



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AA

v

**University Hospitals North
Midlands NHS Trust**

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham by CVP

**ON 6, 7, 8, 9,10, 13, 14, 15, and
16 June and 1 August 2022,
reserved decision**

EMPLOYMENT JUDGE Dean

**MEMBERS Mr P Wilkinson
Mr P Tsouvallaris**

Representation

For the Claimant: Ms Tharoo, counsel

For the Respondent: Mr Martin Fodder, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimants' complaints that she was subject to unlawful discrimination contrary to section 26 of the Equality Act 2010 in relation to the protected characteristic of sex succeeds.
2. The claimant's complaint that she was subject to victimisation contrary to section 27 of the Equality Act 2010 does not succeed and is dismissed.

REASONS

Background

1. The Claimant was employed by the Respondent from 27 July 2016 to 4 August 2020, latterly as a core surgical trainee in General Surgery [C/1]. Her educational supervisor was EE. The respondent is a large teaching University Hospital Trust based in the North Midlands. The Claimant had decided to pause her training from August 2020 for one year in order to undertake a master's degree. As such, her contract with the Respondent was due to expire at the end of her training period.
2. On Thursday 11 June 2020, the Claimant alleges that she was subjected to the sexual assault by XY. She contacted her friends and professional colleagues in the days immediately after for advice on how she should proceed. She decided, by Tuesday 16 June 2020, to formalise her complaint and make contact with the Respondent's HR department [446]. Thereafter, matters progressed slowly, and a statement was not sought from her until 23 June 2020 (after both she and her BMA representative, Debbie O'Rourke ('DOR') had chased for an update). The Respondent decided to conduct an investigation in line with its Maintaining High Professional Standards in the Modern NHS – Disciplinary and Management of Performance Policy and Procedure for Medical and Dental Staff ('MHPS') [115-158]. The Claimant was

informed of the appointment of IES as case investigator on 9 July 2020 [545] and she met with IES on 20 July 2020 [607-629].

3. On 24 July 2020, the Claimant asserts that she was made aware by HH of the fact that IES had asked him questions of an inappropriate nature about the Claimant. The Claimant discussed this with DOR, who then raised a complaint against IES to the Respondent. This was considered by NC, who decided that there was no need to remove IES from the investigation. This decision was then communicated via a letter from JH [825-826].
4. On 7 September 2020 the claimant began a period of Early Conciliation [35] prior to issuing a complaint in the Employment Tribunal presented on 23 October 2020, Case Number 13010015/2020. The Claimant had raised two complaints of harassment to the Employment Tribunal, relating to the sexual assault and the HH conversation.
5. The Claimant had no further direct involvement in the investigation, until being informed that a decision had been taken that there was a case to answer against XY, but because he was no longer employed by the respondent, no disciplinary hearing would take place [1143]. This letter was sent on 7 April 2021, almost 10 months after her original complaint had been raised.
6. The Claimant brought a further complaint of victimisation arising from the IES questions, very shortly after receiving the transcript of the interview between IES and XY as part of disclosure in the first complaint to the Employment Tribunal. In particular the Claimant made a second reference to ACAS for Early Conciliation on 11 June 2021 and following issue of an Early Conciliation Certificate on the same day presented a second complaint to the Employment Tribunal on 21 June 2021 Case Number 1302932/2021.

Issues

7. The parties agree that the issues to be determined at this liability hearing are confined to two statutory complaints of unlawful harassment because of the protected characteristic of sex and of victimisation:

Section 26: Harassment

1. Did the following conduct occur?
 - i. On or around 11th June 2020, did XY engage in conduct of a sexual nature towards the Claimant as described in paragraph 2 of the first claim form [31]?
 - ii. On or around 24th July 2020, did Dr Elsayed (an employee of the Respondent) make enquiries of a colleague, HH, about the Claimant's character: in particular, whether she had engaged in any romantic relationships with colleagues in the past and whether the Claimant was considered to be a promiscuous person.
2. If so, was this conduct unwanted?
3. Did the alleged conduct have the purpose or effect of either:
 - i. Violating the Claimant's dignity; and/or
 - ii. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
4. In deciding whether the conduct had the effect referred to in section 26(2), each of the following must be taken into account:
 - i. the Claimant's perception;
 - ii. other circumstances of the case; and
 - iii. whether it was reasonable for the conduct to have that effect on the Claimant. **NOTE** The Respondent will not present any evidence to contest Claimant's case that she was subjected by XY to the conduct as described in paragraph 2 of the details of complaint. The Respondent will not cross examine the Claimant with a view to contesting the Claimant's case as to what

happened. The Respondent acknowledges that the Employment Tribunal will find that the Claimant was subjected to that conduct.

5. Has the Claimant proved facts from which the Tribunal could properly and fairly conclude that the conduct was related to the protected characteristic?
6. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for the conduct?
7. As to a.(i) only, if it is found that XY did harass the Claimant then:
 - i. did XY do so in the course of XY's employment by the Respondent?
 - ii. Can the Respondent show that it took all reasonable steps to prevent XY
 2. from doing what XY is alleged to have done or
 3. from doing anything of that description.

Section 27: Victimisation

8. The Respondent accepts that:
 - the Claimant's complaint about XY's conduct towards her on 11th June 2020, amounted to a protected act under section 27(2).
 - R accepts that on 4th September 2020, Dr Elsayed (an employee of the Respondent) asked Dr XY the questions set out in paragraph 3 of the second claim form [79]
9. Did the asking of those questions constitute a detriment to the Claimant?
10. If so, did Dr Elsayed subject the Claimant to that detriment because of the protected act.

Remedy

11. It has been agreed the question of remedy and evidence related to remedy issues such as aggravating matters will be addressed separate to the liability hearing. That said:-
12. If the Claimant succeeds, in whole or part in relation to other claims, the Tribunal will be concerned with issues of remedy and in particular, if the Claimant is entitled to a declaration in respect of any proven unlawful discrimination, recommendations, damages, compensation (including for injury to feelings) and/or the award of interest, will decide how much should be awarded.
13. Generally the tribunal will also need to consider :-
 - i. if the Claimant or Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, would it be just and equitable in all the circumstances to increase or decrease any award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?
 - ii. if the Respondent has breached any of the Claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

Applicable Law

8. Burden of Proof

Section 136 of the EA10 provides that:

"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".

9. This provision reverses the burden of proof if there is a prima facie case of discrimination, harassment, victimisation or failure to make reasonable adjustments. The courts have provided detailed guidance on the circumstances in which the burden reverses Barton v Investec [2003] IRIR 332 EAT as approved and modified by the Court of Appeal in Igen v Wong [2005] IRLR 258 CA but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred.

Harassment

10. Harassment is defined in section 26 of the EA10 as:

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

- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
- (b) the conduct has the purpose or effect of—violating B’s dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

—

- (c) the perception of B
- (d) the other circumstances of the case;

- (e) whether it is reasonable for the conduct to have that effect.”

11. This is a similar definition to that contained in the SDA and RRA although the predecessor legislation used “grounds of” rather than “related to”. It is arguable that “related to” could be wider.

12. As can be seen from the wording, if the Employment Tribunal concludes that unwanted conduct related to a protected characteristic has taken place, there is a distinction between cases where the conduct was for the purpose of violating B’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, and conduct which has that effect.

13. If the unwanted conduct was for that purpose, it would, as a matter of law, constitute harassment. However, if the conduct was not for that purpose, but had that effect, the Employment Tribunal must also consider B’s perception, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect. If so, the conduct would amount to harassment.

14. It is therefore important for the Employment Tribunal to state whether it is a “purpose” or “effect” case and to explain the reasoning as to why, in an “effect case”, the conduct constituted harassment Lindsay v LSE [2013] EWCA Civ 1650. In an “effect” case, there are two questions: the first is whether B felt that their dignity had been violated or that A had created a hostile etc. environment (a factual question dependent on B’s subjective perception); the second is whether it was objectively reasonable for B to feel that way EOC v Secretary of State for Trade & Industry [2007] IRLR 327 HC.

15. The law also provides that direct discrimination and harassment are discrete matters, because “detriment” does not include conduct amounting to harassment (section 212(1) EA10).

16. In this case the respondent relies upon the defence in s109 (4) Equality Act 2010. Section 109 of the Equality Act provides that anything done in the course of employment must be treated as done by the employer unless the provisions of section 109(4) applies which states:

“(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.”

18. The question of whether an act is done ‘*in the course of..... employment*’ is to be construed in the sense of which a layperson would understand the words is the test identified in Jones v Tower Boot Co Ltd 1997 ICR 254 CA.

19. More recently HHJ Tayler in Allay(UK) Ltd v Gehlen UKEAT/31/20 para 25 sets out the three stage analysis to be undertaken by the Employment Tribunal:

- a. Identify any steps taken by the employer
- b. consider whether those steps were reasonable
- c. consider whether any other steps should reasonably have been taken.

20. The burden of proof to establish the defence is squarely upon the employer and the tribunal is grateful for the analysis of the relevant law in respect of the s109 (4) defence provided by both parties counsel in their detailed written submissions. The tribunal has considered other authorities to which we are referred including:

- a. Mahood v Irish Centre Housing Ltd UKEAT/0228/10
- b. Canniffe v East Riding of Yorkshire Council EAT/1035/98
- c. Caspersz v Ministry of Defence [2006] UK/EAT/0599/05
- d. Livesey v Parker Merchanting Ltd UK/EAT/0755/03

Victimisation

21. Section 27 of the EA 2010 defines victimisation as follows: “A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act.”
22. Section 27(2) defines the following as constituting protected acts:
- “(a) bringing proceedings under the EA10;
 - (b) giving evidence or information in connection with the proceedings under the EA10;
 - (c) doing any other thing for the purposes of or in connection with the EA10; or
 - (d) making an allegation (whether express or not) that the person alleged to have subjected the claimant to detriment or some other person has contravened the EA10.”
25. Section 27(3) provides that giving false evidence or information, or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
26. The definition is substantially the same as under predecessor legislation, save that the predecessor legislation made reference to less favourable treatment rather than subjecting to detriment. The former definition technically required a comparator, although there was a question as to whether a comparator was necessary St Helens MBC v Derbyshire [2007] IRLR 540 UKHL.
27. The starting point is that there must be a protected act. If the claimant cannot establish that they have in fact carried out a protected act as defined by

subsection (2), their claim will not succeed unless the Employment Tribunal concludes that the person alleged to have victimised them believed they had done so or may do so. It is necessary for that person to know of the protected act Nagarajan & Scott v Hillingdon London Borough Council [2001] EWCA Civ 2005 or, as the case may be, suspect there has been a protected act.

28. If there has been a protected act, as is conceded here the Employment Tribunal must then consider whether the claimant was subjected to detriment because of it. The fact that a claimant does not become aware of the detriment until some time after the act of victimisation does not militate against a successful complaint Garry v London Borough of Ealing [2001] EWCA Civ 1283.
29. We are guided by the recent review of the concept of detriment in the judgement of Sir Patrick Elias in Jesudason v Alder Hey Children's Hospital NHS Foundation Trust [2020] EWCA Civ. 73 which, although a case on whistle blowing, refers to the same applicable principles of law.
30. Whether or not a detriment is caused to the complainant is not sufficient in complaints of victimisation, the tribunal to ascribe liability has to determine the causation or reason why the detriment was caused Chief Constable of West Yorkshire v Kahn [2001] ICLR 1065.

Evidence

31. We have been referred to an agreed trial bundle of documents extending over some 1649 pages [R1] together with additional documents including missing pages [R2], WhatsApp message bundle [R3], Agreed Factual Matters [R4], Witness statement bundle [R5]. The bundle of witness statements contained witness statements for:

Laura Reynolds ["LR"], People Operations Lead, at the relevant time a Deputy HR Business Partner;
Justine Howard ["JH"], HR Business Partner;

Nicholas Coleman ["NC"], Consultant Intensivist and Deputy Medical Director;

Michelle Moore ["MM"], HR Business Partner, Specialised Division;

Dr Ingi Adel Salah Elsayed ["IES"], Consultant in Renal and Intensive Care Medicine;

'HH' Consultant General and Colorectal Surgery;

'EE' Consultant Colorectal Surgeon;

Jane Louise Hare, ["JLH"]Deputy director HR;

Nicola Holland ["NH"], Deputy HR Business Partner – Specialised Division;

'II' Consultant Urologist;

Charlotte Lees ["CL"], Raising Concerns and Workforce Equality Manager;

'AA' the claimant, Core Surgical Trainee General Surgery, at the relevant time on rotation in Urology department;

'BB' Consultant HPB, Laparoscopic and General Surgeon.

32. It was agreed in prior case management Preliminary Hearing before Employment Judge Perry on 13 April 2021 that on an interim basis and at the commencement of this hearing this tribunal directed that the identity of the parties, given the nature of the allegations made, a pseudonymisation order in favour of the claimant, the alleged perpetrator of the first incident about which she complains, XY, and the identity of other parties should continue to protect the identity of the parties on the basis that appeared on the basis of the information before this tribunal was proportionate and necessary to protect their identities.

Agreed Factual matters

33. This case centres on an alleged sexual harassment of the Claimant, 'AA', on 11/6/2020 by a fellow doctor, XY, and the Respondent's investigation into the Claimant's complaint about this and in particular a conversation on 24/7/2020 between the Investigating Officer (Dr Elsayed- 'IES') and HH

(a consultant surgeon employed by R) alleged to be harassment by IES of AA related to protected characteristic of sex questions asked by IES of XY at an investigation meeting on 4/9/2020 alleged to be victimisation of AA on the ground of AA doing a protected act.

34. The respondent accepts that AA had very limited involvement in the investigation itself and Respondent recognised that accordingly she is only in a position to 'agree' with those factual matters referred to below which directly involved her and cannot comment on matters which are outside of her sphere of knowledge.
35. The Respondent recognised that matters relevant to the claims AA pursues would need to be tested in cross-examination, and that both sides will provide full written submissions to the Employment Tribunal after the evidence has been heard which confirms the extent to which, having heard from the witnesses, the parties contest the relevant factual matters which the ET will have to determine.
36. The Respondent relies upon a reasonable steps defence to the allegations of harassment.
37. The chronology prepared by the Respondent was provided as a tool to identify the context of the pleaded claims, identify the exchanges where there was apparent disagreements between the claimant and the other party to the relevant conversation and identifies the documents which evidence the Respondent's investigations and the principal witness evidence from the respondents witnesses in relation to factual points which are most likely in issue.

Findings of fact

38. Ordinarily in making findings of fact we restrict ourselves having heard extensive witness evidence to making findings in respect of those matters

which are necessary to enable us to determine the issues in this case. Unusually in this case, while the legal issues are confined to determination whether or not the claimant was subject to harassment or victimisation the claimant claims aggravated damages based upon the respondent's conduct after she made her initial complaint and claims those damages pursuant to the dicta of Underhill P in Commissioner of the Police of the Metropolis [2012] ICR 464, EAT as well as an uplift the respondents failure to comply with the ACAS code. The findings of fact we have made have sought to address the wider circumstances in respect of which the respondent dealt with the claimant's allegations of unlawful harassment.

39. The Claimant was employed by the Respondent from the 27 July 2015 and she became a Core Surgical Trainee in general surgery on the 1 August 2018. There was a period from 3 April 2019 to the 6 August 2019 when the Claimant was employed by another NHS Trust where she had transferred her contract to work and she subsequently returned to Stoke to complete her Core Surgical Training.
40. During 2020, the Claimant worked as a Second Year Surgical Trainee with 4 years' service at the Trust. In the summer of 2020, the Claimant was on rotation in the Urology Department having previously rotated through placements in Urology, Colorectal and Upper GI. The Claimant's post working for the Respondent Trust was due to terminate with effect 5 August 2020, she having made a decision in June 2019 not to apply for a ST3 post as she was to take a year out to travel and to study for a master's degree. The Claimant expressed her intention to take her master's degree and then to return to her clinical training. As a result of the events that followed an incident that the Claimant referred to as sexual harassment by a fellow doctor XY that occurred on the 11 June 2020 and the Respondent's investigation of her concerns about the unlawful harassment and discrimination and following the termination of her employment as a surgical trainee and subsequent ad hoc shifts at the Respondent Hospital, the Claimant chose not pursue her medical career.

41. The Tribunal have been reminded, having considered the case in 2022, that the circumstances surrounding the investigation of the Claimant's discrimination complaints must be viewed from the landscape of working within the NHS during the times of the Covid 19 pandemic. We remind ourselves that concerns relating to the progress of the Covid 19 virus arose in the first months of 2020 and on the 16 March the Prime Minister of the United Kingdom advised that everyone should stop non-essential contact and travel. To understand the impact of the pandemic on life in the United Kingdom during the relevant time it bears reminding ourselves of events during that time. By the 19 March 2020, there was an ambition that the United Kingdom would be able to "turn the tide of Corona Virus" in 12 weeks and a national lockdown in the United Kingdom was ordering people to "stay at home" was announced on the 23 March and in accordance with the Government's plan for lifting of lockdown and the so called "National Hibernation" approached an end on the 23 June 2020 when there was relaxing of restrictions and the 2 metre social distancing rule was applied. In June and July, further restrictions were eased in England and by the 3 August the public were encouraged to become more mobile, including under the "Eat Out" to "Help Out" scheme. However by the 14 September, the "Rule of 6" in respect of indoor and outdoor social gatherings about 6 was banned in England and on the 22 September, new restrictions including the return to working from home and a 10pm curfew for the Hospitality Sector was introduced as what was described at the end of the month as "a critical moment" in the Covid 19 crisis. On the 31 October 2020 the Prime Minister announced a second lockdown in England to prevent a "medical and moral disaster" for the NHS which came into force on the 5 November 2020 and although a second lockdown ended on the 2 December, social distancing remained in place subject to a relaxation over the Christmas holiday period. On the 6 January 2021 England entered a 3rd National lockdown in respect of which a roadmap for lifting the lockdown was issued on the 22 February in respect of which under step 1, schools reopened on the 8 March in England, recreation in

open outdoor public spaces was allowed between 2 people and the stay at home order remained in place. The stay at home order was lifted on the 29 March 2021 and step 2 of the roadmap was effective on the 12 April which allowed non-essential retail and public buildings and hairdressers to reopen and wider social contact rules nonetheless continued to apply in all settings, providing no indoor mixing between different households being permitted. At step 3, this took effect on the 17 May and as the Government Vaccination Programme moved at pace and step 4 of the roadmap was deferred until the 19 July 2021 when most legal limits on social contact were removed in England and the final closed sectors of the economy reopened. Having announced the winter plan for England, for Covid known as “Plan B” which would be used if the NHS was coming under “unsustainable pressure” on the 14 September and by the 8 December 2021 the Prime Minister announced a move to Plan B measures in England following the spread of the Omnicom variant.

42. The Respondent has reminded us that NHS Trusts, both nationally and locally were, during the relevant period, in respect of which these events took place, were under extreme pressure. We have heard evidence from the Case Manager, Nicholas Coleman, a Consultant Intensivist and Deputy Medical Director of the Trust who described the impact on the Respondent in the clinical environment was “chaotic” and communication within the Trust was adversely effected as the Respondent faced “a massive clinical challenge for everyone” and people working from home and communication channels were not as good as they would ordinarily be and the Respondent struggled at times to keep communication open. We acknowledge that Dr Coleman and Dr Elsayed, in renal and intensive care medicine were both intensive care specialists working in one of the areas of medicine that were placed under the most pressure by the covid pandemic. Dr Coleman describes that in the 18 months from April 2020 onwards he put it as “working more than full-time and at times double the normal amount of intensive care patients required to be cared for”.

43. The Tribunal have heard evidence that Doctor Elsayed who was the investigating manager in the case, was under such pressure at work that she had to move out of her family home. We do not doubt that during the relevant time, both administrative staff within the HR resources available at the Respondent Trust and the time and attention of Clinicians were all undoubtedly under pressure and working in extraordinary times.

44. In reaching our Findings of Fact in this case, we considered the complaints and the responses of the Respondent and the decisions taken by parties involved in the case and the witnesses who have appeared before us. The complaint about which the Claimant complains are matters in respect of which, 2 key policies are applicable, namely the Dignity at Work Policy dated June 2019 [97-114] and the Maintaining of High Professional Standards in the modern NHS dated September 2019 ["MHPS"] [115-158]. In respect of the Respondent's policy and training documentation, we have been referred to a number of documents contained within the index bundle, in particular those in relation to training of medical staff and in relation to equality, inclusion and diversity [161-374].

45. The Respondent's Dignity at Work Policy identifies its aims to be amongst other things: -

"Provide guidance for managers on the processes to be followed once a dignity at work complaint or allegation of bullying or harassment is raised.

Ensure that serious incidents of alleged bullying and harassment are investigated promptly, sensitively and objectively".

In identifying the relevant responsibilities of parties to the workplace, Paragraph 5.3 describes the responsibilities of managers to include: -

- *"Dealing with any complaints fairly, thoroughly, quickly and sensitively, respecting the feeling of all concerned.*
- *Ensuring that all allegations dealt with.*

- *Maintain confidentiality relating to all aspects of dignity at work cases at all times.*

46. In respect of staff support, Paragraph 7.1 describes: -

“The Trust has appointed a number of employees and support advisors to provide impartial and confidential advice and guidance within the terms of this policy”

and there is reference to Paragraph 7.2 to staff counselling services: -

“The Trust recognises that being involved in this process can be extremely stressful. The Staff Counselling Service can provide confidential counselling and support and is accessed by self-referral. Contact the Department on Extension 79990 or via the intranet”.

47. The policy described as “Maintaining High Professional Standards in the modern NHS – Disciplinary and Management of Performance Policy and Procedure for Medical and Dental Staff [“MHPS”] [115-158] is a document dated September 2019 as it applied within the Trust. The Policy at paragraph 1.1 sets out the arrangements for handling concerns about Doctors and Dentists conduct and capability. The Policy details the arrangements where a formal approach needs to be followed including the appointment of a Case Manager, a Case Investigator and a designated Board Member and describes that the seniority of the Case Investigator will differ dependent on the grade of practitioner involved in the allegation, notably Paragraph 8.2 provides: -

“All concerns should be investigated quickly and appropriately. A clear audit route must be established for initiating and tracking progress of the investigation, its costs and resulting action.

48. In describing the manner in which the investigation is to be conducted by the Case Investigator”. Paragraph 9.3 provides: -

“The Case Investigator has wide discretion on how the investigation is carried out, but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner. Information gathered in the

course of an investigation may clearly exonerate the Practitioner or provide a sound basis for an effective resolution of the matter”.

49. The Case Manager’s role is described at Paragraph 10 [125]. The timescales of an investigation are detailed at Paragraph 11 and at 11.1 provides:

“the Case Investigator should, other than in exceptional circumstances, complete the investigation within 4 weeks of appointment and submit their report to the Case Manager within a further 5 working days. The Case Manager must give the Practitioner the opportunity to comment in writing on the factual content of the report produced by the Case Investigator. Comments in writing from the Practitioner, including any mitigation, must normally be submitted to the Case Manager within 10 working days of the date of receipt of the request for comments. In exceptional circumstances, for example in complex cases, or due to annual leave, the deadline for comments from the Practitioner should be extended.”

50. The Tribunal note that as the chronology of events in this case details below, the case investigation was not conducted nor completed, nor was a report submitted to the Case Manager within the time parameters detailed at paragraph 11.1. We have no doubt that the Covid 19 pandemic and the response to it particularly in the NHS was an exceptional circumstance. However, we observe that the Case Investigator in this case was appointed on the 9 July 2020 [545] and a draft investigation report was first prepared by Doctor Elsayed on 13 November 2020 on conclusion of the investigation and the final version of the report after various iterations were submitted to the Investigation Manager to the Case Manager Doctor Coleman on the 29 December 2020, after which Mr Coleman having received comments from the Practitioner XY’s BMA Representative, determined that there was a case of misconduct to answer. However, as the perpetrator of the unlawful harassment in this case, was at the time no longer employed by the Respondent Trust, the decision was taken that no

further action should be taken by the Trust in respect of XY as the case had been referred to the GMC who were sent a copy of the Case Investigator's Report.

51. The Respondent at the outset of the Hearing have confirmed that the Respondent does not intend to present evidence to contest the Claimant's claim arising from the sexual assault and that it acknowledges that the Employment Tribunal would as a consequence find that the Claimant was subjected to the conduct alleged by her to have been committed by XY. It assists the understanding of the events of the original assault and subsequent investigations to understand the extent of contact that the Claimant AA had with the perpetrator of the sexual assault on her by XY on the 11 June 2020.

52. In June 2020, the Claimant was a Second Year Surgical Trainee with 4 years' service with the Respondent Trust. On the 1 June, she began a rotation in the Urology Department having previously rotated through placements in Urology, Colorectal and Upper GI. Her post was due to terminate with effect from 5 August 2020. The Claimant gives an account of the limited extent of her interaction with XY before the 11 June 2020 in her witness statement which was unchallenged [Para 4-7]. The Tribunal accepts the Claimant's account that she was aware of XY as a colleague prior to June 2020 but did not know his full name. Whilst studying for the MRCS in particular the final part of the membership exams for the College of Surgeons (MRCS) Part B, XY had told the Claimant that he was studying for the exam and asked whether she wanted to revise with him, she declined politely. On the 11 February 2020, the Claimant whilst attending to sit her exam in Edinburgh, met XY at the end of the examination and he asked her to have dinner with him, she declined. He later asked her if she wanted to meet him at a motorway service station for a break and to meet up, again she declined. XY later sent a further text to the Claimant asking her if she wanted to have dinner and she declined again [1532-1533]. When the Claimant received her exam results on the

13 March 2020, out of politeness, she enquired of XY by text “how he had done”, he reported “he had failed the examination” and she offered text books to him and to several other colleagues who she knew were revising for the examination again.

53. The Claimant in her witness statement [Para. 8] describes that she had a further text message communication to XY when he was included on a circulation to a number of Urology Registrars querying when she had been asked by BB to query the number of Urology Registrars.
54. On another occasion on the 27 May 2020, the Claimant was incorrectly rostered to work when she had booked time off to attend an emergency hospital operation to remove what had been believed to be a malignant melanoma. Having notified the Rota Coordinator by email on the 21 May 2020, that she would not be able to work on the morning of the 27 May because of the appointment, a number of people within the Urology Department had messaged the Claimant to ask her where she was, one of whom was XY and in response the Claimant sent a text to several people including XY to inform them of the oversight. We find that whilst the Claimant understandably was annoyed that the Rota Coordinator had not made the correction as she had asked to the rota which had caused the Claimant to be stressed and anxious, that was not a discomfort caused by XY or a matter which she considered when reporting the fact of his sexual assault upon the Claimant.
55. Having offered her MRCS books to a number within the Urology Department, XY had indicated to the Claimant that he was keen to collect the books and hoped to collect them from the Claimant’s home. She had declined and indicated to him that she would bring the books to work. The Claimant received a text from the XY on the 10 June to ask for the books and she informed him that she was busy on SAU but would be around the following week [1301].

56. The Tribunal, based upon the Claimant's account which is not challenged by the Respondent, that prior to the date of the sexual assault on the 11 June 2020, the Claimant had not met XY outside of work or the Education and Examination setting and all discussions or text correspondence between them were about work or education related matters and not personal. She was his colleague and they were not friends as accepted by XY during the course of the investigation.

Sexual Harassment by XY Incident 11 June 2020

57. Set against the background of the Claimant resisting the attempts of XY to arrange person encounters with her, on the 11 June 2020, whilst on duty on a late shift at Royal Stoke University Hospital, the Claimant was subject to unwanted conduct of a sexual nature by XY. The outline details of the assault are set out in the claimant's witness statement [Paras 15-23] . Whilst alone in the Urology Offices, XY instigated physical contact with the Claimant without her consent which included hugging her, massaging her back, touching her sides and face and kissing her face and neck. When the Claimant tried to leave the office, XY physically prevented her from doing so and she had to push him away from her in order to be able to leave the room. The unwanted physical contact was unwanted conduct of a sexual nature which had the purpose and effect of violating the Claimant's dignity and created an intimidating, hostile, degrading, humiliating and offensive environment for her.

58. The Claimant's account of the encounter has not been challenged by the Respondent. The incident occurred on the 11 June 2020, and the Claimant was working as a Senior House Officer on duty on a late shift at the hospital, where at about 7.40pm the incident occurred. We find that the encounter with XY was entirely uninvited. At Paragraph 23 of her witness statement the Claimant describes that as a result of the encounter, when she left the room she didn't look back, she states: -

"I felt absolutely violated. Angry and so upset. I was trying so hard not to cry. I felt so awful. I also felt incredibly anxious about getting to handover, as I was worried about being late and I knew I needed to look after the patients and make sure my colleagues were aware of what they needed overnight. I knew I needed to maintain my composure and do what was best for them. I didn't want to be upset, I was so scared that if I started crying, I wouldn't be able to stop. It was horrible. I was also in shock, not just about the assault, but also about how lucky I had been to finally manage to push him off me in that office, I had tried over and over again to get him off me. I had struggled against him and he had held me even tighter, and pushed me against the desk, refusing to let me go and kissing me more and more. My mind was reeling – what if I hadn't had that burst of strength to break free? What would he have done to me if I hadn't managed to get out of that room? I felt sick."

The Claimant's account in her witness statement that was not contested by the Respondent is compelling.

59. Immediately after the incident, the Claimant left the Urology Offices, composed herself and made sure she was looking respectable and then went to the SAU to complete the handover. At the end of her shift the Claimant was intending to drive to visit friends in London. The Claimant sent text messages to a number of individuals, first to her friend DD [1441-1446]. The text messages the Claimant sent to her friend provided a contemporaneous note which is echoed in the Claimant's witness statement. DD confirmed to the Claimant that XY's behaviour was
- "like sexual assault, it's so rapey, you need to at least inform someone. I know it's hard because it's their word against yours, but surely someone will listen??"*

Similarly the Claimant sent text messages to her friends and colleagues at work, to HH a friend and professional colleague at the hospital [1342], BB [1310-1311] one of the Claimant's friends and colleagues all of whom were sympathetic and supportive of the Claimant's predicament and advised her

to report the incident to the Respondent Hospital authorities. The Claimant sent texts to EE, her Educational Supervisor and spoke to him on the telephone on the 12 June [1287].

60. It is fair to say that the Claimant expressed concern in her email exchanges and as she answered in cross-examination, that she was initially concerned to put in a formal complaint as she *“didn’t want to be a labelled as slut or her reputation to be dragged through the mud”*.
61. It is evident to the Tribunal that in part the Claimant was hesitant about making a formal report to the Respondent as she had had an experience where previously she had been the subject of rumours that circulated in relation to her friendship and the support she had from one of the hospital consultants, JJ. The Claimant who was orphaned and had no family had been invited by the consultant to join him and his wife and children for a family at Christmas and as a result, rumours were spread around the Department by members of the nursing staff which suggested that she seemingly had an inappropriate relationship with one of the surgical consultants. It is acknowledged that there was no truth whatsoever in the rumours, however EE had an extending pastoral care to the Claimant suggested to her that she may find it helpful to get away from the environment at Stoke Hospital for a while and he, with the Claimant’s agreement, arranged for her to be seconded to another NHS Trust Hospital for a period of time. In that context the Claimant was concerned that her reputation maybe *“dragged through the mud”*. We observe that well meaning though EE’s pastoral care of the claimant was in facilitating her transfer to the other NHS Trust Hospital it was perhaps indicative of the ‘gossipy’ environment at the hospital which was not curbed by the Respondent.
62. During her telephone discussions with EE as her Education Supervisor following the assault by XY, the Claimant accepts that EE was trying to do his best to assist the Claimant and to address some of her concerns. He

said he had limited experience about the process about putting in complaints and would discuss them with his wife, who was also a doctor albeit at a different Trust, and with the Deanery to gain advice. In the event, the Claimant took advice from the BMA and decided that she would report her concerns formally to the Trust via the HR Department.

63. There is a dispute in the evidence between the account given by the Claimant of her discussions with EE and his. In her Grounds of Application [31] at paragraph 4 the Claimant suggests that EE told her that he wished for the matter to be resolved informally and the Claimant suggests that she considered the suggestion entirely inappropriate and evidence that the Respondent did not take her complaint of sexual harassment seriously was behaviour which aggravated the Claimant's distress. In her evidence to the Tribunal, the Claimant in her witness statement [para 40] describes that when the Claimant asked EE about the process, he initially suggested that he should sit down and have an informal chat with XY to give him a warning saying that "*such a complaint didn't have to wreck XY's career*". The Claimant in her statement suggested that, that initial response by EE made her second guess herself however she acknowledged that EE made it plain to her that he would take advice from the Deanery and from his wife who, was also a Doctor, working for a different trust and that she might have some idea what to do. During her discussion with EE on the 15 June, the Claimant suggests that EE had taken advice from the Deanery lead which was echoed by the Claimant's BMA Representative that as XY was not a trainee but a direct employee of the Trust that the Deanery had no authority or jurisdiction over him.

64. We have found EE to have been a witness who was sympathetic to the Claimant's situation and wanted to take whatever course of action the claimant chose when he had a more clear understanding of the next steps that may be correct to take. We accept the account given by EE that in his initial discussions with the claimant he was honest in telling the claimant

he was not certain of the steps to be taken and he made it plain to the claimant he would take advice, and the approach to be taken would be guided by the claimant's wishes. However, we find EE did not have a clear understanding of what steps needed to be taken under the Trust's Dignity at Work Policy when first the claimant informed him of the assault.

65. On the 16 June the Claimant reported the incident to the HR Department [446] at 13:27. The email addressed to Catherine Lees, copied to Emma Bailey and Yvonne Davies was in respect of the HR Policy and the Claimant wrote: -

"Apologies for the email, but I need to contact someone in Human Resources urgently, and I chose these names from the address book.

I am a Doctor at UHNM, unfortunately on Thursday evening, whilst at work I was sexually assaulted by another member of staff.

I therefore require the relevant local HR Policy. I have checked on the Intranet, and I believe the one that I need is HR02? The Dignity at Work Policy? Although, I may be wrong in this! The link on the Intranet clicks through to an empty page, so I cannot access it.

Please would it be possible for you to email me a copy of this policy as soon as you can?"

66. In response, Emma Bailey responded to the Claimant later on the 16 June at 14:34 attaching a copy of the policy and apologising that although she no longer worked in the HR Department, she attached a copy of the policy as she believed that was what the Claimant required. On the same day, Cath Lees, the Medical Staffing Officer, wrote to the Claimant [449] to confirm her understanding that the Claimant's concerns had been passed to the Employer Relations Team to urgently pick up.

67. On the 16 June, Laura Reynolds who at the relevant time was Deputy HR Business Partner, asked the Claimant if it might be possible for them to discuss the concerns that she had raised [452]. The Claimant informed Ms. Reynolds that she had made contact with the BMA and that her representative Debbie O'Rourke had been appointed to advise her [451]. Having had a brief discussion with the Claimant lasting about 30 minutes, Ms. Reynolds told the Claimant that what she was reporting was a serious matter and that she should contact the Police. The Claimant confirmed that she was then on leave and was returning to the Hospital on Thursday 25 June and there was no risk immediately of her seeing XY again whilst at work as she would not be there. Ms. Reynolds explained to the Claimant how the investigation process worked and that a fact-finding investigation would take place, that things could be quite lengthy and informed the Claimant that staff counselling was available to her if she wanted it.

68. The Claimant having raised her concerns with HR on the 16 June, no further response was sent by HR to the Claimant after that date until on 23 June when the Claimant emailed Ms. Reynolds asking for an update [488]. Ms. Reynolds responded to the Claimant's emails in the afternoon to inform her that Justine Howard, the HR Business Partner would be liaising with her BMA Representative Debbie O'Rourke and when asked, the Claimant confirmed that she was happy for Ms. Howard to make contact with her directly [501]. It was agreed that Ms. Howard would lead on the investigation and Ms. Reynolds would be a point of contact for the Claimant's welfare and wellbeing and those arrangements were confirmed to the Claimant on the 23 June by email at 15:34 in which the Claimant was also offered further support and counselling [501].

69. On the 24 June, Debbie O'Rourke the Claimant's BMA Representative forwarded a copy of the Claimant's statement to Justine Howard at 14:46 [505]. The Claimant emailed Ms. Reynolds on the 30 June asking for an update on her statement that had been sent on the 24 June and the Claimant sent her a further email on the 1 July at 19:23 [419] to explain

that she wanted a meeting, as she didn't feel supported and needed to have her concerns allayed to discuss how the Respondent could safeguard her wellbeing as she was on a nightshift that evening and she was struggling with anxiety about feeling unsafe [419]. Subsequently, Ms. Reynolds engaged in email correspondence with Debbie O'Rourke's Secretary at the BMA to set up a Teams Meeting which, because Ms. Reynold's limited availability to only Thursday 9 July until she was on a period of annual leave and then that she would be free any day of the week commencing the 20 July [523] a Teams meeting was arranged for the 22 July at 10am [536].

70. On the 8 July, the Claimant accepted the invite to the Teams Meeting and raised her concerns about working nightshifts and explained that because of the lack of progress and pastoral support she felt vulnerable and exposed and she considered she should not be working nights until after the meeting on the 22 July [535-536]. Ms Reynolds asked whether the Claimant had spoken with her Clinical Lead and the Claimant responded on the 9 July to indicate that she had not contacted the Clinical Lead and raised her concerns about the lack of communication and progress [535]. The Claimant's email of the 9 July at 17:32 Laura Reynolds copy to Debbie O'Rourke was explicit. She wrote: -

"My feeling vulnerable in working nights is secondary to the fact that this issue is still ongoing and we have not had any formal meeting or discussion.

If the situation was being resolved, or indeed if I was communicated with any progress, I would probably feel more comfortable working them.

I was rather hoping we might have made some progress prior to the set of nights I have next weekend.

Simply put, my anxiety is not working from nights themselves. It is from being sexually assaulted at work, and then having minimal contact or support from HR in continuing my complaint, having to send repeated emails etc..

It is the communication issues that we have had since then which have been the primary source of my anxiety. As now I have lost trust in UHMM as should something else happened at work, I do not trust that it will be dealt with expediently, as the last sexual assault wasn't."

71. Sadly the Claimant's email response of the 13 July reminded Ms. Reynolds that the email on the suggested meeting did not negate the issues that she was having with HR and the lack of communication from Ms. Reynolds. That email and the Claimant's subsequent email of the 15 July at 7:21 [577] were not seen by Ms. Reynolds until she returned from annual leave on the 20 July having commenced a period of annual leave on the 13 July the same time when Ms. Howard was absent on annual leave also. The Claimant wrote in relation to her concerns about her being on rota on days when her assailant XY was down as working at the Trust and stated:-

"you are my representative from HR to liaise with. I think my email required a response from someone other than a single line from a rota coordinator.

Please one of the major issues I am having here is a lack of communication in responses to emails and unfortunately many of the emails in question are ones that have been sent to you. This is massively impacting on my own pastoral wellbeing.

The attack itself rendered me powerless, but now it is being compounded by the growing number of unanswered emails from HR. Please could you reply to both this and my email regarding my assault

when being at work. It is poor form from the Trust that he has not been put on unpaid leave on its own rotating system.

Can we affect this change?"

72. The Tribunal have heard that regrettably Ms. Reynolds had put her “*out of office email response*” only to respond to internal emails and not to external emails. As the Claimant had used her G-mail E-mail account to correspond with the HR Department and the Claimant was unaware that Ms. Reynolds and Ms. Howard were both on annual leave.
73. Subsequently, on the 21 July, Debbie O’Rourke cancelled the meeting and the Claimant made contact with the Chief Executive, Tracy Bullock on the 23 July to raise a complaint about the delays in the investigation into her allegations of sexual harassment and the poor communication from Justine Howard and Laura Reynolds. In response to the Director of HR’s request Ms. Reynolds prepared a timeline of events [801-804] in relation to the investigation into XY.
74. On the 9 July 2020, the Claimant had been informed that a Case Investigator had been appointed [545]. It is of note and disappointing that, the claimant having provided her written statement to the Respondent on the 24 June 2020 [505], and XY having been informed of his suspension and the commission of an investigation under the provisions of the MHPS on the 7 July 2020 [527-528], the Claimant was not provided with the same update of the progress of her concerns and the appointment for Case Investigator at the same time as was her assailant XY.
75. The Claimant having reported the incident that occurred on the 11 June to HR on the 16 June, it transpired that on Saturday 20 June 2020 XY had been arrested for a sexual assault on a female under the age of 16 years and as a result XY had been excluded from clinical practice on patient safety grounds. On 22 June, the Trust had provided XY with a conditional

offer of a further 12 months fixed term contract to commence on the 5 August 2020 when they were unaware that XY had been arrested in respect of the alleged assault which had taken place outside of work. As a result whilst XY was excluded from clinical duties until such time as criminal matters were concluded, and it was deemed inappropriate and a misuse of public money to extend his contract and the offer of a further 12 month contract to commence on the 5 August 2020 was withdrawn. XY was informed also that an internal allegation had come to light regarding the incident between XY and AA and that those specific allegations and the terms of reference were to be investigated [527-528]. It is strange, notwithstanding the claimant had reported the assault by XY on 16 June, that information had not been taken into account when the decision to offer a further extension of his contract to XY until further investigation had been undertaken.

76. In light of our findings of fact in relation to the chronology of contact between the Claimant and the HR Department, we find that the Claimant having first raised her concerns on the 16 June with HR and provided her account of the incident following the Respondent's request for a written account on the 24 June there was a delay in appointing a Case Investigator until the 7 July. We find the fact that a Case Investigator had been appointed was not communicated to the Claimant until the 9 July, was not consistent with the Respondent's own policies that are referred to in the Dignity at Work Policy which in turn refers to the MHPS [126].

77. It is evident from the Claimant's evidence that the Respondent's HR Department suggested that the Claimant might gain support from the Clinical Director. We accept the Claimant's account that she was reluctant to make contact with the Clinical Director himself as she did not want him to be made aware that she had been subject to a sexual assault, instead the Claimant went to her own GP who signed her unfit to work nights, in order that she could ensure that she was not placed in a vulnerable position working in that environment.

78. The Claimant describes that she had difficulty making telephone contact with people whilst, during the course of her working day, she was either involved working in theatre and unable to make personal calls or working in an area that had poor mobile telephone reception. Moreover, not unreasonably, we find the claimant wanted to keep a written record of her communications with the HR Department and the Respondent as confirmed in her text correspondence with HH [1366].

79. Although the Tribunal have heard evidence about the difficulties the Respondent's, doctors, managers and HR Team had, during the time of the Covid 19 pandemic with many people working from home and under unprecedented and extreme pressure, we find that whilst it may explain, it does not excuse entirely the Respondent's delay in maintaining timely communication with the Claimant who was raising serious concerns in respect of a sexual assault in her complaint to the Respondent of the 16 June which was a protected act taken by her. We find that the Respondent ought reasonably to have put in place steps to supervise the timely progress of the Claimant's concerns and to evidence discussions that were had from time to time with the Claimant. It is somewhat surprising that no file notes were taken of discussions with the Claimant, had by either Ms. Reynolds or Ms. Howard. Whilst there was an explanation given for the delay, it was not satisfactory.

80. Having been informed that a Case Investigator had been appointed in accordance with the Trust Policy HR18 – Maintaining High Professional Standards in the modern NHS-Disciplinary & Management Performance Policy and Procedure for Medical and Dental Staff ("MHPS"). The Case Investigator Doctor El Sayed wrote to the Claimant on the 10 July [553-554] setting out the terms of reference for the investigation as being: -

"That on Thursday 11 June 2020 at approximately 7.40pm while alone in the Urology Offices, Mr XY instigated an unwanted physical contact (initially a hug) with Doctor AA.

That he then pushed her back into a chair, massaged her back, touched her sides and face and kissed her face and neck, all without her consent.

That he physically prevented her from leaving the room and that Doctor AA had had to push him away in order to leave.”

81. Notwithstanding the fact that the Claimant had been informed that XY would not be at work for the foreseeable future, the Claimant had been made aware that XY was still recorded on the rota to be at work. During answers in cross examination, the Claimant accepted that XY's name remained on the rota by accident rather than by design and that there was no malevolent intent by the Respondent rather that his name remained on the rota was an error. Nonetheless, it caused her significant distress and her GP signed her unfit to work nights as a result of the respondent not acting proactively to protect the claimant.

Equality and Diversity and Bullying and Harassment and Dignity in workplace policy, training and procedure

82. Before turning to the investigation undertaken by Doctor El Sayed we pause to consider the policy documents and training on those policies that were delivered by the Respondent's relating to Equality and Diversity and bullying and harassment and dignity in the workplace. We have referred to above to the Dignity at Work Policy [97] and the Guidance on Sexual Harassment [195-196].

83. Having reviewed the policies the Tribunal find that neither the Claimant nor EE her Educational Supervisor were familiar with the Respondent's policies and procedures relating to dignity and equality in the workplace, sexual harassment or procedures under the MHPS Policy. We have had cause therefore to scrutinize the general training and enforcement of the

policies and procedures as they were applied by the Respondent in relation to the workforce. The Respondent has relied in the main upon the evidence given by Charlotte Lees who was the Respondent's Raising Concerns and Workforce Equality Manager, she has confirmed that she took on the role when it was created in November 2015 and identifies that as the lead for the Trust's Workforce Equality and Diversity Strategy and implementation her role is to support the Trust, to create a culture of speaking up and to be a point of contact for workers who wish to raise concerns in the workplace. It is surprising that in this case, notwithstanding Ms. Lee's role, the Claimant was not referred to her to provide support on raising her harassment concerns, nor did she provide advice to the Claimant's Educational Supervisor or the Case Manager or the Case Investigator in respect of the concerns relating to XY's conduct.

84. We have been informed that the Respondent produced an Equality & Inclusion Annual Report and have held workforce Equality events to shape and develop their equality objectives. On the 21 June 2018, the Respondent held a "Tackling Harassment Round Table Event" which amongst other things led to the production in 2018 of a Guidance for Managers on Harassment [205-206] and [207] and [209-214] which were placed on the Respondent's Trusts Intranet. An Anti-Bullying Week is held in November each year and on 16 November 2018 the Respondent sent out a Trust Bulletin to all staff which referred to tackling bullying and harassment at UHNM and asked staff to watch a video from the Chief Executive [219-220] with links to other documents including "tackling bullying and harassment at UHNM" [Page 221] and the updated Bullying in the Workplace Guidance [223-228].

85. New staff, of which XY was one, are sent a copy of the Trust's "Values and Behaviour Frameworks" and XY's offer letter dated 19 June 2019 attached a copy of the welcome pack which includes the Trust's Values and Behaviours Framework [229-238 and 239]. The Trust referred to the fact that XY had, on beginning employment, attended a day long corporate induction training course on the 12 August 2019 [271-272]. We have been

provided with a transcript of the training video [273-282] and the section dealing with harassment is at [278-280] which confirms that harassment includes things like uninvited personal contact, identifying the effects of bullying and harassment in the organisation as being:-

“significant from poor productivity, high absenteeism, loss of confidence from our patients to increased Tribunal cases and actions forms a stress related illness.

For our workforce it can be low morale, demotivation at work, high staff turnover through people leaving, resulting in the cost of retraining staff and adverse publicity which impacts on our ability to recruit.”

and identifies that if the Trust does not do something about bullying and harassment at work: -

“We would see risk of litigation for allegations of harassment. Employment Tribunal costs, damage to reputation amongst staff and general public, low morale resulting in low productivity, high turnover with resulting costs and the cost of increased staff absence of staff.

It continued:

We all have a responsibility to challenge prejudice and discrimination wherever we see it.”

86. We have been referred also to the employee training on equality and diversity [1565-1595] which includes slides on bullying and harassment [1583-1592] which is compulsory training refreshed every 3 years. Although the Equality and Diversity training does not refer to specific sex harassment, the document does refer to harassment being in respect of any of the identified protected characteristics of which of course sex is one. Whilst the reference to harassment as a generically prohibited conduct under the Equality Act, the presentation in the Equality and Diversity Training makes no reference to the impact of harassment upon

the person to who is subjected to the harassment nor the disciplinary consequences that arise in respect of proven harassment.

87. It is evident that neither the Claimant nor her Educational Supervisor EE, nor indeed those of her colleagues with whom she spoke about the assault by XY were well informed of the procedure by which the Claimant should raise a complaint about XY's conduct, notwithstanding the direction contained at [paragraph 5.4] of the Dignity at Work Policy [104-105]. We find there was insufficient information detailed in the policy to advise employees how to familiarise themselves with its requirements if required. Moreover although the wording of the policy identifies that any managers dealing with any complaints did so fairly thoroughly quickly and sensitively, respecting the feelings of all concerned there is no guidance to which the Tribunal have been referred to give clear directions to how that task ought to be undertaken by managers [513].

88. It is noteworthy that none of the documents to which we have been referred identify that the prohibited conduct of harassment, whether for sex or any other reason would be sanctioned in any particular way and treated as an act of potentially serious misconduct identifying the potential sanctions on the individuals up to and including dismissal or referral to an individual's professional body the General Medical Counsel.

89. The evidence given by Ms Lees is that guidance on sexual harassment was sent to the staff in the form of a bulletin November 2017, however there is no evidence produced to the Tribunal that the materials were sent out after that dated nor were there clear links to be found on the Respondent's Intranet.

90. The Claimant was not aware herself of the Dignity at Work Policy as demonstrated in her email to HR asking for assistance, despite she having completed the Equality and Diversity Training on the 18 January 2019

[1597]. In answer to questions in cross examination, none of the witnesses EE, BB and HH, all Consultants at the Respondent Trust recalled any training on the diversity on the Dignity at Work Policy having been delivered to them nor had they ever heard of the person occupying the role of “Employee Support Advisor” despite the Dignity at Work Policy requiring staff who were supporting anyone who was being harassed to advise them to contact one of those individuals [105]. We are led to believe that either the training was not delivered to the clinical staff at a senior level or that had it been it was ineffectual and was not lived by clinicians nor was it effective to address inappropriate behaviour including banter, gossip and harassment in the work place. The respondent were in all practical respects aware that senior staff did not prior to the incident on 11 June 2020 effectively address inappropriate behaviours in the workplace.

91. It is particularly unsatisfactory that EE who as the Claimant’s Educational Supervisor was something akin to a “manager” within the organisation was not aware of the role of “an employee support advisor”, nor was he familiar with the process to be undertaken to raise concerns about the sexual assault and harassment.

92. EE’s in his witness statement [paras 5-6] details his communications with the Claimant as her Educational Supervisor and College Tutor responsible for junior doctors who were training to be surgeons. EE was responsible for the claimant’s pastoral and professional guidance and care and his statement details the support that he had provided to the claimant during the course of her working at the respondent, including directing her to the support that was available from the Professional Support Unit in Birmingham which provided support to Regional Trainees who were experiencing difficulties. We do not doubt that between 2016 and 2020 EE sought to act in the claimant’s best interests and gave her pastoral support and guidance. However well-intentioned his support in arranging the claimants short term relocation to the other NHS Trust Hospital sadly he did not deal with the underlying difficulty of the entirely misinformed gossip

about the claimant's friendship with consultants. In responding to the claimant's concerns in relation to XY's assault upon her EE's response was not clear and he confirmed that his first thought of dealing with the Claimant's concerns was to perhaps take an informal approach whilst acknowledging that he would need to take advice on any other available options. We find that EEs intentions were to support the claimant in whatever course of action she chose to take however the proposed action going forward was not confirmed before the claimant obtained clear advice from the BMA.

93. It is telling that it was EE who, when the Claimant was faced with rumours circulating about a more intimate relationship with a Consultant JJ, had arranged the Claimant's transfer to another NHS Trust Hospital and Deanery for a short period of time. It is troubling to the Tribunal that neither he nor the Deanery Training Programme Director, himself another employee of the Respondents, were clear as to whether the Claimant's concerns were to be referred through the Deanery or through the Respondent and EE did not make any approach to HR or anyone to take advice upon the correct approach to be taken. We conclude that the such training in the Equality and Diversity and any harassment procedures that may have been delivered to senior staff had not been sufficiently clear to be retained by the Trust staff in practice.

94. EE, on the 15 June 2020 messaged the Claimant [1290] to suggest that he thought he should arrange a "formal meeting" with XY to get a statement from him and sort contact details for XY. Such a formal meeting did not follow any of the policies operated by the Respondent and sadly EE did not comply with his responsibilities either as an employee under the Dignity at Work Policy 5.4 [105] or his responsibilities as a manager paragraph 5.3 [104]. It was only as a result of the Claimant taking advice from the BMA that she was informed that she ought to raise her concerns via the Trust, rather than through EE [1292]

95. It is evident to the Tribunal that such training as was given to managers and employees of the Respondent in relation to equality and diversity was not sufficiently impactful to have a lasting recollection by those trained nor was there clear direction as to the gravity of sanction to be imposed in respect of breach of the policies. A culture of gossip within the Trust seems to have prevailed that was not checked by the respondent as it ought to have been to give force and effect to the Dignity at Work policy.
96. We note that notwithstanding the Respondent's HR witnesses confirming that they were familiar with the Dignity at Work Policy, neither Ms. Howard, Ms. Lees, nor Ms. Hare could remember any training on the policy itself having been delivered to them.
97. When the Claimant decided to report the incident, she conducted an intranet search to find the relevant policy and when she identified the Dignity at Work Policy as being potentially relevant and applicable in her case, the link to access it was not accessible [446].
98. We find that, although the respondent had policies in place in relation to Dignity at work and Equality and Diversity and unlawful discriminatory treatment, even those who were responsible for its implementation were unclear that they had had training on the policies. It is evident to the tribunal having heard evidence from a number of witnesses that notwithstanding training neither HR staff nor the clinicians were familiar with the policies and procedures in anything other than the vaguest of terms.
99. Although we have been referred to the fact that XY had received E&D training on 12 August 2019 it is evident that despite that he committed the assault on AA. More importantly the Claimant, despite having had the same E&D training on 18 January 2019 [1597] had no been aware of the Dignity at Work policy and was unclear what to do or who to contact to raise concern about the sexual assault.

100. The individuals EE, BB and HH all consultants working for the Trust could not recall having had any training on the Dignity at Work policy nor had they ever heard of an Employee Support Advisor notwithstanding the policy itself referring to such a person being able to support anyone being harassed. It is extremely concerning that 'managers' within the organisation of which EE as the claimant's Educational Supervisor was one, clearly were not aware of their responsibilities under the policy. Indeed EE when first approached by the claimant in relation to the incident variously suggested an informal approach to XY, speaking with his wife and taking advice from the Deanery.

101. Even when the claimant, having reflected on the sexual assault and being supported by her friends, decided to take some action her initial search on the intranet suggested that the Dignity at Work policy might have been applicable to her circumstances, the link to which she was referred did not work.

102. We find that the respondent did provide to it's employees training, limited though it was, on the subject of Dignity at Work and harassment in the workplace. However we have found that the training was limited and plainly not sufficiently well delivered to ensure that the workforce was aware of the practical implications of the training and its application in the workplace. That 'gossip' was accepted in the workplace without challenge and we find it indicative of the fact that the training, such as it was, was superficial and not embedded within the reality workplace environment. The respondent had not focused its training on the importance of employees speaking out about harassment in the workplace or the consequences of harassment. Managers faced with real time issues relating to harassment in the workplace, in particular the permissive environment when 'gossip' about female staff members friendship with male consultants went unchallenged demonstrates that the adherence to the policy was not delivered in the clinical environment between staff.

Suspension of XY and the investigation

103. Having reported the sexual assault to HR on the 16 June 2020 and the Respondent acknowledges that the Claimant's email engaged provisions of the Respondent's Dignity at Work Policy. It is accepted by the Respondents that in the circumstances, the policy required and the Maintaining High Professional Standards in the Modern NHS [115 -126] identified the following steps:-

- i. To take key actions to clarify what had happened
 - ii. To consider discussing with NCAS/PPAS
 - iii. To consider if urgent action was needed to protect patients and whether restrictions on practice or exclusion was required.
- a. As a formal approach under conduct was required to appoint a Case Investigator and a Case Manager.

In the event, the Respondent did not engage in those necessary steps until the week commencing 26 June 2020.

104. Coincidental to the Claimant's complaint about the conduct of XY, on Monday 22 June 2020, Ms. Howard a business partner in the Respondent's surgery division took a call from the Police who informed her that XY had been arrested on the 20 June for an offence of sexual assault of a female under the age of 16 years. XY had been released by the police under investigation and the telephone call was followed by correspondence later the same day [479-480]. A Teams Meeting was convened by the Respondent's then Medical Director, HR Director, Ms. Vaughan, Justine Howard, HR Business Partner and Andrew Vernon, Head of Legal Services. The meeting discussed the alleged sexual assault on a female under the age of 16 outside of work and also the allegation that XY had sexually harassed a colleague in the hospital. The meeting concluded that in light of the very serious allegations against XY, he should be excluded. Mr Coleman, Consultant Intensivist and Deputy Medical Director has given evidence to us to confirm that it was agreed he would speak with the Practitioner Performance Advice Service to obtain their advice on the exclusion and he spoke to that service on the 26 June.

105. On 22 June, Mr F.F. Consultant Urologist met with XY to inform him that he was excluded from clinical duties and that Mr Coleman had been appointed as Case Manager regarding XY's arrest on 20 June 2020. The letter confirming XY's exclusion [481- 482] confirmed his exclusion from a clinical practice was on the grounds of patient safety. In accordance with the Trust Policy on MHPS, we observe that the exclusion was not unlimited, that XY was informed he was not excluded from the Trust's premises and he could therefore participate in audit and CPD activities and we accept Mr Coleman was not aware of that limitation until early June when he was informed of the fact by Justine Howard that XY had not been fully excluded from the Trust premises. The evidence we have heard from Michelle Moore, HR Business partner specialised division is that she had told Justine Howard the HR Business partner that XY had been told that he should not attend the site without permission however that was not stated to be the case in the letter of suspension. Tellingly there are no notes provided of the meeting at which XY was excluded from the Trust in breach of the requirements under MHPS [para 7.7 at 124].

106. Justine Howard confirmed in her evidence that she and Mr Coleman having taken the decision on the 22 June to fully exclude XY they became aware sometime before the 7th of July that the exclusion had not in fact been full and they sought to rectify that by drafting a letter to him detailing amongst other things an extension to the terms of his exclusion [527-528]. For reasons that have not fully been explained it was decided that instead the extension of the exclusion being immediately confirmed in writing instead it would be explained in a meeting with XY and as a result there was nothing to prevent XY being able to access the hospital site and in that regard we find the respondent failed to protect the claimant. More worryingly is the fact that in response to being told on 9 July that an investigator had been appointed when the claimant emailed Justine Howard on 9th July [544] expressing her concerns that she might

encounter XY when she was scheduled to work nights in her response to the claimant [543] Ms Howard informed her inter alia that:

“XY is not in the organisation so there should be not reason why you would come across him in the workplace”

a state of affairs Ms Howard at the time knew not to be correct.

107. It is unexplained why the respondent did not take steps to exclude XY from the hospital site entirely immediately upon receipt of the claimant's complaint on 16 June 2020 given the serious allegation contained within it. But for the intervening event of the police report on 22 June it is not clear whether or when XY would have been excluded from the hospital pending investigation of the claimant's allegations. What is clear is that Ms Howard in answer to cross examination acknowledged that XY was suspended and excluded from clinical practice though not from the site. Somewhat naively Ms Howard explained that she *'truly believed'* XY would not attend the site however she did acknowledge that the Trust not having excluded XY from the site had effectively failed to protect the claimant.

108. Despite the claimant having raised her complaint on the 16 June, it was not until she was asked to provide a written statement on the 23 June that the respondent sought the detail of the complaint. We have heard evidence from Ms Howard that until a written statement from the claimant was produced a decision would not be taken in respect to suspension of XY. We are led in the circumstances to conclude that the claimant complaint would not itself have caused XY's suspension until the 24th of June when details of the complaint that it occurred on 11 June and reported on 16 June were provided. We find the double standard of the immediate response to the report by the police of their investigation into XY was in stark contrast to a very different and unhurried approach taken by them into investigating the claimant's very serious complaint.

109. Despite the assurance given by Ms Howard on 9 July the claimant, having seen that XY was scheduled to be on rota on 'medic online', sent

an email to Ms Howard and a number of others on 14 July 2020 [569-570] asking:

“why was I not told that he would still be down as being at work on the rota?

I’ve now had a virtually sleepless night before 2 successive workdays as a result of him being in according to your own system...

The pastoral care is shocking. How did anyone expect me to react when seeing the rota and seeing that he was apparently still at work?

I’m a victim of a sexual assault that happened whilst I was doing my job at this trust. The fact that yet again my feelings have not been taken into account is damning.”

110. On 9 July the claimant in email correspondence asked why it was taking a length of time to progress the investigation into her report of the assault on her by XY. In response to the claimant’s email Ms Howard responded on 11 June [543] which while in part was supportive and informed the claimant of steps that were being taken none the less misstated the circumstances in relation to XYs exclusion and told the claimant that:

Confidentially XY is not in the organisation so there should be no reason why you would come across him in the workplace. However if you feel that certain shifts are putting you under more stress then we are more than happy to ask for your working patterns to be reviewed.”

Sadly the failure to exclude XY from the site meant that there was no reason why he could not attend site while the claimant was working, even if not attending for clinical reasons, much as he had on 10 June when he had committed the assault. Ms Howard albeit reluctantly accepted that the respondent had not done enough to protect the claimant and the statement about the claimant not coming across XY in the workplace was misleading.

111. We find but it was not until 21st July 2020 that XY was finally informed that his exclusion was absolute. The respondent's cavalier disregard for the concerns raised by the claimant and her evident anguish about the prospect of encountering XY shows a reckless lack of thought and consideration of the claimants case and her well being. That neither Ms Howard nor Dr Coleman in their initial witness statements dealt with the oversight in failing to fully exclude XY and gave an account of the issue in supplementary witness statements is indicative that it was not a matter which they considered to be at the core of the claimant's concern about the respondent's treatment of her and her complaint.

112. On the 24 June, the Claimant's BMA representative sent to Justine Howard details of the Claimant's complaint of sexual harassment that had occurred on 11 June [505-508]. Although Mr Coleman confirms that he was asked by the Medical Director Mr Oxtoby to agree to be appointed Case Manager in relation to the allegations made by the Claimant against XY in accordance with the MHPS Policy, he did not recall the date of those instructions. However by the 26 June, Ms. Howard emailed Mr Coleman and others with the draft terms of reference for the investigations [518]. Mr Coleman was absent on annual leave from the 29 June – 6 July and the terms of reference for the investigation and the appointment of Dr. Ingi Elsayed was appointed as Case Investigator under the terms of reference for the complaint raised by the Claimant [537-542]. Ms. Holland was the HR Business Partner who would support Dr. Elsayed in the investigation.

113. The terms of investigation at [539] identified that the investigation should address the following issues as alleged by AA:-

- *“That on Thursday 11 June 2020 at approximately 7.40pm whilst alone in the Urology Offices Mr XY instigated an unwanted physical contact (initially a hug) with Dr. AA.*

- *That he then pushed her back into her chair, massaged her back, touched her sides and face, and kissed her face and neck all without her consent.*
- *That he physically prevented her from leaving the room and that Dr. AA had to push him away in order to be able to leave.*

The Case Investigator should try to ascertain the facts. Where this is not possible, the Investigating Officer should record any conflicts of evidence and express the views as to what, if any evidence is preferred and why.

The Case Investigator is invited to express the view on whether Dr. XY's actions and behaviour have breached the Trust and Dignity at Work Policy and if so, how and in what regard?

3.0 It is expected that the investigation under the maintaining high professional standards procedure will be completed by within 4 weeks and that a report will be submitted to Dr. Nick Coleman, Case Manager within 5 days of completion of the investigation. Dr. Coleman will then make a decision on how to proceed after discussion with the Trust Medical Director. Any case of proven misconduct would be put to a conduct panel in accordance with the Trust's Disciplinary Procedure. "

114. As a result of the nature of the serious allegations against XY, Mr Coleman notified the GMC of the allegations and the GMC Investigating Officer Ruth Breeze notified the Respondent on the 15 July that the GMC had made Interim Orders Tribunal had made an interim order of conditions on XY's registration for a period of 18 months [585-588]. Because of Ms. Howard's annual leave between the 13 & 17 July a Teams Meeting was arranged with Mr Coleman to attend XY and his BMA Representative, Mr

Coleman being supported by Justine Howard on the 21 July [579-584] at which XY was informed of all of the allegations against him, of the appointment of Dr. Elsayed as Case Investigator in accordance with the MHPS and for him to be fully excluded from the Trust. The arrangements were confirmed in writing on the 21 July [635-636].

115. We have heard evidence from Dr. Elsayed who was the investigator in this complaint. Dr Elsayed confirmed in her evidence that she had received training to act as an investigator having attended a two-hour in-house training course on Maintaining High Professional Standards outlining the role of the investigating officer and how to conduct investigations. The investigation into the claimants alleged assault by XY was the first undertaken by Dr Elsayed. Nichola Holland, Deputy HR Business Partner was appointed to advise and support Dr Elsayed in her role as Case Manager.

116. On 20 July 2020, Dr. Elsayed conducted the investigation meeting with the Claimant who was represented by her BMA Representative Debbie O'Rourke. Dr. Elsayed was supported by Ms. Holland from HR. The interview was recorded and we have been referred to the notes of that interview [607-629].

117. During the course of the investigation interview between AA and Dr. Elsayed it is evident that Dr. Elsayed acknowledge that what the Claimant:-

"in reporting the assault had been very brave",

118. Dr Elsayed expressed her sympathies with the Claimant's situation. Having outlined to Dr. Elsayed the background to the case and the contacts that the Claimant made with her various friends on the day of the incident and the weekend thereafter, the Claimant explicitly asked that Dr. Elsayed did not make contact with a number of the individuals who she

had spoken to who were Consultants at the Trust . The claimant made it clear that she was concerned that Consultants, who she considered were also her friends or were former mentors would be dragged into the investigation unnecessarily. She referred in particular to her request that BB, who was a Consultant and friend should not be dragged into the investigation [612]. The Claimant confirmed to Dr. Elsayed that she was happy that in the investigation Dr. Elsayed spoke with CC who she had spoken to a couple of hours after the incident, but the Claimant expressed her concern that if Dr. Elsayed was “*digging through relationships with older surgical consultants*” she had very real concerns about her continuing relationships with surgical consultants at the Trust and she voiced her concerns [614] saying :-

“I am happy to speak to C, but I worry that if we start digging through... considering this is a question of impropriety, it is a question of somebody behaving inappropriately in the workplace, I am concerned that if you start digging through relationships that I have with other people who are as you know older surgical consultants and stuff like that they will withdraw from me and I will lose that pastoral support because they will consider themselves to be tarred by this.

The Claimant continued:-

“They will because that is how people work, because people are aware of the fact that as a woman, if you make a complaint, people, they are surgeons, they do not understand nuances of emotional intelligence by and large. As a woman if you make a complaint you label yourself as something, you label yourself as a troublemaker, it is easier for people if they think that somebody is not going to give them a quiet life, it is easier for them to just withdraw from them altogether.”

119. We find that the Claimant not unreasonably was extremely concerned that the wider investigation of the incident and about the behaviours of either AA or XY might undermine her existing good relations with a

number of surgical consultants. AA plainly put Dr. Elsayed on notice about her sensitivities and concerns about the damage to her reputation and good standing within the Trust. We observe that the claimant's comments were perhaps informed by the circumstances in which she had been the subject of unfounded rumour which ultimately had led to her spending time away from the Trust at another NHS Trust Hospital for a period of time. In particular the claimant explained to Dr Elsayed [618] that:

"No, I just want the maintenance of the few scattered relationships that I do have, I just want them to not be put in jeopardy. To me it seems like I have been brave in coming forward and this has been an

immensely emotionally stressful period and I understand what you are saying but there are other banks of evidence that can be sought without digging into consultants who I have called at 9 o'clock at night, because their response will be if this is widely know people will assume impropriety there and that will make them think, OK I won't speak to AA again because if she is going to share that she called me at 9 o'clock at night then people will think that there is an improper relationship because that is what has happened in the past, this is based on my previous experience."

120. The discussion during the course of the investigation meeting considered also the Claimant's intentions to leave the Trust in April 2020 to take up studies for a master's degree. The record of the discussion [624] details the way in which the Claimant sought to progress a return to a career in medicine and expressed her anxiety, since the assault, that she had about returning to the role of a senior surgical doctor in a hospital as an ST3 in general surgery. The Claimant expressed her concern:-

"I think it is really important to consider the future though, I mean I have spent the last 9 years trying to build a career in medicine and I think you know, I think it is really important to think if my confidence is this low now, how do I get that back so that I am in a position where I can

be the most senior surgical doctor in the hospital which is what an ST3 in general surgery is, and nights and things like that, how do I get to the position where I am mentally ok with that, not only in terms of physically being there but I am in a decent head space where I can make sound clinical judgements and I am not overtaken by anxiety which is something that you know, if you had asked me in May or before this happening it is something that I would have said is infinitely achievable, I have never had any issues with the clinical component of my job and as I say I have always felt very safe in the hospital. However I think it is really important to think well this is where we are now come July 2020, in a year's time how do we get to the point where things are ok, because otherwise it is not just a case of this having happened to me and the effects from this, it is I don't want this to basically wreck a part of my life which I think it is a danger of doing. Arguably if this had have happened, if this had have happened a year ago then I think I would have been a much safer, I would have been in a much more stable place to deal with this because I would have had time to get over it, but the timing that this has happened has been the worst possible time because it has been on top of COVID and then it has been right at the end of my training and I worry if I am not careful and I don't know what the solution is, I do think there is some merit in having some form of agreement with the Trust where I can work a few shifts but I can't force people to take me on as a worker and I don't know what jobs are or are not available. I worry that given the timing of this if I am not careful I will leave medicine and I will not return in a capacity to be a surgical registrar, which is a kind of a shame really."

121. In response to the Claimant's note of concern, Dr. Elsayed expressed the view that perhaps EE or Dr. BB would be able to help the Claimant and she went on to discuss the possibility of jobs in the NHS post pandemic and there was a discussion about Dr. Elsayed perhaps being

able to put the Claimant in touch with a contact at Stoke Hospital Accident & Emergency department.

122. The Claimant described to Dr. Elsayed in great detail her vulnerability as a result of the assault [621] and the Claimant commented towards the conclusion of the interview in answer to questions as to whether she had taken time off and she stated:

"I have had some annual leave since then, but I am supposed to be on nights this weekend and I spoke to my GP and they were like, don't work them. But otherwise no, I mean I am coming to an end anyway, but what I worry about actually is even if I made the decision to go back into training, I think I would struggle to do so because I am leaving on such a sour note. It is like if you drive a car and you have massive car accident and then you put your car away and you don't drive for another year, you are going to really struggle, you will first experience getting back into that car, to actually manage to do your job, and to actually manage to drive and that is how I feel."

123. We find that Dr. Elsayed engaged in a lengthy discussion with the Claimant about ways in which she might gain further experience to build her confidence in the working environment before she took a break to complete her masters, doing shifts perhaps in A&E.

124. We find that Dr. Elsayed, together with the Claimant's BMA Representative, was encouraging of the Claimant, supportive of her and sought to assist the Claimant in developing a plan that would help her continue to undertake clinical work once her current contract ended in August 2020. Unfortunately, well intentioned though Dr Elsayed was, her lack of experience in conducting an investigation of the kind required in this case led ultimately to a course of events which did not reflect well upon the respondent. To be fair to Dr Elsayed she was entrusted with the investigation of the claimant's complaints notwithstanding the fact that having been trained in a 2 hour training session in March 2019 some 16

months before the investigation and she had no prior experience in undertaking an investigation of this particular kind. Moreover Dr Elsayed was supported by an HR advisor Ms Nicola Holland who we heard had only being involved in one such case before, not in relation to a doctor and she had not received any training on supporting such an investigation. Dr Elsayed in answer to cross examination was unable to recall any detail about the training that she had received.

125. In her efforts to provide support to the claimant in relation to her concerns about leaving the Trust on what she had described to be a sour note Dr Elsayed we find made genuine efforts to facilitate the claimant being able to work locum shifts in A&E in email correspondence with Brijesh Patel, consultant in Emergency Medicine on 24 July [736]. During the conversation seeking to reassure the claimant Dr Elsayed told her that if she spoke with EE or HH or BB all consultants at the hospital it would be limited to understanding the contact that the claimant had had with them in the immediate aftermath of XY's assault on her.

126. However, notwithstanding the claimant's express wish that Dr Elsayed did not make contact with her friends who worked as doctors and consultants at the Trust, Dr Elsayed without first speaking with Nichola Holland who was supporting her in the investigation nonetheless made contact initially with HH by telephone on 4 July 2020 and the scope of her discussion with the doctors was beyond the extent limited to the claimant's communications with them after the assault on 11 June.

127. Following the investigation meeting with the claimant Ms Howard forwarded to the claimant contact details for the Occupational Health service and referred her to other support from Staff Supporting Counselling Services on 27 July [717]. Dr Elsayed, as she had proposed, wrote to the Respondent Emergency department in relation to a core surgical trainee who was keen to do some clinical work during the year [736-735].

Investigation with HH 24 July 2020

128. Having been commissioned to conduct an investigation in accordance with the terms of reference Dr Elsayed conducted her investigation interview with the claimant and her BMA representative on 20 July 2020. On 21 July XY was informed that Dr Elsayed had been appointed to conduct the investigation into the allegations made by the claimant [635] and on 24 July 2020 Dr Elsayed wrote to XY to arrange an investigation interview on 4 August [653] which was deferred to 4 September 2020.
129. On 24 July the claimant forwarded to Dr Elsayed and Justine Howard and to her BMA representative copies of the text messages she had sent to her friends on 11 June in the immediate aftermath of the XY assault [669-674].
130. Despite the clear indication from the claimant that she did not want Dr Elsayed to make contact with her friends who were consultants at the Trust for the reasons explained in the investigation interview on 20 July, Dr Elsayed nonetheless made email contact with HH [701] then by telephone on 24 July. HH at the relevant time it is agreed was a close friend of the claimant. HH is a Consultant General and Colorectal Surgeon and on 24 July he sent a text to the claimant to inform her that he had been contacted by email by someone he did not know who indicated that they wanted to speak to him about an anonymous trainee [1422]. There had been no indication in the email message about the subject of the proposed conversation however HH sent a text to the claimant at 5:36 pm to ask her to telephone him if she was in private. The claimant gives an account that she spoke to HH at 5:37pm for almost 20 minutes on 24 July. The claimant's account is that HH told her that Dr Elsayed had spoken to HH and asked him questions about the claimant's character and in particular whether she engaged in any romantic relationships with colleagues in the past and whether the claimant was considered to be a promiscuous person. The claimant asserts in her evidence that HH was anxious and on edge during the call with her and concerned that Dr Elsayed intended to

ask the same questions of others, including the claimant's friend BB who is a Consultant HPB, Laproscopic and General Surgeon at the Trust.

Subsequently and on her account at the suggestion of HH the claimant contacted BB to warn him that he might expect a call from Dr Elsayed

131. The tribunal having heard evidence from HH and seen the content of emails between him and the claimant and we concluded that HH was very reluctant to get involved in the enquiries that Dr Elsayed made of him.

132. In his witness statement HH says at paragraph 14 that at no time did Dr Elsayed ask him questions relating to the claimant's sexual conduct and romantic relationships with her colleagues.

133. HH did not make any notes of the conversation with Dr Elsayed however we have been referred to Dr Elsayed's handwritten notes [703-705] and the typed version of the notes [707-708]. We note that Dr Elsayed did not inform her HR support Nicola Holland that she intended to hold the discussion with HH before the discussion. HH has confirmed that the typed notes were an accurate summary of the matters he spoke to Dr Elsayed about. The recorded topics reflect a discussion about the claimant's good performance, her 'bulky' logbook and the view that she had tried unsuccessfully to get a non training grade job at the Trust, referred to an occasion when the claimant had not attended a theatre list, on day off, when she had in error been left on the rota. After discussion about the claimant's performance there had been questions though not recorded in the notes about the claimant in general which led to the observation that the claimant was '*generally friendly*' and there was reference to the fact that the claimant was:

"quite friendly with a colleague - felt that this was a grey area-not evidenced or warrants concerns."

The tribunal concludes that this was an oblique reference to the claimant's friendship with JJ that had been the subject of entirely inappropriate and misconceived 'gossip' amongst nurses.

The discussion subsequently moved to reflect the fact that HH described the claimant as expressing the view that she:

"felt entitled to continuous employment -felt that it should not go through open employment/competition entry. Heated conversation regards entitled".

In response to cross-examination HH has given an honest response that he cannot in 2022 recall the detail of a short telephone conversation in the summer of 2020. HH stated he does not recall being asked by Dr Elsayed about any romantic relationships the claimant had and is adamant that he was not asked if AA was 'promiscuous'. The furthest HH refers to '*relationships*' beyond the claimant being '*generally friendly*' was in relation to comment about a '*grey area*' to which he confirms that there was '*nothing inappropriate or clandestine*' although he observed that a friendship with which was not inappropriate or of concern was a subject about which he was aware there was talk including by nursing staff.

134. It is the claimant's assertion that HH's account bears no relation to what he told her on 24 July or in any of his subsequent actions. The tribunal has had sight of the claimant's contemporary text messages with her friend DD and we find that it bears witness to the claimant's contemporary recounting the gist of HH's conversation with Dr Elsayed. It does not refer at all to there being any suggestion that the claimant was promiscuous. On 24 July at 6:02pm within her long text dialogue with her friend DD [1469] the claimant alerted DD that:

" the trust are digging and they may contact you"

Later 7:03pm still on 24 July [1472] the claimant confirmed the investigator was asking about:

“Clinical ability. Behavioural issues. Relationships. Inappropriate relationships.”

135. Within the text conversation in a later response to later text message on 28 July [1484] the claimant told DD that:

“they haven't spoken to you or CC I don't know if they've spoken to anyone else HH said ‘inappropriate relationships’ but obv that's just his recollection. 1:43”

136. In answer to cross examination the claimant said that HH had told her he had been asked questions about her relationships and she considered them to be asking about ‘*inappropriate nature of relationships*’ which was the same thing as ‘*promiscuity*’ and the claimant asserted that specific term had been used by HH in reporting the conversation to her.

137. Immediately after her conversation with HH the claimant called BB to warn him to expect a call from Dr Elsayed. The claimant also sent a text to BB [1468] followed by a telephone call to him in which conversation the claimant reported the contents of the discussion she had had with HH. BB in his witness evidence was clear that although he could not recall the conversation verbatim his recollection was clear and that the word ‘*promiscuous*’ had not be used.

138. The tribunal are compelled to find that the words the claimant later described as having been used by HH to describe his being asked if the claimant was ‘*promiscuous*’ are more likely than not to have been the interpretation the claimant put on the enquiry rather than the words HH reported as being used by Elsayed to describe the claimant’s behaviour. We are mindful in particular that the claimant had, in her own interview with Dr Elsayed [614] expressed concern that if Dr Elsayed:

“start digging through relationships that I have with other people who are you know older surgical consultants and stuff like that

they will withdraw from me and I will lose that pastoral support because they will consider themselves to be tarred by this."

139. When asked by Dr Elsayed why that might be the case the claimant explained despite her BMA representatives assurances otherwise that:

"Because that is how people work. They will because that is how people work, because people are aware of the fact that as a woman if you make a complaint people, they are surgeons, they do not understand nuances of emotional intelligence by and large. As a woman if you make a complaint you label yourself as something, you label yourself as a troublemaker, it is easier for people if they think that somebody is not going to give them a quiet life it is easier for them to just withdraw from them altogether."

We are led on balance to conclude that it is more likely than not that the claimant imported the descriptor of promiscuity to the claimant's behaviour rather than the more neutral, though equally inappropriate reference to *"inappropriate relationships"*.

140. We find that the line of enquiry Dr Elsayed made of HH may well have been to discuss two main points being the claimant's clinical ability and her relationship with colleagues with a view towards identifying whether or not it may be possible to find another post for the claimant in the Trust. However we find that although open questions may have been asked of EE and HH it is evident that the questions were asked with the agenda also of understanding the background of the claimants relationships with her work colleagues which went beyond the two main points to which Dr Elsayed refers. We find having considered Dr Elsayed's record of the conversations the questions asked by her provoked responses that commented upon gossip in the hospital relating to the claimant's friendships with consultants that may have been inappropriate. The line of questioning was intrusive into the personal relationships the claimant had with her work colleagues and mentors and well beyond the scope of the terms of reference for the investigation which to an independent observer

might be seen as prying into the claimant's private life and casting aspersions on the claimant's private life and character to an extent that creates an intimidating, hostile and offensive environment for the claimant when such questions were asked in response to the claimant having asserted that she had been subject to a physical assault.

141. Dr Elsayed in answer to cross examination confirmed that the questions were asked that were beyond the scope of the terms of reference for her investigation and were asked of those who were not in a position to offer the claimant locum work. In her witness statement [para12] Dr Elsayed said she had decided that she should speak to HH about supporting the claimant to find a job as she had promised her. However Dr Elsayed went further and suggested that she had anticipated that during the conversation, she hoped it would come out whether the Claimant had called him following the incident on 11 June 2020 and whether she was upset. EE in answer to examination reported that he like HH had received an email from Dr Elsayed which contained very scare information as to why she wished to speak with him.

142. While Dr Elsayed had told the claimant in her interview on 20 July that she would not propose in her enquiry of HH or EE tell them the true nature of her investigation it is clear to the tribunal that Dr Elsayed saw the discussion to be one that went beyond the initial 'purpose' of the call.

143. The tribunal is mindful that at the stage she spoke to HH, Dr Elsayed had not put to XY the claimant's allegations nor had she considered his response. Dr Elsayed was conscious that XY may have admitted the claimant's account of the encounter to have been true thus obviating the need to continue any further enquiries. We find Dr Elsayed, inexperienced as she was, disregarded the terms of reference and in so doing undermined the claimant's faith in the investigation. In questioning HH about the claimant's relationships at work, whether inappropriate or not, caused the claimant reasonably to believe that her relationships at work

were being tested to consider if she was herself at fault in some way. We are well aware that it was not the intention of DR Elsayed to harass the claimant in any way however that perception of it was one reasonably held by the claimant when she understood not unreasonably that her relationships at work were being questioned.

144. We find the nature of the questions Dr Elsayed put to HH as they were reported to the claimant by HH were asked of him because the claimant, a female had raised a complaint of sexual harassment by XY of her on 11 June and that the enquiries were of a nature that was testing the claimant's credibility and her character. We set out below the findings of fact we make in relation to the investigation that Dr Elsayed made in interviewing XY [875-891] however we observe not similar enquiries were made of others within the Trust or outside relating to XY's clinical experience or his relationships at work as they were put in respect of the claimant.

Claimant's complaint in relation to Dr Elsayed's investigation re HH

145. Sadly having recorded the interview with the claimant on 20 July on the 27 July there was a data breach by the respondent's in that the audio recording of Dr Elsayed's interview with the claimant was, in error downloaded by a member of the HR department and distributed to 3 members of staff who had no connection with the investigation. Jane Haire the deputy director of HR wrote to the claimant informing her of the breach and apologised for it [729].

146. In response to the claimant's concerns in relation to XY being listed on the rota Ms Howard on 29 July updated the claimant and her BMA representative to assure them that XY was not in the workplace [731] .

147. By the 30th July the claimants BMA representative emailed Ms Haire asking for a telephone discussion about what she described as “ a *catalogue of mistakes*” Not least a serious breach of the GDPR [737].
148. As a result of the concerns that were raised on behalf of the claimant Ms Howard made contact with Dr Elsayed to ask her to confirm what had been discussed with the doctors that she had made contact with to ensure the discussion was documented as normal procedure was to formally invite and record any conversation in the investigation [740]. Dr Elsayed provided her notes of the telephone discussions with HH and with EE.
149. On the 3 August Ms O’Rourke the claimant’s BMA representative sent a reminder to Ms Haire that she was waiting information as to whether Dr Elsayed’s conversations had been outside of terms of reference or indeed if another independent investigator could be appointed and progress is to the GDPR breach [777]. In response to the inquiries that she made Ms Howard sent to Ms Vaughan the HR Director a timeline document regarding the investigation [799 – 806].
150. Also on 3 August Dr Elsayed sent to Ms Howard a list of questions she considered needed to be asked of those she intended to formally interview namely BB, HH and EE as well as the claimant’s friend CC and DD [807-806].
151. On 5 August Ms Haire responded to Ms O’Rourke by e-mail setting out what the conversations between Dr Elsayed and HH and EE Had been about [824-825]. It was confirmed to the BMA that Dr Elsayed would not be removed from the investigation.
152. Ms Haire was providing HR support to Dr Coleman who was the Case Manager and he confirmed to her that in his opinion Dr Elsayed’s informal investigations, though not strictly within the terms of reference, were not expected to cause any problem with the investigation.

153. In his evidence to the tribunal Dr Coleman has confirmed that the only investigation that he did in respect of Dr Elsayed's informal discussions was to hold a verbal conversation with her. Dr Coleman confirmed that he did not see any of the relevant documentation namely the notes of the telephone discussions with HH and EE, rather his understanding on the suitability of Dr Elsayed continuing to be the investigator was on the basis that he had a long standing relationship with her as a close colleague. We find had Dr Coleman made proper enquiries he would have seen the inconsistency in the account given by Dr Elsayed about her telephone conversations. While we note that Dr Coleman was of the view that to change investigators at an early stage of the enquiry would build in delay we have no doubt it would have been the proportionate and reasonable thing to have done in the circumstances. In the event the length of time that subsequently was taken in completing the investigation does not support the assertion that to retain Dr Elsayed as the investigator was a pragmatic and reasonable approach to take.

154. Ms Tharoo has suggested that Ms Haire made a number of misrepresentations suggesting that she had spoken with Dr Elsayed herself while she had not. We read the email [825] rather differently. Ms Haire refers to having spoken to Ms Howard who had been in the initial interview with the claimant and Dr Elsayed and it is to her account that Ms Haire refers.

155. The tribunal find that in her telephone discussions with EE [725] and HH [707] that while there was not an explicit reference to the assault by XY there was discussion about the claimants contact with XY. In discussion with EE it was noted that the claimant had *"Fallen out with a urology trainee – Mr"* and later a further note *" She told Mr EE that she had travelled to and back from Edinburgh together? Spoke about wife and children ad Does not want to leave Stoke!"* In respect of HH the note was *" Personal – aware that there has been noise about urology middle grade"*

156. Although in her evidence Dr Elsayed denies that she asked HH about the claimant's inappropriate behaviour the note immediately after reference to the "noise" about a urology middle grade seemingly in respect of that incident continues and records:

" CD Involved – Mr HH not involved work colleague Not witnessed inappropriate behaviour concerns. Just generally friendly"

The Tribunal find that the comment was, as HH described, in response to questions asked by Dr Elsayed. The tribunal find that no doubt because of her total lack of experience in conducting an investigation, DR Elsayed engaged in 'informal' investigatory meetings with HH and EE and the conversations were held under false pretence to inter alia gain background information on the claimant's personal relationships with colleagues with a view to contextualising the allegations she made against XY. We do not ascribe any bad intent on the part of Dr Elsayed however the questions were inappropriate, outside the terms of reference of the investigation and had the effect of undermining the claimant's dignity in the workplace. We observe however that that both EE and HH were supportive of the claimant in all their comment, though uncomfortable about the questions that were asked by the investigator.

157. Dr Coleman in response to cross examination has confirmed that had he read the notes at the time of the complaint he would have understood that Dr Elsayed had misled him and that it would have compromised the investigation. It is disappointing that when in November 2020 the truth of Dr Elsayed's investigation came to his attention Dr Coleman did nothing to remedy the situation other than to wait the report.

158. Ms Tharoo asserts that the respondent treated the claimant's complaint "*with complete disdain (or highhandedness, to use the relevant terminology)*". The Tribunal view is rather different. We are mindful that the respondent had reported XY to the GMC in respect of both the police investigation and the allegations raised against him by the claimant. The tribunal takes notice of the fact that both XY and the claimant ended their

employment with the respondent when their contracts ended on 5 August 2020. It does not escape our notice that at the time the respondent were working in quite exceptional times and the call on his time at the time inevitably meant that Dr Coleman was not as attentive to scrutinise the investigation more than he did. We acknowledge, as did Dr Coleman in his written confirmation 30 November 2020 in response to the request of the Professional Standards and Conduct Committee meeting on 24 November [1047-1048], that he make further enquiries into the allegations made by AA concerning the conversations Dr Elsayed had with HH on 24 July. As a result of his enquires Dr Coleman concluded, as have we that:

“at no time did Dr Elsayed ask any questions relating to her sexual conduct or whether she had been a promiscuous person”

Dr Coleman did not consider that Dr Elsayed was compromised in her ability to conduct a fair investigation.

159. Dr Coleman had concluded in November, with sight of relevant notes of the investigation had a clear understanding that Dr Elsayed had spoken to a surgical colleague outside of the terms of reference of the investigation. However Dr Coleman concluded Dr Elsayed's actions it did not compromise the investigation and that to reboot the process to restart it anew would not change the outcome and would put an unnecessary burden on the claimant in delaying the process for several more months.

160. The tribunal finds that the respondent did not properly investigate the claimant's complaints about Dr Elsayed's investigation and did not have proper regard to the impact of the decision on the claimant .

The continued investigation with XY

161. Having been permitted to continue her investigation into the allegations made by the claimant Dr Elsayed preceded to interview XY initially on 4 August 2020 when at a video meeting XY was accompanied by his BMA representative. During the meeting XY raised concerns in relation to the data breach regarding the transcript of the investigation meeting with the claimant and it was agreed the meeting would be adjourned. At the same

meeting XY requested that II was not to be contacted as he wasn't aware of the investigation and to interview him would damage XY's career. Subsequently Dr Elsayed discussed the request not to interview II with Dr Coleman who concluded II's evidence would not be relevant to the investigation. On 4 September 2020 the investigation meeting with XY was reconvened in the presence of his BMA representative [875-891]. It is in relation to the questions asked by Dr Elsayed of XY that the claimant presented her second complaint to the tribunal Case number 1302932/2021.

162. The key passage of the interview which the claimant asserts to have been victimisation of her is captured in the notes of the interview [889].

"IES: OK, are there any other instance where you thought that [the Claimant] was for example, invading your own personal space, did you ever have a feeling that [the Claimant] is being overly familiar with you for example?"

"IES: OK, but she has never for example instigated physical contact with yourself?"

"IES: And wherever you were standing with her, you wouldn't feel uncomfortable that she has stood close or something like that?"

"IES: If you are standing with her, you wouldn't feel uncomfortable, you don't feel that she is being too close to you or that she is terribly invading your own personal space?"

163. Dr Elsayed in her written statement claims that the questions were asked not to investigate whether the Claimant was herself guilty of sexual harassment as claimed but to explore the nature of the relationship between the Claimant and XY. The Claimant had insisted to Dr Elsayed that their relationship was superficial and that she hardly knew XY and that she did not know his name. XY had a different view. He described their relationship as being much closer and familiar and produced copies of 10 WhatsApp messages between them. The answers which XY had

given had suggested inconsistencies between his account of their contact and that of the claimant. Further, Dr Elsayed was conscious that in her discussion with EE he had suggested [726] that EE had suggested that the Claimant and XY had travelled home together from Edinburgh following their exam (MRCS). Dr Elsayed explained that her reason for asking these questions had been to establish how friendly and familiar they were and what were their normal behaviours towards each other and whether there had been any previous physical contact.

164. The tribunal has been invited by Mr Fodder, the respondent's counsel to consider the investigation interview and the questions put to XY in their totality. In context we find the offending series of questions came after a long exchange of probing questions put to XY about his reason to be in the hospital on the 11 June. There followed questions about XY's contact with the claimant in relation to a variety of subjects including exams, books and rota arrangements. The entirety of the questions [877-888] probe the explanation that XY gave for being in the site on 11 June and put to XY the account of the encounter as alleged by the claimant.

165. Ms Holland in response to cross examination has accepted that the questions asked by Dr Elsayed were inappropriate and should not have been asked and that she should have intervened. We conclude that like Dr Elsayed Ms Holland was inexperienced in such investigations as those raised in this case.

166. The employment tribunal is mindful that Dr Elsayed in her meeting with XY was forensic in her examination of him and we accept her explanation that she sought to ask questions of XY to ensure that when addressing the alleged assault XY would not be in a position to suggest that the physical encounter was consensual. Whilst it would have been better had the investigation simply asked XY the single open question for him to give his account of what happened on the evening of the 11 June the approach taken was that of a wholly inexperienced investigator.

167. The tribunal has reach the conclusion that on the facts and in context the questions of XY by Dr Elsayed were natural questions put in response to the allegations being reported and investigated within the respondent's procedures and not less favourable treatment because the claimant had done a protected act. We have found Dr Elsayed to be conscientious in wanting to complete a thorough investigation, albeit one in which she allowed her inexperience to overcome the need to adhere to the relevant procedures. We take into account the empathy that Dr Elsayed showed to the claimant during her interview with her and find that Dr Elsayed sought to establish the facts of the incident and did not ask the questions that she did of XY because the claimant had brought the complaint against him. We find the questions asked of XY by Dr Elsayed were framed because that was the nature of the investigation she conducted and the questions that she asked were to provide a better understanding of what XY's account of his relationship with the claimant was. It is unfortunate that the usual checks that would have been made by the intervention of an experience HR support were not exercised by Ms Holland who herself was inexperienced in such investigations.

Time taken to complete the investigation

168. Having interviewed XY on 4 September Investigation meetings with BB on 1st October [959-965] and with EE on 2nd October [993-998]. Following further delay due to Dr Elsayed's annual leave the first draft of the investigation report was not finalised until mid November. Whilst we have been referred to the impact of the COVID pandemic on the working environment within the respondent both clinically and in respect of administration neither that, nor periods of annual leave, excuse the delay in the conclusion of the investigation although they do provide an explanation.

169. Dr Elsayed has in response to cross examination accepted that in conducting her enquiries that in certain areas she had not taken a number of steps that she could have done in further interrogating XY's explanation for his movements on 11 June. We accept that Dr Elsayed's account that she did not consider the rumours about the claimant's various friendships to take away from the claimant's credibility. We have found that Dr Elsayed was sympathetic to the plight of the claimant, a female working in the environment that the claimant did and the double standards that were faced by aspiring female surgeons generally and the claimant in particular. However the tribunal have found that Dr Elsayed's view in reaching the conclusions that she did to have expressed the view that on the balance of probability there was not sufficient corroborative evidence to support the claimant's complaint to be one that was not a reasonable conclusion to be reached at the investigation stage.

170. On 15 December Dr Elsayed sent her 'final report' to Dr Coleman the Complaint Manager [1081-1090] and it is apparent that on his receipt of the report Dr Coleman intervened to point out to Dr Elsayed that various comments she had made in relation to the evidence were not appropriate and a final version of the final report was produced on 14 January 2021 [1095-1110]. It is accepted by Dr Coleman that he should not have intervened to guide Dr Elsayed on the contents of her report and comment on evidence. In the event having received the final version of the report Dr Coleman circulated the report with his recommendation that he believed that in respect of the matters that were to be investigated under the terms of reference there was a case of misconduct to be answered by XY. On 14 January 2021 Dr Coleman circulated the report together with his view that there was a case to answer but that as XY was no longer employed by the Trust he wondered whether hearing would need to be held [1106].

171. In response the Director of HR Ms Ro Vaughan on 15 January 2021 advised Dr Coleman that the report would need to be shared with XY and his BMA representative and that although XY was no longer an employee

and it would difficult to hold a hearing or impose a sanction on him there was an obligation to share information with anyone who might be employing him if he was working in the UK. Dr Coleman was reminded that it would be necessary to inform the GMC to confirm if XY had been an employee they would have held a hearing.

172. On 1 March having received comments on the report and the recommendation from XY's BMA representative Dr Coleman wrote to XY via his BMA representative [1139] to confirm that were XY still employed by the trust there was a misconduct case to answer that should be before a Disciplinary Panel at a conduct hearing. Given that XY was no longer working for the Trust and was abroad it was confirmed no further action would be taken other than to send the GMC a copy of the investigation report.

173. We find that the decision taken by the respondent in the circumstances was reasonable in relation to the outcome vis a vis XY. The tribunal observe that notwithstanding the determination of the MHPS investigation was communicated to XY, the respondent did not at the same time inform the claimant of the outcome of the investigation. We note that at the original investigation meeting [627] with the claimant she was informed that she would not necessarily be informed of the progress or outcome of any investigation or disciplinary hearing in respect of XY.

174. On 28 May 2021 the respondent's solicitor wrote to the claimant solicitor disclosing documentation to them of the investigation meeting between Dr Elsayed and XY and as a consequence of reading the notes the claimant began a further period of Early Conciliation through ACAS on 11 June 2021 and subsequently presented the second complaint to the Employment Tribunal on 21 June 2021 alleging victimisation.

175. We observe at this stage that the Claimant's claim has evolved in respect of what she considers to be the aggravated damage flowing from the respondent's treatment of her as she a result of a significant deterioration in her mental health; whilst the alleged harassment and victimisation clearly caused her injury to feelings, the extent of the Respondent's failings (some of which have only been exposed in disclosure for these proceedings) has, cumulatively, adversely impacted the Claimant's mental health, and indeed her trust in the Respondent, and the NHS more widely. Although she had intended, when her contract with the Respondent ended in August 2020, to undertake a master's degree for one year and then return to her surgical training, her significant mental health difficulties meant that she was not able to countenance continuing her medical career at all, in circumstances where even attending a hospital for her own health needs caused her significant anxiety and distress. As such, the Claimant has now commenced employment (at a much lower salary) in a non-medical field. According to her GP notes, she is suffering from Mixed Anxiety and depressive disorder and PTSD [1548]. The findings of fact that the tribunal has sought to make, though not forensic of the minutiae of the evidence before us, is we trust sufficiently detailed to enable the parties to distil the findings that the panel have made in respect of the reasons for the respondent's management of the claimant's complaint that led to the MHPS investigation into the behaviour of XY. In summary we find that the explanation for much of the delay in the progress of the investigation in this case is founded in the combined effect of the impact of covid on the commitments of clinicians in this case, Dr Elsayed and Dr Coleman in particular and the effect of HR staff working from home. There were undoubtedly failures in the management of the investigation and more forethought in the allocation of available resources and the need to appoint an experienced investigator and HR Support rather than the novice that was Dr Elsayed cannot be overstated as the reason for the delay in handling the MHPS investigation.

Argument and Decision

176. We are grateful to counsel on behalf of both parties in this case who have tendered lengthy written submissions and also addressed us orally. Having made findings of fact on a wider range of the evidence than is strictly necessary for us to determine the legal issues in this case we confine our determination to those legal issues.

Section 26: Harassment

177. Did the following conduct occur? On or around 11th June 2020, did XY engage in conduct of a sexual nature towards the Claimant as described in paragraph 2 of the first claim form [31]?

178. It is not disputed that XY engaged in conduct of a sexual nature towards the claimant as described in her first complaint to the Employment Tribunal. It is not disputed that XY was on the respondent's site for the purposes of conducting work for the respondent's benefit in so far as he was ostensibly on the site for the purposes of conducting professional development. The assault occurred while the claimant was at work on the respondent's premises.

179. It is not disputed that on or around 24th July 2020, Dr Elsayed (an employee of the Respondent) did make enquiries of a colleague, HH, about the Claimant's character her clinical ability and relationships at work. In reaching the findings of fact that we have in relation to the conversation with HH we have concluded that inappropriate questions were asked of HH outside the remit of the terms of reference of the MHPS investigation.

180. The facts as they have been found to confirm that the line of questioning was intrusive into the personal relationships the claimant had with her work colleagues and mentors and well beyond the scope of the terms of reference for the investigation which to an independent observer

might be seen as prying into the claimant's private life and casting aspersions on the claimant's private life and character to an extent that creates an intimidating, hostile and offensive environment for the claimant when such questions were asked in response to the claimant having asserted that she had been subject to a physical assault.

181. However the findings of fact that we have made did not include a finding that in particular, the questions were asked of whether she had engaged in any romantic relationships with colleagues in the past and whether the Claimant was considered to be a promiscuous person.
182. While the intention of Dr Elsayed we have found was not to violate the claimant's dignity or to create an intimidating, hostile, degrading humiliating or offensive environment for the claimant that, sadly, was the effect that the reporting to her of the enquiry had.
183. There is no doubt on the facts of this case that the questions asked of HH and the claimant knowledge of them were hugely concerning to her. The claimant through her BMA representative asked for Dr Elsayed to be removed from the investigation. As a tribunal we consider that the questions, which were asked only in relation to the claimant and not of the alleged harasser XY, had the unintended consequence of violating the claimants dignity which ran expressly contrary to the claimants wish that the individual not be contacted. We have found that although the word 'promiscuous' was not used and to an extent the claimant resiled from it's use saying not it was synonymous with the suggestion that she had inappropriate relationships with multiple work colleagues. We conclude that the enquiries that we found were made were in relation to inappropriate relationships and amounted to harassment because of the claimant sex.
184. In reaching the conclusion that we have we have taken account of the claimant's perception of the questions asked of HH by Dr Elsayed in the

investigation. We have considered all of the circumstances of the case, the fact that the enquires were made against the claimant's express wishes, and were made out with the terms of reference of the MHPS investigation. There is no doubt that the conduct of XY in having assaulted the claimant on 11 June was clearly harassment and reasonably considered by the claimant to be such. We conclude that the claimant was equally entitled to perceive Dr Elsayed's questions of HH to be harassment of her because of her sex enforced by the fact no similar questions were asked of HH or anyone else in relation to XY the subject of the investigation. Scrutiny of the personal relationships of the claimant who was the victim of an unwanted sexual assault was a serious further act of discrimination.

185. The claimant quite clearly has proved facts from which the Tribunal can only properly and fairly conclude that the conduct was related to the protected characteristic.

186. We turn next to consider whether the respondent has established a non-discriminatory reason for the conduct and for the reasons we have already confirmed it is not disputed that the acts of XY were only because of the claimant sex.

187. For the reasons we have detailed while we conclude it was not the intention of Dr Elsayed to behave in a way that had the purpose of harassing the claimant the unintended consequence of her conversation with HH had the effect of violating the claimant's dignity and creating an intimidating , hostile and degrading environment for the claimant.

188. Finally we turn to the respondent's defence to the complaint against them that XY harassing the claimant did so in the course of his employment by the respondent. The respondent asserts that they took all reasonable steps to prevent XY behaving in the way that he did to harass the claimant. We have been guided in large part by the submissions both counsel have made in respect of the guidance given to employment

tribunals by HHJ Tayler in Allay. We like the tribunal in Allay have found that the respondent provided staff with training in respect of equality and Diversity to encompass Dignity at Work and harassment in its most generic terms. Unlike in Allay we have found that the training delivered and procedures to which employees were referred was not well publicised nor were they dealt with in training in anything more than a superficial and relatively brief way. The training did not identify separately the different types of harassment referring only to generic 'harassment' rather than the sort of harassment that may be encountered in respect of each protected characteristic. The Dignity at Work policy was referred to on only one slide on the presentation by reference to 'support available' and in the event policies on the respondent's website did not include links to other relevant documentation. The 'management' or quasi managerial level of clinicians were not familiar with the processes of the Dignity at Work policy which refers to harassment.

189. There was not training in respect of how allegations of harassment at work would be treated or about potential sanctions if the allegations were proven, whether disciplinary sanction up to and including dismissal or referral to the General Medical Council. Moreover, despite training none of the clinicians who have given evidence at the hearing recalled the substance of the training in respect of harassment. We have found that in fact the working environment in which the claimant operated was one in which when she became the subject of 'gossip' no steps were taken to address the behaviour which itself amounted to harassment because of the claimant's sex.

190. Our findings of fact led us to conclude that the training delivered by the respondent was not effective. It was evident to the tribunal that even if trained, the 'mangers' such as EE, the claimant's Educational supervisor, did not know what to do when he observed harassment. Initially when in response to uncomfortable 'gossip' about her and her friendships with consultants the claimant was moved to another hospital without tackling

the root cause of the necessity to move, gossip amongst nursing staff about the claimant. Indeed in his initial response to the claimant's report about the XY assault itself EE though well intentioned was unaware of the steps to be taken or the options available to the claimant. Even more worrying was the fact that members of the HR team were not aware of the procedures or training. We are led to the conclusion any such training was short lived in people's memory and not regularly refreshed and there has been no supportive evidence of regular updates being circulated to staff about Dignity at Work or harassment and the consequences of any breach on procedures.

191. We have concluded that the respondent if delivering training on harassment within the Dignity at Work policy ought to have recorded the refresher training and that the training itself should have included worked case studies or likely incidents of harassment in the work place including in respect of 'banter' and 'gossip' and inappropriate physical contact. We have made findings of fact that the working environment at the respondent in the clinical setting was not one which set clear boundaries and inappropriate behaviour was allowed to continue left unchecked. There was an apparent disconnect between the clinical working environment and any scrutiny of working practices in the clinical environment setting by HR.
192. Mr Fodder in his submission suggests that the training given to XY was thorough and forcefully presented, however on the basis that the same training was seemingly given to all the clinicians who have appeared before us the content of the training was not apparently memorable. Although it is suggested that it is backed up by repeated messaging that evidence has not been presented to us. On the contrary all of the evidence before us suggests that the emphasis of the training was of the need to avoid the Trust being embroiled in litigation and cost and there is every reason in this case to determine the training given was not effective and did not last and was not likely to.

193. While Mr Fodder refers to there being lack of evidence in this case that XY had attended the training on Equality & Diversity and had not understood it, the reality of the evidence before us and the relevant findings we have made leads us to conclude that, despite training, the working environment in the clinical setting between medical staff was that gossip and other harassment was not checked when it was observed and any such training we have no doubt was undermined. The claimant's own reluctance to raise a formal complaint in the immediate aftermath of the assault on her and concern that the detail of her complaint being known and might lead to her being treated differently is testament to the impotence of the training and any policies and procedures.

194. We conclude in this case that the respondent has put before us evidence that XY attended a course however we have considered whether there were any other reasonable steps that should have been taken by the respondent and there were many, identified by the gaps in knowledge of all of the clinical and many of the HR players in this case.

195. The burden is on the respondent in this case to establish the defence under section 109(4) and they have failed to do so.

Section 27: Victimisation

196. The Respondent accepts that:

- the Claimant's complaint about XY's conduct towards her on 11th June 2020, amounted to a protected act under section 27(2).
- R accepts that on 4th September 2020, Dr Elsayed (an employee of the Respondent) asked Dr XY the questions set out in paragraph 3 of the second claim form [79]

197. We ask ourselves whether the claimant, on reading the transcripts of Dr Elsayed's interview with XY, was caused to suffer a detriment as a result of Dr Elsayed asking of those questions which she did. We remind ourselves that the question of whether there is a detriment is dependant upon if a reasonable person might consider the relevant treatment to constitute a detriment and is not entirely subjective. On the facts before the tribunal we conclude that the questions asked were reasonably to be seen in the context of the investigator putting the claimant's allegations to XY and it was not entirely unreasonable to understand the personal exchanges between the claimant and XY and the nature of the relationship between them although the manner in which the enquiries were put was inappropriate.
198. Turning to the essential question in relation to a complaint of victimisation we have considered the reason why the questions were asked by Dr Elsayed even were they to be considered to be a detriment. We ask ourselves perhaps the easier question of whether the questions asked by Dr Elsayed were asked of XY because the claimant had done a protected act.
199. While it is plain that the questions asked of XY would not have been asked had it not been the case that the claimant brought a complaint of sexual harassment leading to the inevitable investigation into the allegations and the need to interview XY that is not enough to satisfy the statutory test. We are required to ask the reason why the questions were asked.
200. In light of the findings of fact we have reached we conclude that the questions asked by Dr Elsayed were asked not because the claimant had brought the complaint but instead because Dr Elsayed, albeit wrongly, thought she needed to ask the questions that she did in order to complete her report to the Investigation Manager.
201. The tribunal conclude that the claimant's complaint of unlawful harassment because of sex is well founded and succeeds.

202. The claimant's complaint of victimisation does not succeed and is dismissed.

Employment Judge Dean
Date: 17 July 2023