



EMPLOYMENT TRIBUNALS

Claimant: Mrs Elspeth Desert

Respondent: Professor Matt Phillips (1)

North Cumbria Integrated Care NHS Foundation Trust (2)

HELD AT: Manchester (by CVP)

ON: 26, 27, 28, 29 & 30
June 2023, with
deliberation in
chambers on 27 July
2023

BEFORE: Employment Judge Johnson

MEMBERS: Mr Cunningham
Mr Frame

REPRESENTATION:

Claimant: Mr S Walker (solicitor)

Respondent: Ms A Niaz-Dickinson (counsel)

JUDGMENT

The judgment of the Tribunal is that:

- (1) The complaint of harassment by reason of the claimant's sex contrary to section 26 Equality Act 2010 is not well founded which means it is unsuccessful in relation to both respondents in these proceedings.
- (2) The complaint of victimisation contrary to section 27 Equality Act 2010 is not well founded which means it is unsuccessful in relation to both respondents in these proceedings.

REASONS

Introduction

1. These proceedings arise from the claimant's employment with the second respondent hospital trust and where she had worked since 1 January 1994. She is a psychologist by profession and at the material time between the dates of August 2020 and April 2022. The claimant said that at the material time, she was employed as a Clinical Director (Pain Management) at Cumberland Infirmary.
2. The claimant presented a claim form to the Tribunal following a period of early conciliation from 13 April to 14 April 2022 on 14 April 2022. She named her line manager as first respondent and her employer as the second respondent. She brought a complaint of discrimination arising from her sex contrary to the Equality Act 2010 (EQA), including a complaint of victimisation relating an ongoing equal pay complaint which was presented under case number 2410657/2019, and which was presented before the relevant events in this case.
3. The respondent presented a response resisting the claim on 21 June 2022, which was initially a holding response and comprised of rudimentary grounds of resistance and sought further particulars from the claimant.
4. The case was the subject of case management before Employment Judge (EJ) Doyle on 1 November 2022. The complaints were clarified, a final hearing date listed, and appropriate case management orders made. The claimant provided an amended grounds of claim and in turn, the respondent provided an amended ground of resistance. A final list of issues was agreed and although there were some issues arising concerning disclosure of documents, the case was ready to be resolved as listed.

Issues (as agreed by the parties)

5. Harassment relating to the protected characteristic of sex (contrary to s. 26 Equality Act 2010)

A1. Did the First Respondent engage in unwanted conduct towards the Claimant, namely: -

- (i) August 2020. The First Respondent used an inappropriate tone in e-mails dated 14th August 2020 sent to the Claimant in connection with an HR issue relating to a staff member that the Claimant managed.
- (ii) September 2020. The First Respondent was openly disrespectful of the Claimant's professionalism and her workload in relation to discussions around the Claimant's need for a deputy.

- (iii) September 2020 and March 2021. The First Respondent prevented the Claimant from engaging in work-related conversations with NHS commissioners, which conversations were required to permit the Claimant to carry out her delegated contractual responsibilities.
- (iv) September 2020. In an e-mail dated 25th September, the First Respondent improperly alleged that the Claimant had not completed a task assigned to her and asked others to check on the Claimant's actions rather than dealing with the matter himself.
- (v) October 2020. The First Respondent questioned the Claimant's role as Clinical Director for Pain Management, despite being provided with the required evidence by the Claimant. He sent a number of e-mails regarding his views on the Claimant's position that the Claimant felt were intimidating and threatening.
- (vi) February 2021. The First Respondent improperly took decisions on the Claimant's service's behalf, without agreement or discussion, by responding to the Second Respondent's executives about service provision in staff health by the Claimant's team.
- (vii) March 2021 – May 2021. The First Respondent unilaterally removed the Claimant's role as Clinical Director for Pain (a role that the Claimant had been undertaking between November 2019 to May 2021) and adopted what the Claimant considered to be a bullying tone in e-mails on the issue. The Claimant also submits that the First Respondent deliberately ignored the evidence that the Claimant had previously provided when requested to do so between October 2020 and May 2021.
- (viii) In March – May 2021. The First Respondent queried some work completed by a previous colleague in respect of an audit. The First Respondent's verbal conversation and e-mails relating to this matter were critical of the Claimant, even though the Claimant had not been responsible for the piece of work in question. The audit itself formed part of the subsequent fraud allegations made against the Claimant.
- (ix) April 2021. The First Respondent sent an e-mail on 29th April 2021 which the Claimant felt was intimidating. The e-mail related to criticism of the Claimant regarding a delayed referral to the acute pain team.
- (x) August 2021. In an e-mail dated 9th August 2021 which related to the First Respondent's handling of long COVID, the First Respondent undermined the Claimant in relation to the pathway

and conversation and decided that a male doctor was to lead the piece of work in question.

- (xi) In March 2021, the First Respondent undermined the Claimant in relation to a Pathway for Tier 3 weight management, work she had been undertaking for the previous five years. The First Respondent decided that a male Consultant was to lead the piece of work in question.
- (xii) November 2021. In a number of e-mails sent over 18th and 19th November 2021, the First Respondent unfairly criticised the Claimant's handling of a complaint. In relation to this matter, the First Respondent complained about the Claimant's tone in an e-mail for which the Claimant was rebuked by her line manager. However, the First Respondent's complaint had not given the proper context or full information to the line manager who rebuked the Claimant.
- (xiii) Various dates – April 2021 until 27th January 2022. The First Respondent made formal complaints about the fraud allegation and that the First Respondent acted in this way in order to punish the Claimant for raising her grievance regarding the First Respondent's bullying behaviour.
- (xiv) Various dates. The First Respondent would set tasks for the Claimant (such as preparing a written paper on an issue) and then either ignore the Claimant's response or act on that matter before he had received any response. (Confirmed as not being pursued at final submissions on day 5).

A2. If so, was that unwanted conduct related to the Claimant's sex, (sex being a protected characteristic)?

A3. If so, did that unwanted conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?

A4. Are those incidents of unwanted conduct relied upon by the Claimant in 2020 and 2021 time barred as alleged by the Respondents in their Amended Response? Is the conduct complained of for the period 2020 to 2021 inclusive causally related to the conduct complained of in 2022 that led to the Claimant bringing her claim?

A5. If so, are the incidents relied upon by the Claimant therefore in time as they amount to conduct extending over a period of time (s.123(3)(a) Equality Act 2010)?

A6. If not, would it be just and equitable for the Tribunal to extend time to permit those claims to be brought out of time?

6. Victimization

B. Victimization (contrary to s.27 Equality Act 2010)

B1. Are the Claimant's equal pay claims before the Manchester Employment Tribunal under claim number 410657/2019 a 'protected act' as defined by s.27(2)(a) Equality Act 2010? This is conceded by the Respondents.

B2. If so, has the Second Respondent subjected the Claimant to a detriment because of the Claimant bringing those proceedings?

B3. Specifically, did the Second Respondent: -

- (i) Fail to deal promptly with the Claimant's grievance; and
- (ii) Fail to deal appropriately with the disciplinary allegations raised against the Claimant by the First Respondent.

B4. The Claimant submits that the treatment was afforded to her by reason of her bringing her equal pay claim. If it is accepted that the Claimant has presented a *prima facie* case that this may be the reason for the treatment afforded to her, is the Second Respondent able to show that the treatment was afforded to the Claimant for another reason (notwithstanding that no such reasons are advanced in the grounds of response).

7. Remedy

- (i) In the event that the Claimant successfully establishes any of her claims, has the Claimant suffered injury to feelings?

Evidence used

8. The claimant originally intended to rely upon the following witnesses at the final hearing:
- a) Mrs E Desert (claimant)
 - b) Reverend Doctor Belinda Stanley (formerly working for the second respondent as a Consultant in Sexual Health and latterly as a Medical Appraiser before she retired to join the Church of England as a Curate).
 - c) Joanne Hill Davies (Specialist in Women's Health at Lowther Health Centre).
 - d) Karl McLeish (a former employee of the second respondent and colleague of the other parties)

It turned out that Mr McLeish's evidence would not be relied upon, and the Tribunal were invited not to read his statement. Ms Stanley and Ms Hill Davies did not attend the final hearing but relied upon their written statements. Mr Walker confirmed that she was aware that limited value would be placed upon witness evidence which was not supported by oral evidence under oath. The claimant argued that her witnesses had been reluctant to attend the hearing because they felt their careers might be vulnerable if they supported her claim. We did not hear their evidence concerning this matter and were unable to make any findings concerning this issue.

9. The respondent called the following witnesses:
- a) Professor Matt Phillips (first respondent and claimant's line manager from 2020 to 2021).
 - b) Dr Roderick Harpin (Locum Bank Consultant Anaesthetist, Appraiser and Medical Examiner – Interim Medical Director at material time of allegations)
 - c) Georgia Wright (Deputy Chief Nurse)
10. In terms of documents, there was a final hearing bundle available which contained proceedings, policies and procedures, emails and process documents together with some additional documents at pages 597 to 604
11. A supplemental bundle was also produced which included documents relating to the referral to Fraud 1 (understood to be part of the second respondent's internal audit), by Professor Phillips, the first respondent. (S1-S255)

12. Further additional documents were produced during the proceedings relating to an email by Prof Phillips agreeing to sign mediation agreement (marked document 'R1') and email and attachments forwarded by Prof Philips to Doctor Halpin concerning investigation into Mrs Desert ('R2')
13. Finally, a cast list and issues were also provided by the parties and agreed by the parties.

Findings of fact

Respondents

14. The second respondent (the Trust) is a large NHS trust in the North West of England in the North Cumbria. It has had a number of names over the years during the claimant's long career with them.
15. The first respondent (Professor Phillips) is an Associate Medical Director employed by the second respondent Trust.
16. The Trust like all NHS trusts, operates with significant HR and legal support and has many policies and procedures. In this case, the following particular processes were relevant and included in the hearing bundle:
 - a) Resolution Policy (dated 4 May 2021).
 - b) Dignity at Work Policy (dated 4 May 2021).
 - c) Disciplinary Policy (dated 1 June 2021).

The Tribunal noted that these policies post-dated the dates of some of the alleged incidents. While this might be the case, limited attention was paid to this in cross examination and Tribunal assumed that the newer policy documents were simply revisions of earlier documents with no material changes of relevance to this case having taken place.

Claimant

17. The claimant (Mrs Desert) is a Head of Speciality on Physical Health Psychology and Clinical Director of Physical Health Psychology. There is a question of a separate role of Clinical Director (pain management) and this will be discussed as part of the findings of fact below). Mrs Desert was based at the Cumberland Infirmary.
18. Being someone who lives in the Lake District and works within the region, Mrs Desert asserted that the Trust had a 'monopoly' position as an NHS employer in this part of the North West. In using this term, she appeared to compare her position with colleagues who work for Trusts operating in Greater Manchester, Lancashire and Merseyside, where many NHS trusts operate along with other health providers, and which means the ability to change workplace without increasing a commute significantly or having to relocate is available. While the Tribunal recognised the logic of Ms Desert's argument

and no doubt any employee living in Cumbria has to perhaps think more seriously about changing employer (by reason of geography and a relatively smaller population), she nonetheless had worked for the Trust since 1 January 1994 without any significant issues arising until the events which form the background to this case.

19. Mrs Desert brought a complaint of equal pay in 2019 under case number 2410657/2019. This is understood to form part of a multiple and has not yet been resolved due to an ongoing Equal Value process. Understandably, this will take some time to resolve. However, for the purposes of this case, it is only relevant in relation to our determination of the complaint of victimisation as it amounts to a relevant protected act.
20. She accepted that her area of work was a women dominated workplace and Professor Phillips was clearly one of the few men who worked directly with Mrs Matthews at the material time in this case.

Appointment of Professor Phillips

21. Professor Phillips began working as a consultant from June 2014 and moved to the Trust in 2016 having previously worked in Greater Manchester. He gave credible evidence that he found there to be significant cultural differences at the part of the Trust where he worked compared with his previous employers. In particular, he felt the sexual health service were not enthusiastic about having consultants working there and he was working in a very female dominated workplace, which may have affected how he was perceived as a new male consultant moving from a metropolitan area, having had no previous experience with North Cumbria.
22. His line of management of Mrs Desert began in August 2020 and finished around the month of October 2021. Professor Phillips did not manage her from this date, seemingly because of the grievance which she had raised and instead, her line manager became Penny Parsons. However, Mrs Matthews believed that Professor Phillips retained an involvement in her management from October 2021 onwards.

Allegation A1(j) – August 2020

23. This allegation arose from unhappiness by Mrs Desert relating to a HR matter and on 12 August 2020, she emailed Vanessa Connor (Associate Director of Operations) and amongst other things referred to an employee who was away on secondment and whom she believed would not be able to return to her substantive role, (pages 164-5). Quite reasonably, Ms Connor noted that a recruitment exercise could not take place for a Data Analyst post when the seconded employee could return to occupy it. On 14 August 2020, Ms Desert replied arguing that the post in question was not the substantive post occupied by the seconded employee, but at this point Professor Phillips who had been copied in replied saying the following:

“I think Elspeth there’s clarity here, you put a member of staff on secondment and now its time for them to return.

There's no confusion. I am in agreement with Vanessa. Your member of staff is returning from secondment. If you have organised her job differently during secondment, I trust you have gone through the correct processes and consultation...

Mrs Matthews then replied saying the following:

"Thank you for your response.

As I said I had a discussion with Tim – if this has not been communicated with you I understand the stance you wish to take.

I will take HR advice regarding next steps to ensure this person is found a suitable role – as I appear to have been paying her during the secondment in your care group this will be straightforward.

I am also very clear that we need to adhere to trust and NHS values – in particular kindness and respect in our behaviour and communication with colleagues."

Professor Phillips concluded by responding at 19:01 on 14 August 2020:

"The same staff member is being returned to your service in the role she left on secondment. I'll be informing hr (sic) the same.

We won't be doing business like seconding individuals out then redesigning their jobs there is no respect or indeed quality management there. Everyone will be treated with kindness and respect.

You haven't been paying anyone Elspeth really, you are a fund holder of the public purse which is to be spent in the service of our communities.

Let's meet soon as I am definitely feeling some anxieties from your service during the transfer and the sooner you have clarity on the triumvirate's expectations the better I think"

24. Mrs Desert felt that the tone of the emails from Professor Phillips included statements which she herself would not have made. There was a dispute as to whether it involved reasonable management advice which Mrs Desert acknowledged Professor Phillips could give, but she felt that the way he responded in these emails, he did not wish to accept her reassurances.
25. Professor Phillips disagreed his comments amounted to bullying but was clearly uncomfortable when questioned about some of the comments which he made. He acknowledged that he was expressing concerns to Mrs Desert about her not using transparent processes relating to the secondment issue.
26. The Tribunal agreed that there was no problem with him getting involved in this matter. However, the way he did so appeared to be patronising in tone

and unnecessarily pedantic, (especially in relation to whose money was being spent as it was clearly expressed from context of budget holder).

27. In terms of this allegation being related to sex, Mrs Matthews accepted insofar as these emails were concerned, they did not make any reference to sex.

Allegation A(ii) – September 2020

28. Mrs Desert alleged that Professor Phillips was disrespectful to her when she discussed her belief that she should have a deputy appointed which she described in her email sent to Professor Phillips (21 September 2020 at 13:04) as being “...deputy role for my Head of Speciality role, to allow succession planning and more delegated leadership.” (p191)

29. Prof Phillips replied at 13:17 by saying:

“[a] CD would rarely have an 8D deputy in fact when I say rarely, I mean never. I’d never. I’d have to understand in the context of parity of CDs the justification for an 8D deputy. Succession planning tends to occur within a role not by promotion.

Still we need a proper think...Just need out thoughts and ideas aligned”.

CD is understood to be a Clinical Director role.

30. Further emails were exchanged with Mrs Desert saying:

“My core role is a Head of speciality for PHP, with a secondary separate job description for the CD role; so it is the Head of speciality role Yannick [name role] and I were discussing. This need was placed on the risk register last year, which Yannick was addressing.

I am very aware that we will not be running inpatient services, and am sorry if I suggested otherwise...”

Professor Phillips reply at 13:56 was as follows:

“Perfect

I think we understand the role of ‘Head of Speciality’. How is that different from a CD? Daya Karat is CD of general Surgery; Louise Buchanan for Cardiology etc. We don’t have a CD for Interventional cardiology, clinic, cardiology, Inpatient cardiology for instance – even though they are delivered differently.

I guess what I am really keen to do is how all the subdivisions in psychology have blossomed into different services whereas all other serves are aligned to their parent speciality.” (p.190).

There was a further exchange of emails where Mrs Desert provided a detailed explanation of her service pathway and Professor Phillips appeared to

acknowledge his appreciation. There is no need to detail it any further in these findings.

31. Mrs Desert believed there was a confusion between Clinical Director and Head of Service but given his recent arrival Professor Phillips had questions he needed to consider. Professor Phillips said he wanted to understand the situation with Mrs Desert's service pathway and nothing more intended.
32. The Tribunal did feel the use of the term 'blossomed' in his email sent at 13:56 inferred that the developments within Mrs Desert's team had expanded unnecessarily and was disrespectful on his part. However, while the comments were unfortunate and belittling, the substance of the inquiry made by Professor Phillips was reasonable and his suggestion that CD's never have a deputy was made as an expression of genuine belief.
33. We did sense that Professor Phillips and Mrs Desert from their emails were irritated with each other, but overall the exchanges were not rude or aggressive, but as her line manager at the time, it would have been helpful, for him to phone or suggest a meeting as the correspondence had reached a point where to many people, there was a need for face to face or voice to voice conversation to soften some of the tension between them.
34. Despite these findings however, the Tribunal noted that in cross examination, Mrs Desert accepted that there was no reference to her sex in the emails between.

Allegation A(iii) – September 2020 and March 2021

35. Mrs Desert alleged that Professor Phillips prevented her from taking part in conversations with NHS Commissioners in order that she could carry out her job.
36. At 17:48 Professor Phillips emailed Mrs Desert and said, "*As a CD I'd expect involvement of your triumvirate in these discussions with the commissioners.*" He went on to be supportive and to say they should meet to discuss, (p177). The triumvirate was understood to be the senior management of each service and consisted of a clinical lead, a management lead and a nursing lead.
37. Mrs Desert didn't explain why she thought this was inappropriate and subsequent emails didn't suggest her being unhappy. It concluded with Prof Phillips saying he would try and make meeting next week at 18:11 (p176), but there was no suggestion that she should be excluded by any reading of the email.
38. Mrs Desert said the meeting did not take place and was not rearranged. She believed another 2 or 3 later took place but that she was not invited to them.
39. The Tribunal were unable to find any evidence of Professor Phillips preventing Mrs Desert from attending and if anything, he appeared to be encouraging her to attend. No reference was made to her sex in these conversations and in

cross examination she also accepted that managers manage in different ways and are entitled to be involved in discussion relating to commissioning.

Allegation A(iv) – September 2020

40. An email was sent on 25 September 2020 at 11:18 from Prof Phillips to Linda Turner who is the Quality Matron for Community Services referring a communications gap which resulted in patients not being contacted, (p.194). He made reference to emails between Mrs Desert and an anaesthetics secretary. He asked for Ms Turner to have a word with the secretary. Mrs Desert responded at 13:13 to say it had been addressed and Prof Phillips replied at 13:23 to say, “Linda will look into it thank you M”.
41. Mrs Desert felt that this reply displayed a lack of trust by Professor Phillips in her. He said in cross examination that it was necessary for governance purposes to involve the Quality Matron. He said that while he could understand why Mrs Desert might feel the way that she did, it would have become clear once Ms Turner spoke with her, that his comments were not directed at her.
42. The Tribunal were unable to see how this particular allegation involved Professor Philips making ‘*improper allegations*’ regarding Mrs Desert’s failure to complete a task. Instead, it was simply a case of a line manager intervening because of concerns that a system of communication with patients might not be working. It was not interfering with her practice and although his reply to her email to both him and Linda Turner (who was asked to investigate this matter), was somewhat curt and making clear that Ms Turner would be dealing with the issue, it was not rude, (p194).
43. It was noted that these emails did not make any reference to Mrs Desert’s sex.

Allegation A(v) -October 2020

44. Mrs Desert at this time was described as being the Clinical Director for Pain Management.
45. During October 2020, Prof Phillips makes enquiries about the rationale behind Mrs Desert’s Clinical Director role for Pain Management. It appeared to have been resolved when Mrs Desert sent an email explaining how the role had arisen, (p262).
46. The matter, however, arose again and the Tribunal noted her email sent on 6 April 2021 at 10:55 when discussions were taking place concerning a Clinical Director (CD) for Integrated Chronic Pain Pathway. She refers to being asked in September 2019 to take on an additional CD role for NCMS, MSK and Chronic pain, (352-354). She accepted that it that was an interim role in cross examination. Her proposal was that her role covered the whole Pathway, whereas in his reply sent at 12:31 Professor Phillips said, “*There is no convincing need for a CD as opposed to a clinical lead – we do not have a CD for every kind of pathway, Integrated or not, across the Trust.*”

47. A further email was sent on 16 April 2021 10:04 from Mrs Desert explaining the HR and governance issues concerning the CD role for Pain. She clearly felt she was being blamed for alleged poor governance in her appointment to the interim CD role in 2019 and argued that this was not the responsibility of the person appointed. She stated she had forwarded the correspondence to her legal representative.

48. Professor Phillips replied at 10:32 and with a very assertive tone, said the following:

“There is no intention of a CD going forward, I have asked you to provide me with any evidence at all that you were appointed as CD for Chronic Pain which to date you have not done, and nor has the AMD who would have been the appointing officer.

I expect you to use the title from the start of May as previously notified, unless you can provide evidence you were appointed.

It is not the case that one can become a permanent CD without an appointment process.

I am comfortable with this position. I am happy to discuss what I think about the effectiveness of the role, however it should be understood in the context that I don't see a need for the role going forward.

I am not aware you have a CD role for Pain; you are the CD of the Persistent Physical Symptoms Service and HoS for Physical Health Psychology.

I hope this is helpful.”(p350)

49. Mrs Desert replied by email at 12:36, (pp348-350) in a lengthy email explaining the background to her background and arguing that the manner of her appointment was not her responsibility, concluding by saying:

“I do believe at all times I have acted in line with the trust and NHS values, and placing patients and their safety at the centre of this process; however I do not believe the same courtesy has been extended to myself, which is regrettable and for me disappointing and at times, as you are aware, distressing.”

50. Professor Phillips simply acknowledged at 12:54 confirming he would look at the email and seems to close the matter down from then. While the Tribunal appreciates that contentious correspondence often concludes with one person trying to bring the matter to a close, it is disappointing as could have been resolved with a face to a face meeting or phone call. Instead, the claimant is left with a vague promise and perhaps a feeling that Professor Phillips was ‘kicking the can down the lane’. There can be no doubt that both of them were exceptionally busy and were providing essential services to the public, but Mrs Desert had clearly explained how unhappy she felt with this process and a telephone call or meeting could have been an opportunity to resolve

this matter, which clearly had a complicated history. Professor Phillips was having to familiarise himself with past activities by management (some of which may have been problematic), but the way in which he communicated with Mrs Desert, left the Tribunal concluding that it was reasonable for Mrs Desert to be offended

Allegation A(vi) – February 2021

51. Mrs Desert said that Professor Phillips improperly took decisions on her service's behalf without any agreement being given by her and without any discussions having taken place between them. This allegation related to a proposal that her Physical Health Psychology Service should provide the staff health service. Mrs Desert had spent considerable time preparing a plan to support the proposal following an initial meeting with the CEO and this was shared with senior management on 9 February 2021 at 15:52, (p310). Dean Oliver, who is an Executive Director, replied at 17:08 and in addition to some queries about the plan, suggested that she get a view from Professor Phillips *'...in terms of how this fits within the overall Care Group's priorities.'*
52. There then followed some email correspondence between Professor Phillips and Mrs Desert (email p.308 11 February 2021). She apologised that he had not been copied into the original email enclosing the plan and he replied on 11 February 2021 at 11:36 he agreed to arrange a meeting and explained that *'I'll need to provide my view to executive of how this fits in with the Care group's (as opposed to the service line's priorities so it would be great to understand the alignments.)'* (pp308-9).
53. Mrs Desert says that the meeting did not take place and referred to an email which she was copied into and which was sent by Professor Phillips to senior management including Dean Oliver on 3 March 2021 sent at 10:26 suggesting there was a lack of consensus amongst his team concerning the provision of workplace mental health services by the Trust's Physical Psychology Team and he was seeking confirmation that there was *'executive support first of all for the prima facie case for increased psychology input into OH'*, (p326).
54. Professor Phillips said that he did discuss the proposals with Mrs Desert beforehand and expressed his relative inexperience of psychological services but was not sure whether Mrs Desert's team which provided physical psychology services to the public was best placed to be *'...branching out into mental health services'*, which he felt should have its own specialised psychologists and support services.
55. On balance we accept that discussions took place with Mrs Desert and Professor Phillips properly referred this matter to Dean Oliver and others. The email sent on 3 March 2021 at 10:26 reflects further discussions which were trying to unpick issues and questions and was legitimate. He was not undermining Mrs Desert and copying her into the email shows he was not attempting to give a view behind her back.

56. The Tribunal in its consideration of the evidence relating to this allegation was unable to see how Professor Phillips' behaviour was inappropriate and made any suggestion that it was affected by Mrs Desert's sex.

Allegation A(vii) – March 2021 to May 2021

57. This allegation bears some similarity to allegation A(v) above and in this case Mrs Desert asserts that Professor Phillips unilaterally removed her role as Clinical Director for Pain and adopted a bullying tone in the emails that he sent to her. Some of the emails are discussed above in relation to A(v) and were provided in the main hearing bundle on pages 348 to 354 from 8 April 2021 onwards. Professor Phillips having newly arrived at the Trust was struggling to understand how Mrs Desert was a Clinical Director rather than a Head of Service as he believed it was not normal practice to have a Clinical Director for every 'service pathway' and his intention was to ask her to explain and demonstrate how she was appointed to the role as he did not have any documentary evidence to support her appointment to a CD role. She attempted to explain the background in detailed emails, but Professor Phillips remained unconvinced that she had demonstrated that she had been properly appointed and he made separate enquiries with other senior managers and HR which did not reveal anything further. He concluded this investigation with the instruction being given to Mrs Desert that from May 2021 she could not use the Clinical Director title and instead should use 'Head of Service'.

58. As already mentioned in A(v), the Tribunal felt that the communications between the two took the form of an argument rather than a discussion and Mrs Desert felt she was trying to justify her own role. Professor Phillips did make a legitimate enquiry concerning the Clinical Director title but could have been handled better and more sensitively. However, ultimately, we were unable to see any suggestion that his emails took a gendered tone.

Allegation A(viii) – March 2021 to May 2021

59. Mrs Desert believed that during this period Professor Phillips was critical of her when he was asked to deal with work carried out by one her former colleagues following an audit. Mrs Desert said this work was something which she had not been involved with.

60. The former colleague in question was understood to be Neil Hall and he was described by Professor Phillips as a consultant in chronic pain anaesthesia and we were referred to emails sent by Mr Hall to senior management (including Mr Harpin), in March and June 2020 where he criticised Mrs Desert for undermining him and he expressed a concern about patients being moved to 'a non-specialist pain service'. This seemed to arise from a disagreement as to whether pain support should primarily be provided by clinical specialists or non clinical psychologists, (pp334 to 347 email chain). However, this issue developed from an audit which questioned whether NICE guidelines were being followed in relation to Pain clinic activity and procedures in February and March 2020.

61. Professor Phillips was contacted by Mr Hall on 6 April 2021, and he forwarded earlier emails and asked him to: *“Note my comment to Rod [Harpin]: I want this to be investigate through appropriate official channels as the behaviour of in particular Elspeth Desert and Joanna Manley has been paramount to harassment and bullying which is outside of the trust values and is impacting on patient care.” (p334)*
62. Professor Phillips was placed in a difficult position as he was being invited to take sides, but he also had to look into the audit (pp332 to 334), and on 1 April 2021 he emailed both Mrs Desert and Mr Hall. While he recognised audits and data could be challenged, this had to *‘...be done in a respectful and helpful way that fits in with our professional duties as scholars and critical thinkers’*. He did feel the audit identified matters of concern and asked them both to deal with a number of matters which he identified and that he needed a psychologist and an anaesthetist whom we understood had been named in the audit produced by 12 April 2021.
63. Professor Phillips had to address the matter. It was brought to his attention, and it was not undermining of Mrs Desert. It was an attempt to get the two relevant professional working together concerning a problem which needed to be resolved. He recognised that there were issues between the two professionals and while Mrs Desert may have inferred hostility from Professor Phillips towards her, on balance of probabilities the Tribunal felt that he was simply reminding both professionals to work collaboratively and collegially.

Allegation A (ix)

64. Mrs Desert asserts that Professor Phillips sent an email to her on 29 April 2021 at 16:49 which she felt intimidating, (p.377). This related to a problem with referrals being sent to the wrong email in box. Professor Phillips was replying to Mrs Desert’s earlier email where she forwards an email chain relating to this issue. He suggests a solution involving personal email addresses not being used by staff as they were not constantly monitored and instead, creating a new email address – Inpatient and acute pain team (pp377-8). It was noted that the opening line of her email began with *“I am aware that this is strictly none of my business – as it is acute pain.”*

65. Phillips replied by:

“Not at all Elspeth.

The original point though is that the referral went to the PPSS managed in box (which you posit here as being the type of solution anaesthetics should offer) but the delay was introduced when PPSS hadn’t passed it to anaesthetics, I’ve highlighted the concern in red.

Could I check what the actual delay was in terms of timeliness? There shouldn’t really be delays from managed Inboxes.”

66. Professor Phillips could not understand why this email was problematic and on balance we would agree with him. It is respectful and makes clear that

Mrs Desert should not be anxious about addressing something that might not directly fall within her work area.

Allegation A (x)

67. Mrs Desert said that an email sent by Professor Phillips concerning long Covid on 9 August 2021 undermined her.
68. Professor Phillips explained that he had been asked to deal with the question of how the Trust should deal with long Covid and he had consulted clinical leaders including Mrs Desert and at this point he discovered that the Respiratory consultant whom we understand to be Matthew Lane was already working on this matter and he asked for his two female physiotherapists to lead on this work area with him.
69. Professor Phillips emailed Dr Lane and Mrs Desert on 9 August 2021 at 08:15 asking them both which care group this work area should sit, saying *"I don't have any strong feelings regarding where it should sit so I wondered where you see it best reporting through"*, (p422).
70. Mrs Desert replied at 13:37 the same day and saying while she hoped to discuss it with another colleague, she informed the others that *"I have no problem with it sitting in respiratory, but a significant part of the clinical work is in the ICC pathways – I was going to look at the data to help understand patient flow – may be we need to link in both some form?"* (p421)
71. Professor Phillips simply replied two minutes later at 13:39 by saying *"I'm comfortable for it to sit solely in one care group to keep reporting clear and we can stick with the same as the regional model; appreciate your thinking though"*. (p421)
72. This did not represent inappropriate behaviour on the part of Professor Phillips. He was tasked to identify who should deal with long Covid, he identified those specialists who might be relevant and consulted with them both. He politely acknowledged Mrs Desert's suggestion and made his decision, notified both specialists together and explained why he made his decision. His behaviour was appropriate and cannot be seen as an attempt to undermine Mrs Desert based upon the evidence which was before us.

Allegation A (xi)

73. In this allegation, Mrs Desert said that she was undermined by Professor Phillips in relation to a pathway for Tier 3 weight management which was an area of work which she had been involved with for the previous five years. She says she was undermined because a male consultant was instructed to lead on this work area.
74. Professor Phillips was part of his *'triumvirate'* of senior clinical, nursing and management staff. A decision was made that as obesity was a significant area of risk in connection with Covid, it was appropriate to *'align'* a Tier 3 weight management service as part of diabetes management. He believed

this was consistent with NHS England Commissioning guidance. He said that a female doctor, Ishara Ranathunga was appointed as the clinical lead and Leslie Jones who was a non medical consultant in public health, who was male and who would lead in any meetings which took place.

75. While he acknowledged that Mrs Desert provided alternative proposals for Tier 3 weight management, Professor Phillips felt that NHS England guidance should be followed. While she criticised him at the time, it was in relation to a bias towards medics rather than male staff, as it was understood by the Tribunal that psychologists were not medics.

76. During her cross examination when giving evidence at the hearing, Mrs Desert described how she had been told not to speak with commissioners. Professor Phillips' email which was sent to her and others including Dr Jones on 23 March 2021 at 19:34 said the following:

"Apologies I'm aware you are having a commissioning conversation however Leslie Jones our public health consultant is leading on the north cumbria strategy alongside Colin Patterson, Anita and NECS so I suggest this conversation should not be pursued out of that forum, (p329).

Mrs Desert replied confirming about her previous work on obesity and that she would work with Dr Jones. On balance, from the evidence available to the Tribunal, we could not see her being undermined by Professor Phillips in relation to this matter.

77. She disputed that this was a reasonable decision stating that Dr Jones was not a doctor with a knowledge of obesity. She acknowledged that the emails did not make reference to her sex and provided little evidence to support her belief that the decision to appoint Dr Jones was motivated by him being male and did not address Dr Ranathunga's role.

78. The Tribunal found that this allegation involved a reasonable decision based upon third party guidance and made sense given situation at that time regarding Covid and obesity. It was not connected with other irrelevant matters included the sex of Dr Jones.

Allegation A (xii)

79. This allegation suggested that in November 2021 Prof Philips criticised Mrs Desert unfairly in relation to a complaint which had been received by the Trust. (pp439-442).

80. A complaint was sent to a number of staff including Mrs Desert on 16 November 2021 at 11:55 from the Trust's Complaint Team and asking that it be investigated, (p442). Mrs Desert prepared a reply to the complainant whom she noted was not the patient who had received the treatment in question. She suggested further actions that should be taken but felt that none of them applied to her service. Emails were then exchanged on 18 November 2021 at 16:04 (p441). Linda Turner then made a correction on 19 November 2021 at 7.28 and Professor Philips then sent an email at 8.52

explaining that the reply required approval before being sent '*run the response and the proposed actions through the CEO office just now*', be amended so that it did not refer to contacting the MP and removing any references to frustrations around commissioning. (p440).

81. Separately on 18 November 2021 Mrs Desert had an exchange of emails with Professor Philips discussing the matter and suggesting a form of reply. He reminded her in his reply that complaints had to be dealt with through the triumvirate with an investigating officer (described as an 'IO' in his email) preparing a draft response. He asked Linda Turner to contact her and '*support her through the required process*'. (p444).
82. Mrs Desert took exception to Professor Philips' reply in an email sent at 8:52 and said she was trying to be '*polite, transparent and honest approach, the manner I adopt universally. However, I will leave it in the corporate domain for you to choose language that is in line with the prevailing steer*'. This did appear to the Tribunal to be an unnecessary sentence for Mrs Desert to include and suggests her displeasure with the changes being imposed corporately and she appears to blame Prof Philips.
83. These emails of course involved several individuals and were not solely exchanged between Mrs Desert and Professor Philips, and they did involve consideration of what Mrs Desert was doing. At this time, Professor Philips was no longer Mrs Desert's line manager and there was a mediation taking place between them. But the criticism itself was not unfair as it involved management ensuring organisation processes are followed. While there was a noticeable tension between Professor Philips and Mrs Desert in how their emails were presented, the communications were necessary under the circumstances.

Allegation A (xiii)

84. Mrs Desert alleged that Professor Philips made formal complaints about her in relation to a fraud allegation which she believed was an act of retaliation because she had previously raised a complaint about him.
85. Professor Philips raised concerns because he becomes aware that Mrs Desert's husband who is GP had been contracted to provide services to the Trust. (pp369-371). The emails within the hearing bundle revealed that on 26 April 2021, Vanessa Connor Associate Director of Operations asked Karl McLeish to provide a copy of a Service Level Agreement ('SLA') between the Trust and Castlegate surgery. She also asked whether there were similar SLAs with other GP surgeries in the region. This was provided the same day and Mr McLeish confirmed there were two other SLAs with Castlegate and another practice relating to CBT trainees. Ms Connor then provided these emails and attachments to Professor Philips. His reply at 11:58 clearly revealed his alarm and his concern that Ms Desert as a Head of Service, engaged an SLA with a GP practice of which her husband appeared to have a pecuniary interest, (pp369-70):

'I don't know where to start.

It looks there is an entire process gone through that has ended up with a Head of Service engaging in an SLA with a practice in which they appear to have a pecuniary interest.

Not to mention it states the GP is professionally accountable to us and therefore presumably you become the RO.

I think we could with the clarity of an impartial investigation into this most unholy mess.'

The 'RO' was understood by the Tribunal to be the initials used within the NHS for the Responsible Officer role. This was an important role, and the RO would ensure that (amongst other things), individual doctor's would have their performance appraisals properly carried out, that they were done fairly and that any issues arising from the appraisal would be properly dealt with.

86. Professor Philips in turn refers to Harpin at 15:30 that afternoon and confirms it will need careful consideration and that he would deal with it, (p369). He was then called into a meeting on 29 April 2021 with Dr Harpin, Anna Stabler (Chief Nurse) and Justine Steele (Director of People). They asked him to send all the documentation he had available, and the panel decided to make a referral to Audit One, which we assumed would deal with matters relating to counter fraud.
87. Mrs Desert accused Professor Philips of '*cherry picking*' the documents which he submitted to Audit One and this involved considerable cross examination of him during the hearing. He denied that he did this because he simply sent all of the documents which he had received. However, when he was taken during cross examination to the supplemental bundle, he was vaguer in his answers as to what he recalled sending. While the Tribunal acknowledges that he was being asked to consider events which had happened some time ago, it was not clear which documents were sent or not sent. However, the Tribunal were not taken to any documents or heard any evidence from witnesses which suggested documents had been deliberately selected so that only those which were prejudicial to Mrs Desert were sent to Audit. While he denied making a formal complaint himself, it is reasonable for a manager to be expected to understand that if they refer matters upwards within an organisation (such as what happened here), it is likely that this referral will result in a formal process beginning with a formal investigation taking place.
88. The Tribunal recognise that by this time, Professor Philips did not have a high opinion of Mrs Desert and the tone of his email reply when Ms Connor sent the information concerning the SLA is quite highly charged. It might be the case that this simply confirmed previously held biases that he held about Mrs Desert, and he certainly displays a mixture exasperation and anxiety in his dealings with this particular event. Whatever he was feeling at this time, it was entirely correct for him to identify potentially inappropriate relationships between a contractor and the person employed by the commissioner to contract with them and to refer it upwards. However, he did not refer the

matter to Audit himself but instead forwarded the matter to Mr Harpin and he did not play a role in the investigation which followed.

89. However, while there is no doubt that this referral would have caused Mrs Desert a great deal of anxiety and led her to conclude Professor Philips was targeting her, on balance we cannot conclude that this was an act which was seeking to punish her. If Professor Philips had turned a '*blind eye*' to this matter, he would have become complicit in something which was naturally of interest to audit and potentially an inappropriate use of public funds. In making these findings the Tribunal does not suggest any impropriety on Mrs Desert's part as this is not what we are required to consider in these proceedings. But in terms of his motivation for raising the matter of the SLA with Castlegate surgery, Professor Philips was behaving properly, and it was not a deliberate act designed to undermine Mrs Desert.

Allegation A (xiv)

90. No longer pursued by Mrs Desert.

The grievance and the protected acts

91. There was no dispute that Mrs Desert had brought an equal pay claim with the Tribunal under case number 2410657/2019, and which appeared to form part of a multiple of such complaints brought against the second respondent Trust.
92. The issue in relation to this alleged protected act is that the Trust failed to deal promptly with Mrs Desert's grievance which involved allegations she had made against Professor Philips.
93. Mr Harpin gave credible evidence that he was unaware of the equal pay complaint and of course so was Professor Philips as he had not joined the Trust until a date after the equal pay complaint was presented.
94. Georgia Wright was the manager who was designated to investigate the grievance which was raised on 8 February 2022. Ms Wright met with Mrs Desert on 14 March 2022 and then Professor Philips on 19 April 2022. She then held a further meeting with Mrs Desert pm 28 April 2022.
95. By this time, Mrs Desert had instructed a solicitor, had her manager changed and suggested additional witnesses for Ms Wright to speak with as part of the grievance investigation. Her decision was given on 30 August 2022. It did not uphold the grievance, but a right of appeal was offered with the decision. She chose not to exercise this right, but on 13 September 2022, told the Trust's People Services team that she did not accept the decision in the original grievance. The process was completed in slightly over 6 months.
96. Ms Wright disputes that Mrs Desert's allegation that it took 2 years for the grievance to be concluded in paragraph 97 of her statement and the period was significantly shorter than this. She believed that Mrs Desert was referring to a separate grievance and dignity at work process in 2020 and not

connected with the 2022 grievance. She also asserted that there was no deliberate delay on her part in relation to the grievance which she was allocated to manage in February 2022. She also gave credible evidence that she was unaware of the equal pay complaint and there was no evidence which suggested that Ms Wright was informed of the equal pay claim by others working for the Trust, or that anyone encouraged her to delay her investigation.

97. The Tribunal felt on balance that the whole grievance may have taken longer than had initially been hoped, but this often happens when additional witnesses had to be investigated, as happened here. We were unable to conclude that the time taken by Ms Wright was deliberately lengthy or connected with the equal pay complaint.

98. The Trust had what was called a Resolution Policy, but which described its aim as being '*...to bring constructive, satisfactory and lasting solutions to disagreements, conflicts or complaints.*' It also explained that it took into account the ACAS Statutory Code of Practice on Disciplinary and Grievance Procedures, (p80). It replaced an earlier grievance policy, (p82). The version provided in the hearing bundle was 3.1 and the title sheet stated that it had been ratified on 4 May 2021 and published shortly afterwards on 9 June 2021. It applied to all Trust staff and is the version which would have been available when Mrs Desert raised her grievance, (p78). The process would involve an invitation by the designated manager within 10 days of them receiving a request for resolution, with the decision being given '*...usually within 5 working days of the meeting, to advise you of their decision.*' (p85). The explanation of the procedure did caution that some concerns required further investigation, although there was an expectation that the employee raising the complaint would be kept informed of any delays that might arise. The Tribunal noted that Mrs Desert found her grievance taking longer than the short timescales which the Resolution Policy provided. However, only the simplest cases could realistically be dealt with during the 15 day period described. Ms Wright did take longer than was ideal, even though Mrs Desert put her to additional enquiries following the second meeting which took place, but the Tribunal also accepts that sometimes a combination of events can make a swift resolution difficult and ongoing engagement with Mrs Desert gave rise to a lengthier process.

Law

Harassment

99. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee.

100. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

- (a) A engages in unwanted conduct related to a protected characteristic (sex in this case); and

(b) the conduct has the purpose or effect of : -

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

101. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

102. Mr Walker referred to a number of cases relating to harassment and they are as follows:

- a) Reed & Ball Information Systems Limited v Steadman [1999] IRLR 299 – where the EAT considered the application of s26(4) and that a Tribunal does not need to conclude that the alleged harasser knew behaviour was unwanted.
- b) Reverend Canon Pemberton v Rt Reverend Inwood, former Acting Bishop of Southall and Nottingham [2018] IRLR 542 – where a claimant's perception of the allegations of harassment made, whether they believed that it amounted to a breach of section 26 (the first subjective test) and whether it was then reasonable for them to believe this was the case, (the second objective test).

103. Ms Niaz Dickinson referred to the following cases in relation to the complaint of harassment:

- a) Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT – the EAT's consideration of the legal tests to be applied.
- b) Warby v Wunda Group plc [2012] WL 1191054 – the question of attributing harassment to the protected characteristic relied upon.
- c) Nazir and Anor v Asim and Anor [2010] ICR 1225.
- d) Laing v Manchester City Council [2006] ICR 1519.

Victimisation

104. Section 27(1) EQA provides that a person (A) victimises another person (B) if they subject them to a detriment because:

- a) B does a protected act, or
- b) A believes that B has done, or may do, a protected act.

105. Section 27(2) EQA identifies the following as protected acts:

- a) Bringing proceedings under the EQA.
- b) Giving evidence or information in connections with proceedings under the EQA.
- c) Doing any other thing for the purposes of or in connection with the EQA.
- d) Making an allegation (whether or not express) that A or another person has contravened the EQA.

106. Ms Niaz Dickinson referred to the following cases:

- a) *Nagarajan v London Regional Transport* [1999] IRLR 572.
- b) *Peninsula Business Services Ltd v Baker* [2017] IRLR 394.

Liability of employers of principals

107. Section 109 EQA provides that anything done by a person in the course of their employment must be treated as having been done by the employer. It is understood that the Trust as second respondent does not seek to raise a defence under this section, (that they had taken all reasonable steps to prevent Professor Phillips as first respondent from doing anything related to the allegations made by the claimant under the EQA in this claim).

Time limits

108. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

109. Ms Niaz Dickinson referred to the following case in relation to time limits:

- a) *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434.

Burden of Proof

110. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other

explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

Discussion

Harassment (section 26 EQA)

111. The Tribunal was asked to consider a lengthy list of allegations found in section A of the list of issues, from A1(i) to A1(xiii) with the final allegation A1(xiv) being withdrawn before the Tribunal heard final submissions from the parties.
112. In terms of the allegations brought, the Tribunal was aware that the relationship between Mrs Desert and Professor Phillips was not good and worsened as time progressed. She was a longstanding employee of the Trust, whereas he arrived at the Trust only a few years ago and the challenges which he made towards Mrs Desert were at times difficult and displayed an irritation between them as he asserted his line management role. This matter did not appear to resolve, and their relationship did not improve and ultimately, Professor Phillips was removed from having any management responsibility for Mrs Desert. However, issues continued to arise, and Mrs Desert was left with the belief that she was being unfairly targeted by Professor Phillips.
113. The allegations appeared to the Tribunal to fall into categories of those which either did not happen in the way asserted by Mrs Desert and were misinterpreted as to their intention and those which happened as alleged and where there was a question of the extent to which they could be considered to relate to her sex or were simply unreasonable and non-discriminatory.

Allegations which did not amount to unwanted treatment

114. In terms of allegations A1 (iii), (iv), (vi), (viii), (ix), (x) and (xi), Mrs Desert appeared to have been treated in a way which was reasonable. We were unable to conclude that this treatment was targeted and amounted to unwanted conduct which had the purpose or effect of violating her dignity or creating a hostile, degrading, humiliating or offensive environment. Mrs Desert may well have felt that this was the case, but the Tribunal were unable to conclude that it was reasonable for the conduct in question to have that effect. These allegations certainly did not appear on balance to relate to her sex, but instead relating to difficulties experienced by Mrs Desert as a long-standing member of staff, being challenged or simply managed by a new manager from outside of North Cumbria NHS Trust.
115. More specifically, in relation to allegation A1(iii), we were unable to find any evidence that Professor Phillips was seeking to exclude Mrs Desert from conversations with NHS Commissioners as alleged and if anything, we found on balance that he was encouraging her to attend meetings of conversations.
116. Similarly, in relation to allegation A1(iv), this matter involved Professor Phillips as Mrs Desert's line manager intervening to confirm that a colleague

would deal with a matter rather than her. He did tend to use emails from his phone rather than face to face conversations. While this sometimes may have arisen from necessity, these messages could result in curt responses. However, even if felt to be unwanted by Mrs Desert, they could not reasonably be considered intimidating or hostile.

117. Allegation A1(vi) was also something which involved a legitimate enquiry by Professor Phillips into a proposal concerning psychological services in North Cumbria NHS and while Mrs Desert may have felt that she was being undermined, this was a case where she was kept involved in the process during February and March 2021.
118. Allegation A1(viii) involved a situation where Professor Phillips was required to deal with an internal audit and something which involved two individuals including Mrs Desert. We acknowledged that it was a difficult situation for all concerned, but while Mrs Desert may have felt the way in which Professor Phillips communicated with her in April 2021, he was carrying out a necessary role. On balance, we were unable to conclude that Mrs Desert could reasonably conclude given the circumstances of this case and allegation that the conduct in question had the purpose or effect of creating an intimidating etc, environment.
119. Allegation A1(ix) simply involved an email sent by Professor Phillips to Mrs Desert on 29 April 2021 concerning the use of email boxes and reassured her that she should not hesitate to raise matters which were not directly within her work area. We were unable to conclude that this amounted to unwanted conduct which could reasonably be intimidatory etc and was simply the fulfilment of a usual management function.
120. Allegation A1(x) was also another matter involving Professor Phillips fulfilling his management role and making reasonable decisions concerning who should lead on North Cumbria NHS's response to long Covid and his reaction to Mrs Desert's proposals on 9 August 2021 at 13:39 was respectful and positive saying to her '*...appreciate your thinking though*'. As with those allegations discussed above, we are unable to say that this alleged conduct amounted to unwanted conduct which had a purpose of being intimidating or hostile and whatever Mrs Desert believed, it was not reasonable to find that his behaviour could amount to unwanted conduct of that nature.
121. Allegation A1(xi) was the final allegation which we felt fell into this category and involved the pathway for Tier 3 weight management and an allegation of Mrs Desert being undermined by the appointment of a male consultant. The Tribunal struggled to see how this could amount to unwanted conduct where the allegation related to the decision to appoint Dr Jones instead of Mrs Desert. While she may have disagreed with the decision, at its highest, the allegation related to an email sent to her on 23 March 2021 at 19:34 involved Professor Phillips asking Mrs Desert and others to discuss commissioning within the correct forum, and it could not reasonably be unwanted conduct with the purpose or indeed the reasonable effect of being intimidating or hostile to her.

122. Allegation A1(xii) involved a matter which arose after Mrs Desert's line management by Professor Phillips and the Tribunal considered the frankness of the exchange between the parties and historic issues which had arisen between them. However, this allegation arose from a tension between Mrs Desert's informal way of suggesting resolution of matters such as complaints and Professor Phillips' belief that the correct corporate procedures should be followed. If anything, it was Mrs Desert's email sent at 8:52 on 18 November 2021 to Professor Phillips which was her expression of resentment towards being told to follow this approach.
123. It may well be the case that Mrs Desert felt that the correction she received from Professor Phillips concerning the appropriate way in which complaints should be dealt with, was unwanted and violated her dignity or created a humiliating environment towards her. The Tribunal's view, however, was that it was not reasonable for her to hold this view as Professor Phillips was correctly ensuring proper processes were followed and his comments were appropriate.
124. Allegation A1(xiii) was the final allegation of harassment relied upon by Mrs Desert and related to the concerns raised by Professor Phillips upon his discovery that Mrs Desert's GP husband had been part of a GP practice which had tendered for and succeed in being awarded a contract by North Cumbria NHS to provide services.
125. These events arose in April 2021 and by this time, the relationship between Mrs Desert and Professor Phillips was not good. It is understandable that the making of formal complaints by him to Professor Halpin concerning this matter may have been felt by Mrs Desert to be deliberate and targeted. Mrs Desert was of the view that the way in which Professor Phillips raised the complaint, he '*cherry picked*' documents submitted to Audit One to give the impression that the issue was one of significant gravity.
126. Based upon the evidence which the Tribunal heard in this case, on balance we were unable to conclude that there was a deliberate attempt to build a case against Mrs Desert by providing only some of the relevant documents. On the face of it, the allegation involved a genuine discovery of a contract involving the partner of a doctor employed by the North Cumbria NHS. Regardless of any ill feeling between Mrs Desert and Professor Phillips, it was a matter which was potentially serious and something which required escalation, even if it did not result in any sanction being imposed.
127. We recognised the anxiety that this referral caused Mrs Desert, but also noted that the matter was properly referred upwards so that Professor Phillips was not directly involved in the investigation of the issue. Quite properly, it was internal audit who were responsible for this task.
128. Under these circumstances, we were content that while Mrs Desert believed this allegation to be unwanted and violating her dignity, we felt that it was not reasonable for her to hold this view. Ultimately, it involved a matter of

good governance and was something which Professor Phillips would have been criticised for, had he decided it was safer not to do anything for fear of further criticism from Mrs Desert.

129. For the avoidance of doubt, we were unable to see that in relation to the allegations discussed in this section, they in anyway related to her sex or gender. It was the case that Dr Jones a male doctor instead of Mrs Desert was appointed to the Tier 3 weight management role (allegation A1(xi)), but the context of the decision was clearly based upon the necessary specifications required for the role and of course the necessary qualifications for there being unwanted conduct were not made in relation to this particular allegation.

Those allegations where there may have been hostility on the part of Professor Phillips

130. As has already been discussed, the Tribunal felt that there was a difficult relationship between Professor Phillips and Mrs Desert and that this did give rise to tetchy emails between them but given his more senior role in line managing her for part of the relevant period in this case, there was a greater expectation that he would seek to ameliorate the effects of any misunderstanding or difficulties between them.

131. Allegation A1(i) was something which arose from email exchanges between Mrs Desert and Professor Phillips, and which related to a seconded employee and the need to follow NHS procedures. This was reasonable and Professor Phillips expressed concerns about ensuring that the seconded member of staff in Mrs Desert's team was allowed to return to her role. However, the email conversation ended up with Professor Phillips making comments which was overly pedantic and patronising by stating that Mrs Desert was not '*paying anyone*' and reminded her of her role of '*fund holder of the public purse*'.

132. The Tribunal felt that Professor Phillips' behaviour in this instance was unwanted and had the purpose or intent of being degrading or humiliating towards Mrs Desert and this was not only in her mind but could objectively be considered so. However, despite these conclusions we were unable to establish that these comments related to her sex and were non-discriminatory on grounds of that protected characteristic.

133. Allegation A1(ii) involved a problematic term being used by Professor Phillips when he was making pointed remarks about Mrs Desert's psychology service having '*blossomed*' and the Tribunal did agree with her that there was unwanted behaviour because of the way in which these remarks were made.

134. It may have been clumsy, and it may have been connected with the way in which Professor Phillips would send his emails, but we agreed that it reasonable to conclude that the email sent at 13:56 objectively had the effect of being degrading towards Mrs Desert. However, like the previous

allegation, we did not believe that this could be attributed to her sex, and it was not related to that protected characteristic.

135. Allegation A1(v) was clearly something which involved a number of emails between Professor Phillips and Mrs Desert regarding her description as being a Clinical Director role for Pain Management. The Tribunal noted that the way in which the CD job title developed was not always clear and not as a result of a formal HR process.
136. However, as was explained within the findings of fact, the Tribunal felt that the way in which the contentious issue was closed down by Professor Phillips and without any attempt to resolve the matter more gently such as by telephone or on a face to face basis with perhaps HR support, left Mrs Desert feeling degraded. This was understandable, especially as the emails undermined her perception of status as a Clinical Director, even it was not correctly awarded. While it may not have been Professor Phillips' intention to violate Mrs Desert's dignity, it was unwanted conduct and had such an effect. However, we did not believe there was evidence to suggest that the conduct related to her sex, but from concerns about the use of the Clinical Director title and we did not hear evidence which suggested that it could arguably be connected with that protected characteristic.
137. Allegation A1(vii) involved further issues relating to the Clinical Director position and as we have already mentioned in the findings of fact, bore some similarity to the allegation A1(v). Consequently, we reached the same conclusion that the enquiry made by Professor Phillips, while a legitimate one, was abrupt and antagonistic and was a situation where he as the more senior doctor, should have attempted to resolve the dispute between the two professionals in a less confrontational way. However, while we accept that there was unwanted treatment with the effect of violating Mrs Desert's dignity, it was not connected with her sex, and it was a matter which could have been more sensibly resolved in a way which sensitively explained why the Clinical Director title could not be used by her

Jurisdiction

138. Based upon the date when Mrs Desert notified ACAS of her potential claim on 13 April 2022, any act of discrimination which took place before 14 January 2022 could be considered as being out of time under section 123 EQA.
139. Given the findings of the Tribunal in relation to the complaint of harassment under section 26 EQA, the consideration of jurisdiction is not directly relevant to its success or failure. However, the Tribunal noted that of the 13 allegations which remained to be pursued at the conclusion of the final hearing, they stretched from August 2020 until 27 January 2022 with the final date relating to the grievance connected with fraud allegation under allegation A1(xiii). The earlier 12 allegations relied upon were described as taking place before 14 January 2022.

140. As Ms Wright explained in her witness statement, the formal grievance which was dated 8 February 2022 appeared to be triggered by the potential disciplinary action concerning the contract which her husband had been awarded, but the investigation covered a wider matter of historic *bullying, harassment and gaslighting* by Professor Phillips. There had of course been earlier grievances brought by Mrs Desert in November 2020 and June 2021 and which Ms Wright explained were dealt with under the mediation process and therefore did not give rise to formal internal grievance decisions.
141. The decision given by Ms Wright relating to the later grievance was given on 30 August 2022 and it was therefore concluded following the date when the claim was brought.
142. The Tribunal felt that in this case, the entirety of the allegations related to problems with Mrs Desert's relationship between August 2020 until the beginning of January 2022 and referred to a number of management interactions with Professor Phillips which did not appear to resolve over time.
143. On balance, the Tribunal felt that these allegations formed part of a series of continuing acts as they related to an ongoing relationship and friction which appeared to exist between the claimant and first respondent. These continuing acts ended with the presentation of the grievance dated 8 February 2022 dealt with by Ms Wright and accordingly this was in time.
144. However, if the Tribunal had not this finding, we would still have determined that it was just and equitable to extend time to accept all of the allegations of harassment given the interrelationship between the claimant and first respondent during this period and the attritional effect it had on Mrs Desert, even if the allegations brought did not ultimately amount to harassment under section 26 EQA.

Victimisation

145. This complaint brought under section 27 EQA requires little consideration by the Tribunal. There was no dispute that the alleged protected act of the claimant bringing proceedings complaining of inequality of pay on grounds of sex under case number 410657/2019, was subject to section 27(2)(a), being proceedings under EQA. Sex equality is covered within chapter 3 of EQA under the equality of terms section.
146. The detriments relied upon under section 27(1) EQA, relate to a failure to deal promptly with the claimant's grievance and a failure to deal properly with the disciplinary allegations raised by Professor Phillips. However, the difficulty for the claimant in relation to this complaint is that she must be able to persuade the Tribunal that the alleged detriments arose because the person responsible was aware that the claimant had made a protected act or believed that they had made a protected act.
147. Having considered the evidence before the Tribunal and in particular the evidence of Ms Wright, Professor Phillips and Professor Halpin, we were satisfied that none of those responsible for the alleged detriments were aware

of Mrs Desert's equal pay claim. As a consequence, this complaint cannot succeed as the alleged detriments cannot have been connected with knowledge or suspicion of the protected act.

148. In terms of the alleged detriments themselves, the Tribunal felt that grievance was dealt with properly by Ms Wright and was not deliberately delayed. It involved a great deal of information and discussions regarding the extent of the grievance. The period which elapsed before the decision was reached was just over 6 months and in taking into account the issues involved, it was not an unreasonable period. The disciplinary investigation arose from the referral by Professor Phillips of concerns regarding Mrs Desert and her husband's practice and their contract with the second respondent Trust. This involved a proper referral to Audit One and they were responsible for any subsequent disciplinary action against her.

149. Under these circumstances, the complaint of victimisation cannot succeed, as those responsible for the alleged detriments were not aware of the protected act and in any event, they could not be considered detriments as they involved processes which were properly carried out.

Responsibility of the second respondent

150. As Mrs Desert's complaints were unsuccessful against Professor Phillips, it is not necessary to consider any liability upon his employer the second respondent North Cumbria NHS under section 109 EQA.

Conclusion

151. Mrs Desert's complaints were unsuccessful and while it is acknowledged that she did not have a good relationship with Professor Phillips, this was something which did not give rise to unwanted conduct which may violated her dignity etc, by reason of her sex. While there were some allegations which involved inappropriate forms of communication in emails from Professor Phillips, the Tribunal was not provided with evidence which persuaded us that in there was something present which left us to conclude that the behaviour in question was connected with Mrs Desert's sex.

152. This was primarily a clash in management styles and while by and large Professor Phillips was seeking to ensure the second respondent's policies, procedures and practices were followed, he at times could be curt in his email communications. This may well have arisen from a tendency to send too short and often direct messages, which suggested an underlying frustration with Mrs Desert's way of working. However, at no stage were we persuaded that it transformed into something more which became a matter of a male medical professional subjecting a more junior professional to conduct which was connected with Mrs Desert being a woman.

153. Professor Phillips as we have mentioned on a number of occasions should have reflected upon how best to communicate with another clinical professional with whom he felt did not always follow processes correctly and

whom he may have felt to be frustrating. While clinical professionals are undoubtedly busy, it is essential that communications are made in a way which try to reduce antagonism between parties. Mrs Desert gave the impression in her emails of being frustrated by the challenges from Professor Phillips following his appointment, but Professor Phillips as her line manager, could have arranged for phone calls or ideally face to face meetings to ameliorate the antagonism that may have existed.

154. Finally, the Tribunal did note at times reference was made to the term '*gaslighting*' which is understood to mean the use of psychological methods by one person to persuade another to question their own sanity or powers of reasoning. Its origins are from the Patrick Hamilton play which he wrote in 1938, but which has gained greater currency in recent decades. It appears to be often used to describe poor behaviour from a partner, relative, friend or colleague and which goes beyond the appropriate definition for the term. Consequently, the Tribunal finds that of late the application of this term by parties in proceedings to describe behaviour from another which they dislike has become overused. It was surprising and unfortunate to see its use in a case involving two clinical professionals and where there was no evidence before the Tribunal to suggest this type of behaviour was in existence. While cases involving discrimination will often give rise to heightened emotions between parties and the Tribunal recognises this, the use of psychological terms such as gaslighting can seem hyperbolic and does not assist a party when bringing their case without the behaviour being clearly in evidence.

155. Accordingly, to conclude, the judgment of this Tribunal is:

- a) The complaint of harassment is not well founded and is unsuccessful.
- b) The complaint of victimisation is not well founded and is unsuccessful.

Employment Judge Johnson

Date 18 September 2023

JUDGMENT SENT TO THE PARTIES ON
21 September 2023

FOR THE TRIBUNAL OFFICE