the period from September to November 2019. There was nothing in the evidence to suggest that 4 October 2019 was for example easier for the majority of the team than any other date. Indeed, on her own evidence, Ms Paxton had no idea of the suitability or otherwise of the date, as she had not checked colleagues or their diaries on this occasion.

102. Once the claimant raised the date clash, the Tribunal considered that Ms Paxton's suggestion of moving the date to accommodate the claimant was disingenuous. It shifted the problem onto the claimant, who said in evidence that she believed it would be seen as her fault if the date was changed and colleagues could not then attend what was a treat for them, or if they had to rearrange their commitments for a new date. The claimant was forced to make a choice between an important event in her regional BME brief and missing the team treat. The Tribunal considered that Ms Paxton undermined the claimant by putting the onus on the claimant in effect not to object or to be seen as causing a problem with arrangements. Consequently, the claimant was not only excluded but undermined in the process.

103. Further, in evidence to the Tribunal, at one point Ms Paxton sought to suggest that the claimant had not been invited at all, despite clear evidence that she had, and she sought to suggest that the claimant was funded from a different budget to the rest of the team and so was not entitled to attend. The question of budgets had not been raised at the material time and was never fully explained to the Tribunal which considered it to be a red herring, an attempt to propound a neutral

explanation for the claimant's treatment, after the event, and it was not supported by the documentary evidence.

104. As to the claimant not being informed that one of her team members had been promoted and/or was acting up as a Band 8B, in or around September 2019, Ms Paxton said in evidence that she feared that the claimant might object. The Tribunal noted that it was part of the claimant's brief to challenge decisions on equality grounds where appropriate and when she found out, she did so. It was a critical matter about which the claimant should have been informed as manager and Ms Paxton accepted as much. However, Ms Paxton described how she found such conversations with the claimant difficult and sought to avoid them. The Tribunal considered this to be an unsatisfactory approach given the claimant's remit as it led to secrecy on Ms Paxton's part. What made matters worse was that, unbeknown to the claimant at the time, this was a proposal from which Ms Paxton ultimately benefitted in addition to the fact that the uplift put Ms Fletcher on the same grade as the claimant.

105. The Tribunal rejected Ms Paxton's suggestion that she was unable to discuss the matter with the claimant due to confidentiality around matters of pay. This did not have the ring of truth about it and the Tribunal considered it was an attempt to justify her actions after the event. NHS pay scales are a matter of public record and, in this instance, there was no evidence that the discussions Ms Paxton had with Ms Boles ever included the amount of money such an uplift in grading might produce for any individual. In all the circumstances, the Tribunal concluded that Ms Paxton intended to exclude the claimant from discussions. In addition, the Tribunal noted that it was initially the white employees, Ms Paxton and Ms Fletcher who stood to benefit. Ms Hurree, a black employee engaged on the same work albeit at a lower grade, was only ever considered once she had submitted a formal request for re-grading. Had she not done so, she would not have been included in the proposal.

106. In October 2019, Ms Paxton discussed the Claimant's mental health with one of the Claimant's own team members, Ms Luff: The Tribunal has found that Ms Paxton actively encouraged Ms Luff to report any concerns she had regarding the Claimant – see paragraph 26 above. The Tribunal noted the context, that the conversation took place at a time when the claimant was away from work, raising a question as to Ms Paxton's recent and actual knowledge of the claimant's demeanour and how she had concluded that the claimant might be unwell, if she had not seen her for a while. From the evidence, the Tribunal considered that Ms Paxton had waited and had purposefully sought out a junior colleague who is also a nurse. The conversation put Ms Luff in an invidious position, placing subtle pressure on her to report the claimant in accordance with regulatory requirements. Such a report might have serious consequences for the

claimant. Importantly, whilst implying to Ms Luff that there might be concerns about the claimant, Ms Paxton took no action herself to seek advice from HR or occupational health nor to report any such concerns herself, despite that she also is a registrant and subject to the same reporting obligations. The grievance appeal rightly concluded that this conversation was inappropriate and it was critical of it. The Tribunal therefore doubted Ms Paxton's intentions for engaging with a junior member of staff in this manner. Ms Luff herself was so concerned that she alerted the claimant.

107. The Tribunal considered and rejected the various excuses given by Ms Paxton for her failure to include the claimant in the recruitment process for the new Band 8A posts that would have been part of the claimant's team in January 2020. It was obvious that the claimant should have been included from the outset and certainly notified of the process, shortlisting and interviews, as she eventually was but only after she complained. The Tribunal found that Ms Paxton went to some length to circumvent the claimant and had intended that the claimant would not be involved, without any good reason. Ms Chandler's evidence was that Ms Paxton had told her the interview panel would consist of herself (Ms Paxton) and 2 external people, with no mention of the claimant. Ms Pollard was given similar information. Ms Paxton sought to explain her actions in terms of not knowing what was happening with the process despite regular liaison with the appointed administrator – see paragraphs 29 – 33 above. For that reason, the Tribunal rejected her explanation as not credible. In addition, Ms Paxton was unable to explain satisfactorily why she had attempted to arrange an interview with Ms Chandler at a time when applications had just opened and before Ms Chandler had even applied, seeking an interview before the official interview date, before any shortlisting process and before an interview panel had been chosen. Further, all this was arranged at a time when the claimant was known to be on leave and had no idea about the recruitment process or that it had started. The Tribunal took account of the fact that Ms Paxton is a long-serving senior manager with experience of recruitment. Nevertheless, she maintained her version of events to the appeal panel and provided them with only a carefully chosen selection of emails. Ultimately, Ms Paxton's timeline and email selection was exposed when Ms Pollard, the appointed administrator supplied all communications. This led the grievance appeal panel to find Ms Paxton's approach and subsequent explanations to be misleading and it effectively reprimanded her for such.

108. The Tribunal has made findings of fact about the findings of the grievance outcome, issued on 1 July 2020 – see paragraphs 44 – 47. The Tribunal considered that the outcome was inadequate in a number of respects, particularly because it failed to examine the claimant's complaint, the essence of which was that her treatment by Ms Paxton was race

discrimination. The respondent called no witness evidence about this discrete allegation within the claimant's case and so the allegation was effectively unchallenged. In those circumstances, the Tribunal drew an inference, from the material before it, that by not adopting a critical approach, the panel did not want to find any discrimination, harassment or other unlawful behaviour and did not properly apply its mind to such matters, instead setting a high bar which would never be reached – see paragraph 47 above.

109. This approach to the claimant's grievance continued in the grievance appeal process where the Tribunal found that the appeal outcome failed to uphold the Claimant's grievance despite the underlying findings made. The problem arose because the appeal looked at events individually and did not consider cumulatively whether there was a pattern of behaviour which required examination. It did not consider the issue of discrimination and/or whether there might be an underlying reason for the matters complained of if those matters were taken together. It did not ask why things happened, nor did it question or probe what it was told. Nevertheless, the appeal officer told the Tribunal that she understood the grievance to be about discrimination. For example, in respect of the conversation between Ms Paxton and Ms Luff, there was no thought given by the appeal as to whether and, if so, why Ms Paxton might be planting an idea in the mind of Ms Luff to report the claimant. This deficiency was highlighted in the hearing when, under cross-examination, Ms Paxton went to considerable efforts to persuade the Tribunal that her conversation with Ms Luff was not about the claimant's health. However, when asked a simple question by the Tribunal, "If it was not about the claimant's health, then what was it about?" she admitted it was a conversation about the claimant's health.

Cumulative effect and inferences to be drawn

110. Having decided for the reasons set out above that a number of the factual allegations were well-founded, the Tribunal nevertheless considered whether taken cumulatively they supported an inference that the treatment complained of was because of or related to race. In doing so, the Tribunal considered what inferences it should draw from its findings of primary fact, and from the surrounding facts, for the purpose of drawing inferences and the Tribunal has therefore stood back to look at the totality of the evidence and the circumstances of the case, including the repeated poor behaviour of Ms Paxton towards the claimant and the respondent's failure to address the discrimination element of the claimant's grievance, to consider whether, taken together, they may represent an ongoing regime of discrimination. The Tribunal was mindful that discrimination cannot be inferred from unreasonable conduct alone. Nevertheless, the Tribunal found that the evidence before it revealed circumstances surrounding the

factual allegations in the claim, from which inferences could be drawn of discrimination in the absence of anything else to explain the behaviour.

111. The Tribunal took account of the claimant's role as a member of the Chief Nursing Officers' Black Minority Ethnic Strategic Advisory Group and as a BME voice in the respondent's North West region. This meant that she was tasked to challenge things where appropriate and she did so. In contrast, Ms Paxton did not like being challenged. The Tribunal found, in those circumstances, that Ms Paxton looked to exclude the claimant from a number of key events and processes. Ms Paxton described in evidence an expectation of "difficult conversations" about BME and equality issues and an expectation of being challenged. The Tribunal concluded from this that Ms Paxton saw the claimant as difficult because of her BME remit and that she sought to exclude the claimant in order to avoid challenges to her position and to avoid the claimant taking matters elsewhere. Ms Paxton's actions were because of the claimant's BME role and responsibility for tackling discrimination in the respondent.

112. When questioned about her actions and the factual allegations, Ms Paxton gave a number of convoluted and at times unsubstantiated explanations. The Tribunal considered that these explanations had been developed with the benefit of hindsight and did not accord with contemporaneous documentation. For example, in relation to the staff uplift, Ms Paxton told the Tribunal that she could not involve the claimant due to matters of employees' pay and confidentiality. However, at the material time, the claimant's issue was about the operation of the respondent's policies and equal opportunities, and not about the amount of money involved which did not require discussion. Indeed, the amount of money involved for each employee was never mentioned between Ms Paxton and Ms Boles. The claimant was Ms Fletcher's manager and was entitled to know the grades of her team in order to manage workloads. She should not have found out by chance. When this was pointed out, Ms Paxton sought to suggest that, although Ms Fletcher was in the claimant's team, she was in fact being line managed by Ms Paxton although there was no evidence to substantiate that suggestion. There was no proper explanation for the claimant not being told of Ms Fletcher's 'promotion' to Band 8B. It was unreasonable and led the Tribunal to draw an inference of discrimination in light of the surrounding circumstances.

113. In addition, the Tribunal found that Ms Fletcher's job title was changed because Ms Fletcher did not understand it as merely an uplift for additional work but in effect a promotion. Ms Fletcher moved onto the same grade as the claimant. Ms Fletcher sent email announcements to the whole team with her new email sign-off, which did not go unnoticed - team members raised it with the claimant who was embarrassed and upset. Ms Paxton sought in evidence to play down the email signature and change of job title

as inconsequential, and maintained that she had nothing to do with it. However, Ms Paxton made no attempt to correct Ms Fletcher at the time, nor to apologise to the claimant for the situation it created. The Tribunal heard evidence that, on occasion thereafter, Ms Paxton would defer to Ms Fletcher, almost as another deputy and in preference to the claimant. This undermined the claimant and was noticed by her colleagues. In any event, the Tribunal noted that the grievance appeal found that Ms Paxton, as line manager, had responsibility for staff email signatures. Her suggestion to the Tribunal that she was not aware of the matter lacked credibility in the face of the appeal finding. In the circumstances, the Tribunal considered on a balance of probabilities that Ms Paxton had discussed the job title with Ms Fletcher either at the time of the award of the uplift or when challenged by the claimant and the Tribunal accepted the appeal finding, to the effect that she bore responsibility, in preference to the apparent excuses provided by Ms Paxton on the matter.

114. The Tribunal noted the lack of diversity in general at the respondent and in senior positions. The Tribunal heard evidence that, in 2018, the claimant was the only Black nurse in the North region and, in 2019, there were only 2, the claimant and Ms Chandler. The Tribunal considered it significant that, in the first version of the grievance outcome report, the respondent managed to transpose the surnames of the only 2 black nurses in the respondent and this had to be pointed out by the claimant in order to be corrected – Bundle page 386 and paragraph 49 above.

115. The claimant had not attended team events for nearly 2 years and there was no evidence to suggest that Ms Paxton had expressed any concern about this. The Tribunal drew an inference from that state of affairs, that Ms Paxton did not care and did not particularly want the claimant to attend. The Tribunal here noted that Ms Paxton and the respondent had access to the claimant's diary but apparently failed to consult it when arranging the team treat on 4 October 2019, in contrast to doing so when arranging interviews in February 2020.

116. In relation to requests to sit on IRP panels, Ms Paxton approached the claimant's staff directly and did not even copy the claimant into emails as a matter of courtesy. Ms Paxton said this was a "streamlined" way of working (although she had never made the claimant aware of such) but accepted in cross-examination that she should have copied the claimant in as the manager of individuals' workloads. The Tribunal were unconvinced of her explanation and considered that Ms Paxton sought to exclude the claimant from any discussion or communication about staffing of the IRP panels, given the claimant's clear objections.

117. Despite the claimant's grievance about Ms Paxton's conduct, the Tribunal considered that the respondent's grievance outcome and appeal outcome

avoided addressing the reasons for Ms Paxton's behaviour towards the claimant. They did not draw inferences from the evidence gathered despite, as the Tribunal found there, were many aspects from which inferences could be drawn. In addition, by setting a high bar of needing to see 'deliberate' discrimination, the respondent failed to consider the possibility of subconscious discrimination at all.

118. The Tribunal has made findings at paragraph 61 above about how, whilst the grievance outcome was communicated to the claimant, it was never shared with Ms Paxton, despite that the grievance had been upheld "in part". The respondent therefore failed to follow through on what were adverse findings about a senior manager. Nobody from the respondent could explain why not. The respondent's Respect at Work policy states that the respondent recognises its responsibilities under the EqA and will not tolerate discrimination and harassment in any form. Yet in this case, it has done just that by its highly unusual omission. A picture arose of confusion as to who was responsible. Ms Grainger, who chaired the grievance appeal, told the Tribunal that it was not within her remit and that feedback to Ms Paxton was the responsibility of HR. There was no evidence that anything had been done thereafter to ensure that Ms Paxton would not repeat similar conduct in future. In that context, the Tribunal considered the email from one of the most senior managers at the respondent, sent to the claimant after her grievance appeal, which talks of working closely with HR to learn lessons, was meaningless where nothing was done to uphold or enforce the Respect at Work policy.

119. In addition, there was no evidence before the Tribunal that any others had been treated equally poorly by Ms Paxton. In that context, of repeated lapses of judgment in her dealings with the claimant, the Tribunal took account of the decision in *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust [2016] UKEAT 0269/15* that the 'unreasonable not discriminatory' defence is less applicable where the evidence shows that only one employee had been made miserable – at paragraph 48 per Langstaff J.

120. There were other matters which arose in evidence which the Tribunal took into account when drawing inferences in this case. Firstly, and extraordinarily, in the course of giving evidence, Ms Paxton resorted to an example to illustrate a point about the contents of meeting notes, by referencing the claimant eating bananas. There was nothing about eating, or bananas, in the minutes referred to and the choice of eating bananas as an example related to the claimant was not explained. The Tribunal considered this to be a shockingly poor example to give, accepting the claimant's submissions that it is a common metaphor and/or pejorative term used in relation to the claimant's racial group and illuminative of the possibility of subconscious discrimination. In submissions, Counsel for the

respondent did not mention his witness' banana comment at all and, when asked by the Tribunal about it, Counsel suggested that it had gone unchallenged at the time and so the Tribunal should simply ignore it, an approach with which the Tribunal wholly disagreed.

121. The Tribunal took account of the fact that the evidence on the uplift for Ms Fletcher, a white employee, revealed that this was actioned by agreement with Ms Boles and did not go through the formal pay band challenge process. In contrast, Ms Paxton did not consider an uplift at the time for Ms Hurree a black employee, engaged on the same additional work. The Tribunal found that Ms Hurree was only later included in the uplift because she commenced a formal process. This difference in approach was another matter for which there was no explanation.

122. Lastly, the Tribunal was referred to what was described by the claimant as "the odd email" which appears in the bundle at page 100. It is an email dated 1 August 2019, from Ms Paxton to a manager in the respondent's IT department about the claimant not being included in electronic circulation lists and meetings and in which Ms Paxton asks that the claimant is invited to all meetings involving Assurance leads. In evidence, Ms Paxton sought to suggest that the fact the claimant had not been invited to meetings was an IT problem. However, there was no evidence that the claimant had raised an IT issue with Ms Paxton at the time or at all. Nor was it evident that the claimant had been excluded from any events because of IT issues. In addition, there were no surrounding email(s) or email chain, no reply from IT nor follow up emails chasing the matter. The email stood alone and the Tribunal considered, in light of Ms Paxton's evidence, that it was disclosed in an effort to deflect attention from her in relation to the allegations of exclusion in the list of issues, for example item 2(i).

Less favourable treatment

123. In light of its conclusions on the factual allegations, the Tribunal considered that the claimant has established less favourable treatment.

124. The claimant relies on a hypothetical comparator who is white or non-black. The Tribunal has found that Ms Paxton had excluded the claimant from a number of events and activities – see above and in particular items 2(i), (ii) and (iv) in the list of issues. The respondent advanced no evidence that someone of another race would similarly have been excluded from such matters and the Tribunal considered that much of Ms Paxton's conduct towards the claimant has gone unexplained. Drawing inferences from the ample material before it, the Tribunal considered that a hypothetical white person who was deputy to Ms Paxton would not have been excluded from such events and would have been informed, at the time, of the uplift/promotion of Ms Fletcher and included in the recruitment

for Band 8A jobs from the outset. In this regard, the Tribunal also took account of the fact that Ms Paxton would defer to Ms Fletcher, a white employee, in preference to the claimant who was her deputy and black – see paragraph 113 above.

125. The allegation about the conversation with Ms Luff was admitted in the ET3, paragraph 8, and in evidence by Ms Paxton. On a balance of probabilities, and having heard from Ms Paxton extensively on the allegation, the Tribunal considered that Ms Paxton's reference to the claimant's health was to her mental health and not to any physical impairment. The respondent has not argued that Ms Paxton did or would have had such an improper conversation about any other individuals and, in oral evidence, Ms Paxton admitted as much.

126. The Tribunal found the grievance outcome to be a further act of less favourable treatment. The claimant contended that the respondent's grievance process would ordinarily deal with all issues raised and set out its reasoning. As the Tribunal has found in paragraphs 44 – 47 above, the outcome simply did not address the reasons for the poor conduct it found. The respondent's decision makers on the grievance were not called to give evidence to explain their approach or the outcome's findings and, in those circumstances, the Tribunal accepted the submissions of Counsel for the claimant, that there was no rational basis for finding that a hypothetical comparator would have been treated in the same way.

127. The grievance appeal outcome, like the grievance outcome before it, found "poor" behaviour and that "unsound" decisions were taken against the claimant but did not adequately address why such had occurred nor did it consider whether the same had happened to anybody else – see paragraphs 58 – 59 above. In evidence, Ms Grainger agreed that discrimination is rarely admitted and she accepted that it was the function of the appeal to see what inferences could be drawn or whether there was an innocent explanation for the conduct complained of. She also agreed that it was the function of the appeal to consider whether there was a pattern of behaviour towards the complainant and whether similar things had happened to others. However, the evidence was that these matters were simply not addressed. Instead, for example, the grievance appeal outcome stated merely that it "did not receive any evidence" of why the claimant was not included in the Band 8A recruitment from the outset but failed to examine this absence of an explanation further. Likewise, in respect of Ms Paxton's approach to the IRP panels by going to staff directly, the appeal outcome merely stated (erroneously) that Ms Paxton had not acted improperly in constituting the IRPs from the respondent's staff when, in fact, the claimant's concern about legalities was correct – see paragraph 23 above. The appeal did not look at the issue of the lawfulness of the IRPs as constituted by Ms Paxton, nor did it seek to

obtain the legal advice that Ms Paxton had professed to rely upon but which did not in fact exist. The Tribunal noted that Ms Grainger accepted "in hindsight" that this was a "deficiency."

128. In all the circumstances, the Tribunal considered that the grievance appeal outcome constituted less favourable treatment and also considered that a hypothetical comparator would have had all material points of their appeal addressed by the respondent and that it would not, for example on the matter of the constitution of IRPs, have merely accepted the word of Ms Paxton on the legality of her actions without further research. Importantly, the Tribunal also considered that the respondent would have ensured that the outcome of a grievance by a hypothetical white or non-black comparator was put to the subject of that grievance which found against them and that corrective action would have been taken.

Because of race

129. In light of the above, the Tribunal considered that the less favourable treatment was because of race. The burden of proof had shifted and the respondent had not shown the reason for the treatment complained of. In respect of the team awayday in May 2019, the Tribunal heard evidence that the claimant did want to attend in some way but she was refused any form of attendance, even remotely, with Ms Paxton expressing concern for the claimant's health but without any medical evidence being sought. There was no explanation for this approach. In addition, there was no reason why the event could not have been delayed for a short period, which Ms Paxton accepted would not have caused an issue. The manner in which the mindfulness event in October was arranged, without consultation, was unusual. Scheduling it on the same day as the respondent's national BME conference prevented the claimant and other Black and non-white employees from attending. Only 1 date was chosen and there was no explanation why discussion did not take place with the claimant, as Ms Paxton's deputy, at the planning stage as usual. In respect of the uplift for Ms Fletcher, this had been mentioned to the claimant initially and she objected, citing issues of equal opportunities. Thereafter, she was not told although the rest of the team, all white colleagues, were aware of the change in role. The respondent has not produced any explanation for why it was that the claimant was not also informed when her white colleagues were. As for the conversation with Ms Luff, the Tribunal considered that Ms Paxton, as a senior and long serving manager knew how to deal with colleagues' health issues. However, her approach to Ms Luff was improper and there was no evidence that she had adopted this approach with any other employees, nor that she had consulted HR or occupational health as might be expected. The recruitment of Band 8As in January 2020 was completely irregular and the Tribunal has found that Ms Paxton acted so as to exclude her Black

deputy manager from the process without any sensible explanation or justification. Eventually, as was shown, Ms Paxton was compelled to involve the claimant. The claimant's grievance was plainly about the conduct of Ms Paxton and about race discrimination, yet that very aspect was not addressed as such and the outcomes of the grievance and appeal were deficient.

130. The failure by the respondent to provide any or any credible explanations for the claimant's treatment led the Tribunal to accept the submissions of Counsel for the claimant, that a white or non-black comparator would have been treated in the same way by Ms Paxton nor have had a grievance outcome that was riddled with such deficiencies. The treatment was therefore because of race.

Harassment related to race

131. The Tribunal considered that Ms Paxton's actions in each allegation were plainly unwanted conduct. There was a pattern of behaviour by Ms Paxton towards the claimant and this was extended by the respondent's ineffective grievance procedures which ignored the issues raised by the claimant and then never followed through on the elements that it upheld. In those circumstances, the Tribunal considered that the proscribed effect had been shown by a series of cumulative acts.

132. The Tribunal considered the impact of the conduct in its totality, including the grievance and appeal process, and considered that the impact on the claimant accumulated over time. Ms Paxton developed an animus towards the claimant which led her to operate in such a way that her actions made life difficult for the claimant and compromised the claimant's ability to do her job. She subconsciously intended to exclude the claimant at every opportunity. This animus also tainted Ms Paxton's approach to the grievance appeal. Taking the allegations together, and the findings of fact, the Tribunal considered there was a pattern of behaviour by Ms Paxton, toward the claimant and towards no other employees, which had the purpose and effect of unlawful harassment – Ms Paxton created an intimidating and hostile and humiliating environment for the claimant at work; her actions in excluding the claimant were intentional in many regards, and her actions had that effect. The claimant reasonably perceived that she was suffering poor treatment amounting to harassment because of race. She became aware of Ms Paxton's conduct in early course and sought to challenge it directly but this failed to prevent the conduct continuing. The Tribunal also took account of the fact that being excluded or side-lined in the workplace had a serious effect on the claimant. It led to her being off work, sick, and latterly seconded to work elsewhere in the respondent. Ms Paxton accepted in evidence that the claimant's upset was "genuine."

133. The grievance conclusions recorded that it was "evident that the relationship between Gill Paxton and the claimant had broken down significantly" and that the claimant "feels greatly impacted by this and she does feel undermined, excluded, unappreciated and disenfranchised" whilst finding that it was reasonable for the claimant to feel like that in the circumstances. Nevertheless, it was not prepared to examine the conduct in terms of possible discrimination nor to even state in clear terms that the grievance appeal had been upheld in part. In those circumstances, the Tribunal considered that the outcome served as a way of placating the claimant whilst failing to deal with the issue of discrimination. The respondent pointed out that Ms Paxton had left the respondent to work elsewhere. The Tribunal noted with concern however that Ms Paxton works elsewhere in the NHS and that the respondent is a senior and, in many ways, overarching body within the NHS structures. The opportunity to address matters remains and uphold the values of the Respect at Work policy was not taken up.

134. In all the circumstances of the case, the Tribunal considered that the conduct complained of constituted harassment because of race.

Victimisation

135. At the start of the hearing, the respondent indicated that it accepted that items 6(i) to (v) in the list of issues are protected acts for the purpose of the victimisation claim.

136. The detriments relied upon are those in the list of issues, items 2(i) to (vi).

137. The Tribunal therefore considered whether the claimant was subjected to any detriment by the respondent because of the protected acts, to the extent that the protected act(s) influenced the respondent's treatment of the claimant materially or more than trivially. The Tribunal had regard to its findings in paragraph 111 above about the claimant's role and brief within the respondent, and what the Tribunal found to be Ms Paxton's attitude towards the claimant – Ms Paxton admitted in effect that she was influenced in her conduct towards the claimant by the claimant's challenges to her, pointing out impropriety amongst other things. The Tribunal has also found that there was a pattern of behaviour by Ms Paxton, as the claimant's line manager, extended by an ineffective grievance procedure that ignored the issues. In addition, the respondent has advanced no good reason for the conduct whether individually or cumulatively. All the detriments occur very shortly after the protected acts and so it is more likely that they would be in the minds of the relevant decision makers and would therefore have had some influence on their acts. The protected acts are all similar in nature, in terms of the allegation

of discrimination and so it is likely that the points the claimant raised would be well understood. In the circumstances of the case, a picture arises of things getting worse, and the subject of the protected acts, Ms Paxton, who knew of the protected acts, was responsible at least in part for the detriments (save the grievance outcome and appeal outcome).

138. The Tribunal therefore considered that the protected acts were a factor in the claimant's treatment, such that the complaint of victimisation succeeds.

Whistleblowing detriment

139. At the start of the hearing, the respondent indicated that it accepted that items 9(i) to (iii) in the list of issues are protected disclosures. Save for item 9(ii) these are also protected acts for the victimisation complaint. In addition, the Tribunal considered that the earlier protected disclosures, items 9(i) and (ii), were repeated and escalated by the claimant in the grievance and appeal process, item 9(iii).

140. The detriments relied upon for this complaint are those in the list of issues, items 2(ii) to (vi).

141. Before considering causation in respect of the whistle-blowing complaint, the Tribunal considered the respondent's challenge to this complaint which it contended was not raised in the first claim form and the complaint was therefore out of time. Having considered the contents of that document, the Tribunal disagreed with the respondent's contention, and took account of the fact that the claimant was a litigant in person when she presented her first claim and the fact that there is no box to tick in the ET1 form to specifically indicate a complaint about whistle-blowing. The Tribunal nevertheless considered that the whistle-blowing detriment complaint had been raised within the statement of case, for example by describing how the claimant spoke to Ms Paxton about the uplift, and the impropriety of it having regard to legal obligations of fairness and equality, and by setting out that she had informed the respondent of the conflict with national guidance arising from the practice of using the respondent's staff on IRP panels which caused Ms Paxton to suggest she had taken legal advice on the matter. The Tribunal considered that these matters were pleaded sufficiently to be understood as allegations of protected disclosures and which were repeated within the grievance process.

142. In respect of causation, the claimant's case on detriment for whistle-blowing effectively mirrors that of the victimisation complaint save that the protected disclosure concerning the composition f the IRP panels does not form part of the victimisation complaint. However, the Tribunal found that the respondent never dealt with this aspect and the grievance outcome did

not deal with the point. The Tribunal therefore accepted the submissions of Counsel for the claimant, and found, on a balance of probabilities the respondent did not want to have to find there had been a breach of a legal obligation or to highlight such within the Tribunal proceedings. At best, the respondent's appeal panel adopted the approach of it being simply a wrong 'management decision.'

143. In light of the Tribunal's findings on all the factual matters above, and its determination of the victimisation complaint at paragraph 137 above, the Tribunal considered that the complaint of whistle-blowing detriment must also succeed.

Jurisdiction - time limits

144. The respondent raises the issue of whether the claims or a number of the allegations brought are in time. ACAS Early Conciliation was commenced on 16 August 2020 and ended on 28 September 2020. Therefore, any acts/omissions which pre-date 17 April 2020 may be out of time i.e., the allegations which constitute items 2(i) to 2(iv) in the list of issues. However, if such acts form part of conduct extending over a period past 17 April 2020 they will be rendered in time (for the EqA complaints), or where that act or failure is part of a series of similar acts or failures, the last of them (for the whistleblowing complaint).

145. In terms of a continuing act(s), the Tribunal had no hesitation in concluding that the acts of unlawful discrimination for which the respondent, in the guise of Ms Paxton, was responsible constitute conduct extending over a period including the grievance and appeal process such that all the complaints which have been determined to be well-founded are not therefore time-barred.

146. The respondent is vicariously liable for the acts of its manager, Ms Paxton. The respondent did not deny that it would be vicariously liable if allegations involving Ms Paxton were well-founded. The Tribunal has found that Ms Paxton maintained a discriminatory approach to the claimant, despite being challenged at the material time and in light of her conduct particularly in respect of the selective emails supplied to the grievance appeal. In addition, in oral evidence, the Tribunal considered that Ms Paxton's convoluted explanations and excuses reflected her conduct at the material time. Taking into account the surrounding circumstances of this case as set out above, the Tribunal has concluded that Ms Paxton was responsible for a continuing course of conduct towards the claimant and that her conduct fed into the grievance and appeal, which amounted to unlawful discrimination. The fact that the grievance process failed to address matters of Ms Paxton's conduct, in terms of the grievance being about race discrimination, compounded the

discrimination. The claimant was excluded from events because of race and her discrimination complaint was not addressed as it should have been. The situation was made worse by the fact that there was no evidence of the respondent addressing the grievance/appeal outcomes by way of feedback and/or corrective action despite its findings.

147. The acts or failures of the respondent also constituted a series of similar acts or failures which also served to extend time for the purposes of the whistle-blowing complaint namely the continuation of discriminatory behaviour towards the claimant which went unchecked and was perpetuated by the failings of the grievance/appeal process. The Tribunal considered that respondent's submissions that the acts of Ms Paxton could not be linked to the acts or omissions of others to be a simplistic approach, having regard to *Arthur v London Eastern Railway Ltd [2006] EWCA Civ 1358* in which Sedley LJ held that a series of similar acts could cover apparently unconnected acts by reason of them having been done to the claimant because of a protected disclosure.

Remedy

148. In light of the Tribunal's findings above, the claims shall proceed to a remedy hearing on a date to be notified separately.

Employment Judge Batten
19 January 2023

JUDGMENT SENT TO THE PARTIES ON:
15 February 2023
AND ENTERED ON THE REGISTER

FOR THE TRIBUNAL OFFICE