EMPLOYMENT TRIBUNALS

Claimant: Ms H Young

Respondent: Medway NHS Foundation Trust

Heard at: London South (by video)

On: 31 July and 1 to 4 August 2023 (hearing) and 5 October 2023 (deliberations)

Before: Employment Judge Evans
Ms Y Batchelor
Ms B Leverton

Representation
Claimant: Mr Murdin (Counsel)
Respondent: Ms Patterson (Counsel)

JUDGMENT

1) The claimant was not constructively dismissed. The claimant's complaint of unfair and/or discriminatory constructive dismissal therefore fails and is dismissed.

2) The claimant was not treated less favourably because of age. The claimant's complaint of age discrimination therefore fails and is dismissed.

3) The claimant was not subjected to harassment related to age. The claimant's complaint of harassment therefore fails and is dismissed.

4) The claimant's complaint under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 fails and is dismissed.

REASONS

Preamble

1. The claimant presented a claim including complaints of unfair dismissal, age discrimination, disability discrimination, and less favourable treatment on the grounds of part-time worker status on 14 December 2021. There was then a case management hearing on 10 January 2023 at which various orders were made and the claim of disability discrimination withdrawn.

2. The full hearing of the claim took place between 31 July and 4 August 2023. This is the Tribunal's unanimous reserved decision with reasons following its deliberations on 5 October 2023. The Tribunal regrets the delay in completing its deliberations. It was scheduled to meet on 17 August 2023 but was unable to do so as a result of the sudden illness of a member of the Tribunal.

3. Before the final hearing the parties had agreed a bundle running to 251 pages. By consent, further pages numbered 253 to 272 were added on the first day of the hearing and, again by consent, a one-page email dated 4 July 2023 was added as page 273 during the course of the hearing. All references to page numbers in these reasons are to the page numbers of the bundle unless otherwise stated or prefixed "WSB". If prefixed WSB the reference is to the page number in the witness statement bundle.

4. The witness statements prepared by the parties had been included in a separate bundle running to 152 pages. The claimant's witnesses had exhibited some documents to their statements that were not included in the main bundle. Witness statements for Ms S Parrett and Ms A Allen were added to the witness statement bundle during the course of the hearing (see [7] below).

5. The parties had also agreed a chronology and a cast list. The cast list was amended during the course of the hearing by agreement to include the dates of birth and working hours of those listed in it.

6. The following witnesses gave evidence in the following order by reference to witness statements prepared and exchanged before the hearing:

    6.1. Ms D Barns, who for most of the relevant period was employed as a part-time band 5 team leader in the respondent's endoscopy department;

    6.2. Ms K Shaw, who for the whole of the relevant period was employed as a part-time band 4 scheduler in the respondent's endoscopy department;

    6.3. Ms T Coffey, who from October 2020 until August 2021 was employed as a full-time band 4 scheduler in the respondent's endoscopy department;

    6.4. The claimant, who was employed as a part-time band 4 scheduler in the respondent's endoscopy department from 2013 until the termination of her employment;

    6.5. Ms K Arneil, who was employed full-time during the relevant period first as an access and data quality manager (at band 6) and then from September 2020 as a service manager (at band 7) in the respondent's endoscopy department;

    6.6. Ms S Weeks, who was employed full-time from January 2020 as a band 4 scheduler and then, from September 2020, first of all on an interim basis and then on a permanent basis, as an operational coordinator (at band 5) in the respondent's endoscopy department.

Preliminary and interlocutory matters dealt with at the final hearing

7. **The witness statements of the claimant's daughters (Ms Parrett and Ms Allen):** the claimant applied to have admitted witness statements from her two daughters, who would not be called to give oral evidence. The respondent opposed the application. It was allowed for reasons given orally at the hearing.

8. **The list of issues:** the claimant applied to amend the allegation which appears at [2.1.4] of the list of issues (and is repeated at [3.1.14] and [4.1.14]) so that it would read as it is now set out below in the list of issues. The respondent opposed the application. The application was successful for reasons given orally at the hearing.

9. **The disclosure application:** the respondent made an application for the disclosure of certain WhatsApp messages at the conclusion of the claimant's evidence at the end of the third day of the hearing. The claimant opposed the application. The application was refused for reasons given orally at the hearing.

The discussion of the list of issues

10. The issues that the Tribunal would need to decide in order to determine the claims had been agreed between the parties prior to the hearing and a list of them included at page 58.

11. As a result of legal issues raised in relation to that list of issues by the Tribunal at the beginning of the hearing, the list of issues was amended by consent (save as set out at [8] above) with the result that the list of issues for the Tribunal to decide was ultimately as set out below.

12. The italicised text shows the respondent's position in respect of each of the factual allegations. Allegations which are struck through were not pursued.

13. So far as the complaint that the claimant was treated less favourably because of her part-time worker status is concerned, in the discussion of the issues the respondent accepted that the claimant was a part-time worker as defined by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("the PTW Regulations") and that Stephanie Weeks, Emily Hancox, Jadie Willis, Lillie Meade, and Terri Coffey were comparable full-time workers.

14. It was agreed that only issues relating to liability would be dealt with during the hearing. Issues relating to remedy (including Polkey and contribution) would if necessary be dealt with subsequently at a separate remedy hearing.

The agreed list of issues

1 Constructive Dismissal

1.1 The Claimant relies on the implied term of mutual trust and confidence.

1.2 Did the Respondent commit a fundamental breach of those terms?

1.3 The Claimant alleges that she was discriminated against because of her age and part-time worker status.

1.4 Was the Claimant entitled to resign, in all the circumstances, in response to either such a breach and/or that discrimination?

1.5 If so, did the Claimant resign in response to either that fundamental breach and/or that discrimination?

1.6 Did the Claimant waive the right to resign?

1.7 If the Claimant was constructively dismissed, was the dismissal in any case fair?

2 Direct Age Discrimination

2.1 Has the Respondent treated the Claimant less favourably than it treated or would treat others?

The Claimant alleges that the following acts or omissions of the Respondent constitute discrimination on the grounds of age:

2.1.1 In or about January 2020, Ms Arneil stopped acknowledging or answering the Claimant's emails.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it was related to age, no justification defence is put forward.

2.1.2 The Claimant's workload and role was changed and given to full-time members of the team, such that the Claimant no longer had a specific role and was effectively demoted to being a general assistant to the full-time workers.

It is denied that this allegation occurred as alleged.
It is further denied that this related to age.
In the event the Tribunal find it was related to age, no justification defence is put forward.

2.1.3 The Claimant was given "walk around duty" which was more suited to the junior assistant in the admin team and disrupted the Claimant's ability to get on with her work.

It is accepted that the Claimant was required to do walk around duty. The Respondent denies this was related to age, as all employees were required to do it irrespective their age. In the event the Tribunal find it was related to age, no justification defence is put forward.

2.1.4 On 2 May 2020, the Claimant sent Kirsty Arneil an email to ask for a meeting about updates to changes in the department by Ms Arneil responded that she was too busy.

It is denied that this allegation occurred as alleged. It is further denied that this related to age or part time worker status. In the

event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.5 On 31 May 2020, the part of the Claimant's role relating to the Will Adams Treatment Centre was given to Ms Weeks and Lilly Mead. There was no consultation about this and the Claimant was not informed directly.

Please see 2.1.2 above.

2.1.6 On 13 September 2020, Ms Arneil asked the Claimant "what are you doing here" in a hostile manner when she popped into the office on a day off.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.7 On 20 September 2020, Ms Arneil told Donna Innes that she couldn't wait for the Claimant to retire so that they could get a full-timer in to position.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.8 On 30 September 2020, an important meeting regarding updates to procedures and systems was deliberately arranged for when the Claimant would be unable to attend.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

~~2.1.9 On 1 October 2020, the Claimant text Debbie Barnes that she felt she had been pushed out.~~

2.1.10 From October 2020, Ms Weeks was hostile, aggressive and rude to the older members of the team, including the Claimant.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.11 From October 2020, the Claimant ceased to be asked for advice in relation to work matters by Ms Mead, Ms Hancox and Ms Weeks.

The Respondent is unclear who stopped asking for advice and has requested confirmation of this from the Claimant.

2.1.12 From 18 December 2020, Ms Weeks no longer acknowledged the Claimant on her entering the office.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.13 On 28 January 2021, the Claimant sent an email to Ms Arneil to ask about applying for a lump sum from her pension. Ms Arneil told her she would have to resign and be re-employed, but that there would not be any hours available for her if she did.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, this was justified as it was Ms Arneil complying with the NHS Pension rules.

2.1.14 At some point prior to 22 March 2021, Ms Arneil breached patient confidentiality regarding patient FM. The Claimant was ignored, patronised, and treated in a disparaging manner in relation to that breach.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.15 On 21 April 2021, the Claimant sent Ms Arneil an email asking about her retirement and pension, which was ignored by Ms Arneil.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.16 The Claimant was excluded from updates regarding important procedural changes, including for example not being updated on new processes for removing patients from waiting lists.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.17 In late spring / early summer 2021, the Claimant noticed that Ms Arneil had removed her from her Facebook friends.

It is accepted that Ms Arneil removed the Claimant from her Facebook friends. However, it is denied that this related to age. In any event, the Respondent asserts this was outside of the course of the Claimant and Ms Arneil's employment.

2.1.18 On 13 May 2021, the Claimant was ignored and snubbed by Ms Arneil at Donna Innes' retirement party.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.19 On 18 May 2021, the Claimant was belittled and berated by Ms Weeks regarding her mobile phone usage and issued her with a "notice of improvement", despite Ms Weeks being aware that the calls related to urgent matters and were taken away from the Claimant's desk. Younger members of the team were allowed to make non-urgent personal calls at their desks during office hours without sanction.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.20 In November 2020, Stephanie Weeks notified the Claimant that her working hours would change from 8am-4pm to 9am-5pm on one day a week.

It is accepted that this occurred. However, it is denied that this related to age. This change was implemented for all staff irrespective of age. In the event the Tribunal find it was related to age, no justification defence is put forward.

2.1.21 On a daily basis, Ms Weeks would say hello to the younger members of the team and ask how they were. In contrast, Ms Weeks would ignore the Claimant.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.22 Ms Weeks arranged for Lillie Mead to share an office with her instead of the Claimant.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.23 Lillie Mead and Emily Hancox were allowed to leave the office at 4pm on days when they started at 8am, whereas the Claimant was not allowed to do so. When the Claimant asked Ms Weeks who would be covering until 5pm, Ms Weeks did not answer and glared at her.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it

did occur as alleged and was related to age, no justification defence is put forward.

~~2.1.24 Jadie Willis and Terri Coffey both raised grievances about Ms Weeks' conduct to Ms Arneil but she took no action to address them~~

2.1.25 On 21 July 2020, Ms Weeks rudely and abruptly demanded that the Claimant tell her what she had discussed with David Moore (Head of Estates) and implied that the Claimant had no business talking to others during working time.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.26 From 25 March 2021, the department's monthly team meetings were transferred from a Tuesday to a Thursday, which was a day the Claimant did not work. The Claimant believes this was done deliberately to exclude her from the meetings.

It is denied that this allegation occurred as alleged. Although the meetings were changed, it was not a deliberate attempt to exclude the Claimant from the meetings. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.27 Ms Weeks timed the Claimant's and Kylie Shaw's lunch breaks and would berate Kylie Shaw if she were a minute or two late, whereas the younger members of staff were allowed to take longer breaks frequently and nothing was said.

It is denied that this allegation occurred as alleged. It is further denied that this related to age. In the event the Tribunal find it did occur as alleged and was related to age, no justification defence is put forward.

2.1.28 From April to May 2021, requiring older members of staff including the Claimant to show proof of medical appointments when they needed time off.

It is accepted that staff were required to produce medical certificates. However, it is denied that this related to age. This was required of all staff irrespective of age.
In the event the Tribunal find it was related to age, no justification defence is put forward.

2.2 If there has been less favourable treatment, was the reason for such treatment the protected characteristic of age?

~~2.3~~ In respect of the allegations of discrimination on the grounds of the Claimant's age, the comparators relied on by the Claimant are: ~~Donna Innes, Jadie Willis, Kylie Shaw and Glynis Corey.~~ Stephanie Weeks, Luke Woodcraft, Emily

Hancox, and Lillie Mead. The Claimant will say that those over the age of 50 were treated in a detrimental manner when compared to those above comparators, who were under the age of 30.

2.4 If the relevant acts and/or omissions would otherwise be discriminatory, can the Respondent show that they were a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aims:

2.4.1 Ensuring it provides an efficient and effective service and a high quality of patient care, including improving and streamlining its working practices and processes where appropriate without unnecessary delay.

2.4.2 Providing a suitable working environment for staff to enable them to provide an efficient and effective service and a high quality of patient care.

2.4.3 Compliance with the rules of the NHS Pension Scheme.

2.4.4 Encouraging employees to achieve and maintain high standards of conduct and behaviour in accordance with the requirements of the Respondent and relevant professional codes of conduct.

2.4.5 Ensuring employees are capable of demonstrating adequate evidence of absence when they are otherwise contracted to work, in accordance with its policies and procedures.

2.5 Has the Claimant brought the claim in respect of the above allegations of discrimination within time taking into account any extension of time for taking part in ACAS Early Conciliation?

The Respondent will contend that the claim is time barred, the allegations of discrimination having occurred more than three months before the Claimant's claim was submitted, taking into account the extension of time for ACAS Early Conciliation, and therefore the Tribunal does not have jurisdiction to hear those parts of the claim.

2.6 If not, would it be just and equitable to extend the time limit for the Claimant to do so?

3 Harassment (Age)

3.1 Did the Respondent act as follows:

3.1.1 In or about January 2020, Ms Arneil stopped acknowledging or answering the Claimant's emails.

3.1.2 The Claimant's workload and role was changed and given to full-time members of the team, such that the Claimant no longer had a specific role and was effectively demoted to being a general assistant to the full-time workers.

3.1.3 The Claimant was given "walk around duty" which was more suited to the junior assistant in the admin team and disrupted the Claimant's ability to get on with her work.

3.1.4 On 2 May 2020, the Claimant sent Kirsty Arneil an email to ask for a meeting about updates to changes in the department by Ms Arneil responded that she was too busy.

3.1.5 On 31 May 2020, the part of the Claimant's role relating to the Will Adams Treatment Centre was given to Ms Weeks and Lilly Mead. There was no consultation about this and the Claimant was not informed directly.

3.1.6 On 13 September 2020, Ms Arneil asked the Claimant "what are you doing here" in a hostile manner when she popped into the office on a day off.

3.1.7 On 20 September 2020, Ms Arneil told Donna Innes that she couldn't wait for the Claimant to retire so that they could get a full-timer in to position.

3.1.8 On 30 September 2020, an important meeting regarding updates to procedures and systems was deliberately arranged for when the Claimant would be unable to attend.

~~3.1.9 On 1 October 2020, the Claimant text Debbie Barnes that she felt she had been pushed out.~~

3.1.10 From October 2020, Ms Weeks was hostile, aggressive and rude to the older members of the team, including the Claimant.

3.1.11 From October 2020, the Claimant ceased to be asked for advice in relation to work matters by Ms Mead, Ms Hancox and Ms Weeks.

3.1.12 From 18 December 2020, Ms Weeks no longer acknowledged the Claimant on her entering the office.

3.1.13 On 28 January 2021, the Claimant sent an email to Ms Arneil to ask about applying for a lump sum from her pension. Ms Arneil told her she would have to resign and be re-employed, but that there would not be any hours available for her if she did.

3.1.14 At some point prior to 22 March 2021, Ms Arneil breached patient confidentiality regarding patient FM. The Claimant was ignored, patronised, and treated in a disparaging manner in relation to that breach.

3.1.15 On 21 April 2021, the Claimant sent Ms Arneil an email asking about her retirement and pension, which was ignored by Ms Arneil.

3.1.16 The Claimant was excluded from updates regarding important procedural changes, including for example not being updated on new processes for removing patients from waiting lists.

3.1.17 In late spring / early summer 2021, the Claimant noticed that Ms Arneil had removed her from her Facebook friends.

3.1.18 On 13 May 2021, the Claimant was ignored and snubbed by Ms Arneil at Donna Innes' retirement party.

3.1.19 On 18 May 2021, the Claimant was belittled and berated by Ms Weeks regarding her mobile phone usage and issued her with a "notice of improvement", despite Ms Weeks being aware that the calls related to urgent matters and were taken away from the Claimant's desk. Younger members of the team were allowed to make non-urgent personal calls at their desks during office hours without sanction.

3.1.20 In November 2020, Stephanie Weeks notified the Claimant that her working hours would change from 8am-4pm to 9am-5pm on one day a week.

3.1.21 On a daily basis, Ms Weeks would say hello to the younger members of the team and ask how they were. In contrast, Ms Weeks would ignore the Claimant.

3.1.22 Ms Weeks arranged for Lillie Mead to share an office with her instead of the Claimant.

3.1.23 Lillie Mead and Emily Hancox were allowed to leave the office at 4pm on days when they started at 8am, whereas the Claimant was not allowed to do so. When the Claimant asked Ms Weeks who would be covering until 5pm, Ms Weeks did not answer and glared at her.

~~3.1.24 Jadie Willis and Terri Coffey both raised grievances about Ms Weeks' conduct to Ms Arneil but she took no action to address them~~

3.1.25 On 21 July 2020, Ms Weeks rudely and abruptly demanded that the Claimant tell her what she had discussed with David Moore (Head of Estates) and implied that the Claimant had no business talking to others during working time.

3.1.26 From 25 March 2021, the department's monthly team meetings were transferred from a Tuesday to a Thursday, which was a day the Claimant did not work. The Claimant believes this was done deliberately to exclude her from the meetings.

3.1.27 Ms Weeks timed the Claimant's and Kylie Shaw's lunch breaks and would berate Kylie Shaw if she were a minute or two late, whereas the younger members of staff were allowed to take longer breaks frequently and nothing was said.

3.1.28 From April to May 2021, requiring older members of staff including the Claimant to show proof of medical appointments when they needed time off.

3.2 If the Respondent did any or all of those things, did such action or inaction amount to unwanted conduct related to the Claimant's age?

3.3 If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to all the circumstances and whether it is reasonable for it to have that effect?

The Respondent denies that the Claimant was harassed as alleged or at all.

3.4 Has the Claimant brought the claim in respect of the above allegations of harassment within time taking into account any extension of time for taking part in ACAS Early Conciliation?

The Respondent will contend that the claim is time barred, the allegations of harassment having occurred more than three months before the Claimant's claim was submitted, taking into account the extension of time for ACAS Early Conciliation, and therefore the Tribunal does not have jurisdiction to hear those parts of the claim.

3.5 If not, would it be just and equitable to extend the time limit?

4 Less Favourable Treatment of a Part-Time Worker

4.1 The Claimant relies on the following particular terms of her contract / acts or deliberate failures to act of the Respondent as detriments:

4.1.1 In or about January 2020, Ms Arneil stopped acknowledging or answering the Claimant's emails.

It is denied that this allegation occurred as alleged.
It is further denied that this related to part time status.
In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.2 The Claimant's workload and role was changed and given to full-time members of the team, such that the Claimant no longer had a specific role and was effectively demoted to being a general assistant to the full-time workers.

It is denied this occurred as alleged. In so far as it is accepted the Claimant was moved from scheduling appointments for WATC to Weekend Lists and Infusions, this was related to her part-time status. However, the Respondent asserts that was justified in line with the needs of the service.

4.1.3 The Claimant was given "walk around duty" which was more suited to the junior assistant in the admin team and disrupted the Claimant's ability to get on with her work.

It is accepted that the Claimant was required to do walk around duty. The Respondent denies this was related to part time status, as all employees were required to do it irrespective of whether they worked full or part time. In the event the Tribunal find it was related to part-time status, no justification defence is put forward.

4.1.4 On 2 May 2020, the Claimant sent Kirsty Arneil an email to ask for a meeting about updates to changes in the department by Ms Arneil responded that she was too busy.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.5 On 31 May 2020, the part of the Claimant's role relating to the Will Adams Treatment Centre was given to Ms Weeks and Lilly Mead. There was no consultation about this and the Claimant was not informed directly.

Please see 4.1.2 above.

4.1.6 On 13 September 2020, Ms Arneil asked the Claimant "what are you doing here" in a hostile manner when she popped into the office on a day off.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.7 On 20 September 2020, Ms Arneil told Donna Innes that she couldn't wait for the Claimant to retire so that they could get a full-timer in to position.

It is denied that this allegation occurred as alleged. In the event the Tribunal find it did occur as alleged, no justification defence is put forward.

4.1.8 On 30 September 2020, an important meeting regarding updates to procedures and systems was deliberately arranged for when the Claimant would be unable to attend.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

~~4.1.9 On 1 October 2020, the Claimant text Debbie Barnes that she felt she had been pushed out.~~

4.1.10 From October 2020, Ms Weeks was hostile, aggressive and rude to the older members of the team, including the Claimant.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.11 From October 2020, the Claimant ceased to be asked for advice in relation to work matters by Ms Mead, Ms Hancox and Ms Weeks.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.12 From 18 December 2020, Ms Weeks no longer acknowledged the Claimant on her entering the office.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.13 On 28 January 2021, the Claimant sent an email to Ms Arneil to ask about applying for a lump sum from her pension. Ms Arneil told her she would have to resign and be re-employed, but that there would not be any hours available for her if she did.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.14 At some point prior to 22 March 2021, Ms Arneil breached patient confidentiality regarding patient FM. The Claimant was ignored, patronised, and treated in a disparaging manner in relation to that breach.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part time status, no justification defence is put forward.

4.1.15 On 21 April 2021, the Claimant sent Ms Arneil an email asking about her retirement and pension, which was ignored by Ms Arneil.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.16 The Claimant was excluded from updates regarding important procedural changes, including for example not being updated on new processes for removing patients from waiting lists.

It is denied that this allegation occurred as alleged. There was no deliberate exclusion of the Claimant. However, in so far as her in ability to attend meetings was because of her part time status, the Respondent asserts that scheduling the meetings as

it did, when it had multiple part-time employees with different days off, was justified in the interests of the service.

4.1.17 In late spring / early summer 2021, the Claimant noticed that Ms Arneil had removed her from her Facebook friends.

It is accepted that Ms Arneil removed the Claimant from her Facebook friends. However, it is denied that this related to her part time worker status. In any event, the Respondent asserts this was outside of the course of the Claimant and Ms Arneil's employment.

4.1.18 On 13 May 2021, the Claimant was ignored and snubbed by Ms Arneil at Donna Innes' retirement party.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.19 On 18 May 2021, the Claimant was belittled and berated by Ms Weeks regarding her mobile phone usage and issued her with a "notice of improvement", despite Ms Weeks being aware that the calls related to urgent matters and were taken away from the Claimant's desk. Younger members of the team were allowed to make non-urgent personal calls at their desks during office hours without sanction.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.20 In November 2020, Stephanie Weeks notified the Claimant that her working hours would change from 8am-4pm to 9am-5pm on one day a week.

It is accepted that this occurred. However, it is denied that this related to part time worker status. This change was implemented for all staff irrespective of whether they were full time or part time. In the event the Tribunal find it was related to part time status, no justification defence is put forward.

4.1.21 On a daily basis, Ms Weeks would say hello to the younger members of the team and ask how they were. In contrast, Ms Weeks would ignore the Claimant.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.22 Ms Weeks arranged for Lillie Mead to share an office with her instead of the Claimant.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.23 Lillie Mead and Emily Hancox were allowed to leave the office at 4pm on days when they started at 8am, whereas the Claimant was not allowed to do so. When the Claimant asked Ms Weeks who would be covering until 5pm, Ms Weeks did not answer and glared at her.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

~~4.1.24 Jadie Willis and Terri Coffey both raised grievances about Ms Weeks' conduct to Ms Arneil but she took no action to address them~~

4.1.25 On 21 July 2020, Ms Weeks rudely and abruptly demanded that the Claimant tell her what she had discussed with David Moore (Head of Estates) and implied that the Claimant had no business talking to others during working time.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status. In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.26 From 25 March 2021, the department's monthly team meetings were transferred from a Tuesday to a Thursday, which was a day the Claimant did not work. The Claimant believes this was done deliberately to exclude her from the meetings.

It is denied that this allegation occurred as alleged. There was no deliberate exclusion of the Claimant. However, in so far as her inability to attend meetings was because of her part time status, the Respondent asserts that scheduling the meetings as it did, when it had multiple part-time employees with different days off, was justified in the interests of the service.

4.1.27 Ms Weeks timed the Claimant's and Kylie Shaw's lunch breaks and would berate Kylie Shaw if she were a minute or two late, whereas the younger members of staff were allowed to take longer breaks frequently and nothing was said.

It is denied that this allegation occurred as alleged. It is further denied that this related to part time status.
In the event the Tribunal find it did occur as alleged and was related to part-time status, no justification defence is put forward.

4.1.28 From April to May 2021, requiring older members of staff including the Claimant to show proof of medical appointments when they needed time off.

It is accepted that staff were required to produce medical certificates. However, it is denied that this related to part time status. This was required of all staff irrespective of whether they were part time or full time. In the event the Tribunal find it was related to part time status, no justification defence is put forward.

4.2 Was the Claimant treated by the Respondent less favourably than the Respondent treats a comparable full-time worker?

4.3 Was the treatment on the grounds that the Claimant was a part time worker?

4.4 In respect of the above allegations of detriments, the comparators relied on by the Claimant are: ~~Donna Innes, Jadie Willis, Kylie Shaw and Glynis Corey~~. Stephanie Weeks, ~~Debbie Barns~~, Emily Hancox, Jadie Willis, Lillie Mead, and Terri Coffey.

4.5 Was the treatment justified on objective grounds?

The Respondent will argue that it had the following legitimate aims:

4.5.1 Ensuring it provides an efficient and effective service and a high quality of patient care, including improving and streamlining its working practices and processes where appropriate without unnecessary delay.

4.5.2 Providing a suitable working environment for staff to enable them to provide an efficient and effective service and a high quality of patient care.

4.5.3 Compliance with the rules of the NHS Pension Scheme.

4.5.4 Encouraging employees to achieve and maintain high standards of conduct and behaviour in accordance with the requirements of the Respondent and relevant professional codes of conduct.

4.5.5 Ensuring employees are capable of demonstrating adequate evidence of absence when they are otherwise contracted to work, in accordance with its policies and procedures.

4.6 Has the Claimant brought her claim in respect of the above allegations of detriments within time?

The Respondent will contend that the claim is time barred, the allegations of detriments having occurred more than three months before the Claimant's claim was submitted, taking into account the extension of time for ACAS Early Conciliation, and therefore the Tribunal does not have jurisdiction to hear those parts of the claim.

4.7 If not, was it reasonably practicable to do so?

4.8 If not, has the claim been brought within such further period as the Tribunal considers reasonable?

5 Remedy

Constructive Dismissal

5.1 Is the Claimant entitled to a basic award and if so, how much?

5.2 Is the Claimant entitled to a compensatory award and, if so, what level of award it would be just and equitable for the Claimant to receive, in particular:

5.2.1 Did the Claimant mitigate her losses following dismissal?

5.2.2 Did the Claimant receive any monies from the Respondent?

5.2.3 Would the Claimant have been dismissed in any event?

5.2.4 Did the Claimant contribute to the dismissal?

5.3 Should any uplift or reduction be applied to the compensatory award due to either party's failure to comply with the ACAS Code of Practice?

Discrimination

5.4 Has the Claimant suffered financial loss?

5.5 Is the Claimant entitled to an award for injury to feelings and, if so, at what level?

The law

Constructive dismissal

15. In order for there to be a constructive dismissal there must be a fundamental breach of contract by the employer. That is to say a significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more essential terms of the contract.

16. If the employee relies on a breach of the implied term of trust and confidence, this is a term that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test is an objective one. Any breach of the implied term of trust and confidence is a fundamental breach.

17. A single act or omission by the employer may of course comprise a fundamental breach of contract. However a course of conduct can also cumulatively amount to a breach of the implied term of trust and confidence entitling an employee to resign and claim constructive dismissal after a "last straw" incident, even though the last straw alone does not amount to a breach of contract and may not in itself be

blameworthy or unreasonable. However the last straw must contribute something to the breach, even if relatively insignificant.

18. So far as the link between the fundamental breach of contract and the employee's resignation is concerned, it is not necessary for the employee to show that the breach of contract was the only cause of the resignation. It must however be one of the factors.

19. Overall, therefore, when considering whether an employee has been constructively dismissed the Tribunal must consider: (1) whether there has been a breach of contract by the respondent (2) whether any such breach was fundamental (3) whether the employee resigned in response to the breach; and (4) whether the employee affirmed the contract notwithstanding the breach.

Unfair dismissal

20. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed. In order to bring a claim of unfair dismissal, the employee must first show that they have been dismissed. The circumstances in which an employee is dismissed are set out in section 95 of the 1996 Act. The burden of proof to show a dismissal has taken place is on the employee. Section 95(1)(c) provides that an employee is dismissed when they terminate the contract with or without notice in circumstances such that they are entitled to terminate it without notice by reason of the employer's conduct (i.e. when there is a constructive dismissal).

21. Section 98(1) of the 1996 Act provides that, when a Tribunal has to determine whether a dismissal is fair or unfair, it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it is a potentially fair reason is on the employer. A reason for dismissal is a set of facts known to or beliefs held by the employer which cause it to dismiss the employee.

22. If the employer persuades the Tribunal that the reason for dismissal was a potentially fair reason, the Tribunal must go on to consider whether the dismissal is fair or unfair within the meaning of section 98(4) of the 1996 Act. This requires the Tribunal to consider whether the decision to dismiss was within the band of reasonable responses. Section 98(4) applies not only to the actual decision to dismiss but also to the procedure by which the decision is reached. The burden of proof is neutral under section 98(4).

23. In considering this question the Tribunal must not put itself in the position of the employer and consider what it would have done in the circumstances. That is to say it must not substitute its own judgment for that of the employer. Rather it must decide whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

Age discrimination and harassment

24. Section 39(2) of the Equality Act 2010 ("the 2010 Act") provides that an employer must not discriminate against an employee by dismissing them or by subjecting them to any other detriment. Dismissal for these purposes includes a constructive dismissal. In the case of a constructive dismissal the question will be whether acts of discrimination sufficiently influenced the constructive dismissal to mean that the constructive dismissal itself amounted to an act of discrimination. The fact that the last straw was not itself discriminatory does not automatically means that the dismissal is not discriminatory (De Lacey v Wechseln (t/a The Andrew Hill Salon) UKEAT/0038/20).

25. One of the forms of discrimination prohibited by the 2010 Act is direct discrimination. This occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1) of the 2010 Act).

26. The question, therefore, is whether A treated B less favourably than A treated or would treat a hypothetical comparator and whether the less favourable treatment is because of a protected characteristic – in this case age. On such a comparison, there must be no material difference between the circumstances relating to each case (section 23 of the 2010 Act).

27. However, section 13(2) of the 2010 Act provides that:

> *If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

An employer may therefore argue that even direct age discrimination is justified.

28. Harassment is defined in section 26(1) of the 2010 Act:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

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

29. Section 26(4) of the 2010 Act deals with matters to be taken into account when deciding whether unwanted conduct had the relevant effect. The Tribunal must take into account the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect.

30. In deciding whether conduct is "unwanted", this is a question of fact which requires the Tribunal to decide whether the conduct was unwanted by the employee (Thomas Sanderson Blinds Ltd v Mr S English UKEAT/0316).

31. Turning to the necessary causal connection, "related to" is a broad test requiring an evaluation of the evidence in the round. It is broader than the "because of" formulation in a direct discrimination claim. In deciding whether conduct "related to" a protected characteristic, the Tribunal must apply an objective test and have regard to the context in which the conduct took place (Warby v Winda Group Plc EAT 0434/11). It is not, however, to be reduced to a "but for" test. It is not enough to show the individual has the protected characteristic or that the background related to the protected characteristic.

32. HHJ Auerbach gave useful guidance in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495:

> *[21] Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative. …*
>
> *[24] However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.*
>
> *[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.*

33. Langstaff J said this at [21] of Weeks v Newham College of Further Education UKEAT/0630/11/ZT in relation to "environment":

> *An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant.*

34. Turning to the burden of proof, section 136 of the 2010 Act provides for a shifting burden of proof:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

35. The correct approach to the shifting burden of proof remains that set out in the guidance contained in Barton v Investec Securities ltd [2003] IRLR 332 approved by the Court of Appeal in Igen Ltd v Wong [2005] IR 931 and further approved recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263.

36. There is a two-stage process to the drawing of inferences of discrimination. In the first place, the claimant must prove facts from which the Tribunal could conclude in the absence of any other explanation that the respondent had committed an act of discrimination against the complainant.

37. In Efobi the Supreme Court confirmed the point that a Tribunal cannot conclude that "there are facts from which the court could decide" unless on the balance of probability from the evidence it is more likely than not that those facts are true. All the evidence as to the facts before the Tribunal should be considered, not just that of the claimant.

38. In Madarassy v Nomura International plc [2007] ICR 867 the Court of Appeal stated that "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it. The Court of Appeal also pointed out that the burden of proof does not shift simply on proof of a difference in treatment and the difference in status. This was because it was not sufficient to prove facts from which a Tribunal could conclude that a respondent could have committed an act of discrimination.

39. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that they have relevant circumstances which are the

same or not materially different as those of the claimant having regard to section 23 of the Equality Act 2010.

40. If the burden does shift, then the employer is required to show a non-discriminatory reason for the treatment in question.

41. Section 212 of the 2010 Act provides that a detriment does not include conduct which amounts to harassment. Consequently, although direct discrimination and harassment claims may be pursued in the alternative, conduct will either amount to discrimination or harassment but not both.

Time limits under the 2010 Act

42. Section 123 of the 2010 Act provides where relevant as follows:

> *(1) Subject to sections 140B, proceedings on a complaint within section 120 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 employment tribunal thinks just and equitable…*
>
> *…*
>
> *(3) For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(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.*

43. Turning to the "just and equitable" extension, it is for the claimant to show that it would be just and equitable to extend time. However, the discretion given to the Tribunal to extend time is a wide discretion to do what it thinks is just and equitable in the circumstances. The Tribunal should assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. These will usually include:

43.1. the length of and reasons for the delay;

43.2. whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigation the claims while matters were fresh;

43.3. the prejudice to the claimant in refusing to extend time.

44. Other factors which may be relevant include:

44.1. the extent to which the cogency of the evidence is likely to be affected by the delay;

44.2. the extent to which the party sued had co-operated with any requests for information;

44.3. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;

44.4. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action;

44.5. the merits of the claim.

45. Although the discretion is wide there is no presumption that it should be exercised so as to extend time. Indeed, the exercise of discretion is the exception rather than the rule (Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576). Further, the burden, which is one of persuasion, is on the claimant to persuade the Tribunal it is just and equitable to extend time.

Less favourable treatment on the grounds of part-time worker status

46. The PTW Regulations give a part-time worker the right not to be treated less favourably than the employer treats a comparable full-time worker as regards the term of their contract or by being subjected to any other detriment when the treatment is on the ground that the worker is a part-time worker and the treatment is not justified on objective grounds (regulation 5).

47. The terms “part-time worker” and “comparable full-time worker” are defined in regulation 2.

48. The limitation provisions are contained in regulation 8. Regulation 8(2) provides that:

> *(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months (or, in a case to which regulation 13 applies, six months) beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.*

49. Regulation 8(3) provide that:

(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

Submissions

50. The parties' representative produced written submissions and a copy of these is on the Tribunal's file. The claimant's submissions ran to 19 pages and those of the respondent to 55 pages. Each of the representatives also made brief oral submissions supplementing their written submissions.

Findings of fact

51. In making these findings of fact the Tribunal has taken into account all of the evidence before it although of necessity it does not refer to each element of it in these reasons.

Background findings

The claimant's employment with the respondent and her relationship with Ms Arneil

52. The claimant began employment with the respondent in 1997. She began working as a band 4 endoscopy scheduler in September 2013. In broad terms, the role involved dealing with patients in the run up to procedures which they were to undergo. From when she began work in the endoscopy department until around May 2020, the claimant's scheduling work had been in relation to endoscopy lists run by a private medical facility, the William Adam's Treatment Centre ("the WATC"), on behalf of the respondent. This work was largely self-contained and the claimant found it satisfying. It fitted with her part-time hours: she worked just two days a week (Mondays and Tuesdays). She always worked part-time during her employment with the respondent.

53. The claimant's allegations in this claim are directed primarily at Ms Arneil and Ms Weeks. The claimant had known and worked with Ms Arneil since 2014. Ms Arneil had sat close to the claimant (and other schedulers) in the office until she became service manager in September 2020, at which point she moved to a different office. It was common ground that Ms Arneil had been a supportive manager to the claimant in the period prior to 2020 and that they had got on well. Emails illustrating this were included in the bundle: for example, the congratulations email of 1 August 2019 (page 103) and the email of 27 November 2019 beginning "Well done Hils" (page 105). There was no serious suggestion by the claimant that prior to 2020 Ms Arneil's treatment of her had been affected either by her age or by her part-time status.

54. From Ms Arneil's perspective, her relationship with the claimant deteriorated primarily from around August 2020. Ms Arneil was upset by the way she understood the claimant had spoken about a medical appointment which Ms Arneil had managed to obtain for her daughter at the height of the covid pandemic, above all because this was something that concerned her daughter. She raised this with the claimant and was not satisfied with the response**.** She therefore "defriended" the claimant on Facebook shortly afterwards and accepts that from that point her relationship with the claimant was "less friendly and more professional".

55. From the claimant's perspective, the deterioration in their relationship had begun a little earlier in 2020 when she had questioned Ms Arneil on how it was that Ms Weeks had been appointed to the band 4 scheduler role as an external candidate when the post was only meant to be advertised internally. The claimant believed that Ms Weeks had been appointed because of nepotism: her father was the general manager of the department. The claimant had made her belief known to Ms Arneil.

56. We find that the matters identified by Ms Arneil and the claimant both contributed to the deterioration of their relationship. However, we find that the deterioration of the relationship between the claimant and Ms Arneil was also clearly caused to a significant degree by Ms Arneil stepping up in September 2020 from her band 5 role to the band 6 service manager role and, more importantly, by the appointment on an interim basis of Ms Weeks to the band 5 role of operational support coordinator. These appointments took place over a very short period of time because of the departure on short notice from the endoscopy unit of another employee. They were announced by an email to the department on 29 September 2020 (page 118). The claimant believed that the promotion of Ms Weeks was a further act of nepotism. The claimant did not approve of Ms Weeks' promotion and believed that Ms Arneil had been complicit in it and to some extent rewarded for that by her own promotion.

57. Ms Barns, a band 5 team leader in the department was aware of the claimant's dissatisfaction and mentioned to Ms Arneil that the claimant had some concerns with the changes to the management structure. This resulted in Ms Arneil sending an email on 30 September 2020 offering to hold a meeting with the claimant to discuss them (page 126). The claimant was cross that Ms Barns had spoken to Ms Arneil, sending her a WhatsApp on 1 October 2020 saying "Thanks Deb, when you said don't trust anyone in the office I didn't realise it included you" (WSB page 75) and, indeed, she and Ms Barns did not speak for several days after that. However, the claimant did not wish to discuss her concerns about Ms Weeks with Ms Arneil, preferring to raise matters of work allocation when they met. The relationship between the claimant and Ms Arneil did not recover subsequently and there was a lack of frank communication between them for which both were responsible.

The appointment of Ms Weeks and the claimant's relationship with her

58. Ms Weeks was appointed to the role of band 4 scheduler in January 2020. The claimant was off work sick at the time but, as found above, took the view that Ms Weeks had been appointed because of her father's position. We find that this significantly affected the attitude of the claimant to Ms Weeks from the outset and was a factor in the intense dislike that the claimant developed for Ms Weeks, which is illustrated by text messages she and Ms Barns exchanged about her (for example, the messages of 7 May 2020 at page 253 and page 255). However we also find that Ms Weeks own behaviour contributed to the claimant's dislike of her: she was loud, perhaps over-confident, and swore a lot.

59. We find that although the text messages Ms Barns and the claimant exchanged in May 2020 make it clear that the claimant did not like Ms Weeks, their relationship

was not at that stage obviously difficult on the surface. On 7 May 2020 in a message to Ms Barns the claimant noted "I don't want to be stuck in an office with her but I'm hoping she may calm down if it's just 2 of us". The claimant clearly liked giving Ms Weeks advice about how the job should be done.

60. The relationship between Ms Weeks and the claimant deteriorated following Ms Weeks' appointment to the band 5 role on an interim basis in September 2020. The claimant did not want this role but, as she accepted ultimately in her oral evidence, she was resentful that Ms Weeks had been appointed. She believed that the role should have been given to another employee. Ms Arneil's explanation for the role being offered to Ms Weeks was in effect that of those with more experience than Ms Weeks only one might have wanted it but she was on a phased return to work having been "very poorly" and that it was not the right time to offer her on an interim basis at the height of the pandemic a job that would be pressurised and cause her stress. Ms Arneil said that when the expression of interest had gone out subsequently for the role on a substantive basis she had encouraged the employee to apply for it.

61. We find Ms Arneil's explanation for the interim appointment to the band 5 role entirely plausible. However, we also find it unsurprising that the claimant was suspicious that it was contaminated by nepotism given the inexperience of Ms Weeks and the short period of time that she had been performing the band 4 role.

62. We find that the claimant's resentment of Ms Weeks' appointment to the band 5 role had a negative effect on their relationship from September 2020 until the termination of the claimant's employment. Equally, we find that Ms Weeks' inexperience as a manager combined with her behaviour as characterised at [58] above had a negative effect on their relationship during the same period.

The two groups in the respondent's endoscopy department

63. We find that from some point in 2020 and increasingly from September 2020 there were two loose groups in the endoscopy department (although all of its employees did not necessarily fall into one or the other – for example, Mr Woodcraft who was a full-time employee in his 20s, remained largely uninvolved).

64. In the first group there was Ms Weeks, Ms Meade (spelt incorrectly throughout the list of issues as "Mead") and Ms Hancox, who had all started work in 2020, worked full-time and as of September 2020 were in their 20s. In the other group there was the claimant, Ms Barns, Ms Shaw, Ms Innes, Ms Coffey, Ms Willis and Ms Hart. They worked part-time (except for Ms Coffey) and were of various ages as of September 2020: the claimant was in her early 60s, Ms Barns was in her late 50s, Ms Shaw in her late 30s, Ms Innes was in her mid-60s, Ms Coffey was in her 20s, Ms Willis was in her early-50s and Ms Hart was in her mid-30s. With the exception of Ms Coffey, who began work for the respondent in October 2020, they all had significant service and substantial experience of scheduling work.

65. We find that the first group formed in early 2020 essentially because its members were all of a similar age and, more importantly, had all been employed around the same time to do the same job (band 4 scheduler). We find that its members

became friends and continued to be so throughout the period in question. We find that as young people with full-time jobs it is likely that their social lives would have been significantly linked to their working lives.

66. We find that the second group was a looser group, whose members were generally longer standing employees, generally worked part-time and whose non-work and social lives will have been less linked to the workplace. We find that they were from September 2020 until July 2021 increasingly linked by their dislike of Ms Weeks as their manager, with five of them making informal complaints about her to Ms Arneil in the late autumn/early winter of 2020. Those five were the claimant, Ms Shaw, Ms Willis, Ms Coffey and Ms Hart. We find that they resented her appointment as their manager in light of her relative inexperience and believed it to have been influenced by nepotism.

General credibility findings in relation to the witnesses

67. Before turning to the specific allegations, we make the following findings in relation to the general credibility of the witnesses. We have done this because a number of the allegations really come down to one witness' word against that of another.

Credibility of the claimant

68. We find that there were a number of matters that did significant damage to the credibility of the claimant:

    68.1. The WhatsApp messages make plain that during the period in question the claimant developed a strong dislike of both Ms Arneil and Ms Weeks. She wrote about them both in a very disrespectful and on occasions vulgar manner (for example the WhatsApp message at page 271 in relation to Ms Arneil or the text message of 11.07 at page 256 in relation to Ms Weeks). However, the claimant sought to downplay her dislike of both of them in answer to questions asked in cross-examination to an extent that we found implausible, because of the extent to which it did not reflect how she was at the time referring to them in WhatsApp messages.

    68.2. The claimant was generally very reluctant to make concessions during her oral evidence. For example, in cross-examination she clearly put forward her case that Ms Weeks had only been appointed because of her family connections, and in her witness statement she states as paragraph 22 that "[Ms Weeks] divided the office from the outset", and yet she maintained stoutly during her cross examination on 1 August that she did not resent her, improbable as this seemed. She did then concede on 2 August that she had felt resentment but her unwillingness to accept what was obvious on 1 August remained.

    68.3. The claimant adopted highly partisan positions in relation to events and maintained them when they were quite clearly not sustainable taking the evidence in the round. For example, she suggested that the emails between Ms Arneil and Ms Weeks on 19 April 2021 at page 163 had been to "create a paper trail" at paragraph 153 of her witness statement and maintained this position during cross-examination when the timing and content of the emails

in relation to the subsequent informal disciplinary action make such a characterisation far-fetched.

68.4. The claimant demonstrated an inability to see events from the perspective of others. For example, she was unduly reluctant to accept that there could be an innocent explanation for Ms Arneil failing to attend an appraisal with her at the height of the first wave of the pandemic. Equally, she found it very difficult to view the reorganization of the work at the WATC – again at the height of the pandemic – other than from the perspective of her personal preferences.

68.5. The claimant demonstrated a tendency to jump to conclusions about the actions of Ms Weeks or Ms Arneil with minimal evidence. For example, the claimant assumed that it was Ms Weeks who had arranged for Lillie Meade to share an office with her rather than the claimant (allegation 22) whereas in fact it became clear during the course of the hearing that it was in fact the claimant's friend, Ms Barns, who had made the decision.

Credibility of Ms Arneil

69. We found Ms Arneil to be a more credible witness than the claimant for the following reasons:

69.1. Ms Arneil was generally more willing to make sensible concessions than the claimant. For example, she accepted that the policy adopted at one point within the endoscopy department of changes outlined in meetings being briefed to employees who were not present by those who were present was not satisfactory. Equally, she accepted when questioned about her email of 25 August 2020 to Ms Barns that with the benefit of hindsight it would have been appropriate to ask after the claimant's wellbeing.

69.2. Ms Arneil demonstrated an ability to see events from the perspective of others in a way that the claimant generally did not. For example, in cross-examination she said that she could appreciate that the urgent interim appointment of Ms Weeks to the band 5 role looked like the promotion of the general manager's daughter with no process.

69.3. Ms Arneil demonstrated an ability to reflect on her own feelings and actions in a way that the claimant generally did not. For example, she said she thought that she had over-reacted by summoning the claimant to a 1:1 on 22 March 2021 (page 152) (with the result that the 1:1 did not go ahead).

Credibility of Ms Weeks

70. We also found Ms Weeks to be a more credible witness than the claimant for the following reasons:

70.1. Ms Weeks was generally more willing to make sensible concessions than the claimant. For example, she accepted that her policy of getting colleagues to update absent colleagues and procedural changes was "not good enough". Equally, she accepted that it would have been better to discuss

the change to working hours with the claimant before she had been informed of the change.

70.2. Ms Weeks demonstrated an ability to reflect on her own actions, recognising that she had been an inexperienced manager, that she had struggled with the transition into a managerial role, and that she had made mistakes.

70.3. Ms Weeks demonstrated an ability to see events from the perspective of others. For example, she accepted that in light of the various complaints made against her she should have done more to improve relationships.

The other witnesses

71. Whilst we found Ms Shaw and Ms Coffey to be straightforward witnesses when cross-examined, we also find that their on occasion excessive enthusiasm to provide support for the claimant reduces the weight to be given to their evidence generally to some extent.

72. Such enthusiasm was reflected in the way Ms Shaw in her witness statement commented on matters in a way which gave the impression that they were within her first-hand knowledge to a greater extent than they actually were. For example, paragraphs 17 and 18 of Ms Shaw's witness statement give the impression that Ms Shaw had some recollection of the kind of calls the claimant did or did not receive on the morning of 18 May 2021, but in cross-examination she readily accepted that her recollections were of a more general nature.

73. Equally, it was reflected in the way that whilst Ms Coffey at paragraph 6 of her witness statement noted that it was harder to recall "so precisely what was said and done to others", she then set out really very specific recollections of the claimant's mobile phone use at paragraph 33, which were all supportive of the claimant.

74. The enthusiasm of Ms Shaw and Ms Coffey to provide support for the claimant is also reflected in the inclusion in both their statements of materials clearly intended to cast Ms Weeks in a bad light which were not strictly speaking relevant to the specific allegations made.

75. So far as the evidence of Ms Barns is concerned, again we found her to be a straightforward witness when cross-examined. However, whilst her witness statement presents her to a considerable extent as a manager standing above the fray, albeit with strong views, the reality of the WhatsApp messages she exchanged with the claimant about both Ms Arneil and Ms Weeks provides a significantly different picture of how she viewed things. An example of this is the WhatsApp messages she exchanged with the claimant between page 253 to 256 concerning Ms Weeks as early as May 2020 which make plain that early in Ms Weeks' employment Ms Barns had formed an unprofessionally negative view of her. This mismatch has caused us to reduce the weight to be given to her evidence.

<u>Findings in relation to each of the allegations</u>

76. Having made these general background findings, and findings relevant to the weight to be given to the various witnesses' evidence, we turn now to the specific allegations made by the claimant.

Allegation 1: In or about January 2020, Ms Arneil stopped acknowledging or answering the Claimant's emails.

77. The claimant was unable to identify any specific email to which she had not received a reply and the respondent had been unable to identify any such email during a search of its systems. Further, there are examples of Ms Arneil acknowledging and answering emails after January 2020 – for example pages 112, 125, 126, 148 and 151.

78. We find on the balance of probabilities that Ms Arneil did not stop acknowledging or answering the claimant's email in or about January 2020.

Allegation 2:The Claimant's workload and role was changed and given to full-time members of the team, such that the Claimant no longer had a specific role and was effectively demoted to being a general assistant to the full-time workers.

79. Our findings in relation to this allegation largely cover allegation 5 also. The claimant clarified during the course of this hearing that this allegation related to her being moved in around May 2020 from doing scheduling work in relation to the WATC.

80. We find that following the onset of the covid pandemic the respondent closed its outpatient service. We find that as a result of this a much larger amount of work was sent to the WATC, with the consequence that there was a much larger amount of work for schedulers to do in relation to the WATC. We find that Ms Barns and Ms Arneil had conversations about how this increase in the work being referred to the WATC should be managed and we find that Ms Barns implemented a new structure, because this was her evidence.

81. We find that at this point the respondent took the view that the WATC work required two full-time band 4 schedulers. We find that accordingly the WATC work was allocated to Ms Weeks and Ms Meade, both full-time employees, and so removed from the claimant.

82. We find that Ms Barns discussed this change with the claimant. This was her evidence and that of Ms Arneil. To the extent that this finding involves preferring the evidence of Ms Barns and Ms Arneil to that of the claimant we do so because of our findings in relation to credibility and because Ms Barns was a witness called by the claimant who in broad terms supported her claim.

83. We find that this did not result in either the claimant no longer having a "specific role" or "being demoted to being a general assistant to the full-time workers". We find that the claimant was given a specific role as set out in the email at page 121 of October 2020 (weekend lists) and also in relation to medical infusions. Further, whilst she also supported other team members backfilling lists, we do not accept that this work was radically different or represented a "demotion". Taking the

evidence in the round, the claimant's work was throughout that of a scheduler. The claimant preferred the self-contained nature of the scheduling work at the WATC, which she had done for a number of years, but the work she did after that was still scheduling work, albeit less self-contained. Although she had done the work at the WATC for a number of years, doing the WATC work was not in any meaningful sense a "role". Her role was to be a scheduler and so had not changed.

Allegation 3: The Claimant was given "walk around duty" which was more suited to the junior assistant in the admin team and disrupted the Claimant's ability to get on with her work.

84. The respondent accepts that the claimant was required to do a walk around duty. In light of the claimant's own evidence, we find that this duty took about 15 minutes on a Tuesday. We find that a task of such short duration would not have disrupted the claimant's ability to get on with her work to any significant extent.

85. The claimant's evidence was that she was the only part-time member of staff who did a walk around duty. She named Ms Meade and Mr Woodcraft as having walk around duties. She accepted in cross-examination that she was treated in the same way as full-time employees.

86. Taking the evidence in the round, we find that the "walk around duty" was a long-standing duty that all schedulers had almost certainly at one point or another been asked to do. It was not, however, an onerous or time-consuming task. It was not a task that had historically been assigned to "the junior assistant"; nor was it more suited to the junior assistant.

Allegation 4: On 2 May 2020, the Claimant sent Kirsty Arneil an email to ask for a meeting about updates to changes in the department by Ms Arneil responded that she was too busy.

87. Neither the respondent nor the claimant had been able to produce a copy of this email. The claimant was unable to explain in any detail beyond that contained in the allegation what she alleged the email was about. Ms Arneil did not believe that she had received any such email or that she had responded as alleged.

88. We find that the claimant did not send Ms Arneil an email on 2 May 2020 to which Ms Arneil responded by saying that she was too busy. We so find, first, because we found Ms Arneil to be a more credible witness than the claimant and, secondly, because when Ms Arneil became aware of concerns of the claimant in October 2020 (by which time their relations were worse than in May 2020) she did not ignore the concerns which had been communicated to her by Ms Barns but rather asked the claimant if she would like to meet with her.

Allegation 5: On 31 May 2020, the part of the Claimant's role relating to the Will Adams Treatment Centre was given to Ms Weeks and Lilly Meade. There was no consultation about this and the Claimant was not informed directly.

89. We refer to our findings above in relation to allegation 2. As noted above, we find that Ms Barns did inform the claimant directly about the change. However we also find that there was no "consultation": i.e. a proposal to make the change was not

put to the claimant and her views formally sought and considered before the change was implemented. We further find that there was no obligation under the terms of the claimant's contract or otherwise to consult with her about the change.

Allegation 6: On 13 September 2020, Ms Arneil asked the Claimant "what are you doing here" in a hostile manner when she popped into the office on a day off.

90. During the course of her evidence the claimant accepted that the date could not have been 13 September 2020 (because that was a Sunday) and said that in fact the incident had taken place on 11 September 2020. She referred to a WhatsApp message as being the source of this correction but neither she nor her representative identified the relevant message in the hearing bundle or witness statement bundle.

91. Ms Arneil denied that the incident had happened. She did not recall the claimant popping in as alleged on a day off and speaking to her but, if she had, Ms Arneil said she would have spoken to her in an inquisitive rather than hostile manner.

92. The Tribunal prefers the evidence of Ms Arneil to that of the claimant because of its findings in relation to credibility as set out above and so finds that Ms Arneil did not speak to the claimant in a hostile manner as alleged.

Allegation 7: On 20 September 2020, Ms Arneil told Donna Innes that she couldn't wait for the Claimant to retire so that they could get a full-timer in to position.

93. The written and oral evidence of Ms Arneil in this respect was to the effect that the conversation with Ms Innes was about what she would do with spare hours if employees retired. She denied saying that she "couldn't wait" for the claimant to retire. Ms Innes did not give evidence. The claimant's knowledge of the conversation was entirely second hand.

94. We accept Ms Arneil's account that she did not make the comment attributed to her for the following reasons. First, we found her to be a credible witness. Secondly, we did not find the email at page 219 to be a smoking gun as Mr Murdin suggested: rather it was simply an explanation after the claimant had resigned of how Ms Arneil would use the claimant's hours following her departure. Thirdly, Ms Arneil made efforts to get the claimant to change her mind about leaving. She would have been unlikely to do this if she "could not wait" for her to retire.

Allegation 8: On 30 September 2020, an important meeting regarding updates to procedures and systems was deliberately arranged for when the Claimant would be unable to attend.

95. There was no meeting on 30 September 2020. There was a one-off meeting on 7 October 2020. The meeting was not arranged by Ms Arneil or Ms Weeks. It was arranged by a more senior manager, Ms Steele, and involved the whole of the endoscopy department – that is to say the nursing staff as well as the administrative staff such as schedulers. We find that a number of members of staff in the endoscopy department worked part-time and that it would not have been possible to arrange a meeting on a day when they could all attend.

96. The claimant did not suggest in her evidence that Ms Steele had arranged the meeting so as to prevent her from attending and we find that she did not. The meeting was not as such "deliberately arranged" for when the claimant was unable to attend.

Allegation 10: From October 2020, Ms Weeks was hostile, aggressive and rude to the older members of the team, including the Claimant.

97. Ms Weeks began performing the band 5 role on an interim basis from late September 2020. In light of our findings at [66] above, we find that what we have described there as the second group approached being managed by Ms Weeks in a negative manner: they disliked and resented her. In light of our finding at [58] and [62] above, we find that Ms Weeks managed a difficult situation badly. This resulted in complaints from five team members as noted at [66] above.

98. We find that on occasions Ms Weeks' lack of experience of both scheduling work and management, when combined with her tendency to be loud, over-confident, and to swear a lot, will have resulted in her seeming to be "hostile, aggressive and rude" to members of the second group at times following her appointment on an interim basis to the band 5 role. However, whilst we find that objectively speaking she was on occasion rude, we do not find that she was either hostile or aggressive.

Allegation 11: From October 2020, the Claimant ceased to be asked for advice in relation to work matters by Ms Meade, Ms Hancox and Ms Weeks.

99. In cross-examination the claimant's evidence was that this allegation related to Ms Hancox and Ms Weeks but not to Ms Meade.

100. So far as Ms Hancox was concerned, the claimant provided no detailed evidence of any significance. She does not mention Ms Hancox in this regard in her witness statement and her oral evidence was vague and unsatisfactory. For example, she provided no details of the kind of advice Ms Hancox sought prior to October 2020 or of any incident when Ms Hancox might have chosen to seek advice from her but in fact sought it elsewhere. The Tribunal finds that Ms Hancox did not stop asking the claimant for advice as alleged.

101. So far as Ms Weeks is concerned, the Tribunal finds that she stopped seeking advice from the claimant once she began to perform the band 5 role on an interim basis in October 2020. The Tribunal finds that at this point Ms Weeks' role changed: she was performing a management role (in relation to which it would not have been natural for her to seek advice from the claimant) and her day-to-day work had changed. Her duties were not similar to those of the claimant in the way that they had been prior to her appointment on an interim basis to the band 5 role. The fact that the nature of Ms Weeks' work had changed was accepted by the claimant in cross-examination.

Allegation 12: From 18 December 2020, Ms Weeks no longer acknowledged the Claimant on her entering the office.

102. There is a straight conflict between the evidence of Ms Weeks and the claimant in relation to this issue. In light of our credibility findings above, we prefer the

evidence of Ms Weeks and find that it was not the case that she "no longer acknowledged" the claimant on her entering the office.

103. However, in light of the evidence we heard from both the claimant and Ms Weeks, we find that neither Ms Weeks nor the claimant always greeted everyone in the office in the same way on arriving in the morning. This entirely unremarkable finding would probably apply to most employees in most office environments. Nevertheless, if underlying relationships are poor – as they were – perceptions that a particular employee greets some employees more assiduously than others may easily arise.

104. In making this finding we have taken account of the supporting evidence given by the claimant's other witnesses. However, we have given limited weight to this, firstly because of the matters identified at [71] to [75] above and, secondly, because we find that in all the circumstances the recollections of anyone not directly involved are likely to have been significantly influenced by their view of Ms Weeks.

Allegation 13: On 28 January 2021, the Claimant sent an email to Ms Arneil to ask about applying for a lump sum from her pension. Ms Arneil told her she would have to resign and be re-employed, but that there would not be any hours available for her if she did.

105. The precise details of this allegation only became clear when the claimant was giving evidence. In her oral evidence she explained that the conversation with Ms Arneil to which the allegation refers took place before 28 January 2021. She did not identify more precisely when the conversation had taken place. In answer to questions asked in cross-examination, the claimant said that she was "confused" about the pension position. The claimant placed some reliance on the email of 28 January 2021 at page 148 which included the words "but Kirsty, last time I spoke to you about taking my pension you said my hours probably wouldn't be there, is this still the case?" and on the fact that Ms Arneil had not specifically denied saying this in her response to the claimant later on the same day (pages 147 to 148).

106. Ms Arneil denies having made the comment set out in the allegation to the claimant. We prefer the evidence of Ms Arneil to that of the claimant for the following reasons:

106.1. First, we found Ms Arneil to be a more credible witness than the claimant.

106.2. Secondly, we attach very little weight to the fact that in her email of 28 January 2021 Ms Arneil does not deny having made the comment. The overall tone of her email is that there are different options under the rules of the pension scheme and that one of these allowed the claimant to apply for her pension without leaving her role. It implies that Ms Arneil believes that the claimant is confused about her options and suggests she speaks to the pensions team. Given the difficulties that existed between Ms Arneil and the claimant by January 2021, the fact that Ms Arneil responded in this manner rather than contradicting what the claimant had said in her own email is entirely unsurprising. There is nothing at all in the email which suggests Ms Arneil is trying to mislead the claimant.

106.3. Thirdly, we are sceptical about the claimant's evidence in relation to matters relating to her pension because we find that she deliberately went behind Ms Arneil's back when on 21 April 2021 she wrote to NHS Shared Business Services saying that she had retired on 31 March 2021 and returned to work on 6 April 2021 (page 165) without having agreed those dates with her manager as she knew she should – indeed she noted her obligation to do this in an email to Ms Arneil also of 21 April 2021 (page 171). By contrast, although in light of this conduct by the claimant Ms Arneil could have sought to frustrate or at least complicate the claimant's wish to "retire and return" if she had wished to do so, in fact her emails with David Arbin on 12 and 13 May 2021 (pages 180-182) show that she did not seek to do this at all.

Allegation 14: At some point prior to 22 March 2021, Ms Arneil breached patient confidentiality regarding patient FM. The Claimant was ignored, patronised, and treated in a disparaging manner in relation to that breach.

107. The alleged breach of patient confidentiality was that Ms Arneil had not dealt with an appointment for an employee of the respondent herself, as the claimant believed the employee had requested, but rather had allowed the matter to be dealt with by the claimant and had permitted paperwork relating to it into general circulation in the office. We find that the claimant jumped to a conclusion about what patient FM had requested, and that in any event there was no breach of patient confidentiality. We so find in light of the evidence of Ms Arneil and, also, the email from patient FM which was included during the hearing as the final page of the bundle (page 273) in which patient FM stated by way of explanation:

> *I was emailed by Hillary Young regarding my colonoscopy. I spoke to Hillary and explained that I would prefer for you to do deal with this. The reason for this being that having worked with Hilary for a long time I am aware she gossips and I did not wish to be spoken about by members of the team. I had no issue with you being involved in the scheduling of my appointment and discussed it openly with both you and Steph. If i recall Hilary continued to email me regarding this despite me telling her that I preferred for you to deal with it.*

108. We note that Ms Arneil was not cross-examined in relation to whether there had been a breach of patient confidentiality. However, the claimant's complaint, properly understood after the claimant had given evidence, was not that patient confidentiality had been breached but that Ms Arneil had "ignored, patronised and treated [her] in a disparaging manner" when she had dealt with the claimant in relation to patient FM.

109. We find that Ms Arneil was frustrated by the claimant continuing to involve herself in patient FM's appointment despite patient FM's wish for Ms Arneil to deal with it. We find that Ms Arneil was also irritated by the claimant's email of 22 March 2021 to patient FM (page 154) which was not copied to her (patient FM immediately forward it to her) in which the claimant said:

I passed over the booking of your procedure to Kirsty two weeks ago she didn't acknowledge me, I just want to make sure it is in hand as I don't want it to be lost of [sic] left.

110. We find that Ms Arneil was irritated by this email both because she felt that any query in relation to whether she had dealt with the matter should have been directed to her (not to patient FM) and also because it suggested that the claimant did not trust her to do her own job properly. We find that such irritation was unsurprising because the email was inappropriate. Ms Arneil summoned the claimant to a 1:1 as a result of the email she had sent to patient FM (page 153) but subsequently concluded that she had over-reacted whilst irritated and so the 1:1 did not go ahead.

111. Overall, we find that Ms Arneil did not breach patient confidentiality, and did not ignore, patronise or treat the claimant in a disparaging manner in relation to the alleged breach or when she dealt with the claimant in relation to patient FM. Rather the claimant sought to be unnecessarily involved in the matter after patient FM had made her wishes clear.

Allegation 15: On 21 April 2021, the Claimant sent Ms Arneil an email asking about her retirement and pension, which was ignored by Ms Arneil.

112. In closing written submissions Mr Murdin stated that "there is no such email in the bundle" (page 15 of the closing submissions) but in fact there was such an email – it was the email referred to at [106.3] above. We find that Ms Arneil did not "ignore" the email: her reply was sent 6 days later on 27 January 2021 (page 171).

113. We find that a period of 6 days from the email being sent to the email being responded to does not amount to Ms Arneil ignoring it because the period is short and because the original email of the claimant does not either suggest it is urgent or request a reply by a particular time and/or date.

Allegation 16: The Claimant was excluded from updates regarding important procedural changes, including for example not being updated on new processes for removing patients from waiting lists.

114. By the time of closing submissions, the claimant's case in this respect was that a plan for meetings of the endoscopy team to be minuted had been abandoned and that no appropriate system had been put in place to make sure that the claimant was updated in relation to changes to processes explained at the meetings (numbered paragraph 16 on page 15 of Mr Murdin's skeleton argument).

115. As we find in relation to allegation 26 below, from late March 2021 the meetings of the endoscopy department were held on Thursdays, a day when the claimant did not attend work. We find that prior to that date to the extent that meetings of the endoscopy department had been regularly held – and it is clear that during the period of covid many were not held – they had usually taken place on a day when the claimant had attended work. We find that by March 2021 the respondent had abandoned the idea of all meetings being minuted and decided that instead those employees who were present at meetings would brief those who were not. We find

that this process was unsatisfactory as both Ms Arneil and Ms Weeks accepted in their witness statements and in cross-examination.

116. So far as the actual example of exclusion identified by the claimant, we find that when the claimant queried on 27 April 2021 (page 175) whether the process set out in the email to her and other members of the department on 20 April 2021 (also page 175) had changed, she was referred back to the team but that when she asked for the position to be confirmed in writing (page 174) it was on the following day, 28 April 2021 (page 173). As such, the claimant was updated in relation to the relevant process.

117. The concise Oxford Dictionary defines to exclude as "to deny access, to keep out". The claimant was not "excluded" from updates regarding important procedural changes. However, for the last few months of her employment the respondent operated a procedure in relation to such updates which could have resulted in her not being properly informed of them.

Allegation 17: In late spring / early summer 2021, the Claimant noticed that Ms Arneil had removed her from her Facebook friends.

118. Ms Arneil did remove the claimant from her Facebook friends. However, in light of our findings at [54] above, we find that this happened around late August 2020, not in late spring or early summer 2021. We find that it happened after Ms Arneil had been made aware of comments that the claimant had made in relation to a medical appointment that her daughter had attended and which upset her. We find that Ms Arneil believed the claimant had become aware of her daughter's medical appointment as a result of a Facebook post she had made.

Allegation 18: On 13 May 2021, the Claimant was ignored and snubbed by Ms Arneil at Donna Innes' retirement party.

119. When cross-examined the claimant denied that she had been on one side of the office during the party whispering to Ms Willis in a way that had made Ms Arneil feel uncomfortable. When a similar statement included in Ms Weeks' statement was put to her she said that Ms Weeks was making it up.

120. By contrast, when cross-examined Ms Arneil accepted that she and the claimant both felt ignored by the other. She did not ultimately accept that she had ignored the claimant but said that she had felt "uncomfortable" and could not "acknowledge" the claimant.

121. The evidence of the claimant and Ms Arneil in relation to this issue reflects the greater willingness of Ms Arneil to make sensible concessions and see matters from the perspective of others, as noted above in our general credibility findings. In light of those findings we prefer the account of Ms Arneil and find that in light of the deterioration of their relationship as found above, neither wished to speak to one another in what was essentially a social situation. Consequently, each ignored the other at the retirement party by remaining apart. Ms Arneil did not, however, snub the claimant.

Allegation 19: On 18 May 2021, the Claimant was belittled and berated by Ms Weeks regarding her mobile phone usage and issued her with a "notice of improvement", despite Ms Weeks being aware that the calls related to urgent matters and were taken away from the Claimant's desk. Younger members of the team were allowed to make non-urgent personal calls at their desks during office hours without sanction.

122. There was a history of excessive personal mobile phone use in the department which had resulted in Ms Weeks sending emails to the whole team on 3 November 2020 (page 140) and 19 April 2021 (page 162).

123. There is no dispute that Ms Weeks sent the claimant a notice of improvement in relation to her personal mobile phone use on 18 May 2021 (page 192). This followed a meeting that Ms Weeks had had with the claimant at 3pm on 18 April 2021 after sending her an invitation to the meeting on the same day at 11.57am (page 193).

124. We turn first to the immediate cause of the meeting that Ms Weeks held with the claimant on 18 April 2021. We find that it was a personal phone call lasting for 10 minutes or more which the claimant had had whilst sitting directly opposite Ms Weeks that morning and which Ms Weeks believed to be with the claimant's gym. The claimant denied having had any such personal phone call, but we prefer the evidence of Ms Weeks for the following reasons:

124.1. We found her generally to be a more credible witness;

124.2. Ms Weeks referred to this phone call in an email of 19 May 2021 to the respondent's HR function (page 195). She wrote "One particular member of my team has continued the use of her phone, whilst in the office, although reminders have been given. Yesterday for example she had a 10-minute conversation in the office regarding her gym membership…". Given the nature and content of this email, we find it inherently implausible that Ms Weeks would have made up this example on 19 May 2021;

124.3. Ms Weeks' oral evidence about the phone call had the ring of truth about it: the call had been noteworthy because the claimant had continued to sit opposite her whilst taking it rather than going out to the kitchen to speak as she tended to do when taking personal calls. The claimant herself commented on how she would do this (her witness statement paragraph 130).

125. We find that the manner in which Ms Weeks spoke to the claimant did not, objectively speaking, "belittle" or "berate" her in light of Ms Week's denial of this. This is because:

125.1. We found Ms Weeks to be a more credible witness;

125.2. The contemporaneous correspondence from Ms Weeks to the claimant does not have that tone at all. The email arranging the meeting (page 193 does not have that tone. Nor does the notice of improvement at page 192. Nor does the non-combative way that Ms Weeks responds on 19 May 2021 (page 196) to the claimant's email of late on 18 May 2021. Nor does the fact that Ms Weeks

took and acted upon advice in sending that email: if she had "belittled" or "berated" the claimant she would have been likely to respond in a more offhand manner.

126. Notwithstanding these findings, we find that the claimant may well have *felt* belittled because we have no doubt that she will have found being sent a notice of improvement by Ms Weeks deeply unpleasant given her view of Ms Weeks and given the difference in age.

127. We find that Ms Weeks was not "aware" that the calls which prompted the notice of improvement were "related to urgent matters and were taken away from the Claimant's desk". We find that the claimant's calls included calls that were not of an urgent nature and were on occasion taken at her desk. Further, the immediate cause of the meeting – the call Ms Weeks believed to be with a gym – was neither urgent nor taken in the kitchen.

128. Turning to the extent of personal mobile phone use in the office more generally, we note that there was no evidence of a truly objective nature before us enabling us to make comparisons between the relative personal mobile phone use of the various members of the team. We find that such evidence as we had was inevitably impressionistic (employees do not generally keep records of calls made by other employees and there was no claim that any detailed records had been kept in this case). We further find that this was an area where the claimant's witnesses over-egged their evidence (as described at [72] and [73] above), perhaps doing so precisely because there was no objective evidence and because the use of mobile phones by another employee in an office is so much a matter of impression and prone to be affected by one employee's view generally of that other employee. We do not therefore accept that the claimant used her mobile phone for personal calls less than other employees in the office.

129. Finally, we find that younger members of the team were not "allowed to make non-urgent personal calls at their desks during office hours without sanction" to any greater degree than others. We find that the claimant and her witnesses characterising the situation in this manner is simply another example of the tendency of witnesses to see matters in respect of which there is no objective measure from the position of their group as identified in the previous paragraph.

Allegation 20: In November 2020, Stephanie Weeks notified the Claimant that her working hours would change from 8am-4pm to 9am-5pm on one day a week.

130. The respondent notified the claimant around November 2020 that she would have to work from 9am to 5pm one day a week. The claimant's contract of employment did not contain any express provision concerning her start and finish times. However the change was a change to the hours that the claimant had worked for a number of years: she had worked 8am to 4pm on her two working days. The change was made because the respondent's service in the endoscopy department operated from 9am to 5pm and it wanted all of the relevant employees to work on occasion till 5pm. The claimant accepted in cross-examination that everyone apart from management members of the team was required to work until 5pm one day a week.

131. The change was disagreeable to the claimant because it meant that she had to travel when the traffic was busier in the evening and arrive earlier than a 9am shift-start required in the morning if she was to be certain of obtaining parking on site.

132. Mr Murdin for the claimant contended that the email thread at pages 145 to 146 showed that Ms Arneil had been told that the change required consultation. We find that this is not what the email from Ms Feroz at page 146 states: this says that consultation is required if "timings of service have been changed". They had not: the timing of the respondent's service remained 8am to 4pm. What had changed was that instead of covering the service with some but not all of its employees the respondent had decided instead to require all employees to work "late" (i.e. till 5pm) one night a week.

Allegation 21: On a daily basis, Ms Weeks would say hello to the younger members of the team and ask how they were. In contrast, Ms Weeks would ignore the Claimant.

133. We have preferred the evidence of Ms Weeks to that of the claimant in relation to this allegation for the reasons set out at [102] to [104] above. We therefore find that Ms Weeks did not ignore the claimant as alleged.

Allegation 22: Ms Weeks arranged for Lillie Meade to share an office with her instead of the Claimant.

134. Ms Weeks stated that she had not taken this decision but rather it had been taken by Ms Barns. Ms Barns confirmed that this was the case when cross-examined. She also confirmed that Ms Weeks would not have had authority to make this decision. In cross-examination the claimant accepted Ms Barns' evidence.

135. We therefore find that it was the claimant's witness, Ms Barns, who made the decision that the office in question would be shared by Ms Weeks and Ms Meade rather than by Ms Weeks and the claimant. We find that the claimant was particularly displeased by this because, believing that she would occupy the office, she had persuaded her son-in-law who worked in the respondent's IT department to speed up the instalment of computers in the office. We so find because the claimant said in cross-examination that she had "facilitated computers being put in there" because she had believed it would be her office. Ms Weeks did not therefore arrange for Ms Meade to share an office with her instead of the claimant as alleged.

Allegation 23: Lillie Meade and Emily Hancox were allowed to leave the office at 4pm on days when they started at 8am, whereas the Claimant was not allowed to do so. When the Claimant asked Ms Weeks who would be covering until 5pm, Ms Weeks did not answer and glared at her.

136. This allegation was confusing: in principle, if an employee began work at 8am then their working day would end at 4pm. The claimant clarified in cross-examination that her allegation was that when Ms Meade and Ms Hancox attended at 8am to attend Endoscopy User Group meetings on days when their working hours were until 5pm, they were then allowed to leave at 4pm rather than working

till 5pm, even if there was no cover for the period 4pm to 5pm. She said that this happened once a month.

137. In answer to questions asked by the Tribunal, the claimant said that she had never asked to be able to leave at 4pm on a day when her scheduled hours had been 9am to 5pm and she had come in early at 8am for a meeting. Consequently, in light of this admission, the first half of the allegation falls away. It is not the case that "the claimant was not allowed to do so".

138. Nevertheless, Ms Weeks' evidence was that on days when Ms Meade and Ms Hancox came in early she would cover the period 4pm to 5pm herself if necessary. The claimant did not directly contradict this evidence and the Tribunal accepts it as true.

139. So far as whether Ms Weeks glared at the claimant when she asked her who would provide cover, the Tribunal prefers the evidence of Ms Weeks because we found her to be a more credible witness. We therefore find that Ms Weeks did not "not answer" the claimant or glare at her.

Allegation 25: On 21 July 2020, Ms Weeks rudely and abruptly demanded that the Claimant tell her what she had discussed with David Moore (Head of Estates) and implied that the Claimant had no business talking to others during working time.

140. There is a direct conflict of evidence in relation to this point between the claimant and Ms Weeks. At the point when the incident is said to have occurred, Ms Weeks was not in a management position and had only been employed by the respondent for just over 6 months.

141. The Tribunal prefers the evidence of Ms Weeks that the incident did not occur as alleged because we found her to be a more credible witness and because we find that it is inherently improbable that she "demanded that the claimant told her what she had discussed" when she was not in a management position. We find that, whilst Ms Weeks did not act as alleged, she may well have nosily asked the claimant what the conversation was about. Indeed, this reflected what the claimant said in cross-examination " [Ms Weeks] didn't dictate, she just wanted to know what I was talking about but it had nothing to do with her".

Allegation 26: From 25 March 2021, the department's monthly team meetings were transferred from a Tuesday to a Thursday, which was a day the Claimant did not work. The Claimant believes this was done deliberately to exclude her from the meetings.

142. There is no dispute that from around this date the endoscopy department's monthly team meetings were moved from a Tuesday to a Thursday. The Tribunal finds that the immediate reason for the change was that Ms Weeks could no longer attend on Tuesdays because she had begun to attend training workshops on Tuesdays (the timing of which was not within her control). The Tribunal finds that the attendance of Ms Weeks as the manager was self-evidently more important than that of the claimant.

143. The Tribunal further finds that, given the varying part-time working patterns of the various members of the endoscopy department, there was no day when meetings could be held and all employees could attend. From 1 April 2021 it was agreed that the meeting would be quarterly. This can be seen from the minutes of the meeting of 1 April 2021 at page 157. The minutes record that the claimant did attend the meeting, although it was held on a Thursday.

Allegation 27: Ms Weeks timed the Claimant's and Kylie Shaw's lunch breaks and would berate Kylie Shaw if she were a minute or two late, whereas the younger members of staff were allowed to take longer breaks frequently and nothing was said.

144. In paragraph 35 of her witness statement the claimant said that "[Ms Weeks] started to make a show of timing Jadie and me when we went to lunch". However, in an answer to a question in cross-examination the claimant suggested that she did not have first-hand knowledge of being timed, stating "As for [Ms Willis] and I we were informed that [Ms Weeks] asked what time we went to lunch and was told the incorrect times and said we had better not have done". When the Tribunal asked questions to clarify whether the claimant's evidence was that Ms Weeks had been timing lunch breaks or just keeping an eye on them the claimant said "I think timing them". The "I think" again reinforced the impression that the claimant was reporting what she had been told and not what she had personally seen.

145. The evidence of Ms Weeks was that she had not timed the claimant's lunch breaks but that she might well have "made comments asking what time others went to lunch, but not in a negative watchful way but to make sure everybody had an opportunity for lunch during the lunch period".

146. The Tribunal prefers the evidence of Ms Weeks and finds that what in fact happened was that from time to time she may have asked when a particular employee had gone to lunch. The Tribunal therefore finds that Ms Weeks did not "time the claimant's lunch breaks". The Tribunal prefers the evidence of Ms Weeks because she was a more credible witness and because for the reasons identified in [144] above it found the claimant's evidence unclear and so unsatisfactory.

147. In so far as the allegation concerns Ms Shaw, it is not directly relevant to the claimant's claim. However, the Tribunal finds that Ms Weeks did not time her lunch breaks either, noting that Ms Shaw provides no significant evidence about this point in her witness statement.

Allegation 28: From April to May 2021, requiring older members of staff including the Claimant to show proof of medical appointments when they needed time off.

148. This allegation was contained at paragraph 38 of the claimant's witness statement. Her answers to questions asked in relation to this issue in cross-examination tended to focus primarily on why she considered any requirement to show proof of a medical appointment to be a breach of confidentiality. She did not claim to have any knowledge of a younger member of staff being permitted to attend a medical appointment without showing the required proof.

149. The evidential basis for this factual allegation even taking the claimant's case at its highest is flimsy: the claimant says Ms Weeks informed her, Ms Willis and Ms

Shaw of the requirement but not Ms Meade, Ms Hancox or Mr Woodcraft. She does not explain how it is that she knows that only herself, Ms Willis and Ms Shaw were informed of the requirement. For example, she does not say that one of the allegedly preferred group told her that.

150. The evidence of Ms Weeks and Ms Arneil was that the requirement applied to everyone and that it had been introduced because the respondent had established that on occasion employees were saying that they were attending medical appointments when in fact they wanted time off for some other reason, for example to attend a job interview. Ms Arneil also said that the policy applied to nursing staff as well as to schedulers.

151. The Tribunal prefers the evidence of Ms Weeks and Ms Arneil. This is because we found them to be more credible witnesses and also because, for the reasons identified above, the claimant's evidence in relation to this issue was at best flimsy.

The alleged last straw

152. The claimant describes the last straw at paragraph 108 of her witness statement as being Ms Weeks' refusal "to give me any information or training on a change to process/procedures that I had not been there to find out about first hand". At paragraph 166 she says "Also on 6th July, I had several instances where I found I was unable to work properly due to being unsure of what the current process and procedure was, to which I needed to adhere". These rather vague allegations were not matters which she mentioned when she resigned the following day. Her email (page 211) stated that:

> *After 24 years of working at Medway Maritime Hospital I have decided it is now time to leave so I am giving 4 weeks' notice, I would like to leave sooner if this is possible. I have worked in Endoscopy Scheduling for 9 years I did enjoy this position very much. Unfortunately, in the last year or so it has become quite apparent I no longer have a role within the department and feel very undervalued, I seem to just help where needed, I have raised this on a couple of occasions, but nothing has changed. I also believe and so do some of my colleagues and family that I am being victimised, so I have come to this decision.*

153. There is also no mention of an incident on 6th July in either Ms Arneil's note of the meeting she and the claimant subsequently had (pages 215 to 216) or in the claimant's correction to those notes (pages 213 to 214).

Conclusions

Which factual allegations were made out?

154. In light of our findings of fact above, only the following factual allegations were wholly or partly made out. The text between brackets is to enable the reader to easily identify the relevant allegation and to place it in time. It is not intended to set out the allegation in full:

154.1. Allegation 2 (change to role) (around May 2020);
154.2. Allegation 3 (walk around duty) (around May 2020);
154.3. Allegation 5 (the WATC role being given to Ms Weeks and Ms Meade) (around May 2020);
154.4. Allegation 10 (concerning Ms Weeks' behaviour) (October 2020 onwards);
154.5. Allegation 11 (Ms Weeks' not asking the claimant for advice) (October 2020 onwards);
154.6. Allegation 16 (exclusion from updates) (from around March 2021);
154.7. Allegation 17 (Ms Arneil removing the claimant as a Facebook friend) (around August 2020);
154.8. Allegation 18 (Ms Innes' retirement party) (13 May 2021);
154.9. Allegation 19 (mobile phone usage) (18 May 2021);
154.10. Allegation 20 (notification of change to working hours) (November 2020);
154.11. Allegation 26 (monthly team meetings moving to Thursdays) (from 25 March 2021).

155. The other factual allegations were not made out. Consequently, there is nothing on which the allegations of harassment related to age, direct age discrimination and less favourable treatment on the grounds of part-time worker status in respect of those allegations can bite.

<u>The claim of harassment related to age</u>

156. Because section 212 of the 2010 Act provides that a "detriment" does not include conduct which amounts to "harassment" we have concluded that it is sensible to deal first with the allegations which have been factually made out as allegations of harassment before considering them as allegations of direct age discrimination and/or less favourable treatment on the grounds of part-time worker status. Finally, we consider the constructive dismissal claim.

Was the conduct unwanted?

157. We conclude that the conduct of the respondent set out in our factual findings in relation to each of the factual allegations that were made out (as listed in [154] above) was unwanted by the claimant. We have no doubt that the claimant felt as strongly about the conduct as her written and oral evidence suggested.

Was the conduct related to the relevant protected characteristic of age?

158. Mr Murdin's submissions concerning why we should conclude that the conduct complained of was "related to" (the harassment complaint) or "because of" (the direct discrimination complaint) age were limited and contained primarily in numbered section 6 at page 18 of his written submissions. They may reasonably be summarised as being that there was a divide in the office (a reference to the two groups we have identified at [63] to [66] above) based on age and that those who were over the age of 50 "were treated in a detrimental manner when compared to those above comparators, who were under the age of 30". We observe also at this point that the focus of Mr Murdin's cross-examination was far more the extent to which the claimant was treated as she was because she was a part-time worker than whether the treatment was in some way related to age.

159. None of the conduct complained of in the factual allegations that were made out obviously related to age. That is to say none of the conduct was intrinsically and/or overtly related to the characteristic in question. However, we must reach our conclusion drawing on all the evidence before us. The submission of the claimant is, in reality, that we should conclude that the conduct related to age because the office was divided by age (and part-time status) with those who were not in Ms Weeks' group of people in their 20s (which we have found to exist in [65] above) being treated differently to those who were.

160. We conclude in light of our findings about the two groups as set out at [63] to [66] above that the claimant has not adduced evidence that the conduct could be related to age. Age was by no means what defined each group (and of course the membership of Ms Coffey of the second group illustrates this neatly). Consequently, whilst we find that the rudeness of Ms Weeks referred to in our findings in relation to allegation 10 was at times directed to other members of the second group, this does not point towards the rudeness being motivated by age, given the varying ages of that group as recorded in [64] above, and the reasons for the tensions between the two groups. The claimant has not proved that those over the age of 50 were generally "treated in a detrimental manner".

161. Further and separately, we have been able to reach clear conclusions about the reason for the treatment of the claimant in relation to each of the factual allegations that was made out and in no case was the reason for the treatment related to age:

161.1. Allegation 2 (change to role): the reason was the respondent taking the view that, because of an increase in the WATC work caused by changes resulting from the covid pandemic, it was necessary for two full-time employees to do the WATC work. This resulted in the claimant being moved to do other scheduling work.

161.2. Allegation 3 (walk around duty): the reason the claimant was asked to do this 15-minute duty once a week was that this was a duty that all schedulers were asked to do from time to time. She was treated in the same way as the full-time schedulers.

161.3. Allegation 5 (the WATC role being given to Ms Weeks and Ms Meade): the reason was the respondent taking the view that, because of an increase in the WATC work caused by changes resulting from the covid pandemic, it was necessary for two full-time employees to do the WATC work. Both Ms Weeks and Ms Meade were full-time employees.

161.4. Allegation 10 (concerning Ms Weeks' behaviour): the reason for the Ms Weeks being on occasion rude to the claimant and other members of what we have described at [66] above as the second group was the mutual antipathy of Ms Weeks and the second group. This in turn was caused by, on the one hand, the belief of the second group that Ms Weeks had been appointed as a result of nepotism and was not capable of competently performing the band 5 role and, on the other, by Ms Weeks being inexperienced both in the work of

the department and as a manager, combined with her loud and over-confident behaviour as found at [58] above.

161.5. Allegation 11 (Ms Weeks' not asking the claimant for advice): the reason Ms Weeks stopped asking the claimant for advice was that on promotion to the band 5 role on an interim basis her role and duties had changed.

161.6. Allegation 16 (exclusion from updates): we have not found above that the claimant was "excluded" from updates but rather that the respondent operated a procedure for the last few months of the claimant's employment which could have resulted in her not being properly informed of them (that is to say verbal updates by employees who were present at meetings when the updates were given). We have concluded that Ms Weeks adopted this system of updates because she was an inexperienced manager who was reluctant to set out updates clearly in writing.

161.7. Allegation 17 (Ms Arneil removing as a Facebook friend): the reason Ms Arneil removed the claimant as a Facebook friend was that she was upset by comments that the claimant had made in relation to a medical appointment that her daughter had attended.

161.8. Allegation 18 (Ms Innes' retirement party): we have not found above that Ms Arneil "ignored and snubbed" the claimant at the retirement party but rather that she and the claimant ignored one another. The reason for this was the deterioration in their relationship, the reasons for which we have set out above (and which were wholly unrelated to the claimant's age or part-time worker status).

161.9. **Allegation 19 (mobile phone usage):** the only part of the allegation which was made out was the issuing of a notice of improvement to the claimant. We find that the reasons for this were that (1) Ms Weeks believed that the claimant had not taken account of her requests to the whole department to reduce their personal mobile phone usage; and (2) the claimant had that very day taken a personal phone call lasting 10 minutes or more whilst sitting directly opposite Ms Weeks.

161.10. **Allegation 20 (notification of change to working hours)**: the reason for the change was that the respondent in order to provide adequate cover for the whole of the hours of service of the endoscopy department (8am to 5pm), wanted all the schedulers to work one day a week until 5pm, rather than just some of them.

161.11. Allegation 26 (monthly team meetings moving to Thursdays): the reason for the change was that Ms Weeks needed to attend the monthly meetings – because she was a manager – but she had to attend training sessions on Tuesdays.

162. In light of these conclusions that none of the unwanted conduct was related to age, it is not necessary for us to consider the purpose or effect of the unwanted conduct.

163. The claimant's claim of harassment related to age therefore fails and is dismissed.

The claim of direct age discrimination

164. We turn first to whether the claimant has proved facts from which the Tribunal could conclude in the absence of any other explanation that the respondent had committed acts of discrimination against the claimant by treating her as we have found it did as summarised at [154] above.

165. We conclude that there were material differences between the circumstances of the claimant and each of the comparators (Ms Weeks, Mr Woodcraft, Ms Hancox and Ms Meade) in relation to each of the factual allegations which were made out and the claimant does not rely on a hypothetical comparator – this was a point discussed expressly at the hearing. For example, in relation to allegations 2 and 5, the comparators were all full-time but the claimant was part-time. In relation to allegation 17, there is no suggestion that any of the comparators made a comparable comment about a matter relating to a family member of Ms Arneil. We note, however, that neither party made detailed submissions in relation to why the comparators were or were not in materially different circumstances.

166. Overall, however, even assuming that there were no material differences between the circumstances of the claimant and the comparators, and so the respondent has treated the claimant less favourably than her comparators, we conclude that the claimant has not proved facts from which the Tribunal could conclude in the absence of any other explanation that the claimant had been treated less favourably because of age. In this respect we repeat our conclusions as set out at [158] to [160] above. The burden of proof has not therefore shifted to the respondent.

167. However, in case we are wrong about that, and the burden of proof has shifted, we conclude that the respondent has shown a non-discriminatory reason for the treatment and that it was in no sense whatsoever because of age. We repeat our conclusions in relation to the reasons for the treatment as set out at [162] above.

168. We therefore conclude that the claimant was not treated less favourably because of age and her claim of direct age discrimination therefore fails and is dismissed. There is therefore no need to consider the issues of justification and time limits.

Less favourable treatment on the grounds of part-time worker status

169. As noted at [13], in the discussion of the issues the respondent accepted that the claimant was a part-time worker as defined by the PTW Regulations and that Stephanie Weeks, Emily Hancox, Jadie Willis, Lillie Meade, and Terri Coffey were comparable full-time workers.

170. Mr Murdin's submissions concerning why we should conclude that the conduct complained of was "on the grounds" of the claimant's part-time worker status were limited and contained, again, at numbered section 6 on page 18. He made two submissions: first, that some of the treatment was expressly on the grounds of part-time status (referring to pages 144, 147 and 148 in this regard). Secondly, that there "was a clear divide in the office, based on age and part-time status".

171. Before considering these points, we note that when the claimant gave evidence she observed on several occasions that a particular arrangement affected her disproportionately because she only worked part-time. For example, if she had to do the walk around duty once a week or work until 5pm once a week, to the extent that there was a detriment, she suffered it proportionately more than someone who worked full-time and so who had to do the walk around duty (allegation 2) or work until 5pm one day in five rather than one day in two (allegation 20). This is in effect an argument of indirect discrimination. The same is also largely true of allegation 16 (exclusion from updates) and allegation 20 (the day of meetings). However the claim had been squarely put as one of direct discrimination. Mr Murdin confirmed that there was no argument that the claimant had been subjected to indirect discrimination, whether because of her age or part-time worker status. Indeed, arguments of indirect discrimination do not fit within the PTW Regulations.

172. Taking the second of Mr Murdin's specific submissions first, the reference to the divide in the office is, again, a reference to the two groups that we have identified above. We conclude in light of the findings that we have made at [63] to [66] that these did not represent a divide based wholly or in part on part-time status. In particular, we observe that both Ms Coffey and Ms Willis, who were members of the second group, worked full-time.

173. Turning to the first of Mr Murdin's specific submissions, we conclude that this applies only to Allegation 2 (change to role) and Allegation 5 (the WATC role being given to Ms Weeks and Ms Meade). Indeed, the respondent accepted that the treatment which we have found to have been proved in respect of those allegations was on the grounds of part-time worker status.

174. Overall, therefore, in light of our conclusions at [161] above, we conclude that the claimant was not less favourably treated than a comparable full-time worker by being subjected to a detriment on the grounds of her part-time worker status except in relation to allegations two and five.

175. This conclusion follows inevitably from our conclusions in relation to the reason for the treatment in allegations 3, 10, 11, 17, 18, 19 and 20. However allegations 16 (exclusion from updates) and 26 (monthly team meetings moving to Thursdays) gave us more cause for thought. This was because the claimant's part-time worker status was in some sense relevant to each: if she had worked full-time as the comparable full-time workers did she would have been less likely to have been affected by meetings no longer being minuted (allegation 16) or the change of the regular meetings from Tuesdays to Thursdays (allegation 26). It is well established that "on the ground that" and "because" mean the same thing (see for example, Amnesty International v Ahmed [2009] ICR 1450). We therefore need to consider the reason or motive, whether conscious or sub-conscious for any less favourable

treatment. There is no "but for" test. The claimant might have succeeded in relation to allegations 16 and 26 if we were required to apply a "but for test". However, we are not and our conclusions above make clear that the respondent's reason or motive in treating the claimant as it did in allegation 16 and 26 was in no way connected to her part-time status. Rather it is simply the case that what were changes affecting all employees in the endoscopy department might well have affected her more than the comparable full-time employees. As noted above, any argument in this respect was therefore an indirect discrimination argument, but no such argument was advanced (and indeed could not have been under the PTW Regulations).

176. Turning specifically to allegations two and five, the allegations both concern her being moved to other scheduling work from the WATC work in May 2020. We conclude, by a relatively fine margin that, given the length of time that the claimant had done the WATC work, being moved to other work was a "detriment" for the purpose of regulation 5(1) of the PTW Regulations. Consequently the claimant was treated less favourably than Ms Weeks and Ms Meade, who it was accepted were comparable full-time workers and who were put onto the WATC work.

177. The question for us, therefore, is whether this treatment was justified on objective grounds. The legitimate aims that the respondent relied on were set out at issue 4.5 and the relevant aim in this respect was "Ensuring it provides an efficient and effective service and a high quality of patient care, including improving and streamlining its working practices and processes where appropriate without unnecessary delay".

178. We conclude that this aim is clearly legitimate, and indeed Mr Murdin for the claimant did not seek to argue otherwise. The question, therefore, is whether the removal of the claimant from the WATC work and the allocation of two full-time employees to that work was a proportionate means of achieving it during the covid pandemic.

179. We conclude in light in particular of our findings of fact at [79] to [83] and [89] that it was, for the following reasons:

179.1. The covid pandemic had produced a large increase in the work going to the WATC – additional scheduling resources had to be allocated to it so that there would be the full-time equivalent of two full-time employees doing it;

179.2. The changes made simply resulted in different schedulers doing different scheduling work (our findings at [83] expand on this point). Whilst the claimant preferred the WATC work, her role was and remained that of a scheduler. She was not demoted. The respondent dealt with the change in her day-to-day work proportionately by having Ms Barns discuss it with her. More might have been required if the change had been a demotion but it was not;

179.3. It is universally recognised that the covid pandemic imposed huge demands and strains on the NHS. The NHS had to make many changes to the way it operated in its attempts to deal with these. The removal of the claimant from the WATC work was just one of these. Given this context, the fact that

the respondent did not allocate scheduling work to the claimant which reflected her preferences was entirely reasonable;

179.4. Whilst as a matter of logic it would have been possible to allocate one part-time and one full-time employee to the work in addition to the claimant, we accept the oral evidence of Ms Arneil that, when she and Ms Barns had discussed how to deal with the increase in WATC work caused by the covid pandemic, they had concluded that the best way to deal with the department's overall workload would be to have two full-time employees concentrating on the 20 sessions at the WATC (which had previously done 4 to 6 sessions a week) and to have part-time employees dealing with other less substantial scheduling which would fit within their hours. In all the circumstances, this was an entirely reasonable management decision.

180. In light of this conclusion, the claimant's claim that she was less favourably treated on the grounds of part-time worker status fails and is dismissed.

181. It is not therefore necessary for us to consider the question of time. However, if it had been, we would have reached the following conclusions. It was agreed during closing submissions that the earliest an act (or omission) could have taken place and been in time was 14 June 2021. The removal of the WATC work from the claimant took place around the end of May 2020. Her claim in this respect was consequently just over a year out of time. Mr Murdin's submissions in relation to why it would be just and equitable to extend time (their paragraph 11) were limited to the fact that if time were not extended that "would allow the Respondent a windfall, whilst significantly prejudicing the Claimant". The claimant has provided no evidence of substance in relation to why she could not have presented a claim earlier and we find that she has had access to legal advice throughout. As such, given that the burden of persuasion is on the claimant, if it had been necessary for us to determine this issue in respect of allegations 2 and 5, we would have concluded that it was not just and equitable to extend time.

<u>Conclusions in relation to the allegations which were not made out</u>

182. Our findings in relation to the allegations which were not made out really divide those allegations into two categories. First, there are matters which we have concluded on the balance of probabilities did not happen at all. Secondly, there are matters which we have concluded did not happen in the way the claimant said – so the allegation is not even partly made out - but there was nonetheless some underlying factual event.

183. Examples of this second category include allegation 8 (meeting on 30 September) and allegation 14 (breach of confidentiality). It was not necessary for us to reach conclusions in relation to the reason for the respondent treating the claimant as it did in relation to the relevant underlying factual events, given that the relevant allegations were not even partly made out. However, in the course of our deliberations we did conclude that in such cases the reason for the treatment was not related to age, because of age or on the grounds of the claimant's part-time worker status.

Constructive dismissal

184. The factual allegations relied upon in support of the constructive dismissal claim were identical to those relied upon in the claims of harassment, direct age discrimination and less favourable treatment on the grounds of part-time worker status. In a nutshell, the claimant's argument is that the factual matters which gave rise to the allegations of discrimination also comprised a course of conduct which breached the implied term of mutual trust and confidence. This is clearly set out at page two of Mr Murdin's submissions. It was also clear from the genesis of the list of issues: as drafted at the beginning of the hearing it suggested that the claimant's case was that if she had not been discriminated against then there was no breach of the implied term of trust and confidence (see its paragraphs 1.1 and 1.2 at page 58). The Tribunal queried if that was the case or whether the claimant would argue in the event that her factual allegations were proved that she was unfairly constructively dismissed even if the discrimination claims based on those factual allegations failed. After some indecision, the claimant's position was that in those circumstances the claimant would nevertheless argue that she had been constructively dismissed, and this is reflected in the final list of issues as set out above. However, there was no suggestion when the list of issues was amended that the factual matters relied upon by the claimant in support of her claim of constructive dismissal had changed.

185. The factual allegations which were not made out in whole or in part are not as a matter of logic relevant to our analysis of whether there was a breach of the implied term of mutual trust and confidence. However, so far as the factual allegations which were wholly or partially made out are concerned, the fact that we have concluded that the matters proved were not acts of harassment related to age, less favourable treatment because of age, or less favourable treatment on the grounds of part-time worker status does not means that the matters proved were also not a course of conduct breaching the implied term of mutual trust and confidence. We therefore turn now to that issue.

186. That issue gives rise to two sub-issues: first, was there 'reasonable and proper cause' for the conduct. Secondly, if not, was it 'calculated or likely to destroy or seriously damage trust and confidence'.

187. Turning to allegations 2, 3 and 5, we conclude that there was reasonable and proper cause for the respondent acting as it did: the changes complained of did not result in the claimant being required to do any duties that were not normally performed by schedulers and they were made in the context of the changing needs of the endoscopy department during the covid pandemic. Equally, there was reasonable and proper cause for Ms Weeks no longer asking the claimant for advice (allegation 11): the changes to her role and day to day work as set out at [101] above. Further, there was reasonable and proper cause for Ms Arneil removing the claimant as a Facebook friend (allegation 17) taking into account that clearly there was no obligation on Ms Arneil to maintain online social relations with the claimant outside work: her belief that the claimant had used information that she had obtained from Ms Arneil's Facebook page in a way that Ms Arneil found upsetting. So far as the notification of change to working hours was concerned (allegation 20), again there was a reasonable and proper cause for this – the need

of the respondent to cover 4 to 5pm (and we note in making this finding that it was not argued on behalf of the claimant that the respondent acted in breach of any express term of her contract by making this change). There was also a reasonable and proper cause for the notice of improvement (allegation 19) in light of our conclusions above about the reason for it being issued. Finally, there was reasonable and proper cause for moving monthly team meetings to Thursdays (allegation 26): there was no day on which everyone could attend and Ms Weeks, a manager whose attendance was required, could no longer attend on Tuesdays.

188. That leaves Ms Weeks' behaviour as found at [98] above that Ms Weeks was on occasion rude (allegation 10), the abandoning of the formal minuting of the monthly meetings from around March 2021 which resulted for the last few months of the claimant's employment in the respondent operating a procedure in relation to updates which could have resulted in the claimant not being properly informed of them (allegation 16), and Ms Arneil ignoring the claimant at Ms Innes retirement party (allegation 18). Viewed objectively, whilst it would clearly have been better if the respondent had not acted as it did, we conclude that this was not, taken together, conduct that was calculated or likely to destroy or seriously damage trust and confidence; there is simply not enough there.

189. In reaching this conclusion we have taken into account that although Ms Weeks and Ms Arneil as managers should not have behaved as they did (allegations 10 and 18), their actions must be seen in context. We find that the claimant dealt with Ms Weeks in a way which made Ms Weeks aware of the claimant's view of her as set out at [62] and [66] above. Equally, we have found at [121] above that the claimant also ignored Ms Arneil at Ms Innes' retirement party because of the deterioration of their personal relationship. We have concluded, in effect, that there was fault on both sides and that, when that is the case, viewed objectively it is less likely that the conduct was either calculated or likely to destroy or seriously damage trust and confidence.

190. The list of issues and the claimant's submissions did not incorporate the alleged final straw into her contention that the respondent had breached the term of trust and confidence. However, it is of course the case that the last straw need add little to the course of conduct relied upon. Equally, we accept that the claimant *might* argue that it was part of allegation 16 or 26 (although Mr Murdin did not expressly do this). Nevertheless, we conclude that even taken at face value the "last straw" added insufficiently to result in the course of conduct we have analysed above becoming a breach of the implied term of trust and confidence. In reaching this conclusion we have noted the lack of detail provided in relation to the last straw. Consequently the claimant was not constructively dismissed.

191. We have dealt with issues 1.1 to 1.4 in the list of issues. In light of our conclusions in relation to those issues it is not necessary to deal with issues 1.5 to 1.7.

192. The claimant was not therefore constructively dismissed and her claim of constructive unfair dismissal therefore fails and is dismissed. Her complaint

that any constructive dismissal was either discriminatory because of age or a detriment on the grounds of her part-time worker status fails both because we have concluded that there was no such discrimination and also because we have concluded that the claimant was not constructively dismissed.

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Employment Judge Evans

Date reasons signed: 5 October 2023

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