EMPLOYMENT TRIBUNALS

Claimant: Ms A Unufe

Respondent: Elysium Healthcare Limited

Heard: in Nottingham on 20 March and on all remaining days via CVP

On: 20, 21, 22, 23, 24, 27 and 28 March 2023

Before: Employment Judge Ayre
Mr C Tansley
Mr G Edmondson

Representatives:

Claimant: In person
Respondent: Miss W Miller, counsel

JUDGMENT

The unanimous decision of the Employment Tribunal is that the claim for direct race discrimination fails and is dismissed.

REASONS

Background

1. The claimant was employed by the respondent as a Ward Manager between January 2020 and April 2021 when she was dismissed. On 29 September 2021 she issued proceedings in the Employment Tribunal following a period of Early Conciliation that started on 16 July 2021 and ended on 27 August 2021.

2. A Preliminary Hearing took place before Employment Judge Clark on 26 January 2022. At that hearing the claims were identified as being for unfair dismissal, direct race discrimination, unauthorised deduction from wages and breach of contract. The claimant was ordered to provide further and better particulars of her complaint of race discrimination. The case was listed for a Preliminary Hearing in public to consider:

    a. The effective date of termination of the claimant's employment;
    b. Whether the claims were in time;
    c. An application to amend the claim to include a complaint of unlawful deduction from wages;
    d. Whether the claimant had sufficient service to pursue a complaint of unfair dismissal; and
    e. To make case management orders.

3. The second Preliminary Hearing took place on 8 April 2022 before Employment Judge Britton. The claimant was represented by counsel at that hearing but has otherwise been representing herself in these proceedings. At the second Preliminary Hearing:

    a. Time was extended in relation to the complaint of direct race discrimination;
    b. The claims for unfair dismissal, unlawful deduction from wages and breach of contract were dismissed on withdrawal; and
    c. Case management orders were made.

4. The remaining claim, of direct race discrimination, proceeded to final hearing.

5. In this judgment we have used the phrase 'people of colour' to describe individuals of a range of different ethnicities, excluding white ethnicity. This is the phrase that was used by the claimant and by the respondent to describe those who are not of white ethnicity.

The Proceedings

6. There was an agreed bundle of documents running to 747 pages. We were also provided with a cast list and a chronology.

7. On the first day of the hearing the claimant sought to add three documents to the bundle. One of those documents was added by consent. The respondent objected to the introduction of the other two documents, which were an extract from one of the claimant's social media pages, and the first page of a decision of the Administrative Appeals Chamber of the Upper Tribunal.

8. Whilst we had some sympathy with the respondent's argument that these documents are not relevant to the issues that we will have to determine, we decided on balance to admit them into evidence. We could see little prejudice to the respondent in doing so, and it is important that both parties feel that they have had a fair trial.

9. On the second day of the hearing the respondent sought to add two documents to the bundle. The claimant did not object to the introduction of these documents, so they were added by consent.

10. On the third day of the hearing the respondent sought to add a further 9 documents into evidence. Eight of those documents related to the evidence of the former employees of the respondent giving evidence on behalf of the claimant. One related to diversity training for Miss Perrin, which the respondent submitted was relevant to its defence under section 109(4) of the Equality Act.

11. The claimant only objected to the introduction of one of the documents and consented to the introduction of the others. Whilst it is regrettable that they were not disclosed earlier, they did appear to be potentially relevant, and we could see no prejudice to the claimant in admitting them into evidence. We took a brief adjournment in the hearing to give the claimant time to consider and discuss the new documents with her witnesses.

12. At the start of the sixth day of the hearing the respondent sought to introduce two further documents to rebut evidence given by Mr Ofurhie in response to questions from the panel. The claimant did not object to the introduction of the new documents, and they were admitted by consent.

13. The claimant applied for an order that the respondent should disclose a photograph of the cuddly toy rabbit that the claimant had removed from a patient, in one of the incidents that resulted in her dismissal. The photograph would show, she said, that the rabbit had beads all over it which could have been removed by the patient and used to self-harm. The respondent admitted that the rabbit had beads for eyes but denied that it had any other beads.

14. Having considered the representations of both parties, it was the unanimous decision of the Tribunal not to issue an order for disclosure. The question of how many beads were on the rabbit was not relevant to the questions that we have to determine in this case.

15. We heard evidence from the claimant and, on her behalf, from:

    a. Anne Ball, nurse and former employee of the respondent;
    b. Catherine Williams, nurse and former employee of the respondent; and
    c. Charles Ofurhie, former Support Worker with the respondent.

16. The respondent submitted that the evidence of the claimant's witnesses (with the exception of the claimant herself) was not relevant as it related to other incidents of alleged racism. It was the unanimous view of the Tribunal that the claimant should be permitted to call these witnesses as their evidence could potentially be relevant to the treatment of employees of colour and the drawing of inferences.

17. For the respondent we heard evidence from:

a. Zoe French, Ward Manager;
b. Dawn Price, Health Support Worker;
c. Anne Woodward (formerly known as Anne Armitage), Hospital Director; and
d. Rebecca Perrin, Regional Director.

18. The claimant also wanted to call three further witnesses, all of whom were still employed by the respondent:

    a. Mr S Salako, who the claimant interviewed during an investigation she carried out into Dawn Price and who the claimant said could give evidence that Dawn Price lied;
    b. Mr I Quainoo, who the claimant said could give evidence as to a delay in returning him to full duties after a medication error; and
    c. Mr L Washington who the claimant said could give evidence as to the character and veracity of Dawn Price.

19. The claimant said that all three of these witnesses had told her they were not willing to give evidence because they were still employed by the respondent and afraid of repercussions. The respondent submitted that none of these witnesses could give evidence as to the key issues in the case, so their evidence was not relevant.

20. We adjourned to consider whether to issue witness orders in relation to any of the three additional witnesses. The unanimous decision of the Tribunal was that no witness orders should be made. The evidence of each of these witnesses was not relevant to the questions that we will have to determine. At best the evidence of Mr Salako and Mr Washington may go to the credibility of Miss Price, but the claimant can give evidence on that and cross-examine on it. Little is likely to turn on the credibility of Miss Price.

21. The evidence of Mr Quainoo about how another employee of colour was treated could potentially be relevant to the drawing of inferences, but the claimant is already calling three witnesses to speak to that.

22. The claimant indicated that she wished to introduce into evidence recordings of conversations she had with Mr Salako and Mr Washington which she said were relevant to the credibility of Dawn Price. The respondent objected to the introduction of the recordings.

23. The unanimous decision of the Tribunal was that the recordings should not be introduced. They appear to be of marginal if any relevant. The claimant can give evidence on what was said during the conversations and cross examine Ms Price on them.

24. On the third day of the hearing, during cross examination of the claimant, it became apparent that the claimant had not received the respondent's witness statements. Miss Miller apologised for this. The statements were served on the claimant, and she was given time to consider them. Both parties indicated that they were happy to proceed with the hearing.

25. On the fifth day of the hearing the claimant indicated that she was unwell and not able to attend a full day's hearing. We therefore finished at lunchtime on the fifth day, to enable the claimant to rest and recuperate.

26. Days two to five of the hearing took place via CVP at the request of the respondent's counsel due to family ill health, and with the agreement of the claimant. The claimant subsequently indicated that due to health it assisted her to attend a hearing via CVP, and the remainder of the hearing also took place via CVP.

27. We heard oral submissions from both parties and Miss Miller produced a written note of the law, for which we were grateful. The claimant was given time to consider the note and Miss Miller's oral submissions before making her own submissions. She submitted written submissions which she supplemented with short oral submissions.

The Issues

28. The issues that fell to be determined at the hearing were as follows:

    a. Did Dawn Kitchen, Dawn Price, Zoe French and Amy Parnell provide false statements for the internal investigation into the claimant?

    b. Did the following amount to less favourable treatment because of the claimant's race:

        i. The provision of false statements by Dawn Kitchen, Dawn Price, Zoe French and Amy Parnell to the internal investigation?
        ii. The dismissal of the claimant?
        iii. The rejection of the claimant's appeal?

    The claimant describes her race as Black British. She compares herself with a hypothetical comparator of a white employee carrying out her role of Ward Manager.

    c. If any employee of the respondent discriminated against the claimant, is the respondent liable for that discrimination?

    d. If the Tribunal finds that the respondent discriminated against the claimant, what compensation should be awarded to the claimant?

29. . On 20 May 2022 the claimant provided Further and Better Particulars of her claim, following an Order made by Employment Judge Britton on 8 April 2022. The Further and Better Particulars contained details of other alleged incidents of race discrimination, some involving the claimant, others involving other employees. The claimant confirmed at the start of the hearing that she was relying on those incidents by way of background information rather than as allegations of discrimination.

30. Miss Miller sought clarification as to whether she should cross-examine on the background information. The respondent was given notice of the background information some ten months before the hearing and Miss Miller indicated that she was in a position to cross examine the claimant on it. The unanimous view of the Tribunal was that the background information may be relevant to the drawing of inferences, and that Miss Miller should therefore cross-examine the claimant on it.

31. There are three parts to the background information relied upon by the claimant. The first is the allegation that employees of colour were treated less favourably and subjected to a hostile working environment as follows:

    a. In or around October / November 2019, the claimant alleges that Anne Woodward reported an agency staff nurse "Yvonne", who is described as non-white, to the NMC for declining to take over a shift due to dangerous staffing levels, and Yvonne was stopped from working at the respondent.

    b. In October / November 2020 the claimant alleges that Mrs Woodward ordered an investigation into an incident involving a patient tying a ligature and ordered those two staff members of colour with the same surname should be stopped from working ' even if that means stopping the innocent and the guilty.

    c. In or around February 2020 the claimant alleges that Catherine Williams, a non-white Ward Manager was told by Tracie Huckerby that she would be referred to the NMC for taking emergency time off due to a serious family situation.

    d. In or around November 2018 to March 2019, the claimant alleges that Dickson Zindawa, a non-white Ward manager, was falsely accused of an incident by two white members of staff, dismissed and referred to the NMC.

32. The second part to the background information relied upon by the claimant is the allegation that Mrs Woodward subjected the claimant to the following treatment with the intention of creating a hostile working environment for the claimant by:

    a. Undermining the claimant by refusing to provide her ward with necessary staff support, which was then granted to the ward immediately after the claimant's dismissal;

    b. Denying the claimant's ward office supplies and equipment including strong wear clothing;

    c. Immediately and incorrectly concluding that a negative response indicating that a company preferred to use an alternative facility was because of care provided on the claimant's ward;

    d. Belittling the claimant at a staff meeting on 10 November 2020 by questioning why the claimant's ward had needed the assistance of an additional manager during a recent incident;

e. Becoming angry towards the claimant in November 2020 because the claimant bought an extra week of holiday; and

f. Refusing to approve payment for the claimant's hours, delaying payment.

33. The third part of the background information relied upon by the claimant was the following allegations that white staff were not treated the same as staff of colour:

a. In January 2021 when a white staff member Bob Jaggard authorised a patient to go on unauthorised leave, but was able to continue working and the claimant was initially blamed;

b. In or around May 2021 when Dawn Price, a white employee received only a final warning;

c. In or around December 2020 when white employees Karen Kew and Bob Jaggard made serious medication errors, but the incident was not investigated;

d. In or around December 2020 / January 2021 when white employees Karen Kew and Steve Purdie made serious medication errors, but no action was taken; and

e. In May 2020 when a non-white employee, Isaac Q, was involved in a similar incident but was not able to complete medication management or hold drug keys and was only reinstated to a nurse role after raising examples of racism in the workplace.

Findings of Fact

34. We make the following findings of fact on a unanimous basis.

35. The claimant is a qualified nurse and was employed by the respondent as a Ward Manager from 13 January 2020 until 27 April 2021 when she was dismissed with immediately effect. She had previously worked for the respondent as an agency nurse and was well regarded by them. She was recruited by Anne Woodward, Director of the Farndon hospital, to work in that hospital. Until the events which led to her dismissal the claimant was well regarded by the management team at the Farndon, and in particular by Anne Woodward and Rebecca Perrin.

36. The respondent is a private healthcare provider specialising in providing care in the areas of mental health and wellbeing, learning disabilities and autism, neurological care and children and education. The respondent has approximately 5,100 employees split across 70 sites.

37. The claimant worked at the Farndon hospital in Newark. Farndon provides care and support to adults with learning disabilities and/or mental health needs, including women who are detained under the Mental Health Act 1993. There are five wards, four of which are low secure wards, and one, Aster Ward, which is a high dependency rehabilitation service.

38. Aster Ward opened for the first time in September 2020 and the claimant was recruited to be the Ward Manager for that ward. She reported to the Lead Nurse, Tracie Huckerby, who in turn reported to the Hospital Director, Anne Woodward.

39. There are five core staff on Aster Ward: two qualified nurses and three health care assistants. These core staff are supported by other professionals as required. Aster Ward is funded by Clinical Commissioning Groups, ("**CCG**") whereas the other wards at Farndon are funded differently. It was a requirement of the CCG that Aster Ward operate independently of the other wards at Farndon. Its focus is on rehabilitation, and its ethos is to use the least restrictive practices possible when dealing with patients.

40. The claimant describes her ethnicity as Black British. The staff working at Farndon are of a mix of different ethnicities. At the time of the claimant's employment the Hospital Director and Lead Nurse were white people (although Tracie Huckerby had replaced a previous lead nurse who was a black employee), and the claimant was one of two Ward Managers who are black people.

41. There is a relatively high proportion of nursing staff at the Farndon who are people of colour. The unit uses agency staff and 99% of those staff are people of colour. The respondent recruits a lot of nurses from abroad to fill shortages in nursing staff. At more senior level, the respondent employs approximately 40 Hospital Directors, of whom up to 25% are people of colour, and 6 to 8 Regional Directors, of whom up to 50% are people of colour.

42. The respondent provides training in equality, diversity and inclusion for employees and is alive to issues of racism in the workplace. The patients treated at Farndon can be abusive towards staff. That abuse includes racist abuse, and the respondent has in place systems to support staff who experience racist abuse from patients. Incoming patients are made aware that racist abuse is not acceptable, and staff are, if necessary, supported to make complaints of abuse to the police.

43. Aster Ward opened in September 2020, and in advance of that the claimant was asked to help out at another of the respondent's hospitals, Field House, which was struggling at the time. They needed a high performing nurse to support the managers at Field House on a temporary basis. Mrs Woodward highly recommended the claimant to Miss Perrin, who asked her to help out at Field House. Miss Perrin and Mrs Woodward had every confidence in the claimant's abilities to support the service.

44. It is clear from the evidence before us that the claimant was highly regarded in her work as a nurse, including by Mrs Woodward and Miss Perrin, both of whom considered her to be very competent. She was chosen to lead the new Aster Ward by Mrs Woodward. Until the events which led to her dismissal, there were no concerns whatsoever about the claimant's performance or her conduct.

45. The claimant's role of Ward Manager included working face to face with patients and a range of other professionals. The Ward Manager is responsible for the operational management of the ward, ensuring that the ward maintains quality compliance standards, providing support and supervision of staff and ensuring all aspects of patient care standards are maintained.

46. The claimant's contract of employment contained requirements for the claimant to conduct herself in a professional manner at all times, comply with all policies and procedures, diligently carry out her duties and use her best endeavours to promote, develop and carry out the respondent's business without bringing it into dispute.

47. The respondent also has a Disciplinary Policy and Procedure. That policy gives the respondent the right to suspend employees on full pay whilst an investigation is carried out and makes clear that suspension is neither an indication of guilt nor disciplinary action. The disciplinary policy also contains examples of gross misconduct, which include:

    a. Ill-treating or abusing service user, causing them unnecessary and avoidable pain and distress;
    b. Incidents of discourtesy or abuse or other behaviour likely to seriously offend service users, for example swearing;
    c. Serious incidents of discourtesy or abuse to work colleagues or visitors which is likely to cause serious offence; and
    d. Not keeping to professional codes of conduct for registered healthcare professionals.

48. The respondent is regulated by the Care Quality Commission ("**CQC**"). On 12 February 2021 the respondent received an email from the CQC stating that an anonymous concern had been raised with the CQC. The concern, in summary was that:

    a. The claimant swore at patients on Aster Ward, using the words; "fuck off"; and
    b. Staff members on Aster Ward were working 12 hour days, not getting breaks and not being paid for working through breaks.

49. The complaint from the CQC was sent to Anne Woodward who responded the same day, indicating that the respondent had not received any concerns of this nature previously, and that missed breaks were logged and paid.

50. The respondent made the claimant aware of the complaint from the CQC and that it had been made on an anonymous basis. It also appointed Amanda Skelham, Lead Social Worker and Dr Rachel Haughton, Lead Forensic Psychologist, to carry out an investigation.

51. On 12 February Amanda Skelham attended Aster Ward and spoke to some patients on the ward. The claimant was also invited to a meeting with Anne Woodward and Tracie Huckerby. During that meeting the content of the CQC complaint was read to the claimant, who became upset.

52. The claimant was asked if there were any staff who she thought may believe that she had wronged them, and she identified the following individuals:

    a. Dawn Kitchen, who she said was upset because the claimant raised a Level 3 incident after she took the ward keys home for 7 days;
    b. Zoe French, who the claimant said had asked about promotion to charge nurse, and was upset with the claimant because the claimant said she thought she was not yet ready for promotion;
    c. Amy Parnell, whose probationary period was extended by the claimant due to a high level of sickness absence; and
    d. Dawn Price, who was the subject of a disciplinary investigation carried out by the claimant, and who the claimant described as a "*pathological liar*".

53. On 17 February 2021 a community meeting took place on Aster Ward. The meeting was attended by a number of members of staff and patients. During the meeting the claimant said that a complaint had been made anonymously to the CQC and referred to the person who made the complaint as a 'coward', 'cowardly' and 'evil'. At least one patient felt worried that the claimant was targeting her when making these comments and reported this to another member of staff.

54. On 22 February 2021 the claimant was temporarily transferred to work on another site whilst the investigation took place. She did not attend work however and was initially uncontactable. Late in the morning of 22 February she called to report that she was unwell. She remained off work until she was suspended a few days later.

55. Following the initial complaint to the CQC, further concerns came to light. In particular, it was alleged that on 17 February 2021 the claimant had removed a cuddly toy rabbit from a vulnerable patient who was on her way to hospital. The toy rabbit had been identified in the patient's care plan as a comfort to the patient, and it had been agreed that she could keep the rabbit with her. It was alleged that the claimant had temporarily stopped the patient from leaving to go to hospital and had arranged for a restraint team to remove the rabbit from the patient, who was calm at the time. It was also alleged that the claimant had asked for the patient's room to be 'risk minimised' with the patient watching, and that her behaviour towards the patient that day was designed to punish the patient for having refused to go to hospital the previous day.

56. On 25 February 2021 the claimant was suspended on full pay pending an investigation into her conduct. A suspension letter was sent to the

claimant. In that letter the respondent set out the matters which were the subject of the investigation, namely:

a. Punitive actions in order to encourage patient compliance;
b. Using profanities towards and about staff and patients; and
c. Using the recent community meeting to air her own grievances about the recent anonymous complaint to the CQC; and
d. Sharing personal information and having inappropriate conversations with a patient at Field House.

57. On 5 March 2021 the respondent wrote to the claimant inviting her to an investigation meeting on 9 March 2021. The claimant attended the investigation meeting on 9 March and was interviewed by Amanda Skelham and Rachel Haughton. During the interview she denied absolutely using bad language to patients and staff. She described being 'absolutely livid' about the complaint to the CQC and accepted that during the community meeting on 17 February she had described the person who made the complaint as a coward or cowardly. She also said that she had received support from her line manager following the CQC complaint.

58. The claimant was also asked on 9 March about other issues that had come out during the investigation. At no point during the investigation meeting did the claimant suggest that complaints were being made about her because of her race.

59. As well as interviewing the claimant, the respondent also spoke to a number of other staff:

a. Dawn Price, healthcare assistant on Aster Ward;
b. Ade Adesokan, nurse;
c. Jade McCollen, healthcare assistant;
d. Dr Philip Barron, consultant Psychiatrist;
e. Zoe French, nurse;
f. Amy Parnell, healthcare assistant;
g. A "JF";
h. Dawn Kitchen, healthcare assistant;
i. Temitayo Akinade, nurse; and
j. Three patients on the ward.

60. The claimant alleged in her claim to the Tribunal that four of the white members of staff who were interviewed during the investigation colluded and made false allegations about her. She also alleged that in doing so they were motivated by race. She did not however make that suggestion at any point during the disciplinary and appeal process. On the contrary, she gave an alternative explanation as to why these four may feel that she had wronged them, and that explanation had nothing to do with race.

61. We were taken in some detail during cross examination to the witness statements provided by each of the four individuals accused of collusion during the investigation process. There were significant differences between the statements given by each of the four. There was no evidence of collusion between the four individuals concerned.

62. Dawn Price was interviewed on 24 March. She spoke about the incident on 17 February 2021 involving a patient. She said that the claimant had come into the office swearing about the patient's toy rabbit and said that the patient was not taking the "fucking" rabbit to hospital because "*it's not a fucking day out*".

63. Miss Price described the claimant as swearing and shouting, and as being "mad" and talking at 100 miles an hour. She said that the claimant had told Zoe French to take the rabbit of the patient and had instructed Miss price to strip the patient's room. Miss Price also said that she was confused because she didn't know why the room was being stripped.

64. Zoe French was interviewed on 19 February 2021. She was asked about the community meeting and said that she had "*heard the back end*" of the claimant telling staff and patients that she was disappointed that someone had gone to the CQC and reported the staff for swearing at patients.

65. She then asked to talk to the investigators about another issue, namely an incident with a patient. She said that the patient had been self-harming and needed to go to hospital for treatment. The patient had refused to go but had subsequently said the next day that she would go if she could take her toy rabbit (described as a "*protective comforter*") with her. Zoe French was the patient's named nurse and knew that access to the rabbit was part of the patient's care plan.

66. Miss French said that the claimant had intercepted the patient and her escorting staff as they were about to leave the ward for hospital and asked them to come back on to the ward. The claimant then said that the patient could not take the rabbit to hospital. The patient was distressed. The claimant then said that the patient's room should be stripped whilst the patient was in the communal area so that she could see it being stripped.

67. Miss French also described the patient as being distressed, distraught and inconsolable over the removal of the rabbit. Miss French asked the claimant if the rabbit could be placed in the window of the office so that the patient could see that it was safe and was told that the patient was not to be allowed to see it. Miss French said that the claimant's tone "*seemed punitive, as if this was a lesson for"* the patient. She finished by saying that "*This makes me feel awful that our ladies would be treated this way and it is not acceptable, I have been here for 7 years and never seen anything like this. I am so glad that I have spoken out, I am worried about my job, this is a manager and it's not ok.*"

68. Amy Parnell was also interviewed on 19 February. She was asked about the community meeting and said that she had not been there. She said that she had concerns about her manager, the claimant. She described the claimants treatment of patients as "*dreadful*" and referred to the incident with the patient. She said that the patient had "*ended up in restraint you know, it was horrible. The rabbit isn't even a risk*

item, it was like she was punishing the patient because she wouldn't have her treatments or meds the day before".

69. Miss Parnell also said that the claimant treated people differently, and that "*if she doesn't like you then you know about it, she gets really angry*". She said that she had heard the claimant swearing at staff and patients on the ward and gave a specific example of this. She was asked if she had questioned the claimant about her behaviour and replied that she would not be comfortable doing so because the claimant did not like to be challenged. She described the claimant as being abrupt and insensitive to people's needs and said that when she had asked for time off following the death of an uncle, the claimant had not replied to her email. She reported that more than one patient had told her they find the claimant to be unapproachable.

70. Dawn Knight was interviewed on 19 February 2021. She had taken the minutes of the community meeting and said that during the meeting the claimant had described the persons who made the complaint to the CQC as a coward. She thought that the complaint had been made about all staff on the ward, rather than just the claimant, because of the way in which the claimant spoke about the complaint in the meeting.

71. Miss Knight also raised other concerns, including about the way in which the claimant spoke to people, describing her as coming across as quite punitive in some cases, and as swearing a lot.

72. During the investigation it came to light that the claimant had given her personal mobile telephone number and personal email address to a patient at Field House. She had also exchanged text messages with the patient, including about the investigation into her conduct. In one text she wrote "*its good for the liars to show their true colours*" and in another "*I am chilling, but will go back after the investigation has been concluded. So I will fight hard and have the last laugh.*"

73. On 24 February 2021 the claimant produced her own 'chronology' which she added to over the following weeks. In the chronology she wrote that:

"*These accusations, are false and maliciously orchestrated to distract me or frustrate me to quit of my own volition; I haven't done any of the things they have allegedly complained I did and I need a full and unbiased investigation, so that those responsible for these false and unhealthy allegations can be exposed.*

I want to use this opportunity to raise awareness of indirect bullying within the workplace, more needs to be done to support BAME in top management within the company. If I can prevent this incident from happening to someone else then I am happy."

74. At the conclusion of the investigation a detailed investigation report was produced, running to more than 100 pages. It was decided that the claimant should be called to a disciplinary hearing to answer the following allegations:

a. Using derogatory language towards patients and staff;

b. Using profane language and raising her voice in an unacceptable manner to patients and staff;

c. Referring to those who complained to the CQC as cowards, cowardly and evil during a community meeting at which patients and staff were present;

d. Using punitive and restrictive practices to command compliance from patients by:

   i. On 17 February 2021 intercepting a patient's healthcare leave with the intention of removing a patient's approved item, but later allowing the same item to travel with the patient;
   ii. Asking for a patient to be present during a room risk minimisation activity (this allegation was included in error and removed at the start of the disciplinary hearing);
   iii. Removing an approved item (the rabbit) from a patient for punitive reasons;
   iv. Denying a patient visual sight of a removed item (the rabbit), causing considerable stress to the patient;

e. Attempting to implement restrictions around shower availability for patients on Aster Ward; and

f. Over stepping professional boundaries with a patient by sharing her personal contact details and speaking to the patient about the investigation

75. The disciplinary hearing took place on 14 April 2021 and was chaired by Anne Woodward. The claimant was accompanied by Patrick Meats, a union representative from the RCN. The meeting lasted for three hours, during which there was a detailed discussion of the allegations. The claimant was told that all of the allegations were considered to be potentially gross misconduct.

76. At no point during the disciplinary hearing did either the claimant or her RCN representative raise the question of racism. They did however raise the issue of collusion between some of the witnesses and suggest that they were lying.

77. During the investigation a number of colleagues said that they heard the claimant swear at work. When this was put to the claimant, she admitted that she had used the 'f' word at work in frustration. In her evidence to the Tribunal, she suggested that by 'f' word she was referred to 'fish' and that 'fish' was an Irish colloquialism. She accepted that she had not told the respondent that 'f' referred to 'fish'.

78. We found the claimant's suggestion that when she admitted to using 'f' word she was in fact referring to fish to be entirely incredible. If this was indeed the case, then given that she and her union representative knew that she was facing potential dismissal for having sworn at work,

they would undoubtedly have raised it during the disciplinary or appeal hearings. The claimant's evidence on this issue caused us to question the credibility of her evidence generally.

79. The claimant acknowledged during the disciplinary hearing that she should not have given out her personal contact details to a former patient.

80. There was a detailed discussion of the incident on 17 February involving the patient. Mrs Woodward told the claimant that she had seen CCTV footage of the incident and had seen the claimant prepare a restraint team to take the cuddly rabbit away from the patient. The claimant insisted that she had removed the rabbit because she considered it to be a risk item to the patient. She accepted however that the patient was no longer self-harming, had not previously used the rabbit to self-harm and was unlikely to do so. She also acknowledged that she could have handled the situation better.

81. After the disciplinary hearing Mrs Woodward considered her decision. She produced a document headed "Summary of decision making" which set out the reasons for her decision.

82. Mrs Woodward found that the claimant was guilty of gross misconduct and that she should be dismissed with immediate effect as a result. She did consider alternatives to dismissal but concluded that these were not workable given the claimant's role as a nurse because they would mean that she would continue to have contact with patients and staff.

83. Mrs Woodward's conclusions were that:

a. The claimant had on occasion used profane language and raised her voice in an unacceptable manner to patients and staff. A number of those interviewed during the investigation had reported this, and during the disciplinary hearing the claimant had admitted to swearing in frustration.

b. The claimant had used punitive and restrictive practices with a patient through an unnecessary use of restraint of a patient who was calm at the point of physical intervention, and the sole purpose of the intervention was to remove a cuddly toy which the patient's care plan allowed her to keep as a comforter and which posed little or no risk to the patient. In reaching this conclusion Mrs Woodward relied heavily on the CCTV footage which showed a restraint team being organised and going to a patient who was calm and relaxed to remove her rabbit. This was in Mrs Woodward's view an unnecessary use of restraint to remove an item which posed little or no threat, abuse of the patient and a breach of the NMC Code of Conduct.

c. The allegation of denying access to showers was not upheld;

d. By discussing the anonymous CQC referral within a community meeting and using the words cowardly and evil to describe the

anonymous complainant, the claimant had failed to uphold the reputation of her profession, failed to be aware of how her behaviour could affect others and failed to treat people fairly;

e. The claimant had overstepped professional boundaries with a patient by sharing personal contact details; and

f. An allegation that she had used the title 'Dr' falsely on social media was not upheld.

84. Mrs Woodward wrote to the claimant to inform her of her decision. The letter was dated 23 April 2021 and we adopt the finding of Employment Judge Britton that it was received by the claimant on 27 April 2021.

85. The claimant was informed of her right to appeal against the decision to dismiss her and exercised that right. On 28 April 2021 she sent her appeal to Rebecca Perrin who was appointed as appeal hearer. She set out a large number of grounds of appeal, including what she described as 'untrustful witness statements', a lack of supporting evidence, a failure in process, selective witnesses and a lack of substantiated claims, and failure to take account of mitigating and explaining circumstances.

86. The last ground of appeal raised by the claimant was:

"*There are other numerous instances of racial bias, microaggressions or unfavourable treatment of myself and other staff who are of none white ethnicity."*

87. The claimant was invited to an appeal hearing which took place on 19 May 2021 and was chaired by Rebecca Perrin. The claimant was again represented by an RCN representative.

88. One of the issues raised by the claimant in her appeal was that the respondent failed to interview all staff and patients on the ward and had selected a small number of staff to be interviewed. In fact, the respondent interviewed 13 people, including the claimant, as part of the investigation. At least three of those interviewed were people of colour.

89. During the appeal hearing Miss Perrin asked the claimant who she thought should be interviewed in addition to those who had already been spoken to. The claimant gave just two names: Valantino Adolph and Charles Ofurhie. Both of those were interviewed after the appeal hearing and before Miss Perrin reached her decision.

90. The claimant was also asked in the appeal about her allegation that witnesses had colluded and what evidence she had to support that allegation. She said that the collusion was because she had managed some of the people who had given statements and that they had been upset with her as a result. At no point during the appeal hearing did she or her trade union representative suggest any link between the collusion and race. On the contrary she said that the collusion was a

response to management decisions that she had taken about the four individuals concerned.

91. Miss Perrin asked the claimant and her representative about the 'numerous incidents of racial bias raised in the claimant's appeal. The claimant said that she 'just felt that things hadn't been done right' and alleged that Anne Woodward was the person who had discriminated against her. She made no suggestion that Zoe French, Dawn Price, Dawn Kitchen or Amy Parnell had discriminated against her.

92. The claimant told us in evidence at the Tribunal that she first suspected discrimination by these four individuals after receiving the witness statements made by them prior to the disciplinary hearing. We find it surprising that she did not raise the issue of discrimination in relation to these statements until the Tribunal proceedings. Particularly since she was represented by the RCN during the disciplinary and appeal hearings and told us that she had discussed the issue of racism with her RCN representative in advance of the disciplinary hearing.

93. When asked why she had not raised the issue of racism earlier, the claimant said it was because she had a lot going on at the time. Whilst we accept that was the case, it is not in our view a convincing explanation for failing to raise the issue at the time. The claimant is clearly an intelligent and articulate individual, and she also had the benefit of union representation and advice. In addition, that reason does not explain why the claimant complained of racial bias by Anne Woodward at the appeal, but not of race discrimination by the other four individuals. It was another unconvincing explanation by the claimant.

94. Miss Perrin invited the claimant during the appeal hearing to provide examples of the racial bias that she was referring to. Neither the claimant nor her representative was able to do so, and it was agreed that the claimant would be given time after the appeal to send in examples of racism.

95. On 21 May the claimant wrote to Miss Perrin setting out a number of examples of what she called 'Case of discrimination.' The examples included many but not all of the allegations contained within the background information relied upon by the claimant in these proceedings.

96. Miss Perrin arranged for the two individuals named by the claimant in the appeal hearing to be interviewed. She also went to Farndon and spent the day with the Hospital Director reviewing the concerns raised by the claimant. Whilst there she met with Tracie Huckerby to review the process for managing staff performance, supervising, the morning meeting process, and decisions around incident management and staffing.

97. Miss Perrin looked at Anne Woodward's record of disciplinary action to establish if there were any patterns of racial bias or discrimination. She found that there were not.

98. She also looked at complaints about the service, staff grievances (there were no grievances about racism), and reviewed the ethnicity mix in the Farndon and how people were promoted. She could see that a number of people of colour had been promoted within the hospital.

99. She checked the staff performance matrix and found an even ethnic mix. She looked into the incidents raised by the claimant in her email and found that they had all been dealt with appropriately. She also found that Farndon had been particularly active in supporting the overseas nurses programme and in recruiting nurses from abroad.

100. Having done that, Miss Perrin was very comfortable that there was no evidence of racial bias or patterns of racism within Farndon unit. She concluded that Mrs Woodward's decision to dismiss the claimant was because of the claimant's misdemeanors rather than because of race.

101. On 7 June 2021 she wrote to the claimant to inform her of her decision. Miss Perrin did not uphold any of the grounds of appeal raised by the claimant. The appeal letter is thorough and sets out her decision on the issues raised by the claimant. Her conclusions included the following:

a. There was no supporting evidence to suggest that witnesses had been dishonest and lied during the investigation;
b. The additional witnesses interviewed at the claimant's request did provide any evidence to support the claimant's appeal;
c. There had been no failings in the investigation process; and
d. There was no evidence to suggest that Mrs Woodward had shown any racial bias or discriminated against the claimant.

102. Both Anne Woodward and Rebecca Perrin have had training in equality, diversion and inclusion and had a very good relationship with the claimant prior to these disciplinary proceedings. The claimant was unable to say why, having recruited and supported her previously, either Mrs Woodward or Miss Perrin would suddenly start discriminating against her because of her race during the disciplinary process. We found both Mrs Woodward and Miss Perrin to be honest and credible witnesses and we accept their evidence that they were not motivated at all by race in the decisions that they made.

Background information

103. We make the following findings in relation to the background information raised by the claimant, which the claimant says is relevant to the drawing of inferences as to the reason for her treatment.

104. The claimant alleged that in or around October / November 2020 an agency nurse who is a person of colour refused to take over a shift due to dangerous staffing levels, and that Anne Woodward reported her to the NMC and stopped her working at Farndon as a result. This allegation was not raised in the appeal or the email of 21 May 2021 but

was raised for the first time in Further Particulars provided by the claimant during the course of the Tribunal proceedings.

105. The claimant said that a former lead nurse, Idris, had told her that Anne Woodward told him she had reported the nurse to the NMC. That evidence was third hand. Mrs Woodward's evidence, which we accept, is that she did not report the nurse 'Yvonne' to the NMC. It was not her role to report anyone to the NMC.

106. The claimant accepted in cross examination that, if the nurse had been reported, it could have been for another reason, namely that she had refused to work a shift that she was due to work. The claimant repeatedly commented that it was her 'belief' that the decision was related to race.

107. This was a common theme in the claimant's evidence. On several occasions when asked to explain the link between events and race, she said that it was her 'belief' that they were linked to race. That belief was not backed up by any evidence.

108. The claimant also alleged that in October / November 2020 Mrs Woodward ordered an investigation into an incident involving a patient tying a ligature. It was not clear which of two agency staff, both with the same surname, had been involved in the incident. Mrs Woodward told the claimant to suspend both of them until the investigation found out which of them had been involved. The reason for this was that the incident was a serious one involving patient safeguarding.

109. The claimant did not comply with Mrs Woodward's instructions and did not suspend the agency staff.

110. In her evidence to the Tribunal the claimant accepted that Mrs Woodward's reason for wanting to suspend both of the agency staff was safeguarding, and that it was not linked to race. When asked why she had suggested that it was because of race, when she now agreed that it was not, she said that there was a common theme in Farndon unit for people of colour to be suspended.

111. The claimant alleged that Catherine Williams, a Ward Manager on another ward at the Farndon unit had to take emergency time off due to a serious family situation and was told by Tracie Huckerby that she would be referred to the NMC as a result. Miss Williams, who is a person of colour, also gave evidence to the Tribunal about this incident. Miss Williams accepted that she had been absent without notifying the respondent, and that she expected some action to be taken because she had been 'AWOL' for a period of time.

112. On 11 March 2020 Anne Woodward wrote to Miss Williams about her unauthorised absence from work. She explained that the respondent had tried to contact her without any luck, and that her absence was considered to be unauthorised. She was invited to a meeting to discuss her unauthorised absence and warned that unauthorised absence was considered to be gross misconduct.

113. There was no mention in the letter of a report or potential report to the NMC. Miss Williams told us that she had received another letter in which a threat had been made that she would be reported to the NMC. She was unable to produce that letter however and the respondent's evidence was that there was only one letter sent to Miss Williams, the one that was before us. Miss Williams accepted that she had not been reported to the NMC as a result of her unauthorised absence.

114. We were not persuaded by Miss Williams' evidence. We accept the respondent's evidence that no threat was made of a report to the NMC. Unauthorised absence is not a matter that would warrant such a report being made. We find that this incident did not happen as described by the claimant.

115. The claimant also alleged that in or around November 2018 – March 2019 a Ward Manager of colour, Dickson Zindawa, was falsely accused of an incident by two white members of staff, referred to the NMC and dismissed, whereas the two white members of staff were not.

116. Anne Woodward's evidence on this issue, which we accept, is that Mr Zindawa was not dismissed or referred to the NMC or the Disclosure and Barring Service ("**DBS**"). The claimant was not involved in the disciplinary process and accepted that she had no first hand knowledge of what had happened. She provided no evidence to suggest any link between the treatment of Mr Zindawa and race, and the alleged incident had occurred a long time before the claimant's employment started.

117. The claimant suggested that in January 2021 a white colleague Bob Jaggard had wrongly authorised a patient to go on unescorted leave, and been allowed to continue working following the incident, which she also said was initially blamed on her.

118. There was no evidence before us to suggest that the claimant was initially blamed for the incident. An investigation was started into the incident, and systems and processes were looked into. Bob Jaggard had been unwell and resigned a few days after the incident had taken place.

119. The claimant suggested that the decision not to suspend him was linked to race. She did not know however who had made the decision or why it had been made. There was quite simply no evidence that it was linked to race. It was a mere assertion by the claimant.

120. Mr Jaggard only worked another 11 shifts after the incident and then left. A decision was taken not to pursue a disciplinary investigation or hearing after his departure.

121. The claimant alleged that in or around May 2021 Dawn Price, a white employee, was investigated for stopping a hospital vehicle and offering a cigarette to a patient who was high risk. She complained that Miss Price only received a final written warning. The claimant was the person who carried out the investigation into this incident. Her view was that Miss Price should have received a final written warning or

been dismissed. Given that Miss Price received a final written warning, which was one of the claimant's recommendations, it is difficult to see how the decision not to dismiss Miss Price was racially motivated.

122. In addition to the final written warning, Miss Price was suspended from driving patients and taken off B Ward where the patient was based. When asked why she thought this incident was racially motivated the claimant said it was "obvious" because Miss Price was not suspended. It was put to the claimant that the difference between the incident involving Miss Price and the incidents which lead to the claimant's suspension was that in Miss Price's case Miss Price was trying to soothe and comfort the patient by allowing her to have a drink of water and to smoke a cigarette. The claimant refused to accept this. There was no evidence that the decisions taken in relation to Miss Price were racially motivated.

123. The claimant alleged that in or around December 2020 two white employees, Karen Kew and Bob Jaggard made medication errors which were not investigated. A medication error was made by these two individuals, one of whom was a student nurse at the time. A full 'SOP6' investigation was carried out and both individuals were required to complete an online medication assessment. The student's university were also informed of the mistake that she had made.

124. When asked why she believed the incident was linked to race, the claimant said that it was 'more of a cover up than racism'. We could find no evidence that the decisions made in relation to these two individuals were racially motivated.

125. Karen Kew was involved in a further medication error in December 2020 / January 2021, which also involved Steve Purdie, another member of staff. As this was Ms Kew's second medication error, the keys to the medication cabinet were removed from her until she had received supervision with the Ward Manager and the Lead Nurse. She was also removed temporarily from her preceptorship until her competency was reassessed. She completed three medication rounds supervised by the Ward Manager and online training before she was allowed to return to full duties.

126. This was the first medication error by Steve Purdie. A SOP6 investigation was carried out, the Ward Manager reassessed his medication competency. There was no evidence that the decisions taken in relation to Ms Kew and Mr Purdie were motivated by or linked to race.

127. The claimant accepted in evidence that she was not aware of the action taken in respect of Ms Kew. Despite not knowing what action had been taken, or that the incident had in fact been investigated, the claimant had alleged that the way in which this incident was dealt was linked to race. This was an allegation made without evidence and without knowing all of the facts.

128. The claimant alleged that in May 2020 an employee of colour, Isaac Q, made a medication error and was not able to complete medication

management or hold the keys to the medication cabinet. She suggested that he was only reinstated to a nursing role in May 2021 after raising examples of racism in the workplace.

129. We find that the medication error was made in March 2020 and that an investigation started on 21 March 2020. It was then put on hold because Mr Q was off work shielding. Mr Q allowed his professional registration with the NMC to lapse. The respondent supported him by allowing him to work in a non-nursing role until he was able to reapply to the NMC and regain his authorisation to work as a nurse.

130. There was no evidence before us to suggest that any of the action taken in respect of Mr Q was racially motivated. The claimant accepted in cross examination that Mr Q could have been reinstated for reasons other than because he raised racism but said she wouldn't know because she wasn't there.

131. The claimant also raised a number of incidents in which she said Mrs Woodward had demonstrated an intention to create a hostile working environment for the claimant. She gave no reason however as to why Mrs Woodward would want to do that, as Mrs Woodward had recruited and appointed the claimant and recommended her for the challenging role at Field House. By her own admission the claimant's relationship with Mrs Woodward was good until the complaint from the CQC.

132. The first incident complained of by the claimant was that Mrs Woodward refused to provide the claimant's ward with necessary staff support, which was then granted to the ward immediately after the claimant was dismissed.

133. When Aster Ward was opened, the intention was that it would run as a standalone ward and would not rely upon staff from other wards at Farndon. The reasons for this were that the CQC which was funding Aster Ward, insisted on it, and that as Aster Ward was a rehabilitation service, its philosophy and approach to patient care was different. The respondent had to comply with the request of the CQC that Aster Ward operate independently because the CQC were providing funding for the ward. This was nothing whatsoever to do with race.

134. The approach to staffing on Aster Ward was however reviewed and it was agreed that if there were serious incidents on Aster Ward, categorised as Level 4 or 5, then staff from other wards could assist. This arrangement was put in place whilst the claimant was Ward Manager and remains in place. There was no change in the approach to staffing on Aster Ward after the claimant's dismissal.

135. The claimant also alleged that Aster Ward was denied office supplies and equipment including strong wear clothing. She accepted however in evidence that Aster Ward did have access to office supplies but had a different account it needed to use to order them, and she had not been told about that. She accepted in cross examination that the issue of office supplies was nothing to do with race.

136. It was initially hoped that strong wear clothing (which is non-rip clothing which cannot be torn up to produce ligatures) would not be needed on Aster Ward. The approach taken on the ward was that the least restrictive approach to patient care should be taken, as the focus was on rehabilitation. It was for that reason that strong wear clothing was not initially ordered. After patients were admitted to the ward, it became apparent that strong wear clothing was needed on occasion, and it was ordered. This was nothing to do with race.

137. The claimant alleged that when a company told the respondent they preferred to use an alternative facility, Mrs Woodward immediately concluded it was because of care provided on the claimant's ward, without any basis for making that assumption.

138. Mrs Woodward's evidence was that a complaint had been received from the CCG indicating that the CCG wanted to use an alternative health provider to the respondent. Mrs Woodward assumed that because the complaint came from the CCG which funded Aster Ward, the complaint was about that ward. She asked Tracie Huckerby to discuss the complaint with the claimant.

139. In the event, it turned out that the complaint related to another ward and Mrs Woodward accepted that. There was no evidence to suggest that the decision to ask the claimant about the complaint was linked to race.

140. The claimant also complained that at a staff meeting on 10 November 2020 Mrs Woodward belittled her by questioning why Aster Ward had needed the help of an additional manager during a recent incident. This followed an incident when the alarm on Aster Ward had been ringing out for some time and a Ward Manager from another ward had come to help. Mrs Armitage asked the claimant why this had happened. This was in our view a reasonable question for her to ask, given the funding arrangements for Aster Ward and the CCG's insistence that Aster operate independently.

141. Mrs Woodward was not motivated by race in asking this question and was not seeking to humiliate the claimant.

142. In November 2020 the claimant made use of the respondent's policy of allowing staff to buy an extra week's holiday. She suggested that Mrs Woodward had become angry towards her for doing so, and that this was motivated by race. She accepted in evidence however that she had never discussed the holiday issue with Mrs Woodward. The request to buy extra holiday was made to and discussed with Tracie Huckerby who was the claimant's line manager. She suggested that Tracie Huckerby told her Mrs Woodward was not happy that the claimant had bought extra holiday.

143. Mrs Woodward's evidence was that she had no involvement in any decisions about buying holiday except if she wanted to buy extra holiday herself. We accept her evidence on this issue. She had no involvement in the claimant's request to buy extra holiday.

144. The final allegation made by the claimant was that Mrs Woodward had refused to approve payment for additional hours worked by the claimant whilst at Field House. Mrs Woodward accepted that she had not approved the claimant's claim for payment for hours worked at Field House. The reason for this was that she did not have authority to do so as Field House was a separate site which did not fall under her area of responsibility.

145. Mrs Woodward suggested that the claimant contact Rebecca Perrin about the claim for additional payment, and that she ask one of the administrative staff to help with the claim. Miss Perrin subsequently approved the claimant's claim, and she was paid for the additional hours in November 2020. There was no evidence to suggest that the delay in paying the additional hours was due to race.

The Law

Direct discrimination

146. Section 13 of the Equality Act provides that:

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

147. Section 23 of the Equality Act deals with comparators and states that: "*there must be no material difference between the circumstances relating to each* case. In **Shamoon *v Chief Constable of the Royal Ulster Constabulary [2003] ICR*** the House of Lords held that the relevant circumstances must not be materially different between the claimant and the comparators, so the comparator must be in the same position as the claimant save in relation to the protected characteristic.

148. When determining questions of direct discrimination there are, in essence, three questions that a Tribunal must consider:
   a. Was there less favourable treatment?
   b. The comparator question; and
   c. Was the treatment 'because of ' a protected characteristic?

Burden of proof

149. Section 136(2) of the Equality Act 2010 sets out the burden of proof in discrimination claims, with the key provision being the following:

> "*(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…"*

150. There is, in discrimination cases, a two stage burden of proof (see ***Igen Ltd (formerly Leeds Careers Guidance and others v Wong [2005] ICR 931*** and ***Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205*** which is generally more favourable to claimants, in recognition of the fact that discrimination is often covert and rarely admitted to. In ***Igen v Wong*** the Court of Appeal endorsed guidelines set down by the EAT in ***Barton v Investec***, and which we have considered when reaching our decision.

151. In the first stage, the claimant has to prove facts from which the tribunal could decide, in the absence of an adequate explanation by the respondent, that discrimination has taken place. If the claimant does not do this, the claim will fail. If the claimant does this however, then the second stage of the burden of proof comes into play and the respondent must prove, on the balance of probabilities, that there was a non-discriminatory reason for the treatment. This two stage burden applies to all of the types of discrimination complaint made by the claimant.

152. In ***Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913*** the Court of Appeal held that "*there is nothing unfair about requiring that a claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the respondent's act was a discriminatory one) then the claim will succeed unless the respondent can discharge the burden placed on it at the second stage."*

153. The Supreme Court has more recently confirmed, in ***Royal Mail Group Ltd v Efobi [2021] ICR 1263****,* that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions in section 136 of the Equality Act. So, a claimant must prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

154. In ***Glasgow City Council v Zafar [1998] ICR 120***, Lorde Browne-Wilkinson recognised that discriminators ' do not in general advertise their prejudices: indeed they may not even be aware of them'.

155. It is unusual to find direct evidence of discrimination. The Tribunal has the power to draw inferences of discrimination where appropriate. Inferences must be based on clear findings of fact and can be drawn not just from the details of the claimant's evidence but also from the full factual background to the case.

156. It is not sufficient for a claimant merely to say, 'I was badly treated' or 'I was treated differently'. There must be some link to the protected characteristic or something from which a Tribunal could draw an inference. In ***Madarassy v Nomura International plc [2007] ICR 867*** Lord Justice Mummery commented that: "*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."

157. In ***Deman v Commission for Equality and Human Rights and others [2010] EWCA Civ 1276***, Lord Justice Sedley adopted the approach set out in ***Madarassy v Nomura*** that 'something more' than a mere finding of less favourable treatment is required before the burden of proof shifts from the claimant to the respondent. He made clear, however that the 'something more' that is needed to shift the burden need not be a great deal. Examples of behaviour that has shifted the burden of proof include a non-response or evasive answer to a statutory questionnaire, or a false explanation for less favourable treatment.

158. Unreasonable behaviour is not, in itself, evidence of discrimination (***Bahl v The Law Society [2004] IRLR 799***) although, in the absence of an alternative explanation, could support an inference of discrimination (***Anya v University of Oxford & anor [2001] ICR 847***).

159. If the burden shifts to the employer, then it must prove, on the balance of probabilities, that race was not a ground for the less favourable treatment.

160. In ***London Borough of Islington v Ladele [2009] ICR 387*** the EAT gave guidance to Tribunals dealing with claims of direct discrimination:

a. The crucial question for the Tribunal is to determine the reason why the claimant was treated as she was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

b. If the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, discrimination is made out. It need not be the main or only reason but must be more than trivial.

c. Direct evidence of discrimination is rare, and tribunals often have to infer discrimination from all the material facts. The two stage burden of proof applies.

d. The explanation for the less favourable treatment does not have to be a reasonable one and may indeed be that the employer has treated the claimant unreasonably. Unreasonable treatment is not sufficient to justify an inference of unlawful discrimination.

e. It is not necessary for a Tribunal to go through the two stage burden of proof in every cases. In some cases, it may be appropriate for the Tribunal just to focus on the reason given by the employer and, if it is satisfied that it is a non-discriminatory reason, to go no further.

f. If a Tribunal decides or decides not to infer discrimination from the surrounding facts, it should set out in some detail its reasons for doing so.

g. It is implicit in the concept of direct discrimination that the claimant is treated differently than the statutory comparator is or would be treated.

Liability of employers and principals

161. Section 109 of the Equality Act 2010 provides that:

"*(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A –
(a) from doing that thing, or
(b) from doing anything of that description..."

Submissions

Claimant

162. The claimant referred us in her submissions to the cases of ***Igen v Wong [2005] ICR 931***, ***Hewage v Grampian Health Board [2010] ICR 1054***, ***Nagarajan v London Regional Transport [2000] 1 AC 501***, ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11*** and ***Canniffe v East Riding of Yorkshire Council [2000] IRLR 555*.**

Respondent

163. Miss Miller referred us to ***Shamoon v Chief Constable of the Royal Ulster Constabulary***, ***Adebayo v Dresdner Kleinwort Wasserstein Ltd [2005] IRLR 514***, ***Chief Constable of West Yorkshire v Vento [2001] IRLR 124***, ***Hewage v Grampian Health Board***, ***Royal Mail Group Ltd v Efobi***, ***Anya v University of Oxford and anor [2001] ICR 847***, ***London Borough of Islington v Ladele***, ***Nagarajan v London Regional Transport***, ***Igen v Wong***, ***Brown v Croydon LBC [2007] EWCA Civ 32***, ***Watt (formerly Carter) v Ahsan [2008] IRLR 243***, ***Madarassy v Nomura International plc***, ***Reynolds v CLFIS (UK) Ltd [2014] ICR 907*** and ***Royal Mail Group Ltd v Jhuti [2019] UKSC 55***,

Conclusions

164. The following conclusions were reached on a unanimous basis, having considered all of the evidence , the legal principles summarised above and the oral and written submissions of the parties.

165. We have reminded ourselves that direct evidence of discrimination is very rare and that discriminators rarely accept that they have discriminated. We therefore have the power to draw inferences as to the reason why the claimant was treated as she was.

166. We have considered very carefully the reasons why the claimant was treated as she was by the respondent. The claimant makes three allegations of less favourable treatment :

a. The provision of what she says are false statements by Dawn Price, Zoe French, Dawn Kitchen and Amy Parnell;
b. Her dismissal by Anne Woodward; and
c. The rejection of her appeal by Rebecca Perrin.

167. In respect of each allegation, the claimant relies upon a hypothetical comparator, and she has not identified any actual comparators. The hypothetical comparator must be someone in the same circumstances as the claimant or in circumstances which are not materially different from the claimant, but who is not of Black British ethnicity.

168. We find that the appropriate comparator in relation to each of the allegations of discrimination is a white Ward Manager who faced similar disciplinary allegations as the claimant did.

169. The first allegation of discrimination was that four white employees: Dawn Price, Zoe French, Dawn Kitchen and Amy Parnell made false statements in the internal investigation. Dawn Price and Zoe French gave evidence at the hearing, so we have heard directly from them. The claimant has had the opportunity to cross examine them and their evidence has been tested.

170. We found both Miss Price and Miss French to be honest and credible witnesses. The evidence that they gave at the hearing was consistent with the witness statements that they provided during the investigation. There was no hint of racial bias, conscious or unconscious, in their evidence.

171. We find that they were telling the truth, both in their evidence to the Tribunal and to the internal investigation.

172. Although we did not hear from Dawn Kitchen or Amy Parnell, we were taken in detail to the statements that they provided during the investigation. We have no reason to believe that they were not telling the truth when they gave their statements as part of the investigation into the claimant's conduct, and we accept that they were telling the truth when they provided their statements.

173. There was no evidence before us of any collusion between the witnesses. Each of their statements contained different evidence and had a different focus.

174. Allegations that four employees gave false statements to their employer, colluded in doing so and did so because of race are extremely serious allegations for the claimant to make. Such allegations will only be upheld if there is evidence to support them. There was no such evidence whatsoever, but merely a bare assertion by the claimant.

175. The claimant did not adduce any evidence to support her assertion that the four individuals were motivated by race when they gave their statements. It is notable in our view that during the investigation, disciplinary and appeal processes the claimant put forward an alternative reason as to why the four individuals gave the evidence that she did. When initially told about the anonymous complaint to the CQC on 12 February 2021 she told Mrs Woodward and Tracie Huckerby that the believed the four individuals were upset with her because of management decisions that she had made in respect of each of them. She repeated that assertion later during the disciplinary process.

176. At no point prior to these Tribunal proceedings did the claimant suggest that any of the four individuals were motivated, consciously or subconsciously, by race. This is despite the fact that she had every opportunity to do so and was represented by the RCN during the disciplinary and appeal meetings. She raised the issue of race in the appeal in relation to Mrs Woodward, but not in relation to any of these four individuals. She also told us in evidence that she first believed that the statements were motivated by race when she read them before the disciplinary hearing. Her reasons for not rising the question of discrimination in relation to these four statements were not convincing.

177. The claimant has not, in relation to this allegation, proved facts from which we could in the absence of an adequate explanation by the respondent, decide that discrimination has taken place. We accept that the evidence given by the four individuals was true. We find that the reason they gave the evidence that they did was because they were interviewed as part of the internal investigation and told the investigators what they believed to be true. They were not motivated by race.

178. The second allegation of direct race discrimination relates to the dismissal by Anne Woodward.

179. We have considered carefully the reasons given by Ms Woodward for dismissing the claimant. We are conscious that evidence of a discriminatory motive is rare, and have asked ourselves what was motivating Mrs Woodward, consciously or subconsciously, when she took the decision to dismiss.

180. We are assisted in this by the 'Summary of Decision Making' prepared contemporaneously by Mrs Woodward and by the dismissal letter. These documents set out her reasoning for the decision. We have also considered Mrs Woodward's evidence to the Tribunal, which was tested by the claimant in cross examination.

181. We are satisfied on the evidence before us that the reason why Mrs Woodward dismissed the claimant was because she genuinely believed that the claimant had committed acts of gross misconduct. There was no evidence before us to suggest that Mrs Woodward was motivated in any way by race. Mrs Woodward displayed no animosity towards the claimant and indeed had previously been involved in recruiting her and recommending her for a role at Field House.

182. The investigation that ultimately led to the claimant's dismissal was prompted by an external complaint by the respondent's regulatory body the CQC. It was not initiated by the respondent. Mrs Woodward's initial response to the CQC after receiving the complaint is telling – she sought to reassure them that there had not been any reports of swearing by the claimant.

183. Once the investigation was started more issues came to light, and the respondent investigated these. Some of the allegations for which the claimant was dismissed were ultimately admitted by her. For example, during the disciplinary hearing she accepted that she had used the 'f' word at work, she accepted having referred to the person who complained to the CQC as a 'coward' in the community meeting, and she accepted that she had given her personal contact details to a former patient. She also accepted that she had removed the cuddly toy from a patient under restraint, although maintained that there was nothing untoward in this.

184. We were influenced in reaching our decision by the fact that, until the disciplinary process, Mrs Woodward was a strong supporter of the claimant and had a good working relationship with her. She recruited her and put her forward for a role at Field House. She gave her the important role of managing a new ward that was being set up at the Farndon hospital. She would not have done this if she had not had confidence in the claimant's professional abilities.

185. The claimant could provide no explanation as to why Mrs Woodward's attitude towards her would change and why she would start discriminating against her. The claimant has not proved facts in relation to the second allegation of discrimination from which we could, in the absence of an adequate explanation by the respondent, decide that discrimination has taken place. We therefore find that the decision to dismiss the claimant was taken because of the claimant's misconduct and not because of race.

186. The final allegation of discrimination relates to the appeal. Once again, there was no direct evidence before us to suggest that Rebecca

Perrin was motivated either consciously or subconsciously by race when she decided not to uphold the claimant's appeal. Mrs Perrin presented at the Tribunal as a credible witness, whose evidence we accept. She dealt with the appeal thoroughly and investigated the issues raised by the claimant.

187. The reasons why she did not uphold the claimant's appeal are set out in detail in the appeal outcome. She concluded that there was no evidence to support the claimant's assertion that people were lying in their witness statements. In response to the claimant's suggestion that only selective witnesses had been interviewed she asked the claimant who else she thought should be spoken to and arranged for them to be interviewed. She carefully considered the allegations of racial bias raised by the claimant and spent some time investigating them.

188. We accept that the reasons why the appeal was not upheld were as set out in the appeal letter, and that these were non-discriminatory. Miss Perrin had also been a fan and supporter of the claimant up until the disciplinary process, and the claimant could provide no explanation as to why she would at that stage become motivated by race.

189. We were impressed by the thoroughness of the investigation, the disciplinary hearing and the appeal. This was not a respondent which acted hastily in dismissing the claimant, or which sought to brush allegations of discrimination under the carpet. It took them very seriously and investigated appropriately.

190. The respondent has a duty of care not just towards its employees but also towards its patients. Having concluded that the claimant had treated a vulnerable patient as she did and committed the other acts of misconduct, it was entitled to dismiss her for that.

191. The claimant has not discharged the first hurdle in the burden of proof in relation to any of the allegations of discrimination. She has quite simply not proved any facts from which we could, in the absence of an adequate explanation from the respondent, conclude that discrimination has taken place. Her allegations were based entirely on her belief that race was a motivating factor, without any hard evidence to support that.

192. In any event, even had the claimant discharged the first part of the burden of proof, the respondent has provided non-discriminatory explanations for the action that it took.

193. We have carefully considered the background information relied upon by the claimant in support of her argument that Mrs Woodward was motivated by race. That information does not in our view support her claim. Some of the allegations contained within the background information turned out to be incorrect, others the claimant admitted were not linked to race, and in respect of all of them the respondent has provided a reasonable explanation.

194. There is nothing in the background information relied upon by the claimant that would make us draw an inference that the real reason the claimant was dismissed was race. On the contrary the respondent has provided adequate and non-discriminatory explanations for all of the incidents relied upon by the claimant. The respondent has a diverse workforce and provides mandatory training for its staff in diversity issues. It actively seeks to recruit nurses from abroad and to promote them.

195. For the above reasons the complaints of direct race discrimination fail and are dismissed.

196. In light of our findings above, it is not necessary for us to determine whether the respondent is liable for the acts of its employees under section 109 of the Equality Act 2010.

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Employment Judge Ayre

29 March 2023

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