EMPLOYMENT TRIBUNALS

Claimant: Mrs G Burgan

Respondent: Elysium Healthcare Limited

Heard at: Manchester Employment Tribunal (by video conference)

On: 30 and 31 January and 1 and 2 February 2023

Before: Employment Judge Dunlop
Mr A Wells
Mr TD Wilson

Representation

Claimant: In person
Respondent: Mr P Wilson (counsel)

JUDGMENT having been sent to the parties on 7 February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The respondent is a healthcare provider which runs a number of private hospitals specialising in mental health provision. The claimant, Mrs Burgan, worked as a bank recovery worker (effectively, a healthcare assistant) in the period May to November 2020 when she was removed from the respondent's list of bank staff. She has brought claims of direct discrimination and harassment on grounds of race, and of detriment for having made a protected disclosure.

The Hearing

2. The hearing took place remotely by CVP over four days. We were provided with an agreed bundle of documents of around 230 pages and witness statements. We took time on the first morning to read the witness statements and the key documents referred to in the statements. During the course of the hearing we read the documents which we were referred to by the parties, we did not read every document contained in the bundle.

3. We heard evidence from the claimant and, on behalf of the claimant, from Jane Wilds, a former colleague and Mr Burgan, the claimant's husband.

4. We then heard evidence from the respondent's witnesses: Emma Lamb (Lead Nurse); Safiyya Sidat (Ward Manager); Allison Mayoh (Hospital Director); Jacqueline Scott (Clinical Nurse Manager (retired)) and Alexis Shaw (Ward Manager).

5. We concluded the evidence by noon on day three. We adjourned during the afternoon of day three to enable Mr and Mrs Burgan to attend a funeral. On the morning of day four, the parties presented their submissions. Each side put their arguments in writing, and supplemented these arguments with oral submissions. We adjourned to consider our Judgment, which was given orally on the afternoon of day four.

The Issues

6. The issues in the case were identified by Employment Judge McDonald in a preliminary hearing held on 18 June 2021. It was noted by EJ McDonald that Mrs Burgan accepted she was a worker rather than an employee and was unable to bring a claim of unfair dismissal. (We note that, even if she had been an employee, her short length of service would still have prevented her from bringing a 'standard' unfair dismissal claim.)

7. EJ McDonald went on to identify the email that Mrs Burgan relied on for the purposes of her detriment claim and set out the test as to whether that email contained a protected disclosure. The detriments alleged were the initial decision to cancel shifts Mrs Burgan had been booked to work, and then the subsequent decision to terminate her engagement as a bank worker and stop offering her shifts altogether.

8. As regards the race claim, he identified four separate incidents where it was alleged that Mrs Burgan had been subject to less favourable treatment by her manager, Jackie Scott. Each of these was said to amount to direct discrimination and three of them were alternatively said to amount to harassment. The fifth allegation of direct discrimination was the decision to terminate the claimant's engagement as a bank worker. The list of issues sets out the legal tests for both direct discrimination and harassment and identifies that the Tribunal will also need to consider time limit issues and, if any of the claims are successful, what the appropriate remedy would be.

9. We have reproduced the list of issues in full as an annex to this Judgment.

10. At the start of the case we sought to confirm with the parties whether the list of issues remained accurate and complete. Mrs Burgan indicated that she was 'not sure' that the treatment complained of was due to her race and believed that she may have been treated differently as a bank worker. Mrs Burgan further stated that she understood she could not bring a claim for 'unfair dismissal' but did want to bring a claim for 'unfair termination' and made procedural criticisms of the respondent's actions in terminating her engagement.

11. The respondent acknowledged that, in respect of the 'dismissal' process Mrs Burgan had been treated differently than an employee with full employment rights would have treated. Their position is that such a distinction is both common practice and expressly envisaged by the relevant legislation which offers different rights and protections to workers as against employees.

12. We discussed whether Mrs Burgan's comments should be treated as an amendment application. However, it was difficult for the Tribunal to formulate any claim within the jurisdiction of the Tribunal which would enable Mrs Burgan to put forward the arguments she wished to rely on. The Judge explained to the claimant that if the claim was to be re-cast as, for example, a claim under the Part-Time Workers Regulations 2002 that would almost inevitably result in a lengthy adjournment, with no guarantee that a more arguable claim would result.

13. Following these discussions Mrs Burgan confirmed that she wished to proceed with the claim as it had been expressed in EJ McDonald's List of Issues.

Findings of Fact

Background facts

14. Mrs Burgan is a primary school teacher, she describes her race as British Asian or British Indian. When schools closed due to covid she signed up to become a 'bank recovery worker' for the respondent, starting in May 2020. As noted above, Mrs Burgan accepts that she was never an employee. As a worker she has certain employment rights, although not as many as she would have as an employee.

15. The respondent operates a number of hospitals particularly, for the purposes of this case, psychiatric hospitals and facilities. As a bank worker, Mrs Burgan could be offered shifts at a variety of hospitals. In her case, she worked mainly at St Mary's Hospital in Warrington. Her manager there was Jackie Scott, who was the hospitals clinical nurse manager and responsible for around 100 bank staff.

16. The role of bank recovery worker is an unqualified role, but staff were provided with a week-long inducation and required to complete on-going training. This included training in relation to patient observations and the slides/handouts from that training appeared in the bundle. It is evident from that material that patient observations formed an important part of the work of the recovery workers and that the respondent went to some lengths to explain the purpose and importance of such observations to its staff.

17. Each patient was allocated an observation level. In ascending order of intensity there were:
    Level 1 – General observation
    Level 2 – Intermittent observation
    Level 3 – Within eyesight observation
    Level 4 – Within arm's length observation

18. The training materials explain what is required of staff at each level of observation. In particular, staff are expected to keep patients at level 3 within sight at all times. The training materials indicate that patients' care plans must indicate how the observation requirements are to be balanced with privacy and how patients at levels 3 and 4 are to be observed in their bedroom/bathroom.

19. Mrs Burgan told us, and we accept, that not all level 3 patients at St Mary's were required to be observed in the bathroom. Sometimes their care plans would provide for verbal contact to be maintained with an observer whilst they were in the toilet/bathroom instead.

20. Mrs Burgan seems to have been well-regarded at St Mary's and to have found the work generally rewarding.

Alleged incidents with Mrs Scott

21. As part of this case, Mrs Burgan has made complaints about interactions she had with Mrs Scott whilst working at St Mary's. She said that these amounted to either direct race discrimination or harassment. The complaints were set out in detail in the List of Issues, which referred to four separate incidents. Mrs Burgan's witness statement referred to only three incidences, and gave less detail than that which appeared in the list of issues. We have made some general findings of fact about each incident below, whilst our findings about the key disputed facts are set out later in this Judgment.

22. It is difficult to make clear findings of fact about what happened and difficult, in some cases, to tie together Mrs Burgan's evidence with the allegations as set out in the List of Issues and with the documentary evidence. None of these incidents were documented at the time and the context of all the incidents is the day to day worked being carried out by Mrs Burgan and Mrs Scott respectively. We set out the allegations below as they appear in the list of issues and set out our basic findings of fact about them. Our findings as to whether particular words were said by Mrs Scott are set out later in the Judgment.

That on a date to be clarified in May or June 2020 Ms Jackie Scott, the claimant's manager, had severe words with her and threatened to suspend her shifts because she had not carried out online training, which the claimant had in fact completed. The claimant says that Ms Scott later apologised via an internal email. The claimant says that during that incident Ms Scott referred to the claimant as "your sort". The claimant says this was a reference to her race.

23. There were emails in the bundle which demonstrated that Mrs Scott had 'chased' Mrs Burgan by email about outstanding mandatory training on 1 October 2020. Mrs Burgan confirmed that her training was up to date and Mrs Scott had apologised, explaining that she was referring to an outdated spreadsheet.

24. When questioned about the date, Mrs Burgan said that Mrs Scott regularly gave reminders to staff to complete training, but the incident where she had

apologised was a “one off”. Mrs Burgan said she had “no idea” about the date of that incident due to the passage of time.

25. We find that the incident Mrs Burgan was remembering was most likely the one in late September/October which led to this email. It is apparent from the context of the email that it arises out of an earlier verbal conversation.

On 21 August 2020, possibly around 2.00pm-4.00pm, after the claimant had asked a colleague, Kris Imundi, to seek help from management which was needed to lift a patient off the bathroom floor which was wet and on which the patient had been lying for two hours, the claimant says that Ms Scott said that “your sort should go back to your teaching post”. The claimant says that requests for help from the nurses in charge, Cath and Tulli (surnames not known) had been ignored. There were other healthcare workers present during that incident but the claimant does not know which ones.

26. This incident was not mentioned in Mrs Burgon’s statement at all and she wasn’t questioned about it, although she did ask question Mrs Scott about it and her own position became apparent through those questions.

27. We find that an incident of this nature occurred with a large patient who had laid himself on the floor. Both the claimant and Mrs Scott remembered the incident. Mrs Scott’s recollection was that it was part of his care plan that if he put himself on the floor it was advisable to leave him there and keep him warm until he decided to move. The witnesses disagreed as to whether the floor was wet.

On 21 September 2020 Ms Scott threatened to suspend the claimant's shifts for being unable to attend MVA (managing Violence and Aggression) training due an injury she had sustained to her back. The claimant says she sustained the injury on Sunday 20 September and spoke to Ms Scott about it on the following day. The training was due to happen in October 2020. That was a face-to-face conversation between the claimant and Ms Scott which was witnessed by Laurie, the Ward Manager, (whose surname the claimant is going to confirm). The claimant confirms that Ms Scott did not use the phrase “your sort” during this incident.

28. We accept that the MVA course was compulsory for workers in the claimant’s role. Emails from around this time show that she had had to postpone her attendance on the course due to an injury. On 30 September Mrs Burgan emailed Mrs Scott to say that she had banged her head and coccyx in an accident and would need to, once again, postpone the MVA training which she was due to attend the following week. She acknowledged that it was “imperative” for her to do this training.

29. On the same day Mrs Scott replied expressing her concern about the situation and stating that she would take further advice and then contract Mrs Burgan again. We consider it likely that the conversation Mrs Burgan remembers occurred after this date, rather than on 21 September 2020.

30. We find that Mrs Scott did tell Mrs Burgan than she would be suspended from undertaking shifts if the training was not completed. This reflected the respondent’s policy that the training was mandatory and the fact that the

claimant's training was already delayed. Ultimately, Mrs Burgan did attend the course as scheduled.

On 14 October 2020 Ms Scott threatened to suspend the claimant's shifts for having her mask around her chin. The claimant says that Ms Scott spoke to her twice about this when in patient rooms. On both those occasions, the claimant says the patient was asleep under the duvet and the claimant was maintaining a two-metre social distance. The claimant says that she was not therefore contravening the guidance about the wearing of masks. The claimant says that nobody witnessed Ms Scott telling her off for not wearing her mask when she was in MS's room. When Ms Scott told her off for not wearing a mask in a patient's room, there was an agency worker present, but the claimant does not know their name. The claimant says that both she and the agency worker had their masks on their chin. The claimant says that the threat to suspend her shifts was made by Ms Scott later that day on the ward. There were other staff on the ward, but the claimant could not identify any specific witnesses. The claimant said that during this incident Ms Scott also used the phraseology "your sort". The claimant says that Ms Scott said words to the effect that if "your sort can't do the job they should go back to teaching".

31. Mrs Burgan was confident of the date in relation to this allegation. The respondent observed, and we accept, that this coincided with an up-tick in incidences of covid, which was particularly acute in the north west region. We accept that mask-wearing was important for the hospital and accept Mrs Scott's evidence that a significant proportion of her time in this period was spent trying to ensure compliance.

32. Mrs Burgan explained that she felt she was acting within the rules as she and another member of staff were having a cup of tea at the time.

33. Mrs Scott accepted that she did tell staff members whom she observed not wearing masks, or wearing them incorrectly, that their shifts could be suspended. She has no particular recollection of this incident with Mrs Burgan. The Tribunal does not find that surprising as it is clear to us that this was a commonplace event for Mrs Scott. We are satisfied that she did observe Mrs Burgan with her mask around her chin and did tell her that her shifts could be suspended if she did not wear the mask as required. We make no finding as to whether Mrs Burgan was in fact drinking tea, or as to whether Mrs Scott's reprimand was justified within the hospital's rules at the time.

34. We make further findings, including about the alleged comment using the words "your sort", below.

2 November 2020 Incident

35. On 2 November 2020 Mrs Burgan undertook a shift at another of the respondent's sites, the Gateway Recovery Centre. This was her first shift at that site and she was working on a ward for women with serious mental health problems.

36. For certain blocks within her shift, Mrs Burgan was allocated to conduct hour-long one-to-one observations of a patient. We will refer to the patient as 'Patient A'. This was a level 3 observation within the respondent's policy.

37. Mrs Burgan should have received a shift handover. She stated during this hearing that she had received a general handover but not an additional handover about specific patients, and points out that she has not signed the documentation to indicate that she received this handover. The respondent's position is that other staff who were on the ward in the day are clear that she did receive a handover. We do not have to resolve that dispute for the purposes of this case, but it is material to note that there was a dispute on this point. There is a similar dispute as to whether Mrs Burgan had been given time at the start of her shift to read care plans.

38. Towards the end of Mrs Burgan's shift, whilst she was carrying out observations on Patient A, the patient went to the en-suite bathroom in her room. Mrs Burgan permitted her to do this and did not maintain visual contact with her. When verbal contact ceased Mrs Burgan raised the alarm. The patient had self-harmed by applying a ligature. The ligature was successfully removed.

39. There is a dispute between the parties as to whether Mrs Burgan was at fault for not maintaining visual contact with Patient A when she went to bathroom, or whether the Gateway Recovery staff should have explicitly informed her that this was required. Mrs Burgan's position is that at St Mary's the care plan for the patient would have been clear as to what arrangements were for observation and toilet visits and that a new member of staff would have been clearly told verbally what those arrangements were. Here, she had no information about the position with Patient A. Her position, if we understand it correctly, is that the default would be for verbal contact to be maintained in the bathroom. The respondent's position is that the default position is that level 3 observations require eye contact at all times, including whilst the patient is in the toilet or bathroom.

40. Mrs Burgan was adamant that the fault for this incident lay entirely with the staff at Gateway who had failed to properly brief her. The respondent appears to consider the matter to be equally straightforward in that Mrs Burgan was at fault for failing to maintain eye-line contact.

41. Of course, these possibilities are not mutually exclusive, and it is often the case that serious failures happen as a result of more than one point of failure. It is not our role to enquire into exactly what happened on the ward, what might have been done to prevent it, and the extent of fault, if any, on Mrs Burgan's part. Given the seriousness of those questions and the limitations of the evidence presented to us, it would be wrong to be drawn into expressing any views on that. It is sufficient to note that this was a very dangerous incident involving the claimant's performance of her duties and that the respondent rightly took it seriously.

42. There was a debrief about the incident and Mrs Burgan ended her shift and went home. She completed a scheduled shift at St Mary's the next day. On 4 November, she had a scheduled day off.

43. At 14.46 on 4 November Mrs Lamb, the Lead Nurse at the Gateway Recovery Centre, emailed Mrs Scott and Mr Loo (who was the Lead Nurse at St Mary's) to inform them that a safeguarding incident had occurred, that there would be an investigation and that, pending the outcome of the investigation, Mrs Burgan would not be able to complete any more shifts at Gateway Recovery Centre.

44. At 21.44 that evening, Mrs Burgan emailed Alexis Shaw, who was the ward manager for Cavendish ward at St Mary's, setting out concerns about certain matters relating to patients on that ward. Mrs Burgan relies on that email as being a protected disclosure. The respondent disputes that it is, and our conclusions in respect of that are set out later. For the purpose of the narrative, we record, broadly, that the email raises some concerns about staff not taking a fair share of the workload and discussing patient confidentiality. It then goes on to discuss two particular patients and criticises the treatment those patients are receiving.

45. There is an allusion in the letter in respect of one patient to "what occurred at his flat recently" which Mrs Burgan said "I liken to sexual abuse of a child". It transpired that this related to an allegation that two members of staff who had recently formed a relationship had been indulging in sexual activity within that patient's flat. Although only hinted at in the letter, this allegation played a prominent part in the evidence given orally by Mrs Burgan and by Mrs Wilds. They suggested that the matter was well-known around the hospital and that the staff members involved, who were otherwise considered to be strong staff members, were given a 'slap on the wrist' with no formal sanction. It was a significant plank of Mrs Burgan's argument that these individuals had done something much more serious than she had, and yet had been treated much more leniently. Mrs Mayoh (who was not in post at the relevant time) gave evidence that an investigation at the time into these allegations had found them to be unsubstantiated.

46. On the morning of 5 November Mrs Scott suspended Mrs Burgan from her duties at St Mary's. We are satisfied that the email had not come to her attention at this point and that the reason for the suspension was solely due to the incident on 2 November at the Gateway Recovery Centre. We find nothing surprising in the fact that the Gateway Recovery Centre managers considered Mrs Burgan should not be offered more shifts pending the investigation, nor in the fact that St Mary's managers followed their lead and reached the same decision.

47. Mrs Scott met with Mrs Burgan to explain that she was being suspended. Mrs Scott told her she would be invited to a meeting as part of the investigation. This was based on Mrs Scott's experience of what an investigation would involve. After the suspension meeting Mrs Burgan was escorted from the site. Mrs Burgan was very upset by the manner in which she says this was done and considered it appalling. We consider the respondent had good reasons for the practice of escorting staff from the premises in these circumstances. There are disputes of fact as to what actually happened as they left the building – for example whether there was an interaction with a patient who asked where Mrs Burgan was going. We have not found it necessary to make a determination on these points.

48. Miss Shaw forwarded the disclosure email to Mrs Scott and Mr Loo at 12.18 on 5 November, after Mrs Burgan had been suspended. The email includes the comment *"in light of this morning's event it is just for information purposes*". The Tribunal was surprised by that comment. As indicated in Mrs Burgan's email, it is not a small matter for an unqualified member of staff to reach out to someone several rungs above them and raise concerns about practices they are encountering on a day-to-day basis. Although the information provided was not detailed, it was concerning, and we would expect that the respondent would wish to know more about what was causing such concern in order to ensure that appropriate action could be taken if needed. This is particularly the case given the nature of the patients in the respondent's care.

49. We don't understand why the fact that Mrs Burgan had been suspended due to an unrelated matter would affect what Miss Shaw did with the information she was given. The evidence given in Miss Shaw's witness statement about the steps she supposedly took to look into these matters appeared superficial and condescending to Mrs Burgan. She omitted any mention of the very grave allegations of sexual misconduct which were alluded to, although not spelt out, in Mrs Burgan's email. Similarly, Mrs Scott's initial evidence that she had "no recollection" of any such matter being alleged was simply not credible. The Tribunal would have expected a much greater level of candour from the respondent in respect of these matters.

50. The Gateway Recovery Centre investigation was conducted by Safiya Sidat, a ward manager at the Centre. If this was an unfair dismissal case, then we would have significant criticisms of this investigation. However, Mrs Burgan does not have the right to claim unfair dismissal and we are not considering the case through that lens. In fairness to the respondent, it must also be noted that Miss Sidat's investigation was a clinical investigation into the incident, and not a disciplinary investigation into Mrs Burgan.

51. Broadly, Miss Sidat appears to have kept no records of the interviews which fed into the conclusions she reached in her report, nor has she taken care in the report to identify the sources for particular pieces of evidence.

52. Although Miss Sidat has identified a level of discrepancy between what Mrs Burgan was saying and what other staff were saying, it is clear that the discrepancies in fact went much deeper. For example, it is recorded as a fact in the report that Mrs Burgan unlocked the en-suite door for Patient A, whereas Mrs Burgan disputes this and says it was already unlocked. It appears that Mrs Burgan was not given the chance to comment on, or respond to, assertions made by members of staff on the ward, for example about the level of handover she had received.

53. Mrs Burgan was not invited to meet with Miss Sidat. She was interviewed over the phone on two occasions and this may well have reflected the covid-19 situation at the time. However, the fact that Mrs Scott had told her she would be invited to a meeting added significantly to her sense of grievance.

54. Miss Sidat's report was dated 11 November 2020. However, it is apparent when one considers emails sent to and from Miss Sidat gathering information which appears in the report that was actually finalised no earlier than 17 November 2020. We accept Miss Sidat's evidence that she started drafting the report into a template on 11 November, added to the document as she proceeded with her investigation, and omitted to change the date when she finalised it on 17 November. This was sloppy but not, in our judgement, evidence of any sinister practice or malign motive.

55. It was a significant part of Mrs Burgan's case that Miss Sidat's investigation had pre-judged her conduct as the report had been written before one of Miss Sidat's telephone interviews with Mrs Burgan. Even when documents which made clear that the report must have been mis-dated were brought to Mrs Burgan's attention in cross-examination, she was very reluctant to change her position on this point.

56. The report included the conclusion that "*There is supporting evidence to suggest The staff member had the knowledge and information required to conduct Level 3 observations safely, however did not. The patient came to harm as a direct consequence of this. It is therefore recommended that this is followed up with the staff member using the appropriate HR process at their employing site (St Mary's Hospital)*."

57. This conclusion was notified to Mrs Scott, Mr Loo and Mrs Mayoh on 18 November 2020, along with notification that Mrs Burgan would no longer be permitted to work at the Gateway Recovery Centre. The matter was discussed between the three recipients. There is an email from Mr Loos expressing that "*as much as I like the individual it will be very unwise for us to continue to use her*". He elaborates that there could be difficulties with safeguarding regulators if Mrs Burgan was to return and a similar incident occurred. Following the discussion, Mrs Scott wrote a letter to Mrs Burgan terminating her engagement as a bank worker on 24 November.

58. There was a significant amount of correspondence between the parties following the termination of Mrs Burgan's engagement, most of which we need not elaborate on. However, one matter which we would mention is a letter dated 14 December 2020. This went out in Ms Mayoh's name, but was written for her by HR. It sought to bring the on-going correspondence to a close. Unfortunately, the letter stated that the nature of the incident that had led to Mrs Burgan's removal from the bank was that she had fallen asleep on duty. This was completely wrong, and appears to have come about due to the HR draft not being properly checked. When Mrs Burgan drew this to Ms Mayoh's attention, she received an acknowledgment that this was an administration error, and an apology, by letter dated 21 December 2020. Once again, we characterise this as an error on the part of the respondent which was sloppy, but not sinister. It is the experience of the panel that these errors do happen, and perhaps more regularly than a careful and fastidious person, perhaps like Mrs Burgan, might imagine. Again, it was clear from her conduct in the hearing that Mrs Burgan had struggled to accept this explanation and believed that there was a wider significance to this comment (which she characterised as a libel, nothwithstanding the fact the error had been made in private correspondence to her).

Relevant Legal Principles

Protected disclosure

59. Section 43B(1) Employment Rights Act 1996 provides as follows (emphasis added):

> **(1) In this Part a "qualifying disclosure" means <u>any disclosure of information</u> 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—**
> **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
> **(e) that the environment has been, is being or is likely to be damaged, or**
> **(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.**

60. A "qualifying disclosure" will become a "protected disclosure" depending on whom it is made to and, potentially, the circumstances in which it is made (ss43C-43H).

61. The respondent did not accept that Mrs Burgan's email to Ms Shaw of 4 November 2020 amounted to a protected disclosure. Specifically, Mr Wilson submitted that it did not amount to a disclosure of information. He pragmatically acknowledged, given the context in which the respondent operates and the fact that the disclosure concerned the well-being patients, that if the Tribunal found that Mrs Burgan had made a disclosure of information, then the other requirements were met and the email would amount to a protected disclosure.

62. The EAT considered the question of what amounts to a disclosure of information in the case of **Cavendish Munro Professional Risks Management v Geduld 2010 ICR 325**. The Judgment in that case establishes that disclosing information involves conveying facts, rather than simply making an allegation. Although the employers in the **Geduld** case where insurance brokers, the EAT used a hypothetical example set in a hospital to illustrate the difference. In a passage which has become well know, it was said:

> *"Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information."*

63. Later decisions, including that of the Court of Appeal in **Kilraine v London Borough of Wandsworth 2018 ICR 1850** have cautioned against making an overly rigid distinction between 'information' and 'allegations', pointing out that the categories can overlap. The key, according to that authority, is whether there is sufficient factual content in the statement that it satisfies the test of "tending to show" one of the matters listed at s43B. The Court of Appeal also commented on the hypothetical set out above, emphasising the

significance of context. If the employee in that scenario had made the second comment whilst physically showing the manager discarded sharps lying around the ward, then a different conclusion might be appropriate.

64. Finally, we note that a disclosure of matters already known to the person receiving the disclosure is still a disclosure.

65. Section 47B ERA provides that a worker has a right not to be subject to any detriment on ground that she has made a protected disclosure. Section 48(2) provides that it is for the employer to show the ground on which any act, or failure to act, is done. This shifts the burden of proof to the respondent to show the reason for the detriment if a claimant has successfully established that there was a protected disclosure and that she was subjected to a detriment by the respondent. It may be necessary for the Tribunal to draw inferences to establish the reason for the treatment and guidance as to how this is done is found in **International Petroleum Ltd v Osipov EAT 0058/2017** (this aspect of the case was not challenged in the subsequent appeal decision).

66. In considering whether the employee was subjected to detriment "on the ground" of having made her protected disclosure, the Tribunal must consider whether the protected disclosure materially (in the sense of more than trivially) influenced the employer's treatment of her (**Fecitt v NHS Manchester 2012 ICR 372, CA**). This is a broader test than that applies to unfair dismissal claims under s.103A, but it still requires a causative link, it is not sufficient that the detriment is related to the disclosure in some way.

Direct discrimination

67. Section 13 of the Equality Act 2010 provides that:

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

68. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur, which includes by subjecting her to "any other detriment".

69. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

70. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".

71. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he was treated less favourably than his comparator and there was a difference of a protected characteristic between them. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

72. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

73. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

74. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

75. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare, and that Tribunals frequently have to infer discrimination from all the material facts.

76. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

77. The way in which the burden of proof should be considered has been explained in many authorities. , including: **Barton v Investec Henderson**

Crosthwaite Securities Limited [2003] IRLR 332; Shamoon v Chief Constable of the RUC [2003] IRLR 285; Hewage v Grampian Health Board [2012] ICR 1054; Igen Limited v Wong [2005] ICR 931; Madarassy v Nomura International PLC [2007] ICR 867; Royal Mail v Efobi [2021] UKSC 33. In **Hewage** the Supreme Court approved guidance given by the Court of Appeal in **Igen**, as refined in **Madarassy**.

78. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36; Bahl v The Law Society [2004] EWCA Civ 1070**. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race would have been treated reasonably.

.***Harassment***

79. Section 26 of the Equality Act 2010 provides (as relevant) as follows:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

80. The leading case on harassment is **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**. In particular, we took account of the guidance set out in paragraphs 13-16 of that decision as to how the Tribunal should approach harassment claims.

Submissions

81. We were grateful to both parties for producing written submissions. Both sets of submissions focused on the facts of the case. Essentially, Mrs Burgan repeated various criticisms of the respondent's conduct which she had made in evidence. The respondent's submissions loosely followed the list of issues identified by Employment Judge McDonald. Mr Wilson emphasised the chronology of events and urged the Tribunal to find that there was no connection between the decision to firstly suspend Mrs Burgan and then terminate her engagement and either her race or the content of her email of 4 November 2020. Although Mr Wilson disputed that the email amounted to a protected disclosure, the main focus of his arguments was on causation.

82. In relation to the allegations of direct discrimination/harassment by Mrs Scott, it was notable that Mrs Burgan did not make reference to those allegations at all in her written submissions and only briefly in her oral submissions. Mr Wilson said that the allegations had not been put to Mrs Scott in cross-examination and that her evidence on these incidents should, in any event, be preferred to Mrs Burgan's.

Discussion and conclusions

Discrimination/harassment by Mrs Scott

83. We observed a tendency in Mrs Burgan's evidence to misinterpret matters and to view things in a more sinister or malicious light than was objectively justified. Two examples unrelated to the incidents of alleged harassment are her difficulty in accepting that an error had been made in the date of Miss Sidat's investigation report and her difficulty in accepting that the reference to her falling asleep on duty was an error. A further example relates to a comment made in Mrs Scott's witness statement where she said "*I believe that the Claimant did not understand the differences in procedure due to the fact that she was a bank worker and not an employee and therefore was requesting information and for union representation which she was not entitled to."* We consider that the straightforward interpretation of this statement is that different procedures applied to the claimant as a bank worker, than would have applied to an employee, but she struggled to understand that. Mrs Burgan interpreted it as meaning that Mrs Scott believed she had a deficit in understanding because she was a bank worker and Mrs Scott believed bank workers to be less intelligent than permanent staff. We do not accept that that was a belief held by Mrs Scott, and we do not consider it was an objectively reasonable interpretation of the comments in the witness statement (although we do accept it was Mrs Burgan's genuine reading of them). This tendency on the part of Mrs Burgan is significant in considering the allegations of discrimination/harassment she has made against Mrs Scott.

84. We are satisfied that there is no evidence of anything untoward in any of these incidents. We find that Mrs Burgan has misinterpreted normal, day to day interactions between Mrs Scott as a manger and herself as a case worker.

85. In particular, it is a mischaracterisation to say that Mrs Scott "threatened" to remove Mrs Burgan's shifts either in respect of training or mask wearing. We are satisfied that Mrs Scott would have, and did, inform Mrs Burgan and other workers about the consequences of not completing mandatory training or complying with masking policy. That was part of her role and cannot properly be described as a 'threat'. Unfortunately, there was an error made on at least one occasion when Mrs Scott thought that Mrs Burgan had not completed some training when, in actual fact, she had. We find that this sort of error is common and that Mrs Scott dealt with this in a polite and professional way.

86. Similarly, we are satisfied that the incident involving the patient on the floor (which was not mentioned in Mrs Burgan's witness statement) was simply a day-to-day interaction on the ward. There may well have been concern about how to address the patient's difficult behaviour, and how best to look after him, and staff could well have taken different views on this. The fact that there is a disagreement is not, of itself, evidence of discrimination.

87. The factor which might have turned these day-to-day interactions into something with a racial connotation is Mrs Burgan's allegation that, on several occassions, Mrs Scott used the terminology "your sort" in relation to Mrs Burgan. The Tribunal accepts that that is a phrase which could be a

reference to Mrs Burgan's race and, if used, could raise question marks about Mrs Scott's motivation, and whether she would have addressed a white colleague in a similar way.

88. Mrs Scott denies using the phrase at all. She readily accepts that such a phrase could have racist connotations and robustly denies that she would ever use it. We note that she has worked for a long time in a diverse environment and consider that she would be unlikely to use such terminology in a careless way. Mrs Burgan's evidence about this was limited. She did not, as Mr Wilson pointed out, make any reference to it in her witness statement. However, we would be reluctant to find against her purely on such a technical point – it is not always clear to claimant what needs to go into a witness statement when their case has already been put in other documents.

89. However, we conclude that we prefer Mrs Scott's evidence on this point for a number of reasons:
    89.1 Mrs Burgan made no contemporaneous complaint about the comments. Nor did she raise this treatment as a concern when she made her protected disclosure.
    89.2 Mrs Burgan told us she kept a diary. She has not disclosed diary extracts or suggested that she recorded these comments at the time.
    89.3 Mrs Burgan's account is not clear as to how these words fitted into the conversations that both sides broadly agree took place.
    89.4 Mrs Burgan indicated at the start of the hearing that she herself was not sure that the words were directed to her race, and considered that it might be a reference to her being a newcomer to this type of work.

90. For these reasons we reject Mrs Burgan's evidence that the words "your sort" were used by Mrs Scott. We reject her claim that she was subject to direct discrimination as we find that she has not proven facts which would shift the burden of proof onto the respondent. For the purposes of the harassment claim, whilst we accept that warnings or reprimands from Mrs Scott may have amounted to unwanted conduct, we are satisfied that these were in no way related to race. On this basis, the harassment claim must also fail.

91. We want to make it clear that do not find that Mrs Burgan has fabricated this part of her claim. We have noted that she has a tendency to misinterpret matters and to draw, and cling to, conclusions which are not justified on the material before her. If Mrs Burgan was going to fabricate an allegation of racism then, bluntly, we would expect her to have fabricated something much more direct and compelling than this. We consider that Mrs Burgan has genuinely misheard, and/or misinterpreted, the interactions she had with Mrs Scott on the occasions in question.

Time limits

92. The list of issues notes that there may be time limit issues in respect of these earlier acts. We did not discuss the time limit issues as part of our deliberations in view of our firm conclusion that there had been no act of discrimination or harassment.

Protected disclosure

93. We considered carefully the content of Mrs Burgan's 4 November email and formed the unanimous view that it did amount to a protected disclosure.

94. In particular, in relation to the patient referred to in the 7th paragraph of the letter, the information disclosed (regardless of whether or not it is correct) is that the patient is deteriorating; that he is not receiving much support; that he is receiving less therapeutic input than other patients and that he is engaging in suicidal behaviour. That information is less detailed than the information Mrs Burgan gave in her evidence, when she expanded considerably on her concerns about this patient and the reasons for them, but it is incontrovertibly information which tends to show that this patient's health and safety is being endangered. (Given that one of the matters set out in s47B is engaged, we did not consider it necessary to examine the others relied on).

95. It is harder to say whether the comments in the 6th paragraph related to another patient amount to a qualifying disclosure. Given that neither party has sought to draw a distinction in relation to the reason for Mrs Burgan's treatment between the comments made in the letter about one patient and the comments made about the other we consider that the conclusion in relation to the 7th paragraph is sufficient, and we do not draw a separate conclusion in respect of the 6th paragraph.

Detriment

96. The respondent accepts that it subjected the claimant to detriment by suspending her from her shifts and then by terminating her engagement as a bank worker.

97. Being satisfied that the email of 4 November did amount to a protected disclosure, we then considered whether the respondent has subjected the claimant to detriment on the grounds of making that disclosure.

98. Our starting point is that there is absolutely no evidence to suggest that Miss Sidat was aware of, or somehow contaminated by, Mrs Burgan's disclosures about St Mary's. Although we readily accept Mrs Burgan's point that there are criticisms which can be made of Miss Sidat's investigation, we find those are irrelevant for the purposes of the claims being brought. There might be some relevance if the facts around the investigation gave rise to inferences about the reason for treatment, but on the facts of this case, they do not.

99. Following on from that, we are content with the explanation provided by the respondent for the decision both to suspend Mrs Burgan and then to terminate her engagement. The incident with Patient A was a serious matter and the respondent's concern as to the consequences of continuing to engage Mrs Burgan was genuine. All the contemporaneous documents

point to the fact that the St Mary's managers simply took their lead from the Gateway Recovery Centre, because they considered it would be risky to do otherwise. That is not a suspicious decision which requires explanation. To the contrary, in the experience of the Tribunal it accords with what many employers would do in a similar situation.

100. Although we have expressed some concerns as to the respondent's reaction to the disclosure email, that does not mean that Mrs Burgan was removed from the bank as a result of sending the email. Although Mrs Scott and Mr Loo were aware of the disclosure email at the time the final decision was taken to permanently remove the claimant from the bank, we simply do not find any evidence to support a finding of a connection between the two. On the contrary, there is strong evidence to support the respondent's case, that the decision to terminate was based purely on the result of the Gateway Recovery Centre investigation. In particular, we found the email exchange between Allison Mayoh and Des Loo on 18 November 2020 to be very persuasive as to the reasoning behind the decision to end the engagement.

101. For completeness, Mrs Burgan placed a lot of emphasis on what she says is the inconsistent treatment she received compared to the staff who were allegedly involved in sexual activity in a patient's flat. Inconsistent treatment can be a something which makes a dismissal unfair, although only in cases where the circumstances are truly comparable. This is not, as I have already said, an unfair dismissal case. This point would only be relevant if it tended to show that the respondent had acted as it did because of Mrs Burgan's disclosure. We are satisfied that no such conclusion can be drawn. There may be innumerable reasons, proper or improper, why the staff members said to have been involved in that allegation were not dismissed. For the reasons we have explained, we are satisfied that the respondent did not act in the way it did because of Mrs Burgan's disclosure and the evidence we heard about the circumstances of the other case did nothing to dislodge that conclusion.

Discriminatory termination

102. We repeat the comments we have made about as to the reason for suspension and later termination of engagement. Mrs Burgan, in this case, has not established primary facts which would shift the burden of proof onto the respondent. We are satisfied that there is no connection whatsoever between her race and either her suspension or the termination of her engagement.

Conclusion

103. For those reasons the Judgment of the Tribunal is that Mrs Burgan's claims of detriment on the grounds of having made a protected disclosure, direct race discrimination and harassment on the grounds of race all fail and are dismissed.

Employment Judge Dunlop

Date: 16 March 2023

WRITTEN REASONS SENT TO THE PARTIES ON

21 March 2023

FOR EMPLOYMENT TRIBUNALS

Annex: Agreed List of Issues

The claimant accepts that she is a worker and is therefore not able to bring a claim of unfair dismissal. The claims that she does bring are of:

- Being subjected to a detriment for having made a protected disclosure (section 47B of the Employment Rights Act 1996);
- Claims of direct discrimination because of race under section 13(1) of the Equality Act 2010, read with section 39 of that Act;
- Claims of race related harassment in breach of section 26 of the Equality Act 2010, read with section 39 of that Act.

Whistleblowing and Detriment – section 47B Employment Rights Act 1996

1. Did the claimant make a qualifying disclosure? The claimant alleges the disclosure was set out in an email sent on 4 November 2020 at 21:44 to Alexa Shaw.

2. Did the claimant reasonably believe that the disclosure tended to show one or more of the matters set out in section 43B of the ERA 1996? The claimant relies on section 43B paragraphs (a), (c) and (d) of that Act, i.e. that the information tended to show:

   (a) That a criminal offence has been committed, is being committed or is likely to be committed.

   …

   (c) That a miscarriage of justice has occurred, is occurring or is likely to occur;

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

3. Did the claimant reasonably believe the disclosure was made in the public interest?

4. Was the disclosure made in good faith?

5. Did the claimant suffer the following detriments?

   (a) The cancellation of the shifts for which she was already booked in November and December;

   (b) Not being offered any further shifts working for the respondent.

6. Was the claimant subjected to the detriments on the ground that she had made a protected disclosure?

Direct Race Discrimination

7. The claimant's race is British Asian or British Indian. In bringing her claim she relies on hypothetical comparators rather than actual comparators.

8. What are the facts in relation to the following allegations:

(1) That on a date to be clarified in May or June 2020 Ms Jackie Scott, the claimant's manager, had severe words with her and threatened to suspend her shifts because she had not carried out online training, which the claimant had in fact completed. The claimant says that Ms Scott later apologised via an internal email. The claimant says that during that incident Ms Scott referred to the claimant as "your sort". The claimant says this was a reference to her race.

(2) On 21 August 2020, possibly around 2.00pm-4.00pm, after the claimant had asked a colleague, Kris Imundi, to seek help from management which was needed to lift a patient, MS, off the bathroom floor which was wet and on which MS had been lying for two hours, the claimant says that Ms Scott said that "your sort should go back to your teaching post". The claimant says that requests for help from the nurses in charge, Cath and Tulli (surnames not known) had been ignored. There were other healthcare workers present during that incident but the claimant does not know which ones.

(3) On 21 September 2020 Ms Scott threatened to suspend the claimant's shifts for being unable to attend MVA (managing Violence and Aggression) training due an injury she had sustained to her back. The claimant says she sustained the injury on Sunday 20 September and spoke to Ms Scott about it on the following day. The training was due to happen in October 2020. That was a face to face conversation between the claimant and Ms Scott which was witnessed by Laurie, the Ward Manager, (whose surname the claimant is going to confirm). The claimant confirms that Ms Scott did not use the phrase "your sort" during this incident.

(4) On 14 October 2020 Ms Scott threatened to suspend the claimant's shifts for having her mask around her chin. The claimant says that Ms Scott spoke to her twice about this when in patient rooms. On both those occasions, the claimant says the patient was asleep under the duvet and the claimant was maintaining a two-metre social distance. The claimant says that she was not therefore contravening the guidance about the wearing of masks. The claimant says that nobody witnessed Ms Scott telling her off for not wearing her mask when she was in MS's room. When Ms Scott told her off for not wearing a mask in a patient's room, there was an agency worker present, but the claimant does not know their name. The claimant says that both she and the agency worker had their masks on their chin. The claimant says that the threat to suspend her shifts was made by Ms Scott later that day on the ward. There were other staff on the ward, but the claimant could not identify any specific witnesses. The claimant said that during this incident Ms Scott also used the phraseology "your sort". The claimant says that Ms Scott said words to the effect that if "your sort can't do the job they should go back to teaching".

(5) The decision to terminate the claimant's engagement as a Bank worker for the respondent.

9. Did the claimant reasonably see each of these incidents as a detriment?

10. Has the claimant proven facts from which the Tribunal could conclude that in any of these respects the claimant was treated less favourably than someone in the same material circumstances of a different race would have been treated? The claimant relies on a hypothetical comparison.

11. Has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of race?

12. If so, has the respondent shown that there was no less favourable treatment because of race?

Race related Harassment

13. In relation to the incidents at paras 8(1), (2) and (3) above, the claimant says that they alternatively amount to race related harassment. In relation to each of those incidents:

(1) Was it unwanted conduct?

(2) Was it related to race?

(3) Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(4) If not, did it have that effect?

14. The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Time Limits

15. Were the discrimination and/or harassment complaints made within the time limit in section 123 of the Equality Act 2010?

16. Given the date the claim form was presented and the effect of early conciliation, any complaint about something that happened before 21 October 2020 may not have been brought in time.

17. Were the discrimination and/or harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

(1) Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

(2) If not, was there conduct extending over a period?

(3) If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

(4) If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

(a) Why were the complaints not made to the Tribunal in time?

(b) In any event, is it just and equitable in all the circumstances to extend time?

Remedy

18. If any of the claimant’s complaints are well-founded, how much (if any) compensation should the claimant receive?