



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Whittingham-Reid

Respondent: Avon and Wiltshire Mental Health Partnership NHS Trust

Heard at: Bristol Civil Justice Centre
On: Monday 12th June 2023,
Tuesday 13th June 2023,
Wednesday 14th June 2023,
Thursday 15th June 2023 and
Friday 16th June 2023.

Before: Employment Judge A Frazer
Tribunal Member Mrs B Von Maydel-Koch
Tribunal Member Mrs L Fellows

Representation:
Claimant: Ms A Chacon (Bristol Black Carers) and In Person
Respondent: Ms J Twomey of Counsel

JUDGMENT AND REASONS (RESERVED)

JUDGMENT

1. The Claimant's claims for unfair dismissal under s.103A and s.94 Employment Rights Act 1996, whistleblowing detriment under s.47B Employment Rights Act 1996 and direct race discrimination under s.13 Equality Act 2010 are not well founded and do stand dismissed.

REASONS

The Claims

1. The Claimant brings claims for unfair dismissal under s94 ERA 1996, automatically unfair dismissal under s.103A ERA 1996, whistleblowing detriment under s.47B ERA 1996 and direct race discrimination under s.13 Equality Act 2010. The claim form was presented on 20th December 2021. The ACAS notification was made on 23rd November 2021 and the certificate was issued on 25th November 2021. The matter was the subject of two case management orders, one from EJ Livesey dated 5th October 2022 and one from EJ Roper dated 7th February 2023. The Claimant had produced a lot of documentation upon EJ Cadney's request for further information and both judges distilled the claims and issues in their case management orders. The final list of issues was set out in the order of EJ Roper and is set out below. The Claimant brought 12 protected disclosure allegations. She was advised at the hearing before EJ Roper that if she wished to pursue any further allegations she would need to make an amendment application.
2. I clarified the list of issues with the parties at the start of the hearing and asked if the Claimant wanted to make an amendment application but she decided to proceed on the basis of the list as it was. It was also clarified that this was a case where it was not alleged that the dismissal was discriminatory. There are discrete allegations of race discrimination which are set out at paragraph 5 of the list of issues. It was clarified that in respect of disclosure 1 Ms Babalola was erroneously included as one of the recipients of the alleged disclosure so she was removed from the list.

The Hearing

3. At the start of the hearing the Respondent applied to adduce additional disclosure, namely minutes of safeguarding meetings on 9th and 14th April 2021. We were also provided with a whistleblowing policy, the inclusion of which in the bundle was not contentious. The Claimant objected to the production of the additional meeting minutes as they had not been disclosed in the original proceedings. We found that since the minutes went to the basis for the Claimant's suspension it would be relevant as it went to general fairness/ whether the process including the decision to suspend fell within the band of reasonable responses. The Respondent advised that Amy Evans was on long-term sick leave and was not going to be called as a witness but the parties both decided to proceed in any event, having been given the opportunity to apply for an adjournment. The Claimant was informed that if a witness was not called the Tribunal would attach limited weight to the evidence as they were not present to be cross-examined.
4. The Claimant had not included any reference to her protected disclosures in her witness statement and I queried this with her. With the Respondent's agreement, in evidence-in-chief the Claimant was asked to confirm the protected disclosures that she wished to rely on from the list of issues.
5. We heard from the Claimant and her witness, Rosemary Abbey, and from the Respondent's witnesses namely Jim Kamara, Ife Babalola, Kate Chard, Sue Pinnell, Daniel Walker, Hannah Ray and Mark Arruda-Bunker. We heard closing submissions from the parties on the fourth day and adjourned to

deliberate. The Claimant's representative became unwell with hayfever symptoms on Day 3 and so the Claimant took over her own representation from that point onwards. We deliberated on Day 5 and provide a reserved unanimous decision.

The Issues

1. Unfair dismissal

- 1.1 What was the reason for dismissal? The respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under s.98(2) ERA 1996.
- 1.2 Did the Respondent have a genuine belief in the Claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances.
- 1.3 The burden of proof is neutral, but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:
 - 1.3.1 the Claimant faced four allegations of misconduct, and only two of these (namely allegations one and four) were upheld; and
 - 1.3.2 the Claimant asserts that the Respondent's belief in her misconduct was ill-founded in respect of the two allegations that were upheld; and
 - 1.3.3 in essence in relation to each allegation the Claimant asserts that the investigation was inadequate, and that assumptions and conclusions drawn from the evidence were flawed.
- 1.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
- 1.5 Did the respondent adopt a fair procedure?
- 1.6 If it did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?
- 1.7 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

2. Protected Public Interest Disclosures ('Whistle Blowing')

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the claimant say or write? When? To whom? The Claimant relies on these disclosures:

2.1.1.1 Disclosure 1: an email dated 16 December 2020 to Ms Pinnell and Mr Kamara in which she asserted that she ought not to have been required to work alone on a secure ward; and

2.1.1.2 Disclosure 2: on 30 January 2018 a verbal complaint to sue Priestley that white staff had made derogatory and racist comments towards black staff; and

2.1.1.3 Disclosure 3: on 22 June 2018 a verbal disclosure to sue Priestley that white staff had made derogatory comments towards black staff; and

2.1.1.4 Disclosure 4: on 26 July 2018 a verbal disclosure to Ms Bofu that Lauren Bramble was derogatory about black staff; and

2.1.1.5 Disclosure 5: on 21 November 2018 a verbal disclosure to Amy Evans that the claimant had experienced discrimination was being unfairly treated by Lauren Brimble; and

2.1.1.6 Disclosure 6: on 11 December 2018 a verbal disclosure at a BAME equality support forum to matron Jim Kamara complaining of racism and discrimination; and

2.1.1.7 Disclosure 7: a verbal disclosure on 26 June 2019 to Fion about discriminatory allocation of annual leave; and

2.1.1.8 Disclosure 8: on 19 November 2019 a complaint to Sue Priestley to the effect that the claimant's hours had been changed unfairly and she was not given the same privilege as Ms Pinnell; and

2.1.1.9 In addition, the following disclosures are said to have been made verbally to Ms Pinnell:

2.1.1.10 Disclosure 9: on 9 March 2018 that Lauren Bramble was discriminating against black staff; and

2.1.1.11 Disclosure 10: on 16 July 2018 that there was bullying harassment and unfair allocation of duties in favour of white staff; and

2.1.1.12 Disclosure 11: on 28 November 2018 to the effect that Lauren Brimble wrongly changed the claimant's name to certify who had done the observations; and

2.1.1.13 Disclosure 12: on 21 January 2019 to the effect that Lauren Brimble was continually changing the claimant's hours.

2.1.2 Were the disclosures of 'information'?

2.1.3 Did the claimant believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did the claimant believe it tended to show that:

2.1.5.1 (in respect of Disclosures 2 to 12): a person had failed or was failing to comply with a legal obligation (namely breaches of the EqA); and

2.1.5.2 (in respect of Disclosure 1 only): the health or safety of any individual had been, was being or was likely to be endangered.

2.1.6 Was that belief reasonable?

2.2 If the Claimant did make any of these qualifying disclosures then it was a protected disclosure because it was made to the Claimant's employer pursuant to section 43C(1)(a) of the Act

3. Whistle Blowing Unfair Dismissal (s103A of the Act)

3.1 Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?

3.2 The claimant did have two years' continuous service and the questions which the Tribunal will have to address are:

3.2.1 Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?

3.2.2 Has the respondent proved its reason for the dismissal, namely misconduct?

3.2.3 If not, does the Tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

4. Whistle Blowing Detriment (s 47B of the Act)

4.1 Did the Respondent do the following things:

4.1.1 bring the disciplinary allegations against her; and dismiss her.

4.1 By doing so, did it subject the Claimant to detriment?

4.3 If so, was it done on the ground that the claimant had made the protected disclosure(s) set out above?

5 Direct Race Discrimination (s 13 Equality Act 2010)

5.1 The claimant describes herself as British and Black.

5.2 Did the respondent do the following things:

5.2.1 Allegation 1: failing to investigate the disciplinary case against the claimant in more detail, and reaching a flawed conclusion at the disciplinary hearing which would not have been reached had she been White; and

5.2.2 Allegation 2: failing to heed the claimant's complaint in circumstances where a White employee's complaint was acted upon, and in particular the claimant alleges that she reported to the nurse in charge Ms Babalola that Ms Chard had incited a service user to complain about her and she also informed the manager, Ms Pinnell, but no action was taken. On the other hand, when Ms Chard complained about the claimant's behaviour towards a service user, her complaint was not ignored and was acted upon; and

5.2.3 Allegation 3: As a result of the application of the Safeguarding Policy, the claimant should not have been required to work with service users on a one-to-one basis and her manager failed to inform her colleagues when she was wrongly assigned to one-to-one working. Her refusal to undertake this work was regarded as insubordination such that she had to face a disciplinary charge in circumstances where no charge ought to have been brought; and

5.2.4 Allegation 4: the claimant was told during her supervisions with Ms Pinnell to bring any further incidents involving the Housekeeping Team to her if and when they occurred but instead she faced disciplinary allegations in respect of such further incidents.

5.3 Was that less favourable treatment? The Tribunal will have to decide whether the claimant was treated worse than someone else was treated, known as the claimant's comparator. There must be no material difference between the circumstances of this comparator and those of the claimant. The comparator can be an actual person, or if there is no actual comparator then someone hypothetically. That is to say a hypothetical comparator whom the claimant says would not have been treated in the (less favourable) way in which the claimant was treated. The claimant relies on an actual comparator namely Ms Chard and/or a hypothetical White comparator.

5.4 If the claimant did suffer less favourable treatment above, was this because of race? Is the respondent able to prove that it was for a non-discriminatory reason unconnected to the protected characteristic in question?

The Law

6. Under s.98(2)(b) Employment Rights Act 1996 a potentially fair reason for the dismissal of an employee is conduct. Under s.98(4) ERA 1996 the determination of the question as to whether the dismissal is fair or unfair

(having regard to the reason shown by the employer) – (a) depends on whether the in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and b) shall be determined in accordance with equity and the substantial merits of the case.’

7. Having regard to the wording of that section we remind ourselves that we must not substitute our judgment for that of the employer and that there is a band of reasonable responses to that conduct which might be adopted by a hypothetical reasonable employer. We must not say what we would have subjectively done in the circumstances because if we do we risk falling into the substitution mindset (**Iceland Frozen Food v Jones [ICR] 17, Foley v Post Office [2000] ICR 1283, Hadden v Van den Bergh Foods Ltd [1999] ICR 1150**). We remind ourselves that the band applies to the procedure as much as it does to the decision – **Sainsburys Supermarkets Ltd v Hitt [2002] EWCA Civ 1588**.
8. Further to **BHS Ltd v Burchell [1978] ICR 303** in cases of alleged misconduct, the Tribunal is to assess whether the Respondent had a genuine belief in the Claimant’s misconduct based on reasonable grounds having conducted as much investigation into the case as was reasonable in the circumstances.
9. In **Taylor v OCS Group [2006] ICR 1602** the Court of Appeal stated that there was no rule that earlier unfairness in a procedure can be cured on appeal only by way of a rehearing rather than a review. What was relevant was the examination of the fairness of the process as a whole.
10. The Claimant also brings a claim for automatically unfair dismissal under s.103A ERA 1996. If the Tribunal find that the reason or principal reason for the dismissal was that she made a protected disclosure she will succeed and the Tribunal will not have to assess fairness in the way that it does under s.98(4) ERA 1996.
11. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323** Cairns LJ said:
‘a reason for the dismissal of an employee is a set of facts known to the employer it may be beliefs held by him, which cause him to dismiss the employee’.
12. The reverse burden of proof operates in such circumstances. This was set out in **Kuzel v Roche Products Ltd [2008] EWCA Civ 380 CA**. The burden lies on the employee claiming unfair dismissal under the section to produce some evidence that she had made a protected disclosure. Once that evidential burden is discharged the legal burden is on the employer to establish that the reason was not of the proscribed kind.
13. Under s.43B a disclosure is protected if it is a qualifying disclosure. This is defined as ‘any disclosure of information which in the reasonable belief of the

worker making the disclosure [is made in the public interest] and tends to show one or more of the following –

b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he was subject and

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

14. Under s.43C ERA 1996 a disclosure is protected if it is made to an employer or other qualified person. In this case it is accepted that it was made to the Claimant's employer.
15. In **Kilraine v London Borough of Wandsworth [2018] EWCA 1436** it was held that the essential question for the Tribunal is whether a disclosure contains information tending to show one of the six matters in s.43B(1)(a) to (f); whether a particular disclosure qualifies for protection should be made in the light of the particular context in which it was made. Also at paragraph 35 Sales LJ held that '*in order for a statement or disclosure to be a qualifying disclosure according to this language it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).*' The rigid dichotomy between allegation and information was held not to be on point as perhaps had been earlier thought in **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT**.
16. The Tribunal must also decide whether the disclosure was in the claimant's reasonable belief in the public interest. In **Chesterton Global Ltd v Nurmohamed [2017] IRLR 837** it was held that the question for the tribunal was whether the worker believed, at the time he was making it, that the disclosure was in the public interest and if so, whether that belief was reasonable. While a worker must have to have a genuine and reasonable belief that a disclosure is in the public interest this does not have to be his predominant motivation in making it. The Court of Appeal held that the following factors might be a helpful tool for assessing whether a worker reasonably believed that the disclosure was in the public interest: the numbers in the group whose interests the disclosure served – although not in itself a determinative factor; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed and the identity of the wrongdoer – a disclosure about a more prominent wrongdoer is more likely to be in the public interest.
17. In **Fecitt and others v NHS Manchester [2012] ICR 372** it was held that for the purposes of the burden of proof in whistleblowing detriment cases s.47B will be infringed the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.
18. The Claimant brings a claim for direct race discrimination under s.13 Equality Act 2010. Under s.13 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. Where there are comparators, under s.23(1) Equality Act 2010 there must be no material difference between the circumstances relating to each case. Comparison between an employee and a comparator must be like for like, which means that 'the comparator must be in the same position in all material respects as the victim, save only that he or she is not a member of the protected class' (Per Lord Scott in **Shamoon v Chief Constable of the RUC [2003] ICR 337**).

19. The reverse burden of proof operates in discrimination cases. This is set out in s.136. Under s.136(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. Under s.136(3) subsection (2) does not apply if A shows that A did not contravene the provision. This means that if the claimant proves facts from which the tribunal could conclude, in the absence of adequate explanation, that the respondent has committed a discriminatory act, then the complaint shall be upheld unless the respondent proves that he did not commit the act in question.
20. In discrimination claims there has to be 'something more' to pass the burden to the respondent other than simply a difference in status and a difference in treatment. In **Madarassy v Nomura International Plc [2007] EWCA 33**, LJ Mummery stated:

'56. The court in **Igen v Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. **The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**

57 "Could conclude" in section 63A(2) must mean that "**a reasonable tribunal could properly conclude**" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

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

Submissions

Respondent

21. On behalf of the Respondent, it was submitted that the Claimant had not identified the source of the legal obligation for her protected disclosures. She had not provided the requisite information in accordance with the requirements of s.43B ERA 1996. In addition, the contents of the disclosures were not in the public interest because they related to her personal employment terms and conditions. Ms Twomey reminded the Tribunal of the causal test in **Fecitt** and submitted that the causal link between any disclosure as alleged and the bringing of the proceedings had not been made out. She said that any of the disclosures involving Sue Priestley, Fion and Margaret Bofu cannot have caused the bringing of the disciplinary proceedings because they were not involved in that process. She submitted that it was perverse to connect Mr Kamara with any dismissal because the very purpose of him calling the BAME meeting was to improve equality and behaviour on the ward. The only disclosure that was written down was 16th December email at page 449 and while the Claimant gave evidence about health and safety issues relating to service users, she did not spell this out at the time. The email was about pre-empting a complaint from Ife and at best it was about the service user not having a vape or tea, which was not a matter which endangered health and safety. The reason for the dismissal was not because the Claimant had raised any protected disclosures. There was no suggestion that Daniel Walker, Hannah Ray or Mark Arruda-Bunker were aware of the protected disclosures. What was clear was that the service user complaint triggered the disciplinary process and service user had no knowledge of the disclosures. The case on whistleblowing was not put to the witnesses. At best the evidence was that Hannah Ray was aware of racism generally but not specific to the Claimant's complaints.
22. The reason for the dismissal was that the Claimant had failed to treat the service user with dignity and respect. The decision to dismiss fell within the band of reasonable responses. The service user was threatened and then walked down the corridor and that was the degradation. This happened to a vulnerable service user who had a history of trauma. The Trust was in a position of responsibility and had a duty of care. The Claimant denied the allegation and could not reflect and show a positive attitude. A fair procedure was followed. The Claimant pointed to inconsistencies and so Hannah

interviewed Eniko and Mark interviewed Bimpe. The housekeeping staff would not have been aware of the previous complaints from the service user so there was no way of collusion.

23. As for race discrimination allegation 1, there were independent race equality advisors who were active participants in the process and the Claimant failed to say that the failures were due to race. In respect of allegation 2, the comparator was Kate Chard who was in materially different circumstances as the Claimant was brought to a disciplinary. There was an allegation regarding the same service user and so there was a repeated pattern of behaviour. In respect of allegation 3 – while the Respondent accepted the no lone working issue could have been handled differently the reason was that Sue Pinnell wanted the disciplinary allegation/ basis for it not to be more widely known and it was not like for like circumstances. Kate Chard had been attacked with a paintbrush by the service user so the circumstances were different and there was no suggestion that the Claimant was treated differently because of her race. In respect of allegation 4 – the Claimant had been warned about six similar incidents in the October. The disciplinary policy provided that if matters were not sorted informally they could escalate to being dealt with formally. The Claimant was not dismissed for those matters. It was submitted that the race discrimination allegation should be dismissed.

Claimant

24. The Claimant submitted that Allegation 1 was based on the service user's complaint only because the other witness statements were not available when she was first dismissed and the service user never said that she had made her walk naked. The evidence was inconsistent as there were so many different versions of events from witnesses regarding what happened on the day. The Respondent via Daniel Walker had tried to coerce the witnesses to say the same thing. There was no balance in the investigation. There was no second interview with Shanna Heavens. The Claimant had asked Mr Walker to interview the healthcare assistant who was in the kitchen with housekeeping at the time but he didn't and he said that she was agency staff but she was in fact a bank nurse. The Claimant had requested that he interview the staff who were present on the ward on the day. He did not do this. The ward was laid out in such a way that there would have been a clear view of the area, which would have enabled staff to have seen what was going on. The Claimant had mentioned Margaret Bofu to him, who was the nurse in charge, but because Shanna did supervision he failed to interview her. The Claimant had sent an email about cutlery missing which may have ended up being a risk to service users. This demonstrated that she took risks to service users seriously. Since her email on 16th December she had been stonewalled and there had been no response to her complaint. Kate Chard made a complaint against her on the same day but the allegation was escalated in respect of the Claimant. The housekeeper witness did not want the Claimant to see her face at the hearing.
25. The Claimant complained that there had been a background of discrimination. She had previously complained tirelessly about discrimination to the

Respondent and had contacted SARI. Jim Kamara had been aware of everything and yet nothing had been resolved. She had had no opportunity to contact witnesses to come to the disciplinary as she was suspended. When Kate Chard was cross-examined she knew about allegation 1 in circumstances where Sue Pinnell had said that she had wanted to protect confidentiality so that cannot have been the case. The Claimant felt that there was a conspiracy. She was in danger from a service user who attacked people all the time. There was so much racism and inequality on the ward. The Respondent had put her in a position where she had not been able to work and it had significantly impacted her life circumstances. The supervision notes showed that she had a good record but was made out to be a liar.

Findings of Fact

Background

26. The Respondent provides secure inpatient mental health services at its Fromeside site for service users who may have been in contact with the criminal justice system or who need help to reduce their risk to others. The Claimant was employed by the Respondent from 29th September 2017 to 24th September 2021 as a Health Care Support Worker on its Teign Unit. This is a medium secure inpatient unit in Fromeside for female adults. The Claimant's duties involved carrying out assigned tasks as part of a clinical team in support of registered nurses delivering care to the service users on the ward.
27. The Claimant claims that she made a number of protected disclosures to the Respondent and that as a consequence, the Respondent brought disciplinary proceedings against her and ultimately dismissed her. The Respondent's case is that she was dismissed for misconduct in that she failed to treat a service user with dignity and respect. The protected disclosures alleged and our findings made on them are recorded below.

Protected Disclosures

Disclosure One

28. On 16th December 2020 at 3.33pm the Claimant sent an email to her line manager, Susan Pinnell:

'Hi Sue

Today at around 1230, I was the only staff available on ward the ward floor, staffs FK and RS was doing extra care since 10:30 while NIC was busy with the new service user with two other nurses. I was unable to do my role as security nurse I full due to short of staff and su's on rehab wanted me but I was unable to go over. At 1300 I was unable to do garden break for either side of the ward, su's stood waiting for over 45 mins, Preeti came for the late shift and did the garden on the rehab side, Rosemarie came around 5 mins later, so I told the two staffs who was 2-1 that I am going to do this side so if there is an emergency could they ask her to re leave me, as I was moving off

lfe came to me and was handing me the obs folder for me to fill out the hour that wasn't done, I told her that I could not do that because I was not doing the observations because I was literally standing in the corridor with the other su's trying to keep them calm and explain why their needs aren't met, lfe insist that I should do them beause I was here, I ask her to come to the office so we could talk, lfe said she know lwas not able to do the obs, but I shoud just do it and help each other out, I told her if something should happen and I sign my name to something I didn't observed then I would have commit fraud!! She didn't want to hear, so I remind her of a similar situation last week when she told me that I cant sign or have someone else what they didn't observed, so I went and did the garden break for the su's who have now been waiting patiently, lfe then came to the garden door and came right up to my face and said to me "Jacqueline you are being nasty for not doing it" I reply that she was being nasty for calling me that. I left her at the garden door and went to the office trying to contact you are Jim but you weren't available, she then came again in front of su's and staffs in the corridor handing me the obs folder at 13:50 for me to do the 13:30 obs I said I can do the 13:50 she continue to push the folder at me, so I told her to put it in the office beause I was now covering 2 to 1 for staff RS while she was having something to eat because they were now on for almost 4 hours, I also did the same for staff FK.

I would like to make a report for this incident because I was the only staff doing all I could for the su's for almost 2 hours on my own and have a qualified calling me nasty to my face I am deeply hurt and shaking because I can't believe she could do this to me.'

29. The Claimant alleges that she made a protected disclosure in that she asserted that she ought not to have been required to work alone on a secure ward. She says that she reasonably believed that the information disclosed was in the public interest and tended to show that the health and safety of an individual had been, was being or was likely to be endangered.
30. In our finding the Claimant does not spell out that she is bringing this information to the attention of the Respondent which she reasonably believed tended to show that the situation was endangering the health and safety of anyone. Her evidence was that it was implicit from the contents of the email on the basis that the information demonstrates that she was working alone and the inevitable conclusion from that would be that the health and safety of the service users would be endangered. However we do not find that the information provided goes far enough to show that. Looking at the overall context and meaning of the email, we find that the Claimant was in fact complaining about the shortage of staff because it led to her being unable to carry out certain duties, which had ultimately resulted in an altercation with lfe when she had refused to carry out what lfe has asked her to do. She claims that lfe had called her nasty to her face and she was hurt about that. This is clear from the last paragraph.
31. We do not therefore find that the Claimant disclosed information which she reasonably believed tended to show that the health and safety of an individual was being or had been endangered.

32. We also considered whether the information tended to show that she reasonably believed that there was a breach of a legal obligation insofar as she was left alone on a secure ward but the information did not go as far as setting this out for the reasons we have given. The Claimant says that she was the only one doing the work for the service users for two hours on her own but does not say or even imply that this is a breach of a legal obligation.

33. We do not find that this was a protected disclosure.

Disclosure Two

34. On 30th January 2018 the Claimant says that she made a verbal complaint to Sue Priestley that white staff had made a derogatory and racist comment towards black staff. This is recorded on her table at page 114. She says that this was information which she reasonably believed was in the public interest and tended to show that the Respondent was failing to comply with a legal obligation to which it was subject. Sue Priestley was the Claimant's line manager until the end of 2019 when Sue Pinnell took over. In her evidence, when questioned about this, the Claimant says that the disclosure was part of a continuous act on the part of the Respondent in not responding to her complaints of racist behaviour on the part of staff. In her diary there is note at page 150 '*Michelle saying lazy piece of shits am the only one doing all the work*' and that '*spoke to SP*'. She referred to this in her closing submissions. The Claimant only records what Michelle says to her at the time but does not state what specifically she told her line manager. The Claimant did not identify precisely what she said to Sue Priestley as the information. There is a lack of specificity in this allegation as to the information that was provided. Therefore, the allegation fails as a matter of proof as we cannot uphold that the information that she disclosed was that she was being discriminated against on grounds of her race by Michelle and that it was information which tended to show that there was a breach of legal obligation. There are no contemporaneous documents in the bundle that record what the Claimant said. This allegation is therefore dismissed.

Disclosure Three

35. On 22nd June 2018 the Claimant complains that there was a verbal disclosure to Sue Priestley that white staff had made derogatory comments to black staff. She says at the table on page 115 '*reported LB Changing my rota, derogatory statements made by white staff members and their conduct towards black staff. Recorded in supervision notes dated 22nd June 2018.*' We were not taken to any notes and there was nothing in the diary. She said that this disclosure formed part of a continuous conduct on the part of the Respondent of not resolving her complaints. However the information needs to be set out clearly and precisely as to what exactly she said so that the Tribunal can assess whether the information disclosed tended to show that there was a breach of a legal obligation. This has not been done and therefore the Claimant has not proved that she made a protected disclosure.

Disclosure Four

36. The Claimant says that on 26th July 2018 she made a verbal disclosure to Ms Bofu that Lauren Brimble was derogatory about black staff. The Claimant says that Margaret was the nurse in charge and that she had reported it to Sue Priestley too. In her table the Claimant records that Lauren was heard saying *'they're all fucking lazy'*. She goes on to say that Lauren treated her unfairly and discriminated against her for a white staff, Lloyd, with allocation of breaks. There is a diary entry at page 156 which records that she told Ms Bofu that Lloyd had been allocated the breaks and that this was unfair discrimination. In our finding the Claimant has established that she provided information to the Respondent which tends to show that the Claimant reasonably believed that the Respondent was in breach of a legal obligation. The Claimant had put in a request about her shifts and the complaint is that Lloyd had been allocated the shift in priority to her. She alleges that Lauren had lied to her by saying that Lloyd had asked first and she had said that when she had put her request in there were no other requests there that morning. The Claimant reported the matter to Ms Bofu, which is recorded in her diary entry. We find that the Claimant reasonably believed that the information tended to show discrimination on the basis that she said Lauren had said *'they are all fucking lazy'* and that she had stated that this was unfair discrimination. We then came to determine whether the disclosure was in the public interest. While the Claimant raised this, we find, because it affected her own employment situation, the comment made referred to *'they are all fucking lazy'* and we heard evidence from both parties that there had been some concerns with race relations on the ward so that state of affairs provides the context. In our finding, the Trust is a public body and it would be in the public interest for any matters of that nature in circumstances where there in interface with public service users, for any such issues to be raised. Therefore, we conclude that the Claimant reasonably believed that it was in the public interest and that she made a protected disclosure.

Disclosure Five

37. The Claimant alleges that on 21st November 2018 a verbal disclosure was made to Amy Evans that the Claimant had experienced discrimination and was being unfairly treated by Lauren Brimble. The week of 21st November 2018 is missing from the Claimant's diary. There was no other contemporaneous documentary record that could assist us with that date and precisely what the Claimant had said to Amy Evans. Amy Evans' statement said that the Claimant had told her once in the corridor on the ward that the Claimant had said that she felt discriminated against but it is not clear that this was the same date or that it was in relation to Lauren Brimble, which is the allegation. We find that the Claimant has not established on the balance of probabilities that she disclosed such information to Amy Evans on that particular date.

Disclosure Six

38. The Claimant alleges that on 11th December 2018 she made a verbal disclosure at a BAME equality support forum to the matron, Jim Kamara, complaining of racism and discrimination. In her table she says '*I attended a BAME equality support forum which was organised by Jim Kamara, I made my complaints about the racisms, discriminations, bullying and unfair treatment that is going on Teign Ward and all the complaints that I have made nothing is being done about it.*' We have the minutes of that meeting at page 193. It was accepted by Mr Kamara that the Claimant and other staff complained of racism and discrimination at that meeting. Under cross-examination the Claimant was asked about whether it was germane to her personal treatment but the Claimant asserted that this was in the public interest as it was a matter the public at large needed to know about, which was why she attended the BAME meeting. We find that she did reasonably believe that the information that she disclosed at the meeting tended to show that there was a breach of a legal obligation by the Respondent. We note that this was disclosed in the context of a meeting which discussed the wider issue of discrimination on the ward, not just in relation to the Claimant herself. The Trust is a public body and it would be in the public interest for any matters of that nature in circumstances where there is interface with public service users, for any such issues to be raised. Therefore we concluded that the Claimant reasonably believed that it was in the public interest and that she made a protected disclosure.

Disclosure Seven

39. The Claimant claims that on 26th June 2019 she complained to Ffion about the discriminatory allocation of annual leave.

40. In her diary (168) the Claimant says '*spoke with Ffion in regard to incidents with SC and equal opportunity not given to all staff on experiencing certain kinds of leaves*' and '**security nurse all day because of staff shortage.*' She refers to equal opportunity but she does not spell out precisely what was said to Fion. In evidence she says that she accepted that she did not mention race but in her diary she knew what she meant. It was not clear to us what information she disclosed on that date which would tend to show that there was a breach of a legal obligation by the Respondent. Therefore we find that the Claimant has not established on the balance of probabilities that she made a protected disclosure.

Disclosure Eight

41. On 19th November 2019 the Claimant says that she made a complaint to Sue Priestley to the effect that her hours had been changed unfairly and she was not given the same privilege as Ms Pinnell. This is documented in her table at page 119 where she states that she was on a study day with Ms Pinnell. Ms Pinnell's hours were not changed but the Claimant's were. The Claimant complained to Sue Priestley and says that she said '*Why was I not given the same privilege as Sue Pinnell?*' She says '*I told her that this was not fair. She then changed it.*' We find that there was no information disclosed here that

tended to show that there was breach of a legal obligation as the Claimant simply makes a general allegation of unfairness. The information related to her own personal employment situation as it related to her hours so it was not in the public interest. We do not uphold this allegation as a protected disclosure.

Disclosure Nine

42. The Claimant says that on 9th March 2018 she disclosed to Sue Pinnell that Lauren Brimble was discriminating against black staff. The Claimant at page 114 says *'Incident of discrimination, unfair treatment, favouritism, abuse of power and preferential treatment to white staff against black staff by the nurse in charge, Lauren Brimble, who changed a white staff duty and assigned a black staff so the white staff could have a cigarette break. The ward was short staffed as usual.'* There is a diary entry of this at page 152 on a clean sheet of paper. There has to be a disclosure of information and there is no information that we can see that was disclosed to Sue Pinnell that there was discrimination. The Claimant says that Sue Pinnell was there so should just have known. This is not enough. The Claimant has not established that she disclosed information on this date that tended to show that the Respondent was discriminating against her. In the note she documents the situation and simply refers to it being unfair. Therefore we do not find that the Claimant made a protected disclosure.

Disclosure Ten

43. On 16th July 2018 the Claimant alleges she disclosed to Sue Pinnell that there was bullying, harassment and unfair allocation of duties in favour of white staff. On her table at page 115 she says *'bullying and harassment, unfair allocation of duty and fraudulent adjustment of time on my rota by white staff, Lauren Brimble, Nurse in Charge'*. There is a diary entry at page 155 which is a complaint that 3 other staff were in an office eating and that she was left to do the obs. There is no record in that diary entry of a complaint made to her manager. There is no mention that this was discrimination. We do not find on the balance of probabilities that she has established that she disclosed information to her line manager which tended to show that there was a breach of a legal obligation.

Disclosure Eleven

44. The Claimant alleged that on 28th November 2018 the Claimant disclosed to Sue Pinnell that Lauren Brimble wrongly changed the Claimant's name to certify who had done the observations. This is on the table at page 116 where the complaint is that Lauren had forgot to do the obs and that she had scribbled out her name and put the Claimant's instead. The Claimant says that she asked Lauren why she did that in the presence of Sue Pinnell and nothing was done about it. Under cross-examination the Claimant said that Sue was present and did nothing about the situation and she said that she knew that Sue knew so she did not think that she needed to say something. The Claimant had a discussion with Lauren to ask her why she did it. The

Claimant therefore did not disclose information which tended to show that there was a breach of a legal obligation. We do not uphold this allegation therefore.

Disclosure Twelve

45. The Claimant alleges that she made a verbal disclosure to Sue Pinnell on 21st January 2019 to the effect that Lauren Brimble was continually changing the Claimant's hours. This is in the table at page 118 where she says *'I decided to start regularly checking my working hours on my rota because Lauren Brimble continuously changing my working hours by reducing the actual hours I worked. I started noticing that I was owing up to two days at a time even though I worked every day of my shifts and even extra hours most times due to short of staff. I complained to charge nurse Sue Pinnell and she advised me to speak to the manager Sue Priestley which I did.'* Under cross-examination the Claimant was questioned about public interest and she said that if it was her day off then she would be reported for not working. The information that she disclosed to Ms Pinnell is not set out. It was not clear what precisely she said to Ms Pinnell. Moreover we find that the disclosure cannot have been in the public interest as it related to the alleged change of her working hours and was a private issue. This disclosure is not upheld.

Conclusions on Protected Disclosures

46. The Claimant made two protected disclosures to the Respondent. The first was that on 26th July 2018 she complained to Ms Bofu that the unfair allocation of breaks to Lloyd was unfair discrimination and the second was that on 11th December 2018 she made complaints of discrimination to Mr Kamara at a BAME meeting.

Findings of Fact leading to the Claimant's Dismissal

47. On 1st February 2021 Dr Kirsty Nash, clinical psychologist, had a discussion with a service user ('SU') in which SU disclosed that she had been asked to leave the bath that morning because of room/ corridor cleaning and had said that she had walked naked back to her room. She said that she was angry about this and that she felt abused by staff. The SU in question had weekly meetings with her psychologist.

48. After this discussion Dr Nash spoke to the nurse in charge that day, Shanna Heavens. The interview record at page 319 discloses that the Claimant had already spoken to Ms Heavens to inform her about the situation and that she had said that she had covered the SU with a towel. Ms Heavens had then confirmed to Dr Nash that the SU had been covered with a towel and that she was encouraged to cover up when moving between bedroom and bathroom (notes taken from Dr Nash's RIO entry on page 280). Therefore at the time this matter was not escalated as an issue. Dr Nash's evidence was that she was reassured by what she had been told. (Investigation pack page 382). No further action was taken.

49. Some time later the service user complained to Emily Harrison. There are interview notes taken from Mr Daniel Walker, Investigator, with Emily Harrison dated 30th November 2021. Emily Harrison said that she had been approached by SU as SU was upset and felt that she was being mistreated by staff. Emily Harrison, who was with a student, Claudette, at the time, advised SU to write a statement. The statement from SU is at page 279. This states *'I was in the bath and Jacqueline knocked on the door and said to come out it's room cleaning. I replied 'I'm in the bath, if the cleaners need to come into my room then I'll get out'. Jacqueline then said 'You need to get out or I'll get you out myself.' She said this in a threatening way. She then went away and later came back. I was then out of the bath but naked. She said 'you've got to get out'. So I left the bathroom naked and Jacqueline said 'We don't care'. So I walked down the corridor naked, until I got some clothes on when I got to my room.'*
50. SU's complaint went to Sue Pinnell who met with SU on the ward on 3rd March 2021. She also met with the Claimant that day for a supervision (335). During that meeting the Claimant raised concerns that she had about SU and how staff had not supported her. The Claimant was informed that SU had raised a written complaint about being made to walk down the corridor naked and that SU had also raised this with her psychologist. Sue Pinnell advised the Claimant that owing to the nature of the concern she would be raising the matter with safeguarding. She then contacted Safeguarding on 5th March 2021 and spoke to Anne-Marie Bennett, Named Professional, Safeguarding Adults, who said at that time that no action would be taken in response to the complaint because it did not feel that it met safeguarding adult threshold and that the issues could be explored through supervision. On 19th March 2021 Anne-Marie then telephoned Ms Pinnell to say that after speaking with her team she did in fact now have concerns as previously, she had thought that the Claimant was a cleaner. Following her supervision meeting with Sue Pinnell the Claimant went off sick from 8th March 2021 to 30th March 2021. By then there was a risk assessment in place from Mr Kamara dated 23rd March 2022 and accordingly the Claimant was to be no lone working. Anne-Marie Bennett's management team raised concerns and had called a huddle on 8th April 2021. The Claimant was put on special leave. Therefore there was a short period of time from the Claimant's return from sick leave until she was put on special leave where she was no lone working.
51. On 9th April 2021 there was a further huddle attended by the Claimant's manager and Anne-Marie Barrett. Angia Jakubowska indicated at that meeting that she would like the Claimant to be put on special leave rather than being transferred to another ward as this would transfer the risk. At the huddle it was agreed that the Claimant would be suspended. It reads: *'The group agreed JWR will need to be suspended for the safeguarding investigation. There are also separate concerns about her conduct to other members of staff.'*
52. On 12th April Sue Pinnell and Matron Steve Hale informed the Claimant that a safeguarding referral was made which would proceed to a full enquiry. She was suspended on full pay and Mr Stefan Jakubowski, Service Manager

Secure Services, sent a letter advising her of such on 13th April. Within that letter she was informed of the following allegations:

- That you failed to treat a service user with dignity and respect on 1st February 2021;
- On 28th March you ignored the same service user that you failed to treat with dignity and respect on 1st February;
- On 7th April you refused to take a reasonable instruction from the registered nurse on your shift and
- On 7th December 2021, 21st December 2020 and 19th February 2021 you were unprofessional in your behaviour towards colleagues in the Housekeeping Team and towards your ward manager on 8th April 2021.

53. The Claimant was informed that the suspension was not a disciplinary sanction of itself. She was not permitted to make contact with work colleagues or to come into work. At that stage an investigating officer had not been appointed and the Claimant was advised that one would now be appointed and would contact her. Daniel Walker was informed on 16th April by Victoria Walsh on behalf of Stefan Jakubowski, Service Manager and Case Manager, that he was required to carry out a disciplinary investigation. At the time he was Ward Manager for Hopton Ward. Sophie Hannah was Ward Manager for Bradley Brook at the time and supported him with the investigation. He had had no prior involvement in any of the issues that had arisen on Teign ward. His report is at page 221 of the bundle. Sue Pinnell sent him the documents at page 223 which included supervision notes and emails from other members of staff raising complaints about the Claimant. Appendices 7, 8, 9 and 10 were emails from colleagues who had raised allegations and complaints about the Claimant.

54. Mr Walker did not interview SU because she was unwell and there was concern that her involvement would cause her undue stress. Mr Walker interviewed eleven witnesses as part of the investigation (222). The Claimant was interviewed on 12th May 2021. The Claimant's account in relation to SU was that SU was in the bathroom and the Claimant had asked her to hurry up as it was housekeeping time. She said that SU had told her to leave her alone and that if she did not, she would walk down the corridor naked. The Claimant had said if that's what you want to do and said there were towels there. She wrapped herself and her head and left bathroom towels where the wet ones had been. The Claimant said that she then collected the towels. The Claimant denied saying to SU 'you need to get out or I'll get you out myself'. She confirmed that SU was wrapped in a towel. The Claimant mentioned that the housekeeper ought to have seen SU as they were waiting to clean the rooms.

55. Mr Walker interviewed Amie Ceesay-Sowe of housekeeping on 4th June 2021. Her account was that the Claimant had dragged the SU out of the bathroom and pulled her to the bedroom naked. She said that the claimant was kicking her and kicking her clothes along the floor.

56. A disciplinary hearing was then arranged to take place on 17th September. It had been convened for 27th August but had been postponed at the Claimant's request. The letter inviting the Claimant to the hearing is at page 373. The Claimant was provided with the Respondent's disciplinary policy and the names and positions of the panel members. The panel members comprised Hannah Ray, Operations Manager, as the Chair, Dr Ragini Heeramun as the Independent Equality Advisor and Emily Saad, Interim Deputy HR Business Partner. The presence of the Independent Equality Advisor was to ensure that the Claimant was not treated less favourably because of her race in the process. The Respondent advised the Claimant that she could contact Ms Ray to notify her of any witnesses that she wished to call. The Respondent indicated that it was intending to call Amie Ceesay-Sowe and Kate Chard. The Claimant attended the hearing on 17th September supported by her representative, Ms Chacon. The Respondent's minutes of the hearing are at page 436. Ms Ray communicated the decision to the Claimant by letter dated 24th September 2021. During that hearing the Claimant had an opportunity to question Ms Ceesay-Sowe. It was clarified that she had not witnessed the Claimant kicking the SU but kicking her clothes down the corridor. The Claimant stated that Ms Ceesay-Sowe was not present that day.
57. Following the hearing Ms Ray spoke to Ms Ceesay-Sowe's supervisor, Eniko Brinzan, whom it had been said at the hearing had been present that day. The interview notes are at page 446. Ms Ray stated in the disciplinary letter that the supervisor confirmed that she was present on shift with Aimee and that she had corroborated the facts presented regarding SU being naked, the kicking of the clothes across the floor and the communication and outbursts by the Claimant. Ms Ray informed the Claimant in the outcome letter that on the balance of probabilities, as a result of the actions that she took on that day, her practice demonstrated a substantial serious disregard for the care of the service user and their risks. The panel concluded that the Claimant had demonstrated wilful gross negligence by mistreating them in terms of the dignity and respect that they should expect as a standard within the service.
58. The panel did not uphold allegations 2 and 3 but did uphold allegation 4. In respect of allegation 4 the Claimant was issued with a final written warning. The panel clarified that the aspect of that allegation that referred to the ward manager was dismissed by the investigating officer. The panel found that there was evidence about the Claimant's manner of communication and evidence that colleagues were reluctant to work on the ward due to the instances of communications. The Claimant was dismissed for allegation 1.
59. The Claimant appealed by letter dated 6th October 2021, complaining of bias, discrimination and lack of support from management. In her grounds of appeal in respect of the first allegation, for which she was dismissed, she contended that she was not given the benefit of the doubt as Aimee had not reported the allegation when it occurred and the incident was only recorded four months later at her interview; that there were discrepancies between her written and verbal information given; that the Claimant had complained about the difficult behaviour of the service user on several occasions and that she had never been given support and safeguarding; that other members of staff

received safeguarding immediately and emails were sent to notify all staff members eg Kate Chard and Emily Harrison and that the service user regularly made allegations against the staff. On 8th October 2021 Joanna Gasiorowski, HR Business Partner, wrote to the Claimant to clarify why she felt that she was dismissed due to bias and discrimination. Accordingly she made further submissions in a letter dated 15th October 2021.

60. Mark Arruda-Bunker, Associate Director of Operations, was appointed as Appeal Hearing Chair. The Claimant was then invited to an appeal hearing on 18th November 2021 and provided with the appeal management statement of case. The Claimant was provided with the opportunity to submit any documents and given the right of accompaniment. At the appeal hearing Mr Arruda-Bunker was on a panel with Kutie Ngundu, Independent Equality Advisor, and Joanna Gasiorowki. The Claimant attended with Ms Chacon. Mr Arruda-Bunker permitted the Claimant to put her case and supply additional documentation. He adjourned and formed the view that the process had not been the most thorough to date. He wrote to the Claimant on 18th November 2021 to inform her that he had asked the case investigator to interview Aimee Ceesay-Sowe, Eniko Brinzan and Adebimpe Akanbi. He also informed the Claimant that he had received information from the electronic access system that both Aimee and Eniko were present on Teign ward on 1st February 2021. He indicated that he would be seeking an opinion from the SU's consultant psychiatrist.
61. Ms Ceesay-Sowe was re-interviewed on 26th November 2021. Ms Brinzan was interviewed on 24th and 29th November. Mr Walker also interviewed Sue Pinnell about the reporting of the safeguarding incident and about the SU's previous behaviour in walking around the ward naked. On 30th November 2021 Mr Walker interviewed Bimpe. Her evidence was that she recalled seeing the SU walk out of the bathroom, that the staff member came out with some clothing and that there had been shouting that had preceded the incident. The Claimant was given an opportunity to question the witnesses, which she did on 23rd November 2021.
62. Mr Walker also interviewed Emily Harrison on 30th November 2021. Her evidence was that the SU had come to her and was quite upset. She said that she advised SU to write a statement and that SU had advised that she was being mistreated by the Claimant. Mr Walker also clarified with Buba Tourbay that Eniko had reported this incident to Sue Slade at the time. Dr Thom, SU's consultant psychiatrist, provided a letter dated 3rd December 2021.
63. On 9th December 2021 Mr Arruda-Bunker wrote to the Claimant. He found that the security fob record showed that Aimee Ceesay-Sowe was working in Teign ward on 1st February, which he found contradicted the Claimant's account that Aimee was not present on shift. Despite that evidence he found that the Claimant's position had remained unchanged, which he said *'brings into question at best the accuracy of the recollection of events, or worse raises concerns over your honesty and integrity'*. He relayed in the letter that Dr Thom had spoken to SU who had again said that she had left the bathroom naked following the Claimant's intervention and had felt 'violated' by what had

happened. Mr Arruda-Bunker found that this statement was consistent with the service user's original statement to Kirsty Nash on 1st February 2021 and the entry on RIO dated 2nd March 2021. It was found that while there were some inconsistencies in the events reported, all three witnesses interviewed were consistent about SU leaving the bathroom naked and SU had said that she was naked as well. The panel found that while the Claimant had denied the allegation, on the balance of probabilities the Claimant had failed to treat SU with dignity and respect. The appeal panel noted the Claimant's submissions that after she had complained to management on 16th December 2020 she had felt that there was a lack of support, which led to her absence for anxiety and depression. The appeal panel found that this information was not made available to the disciplinary panel and should have been but that if it had, it would not have made any difference to the outcome.

64. In his evidence to the Tribunal Mr Arruda-Bunker was questioned about his decision. He stated that the reasons for the decision were SU's consistency in account as between that given in her original complaint in March and that given to her psychiatrist. The psychiatrist had said that she did not make up those sorts of allegations. There was consistency in account from the housekeeping staff. There was consistency as between the account SU gave to Dr Thom and in her complaint in March that she had felt threatened by the Claimant. He added that the Claimant was shown to be an untrustworthy employee because throughout, she had denied the allegations and the evidence had shown that her denial was not true. He was questioned about whether he had considered the Claimant's previous good record. He said that he had but because of the seriousness of the allegation and because of the Claimant's denial, anything short of dismissal was not appropriate.

Conclusions

Whistleblowing detriment

65. We find that the bringing of the proceedings against the Claimant was because a safeguarding referral about SU had been made and that the safeguarding team were concerned about it. This, we find, had nothing to do with the Claimant's raising any protected disclosures about discrimination. Sue Pinnell was party to the protected disclosure made in 2018 but the instigation of the disciplinary proceedings three years later had nothing to do with that disclosure. The background was that the safeguarding team were genuinely concerned about the referral and this is clear from the minutes of the discussion in the 'huddle' on 9th April 2021. There were concerns expressed too about the Claimant's conduct to other members of staff and there is basis for this in the form of the email complaints that had been raised by other colleagues. In addition, Mr Kamara had had an informal supervision meeting with the Claimant on 27th October 2020 (192) where he spoke to the Claimant about perceptions about her behaviour. She was not disciplined but some issues of concern were flagged to her. Therefore there was basis for there being concerns about her behaviour and conduct such that they formed part of the disciplinary proceedings, even though some of the allegations were not upheld.

66. We considered whether the Claimant's report of discrimination to Mr Kamara at the BAME meeting had any influence on the Respondent choosing to bring proceedings against her. We heard that the Respondent had been proactive in stamping out any race discrimination within the organisation and had garnered a number of initiatives including the 2018 meeting. We find that this was inconsistent with the Respondent wanting to bring proceedings against the Claimant because she had complained of discrimination in the 2018 meeting. The Respondent had convened the meeting in order to respond to and stamp out any discrimination. Mr Kamara was involved in the safeguarding huddle in which the Claimant's suspension and the bringing of an investigation was discussed, but the minutes of those meetings indicate that the primary concern was the safeguarding referral that had been made.

67. Therefore the reason for the bringing of the proceedings was because SU had raised a complaint that she had walked from the bathroom to the bedroom naked with the Claimant present and because there were also concerns about the Claimant's behaviour towards other colleagues. The Claimant was ultimately dismissed for the allegation, which was upheld. The Claimant's claim for whistleblowing detriment is therefore dismissed.

Whistleblowing Dismissal

68. We find that the reason for the Claimant's dismissal was that she had treated a service user without dignity and respect in that the service user walked down the corridor naked from the bedroom to the bathroom and that the Claimant had contributed to this happening by her words and conduct. There was no other reason for dismissal that operated on the minds of either Hannah Ray and her panel or Mark Arruda-Bunker and his panel. Both sets of decision makers were independent, had heard the allegations and the evidence about the incident and had come to the decision on the basis of that evidence. Ms Ray was aware of the wider issues on the ward. She was new in post on 1st February 2021 and we heard that she was proactive in assisting to resolve the toxic culture/ discrimination issues in Teign ward. She had attended the BAME support group, attended events with senior management about the culture and had run how to raise concerns and freedom to speak up training. We find that her involvement in matters post-dated the making of the disclosures and was entirely unconnected to them. Her decision was on the basis of the Claimant's conduct as alleged. Mr Arruda-Bunker approached the matter objectively and thoroughly and we were satisfied with the reasons that he gave for upholding the Claimant's dismissal. This allegation is therefore dismissed.

Unfair Dismissal

69. We find that the Respondent had a potentially fair reason for the Claimant's dismissal, namely conduct. We have considered the band of reasonable responses test both in relation to the procedure and the decision to dismiss.

70. In this case the Respondent's appeal officer identified that there had been some shortcomings in the investigation and so further investigation was conducted, also in response to the Claimant's position that she denied the allegation. The investigation was conducted thoroughly in that the three housekeeping staff were interviewed and Dr Thom was also interviewed. The key fob system was checked when the Claimant said that the key witness in the disciplinary was not present. Having regard to the process overall, we find that there was a fair and reasonable investigation. Any shortcomings at the initial investigation stage were looked at later on in the proceedings. We did not consider that Mr Walker was motivated by any agenda against the Claimant. We formed the impression from his evidence that he saw his role as obtaining the evidence and then providing it to the disciplinary panel to make a decision. We did not find that a reasonable investigator would have interviewed everyone on the ward as the dispute was about whether the SU was naked. Considering the process overall the Respondent interviewed who it knew to be present, namely the housekeeping staff. The Claimant had mentioned a housekeeping member of staff in her initial interview. There was also other evidence that corroborated the SU's account, which dispensed with the need to interview everyone on the ward.
71. The Respondent had reasonable grounds to believe that the Claimant had been guilty of the conduct as alleged. Mr Arruda Bunker explained his reasoning coherently to us and we found that it could not be faulted. There may have been some inconsistencies between the housekeeping accounts but he found that overall the staff were consistent and that in any event their accounts tallied with SU's account, which had been given consistently on more than one occasion. He was entitled to find that the SU was naked and, as he said to us, the Claimant had contributed to SU feeling that she had to come out naked. The Claimant had not encouraged the SU to cover up. He was also entitled to find that the Claimant was untrustworthy going forwards as she had denied the allegation throughout. She had maintained that Aimee was not working that day but that had been found to be a false assertion owing to the fob records. The findings were made on the balance of probabilities (more likely than not). We found that the decision was made impartially and carefully on the evidence by an independent panel. The appeal panel considered the point raised by the Claimant that the service user may have made false allegations and this was investigated.
72. Objectively speaking, we find the decision fell within the band of reasonable responses because the allegation was so serious that it was open to an employer in those circumstances to dismiss. The Claimant's conduct raised a serious safeguarding issue in respect of a mentally unwell service user, who had raised the matter to her psychologist. We find that the decision was open to the Respondent and fell within the band of reasonable responses.
73. We were satisfied that the procedure was fair. The Claimant was informed of the allegations against her and given time to prepare. She was able to fully put her case. She was given the right of accompaniment. She was given the opportunity to appeal. The investigator, decision makers and appeal makers had not been involved in the case before and were impartial. Where there

were further investigations done at the appeal stage, the Claimant was allowed to ask questions and given an opportunity to present her case on the additional evidence.

74. The Claimant's claim for ordinary unfair dismissal is therefore dismissed.

Race Discrimination

Allegation 1

75. The allegation was that the Respondent failed to investigate the disciplinary case against the Claimant in more detail, and reached a flawed conclusion at the disciplinary hearing which would not have been reached had she been white.

76. As we have found above, the shortcomings in the investigation were remedied by the time of the appeal. We did not consider that if there were flaws in the initial process, that had anything to do with the Claimant's race. Any individual who had been faced with the same allegation would also have been subjected to a similar investigation and would have been dismissed as a consequence. This allegation is dismissed.

Allegation 2

77. The allegation is that the Respondent failed to heed the Claimant's complaint in circumstances where a white employee's complaint was acted upon. She alleges that she reported to the nurse in charge, Ms Babalola, that Ms Chard had incited a service user to complain about her. She also informed her manager but no action was taken. When Ms Chard complained about the Claimant's behaviour towards the service user, her complaint was not ignored and was acted upon.

78. On 16th December the Claimant complained about Ife Babalola, who was nurse in charge on Teign ward that day. The Claimant claimed in her complaint that Ms Babalola had asked her to fill out the obs folder for the hour for which there was no entry. The Claimant said that she could not do that as she had been standing in the corridor trying to keep the service users calm as their needs were not being met. There ensued a discussion where the Claimant said that if something should happen and she had filled it out, signing her name to something she did not do, she would have committed fraud. She went and did garden break and says that Ms Babalola came right up to her face and said 'Jacqueline you are nasty for not doing it'. Ms Babalola's account, which she provided to Sue Pinnell on 9th April, was that the Claimant had not done the obs and that the Claimant could have passed it on to another staff whom was available to cover or just complete it as she had seen all the service users who were in the lounge. She stated in evidence that she gave that account in response to Sue Pinnell asking her about the allegation that she had called the Claimant nasty.

79. In evidence before us Ms Babalola said that there was an admission that day and that they did not have the staff in numbers to cover the demand. Ms Babalola said that when she was spoken to about the incident she was honest and did say that the Claimant had been nasty. She added that she and the Claimant had been clashing for a long period of time.
80. On 28th February 2021 Kate Chard sent an email to Susan Pinnell because of an incident that had happened on the ward between the Claimant and the service user, 'SU'. She had observed SU asking for the Claimant as she wanted to get some vape cartridges, which were locked in a cupboard. The Claimant was security nurse that day. She said that the Claimant had said that it was nearly lunch time and that she was busy. SU became worked up and was complaining she was not being supported. We heard from Ms Chard that the Claimant had gone to the cupboard behind the office where the bags and coats were kept and then had a conversation with another nurse, so was not performing any duties. Ms Chard says that she was concerned that this was not good practice so she reported the incident. The concern on the part of Ms Chard was that the Claimant had simply said that she was busy to SU. Ms Babalola said that she did not see Ms Chard encouraging the service user to make a complaint but she did note that Ms Chard was unhappy about having observed the Claimant's behaviour. She informed the service user that she could make a complaint if she wished.
81. We accepted Ms Pinnell's evidence about the reason why Ms Chard's complaint was pursued by the Respondent. The allegation concerned the same service user who was the subject of the safeguarding complaint and in combination with the incident that was alleged to have occurred on 28th February, there was a concern that this was a continuation of behaviour towards SU. We did not find that Ms Chard incited the SU to complain. Ms Chard did however complain about the Claimant's behaviour towards the SU.
82. We conclude therefore that the reason why the Respondent instigated proceedings in relation to Ms Chard's complaint was because there were concerns that there was a continuation of conduct towards SU and not because of the Claimant's race. This allegation is dismissed.

Allegation 3

83. The Claimant says that as a result of the application of the Safeguarding Policy she should not have been allowed to work with service users on a one-to-one basis and her manager failed to inform her colleagues when she was wrongly assigned to one-to-one working. She says that the refusal to undertake this work was regarded as insubordination and she had to face a disciplinary charge because of it when no charge ought to have been brought in the first place.
84. After the safeguarding allegation had been made, Mr Kamara conducted a risk assessment on 23rd March 2021 which resulted in the Claimant being allowed to work on the ward but no lone working. This was to protect her and

the service user. He met with the Claimant to advise her upon her return from sick leave.

85. The third allegation on the disciplinary charge sheet there was an allegation that the Claimant had refused to take a reasonable instruction from the registered nurse on her shift on 7th April. This allegation was not upheld at the disciplinary stage.
86. Ms Babalola was nurse in charge in the early shift of 7th April. She recalls being on shift that morning as she did the allocations upon her return from leave that morning. A colleague informed her that the Claimant was not to lone work with service users. Ms Babalola says that she was unaware of this and advised the Claimant that she should make sure the colleagues that she was working with were aware of the position. She says that she asked the Claimant to update her but that the Claimant just walked away. Ms Babalola said that she did not like the Claimant's attitude so she reported it to Ms Pinnell.
87. We heard evidence from Rosemary Abbey who was nurse in charge on the late shift on 7th April. She said that Sue Pinnell had said that the Claimant was not to be lone working with SU. She put the Claimant on general obs and the Claimant said that she was unable to go on the corridor as she is no lone working and would need a chaperone. She said that she went back to Ms Pinnell and explained that the Claimant had told her she was no lone working for all patients not just SU.
88. We heard that Ms Pinnell had been concerned not to disclose the no lone working because of concerns about there being a potential breach of confidentiality in terms of the safeguarding allegation. However as a consequence we find that there was some lack of communication, and indeed, miscommunication as to what the rule was as concerned the Claimant.
89. We find that the allegation was brought up as an allegation because of the Claimant's attitude as per Ms Babalola's evidence, which is why she then reported it to Ms Pinnell. On 8th April there was a safeguarding huddle in which concerns about the Claimant's attitude were discussed. We find that the reason for the allegation being escalated was not the Claimant's race but because a white individual who had walked off and was alleged to have displayed an attitude would also have been reported.
90. This allegation is therefore dismissed.

Allegation 4

91. The allegation was that the Claimant was told during her supervisions with Ms Pinnell to bring any further incidents involving the housekeeping team to her if and when they occurred but instead she faced disciplinary allegations in respect of such further incidents.

92. In or around early 2021 Sue Slade, Hotel Services Manager, contacted Sue Pinnell because she had received complaints from housekeeping staff about the Claimant's attitude towards them. Sue Pinnell then spoke to the housekeepers, who had said that they were unhappy about how the Claimant had spoken to them. Ms Pinnell then spoke to the Claimant and asked her to report any further concerns about how the housekeepers were undertaking their roles to her so as to prevent any altercation between her and the housekeepers from taking place in the future.
93. Sue Pinnell said that the housekeeping matters were relevant to concerns about the Claimant's overall conduct about how she was treating other staff. There was concern that there were patterns of behaviour. There had been an informal discussion in October 2020 so it was not a new concern but had been raised informally. We accept this evidence because we have heard that there were concerns about the Claimant's attitude towards staff generally. We considered whether Ms Pinnell would have actioned the same allegations in the case of a white member of staff and we find that she would have done. Those allegations have to be seen in the context of the Claimant's alleged behaviour and attitude towards a service user, to housekeeping staff and to nurses in charge. Ms Pinnell in her statement also mentioned a phone call on 7th April where she had phoned the Claimant to talk about shift patterns and the Claimant had given a torrent about how she felt that she had been treated. Ms Pinnell said that she had felt the outburst was aimed at her and so she had reported it to Mr Kamara. In the circumstances, we find, that someone who had displayed a pattern of what was perceived as unreasonable attitude or behaviour would also have been called to a disciplinary hearing in those circumstances because in the context, there may have been a pattern of conduct.
94. This allegation is therefore dismissed.

Employment Judge A Frazer
Date: 12 July 2023

Judgment & Reasons sent to the Parties:
14 July 2023

FOR THE TRIBUNAL OFFICE