



EMPLOYMENT TRIBUNALS

Claimants: (1) Ms P. Mntonintshi
(2) Ms U. Jama

Respondents: (1) Barking Havering & Redbridge University Hospital NHS Trust
(2) Ms C. Beck

Heard at: East London Hearing Centre

On: 2-5, 9-10, 16-17 and 23-26 August, 26 September and 27 and 28 October 2022,
and in chambers on 10, 11 and 14 November 2022

Before: Employment Judge Massarella
Mrs B.K. Saund
Mr J. Webb

Representation

For the Claimants: Ms S. Knight-Webb (Solicitor)
For the Respondents: Ms H. Patterson (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. In relation to Ms Mntonintshi's case against the First Respondent:
 - (i) the following claims of direct race discrimination succeed: M-DD5; M-DD6; M-DD8;
 - (ii) the following claims of harassment related to race succeed: M-HAR2; M-HAR3; M-HAR4;
 - (iii) the following claims of victimisation succeed: M-VICT1; M-VICT2; M-VICT4;
 - (iv) all other claims are either not well-founded, or are excluded by operation of s.212(1) EqA, and are dismissed.

2. **In relation to Ms Jama's case against the First Respondent:**
 - (i) the following claims of direct race discrimination succeed: J-DD1; J-DD7; J-DD9; J-DD13; J-DD14; J-DD15; J-DD16; J-DD19; J-DD20; J-DD21 and J-DD23;
 - (ii) the following claims of harassment related to race succeed: J-HAR3; J-HAR11; J-HAR26 and J-HAR27;
 - (iii) the following claims of victimisation succeed: J-VICT3; J-VICT4; J-VICT6; J-VICT7; J-VICT8, J-VICT11 and J-VICT13;
 - (iv) the following claims of whistleblowing detriment succeed: J-DET3; J-DET4; J-DET5; J-DET7; J-DET8; J-DET9, J-DET12 and J-DET13;
 - (v) all other claims are either not well-founded, or are excluded by operation of s.212(1) EqA, and are dismissed.

3. **In relation to Ms Jama's case against the Second Respondent:**
 - (i) the claim of victimisation, J-VICT11, succeeds;
 - (ii) all other claims are not well-founded and are dismissed.

REASONS

Procedural history

1. By a claim form presented on 15 September 2020, after an ACAS early conciliation period between 12 July and 19 August 2020, Ms Princess Mntonintshi (the First Claimant) claimed race discrimination against Barking Havering & Redbridge University Hospital NHS Trust (the First Respondent).
2. By a claim form presented on 23 September 2020, after an ACAS early conciliation period between 28 July 2020 and 28 August 2020, Ms Ubah Jama (the Second Claimant) claimed race discrimination and whistleblowing detriment against the First Respondent.
3. The First Respondent lodged amended grounds of resistance on 5 January 2021. A preliminary hearing for case management took place on 11 January 2021 before EJ Jones.
4. On 24 February 2021 the Claimants lodged further and better particulars of their cases. The First Respondent lodged further amended grounds of resistance on 15 March 2021.
5. By a second claim form presented on 16 June 2021, after an ACAS early conciliation period between 8 April 2021 and 20 May 2021, Ms Jama claimed race discrimination and whistleblowing detriment against the First Respondent and Ms Claire Beck (the Second Respondent).

6. The cases were consolidated on 1 September 2021.
7. There was a second preliminary hearing for case management before EJ Jones on 9 December 2021.
8. Both Claimants remain in the employment of the First Respondent.

The hearing

9. We had a bundle of documents of just over 2,000 pages. It had been comprehensively redacted, without permission from the Tribunal, to the point where some documents were incomprehensible. It was confirmed that patient confidentiality was not an issue. We asked for an unredacted copy, which was provided.
10. We heard evidence from:
 - 10.1. the Claimants;and on their behalf from:
 - 10.2. Ms Pamela Akite (Biomedical Scientist at Queen's Hospital until June 2021);
 - 10.3. Ms Marie Swamba (Biomedical Scientist at Queen's Hospital until the end of February 2020);
 - 10.4. Ms Lorraine Chin (Chief Biomedical Scientist until she left the First Respondent in 2019);
 - 10.5. Mr Festus Ike Egbomwan-Irabor (Biomedical Scientist and the Claimants' Unite representative);and on behalf of the Respondents from:
 - 10.6. Ms Iris Valera-Larios (Band 8 Lead Biomedical Scientist for Biochemistry at Queen's Hospital);
 - 10.7. Ms Tatyana Zadorozny (Band 7 Senior Biomedical Scientist);
 - 10.8. Ms Claire Beck (Band 7 Senior Biomedical Scientist at Queen's Hospital at the material time);
 - 10.9. Mr Ian Kemp (Head of Pathology);
 - 10.10. Mr Casper Myburgh (Band 8a Service Manager, until he left the department on 16 March 2020);
 - 10.11. Ms Elizabeth Perry (Band 7 BMS until July 2020, then Quality and Training Supervisor);
 - 10.12. Mr James Ellender (Deputy Head of Financial Management);
 - 10.13. Mr Malcolm Patten (Band 8a Lead BMS in Blood Sciences);
 - 10.14. Mr Jeff Middleditch (Band 9 Divisional Manager in the Cancer & Clinical Support Division); and

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- 10.15. Mr Paul Cockfield (Blood Science Manager for Biochemistry at Queen's Hospital).
11. The first two days of the hearing were taken up with a combination of Tribunal pre-reading and further case management. Although there was an existing list of issues which was agreed and appeared comprehensive, on closer inspection it was apparent that it needed clarification. Part of the problem was that a single list of issues had been drawn up in relation to both cases. They are different cases, although they were being heard together and had common ground.
12. By the end of the second day, and after several iterations, a definitive list of issues, one for each Claimant, was agreed between the representatives. Although not set out separately in this judgment, the underlined subheadings below are imported from that list.
13. Because multiple legal labels were applied to all the factual allegations (between two and four for each), the following code was adopted:
- 13.1. J-DD1 refers to a direct discrimination claim by Ms Jama;
 - 13.2. J-HAR1 to a claim by her of harassment related to race;
 - 13.3. J-PA1 to a protected act in her victimisation claim;
 - 13.4. J-VICT1 to an act of unfavourable treatment said to be victimisation;
 - 13.5. J-PD1 to a public interest disclosure;
 - 13.6. J-DET1 to an alleged whistleblowing detriment;
 - 13.7. the prefix M- is used for Ms Mntonintshi's claims.
14. We were provided with an opening note on behalf of the Respondents, a document containing agreed facts, and an agreed chronology, cast list and timetable for the hearing.
15. Permission was given for three witnesses to attend the hearing by video link: Ms Beck, Ms Swamba and Ms Wardell.
16. Permission had also been granted by EJ Burgher before the hearing for observers (friends and family, other employees/former employees of the Trust, instructing solicitors and so forth) to observe the hearing by CVP. We explained that it was the responsibility of anyone who wished to observe in this way to ensure they were in the waiting room five minutes before the beginning of each session, so that they could be admitted as a group. If anyone wished to enter the CVP room thereafter, they were asked to contact the professional representatives, who would alert the Judge.
17. As for the timetable, the case had originally been listed for fifteen days but had been reduced to thirteen because of judicial availability. We then lost a further day while the parties clarified the issues, and two more days because of the sudden ill-health of one of the Tribunal members. We added an additional day to the end of the hearing to complete the process of hearing all the evidence and submissions. Mr Cockfield was due to give evidence remotely during that period but, owing to technical difficulties, was unable to do so. He was then on holiday.

18. We listed the next available day (19 September 2022) to hear his evidence and closing submissions, as well as a further day for deliberations. That day had to be vacated because it was the day of the Queen's funeral. We relisted to 26 September 2022, anticipating that we would hear Mr Cockfield's evidence, read the written submissions which the parties would submit in advance, hear brief oral submissions and begin our deliberations. That plan also failed when we discovered that the representatives' combined written submissions ran to over 200 pages. We listed two further days in October, one to read the submissions, the other to hear any oral submissions, strictly limited (by agreement) to an hour each. We had regard to the submissions in their entirety. We do not attempt to summarise them in what is already a long judgment.
19. We then listed a further three days for deliberations. We warned the parties at the end of the hearing that there was likely to be a considerable delay in completing and sending out the judgment in this case, given the volume of material provided, the number of allegations/causes of action and the competing demands of other cases.

Findings of fact

The biochemistry department

20. The First Respondent operates two hospitals: Queen's Hospital in Romford and King George Hospital in Goodmayes. The events of this case relate to the work of the Clinical Biochemistry department at Queen's Hospital within the Trust's Cancer and Clinical Support Division.
21. Biomedical science involves identifying, researching, monitoring and treating diseases. Biomedical scientists ('BMS'), among other things, analyse fluids and tissue samples from patients to identify markers of disease and provide reports that highlight the effectiveness of treatment. The BMS team carries out both administrative work and technical work. The administrative work includes external quality assurance (EQA) which involves checking and benchmarking results against other labs. The technical work includes working 'on the bench' using specialist equipment and computers.
22. There are two analysers in the department, manufactured by Roche, which look like oversized washing machines. They are nicknamed 'Bamm-Bamm' and 'Pebbles'; they are used to analyse samples. The analysers are connected by a track to the fridge, where samples are stored.
23. The biochemistry department usually consisted of around 20 people, of whom four or five were Band 7 senior BMS, referred to as 'Seniors'. Their role was to deal with the various sections and day-to-day running of the laboratory. In 2020 the Seniors were Ms Zadorozny, Ms Beck, Mr Tajwant Lidher and Ms Jama. Ms Yetunde Nwagbo joined in September 2020 while Ms Jama was on sick leave.
24. The Seniors report to the Band 8a Lead BMS. At the material time that was Ms Valera-Larios (who is white Spanish). There were two other Lead BMS: Mr Patten (Blood Sciences); and Mr Stanley Betserayi (Haematology). Ms Valera-Larios managed the Clinical Biochemistry team; Mr Patten's role was more operational (for example, managing testing at the patient's bedside). He and Ms Valera-Larios shared an office, but he usually had little interaction with her team.

25. Ms Valera-Larios reported to Mr Cockfield (Blood Science Manager), who oversaw and managed various departments within pathology: biochemistry, haematology and blood transfusion, plus smaller sections such as immunology and prenatal screening. Mr Cockfield reported to Mr Kemp (Head of Pathology, responsible for several hundred staff), who in turn reported to Mr Middleditch (Divisional Director). Between August 2018 and March 2020, Mr Casper Myburgh, who has an HR background, was also temporarily seconded to the role of 8a Service Manager, parallel to Mr Cockfield. When the pandemic struck, he was redeployed to the Covid-19 emergency planning team. He no longer works for the First Respondent.

The HCPC standards

26. The Health and Care Professions Council ('HCPC') regulates health and care professions in the UK, including BMS. The HCPC has standards of conduct, performance and ethics which, among other things, impose obligations on registrants to manage risk and report concerns about safety and to be open when things go wrong.

The management culture before the arrival of Ms Valera-Larios

27. Before November 2019, the Biochemistry department at Queen's Hospital had been managed by Ms Lorraine Chin and Mr Malcolm Patten as joint Lead BMS. We heard evidence from them both.
28. There was some generalised evidence from some of the First Respondent's witnesses that Ms Chin had been a poor/lax manager. We reject it. We find that she was a respected and respectful manager of staff; she was approachable and provided a supportive working environment. In her evidence Ms Chin was clear that she held both Claimants in high regard in terms of their performance and denied that there were any particular issues with their timekeeping, although she accepted that timekeeping was a general issue among staff during her period of management. It remained so under Ms Valera-Larios. Mr Patten had no criticisms of either Claimant. Indeed, he promoted Ms Jama to Band 7.
29. In April 2017, Ms Zadorozny joined the team as Band 7 Senior BMS in Clinical Biochemistry from another Trust. She is white Canadian. Her main role was to monitor the quality of results that were released from the laboratory, while supporting the team of Band 6 BMS with their training and work.

Ms Valera-Larios's appointment as Lead BMS for Biochemistry

30. From 1 November 2019, Ms Valera-Larios took over from Ms Chin as Lead BMS for Biochemistry. This was her first Band 8 role; she had previously worked at King George Hospital in a Band 7 role. She had overall responsibility for the BMS (including the Seniors).
31. Mr Cockfield's evidence was that Ms Valera-Larios acted on his instructions throughout in implementing what he described as a more structured and regimented style of management.
32. Ms Valera-Larios also introduced a new system whereby the Seniors would rotate between sections every few months: quality control and assurance, stock control, automation, special section and rota/training/competency. Ultimately,

the plan did not work as anticipated, in part because the Covid pandemic intervened.

33. Ms Valera-Larios had been given some internal management training before taking up this, her first, management position, but it was plain to us that she was out of her depth. She lacked the management and people skills to deal with a challenging department, which needed a more experienced manager who could effect change in a sensitive and consensual manner. We also find that she lacked insight into the gaps in her own skills and training and responded badly to being challenged or questioned. She had poor judgement and sometimes made decisions without thinking through the implications.
34. To be fair to Ms Valera-Larios, we record that we were not impressed with the management skills of the senior managers above her: Mr Cockfield, Mr Kemp and Mr Middleditch. There was a lack of clear direction and constructive challenge from above and a reluctance to intervene decisively to help her to resolve difficult situations appropriately. Too often she was left to her own devices and her accounts of difficult situations accepted without scrutiny.
35. Late in the First Respondent's case, after Ms Valera-Larios had finished her evidence, it was suggested for the first time in oral evidence (by Ms Perry, with some support from Mr Patten) that Ms Valera-Larios was abrupt and insensitive with all staff, irrespective of their race, and like a 'bull in a china shop'. Ms Perry said for the first time that she had left the First Respondent because of Ms Valera-Larios's treatment of her, although she gave scant detail.
36. Neither Ms Perry nor Mr Patten included this evidence in their statements; it was not part of the First Respondent's pleaded case. We approached it with considerable scepticism. It might have carried more weight, had it been run from the outset and supported by concrete examples. As it was, we note that there had been no suggestion by Ms Beck or Ms Zadorozny, both of whom are white, that Ms Valera-Larios ever behaved towards them in an inappropriate manner, nor did any of her (white) managers lead evidence in their statements that they had been on the receiving end of such behaviour, although Mr Kemp said he had observed it on occasions.
37. Ms Beck joined the Trust on 8 November 2019 as Band 7 Senior BMS. She had previously worked with Ms Zadorozny for fourteen years at Basildon Hospital. They knew each other well and were friends outside work. Ms Beck also met Ms Jama at Basildon Hospital, when Ms Jama was working as a locum.

The divisions within the department

38. The biochemistry department was racially very diverse. We were shown a table which suggested that some two thirds of staff were from minority ethnic backgrounds. The First Respondent relies on this to rebut the suggestion that there was discrimination in the department. The Claimants pointed to the fact that the majority, black staff tended to occupy the more junior roles; the minority, white staff the more senior roles.
39. The position is slightly more nuanced: the overwhelming majority of BMS were people of colour; we have already found that, for most of the material time, the Seniors were equally balanced between black and white staff; the managers from Ms Valera-Larios upwards were all white. Moreover, Ms Valera-Larios

turned consistently to Ms Beck and Ms Zadorozny almost as *de facto* deputies. The effect of all this was that it was the white managers (and quasi-deputies) who held power and influence in the department.

40. In a meeting held in May 2021, as part of the re-investigation of the Claimants' formal grievances conducted by Ms Eyon Besong (HR Consultant, Capsticks HR Advisory Service) ('the Capsticks investigation'), Ms Zadorozny was asked if there was segregation along racial lines in the department. She said this:¹

'TZ: Yes I would say so. Another of our young ones says its blacks against the Asian who have a lot more segregation. There are very few white people in the lab – it makes me quite sad.

EB: What is the cause of the segregation?

TZ: It does seem like its friends and that's it. It's been since this incident and the ET3, I think it is as bad as it was before but I can't put my finger on it.'

41. Asked in cross-examination about this exchange, Ms Zadorozny explained that she meant that it was the whole situation which made her sad, not the lack of white members of staff (as was put to her). We accept that: if she held such a view, it is unlikely that she would have expressed it so bluntly in a recorded interview. However, her answer is telling in other respects: she is silent as to whether the segregation operated as between black and white staff, choosing to focus on divisions between different minority ethnic groups; moreover, she must have known that it was more than a mere issue of friendship groups when, by that point, multiple complaints of race discrimination had been made against white staff, including against her and including in these proceedings.

42. We find that the divisions were, in part at least, as between black and white staff. Specifically, Ms Valera-Larios, Ms Zadorozny and Ms Beck had always had a good relationship with each other. In an email of 9 March 2020, Ms Valera-Larios's explanation was as follows:

'I support Claire and Tatyana as they are hard-working, communicative and they are very cooperative when it comes to the senior tasks.'

43. Their solidarity with each other only increased when the events we describe below began to unfold. They were unfailingly supportive, indeed defensive of, each other throughout, including in response to allegations of discrimination, both at the time and in their evidence to us. Although they did not describe themselves as such, we find that they were themselves a powerful clique, given Ms Valera-Larios's role as Lead.

44. The divisions were not all recent. Mr Cockfield described the atmosphere in biochemistry as 'toxic', a state of affairs which, according to him, predated the events in question when there was an industrial dispute in the Department in around 2018, which he says gave rise to 'mistrust and animosity'. However, he acknowledged that there was a further deterioration in the team dynamic in late 2019/early 2020. He ascribed this to a time when Ms Zadorozny became

¹ Where contemporaneous documents are quoted, the original spelling, punctuation and grammar is retained, except where clarification is necessary for sense, when it is shown in square brackets

concerned about the technical practices of Ms Charlene Mandeya and ‘took it upon herself to keep an eye on her outputs to ensure safe practices were being implemented.’ Ms Mandeya is black Zimbabwean. According to him, other staff, including the Claimants, ‘rallied around Ms Mandeya to ‘protect’ her from Ms Zadorozny’s scrutiny’ which he feels precipitated a further deterioration in the relationship between the Claimants and Ms Zadorozny.

45. Of course, late 2019 is also when Ms Valera-Larios arrived in the department and, as we find below, she encouraged Ms Zadorozny and Ms Beck to monitor other staff. It will be apparent from our findings below that we have concluded that Ms Valera-Larios’s conduct played no small part in the deterioration of professional relations within the department.

The Claimants

46. Ms Jama is employed as a Band 7 Senior in the Biochemistry department at Queens Hospital, a role she has held since 4 February 2019. Before this she worked as a Band 6 locum BMS in the same department from February 2018. She is black and of Somalian ethnic origin.
47. Ms Mntonintshi works as a Band 6 BMS. Her current period of employment with the First Respondent began on 6 January 2020, although she had two previous periods totalling ten years (2007-2013 at King George Hospital; and 2015-2018 at Queen’s Hospital). During the second period, in 2016, she was promoted to a Band 7 Senior role. When she returned to the Trust in 2020 there were no vacant Band 7 positions and so she applied, and was appointed to, a Band 6 position. Ms Mntonintshi is black South African.
48. Management, and in particular Mr Cockfield, was keen on both occasions to secure Ms Mntonintshi’s services and went to considerable lengths to do so. Ms Valera-Larios played her part in ensuring that Ms Mntonintshi could continue to work for the First Respondent by applying for an exceptional payment of wages to her in January 2020.
49. Before the events of this case Ms Mntonintshi and Ms Zadorozny had a good relationship, indeed were friends: they used to go walking together at lunchtime; when Ms Mntonintshi left in 2018, Ms Zadorozny arranged her leaving present which was a Tiffany necklace; they kept in contact when Ms Mntonintshi was in South Africa; before she returned, Ms Zadorozny spoke highly of her to Ms Beck.

Jama Issue 1: J-DD1 / J-HAR1 – ‘Ubah Jama was denied a training opportunity to attend a 3-day Roche CITM administration training course which was given to her white colleague, Claire Beck’

50. Built into the two analysers, Bamm-Bamm and Pebbles, was an IT interface which enabled staff to release results to the Trust hospitals. It was also used to download new applications for tests. By January 2020, there was no dedicated admin client administrator within the team; the employee who used to perform this role had left; Mr Patten was temporarily covering it but had other responsibilities.

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51. Roche, the manufacturer, offered a one-week, residential training course in Brighton to teach attendees to programme and configure the system to the individual laboratory's requirements.
52. Ms Jama had told Ms Valera-Larios in December 2019 that she would be interested in attending the course. She often performed downloads on the analysers and, around that time, had had to phone someone at King George Hospital because she could not resolve an IT issue herself. Ms Jama said that a colleague, Ms Akinlade, witnessed this discussion; during the Capsticks investigation in April 2021 Ms Akinlade said that she did not recall this conversation. Given that it took place some eighteen months before, we find that unsurprising. We are satisfied that the conversation took place.
53. We observe at this point that we found Ms Jama to be a consistent witness, albeit we did not accept her perception of certain events and we are critical about some of her own behaviour.
54. By an email at 13:23 on 16 January 2020 to Ms Valera-Larios, Roche offered a space in a course on 11-13 February 2020, nearly a month later.
55. Ms Valera-Larios said during the initial investigation of the Claimants' formal grievances by Mr Max Ndongwe ('the Ndongwe investigation') that Roche offered the place as a result of 'a last-minute cancellation'. She told the Capsticks investigation that the offer was made at 'very short notice'; it is plain from the dates above that both statements were untrue. Ms Valera-Larios gave a different explanation in oral evidence as to why she took the decision so quickly, which was that it took time to make the arrangements, including booking the hotel.
56. Ms Valera-Larios thought that one of the Seniors should go on the course. Her evidence was that she announced the opportunity in the lab to all of them, including Ms Jama; that Ms Zadorozny and Ms Wardell both expressed an interest, but she decided that Ms Beck should go because she was always keen to help out on IT matters. Ms Valera-Larios replied to Roche at 14:41, saying that Ms Beck would attend.
57. Ms Valera-Larios's evidence was that Ms Jama showed no interest; rather, she came over to complain about the noise they were making. In her sworn statement, Ms Valera-Larios also said that she remembered that Mr Lidher was present but that he did not put himself forward. That was untrue: the rota for that week showed that he was away from work that day. When this was pointed out to her in cross-examination, she said that it might have been 'another guy with a beard', although she could not be certain who that might have been; Mr Lidher's appearance is distinctive, he is exceptionally tall and wears a turban.
58. Given these inconsistencies, we preferred Ms Jama's account of what happened that day: the opportunity was not openly announced; Ms Valera-Larios simply went into the lab, over lunch when she must have known that some of the Seniors would be on their break (and on a day when one of them was on leave), and offered it to Ms Beck, who accepted. Ms Jama only found out about it on 10 February 2020 when she was doing the rota and Ms Beck asked to be taken off it for three days as she would be away doing the training.

Jama Issue 2: J-PA1 - 'Ubah Jama complains to Malcolm Patten about training incident, favouritism, and poor treatment'

59. Ms Jama did not raise this issue with Ms Valera-Larios. She said she was not willing to speak to her one-to-one because she did not feel 'safe'. Nothing had happened at this point which could reasonably give rise to such a perception (although the position changed later). Ms Jama is an experienced professional and Ms Valera-Larios was her line manager. An informal conversation might have led to a positive outcome, for example Ms Valera-Larios offering Ms Jama the next available slot. By choosing not to communicate with Ms Valera-Larios, Ms Jama contributed to the worsening of their relations.
60. Instead, Ms Jama complained orally to Mr Patten. She relies on this as a protected act for the purposes of her victimisation claim. She did not say in her witness statement that she mentioned race as a factor when she spoke to Mr Patten. We find that she did not: at this stage she was complaining only of favouritism by Ms Valera-Larios towards Ms Beck.

Mntonintshi Issue 1: M-DD1 / M-HAR1 – '[In February 2020] Princess Mntonintshi was asked by her colleagues, Sarah Wardell and Elizabeth Perry, how she was able to remember her training even though she had been inactive for a year and a half, implying that she was incapable despite her many years of experience and training in the field'

61. In February 2020, Ms Mntonintshi was carrying out maintenance work on one of the analysers; she was doing so from memory, without looking at the standing operating procedures (albeit the analysers have built-in guidance). Ms Wardell and Ms Perry observed her and asked her how she was able to remember all her training when she had been away from the job for a year and a half.
62. In her later, written complaint of 9 March 2020, Ms Mntonintshi said that 'the tone in which they asked this suggested that they heavily doubted my ability to recall my many years of experience and training in this field'.
63. Ms Perry and Ms Wardell denied this. Ms Perry explained that she was paying Ms Mntonintshi a compliment: it was almost like she had never been away. Ms Wardell remembers asking Ms Mntonintshi how she was finding being back and offering to go through any new refresher training, if she felt she needed it: she was trying to be friendly and helpful.
64. Ms Mntonintshi was unable to explain to the Tribunal why what they said was (to use her own word) 'abrasive'. She said that it was their tone. We find that implausible: it is difficult to say the word she ascribes to them in an abrasive tone.

Ms Beck asking Ms Jama about her timekeeping

65. Ms Jama alleges that on several occasions between February and August 2020 Ms Beck asked her where she had gone. Ms Beck accepts that she kept a close eye on timekeeping. We find that she probably did challenge Ms Jama on around this time, but we accept that she did the same with Ms Zadorozny. Ms Valera-Larios had asked her to keep an eye on timekeeping generally; it was a long-standing problem.

Mntonintshi Issue 2: M-DD2 / M-HAR2; Jama Issue 4: J-DD3 / J-HAR3: 'on 13 February 2020] - Tatyana Zadorozny lost her temper with a black colleague and threw a pleural fluid sample at the wall close to the Claimant and two other black employees, which was a health and safety breach and potentially dangerous'

66. On 13 February 2020, Ms Zadorozny was working in the same area as Ms Jama, Ms Mntonintshi and Ms Swamba, a junior locum, who is black. The three black employees were sitting in a line at the same bench. Ms Zadorozny was working on another bench.
67. Ms Zadorozny approached Ms Swamba and asked her to help with logging the appearance of a fluid sample in a tube. Ms Swamba said that she was not trained to do that task and did not know what to do with it. While she was still speaking, Ms Zadorozny walked away from her saying 'Well I guess that isn't going to get done then'. As she sat down, she tossed the tube the short distance towards the sample rack which was on the bench where three colleagues were sitting; it hit the wall near Ms Mntonintshi. Ms Zadorozny threw it in a contemptuous manner but not with force.
68. There was no possibility that the tube would land safely in the rack. The fluid sample was in a plastic tube with a pop-on top; the top had a hole in it to allow air to exit the tube. It is wrapped in parafilm when it is being transported, but this tube was not wrapped. There was a real risk that the contents were infectious and a real risk that the top might come off/the liquid might escape and splash one or other of Ms Zadorozny's colleagues. There was also an obvious risk that the sample would be spoiled, affecting patient safety.
69. Ms Zadorozny had lost her temper. She did not intend to put her colleagues at risk, but she acted recklessly and disrespectfully.
70. Fortunately, the top did not come off (as Ms Swamba later suggested it had). It did not go near Ms Mntonintshi's head (as Ms Jama later suggested it had and Ms Mntonintshi repeated). Nor was there any risk of the tube shattering (as Ms Mntonintshi later asserted it had) because it was made of plastic.
71. In our judgment, it was a serious act of misconduct, which ought to have been the subject of an incident report and an immediate disciplinary investigation. We note that, in the footer of Mr Kemp's emails (the head of pathology), the following maxim appeared: 'every sample is a patient, and every patient matters'. Mr Middleditch said he had never heard of this happening before. Mr Myburgh characterised it as a 'never event'; in cross-examination he said that it was potentially gross misconduct (although he later sought to resile from that position). Notwithstanding the exaggerations in their later accounts, we accept that Ms Jama, Ms Mntonintshi and Ms Swamba were genuinely shocked and worried by this exceptionally unprofessional conduct.
72. Mr Zadorozny says that she immediately apologised to them. The Claimants denied this. We find she did not: we think it improbable that she would have done so while still experiencing that degree of frustration and anger. She must have realised when she calmed down that what she had done was seriously wrong, but she did not apologise at the time.

Jama Issue 5: J-PD1 – 'Ubah Jama informs Tatyana Zadorozny that she will be filing an incident report over the sample throwing incident'

73. Ms Jama says that she told Ms Zadorozny that she intended to complete an incident report. We find that she did not; if she had, she would have done it. She reported the incident orally the next day to Mr Cockfield; she did not make a written complaint about the incident until 16 March 2020, when she complained to Mr Middleditch.
74. Ms Zadorozny must have been concerned that there might be repercussions from this incident. She mentioned it to Ms Valera-Larios herself, but not until after the weekend, by which time other events had occurred.

Jama Issue 6: J-DD4 / J-HAR4 / J-DET1 - [On 14 February 2020] Ms Zadorozny falsely accused Ubah Jama and Princess Mntonintshi of taking 1.5 hours for lunch that day

75. No food or drink is permitted in the lab. Staff had an hour for lunch and 15-minute tea breaks in the morning and afternoon. These were usually coordinated at the start of the day to make sure that sections were not left unattended.
76. On 14 February 2020, Ms Zadorozny approached Ms Jama and accused her and Ms Mntoninshi of having taken a 90-minute lunch break. There is a dispute as to what day the break was said to have been taken: the same day (according to Ms Jama) or the previous day (according to Ms Zadorozny). We think it more likely that the argument was about the previous day; that is consistent with the contemporaneous document showing Ms Zadorozny checking records relating to 13 February 2020.

Jama Issue 7: J-DD5 / J-HAR5 / J-DET2 – '[On 14 February 2020] Tatyana Zadorozny checked over Ubah Jama's work on the analysers, which C2 witnessed and challenged her on. Tatyana Zadorozny at around this time also falsely accused C2 openly in the lab of not running quality control'

77. Ms Jama alleges that on 14 February 2020, Ms Zadorozny inappropriately checked her work and falsely accused her of not running Quality Control. Ms Zadorozny has no recollection of her doing so; she thinks Ms Jama was confusing this with an incident which occurred in March.
78. This allegation is not pursued in the Claimants' closing submissions. In any event we agree with the Respondents' submission that, if the incident had occurred as described by Ms Jama, it is likely there would be a contemporaneous record of it and there is not. We find that the events did not happen as described and the claims fail on their facts.

Checking work and timekeeping more generally

79. By contrast, Ms Wardell gave clear evidence that she was asked by Mr Zadorozny to check Ms Charlene Mandeya's work. Ms Zadorozny gave her no explanation; Ms Wardell felt uncomfortable. There was some suggestion that this was because Ms Mandeya's competencies were not up to date. If that is correct, the appropriate course of action would have been to arrange the necessary training to bring them up to date, not to monitor her surreptitiously, involving other, white, members of staff in doing so.
80. We are satisfied that Ms Valera-Larios had asked Ms Zadorozny to check on the work of other members of staff more generally. We know this because, in

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an email of 9 March 2020, Ms Valera-Larios wrote to Ms Babb of HR, saying that she had now asked them to stop doing so, because she wanted to move towards a 'no blame' culture.

81. We note that the evidence of white members of staff being asked to monitor colleagues, most of whom would be non-white. We note that Ms Valera-Larios did not ask either of the black senior BMS (Ms Jama or Mr Lidher) to be involved in the monitoring.

Jama Issue 8: J-PD2 / J-PA2 – '[On 14 February 2020] Ubah Jama verbally reports to Paul Cockfield issues and incidents including the sample throwing incident and informs him it is a racial issue'

82. On 14 February 2020, Ms Jama went to Mr Cockfield to complain about recent events. She was upset. She told Mr Cockfield about Ms Zadorozny throwing the sample the day before and its obvious health and safety implications. She also spoke to him about the CITM training issue and her feeling of being excluded. Mr Cockfield asked her if this was a racial issue and she told him that it was. Although neither of them kept a note, Ms Jama mentioned race to Mr Myburgh on 19 February 2020 (see below). We think it likely that Ms Jama also complained of race to Mr Cockfield a few days earlier.
83. At the end of the meeting, Mr Cockfield told Ms Jama to take a break because she was obviously upset. Ms Valera-Larios accepts that Mr Cockfield told her about his discussion with Ms Jama but says that he did not mention race. We think it probable that he did.

Jama Issue 9: J-DD6 / J-HAR6 – '[On 14 February 2020] Tatyana Zadorozny and Claire Beck monitored Ubah Jama's breaks and she saw them keep a log/record after Paul Cockfield asked her to take a break when she had reported to him that day the less favourable treatment she was facing'

84. Ms Jama says that on the same day she witnessed Ms Beck and Ms Zadorozny keeping a log of her timings into and out of the lab.
85. While we accept, and have found above, that Ms Beck was generally monitoring timekeeping at Ms Valera-Larios's request, we do not accept that Ms Jama saw her doing so when she returned to the laboratory from her meeting with Mr Cockfield on 14 February 2020. We note that she gave no evidence in her witness statement to that effect, let alone sufficient detail to persuade us that it occurred on that date. She merely repeated the broad allegation when challenged in cross-examination.

Jama Issue 10: J-PD3 / J-PA3 – '[On 19 February 2020] Ubah Jama raised concerns with Casper Myburgh including race discrimination'

86. On 19 February 2020, Ms Jama spoke to Mr Myburgh about the incident on 13 February 2020. He considered the act of throwing a sample to be a serious health and safety issue; he regarded it as 'very unsafe, as it could have contained anything and caused contamination, as well as losing the sample'.
87. Mr Myburgh accepted that Ms Jama also told him there was favouritism within the team, but he told the Tribunal that he did not remember whether she said

that race was a factor. That evidence was evasive: he subsequently accepted that, at an internal interview, he specifically said that she mentioned race.

88. On either 19 or 20 February 2020, Mr Myburgh asked Ms Valera-Larios to raise an incident report (IR1) and to investigate the incident. He also told her and Ms Beck that Ms Jama thought that there was a racial slant to the behaviours in the Department. Ms Beck was very upset by the suggestion.

Jama Issue 11: J-DD7 / J-HAR7 / J-VICT1 / J-DET3 / J-PA4 – ‘[on 20 February 2020] Iris Valera-Larios questioned Ubah Jama about the sample throwing incident. During the conversation, Iris Valera-Larios showed no concern for the welfare or health and safety of the three black members of staff but instead stated that she did not want to take sides, stated that she wanted to take her to Paul Cockfield’s or Casper Myburgh’s office for mediation and when Ubah Jama asked what she was being accused of, Iris Valera-Larios did not reply. Ubah Jama confirmed that Tatyana had lost her temper and thrown the sample’

89. The first Ms Valera-Larios knew about the sample-throwing incident on 13 February 2020 was on Monday 17 February 2020, when Ms Zadorozny spoke to her about it. As we have recorded above, Mr Myburgh then instructed her to look into the incident.
90. Ms Valera-Larios approached Ms Jama on 20 February 2020. She expressed no concern for the welfare (or feelings) of the three black members of staff who were present at this incident. She sought to downplay it, saying that she did not want to ‘take sides’. Ms Jama pointed out (rightly, in our view) that there were no ‘sides’ to take in an incident of this sort: Ms Valera-Larios already knew that Ms Zadorozny had accepted that she had thrown the sample.
91. During their conversation, Ms Valera-Larios made critical observations about Ms Jama’s conduct in relation to this incident, including suggesting that she had failed to help Ms Swamba on the day; Ms Jama took exception to this. The discussion became heated, and Ms Valera-Larios suggested they go and see Mr Myburgh or Mr Cockfield, so that a third person would be present to facilitate the conversation.
92. Ms Jama accepted in cross-examination that she did not raise the issue of race discrimination in this conversation.
93. As we set out below, Ms Valera-Larios downplayed the seriousness of the incident in her subsequent incident report. She went further in an email to Ms Babb of HR on 9 March 2020, in which she referred to the occasion ‘when the two seniors [Ms Zadorozny and Ms Jama] were having an argument and a sample was thrown’. There was no suggestion at any point that the incident arose out of an argument between Ms Zadorozny and Ms Jama. Ms Valera-Larios accepted that this was wrong. We find it was an entirely baseless attempt to implicate Ms Jama.

Ms Valera-Larios’s report about the incident on 13 February 2020

94. On 21 February 2020, Ms Valera-Larios completed the incident report about the incident. It is deficient in several respects.

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95. Firstly, it describes the severity of the incident as 'low/insignificant'. For the reasons we have already given, we regard that as a clear misdescription; we remind ourselves of Mr Myburgh's characterisation of the as a 'never event'. This was obviously a serious incident.
96. Secondly, in describing the incident, Ms Valera-Larios accepted Ms Zadorozny's account at face value, for example that she 'immediately realised the danger of throwing a sample and apologised to the witness involved' without speaking to all three of the individuals who were present, in particular Ms Mntonintshi who was closest to the sample. She did speak to Ms Jama, but not with the care and formality that was required and (as we have found above) not without bias.
97. In the outcome section, dealing with the question of 'root cause' she writes 'rising tensions in the laboratory due to apparent unbalanced responsibilities between senior staff'. Ms Valera-Larios's purpose was clearly to downplay Ms Zadorozny's responsibility and to deflect blame onto others.
98. Finally, in the section dealing with preventative action, the following phrase occurs: 'disciplinary policy followed with appropriate action taken'. Although it is ambiguously expressed, we find that Ms Valera-Larios was seeking to give the impression that disciplinary action had been taken. That was untrue. In fact, there was no disciplinary action until nine months later when Ms Zadorozny was issued with a relatively mild warning for this and a second, similar incident (which we describe below).
99. Ms Valera-Larios even gave the wrong date for the incident (it happened on 13 February 2020, not the next day).

Jama Issue 12: J-DD8 / J-HAR8 - [On 26 February 2020] Iris Valera-Larios failed to inform Ubah Jama that she was conducting senior one-to-one meeting on/around 26 February 2020. Instead Ubah Jama was informed by Tatyana Zadorozny that she was doing individual meetings and wanted to speak with her now.

100. Ms Jama alleges that Ms Valera-Larios failed to tell her she was conducting individual one-to-one meetings with staff on or around 26 February 2020. She says that the first she knew of it was when Ms Zadorozny told her, in a brusque manner, that Ms Valera-Larios wanted to speak to her 'now'.
101. In cross-examination, Ms Jama prevaricated as to whether the focus of this claim was on the failure to forewarn her about the meeting, the tone of Ms Zadorozny's voice or the content of the meeting. We find that there was nothing unusual about Ms Valera-Larios conducting an impromptu meeting; no one else was forewarned about the meetings. We reject the allegation that Ms Zadorozny was rude to the Claimant: we think it likely the Claimant would have complained if that had happened, which she did not.

The independent investigation

102. On 26 February 2020 Mr Cockfield told Ms Jama that an independent investigation into her complaints would be conducted by Graham [surname unknown] in Histology. On the same day Ms Jama asked him if she could take time off in lieu for two weeks, which she planned to use for her MSc research project.

Jama Issue 13: J-DD9 / J-HAR9: [on 28 February 2020] Claire Beck and Tatyana Zadorozny were invited to attend and did attend training on 28.2.20 whilst Ubah Jama was not invited and not told about the training.

103. On 28 February 2020, a technical specialist from Roche emailed Ms Valera-Larios to say that she would be visiting Queens Hospital the following week to deal with some necessary changes to the analysers. There was no mention of training.
104. The Roche rep came into the department to show Ms Valera-Larios how to set up aliquots (portions of larger samples) properly. Ms Beck was passing and asked what they were doing; Ms Valera-Larios suggested that she stay and observe because what they were doing related to the CITM course Ms Beck had attended. Ms Zadorozny knew the rep and when she saw her, stopped to say hello and chat. She also stayed to learn how to do the procedure. The demonstration, which was effectively on-the-spot training, went on for some two hours.
105. Ms Jama was left to cover the laboratory. Ms Valera-Larios did not try to include her. Ms Jama had to ask them to come back because other staff needed to take their breaks.

Mntonintshi Issue 3: M-PA1 – [on 9 March 2020] Princess Mntonintshi emailed Paul Cockfield, copying in Leonard Kemp, with concerns about the working environment within the Biochemistry team'

106. On 9 March 2020, Ms Mntonintshi sent an email to Mr Cockfield, copying in Mr Kemp and Mr Myburgh, about her concerns regarding the working environment in the biochemistry team. She named four individuals: Ms Zadorozny, Ms Beck, Ms Wardell and Ms Perry, all of whom are white. She began as follows:

'I write this letter with concerns to the current work environment harbouring amongst the Biochemistry team. Upon returning to my post, I noticed a huge division amongst the staff members. The rift was so apparent and concrete that individuals would refuse to ask certain senior (Tatyana or Claire) members for assistance. There are multiple instances that have occurred in the lab as a subsequent result of this rift. These incidents have become increasingly concerning and are deteriorating the labs ability to work as an efficient team [...] Their behavior is being backed up by Iris, that is why they have guts to do all these things and manage the section the way they want, not what is required. It is a toxic environment to be working in [...] What is needed in this situation is there to be objective mediation for both sides involved.'

107. She then went on to give examples, including some of the matters raised in these proceedings. Ms Mntonintshi had long experience of working in this department under different leadership, was well-respected and had no improper motive in speaking up in this way. Her email was a genuine attempt to ask senior management to intervene in what was becoming a dysfunctional workplace.
108. Ms Mntonintshi did not refer to race or to discrimination in this email, either against her or anyone else. She relies on the fact that those of whom she was critical were all white, and the individuals who she named as being subjected to inappropriate treatment were all women of colour. On this issue, we accept Mr

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Cockfield's evidence that he did not understand Ms Mntonintshi to be complaining of race discrimination at this point. Moreover, Ms Mntonintshi's oral evidence was that it was only when Ms Valera-Larios's probation statement was accidentally copied to her (para 182 onwards) that she was clear that discrimination was in play; before that she was 'not sure'.

109. Mr Cockfield told Ms Valera-Larios that Ms Mntonintshi had made a complaint about her and several other colleagues. We think it likely that Mr Cockfield forwarded it to her. Ms Valera-Larios emailed Ms Babb on 9 March 2020 to set out her position on the complaint. Ms Babb replied the next day to say that HR would look into undertaking 'restorative work'.
110. On 9-10 March 2020, a discussion took place over email between Ms Valera-Larios, Ms Babb and others about issues within the department and the need for an urgent meeting with the Band 7s to create a set of acceptable standards and behaviours. On 13 March 2020, Mr Cockfield held a meeting with the Band 7s about the investigation into the dysfunctional behaviour in the Department and tightening up processes. It included a presentation about respect.
111. On 13 March 2020, Mr Middleditch spoke to Mr Cockfield and asked him if there were race issues in Biochemistry. Mr Cockfield says that he made some enquiries with senior black members of staff. No specific action was taken as a result.
112. On 13 March 2020, Ms Beck reprimanded Ms Akite for not coordinating her break with others. The discussion became heated: Ms Akite told Ms Beck not to disrespect her; Ms Beck told Ms Akite not to be childish.

Jama Issue 15: J-PA5 / J-PD4: '[On 16 March 2020] Ubah Jama raises concerns with Jeff Middleditch including in a written statement'

113. Ms Jama returned from leave on 16 March 2020 and approached Mr Middleditch to raise concerns, including about Ms Zadorozny's behaviour. She handed him a statement. In it she alleged:

'I have been subjected to a vicious bullying and victimization by my colleagues Tatyana, Claire and my line manager Iris. I have witnessed clear division in the lab caused by the bullying, victimization and racial harassment of staff by these individuals. I have raised these concerns with Malcolm, Paul and Casper.'

114. She then went on to give examples of the treatment. Mr Middleditch said that the allegations she had made would be grounds for disciplinary proceedings, if they were made out. On 18 March 2020 Ms Jama emailed the statement to Mr Middleditch. Mr Cockfield later told Ms Valera-Larios about Ms Jama's meeting with Mr Middleditch and that Ms Jama had accused her of being racist.

Jama Issue 16: J-DD11 / J-HAR11 – '[on 17 March 2020] Tatyana Zadorozny lost her temper again and threw a sample storage rack labelled coronavirus into the clinical waste bin and when the rack did not go in the bin, kept hitting it against the bin aggressively, splashing the biological samples inside, in front of 3 black employees including Ubah Jama and Pamela Akite. ('the second health and safety incident')'

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115. On 17 March 2020, Ms Zadorozny lost her temper in front of black colleagues again.
116. She was training a colleague called Ishak Alibhai. Ms Akite was also present. Ms Akite noticed that Ms Zadorozny was sitting next to a rack which contained Covid-19 samples. They should have been disposed of and were a potential hazard. Ms Akite warned her that they might be infectious.
117. Ms Zadorozny became angry and threw the rack and samples into a clinical waste bin. Ms Akite said she should not throw the rack away. Ms Zadorozny retrieved the rack and angrily banged it against the bin to dislodge the samples. Ms Jama heard the noise and walked over. She asked Ms Zadorozny to calm down, but Ms Zadorozny carried on banging the rack against the bin.
118. This conduct was both unprofessional and unsafe: potentially infectious samples must always be disposed of with the greatest care; Ms Zadorozny's behaviour was aggressive and inappropriate.

Jama Issue 17: J-PA6 / J-PD5 – [on 17 March 2020] Ubah Jama informs Paul Cockfield about the second health and safety incident, that Iris Valera-Larios was unfair and biased and that there was a racial issue underling this behaviour'

119. On 17 March 2020, Ms Jama spoke to Mr Cockfield about the second health and safety incident. She described what had happened and the risks Ms Zadorozny's behaviour posed. She told him that Ms Zadorozny was showing increased aggressive behaviour and that she would not work alone with her as she did not feel safe.
120. As to whether Ms Jama mentioned race discrimination in this conversation, Mr Cockfield gave contradictory evidence. In his witness statement (paragraph 17) he stated that there was no suggestion of race. He was then taken in cross-examination to an email from Ms Jama to him dated 23 April 2020, in which she wrote:

'I previously discussed with you on 17.3.20 that Iris is unfair and biased. I also stated that there's a clear racial issue underlining this behaviour.'
121. Mr Cockfield did not dispute that account in his reply to that email at the time.
122. He was also taken to a note of an interview Ms Valera-Larios attended with Mr Ndongwe on 11 September 2020, in which she said that she did not have anything to do with the investigation of these incidents 'because [Mr Cockfield] said UJ had accused me of being a racist and the accusations are against you on 17/3/20'. In light of this evidence, Mr Cockfield then accepted that allegations of race discrimination were made by Ms Jama at this meeting.
123. We note that, contrary to the account Ms Valera-Larios gave at that internal interview, in her witness statement (at paragraph 173) she stated: 'I was not aware of the conversation between Mr Cockfield and Ms Jama'. That was untrue.

Deterioration of relations and lack of management action

124. From this point onwards, relations between Ms Jama and Ms Zadorozny and Ms Valera-Larios broke down further. Although Ms Jama must bear some

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responsibility for the subsequent deterioration of relationships by her decision to withdraw from certain types of contact, the greater responsibility was on senior management, and in particular Mr Cockfield, to act swiftly and initiate formal procedures immediately (whether disciplinary, grievance or otherwise) with a view to resolving this situation, which was likely to have an impact on the morale and efficiency of the department as a whole.

125. Although some steps were taken, they were neither swift nor decisive. We had regard to the evidence in Mr Middleditch's statement between paragraphs 14 and 23, in which he set out a chronology of how these issues were addressed. In the light of that evidence, we have concluded that Ms Jama's concerns were passed backwards and forwards between senior management (Mr Middleditch himself, Mr Cockfield and Mr Kemp) to little effect.
126. Two things were done. Firstly, HR was asked to look into doing some 'restorative work' which led to a fact-finding investigation by Ms Sandra Rowland (Phlebotomy Manager), which she did not complete until 14 July 2020. It is apparent from her report that she had not even begun interviewing staff until mid-June 2020. Her conclusions are highly generalised, her main conclusion being that the situation in the department was poor and morale was low, which was obvious.
127. Secondly, on 20 May 2020, the Organisational Development ('OD') team (which had previously said that it lacked capacity to become involved) contacted Mr Cockfield and Mr Kemp to offer to undertake 'diagnostic work' in relation to the department. They were then commissioned to carry out an exercise which took place in July 2020. They spoke to members of staff and completed the 'diagnostic phase' at this point and asked to proceed to the next two phases ('the design phase' and 'the deliver phase'). Suffice it to say, no actual change resulted from this report at this time.
128. We note that these events coincide with the imposition of the first lockdown, which provides some excuse for the First Respondent. Nonetheless, we consider that senior management's response was weak and unfocused. We understand that, at the date of the hearing in 2022, the situation still festered: Ms Jama and Ms Zadorozny continue to work in the same department but had not spoken for the previous two years.

Ms Mntonintshi's probation review on 18 March 2020

129. On 18 March 2020, Ms Valera-Larios completed Ms Mntonintshi's probation review. She confirmed in writing that Ms Mntonintshi's first three months of employment could be signed off as completed. She recorded that there were no specific areas for improvement or concern. There was a single reference to the need for Ms Mntonintshi to report issues such as 'sickness, rotas and annual leave' directly to Ms Valera-Larios. Other than that, Ms Valera-Larios was providing an entirely satisfactory report about Ms Mntonintshi.

Jama Issue 18: J-PD6 – '[On 19 March 2020] Ubah Jama submits a health and safety statement to Paul Cockfield for both health and safety incidents, and files an online incident report form for the second incident'

130. On 19 March 2020, Ms Jama sent Mr Cockfield a statement dealing with the two health and safety incidents involving Ms Zadorozny. She copied in Ms

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Mntonintshi and Ms Akite. The First Respondent accepts that this was a protected disclosure.

131. Although Ms Jama also referred to race in the document ('a pattern of behaviour towards staff members of colour by the individual') it was not pleaded as a protected act.
132. Ms Jama also completed an incident report and sent it to Mr Kemp on 20 March 2020. She did not give her name on the form, but it would have been obvious who the author was, given Ms Jama's parallel statement to Mr Cockfield. The First Respondent accepted that this too was a protected disclosure.
133. We think it likely that Ms Valera-Larios and Ms Zadorozny were aware of both documents.

Jama Issue 19: J-DD12 / J-HAR12 – '[On 19 March 2020] Iris Valera-Larios did not notify Ubah Jama of a senior meeting which started at 2pm on 19 March until Ubah Jama was on her lunch break, when she sent an inappropriate WhatsApp message on the BMS emergencies group at 2.09 that day'

134. On 19 March 2020, Ms Valera-Larios notified the Senior team at the morning huddle, at which Ms Jama was present, that she wanted to arrange a meeting for their new Quality Officer to be introduced to the team.
135. Ms Valera-Larios also circulated an Outlook invitation, including to Ms Jama, which gave the date and time of the meeting and explained its content. She accidentally left out the subject header. Mr Lidher did not know about the meeting either.
136. The Claimant accepted that it was not deliberately sent in a way to set her up to fail but maintained that it was discriminatory because she and Mr Lidher did not know about the arrangements for the meeting, whereas Ms Zadorozny and Ms Beck did. She maintained that Ms Valera-Larios acted as she did 'to prevent me from submitting my witness statement on that day, to distract me'. In our judgment that allegation was far-fetched: sending Ms Jama an invitation Ms Valerio-Larios knew she would not receive could not possibly distract her.
137. The meeting started at 2 o'clock; Ms Jama was on her lunchbreak. At 14:09 Ms Valera-Larios sent her a WhatsApp message: 'Hi Ubah we have a senior meeting in the quality and training room if u are free'. Ms Jama said she found this humiliating because Ms Valera-Larios put it on the BMS emergencies group; it made it look like she had simply not turned up for the meeting.

Jama Issue 3: J-DD2 / J-HAR2 - In [March] 2020, C2 requested annual leave from 06.05.20 to 07.05.20 which was unreasonably rejected by IVL with no reason given, and when only 4% of staff were on leave (only 2 people from the department) at the time of the request. IVL was off on leave on 07.05.20 and TZ was given leave for 07.05.20 at the last minute.

138. The Trust has an annual leave policy, which states that: 'Managers approving leave will ensure service needs are met and will normally set standards for the maximum number of staff who may be absent from work on annual leave at any one time'.

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139. The policy was that, normally, requests were rejected if more than 16% of staff (roughly four people) were on leave at any given time, to ensure that staffing levels were adequate. Ms Valerio-Larios accepted that she had a general discretion to allow up to six people to take leave in appropriate circumstances.
140. Ms Jama made a request on 13 March 2020 to take annual leave on 6 and 7 May 2020. The system indicated to her that there was capacity for her to take it. On 26 March 2020, the first national Covid-19 lockdown began. On 29 March 2020, Ms Valera-Larios rejected Ms Jama's request on the system.
141. Doing our best to establish what the position was on 29 March 2020, when the decision was taken, we find as follows:
- there were two people on maternity leave, one of them since October 2019, one since February 2020 (the Trust did not employ maternity leave cover);
 - Ms Wardell was on 12 weeks' medical shielding leave, which had begun on 24 March 2020;
 - Ms Carol Mills was self-isolating and had been doing so since 27 March 2020;
 - Ms Irene Malik was on leave on one of the two days (6 May 2020);
 - Ms Claire Beck was on sick leave between 6 and 8 May 2020.
142. As at the point when Miss Valera-Larios rejected Ms Jama's request, there were definitely five members of staff absent for one reason or another. As to the sixth person, Ms Beck, it was unclear when her leave had been granted.
143. On 6 May 2020 Ms Valera-Larios permitted Ms Zadorozny to take leave on 7 May 2020.
144. Ms Valera-Larios explained that she refused Ms Jama's request because too many staff were due to be on leave on 6 and 7 May 2020. She said that she allowed Ms Zadorozny to take leave at short notice because Ms Zadorozny came to her 'in tears, stressed and emotionally exhausted', owing to the situation in the laboratory.
145. The First Respondent relied on the fact that Ms Valera-Larios had rejected an earlier request for leave on the same two days made by Ms Carol Mills, who is white. The evidence as to what happened in relation to her was very unclear; documents continued to be produced even after evidence was concluded. We were not able to make reliable findings as to whether earlier requests from Ms Mills were rejected or withdrawn. It is clear, however, that by the time Ms Jama's request was rejected, Ms Mills was already self-isolating.

Jama Issue 20: J-DD13 / J-HAR13 / J-VICT3 / J-DET4 - While Ubah Jama was on sick leave from 30 March – 20 April 2020 with suspected Covid 19 symptoms including a painful ear infection and hearing loss, Iris Valera-Larios sent her an e-mail stating that she was required to work from home on the EQA SOP/IQC review form

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146. Ms Jama was off work with suspected Covid-19 between 30 March 2020 and 20 April 2020. At that point there were no tests for Covid. Her leave was recorded on the system as 'Coronavirus Covid-19 (Unconfirmed)'.
147. When she returned, she discovered that Ms Valera-Larios had sent her an email on 30 March 2020:
- 'Sorry to hear you are not feeling well. During the period of self-isolation you will be required to work from home. Would you be able to liaise with Fehmida so she can send you documents to update, please?
- I would suggest you work on the EQA SOP/IQC review form as previously agreed. Fehmida should be able to send you the word document, Please send it back to her by the end of the week so she can download it on Q-pulse for us.
- Wishing you a speedy recovery.'
148. Ms Valera-Larios said in her witness statement (paragraph 91) that she was 'not aware that Ms Jama was experiencing any medical symptoms and only understood her to be isolating due to being in contact with someone with Covid symptoms'. That evidence was untrue: it is clear from her email that she knew the Claimant was ill; there is no reference to the Claimant's self-isolating because of another person.
149. Ms Jama was upset by the email. She replied to Ms Valera-Larios's email on 20 April, saying that she was on sick leave with suspected Covid symptoms and so was not required to work from home.
150. On the same day Ms Valera-Larios had sent an email to Ms Patel, informing her that she was required to work from home and should make sure she was contactable by email. Ms Patel was also marked on the system as having 'unconfirmed Covid'.
151. Ms Valera-Larios also sent Ms Perry (white British) an email in similar terms. Ms Perry's circumstances were different: she was self-isolating because her son was unwell, not because she was ill.
152. Ms Beck was off sick for six weeks in May 2020. Ms Valera-Larios did not ask her to work from home at any point. The reason she gave was that Ms Beck was off for a reason other than Covid. In the course of cross-examination she stated at one point: 'all we knew about Covid at the time was that you get a cough', suggesting that it was regarded in May 2020 as a mild illness. Asked whether that was her evidence on oath she changed her position, saying: 'we knew that you would get a cough if you had Covid'. Ms Valera-Larios also said in cross-examination that Mr Kemp had instructed her that, if someone called in sick, she should contact them and find out if they could work from home. That was untrue: Mr Kemp later confirmed that there was no expectation that employees who are ill would be expected to work from home.
153. On 10 April 2020, Ms Valera-Larios wrote to Ms Babb of HR about four members of staff, all of whom had had time off related to Covid. Most of the email was a request for advice as to how to deal with their absences within the First Respondent's processes. In relation to three of the four, however, she makes

significant criticisms about them: by way of example only, she suggests that Ms Akite 'chooses her hours and swaps her shifts without consulting me'; in relation to Ms Patel, she suggests that she 'played the system by reporting three different reasons for her absence'; and in relation to Ms Jama she suggests that 'she has continued to provoke [Ms Zadorozny] with nasty comments on a weekly basis'. She concludes that she feels disempowered as a manager to deal with these issues.

154. We note that there is no request for guidance as to how to deal with the absences of any white members of staff, and no criticisms of them are made to HR. When asked in cross-examination why not, Ms Valera-Larios replied that 'white staff were not off sick and were not having arguments with anyone'. Both of those statements were incorrect: Ms Beck was off sick; Ms Beck had argued with Ms Akite over an incident concerning the track; Ms Zadorozny had had numerous arguments with colleagues. One inference which we might draw from this is that when a black member of staff was off sick and/or had arguments with colleagues, Ms Valera-Larios tended to perceive them as being at fault, but when a white member of staff was off sick and/or had arguments with colleagues, she did not, and that she judged them against different standards.

Jama Issue 21: J-DD14 / J-HAR14 / J-VICT4 / J-DET5: '[On 22 April 2020] During a return-to-work interview, Paul Cockfield informed Ubah Jama that Iris Valera-Larios would like her to be transferred to King George Hospital to help with Internal Quality Control trends and External Quality Assurance of Biochemistry tests'

155. When Ms Jama returned to work, Ms Valera-Larios asked to meet her to conduct a return-to-work interview. Ms Jama refused to have a meeting with her alone. The meeting was conducted by Mr Cockfield on 22 April 2020. He did not make a note of it, but the next day Ms Jama emailed him her own summary of the meeting, which we accept is accurate.
156. At the end of the meeting, Mr Cockfield told Ms Jama that Ms Valera-Larios and Mr Venkat Nadella (Lead BMS at King George Hospital) wanted her to be transferred to King George Hospital for a fixed period of months. Ms Valera-Larios had proposed the swap, ostensibly because there was specific work that needed to be done (to help with IQC trends and EQA). However, Mr Cockfield accepted that 'the rationale for offering this to Ms Jama, rather than anyone else, was that it would have taken her out of the toxic environment about which she had complained and allowed the tensions between her and Ms Valera-Larios and Ms Zadorozny to de-escalate'. We note that no consideration was given to moving Ms Valera-Larios or Ms Zadorozny. Ms Valera-Larios said in her statement that she could not consider offering this to Ms Zadorozny 'because in short I could not afford to lose Ms Zadorozny's high level of output and expertise to another site'.
157. Ms Jama told him that she thought this was happening because she had complained about Ms Valera-Larios and Ms Zadorozny. Mr Cockfield initially denied that she said this, until he was taken to Ms Jama's email summary in which it was recorded. Mr Cockfield then accepted she had; we find that his evidence was again evasive. He also accepted that the Claimant said the decision was related to her race.

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158. It was put to Mr Cockfield that Ms Patel had been moved to King George Hospital because she had complained about Ms Valera-Larios. Again, Mr Cockfield was evasive about this; he eventually accepted that she was moved, that she had complained about Miss Valerio-Larios and that it 'may have been' Ms Valerio-Larios who had suggested the move. We think it probably was.
159. We do not accept that Mr Cockfield told the Claimant that, if she could not get on with her manager it must be her fault. If this had been said, Ms Jama would have included it in her email; she did not. Moreover, her email was broadly appreciative of Mr Cockfield's approach at the meeting, which it would not have been, had he made this remark.
160. In the event, Ms Jama refused to move. Mr Cockfield also suggested mediation between Ms Jama and Ms Valera-Larios, to which both initially agreed. It was arranged, but Ms Jama withdrew at the last minute because she wanted her complaints to be resolved first.

Jama Issue 22: J-DD15 / J-HAR15 – '[1 May 2020] Iris Valera-Larios made arrangements with Claire Beck to send staff home early without any consultation with Ubah Jama even though Ubah Jama was team leader in the laboratory that day'

161. In early May 2020, the Department was quiet owing to the pandemic. On either 1 or 8 May 2020 (evidence was confused as to which) Ms Valera-Larios was asked if staff in the laboratory could go home early. She discussed this with Ms Beck and allowed it. She did not discuss it with Ms Jama, even though Ms Jama was team leader that day.
162. Ms Jama's evidence was that she believed Ms Valera-Larios and Ms Beck were setting her up to fail by telling staff to leave early without authorisation whilst she was team leader. We reject that evidence: we do not think they were conspiring against Ms Jama in this way. Nonetheless Ms Valera-Larios acted thoughtlessly by going over Ms Jama's head; Ms Jama was entitled to feel undermined.

Mntonintshi Issue 4: M-DD3 / M-HAR3 – '[on around 4 May 2020] Iris Valera-Larios accused Princess Mntonintshi of wrongdoing by questioning why she had worked a late shift on 1 May 2020'

163. The Department shift patterns are as follows: early shifts start at 7:30 a.m. and finish at 4 p.m.; day shifts start at 9 a.m. and finish at 5:30 p.m.; late shifts start at 5:30 p.m. and finish at 10 p.m.; and night shifts start at 10 p.m. and finish at 9 a.m.
164. On 1 May 2020, Ms Mntonintshi had worked an early shift. Mr Stefan Barrett-Thomas, who drew up the on-call rota, was looking for cover for Mr Lidher who could not work the on-call shift between 5:30 p.m. and 10 p.m. Ms Mntonintshi was the only person willing to cover it. The practice was that neither Mr Barrett-Thomas nor Ms Mntonintshi was required to consult Ms Valera-Larios about this decision.
165. There was an hour and a half between the two shifts. Strictly speaking, it was for Ms Valera-Larios to authorise the staff member to work the intervening hours. However, the usual practice was that the staff member would work and be given time off in lieu for those hours; if that were not so, they would either

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have to wait around for an hour and a half or work those hours without pay, neither of which would have been reasonable.

166. Around 5.30 p.m. that day Ms Mntonintshi and Ms Valera-Larios bumped into each other and, in a genial conversation, Ms Mntonintshi told Ms Valera-Larios that she was doing the on-call shift and would expect time off in lieu for the in-between hours. Ms Valera-Larios did not comment.
167. On 4 May 2020, Ms Valera-Larios challenged Ms Mntonintshi as to why she had worked the on-call shift; her attitude was harsh and accusatory. Ms Mntonintshi explained that Mr Barrett-Thomas had asked her to; Ms Valera-Larios had not known this. She then focused on the intervening hour and a half and said that there was no need for Ms Mntonintshi to work those hours, that she understood that in the past Ms Mntonintshi was allowed to do a lot of overtime, but that she must remember that it had to be shared equally. The clear implication was that Ms Mntonintshi was being selfish and abusing the system; she was not. Ms Valera-Larios later accused Ms Mntonintshi of misconduct in relation to this incident.

Mntonintshi Issue 5: M-DD4 / M-HAR4 – [on around 4 May 2020] Iris Valera-Larios wrongly accused Princess Mntonintshi of inviting a Roche representative, Pumla Horshe, who is black and South African, to visit the department to repair a machine during a national lockdown'

168. On 27 April 2020, Ms Pamela Horshe, a Roche representative, who is black and from South Africa and had trained all the staff in the use of the equipment two years earlier, emailed Ms Valera-Larios, asking if she thought that a visit for technical/application issues was needed; if so, she asked her to contact her to arrange one for the next day. Ms Valera-Larios saw the email but did not reply.
169. Ms Horshe attended the next day. This was during the first national lockdown. Rules in hospitals about contact were strict.
170. Ms Horshe began to troubleshoot the machine with Ms Mntonintshi, Ms Jama and Ms Akite. Ms Beck alerted Ms Valera-Larios to Ms Horshe's presence and to the fact that staff were not socially distancing. Ms Valera-Larios approached Ms Horshe and asked her why she had come in. Ms Horshe said that, because she had not heard back from Ms Valera-Larios, she decided to come anyway. Despite her ostensible concerns about Ms Horshe's presence, Ms Valera-Larios did not instruct her to leave. Instead, she watched as Ms Horshe went to lunch with Ms Mntonintshi and others. She said she was annoyed that they went to lunch together because of Covid risks.
171. Ms Valera-Larios then filled out an incident report about Ms Horshe's attendance, identifying Ms Horshe and Ms Mntonintshi as the 'perpetrators' and identifying the severity of the incident as 'moderate', i.e. more serious than the incident when Ms Zadorozny had thrown a fluid sample.
172. Later that evening, Ms Valera-Larios spoke to Ms Horshe's manager who told her that she had authorised her to attend.
173. Not until 4 May 2020 did Ms Valera-Larios speak to Ms Mntonintshi and ask for her account. She accepted that she should have spoken to her first. She asked Ms Mntonintshi if she had invited Ms Horshe to attend because she wanted to

catch up with her socially (even though by then she knew that this was not the case). Ms Mntonintshi said she had not. Ms Valera-Larios told Ms Mntonintshi that it was a very serious issue because of the Covid restrictions and that engineers from Roche had to be authorised by her. She was critical and accusatory.

174. Contrary to her evidence in cross-examination, we find that she did not make similar accusations against Ms Zadorozny or Ms Beck or assume that it might have been them who had been responsible.
175. We found Ms Valera-Larios's evidence on this issue contradictory. For example, in her statement she said that, as soon as she saw Ms Horshe, she immediately called her area manager because of the risk of infection; in oral evidence she said that she spoke to the area manager later in the evening. In her statement she said that she was immediately concerned because Ms Horshe's presence was 'in potential breach of national Covid lockdown restrictions'; when asked why she did not ask her to leave she said she 'wasn't sure what the rules were at the time' and wanted to check with Mr Cockfield 'if we were allowing people in or not.'

Mntonintshi Issue 6: M-PA2 – '[on 6 May 2020] Princess Mntonintshi emailed Len Kemp, copying in Paul Cockfield and Iris Valera-Larios, regarding the accusations by Iris Valera-Larios'

176. On 6 May 2020 at 06:22, Ms Mntonintshi emailed Mr Kemp, copying in Mr Cockfield and Ms Valera-Larios, complaining about Ms Valera-Larios's handling of the two issues we have described above: the on-call shift and Ms Horshe's attendance. She began:

'I write this email with a heavy heart. There have been incidents involving areas where in which I have felt personally scrutinised and torn into by Iris individually. In this letter, I want to highlight some instances that were way out of hand, where in which I feel it would be in the best interest of others to take action. This is to prevent any other incidents from occurring without proper inspection into the individuals and the incidents.'

177. Nowhere in the document did she mention race or discrimination. She attended a meeting with Mr Kemp and Mr Cockfield later that day and had a later meeting with Mr Cockfield alone when, she says, he asked her whether she thought that Ms Valera-Larios was racist. We find that he did not do so.

178. On the evening of 6 May 2020, Ms Valera-Larios emailed Mr Cockfield:

Princess started on the 6th Jan. I have attached her 3 monthly review as I was starting to have concerns over the racial divide they started in the team. I was also concern about her booking A/L through you and bypassing me so I explicitly mentioned she is to report to me directly (see question 4).

Jama Issue 23: J-DD16 / J-HAR16 – '[on 14 May 2020] Prior to staff meeting on/around 14 May, Iris Valera-Larios released a table of tasks for staff for the whole year. Whilst Tatyana Zadorozny and Claire Beck were provided with the table in advance of other staff in the department, despite being a senior member of staff, Ubah Jama was not

provided with the table of tasks in advance of other staff and had no input into compiling the table'

179. By email dated 13 May 2020, Ms Valera-Larios invited the team to the meeting the following day and attached two documents: an agenda and a document called 'TASKS'. The Claimant received the documents the day before; her complaint is that she had no input into it while others, including Ms Beck and Ms Zadorozny, had.
180. Ms Valera-Larios denied this in her witness statement but in cross-examination volunteered that she had discussions with people who were working from home, specifically Ms Perry and Ms Wardell, and that they were having conversations with others by phone. She said: 'sometimes I don't involve everyone we just form a small group'. Ms Jama was not part of that small group. We note that Ms Beck in her evidence said she 'could not recall' whether she was consulted.
181. We find that both Ms Zadorozny and Ms Beck were consulted. They were trusted colleagues of Miss Valera-Larios; we think it improbable that she did not consult them but did consult Ms Perry and Ms Wardell. We accept that Ms Jama picked up on this in the meeting: it was apparent to her that Ms Zadorozny and Ms Beck had insights into the recommendations which she did not have and she felt sidelined. Ms Valera-Larios had excluded her from the preparatory discussions.

Mntonintshi Issue 7: M-DD5 / M-HAR5 / M-VICT1 [on 18 May 2020] Iris Valera-Larios states to Paul Cockfield that she would like to extend Princess Mntonintshi's probation and sends him a document called 'Princess Mntonintshi Probation Statement' with a number of disparaging statements and false allegations against Princess Mntonintshi.

182. On around 18 May 2020, Ms Valera-Larios emailed Mr Cockfield a document called 'Princess Mntonintshi Probation Statement', raising what she described as 'serious concerns about Princess Mntonintshi's conduct at work'. In the opening section of the document, she suggested that she had raised these concerns with Ms Mntonintshi in the probation meeting. She had not.
183. The document then set out her view that Ms Mntonintshi's 'disruptive behaviour' had not improved and that she had made no efforts to resolve conflicts with her and her other colleagues, had made malicious accusations to discredit her and had bullied and targeted Ms Zadorozny and Ms Beck. We note that that was certainly not Ms Zadorozny's belief. In her witness statement, she wrote:

'[Princess Mntonintshi] has always remained professional in her work and continued to communicate with me on professional matters throughout.'
184. Ms Valera-Larios also accused Ms Mntonintshi of 'promoting a culture of blame' at work, yet in the same document she included an extract from an email of 30 April 2020 from Ms Beck, complaining about Ms Mntonintshi, about which she made no criticism. Indeed, all the criticism in the document was aimed at black staff (Ms Mntonintshi, Ms Jama, Ms Akite and Ms Mandeya); it contains no criticism of white staff.
185. Ms Valera-Larios also raised the issue of overtime and wrote:

‘Since Princess started her probationary period, she has been looking for reasons to stay behind and work overtime (OT). She takes any opportunity to justify why she must work overtime. In other Trusts, this behaviour could be interpreted as fraud to the NHS because she is well aware or overtime must be approved by me beforehand.’

186. She also wrote that Ms Mntonintshi was ‘joining Ubah [Jama’s] campaign to harass me’ and ‘making malicious accusations to discredit me’. We find that Ms Valera-Larios believed that Ms Mntonintshi (together with Ms Jama) was complaining about race discrimination, including in the 6 May 2020 complaint which she copied Ms Valera-Larios into. Ms Valera-Larios confirmed in cross-examination that she considered that Ms Mntonintshi was supporting Ms Jama’s complaints, including of race discrimination.
187. She concluded:
- ‘Although I feel very passionate her probation should be terminated if she continues to cause division in the team and doesn’t adhere to the departmental protocols and procedures, I think Princess has the potential to change things around. Princess must improve her attitude and communication with me before passing her probation. This would include keeping me informed of any changes in the rota or other issues in the laboratory that could cause delays, respecting my role and cooperating with the rest of the senior team. This is to ensure a multicultural cooperation where the safety of patients is put before personal feelings or opinions but also to ensure she doesn’t take advantage of the situation for her own personal gain’.
188. Ms Valera-Larios accepted that she had not raised any of these serious allegations with Ms Mntonintshi. Her explanation was that Ms Mntonintshi was not communicating with her and had not done so since March. She later retracted that statement, which was untrue: it was pointed out to her that she had described in her own witness statement various conversation she had with Ms Mntonintshi during that period.
189. We accept Ms Knight-Webb’s submissions in relation to this document (at page 94 onwards of her closing submissions) that it is a wholly unwarranted attack on Ms Mntonintshi, containing falsehoods and exaggerations. Examples are given in the submissions. The most obvious is Ms Valera-Larios’s attempt to suggest that she had given Ms Mntonintshi a negative probation review earlier in the year, when the opposite is true (see above at para 129). The most serious is the allegation of ‘near fraud’ in relation to Ms Mntonintshi’s perfectly innocent offer to cover a shift.
190. Some of the allegations are of such seriousness that, if upheld, they would have amounted to gross misconduct. There was a further potential consequence for Ms Mntonintshi: if she were dismissed as a result of Ms Valera-Larios’s attack on her, there was a real risk that she would lose her immigration status and be deported.
191. The only proper response to the making of these allegations would have been to initiate a formal investigation before making a decision as to whether to extend Ms Mntonintshi’s probation period; that did not happen.

Mntonintshi Issue 8: M-DD6 / M-HAR6 / M-VICT2 – '[on 19/20 May 2020] The Trust subjected Princess Mntonintshi to an extended probationary period with the threat that her employment may be terminated'

192. We are satisfied that the allegation is made against both Valera-Larios and Cockfield. Both of them accepted in cross-examination that the decision to extend Ms Mntonintshi's probation was a joint decision.
193. On 19 May 2020, Mr Cockfield called Ms Mntonintshi into his office for a meeting, at which he said her probation period would be extended by a month with the possibility of termination at the end of the period. He mentioned the allegations contained in Ms Valera-Larios's 'probation statement' in an extremely cursory fashion, telling her only that Ms Valera-Larios was unhappy with her performance. Understandably, Ms Mntonintshi was confused and upset. She had an unblemished conduct and performance record.
194. Mr Cockfield said in his witness statement that he 'understood and agreed with the concerns that Ms Valera-Larios had with Ms Mntonintshi'. In cross-examination he accepted that he had worked with Ms Mntonintshi for many years and thought highly of her; and that the serious allegations made by Ms Valera-Larios conflicted with his previous view of Ms Mntonintshi. He had not investigated the allegations: for example, he had not reached the conclusion that Ms Mntonintshi was guilty of quasi-fraud nor that she might have subjected Ms Valera-Larios to bullying and harassment. He simply took Miss Valera-Larios's allegations at face value.
195. Mr Cockfield confirmed the decision in writing next day. On 22 May 2020, Ms Mntonintshi wrote to Mr Cockfield asking for more details of the alleged performance-related issues.

The forwarding of Ms Valera-Larios's document to Ms Mntonintshi

196. On 28 May 2020 Mr Cockfield, meaning to send to Ms Mntonintshi Ms Valera-Larios's original three-month probation review, accidentally forwarded to her Ms Valera-Larios's 'probation report', containing the full text of her attack on Ms Mntonintshi. The two documents had similar titles and he mixed them up. We infer that his original intention was not to disclose the probation report to Ms Mntonintshi, i.e. to withhold from her the actual document on the basis of which her probation was being extended and which, in fairness, she was entitled to see.
197. Mr Cockfield met with Ms Mntonintshi to discuss his 'error' in forwarding the statement to her. He says that he asked if she thought there was a racial element to the statement and she said 'absolutely not'. We reject that evidence. Mr Cockfield repeatedly denied that Ms Mntonintshi mentioned race discrimination, later accepting that she may have/must have done. We note that the allegations of race discrimination are front and centre in Ms Mntonintshi's subsequent grievance, in which she wrote that she had spoken to Mr Cockfield about her concerns.
198. On 19 June 2020, Ms Mntonintshi lodged that formal grievance with Mr David Amos (Interim Executive Director).

Jama Issue 25: J-DD18 / J-HAR18 / J-VICT5 / J-DET6 – '[On 29 May 2020] Tatyana Zadorozny was witnessed checking Ubah Jama's work from the previous night shift on 28 May 2020, which was C2's last night shift'

199. Ms Jama did a night shift on 28/29 May 2020. She alleges that Ms Akite saw Ms Zadorozny checking her work on the morning of 29 May 2020; Ms Akite noticed that Ms Zadorozny had a USB stick around her neck and was downloading information from the analysers onto it. She did not ask her what she was doing. Ms Jama did not witness this.
200. Ms Zadorozny explained that she does have a USB stick which she uses for various purposes, such as taking and downloading screenshots of calibration data to show the Roche engineers. It results in clearer PDF files than printing and scanning the pages.
201. We are not satisfied that there is sufficient evidence to make a finding that Ms Zadorozny was checking Ms Jama's work.

Jama Issue 14: J-DD10 / J-HAR10 / J-VICT2 – '[Between 1 March and 31 July 2020] - Ubah Jama was assigned the greatest workload out of the Senior BMSs and was not given adequate time to do the work within her shift, in the staff rota which was prepared by TZ and approved by VL'

Jama Issue 26: J-DD19 / J-HAR19 / J-VICT6 / J-DET7 – '[on 11 June 2020] Ubah Jama sent an email to Iris Valera-Larios stating that she would like to monitor the QC trends for both their analysers and that she had not been given any days to perform these senior staff duties for the past 3 weeks. She stated that this was an important and very time-consuming task and involved checking trends and troubleshooting QC and that it would take a total of 2 days to complete. She received no reply to her request for 2 days to complete this clinically important task'

202. Ms Jama alleges that she was assigned the greatest workload of the Senior BMS between March and July 2020. There is nothing in Ms Knight-Webb's closing submissions dealing with a specific allegation of excessive workload before the allegation relating to May 2020 (Issue 26) and so our focus is on that.
203. As mentioned above, Ms Valera-Larios's original plan was that BMS would rotate between four main tasks: EQA coordinator; competencies; stock and IT; rotas and training. In practice, Ms Jama remained on EQA coordination and IQC until she went on sick leave in July 2020. She needed protected time away from the bench (referred to as a 'senior day') to allow her to concentrate on doing the IQCs.
204. Ms Jama wrote to Miss Valera-Larios on 11 June 2020 at 17:32:

'I would like to monitor the QC trends for both Bamm Bamm and Pebbles but it looks like I haven't been given any senior duty days for the past three weeks to allow me to do this. This is an important and very time-consuming task. Please let me know if you would like me to do it as it takes a whole day to check the trends and troubleshoot the issues for each analyser.'
205. The rotas were completed by Ms Zadorozny and approved by Ms Valera-Larios. Both were responsible for this state of affairs. Although there was flexibility as

to when the work on QC trends could be carried out, the longer it was left, the more time it took. It once took Ms Jama four days.

206. Ms Valera-Larios accepted in cross-examination that this task required protected time; it could not be fitted around other tasks; she also accepted that Ms Jama had not been allocated any protected time in the previous three weeks. It is, therefore, correct that the Claimant was not given sufficient time in that period to complete her work on the QC trends within her shifts.
207. Nonetheless, Ms Valera-Larios continued to maintain that there were 'many occasions' in the three rotas when the Claimant was not designated any tasks. She was unable to point out one such day.
208. Ms Valera-Larios's evidence was that she spoke to Ms Babb about Ms Jama's email. She explained why in her statement (paragraph 137):

'I was quite surprised at what she essentially seemed to be saying was that she had not undertaken the work that she had been rostered to do despite having done the rota herself. I agreed with Ms Babb that I would not respond to Ms Jama's email directly but that I would address the issue more generally in the next seniors meeting, which I did. I recall telling the seniors that, effectively, every day was 'seniors' day and that I have empowered and trained my senior staff to know what tasks they have to do and so they do not need to ask permission or take specific protected time in order to undertake those tasks.'

209. In cross-examination, Ms Valera-Larios unconvincingly sought to suggest that she did not say all of this to Ms Babb. We find that she did and that it was misleading: it sought to give the impression that Ms Jama was being unproductive and difficult. Ms Valera-Larios accepted that she knew it was not true that the Claimant had done the rotas herself (Ms Zadorozny was doing the rotas); she did not mention to Ms Babb that Ms Zadorozny had given herself seniors' days during these weeks.
210. Ms Valera-Larios did not respond in any meaningful way to Ms Jama's email, nor did she take steps to resolve the issue by assigning her the necessary time; her focus was on shifting the blame onto Ms Jama.
211. Ms Valera-Larios described the rota in cross-examination as 'very strange': one of the three weeks the Claimant had been put down as team lead for all five days, in addition to being assigned EQA work on three of them. Ms Valera-Larios said that this would not normally happen. She accepted that on those days Ms Jama was assigned an excessive workload. She then sought to suggest that Ms Jama could have rearranged the rota herself (in other words that it was in some way her own fault).

Jama Issue 27: J-DD20 / J-HAR20 / J-VICT7 / J-DET8 – 'Iris Valera-Larios failed to reply to Ubah Jama's email [on 11 June 2020] requesting time off to work on her research project'

212. At 11:44 on 11 June 2020 Ms Jama sent Ms Valera-Larios an email in which she requested time to work on her research project. Ms Valera-Larios replied at 12:36 in an apparently positive manner:

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'Please kindly provide me a timetable of when you are planning to come in (outside normal working hours [...]). If you need time to work on your project during normal working hours drop me an email to allocate you some time off the bench in advance (subject to staff levels and work permitting) before Tatyana finalises the weekly rotas. This will ensure we can accommodate your request.'

213. Ms Jama replied at 15:07, providing that information and asking for specific days to work on her project during normal working hours. Ms Valera-Larios did not reply and did not arrange the dates. She told us this was an oversight. Ms Jama waited for a week and then went to see Mr Patten to arrange the necessary time.

Jama Issue 28: J-DD21 / J-HAR21 / J-VICT8 / J-DET9 – '[On 17 June 2020] Ms Valera-Larios failed to reply to Ubah Jama's e-mail that day about the laboratory using the incorrect Troponin reagent which has a greater interference from biotin'

214. On 17 June 2020 at 17:30, Ms Jama sent an email to Ms Valera-Larios informing her that the laboratory was using the wrong troponin reagent (used to diagnose heart attacks).
215. In her witness statement Ms Valera-Larios said that she recalled she was on annual leave at the time and, by the time she came back, Ms Zadorozny had already resolved the issue; she did not consider there was any need for her to reply. The annual leave records were checked: Ms Valera-Larios was not on leave that day.
216. In cross-examination Ms Valera-Larios said that she did not reply because she finished work at 17:30; the next morning she made enquiries and, once she had all the data, they switched to the other reagent, thereby suggesting that she dealt with it herself. She was taken back to her witness statement, in which she had written that Ms Zadorozny resolved the issue without her input. Ms Valera-Larios then said: 'yes, by the time I looked into it, it had been resolved'. She then suggested that she might have been working from home on the day the email was sent. Asked why that would prevent her from replying, she reverted to her previous explanation (albeit with less certainty): 'I probably was trying to look into it to find any information so that I could reply'. When it was pointed out that she had now given four different answers, she replied: 'I don't recall, it was a long time ago'.
217. On 27 June 2020 Ms Jama submitted a formal grievance to Mr Amos.

Jama Issue 29: J-DD22 / J-HAR22 – '[On 1 July 2020] IVL failed to inform Ubah Jama that she did not work on Wednesdays, which affected Ubah Jama's ability to run the laboratory as she reports to her. On 1 July 2020, the QC material for ammonia expired and Ubah Jama did not know who she had to report to and eventually asked Malcolm Patten to order more and also informed the Consultant Biochemist'

218. Ms Jama alleges that Ms Valera-Larios failed to inform her that she did not work on Wednesdays, which affected her ability to run the laboratory. She referred to the fact that on 1 July 2020 the QC material for ammonia expired; she says that she did not know who she had to report to.

219. Ms Valera-Larios gave evidence in her witness statement (paragraph 143) that she notified the team about a week after a flexible working request was agreed and that her email footer was also amended to say she did not work on Wednesdays. However, Ms Patterson conceded on behalf of the First Respondent that Ms Valera-Larios's email footer was not amended at the material time. We were concerned to yet find another instance of incorrect evidence in Ms Valera-Larios's witness statement.

The Sandra Rowlands report

220. On 2 July 2020, Ms Rowlands shared her report with Mr Cockfield. The report was couched in very general terms and identified patterns and trends, without identifying any individuals. For example, it states that 'some staff within the department have identified a mob culture attitude by a small group of staff', without identifying which staff identified the culture and which staff were said to be the mob. One clear finding was that:

'The biggest issue that many staff expressed were [sic] that problems and complaints by staff have historically not been addressed by management with no feedback given to them. This unfortunately has made some staff not willing to speak up as they feel they will not be listened to regarding any concerns they have. There seems to be a lack of respect for management.'

Jama Issue 30: J-DD23 / J-HAR23: '[on 2 July 2020] IVL emailed senior staff saying ALT (liver function test) was not performing well and they could not run it, rather than coming into the lab and communicating this urgent clinical problem and test unavailability to staff including Ubah Jama'

221. On 2 July 2020, Ms Valera-Larios sent an email to senior staff saying that ALT (a liver function test) was not performing well and they should not run it. When she sent this email she was in her office; she could easily have walked through to the lab and told staff in person. There was a real risk that wrong results might be produced.
222. This was an urgent matter. Ms Valera-Larios knew that Seniors did not look at their emails when they are in the lab. Ms Jama was rota'd in the automated section and Mr Lidher in special chemistry. Although the email was sent at 09:21 to Mr Taj Lidher, copying in Ms Jama, she did not pick up the email until 12:00. In between those times they had been running the tests thinking that it was fine.

223. On 12 July 2020, Ms Mntonintshi contacted ACAS to begin early conciliation.

Mntonintshi Issue 10: M-DD8 / M-HAR8 / M-VICT4 – 'In a meeting [on 15 July 2020], Iris Valera-Larios questioned why the Trust had allowed Princess Mntonintshi to file a grievance while on probation, said that the grievance should not be allowed, that Princess Mntonintshi would be a problem for the next 2 years, that if she could not adapt to her management style she should be terminated and falsely accused her of bullying and harassing Tatyana Zadorozny and Claire Beck'

224. On 15 July 2020, Ms Valera-Larios called Ms Mntonintshi into a meeting with her and Mr Cockfield. At the meeting Mr Cockfield apologised for sending the probation statement to Ms Mntonintshi inadvertently. He appreciated that it

would 'put a strain on the working relationship' between Ms Valera-Larios and Ms Mntonintshi.

225. Ms Valera-Larios did not apologise for anything she had said in the document. Instead she observed that she had a different management style than Ms Mntonintshi had been used to. She also said that she wanted Ms Mntonintshi to check things directly with as her line manager and seek permission from her when permission was required. She went further and questioned why Ms Mntonintshi had been allowed to lodge a grievance while she was on probation. She also said that Ms Mntonintshi would be a problem for the next two years, which was why she had asked for her contract be terminated. That is consistent with the email which Ms Valera-Larios had sent to Mr Cockfield on 10 July 2020, in which she wrote:

'It is my understanding PM is not willing to resolve the situation as she made a statement she has put in a formal grievance and was working with the union. This is another example of how Princess disruptive behaviour does not fit with the new culture I am trying to implement within the biochemistry team [...] her behaviour is very strange because she had not made an effort to improve her attitude. Instead she has contacted the union to make a formal complaint. Her actions are consistent with someone who wants to cause disruption, not someone who is willing to change. I believe she could be after a financial reward.'

226. Ms Valera-Larios also accused Ms Mntonintshi of bullying and harassing Ms Zadorozny and Ms Beck.
227. If, as Ms Patterson submits, this meeting was intended by Mr Cockfield to be conciliatory, it failed: it was a hostile meeting which was shocking and upsetting for Ms Mntonintshi.

Jama Issue 31: J-DD24 / J-HAR24 / J-VICT9 / J-DET10 – '[on 25 July 2020] The Trust unreasonably refused Ubah Jama's request to take annual leave on Eid'

228. On 25 July 2020, Ms Valera-Larios rejected Ms Jama's annual leave request (for Eid) on 31 July 2020, giving as her reason: 'senior needed in automation, too many people on annual leave'.
229. Ms Jama accepted she may have been the last person to request leave on this popular holiday day. It is unclear why she did not make an earlier request.
230. Ms Jama says that she was told that she could not have the day off because the lab would be short-staffed, but when she arrived there was no shortage. Ms Valera-Larios had told her that she needed a senior in automation but Ms Zadorozny was working in special chemistry and could have been moved over. Ms Jama accepted that two of the people working that day were trainees and none of the others were seniors. We find that it was appropriate for Ms Valera-Larios to want two seniors in the lab on that day.

Jama Issue 24: J-DD17 / J-HAR17 – 'At a seniors meeting [on 15 May 2020] Ubah Jama suggested the EQA must be treated as a priority since it was a UKAS requirement and particularly this must be monitored by senior staff in her absence. Yet, on 27.07.20 on her return from annual leave, there were 5 EQA outstanding which arrived the previous week and were not written on the calendar'

Jama Issue 32: J-DD25 / J-HAR25 / J-VICT10 / J-DET11 – '[on 27 July 2020] Tatyana Zadorozny monitored the dates Ubah Jama was returning from leave and deliberately set her up to fail by leaving her with an excessive workload'

231. At a senior meeting on 15 May 2020 Ms Jama suggested that the EQA must be treated as a priority because of its relevance to UKAS accreditation.
232. Ms Jama accepted that there would sometimes be slippage in relation to the EQA and that the function of the lab must take precedence over it. However, she said that at the very least she would still expect staff to enter on the EQA calendar when samples came in, and what the deadline date was. The Band 6s were responsible for making entries into the calendar.
233. On her return from annual leave, on 27 July 2020, she discovered that there were five EQAs outstanding, which had not been written on the calendar. In the week before, Ms Mntonintshi had been rostered to deal with EQAs on Monday to Wednesday; a staff member called Kingsley was rostered to deal with them on Thursday; and Ms Akite and Ms Faz on Friday. The Claimant accepted that there was 'a degree of responsibility' on the people on the rota. There is no evidence that Ms Zadorozny set Ms Jama up to fail, as Ms Jama alleged. She had assigned staff to do the work but they had not done it, probably because the lab was very busy that week.
234. On 28 July 2020, the diagnostic report from the OD investigation into the Department was shared with the team. One finding of the report was that 55% of participants perceived there to be racism in the Biochemistry Function.

The progression of the Claimants' grievances

235. On 28 July 2020, Ms Jama contacted ACAS to initiate early conciliation. On 3 August 2020, she was signed off due to stress at work.
236. On 4 August 2020, Mr Ellender, who was assigned to case manage the grievances, told the Claimants that a formal investigation would be carried out into their grievances. On 7 August 2020, he wrote to Ms Jama to tell her that an investigator had been appointed, Mr Max Ndongwe.
237. Ms Valera-Larios, Mr Cockfield, Mr Kemp and Mr Patten were all interviewed in relation to both grievances in August and September 2020. Both Claimants were interviewed by Mr Ndongwe and Ms Babb on 24 September 2020. Both of them raised concerns about Ms Babb's involvement; they did not regard her as independent.
238. Ms Jama issued her first ET claim on 23 September 2020.

Jama Issue 38: J-DD29 / J-HAR28 – 'To date, the Trust has not taken disciplinary action against Tatyana Zadorozny over the 2 health and safety incidents other than giving her a verbal warning'

239. The report into the two health and safety incidents involving Ms Zadorozny on 13 February and 17 March 2020 was not completed until 21 September 2020. The investigation by Ms Tade Arewoyun was perfunctory and took place long after the event. The only explanation given for this was the intervention of Covid and the fact that she had a period of sickness absence. That cannot account for

a delay of six months. Nonetheless in the report she confirms that Ms Zadorozny threw samples on the first occasion and threw a sample rack on the second occasion. The essential facts of the misconduct were made out.

240. On 1 October 2020, Mr Kemp issued Ms Zadorozny with a verbal warning in relation to the 17 March 2020 incident. He told Ms Valera-Larios about this on 5 October 2020. He issued a relatively mild verbal warning which, in our view, was not commensurate with the seriousness of the incidents.

'It has been necessary to issue this verbal warning as you threw some samples in the laboratory rather than handling them carefully on 14th February and 17 March 2020. As I clarified at our meeting on the 21st, such an incident at work is a misconduct issue. Therefore I must advise that if concerns are raised again of a similar nature, it could lead to further disciplinary action being taken against you, up to and including dismissal. It is therefore important that no further concerns are raised regarding your conduct. I acknowledge that there has been a long period between this incident and the issue of the warning, during which there have been no recorded similar incidents and I apologise for the delay due to Covid-19 restrictions. I have therefore shortened the warning duration as much as possible.'

241. Ms Jama says that she only discovered this as a result of disclosure in these proceedings. She remains dissatisfied with the sanction. She asserts that Mr Middleditch said that the conduct would be grounds for formal disciplinary action and that, if it had been she who had thrown the sample, she would have been dismissed.
242. On 8 October 2020 OH confirmed that Ms Jama was fit to return to work with adjustments from 19 October 2020. Ms Jama attended a return-to-work interview on 23 October 2020 with Mr Cockfield. On 3 November 2020 Ms Jama's GP confirmed that she was fit for work but would benefit from working half days (four hours per day). Ms Jama was absent from work due to Covid and post-Covid recovery between 10 November and 10 December 2020.

The draft investigation report into the two grievances

243. On 10 November 2020, Mr Ndongwe produced a draft investigation report and sent it to Mr Ellender. He concluded that there was 'no evidence of racism, however clear evidence of bias and unfair practices'. He also concluded that there was 'a lack of clarity on the probationary outcome' in relation to Ms Mntonintshi. He considered that it was clear that 'a hostile work environment exists in the pathology department at Queens, with colleagues who have lost respect and tolerance for each other. This divide has created two distinct camps'. Mr Ndongwe criticised the lack of senior support/guidance for Ms Valera-Larios as a new manager which, in his view, 'shows in her predominantly coercive style of leadership, evidenced by her staff and in her own words'. He identified what he described as 'bias (positive) towards [Ms Zadorozny] and [Ms Beck] and negative towards [Ms Mntonintshi]'. He went on:

'This bias has led to the victimisation and harassment (intent is not in question) of [Ms Mntonintshi]. Twice [Ms Zadorozny] has endangered the safety of staff in the lab due to aggressive/inappropriate outbursts in a

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professional setting. No documented evidence of challenging this behaviour, supporting [Ms Zadorozny] (via occupational health) has been made.'

He was also critical of the decision to give a training opportunity to Ms Beck 'despite there being a number of viable candidates for specialised training, no expressions of interest or notification of training availability was issued'. This draft report was not disclosed to the Claimants at the time; they first saw it during these proceedings; it was disclosed late.

244. Mr Ellender was not satisfied with the report and asked Mr Ndongwe to work with HR 'to resubmit the reports please'. He set out a point-by-point critique of the report. Mr Ndongwe did some redrafting of the report. In the final version recommendations including a written apology to both Claimants from Ms Valera-Larios, a recommendation that Ms Valera-Larios undergo/repeat diversity and equality training, and an outline of expected senior behaviour were omitted.
245. Between 19 November 2020 and 23 December 2020, Ms Mntonintshi was signed off work with stress. Ms Jama return to work on 14 December 2020 on a phased return.
246. The final investigation reports were produced on 7 December 2020. Mr Ellender wrote to both Claimants on 10 December 2020 about the outcome of the investigation. On 17 December 2020 both Claimants attended an investigation outcome meeting Mr Ellender. On 24 December 2020 Mr Ellender wrote to both Claimants regarding the outcome.
247. In relation to Ms Mntonintshi, Mr Ellender summarised the position as follows: there was insufficient evidence to proceed with formal disciplinary process for three of the allegations; while the investigator found evidence of poor practice and difficult working relationships, he did not consider that Ms Mntonintshi been subjected to race discrimination. In relation to the probation extension, there was:
- 'a case to answer in that your probation was not managed appropriately, therefore I will recommend that this issue is picked up and addressed. In line with policy I will therefore ask Paul Cockfield to arrange a face-to-face meeting to inform you that your employment will be confirmed.'
248. In relation to Ms Jama, he concluded that there was insufficient evidence to proceed with formal disciplinary process in relation to any of her allegations.
249. Both Claimants appealed the investigation outcome on 5 January 2021. They provided detailed grounds of appeal to Mr Wishart (Interim Director of Workforce) on 12 January 2021.

Jama Issue 34: J-HAR26 / J-VICT11 / J-DET12 – [On 18 January 2021] Ubah Jama checked the new draft EQA Rag file and discovered that under the Ethanol and Anmonia EQA scheme tab of which she is the scheme owner, 'Paininarse' was written in place of her name for the entries for both Ethanol and Anmonia. Claire Beck had entered 'paininarse' in place of Ubah Jama's name and Iris Valera-Larios [and Ms Beck] had failed to remove or change the comment prior to the discovery by Ubah Jama on 18 January 2021'

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250. On 18 January 2021, Ms Jama emailed Mr Cockfield. She had discovered that the username 'paininarse' was written against entries on the new draft EQA summary folder (a spreadsheet) under the ethanol and ammonia EQA scheme tab, of which Ms Jama was the scheme owner. This was visible to colleagues at both Queen's Hospital and King George Hospital. She attached two screenshots, one for ammonia and one for ethanol, which showed that, if the reader ran the cursor over certain cells in the spreadsheet, the username 'paininarse' popped up with the information that the person (Ms Beck in this instance) had inserted.
251. Mr Cockfield replied less than 15 minutes later: '[Ms Valera-Larios] has brought this to my attention. I will investigate immediately.' We infer from this that Ms Valera-Larios knew about the matter before Ms Jama did and did not instruct Ms Beck to remove the offensive tag. Ms Valera-Larios was unable to say with any certainty when she found out about it. Her explanation for not either removing it herself or requiring Ms Beck to remove it was that she thought it might be needed as 'evidence'.
252. Ms Jama's claim relates in part to the entering of the offensive tag and also the failure to remove it. Although the focus in the list of issues is on Ms Valera-Larios failing to remove the offensive tag, it was clear from the pleadings that the failure to do so was also alleged against Ms Beck; she led evidence as to why she failed to do so in her witness statement; it was specifically put to her in cross-examination that she left the tag in deliberately; and closing submissions were made on the issue by Ms Knight-Webb (without objection from Ms Patterson).
253. A meeting took place with Mr Cockfield, Ms Beck and Ms Valera-Larios on 19 January 2021, the content of which is recorded in Mr Cockfield's file note. Ms Beck explained that the tag had automatically transferred into the document from her home computer and it was a 'personal in-joke about the performance of the computer'. She did not realise it had happened until Ms Perry pointed it out. She proceeded to remove the name from some files but not Ms Jama's ammonia/ethanol files 'which had been missed'. Ms Beck said that she 'appreciates how unprofessional it may have appeared and will ensure it is not repeated.'
254. That explanation is consistent with a contemporaneous email from Ms Perry to Ms Beck on 3 December 2020, which concludes:
- 'Have added the Amm/Eth too. Just noticed your comments on the cells are from "paininarse"!'
255. Ms Beck replied:
- 'That's our computer name xxx'.
256. Ms Beck told us that she spent time removing some fifteen references to 'paininarse' on her own documents but did not remove the references from Ms Jama's documents, even though Ms Perry had specifically identified them as affected. She said this was an oversight.
257. After the meeting Ms Valera-Larios wrote to Ms Beck. This is effectively the outcome of the investigation. She wrote that she and Mr Cockfield 'appreciate

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your openness and cooperation regarding this matter'. She recorded Ms Beck's explanation and continued:

'As a role model you have the responsibility to lead by example and respect all staff in every interaction. Today we have discussed the importance of taking responsibility for your actions and pride in your work.

I was sadden[ed] to hear that you do not feel safe working with some colleagues and you have our commitment that we are working towards making progress as a team.

Please be reminded that I have an open door policy and the Trust has many initiatives to help and assist you 24/7 too.'

258. We note that, in this document, Ms Valera-Larios, was as keen to sympathise with Ms Beck for having to work with 'some colleagues' (which we have no doubt was a reference to Ms Jama), as she was to express mild criticism of Ms Beck.
259. On 19 January 2021, Ms Jama emailed Mr Kemp and Mr Middleditch making further allegations of racial harassment and victimisation.
260. On 20 January 2021, Ms Beck wrote to Mr Cockfield, saying that she was happy to attend a meeting with Ms Jama to explain that it was an oversight on her behalf and apologise 'for any upset this may have caused'.
261. The same day, Mr Cockfield communicated Ms Beck's explanation to the Claimant, who did not accept it; she asked him to confirm it in writing, with supporting evidence. She believed at that point that the offensive tag had been deliberately inserted in the boxes. She refused to meet Ms Beck.

Jama Issue 35: J-DD27 / J-HAR27 / J-VICT12 / J-DET13 – [on 21 January 2021] Paul Cockfield emails a brief unsatisfactory report about the 'paininarse' incident'

262. Early on 21 January 2021 Ms Jama emailed Mr Middleditch about the computer matter, confirming that she had asked Mr Cockfield for a written report and asking him to oversee the situation. She wrote: 'this has left me extremely stressed and worried for my safety during my phased return to work'.
263. On 21 January 2021 Mr Cockfield prepared a summary about the computer incident. He emailed it to Mr Kemp, Ms Jama and her union representative. Ms Jama alleges that it was brief and unsatisfactory.
264. In our judgment, the Claimant was entitled to consider that both the extent of the investigation and the brevity of the report were unsatisfactory. Mr Cockfield had accepted Ms Beck's explanation at face value without doing anything to check its veracity. There was no request for her to bring her computer in for it to be examined; it was not objectively established that the name was automatically transferred as the identifier into the spreadsheet; he accepted unquestioningly her explanation that she had forgotten to remove the name from the Ms Jama's documents, even though they were the very ones which Ms Perry had drawn her attention.
265. On 2 February 2021, Ms Beck sent a letter of apology to Ms Jama. She wrote:

'Dear Ubah

I am writing to apologise to you regarding the incident that happened where my own computer name was inserted into a comment on the EQA Excel spreadsheet.

I wanted you to understand that this was not intentional but an oversight on my behalf. I am sorry if this offended you in anyway.

Yours sincerely

Claire Beck'

266. It is obvious that expressing regret if someone has been offended by your failure to do something is not the same as saying you are sorry for failing to do it. This was a carefully worded and half-hearted apology.
267. On 20 April 2021, Mr Ryan McDermott (ICT Senior Desktop Engineer) produced a report, which confirmed that the account had been named long before the incident and the name would have been picked up by Microsoft Office and saved as the username when modifying documents such as Excel spreadsheets.
268. Ms Jama accepted this report, which was only provided to her in the course of these proceedings. She observed that it had only been commissioned after she began ACAS early conciliation in relation to her second claim (on 8 April 2021). She continues to assert that Ms Beck deliberately left the name on the system for all to see even after Ms Perry drew her attention to it, specifically mentioning Ms Jama's spreadsheets.

The grievance appeal hearing

269. The Claimants attended grievance appeal hearings on 9 February 2021, conducted by Mr Wishart (Interim Director of Workforce). Mr Wishart was critical of the extent to which Mr Ndongwe's original conclusions were not properly reflected in Mr Ellender's outcome. He said that the First Respondent should apologise to the Claimants for the lack of transparency. He told the Claimants that a fresh investigation would be carried out.

Jama Issue 37: J-PD7 – [on 26 February 2021] Ubah Jama files an incident report form over cancellation of Roche engineer'

Jama Issue 36: J-DD28 / J-DET14 / J-HAR28 / J-VICT13 – 'Paul Cockfield investigated an incident of Iris Valera-Larios cancelling a Roche engineer's visit which occurred on 25 February 2021, and made findings and recommendations and gave feedback, which he recorded in writing dated 12 March 2021, downgrading the incident to 'no harm' and which contained false accusations and judgments about C2's character and questioned her professionalism rather than objectively focusing on the root cause to prevent recurrence. It with the Lead before putting in an IR1'

270. On 25 February 2021, a Roche engineer was booked to deal with a problem with the analysers. Ms Valera-Larios was personally involved in securing his attendance. At 12:35 Ms Ali of Roche emailed Ms Valera-Larios to tell her that an engineer could attend, but not before 16.30/17:00, i.e. near the end of the shift. An engineer was already due to attend the following morning.
271. Although at first both analysers were down, the team managed to get Pebbles up and running; they had extracted the racks, the analysers were back on and

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they had been loading samples since 14:00. At 14:19 Ms Valera-Larios emailed Ms Ali to tell her this. She wrote that she thought it was safe to cancel the engineer's visit; she thanked Ms Ali for the quick response and the engineer for volunteering to come on site. Ms Ali replied:

'thank you for the update. I really hope they have QC and the probes are all OK!!'

272. An engineer attended on 26 February 2021.
273. Ms Jama told the Tribunal was that the main issue with racks being stuck was that the probes on the analyser get damaged and misaligned. The team could not correct that; it was a job for an engineer. She alleges that Ms Valera-Larios did this on purpose to set her up to fail. We find that Ms Jama picked up this point in retrospect; we do not believe it was her concern at the time.
274. Ms Jama accepted that, as the lab manager, Ms Valera-Larios was entitled to decide whether an engineer was needed; she then said that her real concern was that Ms Valera-Larios did not tell staff members that the engineer had been cancelled. That is a different issue.
275. On 2 March 2021 Ms Jama filed an incident report in relation to the incident, having first told Mr Betserayi. She identified the risk rating as high.
276. Ms Valera-Larios gave an account in an email of 3 March 2021 (HN 97). In it she wrote:

'Seniors are expected to communicate effectively and should be able to arrange engineers without my intervention. I would suggest email as a method of communication if Ubah's lack of communication put patients at risk.

Happy to have mediation or communicate with her via Stanley, find/email at her request. Creating a problem to have a reason to do an IR1 is extremely unprofessional and I hope this gets addressed as she knows she has to discuss incidents before reporting.

Ubah's lack of communication is the root cause of the problem. She also failed to inform Stanley of any service failures or incidents that need to be reported in safeguard. I was not aware an incident report had been done.

I have sent emails in the past reminding the team that they must communicate incidents with me before reporting an IR1. There was a clear breach of communication when the IR1 was reported without informing management.

[...]

277. It is striking that Ms Valera-Larios's main focus in providing her response was to be personally critical of Ms Jama.
278. Mr Cockfield produced an initial report. Mr Cockfield downgraded the incident to 'no harm', which Ms Jama alleges was perverse. In that initial report he also made the following comment:

‘The root cause on this occasion was failure to communicate. The senior BMS [Ms Jama] had not communicated her concerns to the Lead BMSs in Biochemistry [Ms Valera-Larios] or Haematology. Better communication of concerns is paramount and they hope that this is the reason for the IR1 and not the purpose of personal grievance.’

279. Mr Cockfield turned the issue round and called into question Ms Jama’s good faith in raising the issue. Mr Kemp agreed in cross-examination that Mr Cockfield’s comments were inappropriate. He spoke to him and emphasise that an incident report should be blame-free and should not be used to make pointed remarks about an individual, neither should an individual closing it make such remarks.
280. Also in the original version of the outcome Mr Cockfield said that ‘all senior BMS staff have been asked to consult with the Lead before putting in an IR1.’ Mr Kemp agreed that this set up an inappropriate barrier to raising health and safety concerns, especially in circumstances where the concern manager about the manager who, in theory, could be asked to approve a complaint being made about her. Mr Kemp asked Mr Cockfield to revise the outcome to remove these anomalies, which he did.

The appeal outcome

281. On 2 March 2021 the appeal outcome was sent to the Claimants. They were told that the fresh investigation would be carried out by Ms Eyong Beesong (HR consultant for Capsticks). That process was not completed until December 2021.

Mntonintshi Issue 9: M-DD7 / M-HAR7 / M-VICT3 – ‘[20 May 2020 to date] The Trust has to date failed to confirm that Princess Mntonintshi has satisfactorily completed her probationary period’

282. The First Respondent’s case is that this was an oversight. Ms Mntonintshi said that, because she had a grievance underway, it was the responsibility of HR to confirm completion of probation and it was their failure. She confirmed that she was not suggesting that anyone in HR was motivated by race.

Ms Akite’s evidence

283. Ms Faz Patel made a contemporaneous statement about incidents on 7 August 2020, when Ms Akite stated that Zadorozny ‘kept micromanaging and monitoring me’. Ms Patel gave a very different account, in which she said that Zadorozny showed considerable patience that day, did not raise her voice or change her tone, but spoke to Ms Akite in a kind manner. She did not think Ms Zadorozny was micromanaging Ms Akite. On the other hand, she felt that Ms Akite was unresponsive, gave one-word answers, and created an awkward atmosphere for the team. She described Ms Akite’s demeanour as ‘standoffish’, including to her. Ms Akite alleged that Ms Patel wrote a false statement on Ms Zadorozny’s instructions but was unable to explain why she might have done so. We find Ms Patel did no such thing and Ms Akite’s evidence on this unreliable.

284. In the final paragraph of her witness statement, Ms Akite gave an account of an incident which she thought took place in January or February 2020 when she was working alone with Ms Zadorozny at the weekend. She alleged that:
- ‘Tatyana walked up to me and made monkey gestures and sounds and then walked off. She then realised what she had done, came back and said, ‘I don’t know why I just did that, I’m sorry’. At the time, I was confused, and it did not really register that this was racism. I was new. In the beginning I did not realise what was going on. But looking back on it now, it explains why this happened. Later, I told Ubah about this incident in confidence’.
285. If this occurred as described, it would have been a serious act of overt racism. Asked why that was not immediately apparent to her, Ms Akite said because she was in shock. She did not raise it with management, or with HR, and did not file a grievance. She explained that she thought that if she went to management it would create ‘more problems for me’. She said that she mentioned it to her sister in the evening who commented: ‘that’s crazy, you work in a crazy place’. She alleged that her union representative (not the person appearing as a witness in this case) told her she should not raise it because she was only on a two-year contract; she should just get another job. She said that she also had personal reasons for not raising it: she had a thesis to finish, which was a huge burden. She decided to focus on her studies, rather than all the stress of work.
286. The Tribunal is not prepared to make a finding that an incident of this gravity occurred in circumstances where the complainant cannot identify the date, did not keep a note of the incident and did not complain about it at the time. None of the three people she says she told about the incident (Ms Jama, the unnamed union adviser and her sister) have given evidence to confirm that she told them at or near the time. We found aspects of her evidence inherently implausible: the conduct, if it happened, would have been so obviously racist that it difficult to believe that Ms Akite would have been ‘confused’ by it, or that her sister have described it as ‘crazy’, rather than obviously, and shockingly, racist.

The Claimants’ evidence on time limits

287. Asked why she did not bring her claims earlier, Ms Jama said that she had had some issues with the union, which was not moving as quickly as she wished. She consulted them quite early on in February 2020 and they gave advice. She knew about Tribunals and the fact that she could bring a race discrimination claim. She stated that she did not know about time limits. She said she did not find out about time limits until after she submitted a grievance. It was at that point that Mr Egbomwan-Irabor became involved.
288. Ms Mntonintshi said that she had difficulty contacting the union solicitor. She said that the ACAS officer had advised her that she would be running out of time and she should get a private solicitor who would be able to help her. She had union representative throughout. She first spoke to them about discrimination on 19 May 2020, when she had the meeting with Mr Cockfield about her probation period being extended. Up to that point, she did not see the point in involving the union because she thought Mr Cockfield would investigate and the issues would be resolved. She knew about the Employment Tribunal and she knew that she could bring a race discrimination case in Tribunal, although she

did not know anyone who had done so. She learnt about time limits from the ACAS officer.

The law

The burden of proof in discrimination cases

289. The burden of proof provisions are contained in s.136 EqA:

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

290. The operation of the burden of proof provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

‘It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.² He explained the two stages of the process required by the statute as follows:

(1) At the first stage the Claimant must prove “a *prima facie* case”. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving “facts from which the Tribunal could conclude that the Respondent ‘could have’ committed an unlawful act of discrimination”. As he continued (pp. 878-9):

“56. ... The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal ‘could conclude’ that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.

57. ‘Could conclude’ in section 63A(2) [of the Sex Discrimination Act 1975] must mean that ‘a reasonable Tribunal could properly conclude’ from all the evidence before it. ...”

(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

“He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim.”

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.’

291. In *Madarassy v Nomura International plc* [2007] IRLR 246 at [57] Mummery LJ considered what evidence should be considered at the first stage.

‘This would include evidence adduced by the complainant in support of the allegations of [in that case] sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the Respondent contesting the

² *Madarassy v Nomura International plc* [2007] ICR 867, CA

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complaint. Subject only to the statutory “absence of an adequate explanation” at this stage (which I shall discuss later), the Tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.’

292. Mummery LJ continued at [58]:

‘The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim.’

293. In *Royal Mail Group v Efofi* [2021] ICR 1263, the Supreme Court confirmed that a claimant is still required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense.

294. The burden of proof provisions should not be applied by the Tribunal in an overly mechanistic manner: see *Khan v The Home Office* [2008] EWCA Civ 578 *per* Maurice Kay LJ at [12]. The approach laid down by s.136 EqA will require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but where the Tribunal is able to make positive findings on the evidence one way or another, the provisions of s.136 will be of little assistance: see *Martin v Devonshires Solicitors* [2011] ICR 352 at [39], approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 at [32].

295. As for the ‘something more’ required to shift the burden, Sedley LJ observed in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279 at [19]:

‘the “more” which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.’

296. Giving a wholly untruthful response when discrimination is alleged may indicate that the allegation is well-founded, and therefore shift the burden of proof, although it will not always do so: lies may be told for many different reasons (*per* Underhill LJ in *Otshudi* at [37]).

297. Giving a number of inconsistent explanations may also shift the burden to the Respondent: *Birmingham City Council v Millwood* [2012] EqLR 910 (*per* Langstaff P) at [26]; *Raj v Capita Business Services Ltd* [2019] IRLR 1057 at [59-60] *per* Judge Heather Williams QC.

298. The consequence of the way that s.136 works is that, if a respondent fails to show that the relevant protected characteristic played no part in its motivation for doing the act complained of, a tribunal is not obliged to make a positive finding as to whether or how it did so: indeed one of the reasons for the (partial) reversal of the burden of proof which it effects is that it can often be very difficult for a claimant to prove what is going on in the mind of the putative discriminator (*per* Underhill LJ in *Otshudi* at [44]).
299. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at [2, 9 and 11] held that the Tribunal should avoid adopting a 'fragmentary approach' and should consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

Harassment related to race

300. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

...

race

...

301. The Court of Appeal in *Pemberton v Inwood* [2018] ICR 1291 gave guidance on the correct approach to these provisions (*per* Underhill LJ at [88]):

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

302. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered (in the context of the formulation in s.3A

Race Relations Act 1976) by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 *per* Underhill P. at [22]:

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

303. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

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

304. He continued (at [13]):

'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'

305. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ at [12], referring to Elias LJ's observations in *Grant*, stated:

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

306. Although intention is not determinative, it can be a factor (*Dhaliwal* at para 15):

'One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.'

307. An 'environment' is a state of affairs. It may be created by an incident, but the effects are of longer duration. The Tribunal must consider the relevant words spoken in context, including other words spoken and the general run of affairs within the workplace. The frequency of the use of the offending words is not irrelevant (*Weeks v Newham College of Further Education* [2012] EqLR 788).

308. Guidance as to the construction of the wording 'related to a relevant protected characteristic' was given by the Court of Appeal in *UNITE the Union v Nailard* [2018] IRLR 730. It imports a broader test than that which applies in a claim of direct discrimination. It was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well

as those where they were caused by it. However, there are limits. The Tribunal in that case had allowed that a failure to address a sexual harassment complaint, made against elected officials of the union, could itself amount to harassment related to sex 'because of the background of harassment related to sex'. That, the Court of Appeal held, went too far. The Tribunal had not made any findings as to whether the claimant's sex formed part of the motivation of the alleged discriminator.

309. In *Raj v Capita Business Services Ltd* [2019] IRLR 1057 at [53] Judge Heather Williams QC held that, in relation to the question of whether the conduct related to the protected characteristic, the burden of proof provisions in s.136 EqA require the Tribunal to consider whether the facts were such that, absent any other explanation for it, the ET could conclude that it did (stage 1); if so, it must go on to consider whether the Respondent shown that, in fact, it was not (stage two).

The relationship between harassment and other forms of discrimination

310. S.212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment. Thus, a Claimant cannot succeed in a claim of both harassment and direct discrimination, or harassment and victimisation, in respect of the same conduct, since a finding of direct discrimination and victimisation necessarily involve findings of detriment. However, there is nothing in the statutory language to prevent him from advancing claims in the alternative by reference to these causes of action in respect of the same conduct.

Direct race discrimination

311. S.13(1) EqA provides:

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.

312. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [1999] ICR 877, per Lord Nicholls at 884). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at [29]:

'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach...The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'

313. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan* at 886).
314. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been

less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

315. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].
316. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not fall into that category.

Victimisation

317. S.27 Equality Act 2010 ('EqA') provides as follows (so far as is relevant):
- (1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
 - (a) B does a protected act, or**
 - (b) A believes that B has done, or may do, a protected act.**
 - (2) Each of the following is a protected act—**
 - (a) bringing proceedings under this Act;**
 - (b) giving evidence or information in connection with proceedings under this Act;**
 - (c) doing any other thing for the purposes of or in connection with this Act;**
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.**
318. Ss.2(d) covers allegations made by the claimant that the employer or another person has contravened the EqA, whether or not they are express. It is not necessary that the EqA be mentioned, but the asserted facts must, if verified, be capable of amounting to a breach of the EqA.
319. In *Durrani v London Borough of Ealing EAT 0454/12* the EAT upheld the Tribunal's decision that references to 'being discriminated against' referred to general unfairness rather than detrimental action based on the Claimant's race, although the EAT emphasised that the case should not be taken as 'any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of s.27 EqA'. All will depend on the circumstances of the particular case.
320. The EAT in *Chalmers v Airpoint Ltd UKEATS/0031/19/SS* (unreported 2020) upheld the Tribunal's decision that, on the facts of that case, a reference to actions which 'may be discriminatory' in a grievance was not sufficient to amount to a protected act.
321. The Equality Act 2010 Code of Practice on Employment provides at para 9.11:

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‘Victimisation does not require a comparator. The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (*rightly or wrongly*) that they have done or intend to do a protected act’ [emphasis added].

322. The Tribunal must determine whether the relevant decision was materially influenced by the doing of/belief in the doing of a protected act. This is not a ‘but for’ test, it is a subjective test. The focus is on the ‘reason why’ the alleged discriminator acted as s/he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

Time limits in discrimination cases

323. S.123(1)(a) Equality Act 2020 (‘EqA’) provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.
324. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).
325. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.
326. The EAT in *Robinson v Royal Surrey County Hospital NHS Foundation Trust and others* UKEAT/0311/14/MC, 30 July 2015, held that conduct extending over a period may comprise acts that, taken individually, fall under different sections of the Equality Act 2010. Although such an assessment would always be fact-specific, in that case, for example, it was considered that complaints of direct discrimination and failure to make reasonable adjustments might be regarded as conduct extending over a period (at [65]).
327. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so.
328. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse (*Robertson v Bexley Community Centre* [2003] IRLR 434 at [23-24]). There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

329. This is a broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances. Some factors are likely to be relevant in all cases. HHJ Auerbach summarised them in *Wells Cathedral School Ltd v Souter* (2021) EA-2020-00801 at [31-33]:

‘As a matter of law, there is no particular feature that must necessarily be present in order for a just and equitable extension to be granted, nor that, if present, is automatically sufficient to warrant such a grant. However, some factors are, as it is put, customarily relevant. In every case the implication of refusing to extend time will be that the claimant will not be able to have a complaint adjudicated on its merits, as they would, had time been extended. Conversely, the effect of granting an extension of time will be that a respondent will be obliged to defend a complaint on its merits, and exposed to the risk of losing, in a way that would not be so, were time not to be extended.

There are also some essential legal considerations that flow from the statutory time limits framework itself, that form part of the general backcloth in every case, in particular, the inherent importance attached to observance of time limits for litigating, and finality in litigation, even where, as here, there is considerable flexibility in the test that the tribunal must apply when deciding whether or not to extend time. It is also established that the onus is on a claimant to persuade a tribunal that there is some good reason why it would be just and equitable to extend time in the given case.

Beyond those basic principles, what factors are relevant and how to weigh them up in the given case are matters for the employment tribunal.’

330. Other factors will usually include: the reason for the delay; whether the Claimant was aware of her rights to claim and/or of the time limits; whether she acted promptly when she became aware of her rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).
331. Failure to provide a good excuse for the delay in bringing the relevant claim will not inevitably result in an extension of time being refused (*Rathakrishnan v Pizza Express (Restaurants) Ltd* [2016] IRLR 278 at [16]).

Public interest disclosures

332. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

[...]

(d) that the health or safety of any individual has been, is being or is likely to be endangered

[...]

333. In *Williams v Michelle Brown AM*, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'

PIDA detriment claims

334. S.47B(1) ERA provides:

A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

335. Care must be taken to establish the 'reason why' the employer acted as it did. The 'reason why' is the set of facts operating on the mind of the relevant decision-maker, it is not a 'but for' test. The correct test is whether 'the protected disclosure materially influences (in the sense of being more than a trivial influence on) the employer's treatment of the whistleblower (*Fecitt v NHS Manchester* [2012] IRLR 64 at [45]).

336. S.48 ERA provides:

(1A) A worker may present a complaint to an employment Tribunal that he has been subjected to a detriment in contravention of section 47B.

[...]

(2) On a complaint under subsection [...] (1A) [...] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

337. If an employment tribunal can find no evidence to indicate the ground on which a Respondent subjected a Claimant to a detriment, it does not follow that the claim succeeds by default. In *Ibekwe v Sussex Partnership NHS Foundation Trust*, UKEAT/0072/14/MC EAT adopted the same approach as that taken by the Court of Appeal in *Kuzel* (see below). In *Ibekwe*, the EAT concluded that there were no grounds for interfering with the tribunal's unequivocal finding that there was no evidence that an unexplained managerial failure to deal with an employee's grievance was on the ground that the grievance contained a protected disclosure.

Time limits in PIDA detriment claims

338. With regard to time limits, s.48(3) and (4) ERA 1996 provide (as relevant):

(3) An employment Tribunal shall not consider a complaint under this section unless it is presented–

(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.

(4) For the purposes of subsection (3)

(c) where an act extends over a period, the “date of the act” means the last day of that period

Factors relevant to time limits and the burden of proof

339. In accordance with the guidance in *Anya*, we stand back from the detail of our findings of fact and look at the overall picture, both in terms of whether there are factors which might be relevant to the question of whether the burden of proof should shift to the Respondents and whether there was an ‘ongoing situation’ which might be relevant to time limits.
340. Beginning with Ms Valera-Larios, our starting point is that she plainly favoured working with specific colleagues, whom she regarded as more hard-working and better communicators than others. They were white: Ms Zadorozny and Ms Beck. Ms Valera-Larios involved both white Seniors in activities and decisions without involving black members of staff (paras 45, 103-105, 161-162, paras 179-181).
341. Ms Valera-Larios, Ms Zadorozny and Ms Beck effectively operated as a team within a team, without apparently questioning the appropriateness of that. We also noted that, while they were quick to identify cliques among black staff, it appears not to have occurred to them that they were the most obvious, and influential, clique in the department.
342. There were also other identifiable patterns in Ms Valera-Larios’s conduct: accepting at face value accounts given by white members of staff, but challenging accounts given by black members of staff (para 96, 173); criticising black members of staff but not white members of staff (paras 153-154, 184); seeking to mitigate poor conduct by white colleagues (paras 89-93, paras 95-98); seeking to implicate black members of staff (paras 93, 153-154, 167, 171, 185, 208-211); reacting combatively to complaints about her (paras 186, 276).
343. As to Ms Valera-Larios’s evidence to the Tribunal, occasional evasiveness is not an unusual feature of evidence in Tribunal. Tribunals usually seek to avoid making generalised findings about credibility. However, Ms Valera-Larios was so consistently evasive in her evidence that we consider we have no alternative. There were occasions when she gave an answer, which was quickly disproved by a document; she then had no hesitation in reaching for another answer; at one point in cross-examination, she gave four different answers on the same issue, finally alighting on a fifth, which was that she could not recall why she had acted as she did (paras 214-217). She gave positively untruthful evidence on several occasions (paras 123, 148, 152, 154, 188).
344. In her oral submissions, Ms Patterson valiantly attempted to suggest that there might be an innocent explanation for this, largely on the basis that, given Ms Valera-Larios’s inexperience as a manager, together with the fact that she was the subject of so many allegations by subordinates and criticisms from her own managers, it was natural that she might feel under attack and seek to justify herself. Had this only occurred on one or two occasions, that submission might have carried more weight; but the frequency which Ms Valera-Larios gave answers which she thought might assist her, apparently with little regard as to whether they were true or not, led us to rule that explanation out.

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345. We have concluded that the extent of the untruthful and/or evasive evidence by Ms Valera-Larios both undermined her credibility on many (but not all) issues and was a significant factor in shifting the burden of proof to her to show that her conduct was not tainted by discrimination.
346. Mr Cockfield was also an evasive witness, albeit not to the same extent (paras 120-122, 157, 158). There was also a pattern of his unquestioningly supporting Ms Valera-Larios's views in relation to black members of staff in circumstances where he ought first to have probed the issues more carefully (para 156, 194, 278-279).
347. Mr Mybergh gave evasive evidence as to the fact that Ms Jama complained to him of race discrimination on 19 February 2020 (para 87).
348. Finally, it was not in dispute that divisions within the department tended to be along racial lines. We have found that there were divisions between white and non-white staff (para 42). We have also found (para 38 onwards) that the power and influence tended to be held by white members of staff. One finding of the OD diagnostic report in July 2020 was that 55% of participants perceived there to be racism in the Biochemistry Function (para 234).
349. The matters we have identified above contributed to our conclusion, in relation to some issues, that the burden of proof should shift to the Respondents to provide an adequate, non-discriminatory explanation for their conduct. Further, they contributed to our conclusion as to the issue of whether there was 'conduct extending over a period' in relation to time limits.

Conclusions: Ms Jama - Protected acts and public interest disclosures

Alleged protected acts/disclosures which did not occur

350. We have found that Ms Jama did not do/make the following protected acts/disclosures.
- 350.1. Issue 2: J-PA1: Ms Jama did not mention race as a factor in her complaint to Mr Patten on 11 February 2020 (para 60). There was no protected act.
- 350.2. Issue 5: J-PD1: Ms Jama did not tell Mr Zadorozny on 13 February 2020 that she would file an incident report about the first health and safety incident (para 73). There was no protected disclosure.
- 350.3. Issue 11: J-PA4: Ms Jama accepted in cross-examination that she did not make an allegation of race discrimination in her conversation with Ms Valera-Larios on 20 February 2020 (para 92). There was no protected act.
351. As for Issue 37: J-PD7 (the incident report of 26 February 2021 about the cancellation of the Roche engineer), we accept that Ms Jama genuinely believed that cancelling the engineer was the wrong decision, and she was unhappy that Ms Valera-Larios did not properly communicate the decision to colleagues. We are not satisfied she believed that she was disclosing information that tended to show that a person's health or safety was likely to be endangered. In our judgment, the explanation she gave us as to why she did was one she did not have in mind at the time. If we are wrong about that, we

were not satisfied that her belief was reasonable. Having got one of the analysers up and running again, there was no real risk to health or safety.

352. To be clear: we do not accept Ms Patterson's submission that Ms Jama was acting in bad faith or that she was trying to cause trouble for Ms Valera-Larios.

Protected acts/disclosures which did occur

353. We have found that the following protected acts/disclosures did occur.

Jama Issue 8: J-PD2 / J-PA2 – '[On 14 February 2020] Ubah Jama verbally reports to Paul Cockfield issues and incidents including the sample throwing incident and informs him it is a racial issue'

354. In her conversation with Mr Cockfield on 14 February 2020, Ms Jama complained of race discrimination and so did a protected act (paras 82-83).

355. We have also found that Ms Jama disclosed information about the sample-throwing incident; in doing so, we are satisfied that she subjectively believed that the health and safety of individuals (herself, Ms Mntonintshi, Ms Swamba and the patient whose sample it was) had been/was likely to be endangered. That belief was reasonable: although no actual harm was done on this occasion, the conduct created a clear risk of harm to others (thereby 'endangering' them); it was also reasonable for her to believe that Ms Zadorozny might repeat the conduct. For the same reasons we accept that Ms Jama reasonably believed the disclosure was in the public interest (ensuring a safe workspace for all).

Jama Issue 10: J-PD3 / J-PA3 – '[On 19 February 2020] Ubah Jama raised concerns with Casper Myburgh including race discrimination'

356. In her conversation with Mr Mybergh on 19 February 2020 (para 86 onwards), the First Respondent now accepts that Ms Jama complained of race discrimination and did a protected act; the First Respondent also accepts that, in disclosing to him the sample-throwing incident of 13 February 2020, Ms Jama made a protected disclosure.

Jama Issue 15: J-PA5 / J-PD4: '[On 16 March 2020] Ubah Jama raises concerns with Jeff Middleditch including in a written statement'

357. The First Respondent concedes that, by raising concerns orally with Mr Middleditch on 16 March 2020 and in writing two days later (para 113 onwards), the Claimant did a protected act (an allegation of racial harassment) and made a protected disclosure (in relation to the 13 February 2020 sample-throwing incident).

Jama Issue 17: J-PA6 / J-PD5 – '[on 17 March 2020] Ubah Jama informs Paul Cockfield about the second health and safety incident, that Iris Valera-Larios was unfair and biased and that there was a racial issue underling this behaviour'

358. Mr Cockfield accepted that Ms Jama made allegations of race discrimination at the meeting on 13 March 2020 (para 119 onwards). It was a protected act.

359. There is no dispute that Ms Jama disclosed specific information about the second health and safety incident. We are satisfied that she subjectively believed that the information tended to show that the health and safety of

colleagues had been endangered and that belief was reasonable. We accept that she reasonably believed the disclosure was in the public interest.

Jama Issue 18: J-PD6 – ‘[On 19 March 2020] Ubah Jama submits a health and safety statement to Paul Cockfield for both health and safety incidents, and files an online incident report form for the second incident’

360. Ms Jama repeated her disclosures about the two health and safety incidents on 19 March 2020 (para 130 onwards). The First Respondent concedes that both documents contained protected disclosures.

Issue 33: J-PA7 (Ms Jama’s first ET1 on 23 September 2020)

361. The First Respondent accepts that this was a protected act.

Conclusions: Ms Jama - Detriments / unfavourable treatment

Allegations which fail on their facts

362. The following claims fail because we have found that the conduct did not occur as alleged.

362.1. Issue 7: J-DD5 / J-HAR5 / J-DET2 - Ms Zadorozny did not check Ms Jama’s work on 14 November 2020 (paras 77-78).

362.2. Issue 9: J-DD6 / J-HAR6 - Ms Zadorozny and Ms Beck did not monitor Ms Jama’s breaks on 14 February 2020 (paras 84-85).

362.3. Issue 24: J-DD17 / J-HAR17 and Issue 32: J-DD25 / J-HAR25 / J-VICT10 / J-DET11 - Ms Zadorozny did not set the Claimant up to fail in relation to EQAs (paras 231-234).

362.4. Issue 25: J-DD18 / J-HAR18 / J-VICT5 / J-DET6 - Ms Zadorozny did not check Ms Jama’s work on 29 May 2020 (paras 199-201).

Events which did occur but which either were not detriments or for which there was an adequate, non-discriminatory explanation

Jama Issue 6: J-DD4 / J-HAR4 / J-DET1 – ‘[On 14 February 2020] Ms Zadorozny falsely accused Ubah Jama and Princess Mntonintshi of taking 1.5 hours for lunch that day’

363. This allegation fails because it is an allegation that on 14 February 2020 Ms Zadorozny accused Ms Jama of taking an excessive lunchbreak on that day. We have found that she did not; she raised the fact that she had taken a long lunchbreak the previous day (para 76).

364. The relevance of this argument is that Ms Jama says that Ms Zadorozny made a false allegation against her because she had threatened to raise an incident report about Ms Zadorozny’s conduct the previous day. We have found that Ms Jama did not make that threat. For that reason as well, the detriment claim (J-DET1) must fail.

365. In any event, we accept Ms Zadorozny’s evidence that she genuinely believed that Ms Jama had taken a long lunch break the previous day and that this was a contributing factor to her ill-temper on that day, albeit it did not excuse it. It may have been an incorrect allegation, but it was not a false allegation (made

in bad faith). We are satisfied it was the sole reason she raised the subject; the Claimant's race had nothing to do with it. Consequently, the direct discrimination and harassment claims also fail.

Jama Issue 12: J-DD8 / J-HAR8 – '[On 26 February 2020] Iris Valera-Larios failed to inform Ubah Jama that she was conducting senior one-to-one meeting on/around 26 February 2020. Instead Ubah Jama was informed by Tatyana Zadorozny that she was doing individual meetings and wanted to speak with her now'

366. We have found that Ms Jama was asked to attend an impromptu meeting but there is no evidence of any less favourable treatment (paras 100-101). We have concluded that there is no evidence that Ms Jama's race played any part in the request. We have rejected the allegation that Ms Zadorozny was rude to her. A complaint about the content of the meeting goes beyond the pleaded allegation. For these reasons, these claims are not well-founded.

Jama Issue 19: J-DD12 / J-HAR12 – '[On 19 March 2020] Iris Valera-Larios did not notify Ubah Jama of a senior meeting which started at 2pm on 19 March until Ubah Jama was on her lunch break, when she sent an inappropriate WhatsApp message on the BMS emergencies group at 2.09 that day'

367. We have concluded that the sole reason why Ms Jama did not know about the arrangements for the meeting (para 134 onwards) was because Ms Valera-Larios accidentally left the subject out of the Outlook header. The sole reason why she contacted the Claimant by WhatsApp through the BMS emergencies group was because she was trying to attract her attention as quickly as possible. We are satisfied that Ms Jama's race played no part in her conduct. Moreover, there was no detriment to Ms Jama: if she genuinely felt humiliated by this trivial incident, she was over-reacting. The claims are not well-founded.

Jama Issue 29: J-DD22 / J-HAR22 – '[On 1 July 2020] IVL failed to inform Ubah Jama that she did not work on Wednesdays, which affected Ubah Jama's ability to run the laboratory as she reports to her. On 1 July 2020, the QC material for ammonia expired and Ubah Jama did not know who she had to report to and eventually asked Malcolm Patten to order more and also informed the Consultant Biochemist'

368. We have concluded that there was no detriment/unwanted conduct. Even if it was right that Ms Jama had not been told that Ms Valera-Larios did not work on Wednesdays (para 218 onwards), a reasonable employee would not consider they had been subjected to a detriment/disadvantage. Ms Jama was an experienced, senior professional with direct access to senior management. We do not accept that she did not know who to speak to about issues in Ms Valera-Larios's absence. The claims are not well-founded.

Jama Issue 31: J-DD24 / J-HAR24 / J-VICT9 / J-DET10 – '[on 25 July 2020] The Trust unreasonably refused Ubah Jama's's request to take annual leave on Eid'

369. We have concluded that the sole reason why Ms Valera-Larios refused Ms Jama's leave request (para 228 onwards) was because she wanted to have two seniors present on that day. That was a proper exercise of her managerial discretion. Neither Ms Jama's race, nor the fact that she had done protected acts played any part in the decision. The claims are not well-founded and are dismissed.

Allegations in relation to events which we have found did occur and to which we applied the burden of proof provisions

Jama Issue 1: J-DD1 / J-HAR1 – ‘Ubah Jama was denied a training opportunity to attend a 3-day Roche CITM administration training course which was given to her white colleague, Claire Beck’

370. Ms Valera-Larios offered the course to Ms Beck; she did not give Ms Jama the opportunity to be considered (para 50 onwards). Their circumstances were materially the same: both were Seniors; both could benefit from, and were interested in, the course. There was less favourable treatment and a difference of race.
371. Was there something more, from which we could reasonably conclude that the decision was in part because of race? We have concluded that there was: the inconsistent and untruthful evidence which Ms Valera-Larios gave during the internal investigations and at the hearing (para 55 onwards).
372. We asked ourselves whether Ms Valera-Larios had discharged the burden on her of showing that there was an adequate, non-discriminatory explanation for her decision. Her explanation was essentially twofold: that she knew that Ms Beck had a particular interest in IT matters, while Ms Jama did not express an interest; and that the decision had to be taken quickly.
373. Those explanations were not adequate: Ms Valera-Larios also knew that Ms Jama had a specific interest in this course; and there was no pressure of time to respond quickly, which also disposes of Ms Valera-Larios’s final explanation (that it took time to make the arrangements, including booking the hotel), which we found implausible.
374. As Ms Valera-Larios has not discharged the burden on her, we uphold the claim of direct race discrimination, subject to consideration of time limits (limitation).
375. Because of the operation of S.212(1) EqA (see above at para 310), the harassment claim cannot also succeed and we do not consider it. In any event, we regard this incident as more naturally characterised as direct discrimination.

Jama Issue 4: J-DD3 / J-HAR3 – ‘Tatyana Zadorozny, a Senior Biomedical Scientist, lost her temper with a black colleague and threw a pleural fluid sample at the wall close to Princess Mntonintshi and two other black employees’

376. What Ms Zadorozny did on 13 February 2020 (para 66 onwards) was plainly unwanted conduct. We accept that it reasonably had the effect of creating a hostile environment for Ms Jama. We have already found that she was shocked by it. It was also a safety breach and Ms Jama was worried about what else Ms Zadorozny might do.
377. Was it related to race? Our starting point is that both this incident and the later health and safety incident on 17 March 2020 involved extreme behaviour by Ms Zadorozny. Both incidents occurred in the presence of black members of staff, when there were no white colleagues present. Both incidents were triggered by perfectly innocent remarks made by a black member of staff, to which Ms Zadorozny responded disproportionately. Although Ms Zadorozny had a reputation for being bad-tempered, we heard no evidence of her responding in

a similar way to white members of staff. We are satisfied that, absent an adequate, non-discriminatory explanation from her, we could infer that she would not have behaved in this way had the same circumstances occurred with three white colleagues, but that she felt able to do so in the presence of black colleagues. We concluded that the burden shifted to Ms Zadorozny.

378. Her explanation as to why she behaved as she did was that she was stressed and upset because Ms Jama and Ms Mntonintshi had exceeded their breaks that day and that Ms Jama had delayed taking over from her on validation while she performed another task.
379. Although this might provide some context for her behaviour and might explain a minor irritation; it does not adequately explain such an extreme reaction. Moreover, it does not explain at all why what Ms Swamba said (which according to Ms Zadorozny was simply: 'I don't know what to do with this') triggered this response, nor why, instead of showing her what to do or asking one of her colleagues to do so, she behaved in a way which was disrespectful to all three of her black colleagues.
380. We have concluded that Ms Zadorozny has not discharged the burden on her to show that her conduct was in no sense whatsoever related to the race of her colleagues. Ms Jama's complaint of harassment related to race (J-HAR3) is well-founded, subject to limitation; we do not consider the alternative claim of direct race discrimination.

Jama Issue 11: J-DD7 / J-HAR7 / J-VICT1 / J-DET3 / J-PA4 – [on 20 February 2020] Iris Valera-Larios questioned Ubah Jama about the sample throwing incident. During the conversation, Iris Valera-Larios showed no concern for the welfare or health and safety of the three black members of staff but instead stated that she did not want to take sides, stated that she wanted to take her to Paul Cockfield's or Casper Myburgh's office for mediation and when Ubah Jama asked what she was being accused of, Iris Valera-Larios did not reply. Ubah Jama confirmed that Tatyana had lost her temper and thrown the sample'

381. By conducting its discussion as she did (para 89 onwards), Ms Valera-Larios subjected Ms Jama to a detriment: she behaved insensitively, showed no concern for Ms Jama's welfare and sought to criticise Ms Jama without justification.
382. In our judgment, she treated Ms Jama less favourably than she treated Mr Zadorozny: she sought to downplay the seriousness of Ms Zadorozny's conduct and to implicate Ms Jama. There was a difference of race and of treatment. We had regard to the false account she gave to Ms Babb (para 93), as well as the general factors we have identified above (para 339 onwards) into account. We are satisfied that the burden shifts to Ms Valera-Larios.
383. As for her explanation that she did not believe that the incident gave rise to welfare concerns because no liquid escaped from the tube, that is to ignore the potential for harm, which was obvious to other senior managers. The impact of being on the receiving end of such inappropriate behaviour from a senior colleague is obvious. The welfare implications spoke for themselves.
384. In cross-examination Ms Valera-Larios said: 'if one person [Ms Zadorozny] tries to resolve an issue and another senior [Ms Jama] is present, I don't see why it

should be pushed onto Ms Zadorozny'. This was to ignore the obvious distinction: Ms Zadorozny had thrown a sample across the lab, Ms Jama had not.

385. In our judgment, Ms Valera-Larios has not discharged the burden on her to show that race was in no sense whatsoever a factor in her conduct. For these reasons, the claim of direct race discrimination is upheld, subject to limitation; we do not consider the harassment claim.
386. Ms Valera-Larios knew that the Claimant had raised a health and safety concern about the incident with Mr Myburgh. We are satisfied that this also materially influenced her handling of the conversation on 20 February 2020; she set out to defend Ms Zadorozny against the complaint. The Claimant's claim of whistleblowing detriment is well-founded.
387. As for victimisation, it was not put to Ms Valera-Larios that the fact that she knew from Mr Myburgh that the Claimant had complained about race discrimination played a part in her response; the claim was barely pursued in closing submissions and we do not uphold it.

Jama Issue 13: J-DD9 / J-HAR9: '[on 28 February 2020] Claire Beck and Tatyana Zadorozny were invited to attend and did attend training on 28.2.20 whilst Ubah Jama was not invited and not told about the training'

388. The Claimant was treated less favourably than her two white colleagues: she was not included in relevant training (para 103 onwards). Taking into account the factors we have identified above (para 339 onwards), we are satisfied that the burden passes to Ms Valera-Larios to explain her conduct.
389. Her explanation was, effectively, to blame Ms Jama for not showing initiative and asking to be included. That does not explain why, knowing that important training was taking place, she did not take steps herself to involve Ms Jama, nor why she was content to allow the two white seniors to be the only members of staff who benefited from this opportunity. Her explanation was inadequate and the claim of direct race discrimination succeeds, subject to limitation. We do not consider the alternative harassment claim.

Jama Issue 16: J-DD11 / J-HAR11 – '[on 17 March 2020] Tatyana Zadorozny lost her temper again and threw a sample storage rack labelled coronavirus into the clinical waste bin and when the rack did not go in the bin, kept hitting it against the bin aggressively, splashing the biological samples inside, in front of 3 black employees including Ubah Jama and Pamela Akite. ('the second health and safety incident)'

390. The conduct (para 115 onwards) was unwanted by all of Ms Zadorozny's colleagues, including Ms Jama, who witnessed the latter stages of the incident. We accept her evidence that she perceived the conduct to have had the effect of creating a hostile environment for her (and others): she felt unsafe and threatened by these repeated displays of anger. It was reasonable for the conduct to have that effect, particularly in such a sensitive environment.
391. This was the second incident in which Ms Zadorozny displayed aggression in front of colleagues, all of whom were black, and triggered on both occasions by an innocent remark by one of them. There were no instances of her behaving in this manner in front of, or in response to, white colleagues. We are satisfied

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that there is evidence from which we could conclude that Ms Zadorozny's reaction was related to race.

392. Ms Zadorozny's explanation was that she was 'training Ishak Mr Alibhai, he was quite new. I was bombarded with questions, feeling stressed and tired'. In our judgment that does not adequately explain why she reacted so aggressively and disproportionately to Ms Akite's comments.
393. The complaint of harassment related to race succeeds, subject to limitation. We do not consider the alternative direct discrimination claim.

Jama Issue 3: J-DD2 / J-HAR2 – 'In [March] 2020, C2 requested annual leave from 06.05.20 to 07.05.20 which was unreasonably rejected by IVL with no reason given, and when only 4% of staff were on leave (only 2 people from the department) at the time of the request. IVL was off on leave on 07.05.20 and TZ was given leave for 07.05.20 at the last minute'

394. We have concluded that the sole reason why Ms Valera-Larios refused the Claimant's annual leave request in March 2020 (para 138 onwards) was because she considered that there were already too many people off work for one reason or another. The fact that, much later, she allowed Ms Zadorozny to take one of the same days as leave cannot affect her reasoning two months earlier. We accept her explanation that she took that decision at short notice and for compassionate reasons.
395. We can understand why Ms Jama might regard the treatment as unfair, but our focus must be on the mental process of Ms Valera-Larios at the point at which she refused the Claimant's request, and we are satisfied that the Claimant's race played no part in the refusal. The circumstances of the later decision were materially different.
396. The claims are not well-founded.

Jama Issue 20: J-DD13 / J-HAR13 / J-VICT3 / J-DET4 – 'While Ubah Jama was on sick leave from 30 March – 20 April 2020 with suspected Covid 19 symptoms including a painful ear infection and hearing loss, Iris Valera-Larios sent her an e-mail stating that she was required to work from home on the EQA SOP/IQC review form'

397. Ms Valera-Larios wrote to both black members of staff, suggesting they should work, even though she definitely knew that one of them was ill and probably knew the other was (para 146 onwards). She only wrote to one of the white members of staff, suggesting that she work, but she knew that she was not ill. She did not write to the other white member of staff, who was ill, at all. She knew that the Claimant had complained of race discrimination.
398. There was less favourable treatment and a difference of race; moreover, the white members of staff had not done protected acts. We also had regard to Ms Valera-Larios's email to Ms Babb (para 153), in which she made allegations against black members of staff, but not against white staff. There is evidence from which we could reasonably conclude that there was unlawful discrimination (direct discrimination and victimisation).
399. Ms Valera-Larios gave the following explanations: that she did not know Ms Jama was ill; that all that all she knew about Covid was that you got a cough if

you caught it; and that Mr Kemp had instructed her to ask people on sick leave to work from home. All of them were untrue. Consequently, the claims of direct race discrimination and victimisation succeed, subject to limitation; we do not determine the alternative harassment claim.

400. Further, we have concluded that Ms Valera-Larios was influenced, in part at least, by the fact that Ms Jama had made protected disclosures about Ms Zadorozny and the treatment was retaliatory. The whistleblowing detriment claim is upheld, subject to limitation.

Jama Issue 21: J-DD14 / J-HAR14 / J-VICT4 / J-DET5: '[On 22 April 2020] During a return-to-work interview, Paul Cockfield informed Ubah Jama that Iris Valera-Larios would like her to be transferred to King George Hospital to help with Internal Quality Control trends and External Quality Assurance of Biochemistry tests'

401. Mr Cockfield and Ms Valera-Larios both knew about Ms Jama's complaints of race discrimination and her health and safety disclosures. Ms Valera-Larios asked for Ms Jama to be transferred; Mr Cockfield approved the request (para 155 onwards). Mr Cockfield expressly referred to the fact that its purpose was to get Ms Jama out of the environment 'about which she had complained'. We have concluded that the reason why they did so was, in part at least because Ms Jama had complained about race discrimination and made protected disclosures. The claims of victimisation and whistleblowing detriment succeed, subject to limitation. We do not consider the alternative harassment claim.
402. There was a difference of race and a difference of treatment: there was no suggestion of moving Ms Zadorozny. Mr Cockfield was evasive about whether Ms Patel (who was non-white and who had also complained about Ms Valera-Larios) had also been moved at Ms Valera-Larios's request. We consider that there was evidence from which we could conclude that Ms Jama's race also played a part in the decision.
403. Mr Cockfield gave no satisfactory, non-discriminatory explanation as to why Ms Jama should be moved, rather than Ms Zadorozny. Ms Valera-Larios acknowledged that she could have transferred Ms Zadorozny away but said that she 'couldn't afford to lose her'. There was no evidence that Ms Zadorozny was indispensable in a way that Ms Jama was not.
404. The First Respondent has not discharged the burden on it. Consequently, the claim of direct race discrimination also succeeds, subject to limitation. We do not determine the harassment claim.

Jama Issue 22: J-DD15 / J-HAR15 – '[1 May 2020] Iris Valera-Larios made arrangements with Claire Beck to send staff home early without any consultation with Ubah Jama even though Ubah Jama was team leader in the laboratory that day'

405. There was less favourable treatment and a difference in race: Ms Valera-Larios consulted Ms Beck, but not Ms Jama, who was team leader that day (para 161 onwards). There was detriment: the behaviour was undermining; this was not a particularly serious incident, but nor was it trivial.
406. We have already concluded that, by this point, Ms Valera-Larios's behaviour towards Ms Jama had on several occasions been materially influenced by race.

Taken together with the factors identified at para 339 onwards, we are satisfied that burden shifts to her to explain the treatment.

407. Ms Valera-Larios says that the reason she did not consult Ms Jama was because Ms Jama had made it clear that she was not prepared to speak to her. That is not true: Ms Jama had said that she would not speak to Ms Valera-Larios alone; she had not said that she would not do so at all. The explanation is inadequate and the claim of direct discrimination, which is in time, succeeds. We do not determine the alternative harassment claim.

Jama Issue 23: J-DD16 / J-HAR16 – ‘[on 14 May 2020] Prior to staff meeting on/around 14 May, Iris Valera-Larios released a table of tasks for staff for the whole year. Whilst Tatyana Zadorozny and Claire Beck were provided with the table in advance of other staff in the department, despite being a senior member of staff, Ubah Jama was not provided with the table of tasks in advance of other staff and had no input into compiling the table’

408. There was a detriment: the Claimant was professionally disadvantaged because she found herself in a meeting where others had greater input/insight than she (para 179). Again, the treatment was not of the most serious kind, but nor was it trivial.
409. There was less favourable treatment and a difference of race. In light of the conclusions we have already reached that, by this point, Ms Valera-Larios’s actions were materially influenced by race, together with the general factors (at para 339), we are satisfied that the burden shifts to her to explain the treatment.
410. Ms Valera-Larios had no explanation for excluding Ms Jama, other than the fact that she sometimes formed a small group. She did not provide an adequate explanation as to why that group did not include Ms Jama. Consequently, the direct race discrimination claim must succeed; we do not determine the alternative harassment claim.

Jama Issue 14: J-DD10 / J-HAR10 / J-VICT2 – ‘[Between 1 March and 31 July 2020] - Ubah Jama was assigned the greatest workload out of the Senior BMSs and was not given adequate time to do the work within her shift, in the staff rota which was prepared by TZ and approved by VL’

Jama Issue 26: J-DD19 / J-HAR19 / J-VICT6 / J-DET7 – ‘[on 11 June 2020] Ubah Jama sent an email to Iris Valera-Larios stating that she would like to monitor the QC trends for both their analysers and that she had not been given any days to perform these senior staff duties for the past 3 weeks. She stated that this was an important and very time-consuming task and involved checking trends and troubleshooting QC and that it would take a total of 2 days to complete. She received no reply to her request for 2 days to complete this clinically important task’

411. We have found (para 202 onwards) that Ms Jama was not given sufficient time (by way of senior days) in the three-week period leading up to 11 June 2020 to complete her work on the QC trends within her shifts. We have also found that she was given an excessive workload in a week when she was put down as team leader and assigned EQA work on all five shifts. These were plainly detriments.

412. Although Ms Zadorozny prepared the rotas, this allegation was not put to her in cross-examination or pursued in closing submissions; accordingly, we do not uphold it as against her. We have found that Ms Valera-Larios approved the rotas; she did nothing to rectify the position; she did not reply to Ms Jama's request, but instead complained to Ms Babb about her.
413. Ms Jama was treated less favourably than Ms Zadorozny, who was assigned senior days. We are satisfied that there is evidence from which we could reasonably conclude that there was unlawful discrimination: she gave misleading information to Ms Babb and sought to blame Ms Jama, who was not at fault, while making no criticism of Ms Zadorozny; she omitted to mention the fact that Ms Zadorozny had given herself senior days. Taken together with our earlier conclusions as to Ms Valera-Larios's motivation and the general factors we have identified at para 339, we are satisfied that the burden shifts to her.
414. Ms Valera-Larios could not give any explanation for the rotas, let alone an adequate one; her only comment was it was 'very strange'. Nor could she explain her failure to respond to Ms Jama's emailed request. It was submitted in closing that it was 'an oversight'. That is inconsistent with Ms Valera-Larios's own evidence that she agreed with Ms Babb not to respond to it (para 208). If it is true that she dealt with the substance of the complaint by saying at a group meeting that 'every day was seniors day', that was a disingenuous attempt to avoid the fact that Ms Jama had not received the protected time to which she was entitled.
415. Absent an adequate explanation, the claim of direct race discrimination succeeds; we do not deal with the alternative harassment claim.
416. Ms Valera-Larios knew by this stage that the Claimant had made allegations of race discrimination against her and health and safety disclosures in relation to Ms Zadorozny's conduct. We are satisfied that both of those factors played a material part in her response to the Claimant's request. In our judgment, the fact that Ms Valera-Larios gave false information to HR in response to a perfectly reasonable request strongly suggests that she was retaliating against Ms Jama for her complaints by seeking to paint her in a bad light. The claims of victimisation and whistleblowing detriment succeed.

Jama Issue 27: J-DD20 / J-HAR20 / J-VICT7 / J-DET8 – 'Iris Valera-Larios failed to reply to Ubah Jama's email [on 11 June 2020] requesting time off to work on her research project'

417. Although Ms Valera-Larios acknowledged the email, she did not reply to it substantively to arrange the time Ms Jama had requested (para 212 onwards). That was a detriment. We are satisfied that, had Ms Beck or Ms Zadorozny made the request, Ms Valera-Larios would have complied.
418. Having regard to the conclusions we have already reached, and the general factors we have identified at para 339, we are satisfied that we could conclude that her conduct towards the Claimant was now consistently tainted by considerations of race/the fact Ms Jama had done protected acts and made protected disclosures. We are satisfied that the burden shifts to her to explain her conduct.

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419. Ms Valera-Larios's only explanation was that it was 'an oversight'. We disbelieve her; we think it more likely that it was deliberate. Absent an adequate explanation, we uphold the complaints of direct discrimination and victimisation; we do not determine the alternative harassment claim.
420. We have also concluded, on the balance of probabilities, that the fact that Ms Jama had made health and safety disclosures about Ms Zadorozny materially influenced Ms Valera-Larios's conduct; that claim is also upheld.

Jama Issue 28: J-DD21 / J-HAR21 / J-VICT8 / J-DET9 – '[On 17 June 2020] Ms Valera-Larios failed to reply to Ubah Jama's e-mail that day about the laboratory using the incorrect Troponin reagent which has a greater interference from biotin'

421. Ignoring an important clinical matter (para 214 onwards) which Ms Jama had raised was professionally discourteous and was a detriment. We are satisfied that, had Ms Beck or Ms Zadorozny raised it, Ms Valera-Larios would have replied.
422. We could conclude from the fact that she gave several inconsistent explanations for her failure reply to this important email that there was unlawful discrimination. The burden shifts to her to explain the treatment.
423. Her final position was that she could not remember why she did not do so. Absent an adequate explanation, we uphold the claims of direct discrimination and victimisation; we do not determine the alternative harassment claim.
424. We are also satisfied that the fact that Ms Jama had made health and safety disclosures about Ms Zadorozny materially influenced the conduct and we uphold the whistleblowing detriment claim.

Jama Issue 30: J-DD23 / J-HAR23: '[on 2 July 2020] IVL emailed senior staff saying ALT (liver function test) was not performing well and they could not run it, rather than coming into the lab and communicating this urgent clinical problem and test unavailability to staff including Ubah Jama'

425. In cross-examination Mr Valera-Larios accepted that this was not the best way of communicating this important information (para 221 onwards). We think it improbable that she would have communicated it to Ms Beck or Ms Zadorozny in this way. Ms Valera-Larios also volunteered that Ms Jama 'did not want to talk to me', thereby acknowledging that there was something specific to Ms Jama which caused her to communicate by email rather than in person. There was plainly a detriment: Ms Jama was put at a disadvantage in discharging her duties.
426. There is a difference of race and a difference in treatment. Having regard to the conclusions we have already reached, and the factors we have identified, we are satisfied the burden shifts to Ms Valera-Larios to provide a non-discriminatory explanation. She gave two explanations: that Ms Akite was dealing with the matter, which we think improbable; and that Ms Jama did not want to speak to her, which is not completely accurate: Ms Valera-Larios must have known that Ms Jama would have spoken to her about such an important clinical matter, if it had been raised in an appropriate manner.

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427. We uphold the claim of direct race discrimination; we do not determine the alternative harassment claim.

Jama Issue 38: J-DD29 / J-HAR28 – ‘To date, the Trust has not taken disciplinary action against Tatyana Zadorozny over the 2 health and safety incidents other than giving her a verbal warning’

428. The alleged discriminator is Mr Kemp: it is he who decided the sanction based on the investigatory report, not the investigating officer (para 239 onwards).
429. Although the Tribunal regarded the amount of time it took to deal with this serious matter as excessive and the outcome unduly lenient, we have concluded that a reasonable employee, who was not the subject of a disciplinary investigation herself, would not have regarded it as a detriment to her that another employee was not more harshly sanctioned. Consequently, there was no detriment to Ms Jama and the claim of direct race discrimination must fail.
430. As for the harassment claim, even if we were to accept that the relative mildness of the sanction could constitute ‘unwanted conduct’ from Ms Jama’s perspective, we are not satisfied that she perceived that it created the proscribed environment. If it did, we have concluded that it was not reasonable for it to have that effect. That claim is also dismissed.

Jama Issue 34: J-HAR26 / J-VICT11 / J-DET12 – ‘[On 18 January 2021] Ubah Jama checked the new draft EQA Rag file and discovered that under the Ethanol and Anmonia EQA scheme tab of which she is the scheme owner, ‘Paininarse’ was written in place of her name for the entries for both Ethanol and Anmonia. Claire Beck had entered ‘paininarse’ in place of Ubah Jama’s name and Iris Valera-Larios [and Ms Beck] had failed to remove or change the comment prior to the discovery by Ubah Jama on 18 January 2021’

431. We are satisfied that the original insertion of the term ‘paininarse’ into the documents (para 250 onwards) was innocent, for the reasons given by Ms Beck; the claims fail in relation to that.
432. However, we considered that the position was different in relation to the failure to remove it from Ms Jama’s documents. We have concluded that this crossed the threshold into harassment: it had the effect of creating an offensive, indeed humiliating, environment for Ms Jama, given that these documents were visible to colleagues.
433. As for Ms Beck, we have concluded that there was not sufficient evidence that she knew that Ms Jama had made health and safety disclosures about Ms Zadorozny and the whistleblowing detriment claim fails. By a narrow margin we have also decided that there is insufficient evidence from which we could reasonably conclude that Ms Beck was motivated by race.
434. The position is different in relation to victimisation. There is no doubt that Ms Beck knew that Ms Jama had complained of race discrimination, including about her and including by way of issuing Tribunal proceedings. She was upset by the accusation (para 88). There was differential treatment: she removed the tag from all her own documents but not from Ms Jama’s. Her apology was half-hearted. We are satisfied that the burden shifts to Ms Beck to provide an adequate, non-discriminatory explanation in relation to the victimisation claim.

435. She accepted in cross-examination that it was unprofessional; that is why she removed it from her own documents. The only documents she did not remove it from were Ms Jama's. Her explanation was that she had simply forgot to do so. We find that implausible: Ms Perry had specifically highlighted Ms Jama's documents. We note her casual response to Ms Perry's discovery, in which she expressed no surprise or alarm, nor did she say that she would remove it. We also found her evidence that it never occurred to her that it would cause offence if Ms Jama saw it implausible: she must have realised that it would, given the history of tensions within the department between Ms Jama, Ms Valera-Larios, Ms Zadorozny and her. In short, we disbelieve her explanation and conclude that she left it in deliberately.
436. Absent an adequate explanation, the victimisation claim succeeds, as against Ms Beck as Second Respondent and the First Respondent.
437. Ms Valera-Larios was aware of the issue before Ms Jama discovered it but did not instruct Ms Beck to remove it. In view of this, and our earlier conclusions as to Ms Valera-Larios's conduct towards Ms Jama by this stage, we consider that an explanation is called for as to why she did not take steps to do so.
438. We regarded her explanation that it might be needed as 'evidence' as implausible: the evidence could have been preserved by taking a screenshot.
439. For these reasons, we uphold the claim of harassment related to race as against Ms Valera-Larios; we do not consider the alternative claims of direct race discrimination or victimisation.
440. We are also satisfied that Ms Valera-Larios's conduct was materially influenced by the fact that Ms Jama had made health and safety disclosures and we uphold the whistleblowing detriment claim as against her.

Jama Issue 35: J-DD27 / J-HAR27 / J-VICT12 / J-DET13 – '[on 21 January 2021] Paul Cockfield emails a brief unsatisfactory report about the 'paininarse' incident'

441. We have found (para 262 onwards) that Mr Cockfield's report was unsatisfactory. He took Ms Beck's explanation at face value, without ensuring that the matter was properly investigated. In doing so, we have concluded that he exacerbated the hostile environment which had, in part, been created for Ms Jama by this incident.
442. Having regard to the factors we have set out above (para 346 onwards), we are satisfied that there are facts from which we could properly conclude that there was unlawful discrimination and the burden shifts to him.
443. We accept that Mr Cockfield genuinely believed Ms Beck's explanation as to how the tag got into the documents in the first place. However, he gave no adequate explanation as to why he did not probe the question of why it had not been removed from the documents by Ms Beck or Ms Valera-Larios.
444. Consequently, we uphold the claim of harassment related to race; we do not consider the alternative claims of direct race discrimination or victimisation.
445. Absent a satisfactory explanation, we also uphold the claim of whistleblowing detriment: we are satisfied that, by this point, Mr Cockfield was influenced by

the fact that Ms Jama made health and safety disclosures. He now regarded her as a trouble-maker.

Jama Issue 36: J-DD28 / J-DET14 / J-HAR28 / J-VICT13 – ‘Paul Cockfield investigated an incident of Iris Valera-Larios cancelling a Roche engineer’s visit which occurred on 25 February 2021, and made findings and recommendations and gave feedback, which he recorded in writing dated 12 March 2021, downgrading the incident to ‘no harm’ and which contained false accusations and judgments about C2’s character and questioned her professionalism rather than objectively focusing on the root cause to prevent recurrence. It with the Lead before putting in an IR1’

446. A reasonable employee would consider that being subjected to personal criticism for raising a formal concern (para 270 onwards) constituted a detriment.
447. Had Mr Cockfield confined himself to a conclusion that the concern was not as serious as Ms Jama thought it was, he could not have been criticised. However, he unquestioningly took on board Ms Valera-Larios’s highly personalised criticism of Ms Jama (which, by now, he ought to have known to approach with caution) and replicated it in his outcome, calling into question Ms Jama’s good faith and purporting to require her (and others) to secure Ms Valera-Larios’s approval before raising an incident report. That was inappropriate and Mr Cockfield was obliged to revise his outcome.
448. We are able to make a positive finding that Mr Cockfield was materially influenced by the fact that Ms Jama had previously raised complaints of discrimination against Ms Valera-Larios. By now, he believed that she was a serial complainant and he allowed this (and Ms Valera-Larios) to influence his judgement. For these reasons we uphold the claim of victimisation; we do not address the alternative harassment claim.
449. Because we have found that the incident report itself was not a protected disclosure, the treatment flowing from it cannot have been whistleblowing detriment and that claim is dismissed.
450. We are not satisfied that Ms Jama has established facts from which we could reasonably conclude that Mr Cockfield was influenced on this occasion by her race and we dismiss that claim (which was not pursued in closing).

Conclusion: time limits in relation to Ms Jama’s claims

451. Ms Jama’s notification of early conciliation to ACAS was on 28 July 2020. The early conciliation period ended, and ACAS provided the early conciliation certificate, on 28 August 2020. This claim was presented to the Tribunal on 23 September 2020. As the claim was presented within a month of the end of the early conciliation period, assuming a maximum extension of time under the applicable provisions, the earliest date that is within the primary limitation period, as extended, is 29 April 2020.
452. The single allegation against Ms Beck, as Second Respondent, was presented in time.
453. The following allegations against the First Respondent are *prima facie* out of time: J-DD1 to J-DD14, J-HAR1 to J-HAR14, DET-1 to 5 and VICT-1 to 4.

454. Standing back and looking at the overall pattern of events, we have come to the conclusion that the acts of direct race discrimination, harassment related to race and victimisation which we have upheld constituted conduct extending over a period, up to and including the claims which we have found to be in time. We are satisfied that, taken together, they amounted to a 'continuing state of affairs' or 'ongoing situation' (to use the language of *Hendricks*) in which the First Respondent, through the conduct of Ms Valera-Larios, Ms Zadorozny and Mr Cockfield, created an environment in which Ms Jama was increasingly marginalised and excluded because of her race and then penalised for complaining about that treatment. For this reason, we accept jurisdiction in relation to all the claims which we have found to be well-founded.
455. Because we have reached that conclusion, there is no need for an extension of time in relation to the earlier matters. It may assist the parties for us to indicate that, if we had considered such an argument, it is likely to have succeeded.
456. As for the whistleblowing detriment claims, we are satisfied that they amounted to a series of similar acts/failures: Ms Jama's decision to put her head above the parapet and complain to Mr Cockfield, Mr Myburgh and Mr Middleditch about the two health and safety incidents identified her in the eyes of Ms Valera-Larios (and later Mr Cockfield) as a troublemaker and she was penalised and marginalised for this is well.

Conclusions: Ms Mntonintshi - protected acts

Mntonintshi Issue 3: M-PA1 – [on 9 March 2020] Princess Mntonintshi emailed Paul Cockfield, copying in Leonard Kemp, with concerns about the working environment within the Biochemistry team'

457. We have found (para 106 onwards) that this email does not mention discrimination. Nor do we accept the argument that Ms Mntonintshi was doing a protected act by corroborating Ms Jama's allegations of discrimination. Although arguable in principle, it would still require Ms Mntonintshi to make clear that she was corroborating the *discrimination* allegations of another person. She did not do that. Nor did Mr Cockfield believe that Ms Mntonintshi was complaining of discrimination at this point.
458. The email was not a protected act.

Mntonintshi Issue 6: M-PA2 – [on 6 May 2020] Princess Mntonintshi emailed Len Kemp, copying in Paul Cockfield and Iris Valera-Larios, regarding the accusations by Iris Valera-Larios'

459. Although we have found (para 176 onwards) that Ms Mntonintshi did not mention race discrimination, either in this email or orally, we have found (para 186) that Ms Valera-Larios believed that Ms Mntonintshi was complaining about race discrimination and supporting Ms Jama's complaints of race discrimination.
460. We reject Ms Patterson's submission that this was not pleaded. The agreed list of issues, incorporated into the preliminary hearing summary of EJ Jones after the hearing on 11 January 2021, contains the following at paragraph 7.4: 'did the respondent believe that the claimant had done or might do a protected act?' Ms Patterson objects that Ms Mntonintshi was not cross-examined on this basis. This does not assist her because Ms Mntonintshi would not be able to give direct

evidence as to what Ms Valera-Larios did or did not believe. Ms Valera-Larios was fairly cross-examined on the point and accepted it. She agreed that she believed that Ms Mntonintshi was supporting Ms Jama's complaints, including of race discrimination.

Conclusions: Ms Mntonintshi - Less/unfavourable treatment

Mntonintshi Issue 1: M-DD1 / M-HAR1 – '[In February 2020] Princess Mntonintshi was asked by her colleagues, Sarah Wardell and Elizabeth Perry, how she was able to remember her training even though she had been inactive for a year and a half, implying that she was incapable despite her many years of experience and training in the field'

461. We accept the explanations of Ms Perry and Ms Wardell (para 61 onwards). They were expressing admiration for Ms Mntonintshi's ability to recall processes after a significant gap and offering to help should she ever need it. Ms Mntonintshi misinterpreted their remarks. No reasonable employee would take the view that the remarks were to her detriment. If we are wrong about that, we have concluded that Ms Mntonintshi's race played no part whatsoever in their remarks; they were made for the reasons given by Ms Perry and Ms Wardell.

Mntonintshi Issue 2: M-DD2 / M-HAR2: [on 13 February 2020] - Tatyana Zadorozny lost her temper with a black colleague and threw a pleural fluid sample at the wall close to the Claimant and two other black employees, which was a health and safety breach and potentially dangerous.

462. We have reached the same conclusion in relation to Ms Mntonintshi as we reached in relation to Ms Jama (para 376 onwards) and for essentially the same reasons: what Ms Zadorozny did was unwanted conduct; it reasonably had the effect of creating a hostile environment for Ms Mntonintshi; and it was related to race. The claim of harassment succeeds, subject to limitation; we do not consider the alternative claim of direct race discrimination.

Mntonintshi Issue 4: M-DD3 / M-HAR3 – '[on around 4 May 2020] Iris Valera-Larios accused Princess Mntonintshi of wrongdoing by questioning why she had worked a late shift on 1 May 2020'

463. We are satisfied that a reasonable employee would conclude that the harsh and accusatory manner in which Ms Valera-Larios spoke to Ms Mntonintshi (para 163 onwards) was unwanted conduct. We accept that Ms Mntonintshi perceived that it created a hostile environment for her and we regard that perception as reasonable.

464. Ms Valera-Larios gave contradictory accounts of what happened on this occasion: in the 'probation statement', sent to Mr Cockfield on 18 May 2020 she suggested that Ms Mntonintshi's conduct 'could be interpreted as fraud', which is consistent with her being accusatory; at paragraph 107 in her witness statement she claimed that she had said simply 'OK but next time doublecheck with me because over time needs to be authorised in advance', which is not.

465. Taking into account the general factors (para 339 onwards), the burden of proof shifts to Ms Valera-Larios to provide a non-discriminatory explanation. In oral evidence she gave a different explanation: that she was concerned to ensure that Ms Mntonintshi was taking adequate rest breaks. That benign explanation is inconsistent with our findings as to her accusatory manner and with her later

allegation of potential fraud. Her explanations were not adequate, and we uphold the claim of harassment related to race; we do not determine the alternative claim of direct race discrimination.

Mntonintshi Issue 5: M-DD4 / M-HAR4 – ‘[on around 4 May 2020] Iris Valera-Larios wrongly accused Princess Mntonintshi of inviting a Roche representative, Pumla Horshe, who is black and South African, to visit the department to repair a machine during a national lockdown’

466. By completing an incident report, in which she identified Ms Mntonintshi as a perpetrator for allegedly inviting Ms Horshe to attend the premises during lockdown and maintaining that allegation even when she knew it was not true (para 168 onwards), Ms Valera-Larios subjected Ms Mntonintshi to unwanted conduct. We accept that Ms Mntonintshi perceived that it created a hostile environment for her, in which she was treated as untrustworthy; we regard that perception as reasonable in the circumstances.
467. We have summarised the contradictory evidence Ms Valera-Larios gave as to reasons for acting as she did (para 175). We note also Ms Valera-Larios’s assumption that Ms Mntonintshi and Ms Horshe might have wanted to socialise; we could reasonably infer that she made that assumption because both are black and from South Africa. The burden shifts to her to provide a non-discriminatory explanation.
468. Ms Valera-Larios has failed to discharge the burden. We cannot discern any cogent explanation for why she behaved as she did and continued to do so in the face of evidence of Ms Mntonintshi’s innocence. Her claim that her concerns were safety-related are negated by the fact that she did not ask Ms Horshe to leave.
469. The claim of harassment related to race succeeds; we do not determine the alternative claim of direct race discrimination.

Mntonintshi Issue 7: M-DD5 / M-HAR5 / M-VICT1 [on 18 May 2020] Iris Valera-Larios states to Paul Cockfield that she would like to extend Princess Mntonintshi’s probation and sends him a document called ‘Princess Mntonintshi Probation Statement’ with a number of disparaging statements and false allegations against Princess Mntonintshi’

470. There is no doubt whatsoever in our minds that Ms Valera-Larios’s email (para 182 onwards) was retaliation for the criticisms Ms Mntonintshi made of her in her email of 6 May 2020, which we have found she believed was a protected act. There was an almost total disconnect between the positive way in which Ms Valera-Larios characterised Ms Mntonintshi in the original probation review (before the complaint) and the damning account she gave of her in the probation statement (after the complaint).
471. In our judgment, this was a cynical act of victimisation.
472. As for the claim of direct race discrimination, there was no example before us of Ms Valera-Larios treating any of her white colleagues in this way. There is ample evidence from which we could reasonably conclude that Ms Valera-Larios was motivated by race: our earlier conclusions that race had already influenced her conduct; the misleading and untruthful nature of the document itself; the focus on criticising black, but not white, members of staff; her

reference to 'multi-cultural cooperation', taken together with her allegation in the email of 6 May 2020 about 'the racial divide they started in the team' (para 178); the inconsistent evidence she gave (para 188); and the general factors we have identified (para 339 onwards). The burden shifts to Ms Valera-Larios.

473. She was unable to provide an adequate explanation for this wholly unwarranted attack on Ms Mntonintshi. The claim of direct race discrimination succeeds; we do not consider the alternative harassment claim.

Mntonintshi Issue 8: M-DD6 / M-HAR6 / M-VICT2 – '[on 19/20 May 2020] The Trust subjected Princess Mntonintshi to an extended probationary period with the threat that her employment may be terminated'

474. There is no question that the decision to extend Ms Mntonintshi's probation period, which was initiated by Ms Valera-Larios and confirmed by Mr Cockfield (para 192 onwards), was a detriment and unwanted conduct. It also had the (reasonable) effect of creating a hostile working environment for her: it not only put her continuing employment at risk, it also jeopardised her ability to remain in the country.

475. We uphold the claims of direct discrimination and victimisation against Ms Valera-Larios for the reasons we have given in relation to the previous allegation; we do not consider the alternative claim of harassment related to race.

476. As for Mr Cockfield, Ms Mntonintshi accepted in cross-examination that she did not think that he was motivated by race in this instance. Given that concession, we do not uphold the claims as against him, although we emphasise that we regard his conduct in this matter as reprehensible for the reasons we have already given (para 194).

Mntonintshi Issue 10: M-DD8 / M-HAR8 / M-VICT4 – 'In a meeting [on 15 July 2020], Iris Valera-Larios questioned why the Trust had allowed Princess Mntonintshi to file a grievance while on probation, said that the grievance should not be allowed, that Princess Mntonintshi would be a problem for the next 2 years, that if she could not adapt to her management style she should be terminated and falsely accused her of bullying and harassing Tatyana Zadorozny and Claire Beck'

477. Telling your direct report to her face in front of a senior manager, as Ms Valera-Larios did to Ms Mntonintshi, that she should not have been allowed to raise a grievance while on probation period and ought to be dismissed because she would be a problem for the next two years (para 224 onwards), was a detriment.

478. We uphold the claims of victimisation and direct discrimination against Ms Valera-Larios for the reasons we have given in relation to the previous two allegations; we do not consider the alternative claim of harassment.

479. For the avoidance of doubt, we do not regard the fact that Ms Patterson secured an agreement in cross-examination from Ms Mntonintshi that, 'if Miss Valera-Larios said you need to adapt to her management style, that's not necessarily because of your race, is it?' as a concession that all Ms Valera-Larios's conduct at this meeting was not discriminatory. The question related to the most anodyne thing Ms Valera-Larios said, omitting her more serious statements.

Mntonintshi Issue 9: M-DD7 / M-HAR7 / M-VICT3 – '[20 May 2020 to date] The Trust has to date failed to confirm that Princess Mntonintshi has satisfactorily completed her probationary period'

480. The failure formally to confirm to Ms Mntonintshi that she had satisfactorily completed her probation (para 282) was an oversight on the part of HR. Ms Mntonintshi confirmed that she was not suggesting that anyone in HR was motivated by race. Nor was there evidence that anyone in HR was motivated by the fact that Ms Mntonintshi had done a protected act. The claims accordingly fail.

Time limits

481. Ms Mntonintshi's notification of early conciliation to ACAS was on 12 July 2020. The ACAS early conciliation certificate was provided on 19 August 2020. The claim was presented to the Tribunal on 15 September 2020. As the claim was presented within a month of the end of the early conciliation period, assuming a maximum extension of time under the applicable provisions, the earliest date that is within the primary limitation period, as extended, is 13 April 2020.

482. It follows that allegation M-HAR2, which we concluded was well-founded, is *prima facie* out of time. There is a significant time-gap between this claim and the next claim of harassment which is both in time and well-founded (M-HAR3). We do not consider that there is evidence of conduct extending over a period at this early stage in the chronology of Ms Mntonintshi's case.

483. We considered whether to extend time in relation to M-HAR2. Ms Mntonintshi's does not have a particularly cogent explanation for not bringing the claim earlier, but that is not determinative. The period of delay is relatively short. We do not consider that the First Respondent was prejudiced in dealing with the claim: Ms Zadorozny knew almost immediately that her behaviour was being challenged and gave her own account to Ms Valera-Larios soon afterwards; the unsatisfactory nature of that account had nothing to do with the passage of time. On the other hand, the prejudice to Ms Mntonintshi, if not time is not extended, is considerable: she would be deprived of a remedy in relation to a claim which we have found was both grave and meritorious. In all the circumstances, we have concluded that it is just and equitable to extend time in relation to this claim of harassment related to race.

Remedy

484. There will be a remedy hearing to determine the compensation to which the Claimants are entitled. Both remain in employment. If the parties can agree the amount of compensation, they must notify the Tribunal immediately. If not, they must write to the Tribunal no later than 28 days after this judgment is sent out, providing their dates to avoid for a one-day remedy hearing, along with a proposed schedule of directions for the Tribunal to consider.

Case Numbers: 3202401/2020, 3202513/2020 and 3204804/2021

Employment Judge Massarella
Date: 24 February 2023