EMPLOYMENT TRIBUNALS

Claimant: Miss M Cavanagh

Respondents: Northern Care Alliance NHS Foundation Trust (1)
Greater Manchester Mental Health NHS Foundation Trust (2)

Heard at: Manchester **On:** 20 November to 1 December and (in chambers) 4 December 2023

Before: Employment Judge Phil Allen
Mrs A Ramsden
Mr I Taylor

REPRESENTATION:

Claimant: In person
First Respondent: Mr J Boyd, counsel
Second Respondent: Mr A Sugarman, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaints of direct race discrimination against the first and second respondent are not well-founded and are dismissed.

2. The complaints of harassment related to race against the first and second respondent are not well-founded and are dismissed.

3. The complaints of victimisation against the first and second respondent are not well founded and are dismissed.

4. The complaint of unfair (constructive) dismissal against the first respondent is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the first respondent as a social worker with continuity of employment from 2 October 2006. She resigned on 20 August 2021. At the time of the relevant events, she worked as part of the commissioning and review team. That team involved employees and managers from both the first and second respondent and, as her claims related to the actions of employees of both respondents, she brought her claims against them both. The claimant alleged (against both respondents) that she was discriminated against because of her race, was harassed for reasons related to her race, and suffered victimisation. She also claimed that she was constructively unfairly dismissed by the first respondent. The first respondent denied that the claimant was constructively dismissed. Both respondents denied discrimination, harassment, and victimisation.

Claims and Issues

2. A number of preliminary hearings had previously been conducted in this case, and there had been a relatively lengthy process undertaken to establish the claims being brought and the issues in those claims. Preliminary hearings were conducted on: 22 November 2021; 15 December 2021; 27 May 2022; and 28 April 2023. The claimant had originally brought claims against not only the two current respondents, but also eleven individuals. The first and/or second respondent had accepted that between them they were vicariously liable for each of the individuals named. Both had confirmed they would not be running the employer's defence and accordingly, following the hearing on 21 November 2021, the claims against the eleven individuals were dismissed on withdrawal, the claimant having decided that she wished to withdraw those claims. Other complaints initially brought by the claimant were also dismissed on withdrawal during the progress of the claim.

3. At the hearing on 22 November 2021 part of the claim was summarised as follows (214):

> "*She brought a grievance and her argument is that as a tall 6'1" black British woman she was instantly and stereotypically labelled as the aggressor and did not have a fair process. She was investigated on disciplinary allegations and required to move location. She said "there was a presumption being made that I was the perpetrator in the incident I'd complained of because I was the only person being moved". She says her colour and height caused the respondents to stereotype her as an intimidator"*

4. At the last preliminary hearing on 28 April 2023 a final list of issues had been identified and was recorded as an appendix to the case management order (275). The list of issues was made up of two parts: a list of the issues to be determined; and a table containing the schedule of allegations upon which the claimant relied (containing thirty allegations). At the start of this hearing, it was

confirmed with the parties that those issues remained the ones which needed to be determined. The list of issues is appended to this Judgment.

5. On the second day of the hearing, after the Tribunal returned from reading, it was confirmed to the parties that the list of issues omitted any reference to jurisdiction/time. It was not controversial that there were potentially issues of jurisdiction/time which needed to be determined as they had been discussed and recorded in the previous case management orders. In any event, as they were issues of jurisdiction, they were issues which the Tribunal needed to determine even if they were not specifically raised by any of the parties. The additional issues were identified and confirmed, and the parties all agreed that they did not object to those issues also being determined. The additional issues related to jurisdiction/time for the discrimination, harassment, and victimisation complaints, and the three issues to be determined were:

    a. Was the complaint brought within the required time?

    b. Was the complaint part of conduct extending over a period which ended within the required time?

    c. Would it be just and equitable to extend time?

6. During the claimant's evidence on the second day of the hearing, it was established that the claimant did not wish to pursue as allegations all of the matters recorded in the list of issues. She confirmed that she did not wish to pursue the matters recorded at number nineteen in the schedule of allegations and she was happy for the Tribunal to cross out that specific allegation and not to determine it.

7. In the light of what she said, the claimant was asked to consider overnight at the end of the second day whether there were any other allegations which she did not wish to pursue. It was emphasised that the Tribunal was not asking the claimant to delete allegations from the list, but if it was the case that the claimant did not wish to pursue specific matters then it was preferable for her to confirm that at the early point in the hearing to ensure that time was not spent in hearing questions about matters which she was not asking the Tribunal to determine. As a result, on the morning of the third day, the claimant stated that she did not wish to pursue the following numbered allegations in the schedule of allegations: twenty; twenty-four; twenty-five and twenty-seven. It was agreed that those sections of the list of allegations would be crossed out and the Tribunal would not determine the issues arising from those allegations.

8. During her evidence, the claimant also identified that there was an error in a date included in issue 6.1 in the list of issues. The date of the final straw upon which the claimant relied in her claim was 17 August 2021 and not 10 May 2021 (as had been recorded in the list of issues).

9. In this Judgment the Tribunal has determined the liability issues only. The remedy issues were left to be determined later, only if the claimant succeeded in her any of her claims.

Procedure

10. The claimant represented herself at the hearing. Mr Boyd, counsel, represented the first respondent. Mr Sugarman, counsel, represented the second respondent.

11. The hearing was conducted entirely in-person in Manchester Employment Tribunal with all witnesses and all parties in attendance in the Tribunal building. Due to the lack of available recording facilities, the hearing was not recorded.

12. An agreed bundle of documents was prepared in advance of the hearing. The bundle consisted of three lever arch file and ran to 2,184 pages.

13. On the first morning of the hearing the Tribunal spoke to the parties about the issues and the Tribunal hearing, including the likely timetabling of it. It was agreed that the remainder of the first day and the morning of the second day would be required for the Tribunal to read the statements and key documents. The Tribunal accordingly took the time to read all of the witness statements and to note or read the documents referred to within them.

14. The claimant provided a lengthy and detailed witness statement. The Tribunal read the claimant's witness statement during the reading time. The claimant confirmed the truth of her statement under oath at the start of the afternoon of day two. She was then cross-examined by the first respondent's counsel from lunchtime on the second day until the end of the third day, followed by being cross-examined by the second respondent's counsel for the fourth day, before being asked limited questions by the Tribunal and being given the opportunity to say anything she wished to as re-examination. The claimant's evidence finished at the end of the fourth day of hearing, as had been agreed would occur when the timetable was discussed.

15. At the end of her evidence, the claimant asked for a little time to prepare to cross-examine the respondents' witnesses. There was also a discussion about the availability of Ms Brooking who is no longer employed by the first respondent. As a result, the fifth day of hearing started at 1 pm and Ms Brooking's evidence was heard during an extended afternoon session.

16. The first respondent provided witness statements from each of the following witnesses, all of which were read during the reading time at the start of the hearing. Each of the witnesses confirmed the accuracy of their statements, were crossexamined by the claimant, were briefly asked some limited questions by the second respondent's counsel, and (where require) were asked questions by the Tribunal panel. The witnesses who attended from the first respondent were:

    a. Ms Ann Brooking, at the relevant time the Principal Social Worker and Head of Social Work, Professional Standards, Quality and Safeguarding within the Adult Social Care Division and the person who heard the claimant's stage two grievance (she is no longer employer by the first respondent);

b. Ms Jayne Smith, at the relevant time the Team Manager – Pathways and Commissioning and the claimant's line manager;

c. Ms Jenny Leyland, HR Advisor;

d. Mr Andrew Lewarne, Managing Director, Integrated Care Division, Community Services & Elective Medicine and the person who heard the claimant's stage three grievance;

e. Mrs Lauren McCabe, Assistant HR Business Partner in the Integrated Care Division; and

f. Mrs Clare Nott, at the relevant time Divisional Human Resources Business Partner for the Integrated Care Division and a member of the panel who heard the claimant's stage three grievance.

17. Ms Smith was clearly unwell at the time that she gave evidence, but she still wished to do so. Her evidence was all heard during the morning of the sixth day of the hearing. Taking account of her health, the claimant was told to complete the questioning of Ms Smith by the end of the morning, and it was explained that she did not need to put all of her case to Ms Smith in the usual way (an approach to which the respondents' counsel did not object). The claimant also obviously and appropriately tailored the approach she took to asking questions of Ms Smith, in the light of Ms Smith's ill health. Additional breaks were also taken during her evidence.

18. In addition, the first respondent provided witness statements from three witnesses who did not attend to give evidence. The Tribunal accordingly gave less weight to the evidence from those witnesses as it was not able to be questioned by the other parties during the hearing. For one of those witnesses (Ms Dale) a Fit Note was provided to the Tribunal which recorded her entirely understandable reason for not attending. The three statements were provided for:

a. Ms Dian Dale, Senior Administration Officer for the Commissioning and Review Team within Adult Social Care;

b. Mr John Fenby, Professional Lead for Social Care within the Salford Division of the second respondent (but employed by the first respondent); and

c. Ms Fatoumata Jallow, Information Access Officer.

19. The first respondent did not call Ms Maureen Jolley to give evidence and therefore the Tribunal did not hear any evidence from her. The claimant highlighted Ms Jolley's non-attendance, particularly because she was the only person who had previously been named as a respondent for whom a statement had not been provided.

20. The second respondent provided witness statements from each of the following witnesses, all of which were read during the reading time at the start of the hearing. Each of the witnesses confirmed the accuracy of their statements, were cross-examined by the claimant, were briefly asked some limited questions by the first respondent's counsel, and (where require) were asked questions by the Tribunal panel. The witnesses who attended from the second respondent were:

    a. Mr David Chambers, at the relevant time the Operational Manager for Urgent Care;

    b. Mrs Christine Bracken, at the relevant time the Operational Manager in the Community Mental Health Team (and the grievance investigator);

    c. Mrs Emma Hinchcliffe, the Service Manager for Community Services; and

    d. Ms Karen Hodgetts, at the relevant time Head of Operations for Salford Mental Health Services.

21. The first respondent's witnesses' evidence was heard from lunchtime on the fifth day until lunchtime on the seventh day. The second respondent's witnesses' evidence was heard from lunchtime on the seventh day until the end of the ninth day (with no evidence being heard on the afternoon of the eighth day due to the claimant's ill health).

22. After the evidence was heard, each of the parties was given the opportunity to make submissions. Written submissions were provided on the morning of the tenth day by all three parties, with verbal submissions made thereafter. Verbal submissions concluded mid-afternoon on the tenth day. An additional eleventh day was added to the listing, so that the Tribunal could reach its decision in chambers on the remainder of the tenth day and the eleventh day.

23. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

Facts

24. As the claimant stated in her witness statement, the claimant is six foot one inches tall and is a black woman. It was the claimant's evidence that she was the only black member of the mental health commissioning and review team in which she worked. There was no black or ethnic minority representation in management or senior management positions.

25. The claimant commenced employment in 2006 and was transferred to the first respondent, having previously been employed by Salford City Council. Both respondents' witnesses emphasised that, as a result, there was some confusion about which policies applied to her. The grievance policy which was applied was the Salford City Council policy, but an element of that was disapplied as the arrangements did not exist within the first and second respondent. The

Tribunal was provided with and referred to a number of relevant policies, which it is not necessary to recount or address in this Judgment. It was relevant that the first respondent's disciplinary policy contains a paragraph regarding counselling, which describes it as an informal discussion designed to offer advice and guidance. The policy describes counselling as not being a disciplinary act and a way to avoid recourse to disciplinary action.

26. The claimant is a qualified registered social worker. At the relevant time, she was based at the Meadowbrook unit, although she also worked at least one day per week from Ramsgate House. The team in which the claimant worked was staffed by employees of the first respondent, but under a statutory arrangement the first respondent delegated certain statutory functions to the second respondent. A group of staff employed by the first respondent were assigned to the second respondent to manage the delegated functions and therefore sat within (or under) the second respondent's line management structure. At the relevant time, the claimant was line managed by Ms Jayne Smith who was an employee of the first respondent. However, Ms Smith was line managed by Mr David Chambers, an employee of the second respondent. Mrs Hinchcliffe, also of the second respondent, managed Mr Chambers. Ms Hodgetts, of the second respondent, line managed Mrs Hinchcliffe. Of those from whom the Tribunal heard evidence, Mrs Bracken (the investigating officer) was also an employee of the second respondent.

27. In her evidence, Mrs Hinchcliffe explained that the particular statutory arrangement can be difficult in terms of managing staff. It created some issues regarding which policy should be used. Within the evidence heard, the question of which policy should be used for the claimant seemed to have created some difficulty and, particularly in the early stages of addressing her formal grievance, some delay. It was also clear that, on occasion, there was some tension between the two respondent organisations about the approach to be taken to staff, which was most notable in the very different approaches taken by the two respondents to the initial period of lockdown and to requiring staff to attend (or not attend) the workplace during that time.

28. The claimant is a social worker. The claimant worked as part of the commissioning and review team from 2016. She reported to Ms Smith. It was clear that Ms Smith and the claimant had a good relationship which went beyond workplace matters, as was evidenced by the content of some of the text messages which the Tribunal was provided. They were not friends outside of work.

29. In early 2020 the claimant suffered a foot injury. As a result, the claimant worked from home for some of her time. This was prior to the Covid 19 Pandemic (or, at least, prior to the initial lockdown in the UK). It was not entirely clear from the claimant's evidence the extent to which she worked from home in the period leading up to 18 March 2020. Taxis were provided for the claimant to attend work when she needed to attend at Ramsgate House. The Tribunal saw an email from Ms Smith in which she proposed giving the claimant a lift to work for some days and sought other volunteers. In any event, to some extent, in the

period during which she was suffering with her foot injury, the claimant was able to work from home with the agreement of the respondents.

30. The claimant and her long-term partner were the primary carers for the claimant's mother-in-law. She had a terminal illness in early 2020 and had been given only a short time to live. Entirely understandably, a primary focus for the claimant and her partner was the wish to keep her mother-in-law out of hospital and to limit the risks to her from Covid 19. On 16 March 2020 the Government made the first announcement of restrictions arising from Covid 19. We do not need to explain in this Judgment the significant fear and uncertainty created as a result. The Tribunal accepted that the risks and concerns for the claimant were much more significant because of the vulnerability of her mother-in-law and the care which the claimant was providing. The Tribunal was also mindful of the importance of considering the events of March 2020 in the context of what was known at the time, and not with the benefit of hindsight from what has occurred since. In particular, at that time, the primary indicator of Covid 19 was identified as coughing.

31. On 17 March 2020 the claimant asked to work from home and to undertake her work remotely. She was told by Mr Chambers that she did not need to attend the premises.

32. The 18 March 2020 was the first day on which the claimant was able to drive herself to work following her foot injury. The claimant was concerned about working in close proximity to others for the reasons explained. The claimant attended Meadowbrook House.

33. The claimant shared an office with Ms Jolley, another social worker. She also shared with Ms Dale, a senior administration officer. One day a week she worked from Ramsgate house, but on the other days (when in work) she worked from that office except when she was undertaking client meetings/visits. It was the claimant's evidence that there had previously been two incidents with Ms Jolley about which the claimant had raised concerns at the time and informed Ms Smith, but which she had not raised formally. The claimant also contended that there had been occasions when Ms Dale had acted inappropriately towards her, which she had also not raised formally.

34. At 9.04 am on 18 March 2020 Ms Smith (the claimant's line manager) texted the claimant and said (420) "*Are you in today? Maureen has cleaned your desk and key board and phone Dian is coughing everywhere"*. Ms Smith's text referred to Ms Dale coughing. It was the respondents' evidence that Ms Dale had had a cough for some time which related to asthma. It was Ms Smith's evidence that she was aware of that and had spoken to Ms Dale's manager about it. The claimant's evidence was that she was not aware that Ms Dale had previously had a cough, or at least that she was not aware that she had been coughing in the period prior to 18 March.

35. The claimant telephoned Ms Smith following receipt of the text message on 18 March. There was no dispute that Ms Smith suggested that the claimant work

in Ms Smith's office. Ms Smith was herself working in another office. The claimant attributed this to Ms Smith's own health concerns. Ms Smith's evidence was that it was a day when she did not work from Meadowbrook because she attended a multidisciplinary team meeting in another location.

36. The evidence was not consistent about what Ms Smith said to the claimant in that call. In her witness statement for this Tribunal hearing, Ms Smith made no reference to giving the claimant any instructions relating to Ms Dale. However, in his witness statement, Mr Chambers placed emphasis on the fact that he understood that Ms Smith had told the claimant to leave it (when referring to Ms Dale's cough) as it was under control. The claimant herself was entirely unaware of any instruction given regarding Ms Dale and expressed being flabbergasted when the allegation was raised later that she had failed to follow an instruction. In her email of 14.22 on 18 March 2020 (437), Ms Smith informed Mr Chambers that "*MC then phoned me shortly after and expressed her unhappiness with DD being in work I said leave it with me to speak to DD and HL her manager".* Based upon the evidence we have heard, the Tribunal accepted the claimant's evidence about that conversation with Ms Smith and found that Ms Smith did not give the claimant an instruction, albeit that Ms Smith might have said the more generic and off-hand comment of "*leave it with me*".

37. When the claimant arrived at Ms Smith's office it was being used by somebody else. The claimant decided to contact Ms Smith to tell her that she would be returning home as a result. Prior to doing so, the claimant went to her own office. The claimant explained that she did so because she needed to write her movements on the movement board in the office, as she was due to be on annual leave on 19 and 20 March.

38. It was the claimant's evidence that she entered the relevant office at approximately 10.15 am. Ms Dale was sat at her desk in the far corner of the room and was on the phone. Ms Jolley was sat at her desk behind the door. Ms Dale gesticulated to the claimant that she wanted to say something to her, so the claimant remained by the door awaiting the end of Ms Dale's call. Ms Jolley passed the claimant wet wipes to wipe the door handle, which the claimant had just touched. They had a brief conversation which included Ms Jolley mentioning that Ms Dale had been coughing a lot that morning.

39. There was a clear dispute about what happened once Ms Dale came off the phone. The claimant's evidence was that Ms Dale immediately said she was fine without the claimant saying anything. The claimant attempted to explain in a calm manner about isolation periods and symptoms including a persistent cough. Ms Dale immediately started shouting at the claimant stating that nobody was going to tell her to go home, that she would go home when she decided, and that she didn't have a cough. She shouted about her husband being fine and not displaying symptoms. The claimant felt bullied and intimidated and shaken. She left the office.

40. It was the claimant's evidence that she needed to return to the office to write her movements on the board regarding annual leave. It was also the claimant's

evidence that, immediately upon her re-entering the office, Ms Dale shouted at her to get out, asked why she had come back there and referred to the claimant as "*pathetic*" and a "*drama queen*".

41. Ms Dale's evidence as recorded in her witness statement for this Tribunal was that the account which she gave later (505) was her recollection. She said that the claimant called Ms Dale pathetic and selfish and told her to shut up three times when Ms Dale tried to speak. The Tribunal did not hear evidence from Ms Dale and the claimant did not have the opportunity to cross examine her. We gave her statement considerably less weight as a result. The Tribunal did not hear evidence from Ms Jolley and no witness statement was prepared for her.

42. Of those present on 18 March 2020, the Tribunal heard evidence in-person only from the claimant. As already stated, whilst a statement was provided from Ms Dale and a reason given (and certified) for her non-attendance at the hearing, Ms Dale's statement was given considerably less weight because her evidence could not be tested by cross-examination. The Tribunal accepted the claimant's account about what occurred in the office on 18 March 2020 and, where there was dispute, preferred her evidence to the evidence from Ms Dale about what occurred.

43. It was the claimant's evidence that she left the office distressed and in tears. She spoke to Mr Fenby briefly about what had occurred. She phoned Ms Smith from a meeting room, but her phone was engaged. Ms Smith then phoned the claimant and spoke to her. The claimant said that she wished to complain about Ms Dale but, due to her level of distress, the claimant wanted to return home and phone Ms Smith from there. Accordingly, the claimant did not provide Ms Smith with a full account when she spoke to her from the offices. She spoke to her later in the day, after the claimant had returned home. Ms Smith in her evidence confirmed that a conversation took place with the claimant when she remembered that the claimant was quite distressed at 10.48 that morning. It was Ms Smith's evidence that she thought the claimant was at home by that point, and she asked the claimant to write to her to email what had happened. It was the claimant's evidence that she spoke to Ms Smith again on returning home and attempted to explain what had occurred but was told to email Ms Smith with the details of the incident. Ms Smith told her not to complain directly to Ms Dale's manager (as the claimant proposed). Based upon the evidence given by the claimant and Ms Smith and their ability to recall events as demonstrated to the Tribunal during cross-examination, the Tribunal accepted the claimant's evidence about her two calls with Ms Smith and what was said. There was no evidence heard by the Tribunal that the claimant alleged or asserted discrimination in either of the telephone calls which she had with Ms Smith.

44. The reason why the claimant had been unable to speak to Ms Smith when she first tried to call her immediately after the incident, was because Ms Dale had telephone Ms Smith to complain about what had occurred. Ms Smith's evidence was that she told Ms Dale to write down everything that had happened and send

it to her and Ms Dale's manager. In her statement, Ms Dale recorded that she also spoke to her own manager.

45. The Tribunal was shown the copy of a text message sent by Ms Jolley to Ms Smith (421) in which she said "*Michelle came in on one and Dian wound her up*. *Jayne it was horrible*". The message had no time recorded on it.

46. It was clear from the evidence that Mr Fenby spoke to Mrs Hinchcliffe. Mrs Hinchcliffe went to the relevant office and spoke to Ms Dale and Ms Jolley (together and at the same time). Mrs Hinchcliffe emailed Ms Smith and Mr Chambers at 11.54 (424). She provided a brief account, saying that there had been an altercation. She stated that Ms Dale was fit to be in work. She said she had asked Ms Dale and Ms Jolley to record what had happened. She asked Mr Chambers to ask the claimant. Even though she had not yet heard from the claimant, she went on to say "*It sounds like quite an unpleasant exchange and not one we would expect or should tolerate in a professional working environment*". The claimant was not aware at the time that Mrs Hinchcliffe had been involved in, or taken the lead in, deciding the approach to be taken, and she only became aware when the emails were eventually provided as part of the subject access request response by the second respondent in 2021.

47. At 12.06 Mr Chambers responded to Mrs Hinchcliffe (429) and explained that Ms Smith had already spoken to the claimant and the claimant wanted to put a complaint in. He explained that Ms Smith was happy to sit down with the claimant and Ms Dale the following day to mediate.

48. Ms Smith telephoned Ms Jolley and asked her to provide an email with details of what had happened (the claimant accepted that occurred, as she was not there). Ms Jolley sent an email at 12.06 (1996) to Ms Smith (copied to Mrs Hinchcliffe). The Tribunal did not hear any evidence from Ms Jolley. In Ms Jolley's email it was recorded that when Ms Dale came off the phone, the claimant demanded that Ms Dale explain why she was in. She described that it became quite heated very quickly. She said the claimant accused Ms Dale of being irresponsible and explained the position with her mother-in-law. The claimant was described as having been very accusatory and not giving Ms Dale the opportunity to explain herself. She went on to describe that it had got very personal, with the claimant making comments about Ms

Dale and Ms Dale responding "*robustly*". Ms Jolley said the claimant accused Ms Dale of being pathetic and selfish, and when Ms Dale responded, shouted at her to shut up. She referred to the claimant as having told Ms Dale to shut up about twelve to fifteen times. She summarised that the whole encounter lasted about fifteen minutes and was very unpleasant to witness. The claimant was described as having come into the office in a heightened state. The statement did not describe the claimant as being intimidating.

49. At 12.27 Mrs Hinchcliffe responded to Mr Chambers email (428). She stated:

"*From the look of Maureen's statement this is not a case for mediation.*

I have asked Jayne to write a statement following our phone call just now. She expressly asked Michelle not to approach Diane and said she would deal with it.

Dave, please will you look at the SRFT disciplinary policy and take some HR advice on this? I think we need to investigate this as a misconduct case"

50. Ms Smith emailed Mrs Hinchcliffe at 12.15 and explained that she had spoken to Ms Dale's manager, and they were both happy to attempt to sort this out. At 12.30 Mrs Hinchcliffe responded to Ms Smith (and Mr Chambers) and said (423):

"*Just to be clear, Dave is checking the policy and having a conversation with HR re this.*

Screaming 'shut up' at a colleague 12/15 times is not professional or acceptable way to behave"

51. Following a further exchange of emails, Mrs Hinchcliffe said further in an email to Mr Chambers (copied to Ms Smith and Mr Fenby) at 13.27 on 18 March (426):

"*It's not urgent as MC is off for a couple of days so we'll need to plan before she returns.*

John, just for info at this stage. We are planning to formally investigate this morning's issues"

52. It was clear from those emails that Mrs Hinchcliffe had already decided at 12.27 on 18 March that the claimant should be placed under an investigation as part of the disciplinary procedure, without seeing the claimant's statement or without identifying what the claimant said had occurred. That decision was largely based upon the verbal accounts of Ms Dale and Ms Jolley (when Mrs Hinchcliffe had visited the office) and the email statement of Ms Jolley. The claimant was unaware until she was provided with a copy of the email in 2021 as part of the response to her subject access request, that Mrs Hinchcliffe had been the person who made that decision.

53. The Tribunal was provided with an exchange of emails between Ms Smith and Ms Leyland on 18 March in which Ms Smith sought a copy of the relevant disciplinary procedure (436) and then asked about who would investigate an allegation involving an employee of the first respondent.

54. Ms Dale sent an email at 13.55 (433) to her manager, copied to Ms Smith and Mrs Hinchcliffe. That email provided a lengthy account of what had occurred from Ms Dale's perspective. It reported what Ms Dale described as a heated exchange with the claimant. She described the claimant as looking at her angrily and, later, ranting. She described the situation as heated and the claimant as being on the attack. She said the claimant was insistent that Ms Dale should not be in work and should leave. She said that she was told to shut up each time she tried to interject. The situation was described as heated and

became so very quickly. Ms Dale recounted that she told the claimant that she was being pathetic too (when she was accused of being pathetic). She stated that she was not leaving work as she was not ill, and she would decide if she would be in work or not and would not be told to leave by the claimant or anyone else. She described her responses as being in a defensive manner. It also corroborated the claimant's account that she had returned to the office to record her movements but did not record what Ms Dale had said when she did so. At the end of the email Ms Dale explained that shortly after the events, Mrs Hinchcliffe had come to the office and Ms Dale had explained to her what happened, and Mrs Hinchcliffe had asked Ms Dale to put in an email what had occurred. The email did not describe the claimant as being intimidating.

55. Whilst the Tribunal has accepted the claimant's account about what occurred on 18 March as being entirely accurate, nonetheless it also accepted that the information which was provided to Ms Smith, Mr Chambers and Mrs Hinchcliffe on the morning of 18 March was as set out in the emails from Ms Dale and Ms Jolley (with the only accounts from the claimant being the brief accounts in her conversations with Mr Fenby and Ms Smith shortly after the events). We accepted that Mrs Hinchcliffe formed her view about what should happen next based upon those accounts (without waiting for the claimant's account).

56. At 14.22 Ms Smith emailed Mr Chambers with her account of events (437). In that email Ms Smith said, about her initial telephone call on 18 March, that the claimant, "*then phoned me shortly after and expressed her unhappiness with DD being in work I said to leave it with me to speak to DD and HL her manager".* She recounted that the claimant had told her later that she had been in the office and Ms Dale had been screaming at her (and had explained the importance of avoiding Covid risk). Ms Smith also described Ms Dale as being very angry about what had happened, when Ms Smith spoke to Ms Dale.

57. The claimant emailed her account of the events to Mr Chambers, copied to Ms Smith, at 15.24 on 18 March (438). She provided a lengthy account of what had occurred, which was entirely consistent with the evidence which the claimant gave to the Tribunal. In the email the claimant said "*I repeatedly asked her to leave me alone, be quiet and get on with her own work….I repeatedly asked her to be quiet and then repeatedly to shut up as a last resort".* After recounting the events of 18 March, the claimant also said that this was not the first time that Ms Dale had exhibited appalling behaviour to the claimant or colleagues. She referred to the incident which she said had occurred in December. The claimant did not allege discrimination in the email. The claimant then said, "*I want to formally complain about Dian's attitude and would appreciate your guidance in relation to how I do this".* In her evidence to the Tribunal, the claimant made it clear that she was genuinely seeking guidance from Mr Chambers about how she should formally complain about Ms Dale, as she had never needed to raise a formal complaint before. Nobody ever explicitly responded to that request. Mr Chambers emailed Ms Smith at 16.10 on 18 March and said, "*Don't respond to this, leave it with me*". It was Mr Chamber's evidence that his response was in the telephone conversation on 23 March.

58. The claimant was on leave on 19 and 20 March. She then had a period of isolation and therefore did not return to the workplace but worked from home. The claimant isolated for a period until 1 April.

59. A terms of reference document was prepared for the investigation. A copy was not provided to the Tribunal. It was attached to an email sent from Mr Chambers to Ms Leyland (the first respondent's HR Advisor for adult social care) at 15.42 on 18 March (443). What was known about the content of the terms of reference could be inferred from the investigation report prepared by Ms Bracken and Ms Kaczmarczyk (805) in which it was explicitly said that the investigation was undertaken into the following terms of reference:

"*1. To investigate whether any of the factors in this incident constitutes as verbal intimidation and/or harassment. Harassment, as defined in the SRFT Bullying and Harassment policy, is 'unwanted conduct related to a protected characteristic which has the purpose of effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for that individual'. The protected characteristic her would be the long term health condition.*

2. To investigate if a direct instruction from a line manager was ignored.

3. To investigate if the behaviour during the incident was in breach of the HCPC 'Standards of conduct, performance, and ethics."

60. On the assumption that the terms of reference included the words reproduced in the investigation report, that was the first time that the word intimidation was used in relation to the claimant or the incident. Intimidation was not a word used in the previous statements. Unlike the definition of harassment, it was also not a word used in the Bullying and Harassment policy to which reference was made.

61. Mrs Bracken (of the second respondent) was asked to investigate the incident on 18 or 19 March. The request was made by Mr Chambers and Mrs Hinchcliffe. She was of equivalent seniority to Mr Chambers. She was employed by the second respondent. She was pregnant and therefore was required to work remotely throughout the relevant period. The terms of reference for the investigation were sent to Mrs Bracken. Mrs Bracken was supported by Ms Leyland and Ms Kaczmarczyk (HR Graduate Trainee for the first respondent, from whom the Tribunal did not hear any evidence). It was Mrs Bracken's first grievance investigation, and it was obvious from her evidence that she relied heavily upon Ms Leyland and Ms Kaczmarczyk during her investigation.

62. Ms Leyland prepared a first draft of the letter to be sent to the claimant regarding the investigation. She emailed it to Mr Chambers at 1.57 pm on 19 March 2020 (447). The first draft which she prepared (448) included allegations summarised in the first paragraph. It was Ms Leyland's evidence that it started as a pro forma letter, and she would have added content to it. That paragraph was specific to this investigation. It stated that the allegation was that the claimant had behaved

in an intimidating manner. The word intimidation had been used in the terms of reference. The draft letter was to be sent from Mrs Bracken, albeit it was Mrs Bracken's evidence that she was not involved in the letter being written. The first paragraph in the draft letter said the following:

"*Further to your conversation with **** informing you that we had received a complaint in regards to your behaviour at work on Wednesday 18th March 2020. The complaint is in regards to your behaviour towards Dian Dale, Administrator where it has been alleged that you behaved in an intimidating manner towards her, and inappropriately discussed her health and fitness to be in work, despite a direct instruction from your line manager not to do so"*

63. When asked about the drafting of this paragraph, Ms Leyland became confused when giving evidence. She initially asserted that the first paragraph had been included following a telephone conversation with Mr Chambers and she suggested that what had been said would have been drafted by Mr Chambers. She then changed her evidence and said that she had been confused when answering the question. She then said that her answer was that she could not remember, she was sorry, she could not recall who had written it. In his witness statement, Mr Chambers referred simply to Ms Leyland providing him with the draft letter which he amended. He made no reference in his statement to being involved in drafting the letter. He acknowledged when questioned that there would have been a conversation with Ms Leyland, but he could not recall having any involvement in the drafting of the words in the first paragraph. In the absence of any evidence to the contrary and in the light of Ms Leyland's final position when asked, we found that the paragraph was written by Ms Leyland. However, we also found that the first time when intimidation had been referred to was in the terms of reference document which Mr Chambers appeared to have drafted (as he sent the email which provided it) and therefore that it was Mr Chambers who first introduced the allegation that intimidation by the claimant had occurred on 18 March.

64. The final version of the letter was not sent to the claimant until 10.59 am on 23 March, after Mr Chambers had spoken to the claimant. The first paragraph of the final letter remained unamended from the draft, save that the word "*myself*" had been added in place of the stars. The majority of the letter set out the process that would be undertaken, which was an internal investigation to gather the facts and to decide whether the matter should proceed to a formal disciplinary hearing under the first respondent's disciplinary procedure. The investigation would establish the facts. No disciplinary action would be undertaken without a disciplinary hearing. The right to be accompanied was outlined. It also stated that, due to Covid, the interview with the claimant would be conducted on the telephone or in a written format. The final version of the letter was sent from Mr Chambers and not Mrs Bracken, as had been proposed in the draft. A paragraph was added by Mr Chambers which said:

"*As discussed during the course of the investigation, you will be based at Ramsgate House to undertake your duties. I am also aware that you raised*

issues about the incident in question, these will also be looked into as part of the investigation"

65. The Tribunal was not provided with an equivalent letter sent to Ms Dale which informed her about the investigation and/or the possibility of disciplinary action being taken against her. It did not appear to be in dispute that there was no such equivalent letter (despite what had been said in Mr Chamber's additional paragraph). In answering questions in cross-examination, Mr Chambers expressed the view that, to some extent, it was semantics whether Ms Dale was also on a disciplinary or not. It was clear from Mrs Bracken's evidence that she understood her investigation to be one which was undertaken as part of a potential disciplinary process for the claimant, albeit she also made reference to the fact that the investigation was into the incident on 18 March.

66. The claimant spoke to Mr Chambers on the telephone on 23 March 2020. There was a conflict of evidence between the claimant and Mr Chambers about whether or not the claimant referred to discrimination in that conversation. The claimant said that she did. Mr Chambers denied that there was any mention of discrimination in the conversation. The claimant relied upon the conversation as being the second protected act. Notably, in none of the correspondence which followed the conversation, including in the lengthy emails in which the claimant took issue with the letter which had been emailed to her immediately following the conversation, did the claimant allege discrimination or make any reference to having done so in that conversation. The Tribunal concluded that had the claimant alleged discrimination in the telephone call as she asserted, she would have made some mention of discrimination in the subsequent emails or, at least to having alleged discrimination in the conversation. As a result, on balance, we found that the claimant did not allege that she had been discriminated against in the telephone conversation which she had with Mr Chambers on 23 March 2020.

67. The final version of the letter (461) was sent immediately following that conversation. The email which attached the letter was sent at 10.59 on 23 March (460). In the email Mr Chambers asked the claimant not to speak to anyone about the investigation, but identified Ms Smith as the claimant's support if she did need to speak to someone.

68. At 12.48 on 23 March the claimant emailed Mr Chambers in response to the letter which had been sent to her (459). She said she took exception to the allegation that Ms Dale had felt intimidated, and she explained why that was the case with reference to what had occurred. She went on to say that she would argue that she was the person intimidated and not Ms Dale. She also objected to the allegation that there had been a direct instruction and explained that there had not been. Notably, the claimant did not allege race discrimination in that email and did not make the assertion that the intimidation allegation was one which stereotyped the claimant as a tall black woman. The claimant ended her email by saying:

"*I fully appreciate that you will be remaining impartial and cannot discuss this but I did not want to receive this letter and see that it is not factual without responding. Do I wait to discuss these discrepancies with Christine? If you can let me know that would be great"*

69. Mr Chambers responded to the claimant's email at 13.10. As with the entire email exchange, it was copied to Ms Smith, Ms Bracken and Ms Leyland. Mr Chambers said:

"*You will have the opportunity to discuss all this with Christine in your interview*"

70. In a continuation of the email exchange the claimant responded twenty-seven minutes later and asked (458):

"*I'm just a little confused as this disciplinary letter seems to be in relation to Dian making a complaint against me however, I'd already complained to you about her and asked that this was dealt with formally. Am I right in saying that Christine will be contacting me in relation to Dian's complaint? If so then who will be dealing with mine? I didn't get a response from either you or Jayne regarding my complaint to you last Wednesday so I'm not clear in relation to how this is being dealt with. Clarification would be much appreciated"*

71. Mr Chambers replied to say that this would be considered as part of the investigation. The claimant responded to say that, as long as her complaint was being dealt with as part of the process, then she was happy with that. Ms Leyland replied to that email at 9.31 in the evening, by saying that they would normally meet with the claimant to ask her questions, but given the situation with Covid "*we plan to conduct the interview over the telephone or/and through written questions"* (457).

72. On 24 March Mrs Bracken emailed the claimant about the investigation and asked the claimant to complete a statement regarding the events (481). She also addressed the unusual circumstances of Covid and said, "*We will however arrange for telephone contact in the coming days"*. The claimant was also invited to contact Ms Bracken or Ms Leyland by phone or email if she had any questions.

73. As part of the investigation, each of the people who could give evidence were asked to provide written statements, and each of them did so. The Tribunal was provided with those written statements. In large part, the content reflected or reproduced the emailed accounts provided. There were statements from; the claimant (491); Ms Dale (505); Ms Jolley (565); and Ms Smith (594). Ms Dale also produced a second statement (506) in which she described the claimant as a really nice person, and an excellent Social Worker who did all she could for the service users who she came into contact with. Ms Dale explicitly stated that she did not want to get the claimant into trouble for the altercation. She also expressed a wish for this to be sorted out soon.

74. At no point during Mrs Bracken's investigation did Mrs Bracken speak to the claimant. She did not speak to her by telephone. Mrs Bracken also did not speak

to Ms Dale. She did speak to Ms Jolly and Ms Smith. It was Mrs Bracken's evidence that she spoke to Ms Jolly because Ms Jolly had telephone Mrs Bracken.

75. In her evidence, Ms Brooking (who heard the claimant's grievance) stated that it was recognised by HR as part of the grievance that the investigation which the second respondent's managers commissioned was not correct process, that Adult Social Services HR should have been consulted and made aware, and that an investigation would not have been the chosen initial response by Adult Social Services HR. That is, she said the approach decided upon by Mr Chambers and Mrs Hinchcliffe was not correct.

76. It was Mr Chamber's evidence that when he spoke to the claimant on 23 March 2020, he informed her that for the period of the investigation into her conduct, when she returned to work in the office from her period of self-isolation, she would be based at Ramsgate House. He explained his reasons for asking the claimant to move (rather than Ms Dale) including because the claimant already worked some of her working week from Ramsgate House, it was similar travelling distance for the claimant, and Ms Dale's role was to do the administration for the commissioning and review team based at Meadowbrook. It was the second respondent's policy at the time that all employees should continue to attend work where possible. As explained below, the claimant was instructed to return to work from 6 April and was instructed to do so from Ramsgate House. In fact, the claimant never did actually return to work in the office or work from Ramsgate House after March 2020 (for the reasons explained below).

77. On 3 April 2020 the claimant emailed Mr Chambers to say that she would be working from home on 6 April (515). She asked about the investigation. She explained that, regarding the seriousness of the virus, she would be working from home and not from Ramsgate House as advised. She said, "*I do not want to put myself, colleagues and immediate family at unnecessary risk when you consider that this is a life and death situation".* She explained her concerns and confirmed her ability to work from home. She emphasised that the priority was to keep her motherin-law safe.

78. Emails were exchanged between the claimant and Mr Chambers on 6 April 2020. Mr Chambers informed the claimant that the expectation was that she would work at Ramsgate House. The claimant responded at some length (527). She said there was no justification for the team to be office based. Within her email (in a paragraph addressing the expectation to be based at Ramsgate House) she said "*Also, given that I have not yet been contacted in relation to my initial complaint made on 18/03/20 or given the opportunity to discuss Dian's treatment of me, I feel that I am being unfairly discriminated against and a presumption has been made in relation to the incident that occurred with Dian. Any investigation should be a fair process".* That was the first time the claimant referenced discrimination in a document to which the Tribunal was referred.

79. Mr Chambers responded to the email by re-asserting that he considered being at Ramsgate House was a reasonable request and he said it was without prejudice (presumably to the outcome of the investigation) and to support a fair investigation. In that email, Mr Chambers also asked whether the claimant had a preference about where she would be redeployed, and he suggested in-patients. When it was put to Mr Chambers that this suggestion was threatening, it was his evidence that he did not intend the email to be threatening, but at that point in time the second respondent was redeploying people to in-patients. The claimant sent a further response expressing her position. A risk assessment was also undertaken on 6 April between Ms Smith and the claimant.

80. In an email of 7 April (575) Mr Chambers informed the claimant that there was an expectation that she would work from Ramsgate House if possible and, if she did not, "*this may be investigated further, which may result in a formal disciplinary action*". In cross-examination Mr Chambers accepted that it probably was not a very sensitive email and he also accepted (as he had done when interviewed as part of the stage three grievance process) that, with hindsight, he probably would have allowed the claimant to work from home. He emphasised, when answering questions, the particular challenges and uncertainties faced at the time with the Covid pandemic and that much of what he said was repeating the guidance in place at the time.

81. At 17.43 on 7 April, the claimant sent an email to an email address which she had obtained (scoicd.covi-19) to raise a complaint about the investigation and, in particular, being told that she could not work at home (1781). The email recounted what had occurred and focussed upon concerns about the health and welfare of the claimant and her immediate family. She stated that her manager was satisfied that she could continue to undertake her work from home. She forwarded her emails with Mr Chambers. She stated that even without the investigation she would not want to return to her office as she did not feel it was safe. She said:

"*I am finding the emails I am receiving from David Chambers very threatening and harassing in nature and it is contributing to a deterioration in my own physical and mental health. I feel that my own health and well-being and personal circumstances are being ignored"*

82. The emails provided to the Tribunal showed that the claimant's 7 April email was forwarded to Mark Albiston (the divisional director for adult social care for the first respondent), Mr Lewarne and (by Mr Albiston) to Ms Hodgetts (of the second respondent). Mr Albiston sent a second email to Ms Hodgetts providing the email trail at 16.58 on 8 April in which he quoted from the claimant's email highlighting certain extracts from what she said (but not highlighting the paragraph about Mr Chambers quoted above). He said (1780):

"*In line with the National Guidance the expectation is that any staff who can undertake their work from home must work from home … It is especially concerning that disciplinary action has been indicated in this email exchange, which is wholly inappropriate and we are asking an officer to come into work*

who is a carer for a family member in a high risk category. I have asked John to speak with Dave and Michelle today so we can ensure Michelle is supported to work from home tomorrow and up to the point that National guidance changes. In addition to this I will need your support to understand which SRFT staff are currently working in the office and the rationale for this decision. As the National Guidance is clear that staff should only come into work if it is absolutely necessary"

83. The above exchange was seen by Mr Albiston, Mr Fenby, Mr Lewarne and Ms Hodgetts. There was no evidence that it was ever seen by Mrs Hinchcliffe, Mr Chambers or Ms Smith. When answering questions about it, Ms Hodgetts explained that she only read the email from Mr Albiston and the parts of the claimant's email explicitly quoted in the extracts he included in his email, she did not read all of the claimant's email. We accepted that she did not read what the claimant said about Mr Chambers.

84. The emails addressed a disagreement at that time between the two respondents about where staff should work. The second respondent's position was that all staff were required to attend the workplace irrespective of whether or not they were in frontline service user facing roles. It was also the second respondent's position that staff could be redeployed to clinical roles. The first respondent's position was that staff should work from home where possible. It also did not agree that social workers could be redeployed to front line clinical roles.

85. Prior to the claimant sending her email to the email address, Mr Fenby had emailed a number of recipients at 17.02 on 7 April 2020, stating that the first respondent's staff were not to be redeployed on the wards (despite the second respondent's request that they should be) (567). Mr Fenby also emailed the claimant on 8 April at 18.29 (583) to let her know that, on Mr Albiston's instruction, she should not be coming into the workplace at the time given the situation with her mother-inlaw. He also said that her coming into the workplace was not necessary and was not in line with Government guidance (583). The Tribunal was also shown emails (1791) between Ms Hodgetts and Mr Albiston in which the dispute about what occurred were aired. Ms Hodgetts complained that Ms Leyland had advised on and proof-read Mr Chamber's email to the claimant threatening disciplinary action if she did not attend work.

86. As already explained, in the Tribunal hearing and in the course of the stage three grievance process, Mr Chambers accepted that with hindsight, he probably would have allowed the claimant to work from home. The Tribunal, whilst appreciating that it had the great benefit of considering events some years after and knowing what transpired with Covid, cannot understand the second respondent's position at the time and fully agreed with what was said in emails at the time by Mr Albiston and Mr Fenby (of the first respondent), that requiring the claimant to attend at work was contrary to Government guidance at the time. We also noted that the first respondent's position, and what was said by Mr Fenby, was considerably more empathetic and appreciative of the claimant's concerns, than the disinterested stance of Mr Chambers and the

second respondent. We found Mr Chambers' emails at the time showed an absolute and complete lack of empathy. The insistence that the claimant attend the offices to undertake work, clearly caused the claimant a considerable amount of anxiety at the time. In his evidence, Mr Chambers emphasised both that the claimant never in fact undertook any work at Ramsgate House and the short period of time in question whilst the possibility of returning to work was in dispute.

87. On 17 April 2020 Mr Fenby emailed Ms Smith to check that the team was working from home (616). Ms Smith responded to confirm that they were.

88. On 17 April Mrs Bracken sent to the claimant a set of written questions which she was asking that the claimant respond to. The claimant asked whether Ms Dale was also to be subject to disciplinary action. Ms Smith and Ms Jolley were also sent questions by Mrs Bracken on the same date. Each of them responded.

89. On 6 May Ms Anna Kaczmarczyk, an HR Graduate Trainee at the first respondent, emailed Ms Leyland providing a draft disciplinary report which she had prepared (744). Ms Leyland forwarded the email and the report to Mrs Bracken thirty-four minutes later. Mrs Bracken did not amend the report. There was no evidence that Ms Leyland or Mrs Bracken attempted to address the queries which Ms Kaczmarczyk had raised about it (the report appeared to have no conclusion even when issued). We did not hear any evidence from Ms Kaczmarczyk but the entirely sensible commentary she provided with the report was as follows:

"*I have not written the conclusion as I am not 100% sure if the allegations I have recorded are correct or if the conclusions are supposed to be definitive answers when they can be. However, for reference, I think my overall conclusion would be that Michelle may have initiated a heated exchange and behaved unprofessionally, but Dian's response was not professional either. They've both engaged in an argument and called the other pathetic and told each other to shut up, and so I don't think this would constitute as one party behaving in an intimidating manner.*

I don't think the line managers 'direct instruction' was clear enough for it to be considered that Michelle defied that. Jayne's statement says that she only said 'leave it with me'.

I think mediation would be an appropriate conclusion to this investigation…"

90. The team in which the claimant worked were asked to undertake Covid assessments of service users. It was Ms Brooking's evidence that she understood that whilst all of the claimant's team worked from home from 17 April 2020, that unlike the other members of the team the claimant worked entirely from home whilst other team members visited clients and undertook Care Act assessments which might require meetings.

91. On 15 May 2020 the claimant was allocated a number of new clients in a spreadsheet, who she was being asked to contact. Immediately after sending

the email, Ms Smith also emailed to say that she would be away and any issues should be raised with Mr Chambers. The claimant responded to Ms Smith with an email asking various questions. The claimant did not respond to Mr Chambers. The claimant's evidence was that she did not respond to Mr Chambers because she objected to him following the emails regarding the place of work.

92. The Covid checklists allocated to the claimant and her colleagues were a new arrangement put in place as a result of the pandemic. The claimant envisaged each checklist completed to be a significant piece of work, which it was clear she considered to be of considerable importance, and which required significant care. Ms Leyland's evidence was that she would expect each one to take only fifteen minutes. Ms Smith also clearly envisaged them to be a quicker review which needed to be undertaken more quickly. Ms Smith emphasised that the reviews allocated did not need to be undertaken at all where the service user was in residential or supported accommodation.

93. The evidence which the Tribunal heard about the allocation of the Covid checklists was somewhat confused. Ms Smith's evidence was that they were fairly and equally allocated to the members of her team. However, even allowing for the fact that different members of the team worked different hours and some members had other responsibilities, that evidence was not consistent with the documents shown to the Tribunal and the numbers of checklists allocated to the claimant. On 15 May the claimant's email to Ms Smith (1159) said that she had: completed seven from the first list; had two outstanding awaiting responses; had done five from the Cromwell list with eighteen left; and there were thirty-nine people on the new Ramsgate list; forty-nine people on the Prescott list; and an unstated number on the new EIT list. The claimant asked whether she was supposed to do them all, and the Tribunal was not provided with any response which either allocated any of the new allocation to others or which allocated anything like that number to other members of the team. On 28 May 2020 the claimant emailed Ms Smith about the checklists allocated to her (2135) and said she was still working through the Cromwell list which had twenty-nine on it and had yet to undertake the checklists for the Prescott list, which had forty-five on it, the EIT, which had two on it, and the Ramsgate list, which had seventy-five on it. Ms Smith emailed the claimant addressing what she said and said that there were fifty-five at Ramsgate (not seventy-five) and thirty-seven of those at Prescott did not need to be done because they were in residential or supported accommodation. In a document which Ms Smith prepared for the stage three grievance hearing (1583) and which she evidenced was accurate based upon the content of the shared reports, Ms Smith recorded that in total one hundred and twenty checklists were actually completed, of which: the claimant completed twentyfour; Janice Fields (who worked two days per week) completed thirty-three; Joseph McClusker (who was full time but also had other duties) completed forty-four; Maureen Jolley (who worked two days per week) completed seventeen; and Ms Smith herself did one (which appeared to be one the claimant had said she could not do in the light of previous issues with the service-user). On the basis of those totals, it was clear that the claimant

did not in fact complete an unfair or disproportionate number of the checklists actually completed. However, Ms Smith was unable to explain the significantly higher allocation made to the claimant, when the number of checklists she was allocated was taken into account (which based upon what Ms Smith said in the exchange of 28 May appeared to have been ninety-four excluding those in residential or supported accommodation).

94. On 19 May 2020 the claimant sent an email to Ms Dale raising a query from a Doctor about payment and asking her to telephone him (1129). It was the claimant's evidence that she did not deal with Ms Dale very often, but, on this occasion, this was something which was Ms Dale's responsibility. The claimant received no response. She said in evidence that she was notified with a not read reply that there had been no response, although she was not sure why or when that had occurred. On 12 June 2020 the claimant emailed Ms Smith, copied to Ms Dale, asking her to check if the email of 19 May had been dealt with. That email was sent at 14.20. At 14.24 on the same day, Ms Dale responded to the claimant to say that she had received and was dealing with the message. The claimant responded at 14.24 and said, "*That's great thanks*" (copied to Ms Smith). The first of those emails was the only email which we were shown which evidenced Ms Dale not responding to the claimant or undertaking something which she was asked to do by the claimant at the time.

95. As part of her investigation, Mrs Bracken did not speak to the claimant at all. She also did not speak to Ms Dale. She did speak to Ms Jolley who telephoned her.

She also spoke to Ms Smith. It was Mrs Bracken's evidence that she felt it was not necessary to set up any meetings with the claimant because she had received the information she had sought by email. It was Mrs Bracken's view, on balance (and based only on the documents and emails provided by the claimant, without speaking to her) that she considered that the claimant was likely at least to have shouted at Ms Dale and that it was more likely than not that the claimant had instigated the altercation. She did not feel that Ms Dale's behaviour warranted any further action. In her witness statement, Mrs Bracken emphasised that race was not a factor in her investigation (and it was not mentioned by the claimant).

96. The Tribunal was shown a draft version of the outcome letter following the disciplinary investigation, in which Mrs Bracken proposed to impose a formal warning on the claimant, which would remain on the claimant's personal file for twelve months (812). Mrs Bracken proposed imposing that sanction even though she had not spoken to the claimant and even though there had been no disciplinary hearing arranged or undertaken. That sanction was ultimately not imposed.

97. On 26 May 2020 Mrs Bracken sent an email to the claimant (823) attaching the letter which contained the outcome of the investigation (824). In that letter she stated that the outcome was that it did not warrant any formal action. She went on to say that:

"*however further Informal Counselling must be undertaken to support a change in your conduct following the behaviours you displayed on 18th March 2020.*

The investigation has indicated that the conduct you displayed on 18th March 2020 was unsatisfactory and was not in line with the Trust Values and what is expected of a Registered Social Worker. I feel that there was a breakdown in communication between yourself and Dian Dale and Mediation could be considered to address this breakdown in communication."

98. The letter contained no right of appeal. The letter did not contain a period of time after which it would be removed from the claimant's file. No equivalent letter was sent to Ms Dale, indeed it did not appear that Ms Dale was sent anything following the end of the investigation.

99. The Tribunal found Mrs Bracken to be a thoroughly unimpressive witness who took no ownership whatsoever of the report produced following her investigation. It was very clear from her verbal evidence that Mrs Bracken did not consider that the investigation which had been undertaken was one which met the standard expected and she repeatedly emphasised that, if she undertook the investigation again, she would conduct it differently. She particularly emphasised the Covid situation when the investigation was undertaken and her own personal circumstances at the time (she was shielding due to pregnancy).

100. In terms of the investigation's outcome, the Tribunal found that the letter sent was a sanction and was critical of the claimant. In terms, it was a warning given to the claimant albeit not stated to be a warning and not a formal warning within the first respondent's policy. The claimant was given no right to attend a hearing before the warning was imposed. She was not given a right of appeal. There was also, importantly, no time limit recorded for how long the critical letter would remain on the claimant's file. In practice therefore, the claimant was placed in a worse position than if a formal warning had been imposed (as that would have involved a hearing, a right of appeal, and a time limit for how long it would be live). The Tribunal accepted and noted that a counselling recommendation was included in the first respondent's policy as being something which could be imposed in the way it was (being something which is neither reflected in nor supported by the ACAS code of practice on disciplinary and grievance procedures).

101. Ms Smith returned from the leave which she had commenced on 15 May on or around 26 May. She emailed the claimant. The claimant herself had a period of leave from 1-8 June.

102. On 8 June 2020 Ms Smith emailed the claimant about the allocation of clients for assessments. Some of the claimant's colleagues had undertaken some of the reviews upon which the claimant had been working prior to her annual leave. They would not have been aware that she was doing so as it was the claimant's evidence that only completed review forms were saved to the central location which was accessible to all. The claimant objected to this allocation as she had

undertaken some work on some of the checklists, which had been re-allocated and undertaken by others while she was away.

103. From 15 June 2020 Mr Chambers took over the claimant's line management from Ms Smith (891). It was Mr Chambers' evidence that the reason line management was changed was because Ms Smith had issues with her health and one of the things which Ms Smith perceived was impacting upon her levels of stress was needing to line manage the claimant. Mr Chambers presented the decision as being one which was taken with the intention of trying to ensure that Ms Smith continued to be able to attend work. That evidence was broadly corroborated by the evidence of Ms Smith herself. It was the claimant's case that the reason why there was a need to change managers was entirely fictitious and that the change was made because of her race and in order to bully and harass her. The Tribunal entirely accepted Mr Chambers' and Ms Smith's evidence about the reason for the change and found their evidence on that issue to be genuine and truthful.

104. It was also part of the claimant's case that it was unreasonable and discrimination on the grounds of race for the line manager to be changed to Mr Chambers, someone who the claimant had already alleged had acted in a way towards her which amounted to bullying and harassment. Mr Chambers' evidence was, in summary, that there was no one else at the relevant level who could line manage the claimant and, other than Mrs Hinchcliffe who was more senior, there was nobody else with the appropriate knowledge of the team who could undertake the management. His evidence was that although he had had challenging conversations with the claimant about the need to work in the office in March 2020, he was not aware that the claimant continued to believe that he had bullied and harassed her. It was his evidence that, had he done so, he would not have taken on responsibility for managing the claimant. The Tribunal accepted the evidence given by Mr Chambers about the reason why the decision was made to change the claimant's line manager to him personally and accepted that it was not done because of the claimant's race or to bully and harass the claimant.

105. Unfortunately. the claimant suffered a bereavement on 4 July 2020. Flowers were sent to the claimant, which she acknowledged she had received. The claimant had a period of compassionate leave which followed the bereavement.

106. While the claimant was absent, her trade union representative emailed asking that she be supported (925)

107. The claimant commenced a period of long-term absence on ill health grounds on either 13 or 20 July 2020 (928/948). From the claimant's evidence it appeared that she was on self-certificated absence for the first week and absence covered by a fit note for the absences thereafter. There was no dispute that fit notes to cover the absence were provided throughout the claimant's period of absence. She did not return to work prior to her resignation on 20 August 2021. As the claimant had already had periods of ill health absence, her full pay expired soon after her absence commenced and, thereafter, she would

have received six months of half pay. On occasion, during the absence, full pay was paid as a result of acknowledged delays in matters progressing.

108. On 23 July an email was sent from Mrs Hinchcliffe to Ms Smith and Mr Chambers which confirmed that Mr Chambers would be the line manager for the claimant (935). Ms Leyland asked Mr Fenby to contact the claimant whilst she was on sick leave on 30 July (936). Mr Fenby's evidence was that he did not because he sat outside of the line management structure as a link person between various organisations. When being cross-examined, the claimant was very clear that she was not alleging that Mr Fenby personally had discriminated against her, rather her allegation arose from the fact that it had been agreed by others that he would, and he did not.

109. The claimant submitted a formal grievance on 3 August 2020 (937). This was the third alleged protected act. In the grievance the claimant said that she believed that the behaviour and conduct of Ms Dale was direct discrimination on the grounds of race. She said that the investigation undertaken by Mrs Bracken had been discrimination on the grounds of victimisation. She said that she believed that the behaviour and conduct of Mr Chambers was victimisation and bullying on the grounds of discrimination. She referred to the email of 23 March in which she had been told that she was subject to a disciplinary investigation. She also referred to the emails about working from Ramsgate House and not being allowed to work from home. She also alleged that the behaviour and conduct of Ms Smith was victimisation and bullying on the grounds of discrimination. In the conclusion of the grievance in stating what she was seeking, the claimant: asked for her initial complaint against Ms Dale to be investigated; for Ms Dale's behaviour to be addressed; For an apology from Ms Dale; for action to be taken against Ms Dale; for full disclosure of Mrs Bracken's investigation; for acknowledgement and apology from Ms Smith and Mr Chambers for their behaviour towards the claimant; and for all those involved to receive training in relation to discrimination, victimisation and bullying.

110. As a result of the claimant's grievance and the fact that Mr Chambers was named within it, the decision was made to change the claimant's line manager from Mr Chambers to Mrs Hinchcliffe (his line manager and someone employed by the second respondent and not the first respondent). The claimant was informed of this in an email from Ms Leyland of 5 August 2020 (944). The claimant objected as she did not believe that Mrs Hinchcliffe would be impartial (945). The claimant's position at the time was based entirely upon the fact that Mrs Hinchcliffe was Mr Chamber's line manager. Subsequently and following receipt of the response to the subject access request in 2021, she also identified that Mrs Hinchcliffe had in fact been involved in the decisions made immediately following the events of 18 March 2020 (albeit she did not know that at the time).

111. Long term sickness absence meetings were scheduled with Mrs Hinchcliffe on 14 September 2020. In a letter of 16 September (1041) it was confirmed that the meeting was cancelled and rescheduled for 28 September. Meetings (virtually and not in person) took place on 28 September (1058), 12 October (1066) and 26 October 2020 (1076).

112. The claimant alleged that in the meeting on 12 October Mrs Hinchcliffe suggested that the claimant look for an alternative. She took this to mean alternative employment, albeit she accepted that Mrs Hinchcliffe did not explicitly say that. Mrs Hinchcliffe denied that she did. Some subsequent correspondence about this is referenced below. We did not find that the claimant was told to look for work outside the organisation as she suggested. Had that been said in a meeting, we had no doubt that the trade union representative present would have intervened and raised it and would have made more significant statements about it in subsequent emails. We do accept that something was said in the meeting about the claimant looking for alternatives, but in terms of the precise nature and position of her role and the wish to identify a way in which the claimant might be able to return to work.

113. Ms Hodgetts initially arranged for Rebecca Hughes to conduct the claimant's grievance. In evidence, she explained why she felt that Ms Hughes was the best person to do so. On 14 October 2020 Ms Hodgetts exchanged emails with Ms Hinchcliffe, Ms Hughes and others (1074). The email of 14.06 followed a half hour conversation with Ms Nott. Ms Hodgetts was clearly frustrated and said, "*Round and round the garden we go*". When cross-examined about this, Ms Hodgetts emphasised that her frustration and the words used were about the fact that the correct procedure had not been identified and not about the claimant. In a later email of 16 October Ms Hodgetts confirmed that it had been identified that the need to address the grievance fell "*fairly and squarely*" with the first respondent and that it would arrange the panel. Ms Hodgetts' evidence was that legal advice had been obtained that the grievance should be addressed by the first respondent using its procedure. Ms Hughes did not conduct the grievance. Ms Brooking (of the first respondent) conducted the grievance instead. It was both respondents' evidence that the initial period of delay in addressing the claimant's formal grievance arose from this confusion and discussion around the correct procedure. The emails evidenced that the issue was only resolved on 16 October 2020, two and a half months after the claimant had raised her formal grievance.

114. In an email from the claimant to Ms Leyland on 9 November 2020 (1083) the claimant explained that she did not consider the sickness monitoring process being undertaken by Mrs Hinchcliffe to be a supportive process for her. She explained that she had specifically asked Ms Leyland at the outset of the process to allocate someone impartial to undertake the sickness monitoring and to provide support. She also referred to Mrs Hinchcliffe in the second meeting to have suggested that due to this being a difficult situation that she look for an alternative. The claimant did not recount in the email that Mrs Hinchcliffe had made a reference to leaving her job but did go on and say that she had specifically stated during the meeting that she would not be leaving her job.

115. On 9 November 2020 Ms Leyland invited the claimant to a stage two grievance meeting to be held on 17 November 2020 (1094). Whilst described as stage two, this was in fact the first grievance meeting to be held with the claimant. It was also the first formal contact with the claimant about her grievance since either the issue raised on 18 March 2020 or the formal grievance raised on 3

August 2020. In her evidence, Ms Brooking explained the delay in the grievance being progressed by reference to Covid and the resultant busyness of her role. She explained that the unprecedented circumstances unfortunately resulted in some delay. The respondents' explanation was that the majority of the delay resulted from the difficulties arising from the different procedures in place.

116. The grievance hearing took place on 17 November 2020. The claimant was accompanied by her trade union representative. Ms Leyland took notes. Ms Brooking conducted the hearing. The notes were provided to the Tribunal (1235). The claimant did not believe that the notes were accurate. Ms Brooking's evidence was that they provided a good overview of the meeting and insight into the discussion. The notes record that Ms Brooking raised the issue of unconscious bias regarding how Ms Dale perceived the claimant as intimidating and the attitude of seeing the claimant as intimidating and the perpetrator. Ms Brooking was recorded as saying about the disciplinary investigation report and outcome (1241):

"*I appreciate your frankness, in relation to report. I accept what you are saying, it cannot be seen as a report that looks at the full picture"*

117. Following the meeting, Ms Brooking phoned Mr Fenby about providing support to the claimant. She also emailed him on 18 November 2020 (1243). The claimant also provided some emails to Ms Brooking following the meeting.

118. Further long-term sickness absence meetings took place on 16 and 30 November 2020 (1208 and 1257). Absolutely nothing was achieved at the first meeting as it was acknowledged that the grievance was about to be heard.

119. Ms Brooking emailed the claimant on 17 December 2020 (1319) to update her on the progress of the grievance. She explained that it had not been possible to schedule the meetings required prior to Christmas.

120. Stage two grievance investigation meetings took place between Ms Brooking and Ms Smith (1341) and Ms Brooking and Mr Chambers (1345) on 30 December 2020. Based upon those interviews, Ms Brooking's view was that other team members did have fewer reviews/checklists allocated to them, but they were undertaking statutory functions. When cross-examined about the fact that other team members were also not working from the office from 17 April 2020, Ms Brooking drew a distinction between the others who would attend client meetings where required and therefore undertook Care Act Assessments; and the claimant who worked only from home without contact with others and therefore did not do Care Act assessments but only did Covid reviews. As the claimant highlighted, the wording used by the respondents' witnesses on this issue was not always correct, as they referred to the claimant working from home in contrast to her colleagues; when the contrast was actually being between the claimant who worked only from home and her colleagues who worked from home but could also attend client meetings.

121. In his interview with Ms Brooking, Mr Chambers made unsupported assertions that the claimant's work was poor and slow. The Tribunal was provided with no evidence which supported those comments. It was Ms Brooking's evidence that she did not take what was said into account in her decision as it was not what she was addressing.

122. There was some lack of clarity about which documents Ms Brooking had when reaching her decision. She was honest in her evidence that she could not recall precisely what had been provided to her. She said that she could not recall being shown the claimant's email sent immediately following the incident on 18 March. In re-examination she confirmed that she believed she had been shown the statement made by the claimant on 25 March 2020 (491), which contained the same account as the original email. In his interview with Ms Brooking, Mr Chambers asserted that the investigation had been asked to consider both the claimant's complaint and that of Ms Dale. Ms Brooking had clearly accepted that statement at face value. In cross-examination she confirmed that she accepted what she was told by Mr Chambers and Ms Smith and did not investigate to validate or evidence what they told her. From questions asked of her, it was clear that Ms Brooking had not seen the letter informing the claimant that she would be the subject of a disciplinary investigation (461) and was unaware of the difference in treatment of the claimant and Ms Dale in that respect.

123. In her evidence, Ms Brooking confirmed that: she had been aware that the second respondent's managing director at the start of the pandemic had given a clear instruction that all seconded social workers were to be placed into other ward roles; and that the second respondent in the early days of the pandemic had been very concerned to establish working practices that enabled them to continue to deliver a service and which asked staff to relocate to wards across the second respondent. Ms Brooking also said in her evidence that she felt that much of what had happened was down to the nature of communication in the early stages of the pandemic. Ms Brooking concluded from the investigation undertaken, that there was no evidence that the altercation, the subsequent investigation, or the management/workload changes, were in any way related to the claimant's race. In her evidence, Ms Brooking emphasised that she recognised that the claimant had a firmly held perception that the initial altercation was related to race and that there was an undercurrent of racism which underpinned the events which took place (with which Ms Brooking said she could not agree). Ms Brooking also denied that the claimant was treated less favourably in relation to the stage two grievance process or that it was because of race. We found Ms Brooking to be a genuine and credible witness and we accepted her evidence that neither the delay in, nor the outcome of, the grievance process was because of the claimant's race or because of any complaints of discrimination which she might have raised.

124. The outcome to the stage two grievance was provided in a meeting on 4 January 2021 conducted by Teams (when Ms Brooking's systems went down and she left the meeting without returning). It was said the outcome would be provided on 5 January, but it was not. The outcome to the stage two grievance

was confirmed in a letter emailed on 6 January 2021 from Ms Brooking (but dated 5 January) (1389).

125. The grievance outcome letter was relatively detailed and lengthy. Ms Brooking apologised for the time it had taken to respond to the grievance. It addressed matters using a format agreed in the hearing: initial incident; the handling of the incident and relationships with managers; and on-going issues.

126. With regard to the original incident, Ms Brooking said:

> "*It is clear Dian Dale was demonstrating symptoms of Covid-19 and I can see why you were anxious about entering the office because of your personal situation, and how vulnerable your Mother in Law was in terms of her health…*
>
> *We have not identified any evidence that the altercation was motivated by views of discrimination…*
>
> *With the benefit of hindsight the incident occurred at a time at the start of the pandemic and there are clear protocols and guidance to follow where employees are presenting Covid-19 symptoms"* And as a conclusion she also said:
>
> *"I feel this incident was managed in the context of a very challenging time for all employees within the team, heightened tensions led to an unfortunate altercation, and it is understandable that you perceived the incident to be targeting you directly. The findings of the investigation is that it is not possible to lay blame with any individual, practice could have been more professional all round but this does need to be seen within the context of the fear and stress of the pandemic,*

127. Ms Brooking confirmed that the investigation did not provide the claimant with the full opportunity to provide a full response as it was not conducted face-to-face. She said that a new Just Culture framework was being adopted and would be required to be followed before an investigation was instigated. The recommendation for mediation was maintained. However, Ms Brooking said (under a further conclusion heading) (1391):

> "*Unfortunately circumstances at the time meant the investigation was not conducted in the way we would have liked or expected. I apologise that you felt you were not given the opportunity to provide a response in regards to the allegations made against you….*
>
> *… David commissioned the investigation requesting that all perspectives were fully considered. David and Jayne have both apologised for the stress and upset that has been caused by the method taken in the investigation"* 128. In the section on the handling of the incident, Ms Brooking said:
>
> "*I can see that the outcome that was recommended following the investigation is that a meeting should be held with you in regards to your alleged behaviour*

> *at the incident in March 2020. On reviewing the investigation I do not feel the informal counselling meeting should take place"*

129. With regard to the ongoing issues, Ms Booking also addressed those and stated that she did not find evidence of discrimination. She supported the decision to change the claimant's line manager from Ms Smith but said it "*unfortunately was not well communicated to you at the time".* She also said, of the perception that the claimant was treated differently, "*However on reflection, David Chambers can appreciate how you might have interpreted the change of your line manager in this way and for this he is very sorry".*

130. Ms Brooking apologised for the delays in addressing and providing an outcome to the grievance. She concluded that, on the findings of the investigation it was not possible to lay blame with any individual. Of the investigation she said, "*the panel did feel the incident could have been dealt with differently without a formal investigation taking place*". Also, within her conclusions, she said the following:

> "*It is clear that you feel you have been treated differently in relation to Discrimination on the grounds of Race, and whilst I have found no evidence of this, I recognise that this is your experience and I do not in any way wish to invalidate your experience of how you perceived what happened. I believe that communication could have been better between the managers and yourself, and that having a heightened appreciation of the impact of unconscious bias is an important outcome of this grievance"*

131. The Tribunal had difficulty in understanding exactly what that paragraph meant in the circumstances of the grievance being addressed. It was clearly intended to placate the claimant. In many ways, Ms Brooking did <u>not</u> determine the grievance which the claimant brought, save for the acknowledgement that the claimant should not have been subjected to a formal investigation and overturning the sanction imposed of counselling.

132. The claimant emailed Ms Leyland and stated that she would be appealing the grievance outcome in its entirety on 11 January 2021 (1402). The grievance appeal was emailed on 19 January 2021 (1422). The claimant set out within her appeal what it was she was looking for and the issues which she had with the grievance process.

133. A further sickness absence meeting took place on 7 January 2021, the outcome of which Mrs Hinchcliffe confirmed in writing (1419). It was agreed that a phased return to work would be appropriate when the claimant was fit to return.

134. On 15 February 2021 the claimant emailed Ms Nott at some length raising issues with the support which she had received whilst absent (1451). She emphasised that she had repeatedly asked for an impartial person to provide her support whilst off sick and she had explained that this had been ignored with the appointment of Mrs Hinchcliffe who was Mr Chambers' manager. She said that was not a supportive process. She said that until her grievance had been appropriately and fairly dealt with, it was impossible to have a supportive and realistic return to work.

135. The claimant made a data protection subject access request. She made it to the first respondent. The request was made in January 2021 and the disclosure was only provided with a delivery to the claimant's home on 25 March 2021. In her witness statement, Ms Jallow explained why the process was delayed including with reference to the high volume of emails received and the limited number of people within the relevant team responsible. It also took HR some time to collate the requested information. It was Ms Leyland's evidence that she dealt with the claimant's subject access request in the same way as she would have any other subject access request and that the delay was due to workload pressures.

136. When the claimant received the outcome to her data protection subject request, she identified that the vast majority of the documents she had been seeking had not been included. The explanation provided was that the relevant information was held by the second respondent and not the first respondent and the request had only been made of the first respondent. The claimant objected to the fact that Ms Leyland had not informed her that would be the case. Ms Leyland's evidence was that it did not occur to her to inform the claimant that she could/should make a request of the second respondent. She stated that she did not take any particular course of action because of the claimant's race. Ms Jallow in her statement stated that she did not deliberately misinform the claimant about the procedure, and she did not know that the claimant had an email account with the second respondent as well as the first respondent. The claimant did subsequently make a request of the second respondent and documents were provided.

137. The claimant was informed about the date for the stage three grievance meeting by her trade union representative in an email on 10 February 2021 (1446). The claimant had not been provided with the information in error as her work email address had been used for the invite (1461).

138. It was initially proposed that Mr Albiston would be a member of the stage three grievance panel, but the claimant's trade union representative objected to him being a member, in an email to Mrs Nott on 12 February 2021 (1449). Mr Albiston was replaced by Mr Lewarne and the claimant was informed in a revised letter of 3 March inviting her to the hearing (1481)

139. In an exchange of emails between the claimant's trade union representative and Mrs Nott, the Divisional HR business partner, the Unison representative provided her account of what had been said to the claimant about roles during the sickness absence meetings. In an email of 12 February 2021 (1458) she said "*The original advice given to Michelle was to change her job/team which is not the desired outcome. As I am in work on duty I don't have the time to check who made this statement, but I could get back to you on that if it is required*". The Tribunal noted that absence of any statement, evidence, or email from the Unison representative which corroborated what the claimant alleged had been said by Mrs Hinchcliffe in the meeting on 12 October when the trade union representative had been present. The Tribunal did not find that the contention that the claimant had been told to find alternative employment, was consistent with what was said by the Union representative in this email to Mrs Nott. If the representative had heard the claimant being told that she should find alternative

employment (or words to that effect) she would have recalled that and recounted it in this email, rather than limiting herself to saying what she did.

140. The stage three grievance hearing took place on 10 March 2021. The Tribunal was provided with handwritten notes of the meeting (1525). The Tribunal heard evidence from Mr Lewarne who conducted the meeting and Ms Nott who assisted him. The claimant was accompanied by her trade union representative. Ms Brooking and Ms Leyland attended, as did Ms McCabe who took the notes. The notes record that Ms Brooking said that she absolutely agreed that lots of things had been far from ideal practice. Following the end of the appeal meeting, Mr Lewarne decided that he wished to receive further information. He sought additional evidence from Ms Brooking, as much of the documentation had not been provided at the stage three hearing because reliance had been placed on the claimant and her representative to produce the documents upon which they wished to rely.

141. The claimant's trade union representative made a request that a different manager conducted the claimant's long term sickness absence meetings. She emailed Mr Albiston about that on 18 March 2021 (1551). As a result, a conversation took place between Ms Hodgetts and Mr Albiston on 1 April 2021, when they agreed that Mrs Hinchcliffe should remain the responsible manager. On 6 April 2021 Mrs Hinchcliffe emailed Ms Leyland (1591) and said it had been agreed that it would not be appropriate to change to the manager managing the claimant's return to work.

142. In Mrs Hinchcliffe's supervision meeting on 8 April 2021, it appeared from the notes that Ms Hodgetts told Mrs Hinchcliffe that she should continue to manage the claimant's sickness absence, something which Ms Hodgetts' confirmed in evidence. The Tribunal was provided with the note of the one-to-one meeting which Mrs Hinchcliffe had with her manager, Ms Hodgetts (1593). That note was not seen by the claimant at the time. The note recorded that the claimant "*will return to having falsely accused her colleagues/managers re racism*". It was not clear who had said what was recorded and the notes did not provide a full account or record of the context in which it was said. The claimant was unaware of the conversation or the note at the time or during her employment.

143. Ms Smith (with support from Mr Chambers) provided a document which contained additional information sought as part of the stage three process (1581). Within that document Ms Smith addressed the allocation of the Covid checklists. In the Tribunal hearing the claimant contended that the information provided by Ms Smith was not accurate. Ms Smith's evidence was that the information about completed checklists which she provided was obtained from the system. What was said was:

> "*During this period MC took annual leave, and to support her at the beginning of June, I allocated approximately 12 of her outstanding reviews to other team members 6 to JF and 1 that MC asked for someone else to do due to previous difficulties – which I did, despite them having already completed their allocation of reviews.*
>
> *On her return from leave it had become clear that MC was struggling to manage her workload and to prioritise on check lists. So at this point I felt the best way*

to support MC was to allow her to focus on the Covid checklists and reallocate all other aspects of her role within the team. To make this fair and equitable within the team, I also allocated the remaining reviews (41 approx.) of the service users whom we had struggled to make contact with ... along with those she had yet to complete from her original allocation from Cromwell house which was 18 making a total of 59…

Out of approximately 120 completed Covid checklists JF (working 2 days per week) completed 33, JMcC 44 (full time but also AMHP), MC 24 (Full time), MJ 17 (Working 2 days per week) myself 1 (manager)…

The rest of the review team were advised to work from home from April 2020 following SRFT advice"

144. On 7 May 2021 the claimant's union representative emailed Mrs McCabe and requested that any long-term sickness absence meetings with the claimant were not held with Mrs Hinchcliffe (1627). On that occasion the request was explained by the fact that the claimant had now found out that Mrs Hinchcliffe had been involved in the disciplinary case at the beginning. In the subsequent email exchange, the union representative (1628) recounted that in the first meeting the claimant had been told by Mrs Hinchcliffe to go and work for a different team. The claimant added to the email exchange herself (copied to Mrs McCabe and others but sent to the Union representative) (1629) re-iterating that she had said since the meetings with Mrs Hinchcliffe had commenced that she was not comfortable with Mrs Hinchcliffe as she considered her to not be impartial because she was Mr Chambers' manager. She also said "*To clarify, at the first Its meeting, Emma suggested that due to it being a 'difficult situation' I should 'look for an alternative' – basically get another job*". She then went on to explain that she now knew through the subject access request that Mrs Hinchcliffe had spoken to Ms Dale following the incident and had direct involvement as a result. She questioned why Mrs Hinchcliffe had not mentioned her direct involvement in any of the meetings with the claimant. She went on to say, "*I am more than happy for the Its meetings to continue but as I hope you will appreciate, Emma is clearly not an appropriate person to undertake these*". On 13 May, Mrs McCabe emailed the claimant and her representative and said the request to change management had been considered by Mr Albiston and it was not something which could be facilitated (1631).

145. The outcome to the stage three grievance was provided to the claimant in a letter from Mr Lewarne of 10 May 2021 (1632). In evidence, Mr Lewarne confirmed that he was the decision-maker, albeit that the outcome had been discussed with Ms Nott. In his outcome letter, Mr Lewarne addressed the six points which he had understood to have been raised in the appeal. On the complaint and investigation, he found that the investigation undertaken (by Mrs Bracken) appropriately considered the claimant's complaint. He went on to say:

"*there are clear learning opportunities to take forward from the investigation. We believe that you should have been afforded the opportunity to discuss your complaint. We also felt that the outcome of the initial investigation should have*

been delivered to you in person to discuss how those conclusions had been determined"

146. The outcome also addressed the investigation undertaken by Ms Brooking including concluding that there had been an equitable distribution of workload across the claimant's team. It was acknowledged that there had been significant management delay in progressing the grievance and Mr Lewarne said, "*I would like to sincerely apologise for this unacceptable length of time*". The letter also concluded by responding to a list of points which the claimant had raised as potential resolutions sought.

147. Mr Lewarne denied treating the claimant any differently due to the grievance she had raised. It was his evidence that he approached the third grievance stage in the same way as he would have approached any investigation. He denied that any of his conduct was motivated by race. In his evidence to the Tribunal, he acknowledged that there were some aspects of the investigation into the incident which could have been better handled.

148. When Ms Nott was asked about the delay in the claimant's grievance being concluded, she apologised for the time it had taken, saying that she was extremely sorry. However, she emphasised that, in her view, the period of delay which had been unacceptable was the three-month gap, or one hundred and six days, at the start of the process between the grievance being submitted and November. That was the period for which Ms Nott agreed that the claimant's full pay should be extended. In answer to a question about whether ten months to conclude a grievance process was a long time, she answered that no, it depended upon the grievance and the people involved. She also emphasised that the delay was not because of the claimant's race or the colour of her skin.

149. Following further emails from the claimant and her trade union representative, the first respondent made the decision to reinstate the claimant to full pay for the entire period up until 10 May 2021 as a gesture of good will and as an exceptional case. The decision was made by Ms Warner, the Acting Director of HR (1657).

150. The claimant sought some of the information upon which Mr Lewarne had relied in reaching his decision, which had not previously been provided to her. It was provided. She responded to Mr Lewarne with a lengthy email on 26 May (1688). She highlighted in a document provided with her response, the discrepancies which she believed she had identified in the information provided. Mr Lewarne replied on 28 May (1687) highlighting the nature of the stage three decision. He did not address in any detail the additional information which the claimant had provided.

151. Further long term sickness absence meetings were arranged for 5 May and 28 May. Both were cancelled, the latter due to unforeseen circumstances (1667). The meeting took place on 9 June and the outcome was confirmed in a letter from Mrs Hinchcliffe of 17 June (1704). It was noted that the claimant had again

requested an independent manager to facilitate the review meetings. Some proposed supportive measures were set out in the letter.

152. The claimant's ACAS early conciliation period with the first respondent commenced on 11 June 2021 and continued until 23 July. With the second respondent, the ACAS early conciliation period was for the shorter period of 13 to 16 August 2021.

153. On 17 August 2021 Mrs McCabe emailed the claimant to inform her that Rebecca Billington would be taking over management of the claimant's long-term sickness absence from Mrs Hinchcliffe (1734). The reason for doing so was because Mrs Hinchcliffe was starting a secondment. There was no dispute that the claimant had been seeking to have Mrs Hinchcliffe removed as the manager dealing with her sickness absence since her appointment in 2020. The claimant relied upon the replacement of Mrs Hinchcliffe with Ms Billington as the manager responsible for her during her sickness absence, as being the final straw. Ms Billington emailed the claimant on 18 August and proposed a meeting via teams/phone.

154. On 20 August 2021 the claimant resigned. In her resignation (1736) she said that she was resigning in response to a repudiatory breach of contract by her employer and that she considered herself to have been constructively dismissed. She referred to her formal grievance of 3 August 2020 and the process followed. She went on to say:

"*The final straw being the email I received from you on 17/08/2021 in which you state that Rebecca Billington (Service Manager at GMMH) will now be replacing Emma Hinchcliffe … in undertaking Long Term Sickness meetings with me. As you are aware, I have been asking for the removal of Emma Hinchcliffe from the process since August 2020"*

155. The claimant went on to say in her resignation letter that there had been a significant breach of trust and confidence and that she considered her position to be untenable and that she had no option but to resign. The first respondent provided the claimant the opportunity to retract her resignation, but the claimant declined to do so.

156. The claimant entered her claim at the Employment Tribunal on 21 August 2021. The claimant did not provide any evidence about why she had not entered the claim any earlier.

157. In cross-examination, the claimant confirmed that it was her case that there was a very high level of collusion between a number of the respondents' employees. She summarised her case as being that she was verbally abused and placed on a disciplinary investigation, before anyone even spoke to her, based upon the contention that she had instigated and perpetuated what occurred, when she was actually the victim. The claimant alleged that was based on a stereotypical view of the claimant as a tall black woman. She said that all of those about whom she brought allegations held that stereotypical view of her.

Throughout her crossexamination, when she was asked about why it was that she alleged that later events were discrimination and did not occur for some other reason, she referred back to the events of 18 March, the stereotypical view which she alleged had been taken of her, and the fact that she was subjected to a disciplinary investigation when others weren't, and she was the victim.

The Law

158. At the hearing on 28 April 2023, Employment Judge Butler ordered (273) that the respondents send to the claimant a document (or documents) that explained any legal argument upon which they would rely at the final hearing. Each of the respondents produced relatively lengthy documents which clearly and accurately set out the law as it applied to the claims which the claimant brought. In this Judgment, we will not re-produce everything which was recorded in each of those documents, as the parties will be able to look at the documents and remind themselves of what was said. We considered all that was said but will only include in this Judgment the key elements of the law as they applied to this case and the issues to be determined.

159. At no point in the hearing, including in the submissions or in the documents prepared regarding the law, did either of the remaining respondents put forward any argument that it should not be held liable for discrimination and/or victimisation, if discrimination or victimisation was found by those employees for which it accepted responsibility. That was consistent with the acceptance of vicarious liability made at the hearing on 22 November 2021 (215) when it was recorded that neither of the remaining respondents sought to say it was not responsible for the acts of its staff, following which the claimant withdrew her claims against the named individuals (for which vicarious liability had been accepted). It was not clear exactly upon what basis the second respondent was liable to the claimant (who was not its employee), but as the second respondent was represented by professional representatives and did not raise any argument that it was not liable, the Tribunal has not considered or determined precisely how such liability arose.

Direct discrimination

160. The claim relies on section 13 of the Equality Act 2010 which provides that:

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

161. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include any other detriment and dismissal. The characteristics protected by these provisions include race.

162. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same. As Mr Boyd confirmed in his legal framework document, where there are no actual comparators, it is incumbent upon the Tribunal to consider how a hypothetical comparator would have been treated (**Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting** [2002] ICR 646).

163. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

164. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the relevant respondent, that that respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that she has been treated less favourably than her comparator and there was a difference of race between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

165. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the relevant respondent. The Tribunal must uphold the claim unless that respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

166. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the grounds of race. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of race or for some other reason?

167. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his or her motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

168. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. In his opening note on the legal issues, Mr Sugarman relied upon **Glasgow City Council v Zafar** [1998] 2 All ER 953 and **Khan v Home Office** [2008] EWCA Civ 578 for this proposition and quoted from both of those Judgments.

169. The way in which the burden of proof should be considered has been explained in many authorities, including: **Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332**; **Shamoon v Chief Constable of the RUC [2003] IRLR 285; Hewage v Grampian Health Board [2012] ICR 1054; Igen Limited v Wong [2005] ICR 931; Madarassy v Nomura International PLC [2007] ICR 867; Royal Mail v Efobi [2021] UKSC 33**. Whilst the burden of proof has been explained in the context of the direct discrimination claim, it also applied to the victimisation and harassment claims.

Victimisation

170. Section 27 of the Equality Act 2010 says:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act – (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act…"**

171. The first question is whether the claimant did a protected act? Mr Sugarman in his opening note of the legal issues, set out what was said in four key authorities on what is a protected act: **Beneviste v Kingston University** EAT 0393/05; **Durrani v London Borough of Ealing** EAT 0454/12; **Fullah V Medical Research Council** EAT 0586/12; and **Aziz v Trinity Street Taxi Ltd** [1998] ICR 534. The allegation did not need to refer to the legislation. It is not

necessary for the complaint to refer to race if discrimination is asserted, but there must be something sufficient about the complaint to show that it was a complaint to which at least potentially the Equality Act applied. Where the word race is not used, the context had to be clear that such an allegation was being made. It was necessary for the act to be done by reference to the Equality Act in a broad sense.

172. If the claimant has done the protected act, for victimisation the next question for the Tribunal is whether the relevant respondent subjected the claimant to a detriment because of that protected act, in the sense that the protected act had a material or significant influence on subsequent detrimental treatment (significant meaning an influence which is more than trivial).

173. That exercise has to be approached in accordance with the burden of proof. If the Tribunal concludes that the protected act played no part in the treatment of the claimant, the victimisation complaint fails even if that treatment was otherwise unreasonable, harsh or inappropriate. Unreasonable behaviour itself does not necessarily give rise to any inference that there has been discriminatory treatment.

174. In his legal framework document, Mr Boyd said that the essential question is what consciously or subconsciously motivated the employer to subject the employee to the detriment? He said that in most cases that will necessitate an inquiry into the mental processes of the employer, and in particular the person taking the decision or responsible for the act(s).

175. The word detriment in section 27 is to be interpreted widely. The key test is for the Tribunal to ask itself: is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment? An unjustified sense of grievance would not pass this test (as is said in the EHRC Employment code). However, the test is framed by reference to a reasonable worker, so it would be enough if a reasonable worker would or might take such a view. Mr Sugarman relied upon **Shamoon v Chief Constable of the RUC**, **Derbyshire v St Helens Metropolitan Borough Council** [2007] ICR 841 and **The Chief Constable of Northamptonshire Police v Warburton** [2022 EAT 42 on this issue.

176. In his opening note on the legal issues, Mr Sugarman explained that employees sometimes complain that it is an act of victimisation not to properly investigate the protected act, however that does not follow and he relied upon **A v Chief Constable of West Midlands Police** EAT 0313/14 in which the Employment Appeal Tribunal found that it was difficult to contemplate how a failure to hear such a complaint fully could be caused by the making of the complaint itself.

177. Mr Sugarman also emphasised what he said should go without saying, a person cannot unlawfully victimise another unless they have knowledge of the protected act (**South London Healthcare NHS Trust v Al-Rubeyi** EAT 0269/09 and **Thompson v Central London Bus Company** [2016] IRLR 9).

Harassment

178. Section 26 of the Equality Act 2010 says:

> **"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."**
>
> **"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."**

179. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

180. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa). It is important that the Tribunal states whether it is considering purpose or effect. Even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

181. **In Dhaliwal** the Employment Appeal Tribunal said:

> "**Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence"**

182. As well as quoting from that Judgment in his opening note of the legal issues, Mr Sugarman also quoted from **Grant v HM Land Registry** [2011] ICR 1390 in which it was said (of the test for harassment cited above) that "**Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment**", and **Betsi Cadwaladr University Health Board v**

Hughes EAT 0179/13 in which it was said that the "**word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence**".

183. The Tribunal must decide whether the conduct related to race. When considering whether facts have been proved from which we could conclude that harassment was related to race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to race.

Time limits/jurisdiction

184. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

185. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. Mr Sugarman in his legal note referred to the key authorities of **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 and **Lyfar v Brighton & Sussex University Hospitals Trust** [2006] EWCA Civ 1548. The focus of inquiry must be on the substance of the complaint to ascertain whether an ongoing situation or continuing state of affairs amounted to conduct extending over a period as distinct from a succession of isolated or specific acts or an act with continuing consequences.

186. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble** [1997] IRLR 336. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the relevant respondent has cooperated with any request for information; the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

187. Subsequent case law has said that those are factors which illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This has been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 where it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

188. Mr Sugarman in his opening note on the legal issues explained that exhausting internal procedures will not necessarily justify a delay, it is merely a factor to be considered (and he referred to **Robinson v Post Office** [2000] IRLR 804 and **Apelogun-Gabriels v London Borough of Lambeth** [2002] IRLR 116 on this point). In the latter it was said that:

"**It has long been known to those practising in this field that the pursuit of domestic grievance or appeal procedures will not normally constitute a sufficient ground for delaying the presentation"**

189. **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 confirmed that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. It said, of the discretion, *"***There is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule***".* The onus to establish that the time limit should be extended lies with the claimant.

190. Mr Sugarman's legal document recorded that where there is no forensic prejudice to the respondent, that is not decisive and may not be relevant at all (**Miller v MOJ** and **Thompson v MOJ** EAT 0003/15 and EAT 0004/15). But he emphasised that where there was forensic prejudice that would be an important factor.

Unfair (constructive) dismissal

191. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by section 95 of the Employment Rights Act 1996. Section 95(1)(c) provides that an employee is dismissed by his employer if:

> **"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

192. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

193. Lord Denning said in that case (at 226B):

> "**the conduct must … be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded to have elected to affirm the contract.**"

194. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA** [1997] ICR 606 the House of Lords considered the scope of that implied term, and the Court approved a formulation which imposed an obligation 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."**

195. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

196. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

197. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. Mr Boyd highlighted in his legal framework document that **London Borough of Waltham Forest v Omilaju** [2005] ICR 481was authority for the fact that there will be no breach

simply because the employee subjectively feels that such a breach has occurred no matter how genuinely that view is held.

198. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. What is required is conduct which is repudiatory (that is very serious conduct) (**Morrow v Safeway Stores Ltd** [2002] IRLR 9). Mr Boyd quoted from **British Aircraft Corporation v Astin** [1978] IRLR 332 which said it was conduct which was "**so intolerable that it amounts to a repudiation of the contract**". He also relied upon **Blackburn v Aldi Stores Ltd** [2013] UKEAT/0185/12 and quoted from the Judgment in that case in relation to whether non-adherence to a grievance procedure might be a fundamental breach of the duty of trust and confidence in any given case, **"it is not uncommon for grievance procedures to lay down quite short timetables. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the term of trust and confidence**".

199. Mr Boyd in his legal framework document also said that the test to be adopted is not the classic reasonable responses test, but (in accordance with **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121) reasonableness is one of the tools in the Tribunal's factual analysis kit for deciding whether there has been a fundamental breach.

200. Mr Boyd's legal framework document also highlighted that the test for constructive dismissal was set out in **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1 when Underhill LJ said:

> "**In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:**
>
> **(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reasons given…)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?**"

201. In some cases, the breach of trust and confidence may be established by a succession of events culminating in a "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju** demonstrated that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. Dyson LJ said the following:

> **"The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase 'an act in a series' in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.**
>
> **I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.**
>
> **If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. …. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle**
>
> **Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective"**

202. Where there is a fundamental breach of contract by the employer, the employee may elect to accept the breach and bring the contract to an end, or treat the contract as continuing, requiring the employer to continue to perform it – that is affirmation. Where the employee affirms the contract, they lose the right to treat the employer's conduct as having brought the contract to an end. Affirmation can be express or implied. Mere delay will not, in the absence of something amounting to affirmation, amount in itself to affirmation. However, the ongoing and dynamic nature of the employment relationship means that a prolonged or significant delay may give rise to an implied affirmation because of what occurred in that period. Acts which are consistent only with the contract continuing are likely to be implied affirmation. An employee who accepts the payment of wages, places hierself at potential risk of having affirmed the contract. In **W. E. Cox Toner (International) Ltd v Crook** [1981] ICR 823 Browne-Wilkinson LJ in his Judgment emphasised that continued performance of the employment contract can be evidence of affirmation. He summarised the position by saying:

> "**there must be some limit to the length of time during which an employee can continue to be employed and receive his salary at the same time as keeping open his right to say that the employer has repudiated the contract under which he is being paid**"

203. Mr Boyd's legal framework document referred to the case of **Fereday v South Staffordshire NHS Primary Care Trust** [2011] UKEAT/0513/10 and quoted from it. Amongst other things, the Employment Appeal Tribunal concluded that the Employment Tribunal in that case was quite entitled to take the **"prolonged**" delay of nearly six weeks between the grievance decision and the resignation as being an implied affirmation of the contract, "**bearing in mind the claimant was expecting or requiring the respondents (who were employers) to perform their part of the contract of employment by paying her sick pay**".

Other legal matters

204. In his submissions, Mr Boyd placed reliance upon the case of **Chandhok v Tirkey** [2014] EAT 0190/12/1912 and the importance of determining the case as set out in the pleadings. He also quoted at some length from the Judgment in **Gestmin SGPS SA v Credit Suisse (UK) Ltd** [2013] EWHC 3560. We will not set out what was said in that Judgment, but did take it into account.

Conclusions – applying the Law to the Facts

205. The respondents had the benefit of professional representation. The claimant represented herself. We were impressed with the way that the (unrepresented) claimant presented and dealt with her case. We found that she did so professionally, appropriately and with integrity.

Protected acts

206. The Tribunal started its consideration of the issues by considering the alleged protected acts (for the victimisation claim) as set out at paragraph 4.1 of the list of issues. There were three alleged protected acts relied upon.

207. The first alleged protected act was alleged to have occurred in the conversation(s) with Ms Smith on 18 March 2020 or in the email which the claimant sent to her that afternoon. We did not find that the claimant did a protected act either in the conversations or in the email. There was no evidence that she had done so.

208. The second alleged protected act was alleged to have occurred in the claimant's telephone conversation with Mr Chambers on 23 March 2020. This was the telephone conversation which took place immediately after the claimant had taken two days holiday (followed by the weekend) and was the conversation when the claimant thought they would be discussing her complaint about Ms Dale, but in fact Mr Chambers' discussed Ms Dale's complaint about the claimant and the disciplinary investigation which was to take place. At the time of the conversation, the claimant had not seen the accounts provided by Ms Dale or Ms Jolley, nor had she seen the letter which set out the investigation process (albeit that the letter was sent immediately after the telephone conversation). The evidence heard about this and our decision about what was said is recorded at paragraph 66 above, based in part upon what was said and not said in the subsequent emails. We did not find that the claimant did a protected act in that telephone conversation. We found that the claimant did not allege that she had been discriminated against in the telephone conversation which she had with Mr Chambers.

209. The third alleged protected act was the formal grievance submitted on 3 August 2020. In that grievance the claimant clearly and explicitly alleged discrimination. The content of that grievance was obviously a protected act.

210. As a result of what we found about protected acts, the following victimisation claims (following the numbering in the schedule of allegations) could not succeed. The following could not succeed because of what was said in the schedule about the protected acts relied upon for those allegations: 5; 6; 7; 8; 9; 10 and 11. The following victimisation claims could not succeed because the alleged detriment relied upon occurred before the protected act upon which the claimant relied: 12; 13; 14; 15; and 16. That meant that the following victimisation allegations remained to be determined: 17; 18; 22; 23; 26 and 29.

Allegations one and two

211. The first allegation recorded in the schedule was that Ms Dale shouted at the claimant in her office at around 10.15-10.30 am on 18 March 2020. The second allegation (which the claimant confirmed in cross-examination was really a part of the first) was that Ms Dale shouted at the claimant on her return to the office ten minutes later on the same day and allegedly called the claimant "*pathetic*" and said she was "*happy that she was getting to me*". During cross-examination the claimant confirmed that she was not alleging that Ms Dale had said the

things which she said on 18 March 2020 because of the claimant's race. As both claims were recorded as claims for direct race discrimination only, the claimant's claims based upon those two allegations could not, and did, not succeed.

The claimant's allegation about the events of 18 March set out at paragraph 3

212. What the claimant genuinely alleged about the events on 18 March 2020 was that the fact that it was alleged that the claimant had been intimidating was stereotypical and was said because the claimant was a tall black woman. That was the contention recorded in the details of the discussions from previous preliminary hearings and recorded in paragraph 3 of this Judgment. Both respondents' counsel accepted that the Tribunal could determine that allegation as part of the claimant's case.

213. We found that the person who decided that the incident should result in a disciplinary investigation was Mrs Hinchcliffe. We also found that it was her decision that the investigation should address the claimant's conduct and that of the claimant only (even though Mr Chambers later sought to broaden the investigation). In practice that was what occurred. We found that the reasons why she made that decision were:

    a. She had spoken to Ms Dale and Ms Jolley when she visited the office after the event;

    b. She had received a statement from Ms Jolley who was a third-party witness which attributed fault to the claimant; and

    c. She took into account that the claimant was a qualified social worker, whereas Ms Dale was an administrator.

214. We do not agree that the last factor should have been a differentiator with regard to whether someone should be subject to a disciplinary investigation, but nonetheless we accept that it was. We also accept that those were the things which were the reason why a disciplinary investigation was undertaken which was arranged to consider a possible disciplinary outcome for the claimant.

215. It would have been fairer and better practice for Mrs Hinchcliffe to have awaited the claimant's account before she reached her decision. We do accept that this was only a decision to instigate an investigation and not the final disciplinary decision, but nonetheless the principles of fairness generally would have suggested awaiting the claimant's account before deciding the correct approach. The fact the Mrs Hinchcliffe did not await the claimant's own account before deciding the approach was not due to race nor was it due to a stereotype.

216. We have considered whether the respondents or any of their decision-makers determined that there was a perception that the claimant was the perpetrator because of her race. We entirely accept and acknowledge that there does exist a stereotypical assumption that black people are considered to be more likely to be the aggressor in a confrontation. The Tribunal believes that stereotype

exists, has experience of that stereotype, and believe that size and skin colour go together as part of it. We did not accept the submission made by the second respondent's representative that such a stereotype does not exist, nor did we accept that the stereotype is an American one.

217. There was no evidence that Ms Dale or Ms Jolley perpetuated that stereotype. Indeed, the claimant was not genuinely levelling that allegation at them. As we have already explained, we found that Mrs Hinchcliffe's decision was based on other factors and, in practice, Mr Chambers involvement in instigating the process was to do what Mrs Hinchcliffe told him to. Ms Smith sensibly proposed addressing the incident with mediation and discussion and did not apportion blame.

218. We have focussed on the allegation included in the letter informing the claimant of the matters to be investigated dated 19 March (but actually sent on 23 March), in which it was said that the claimant "*behaved in an intimidating manner*" towards Ms Dale. The word "*intimidating*" was not present in any of the accounts on the day (or shortly after). The claimant herself raised the use of the word in her email of 23 March (459) immediately following receipt, as being something to which she took great exception. We accept that it was a significant factor in the claimant's perception that the stereotype upon which she relied, was being applied to her.

219. We fully accept the claimant's perception of the word used and the stereotype she attributed to it. We found that the word "intimidating" was not in fact supported by the evidence available at the time it was first used and was an over-statement of misstatement of what had been alleged to have occurred. There was something of a lack of explanation from the respondent's witnesses about how the word came to be used. The paragraph in the letter sent to the claimant setting out the matters to be investigated which contained the allegations was badly drafted. Those allegations we have found to have been first drafted by Mr Chambers for the terms of reference for the investigation (of which we were not provided with a copy).

220. We considered the evidence which we heard and, in particular, the evidence of Mr Chambers. Based upon what he said when questioned about the allegations made, we found that the inclusion of the word intimidating by him did not reflect the stereotype alleged. We found that it was his own summation of the alleged events based upon the accounts provided. Albeit that we have found the use of the word in our view to have not been supported by the evidence and an over-statement or misstatement of what had been alleged to have occurred, we did not find that his use of the word was either direct race discrimination or, in this case, application of the stereotype which the claimant alleged. We did not find that there was the something more required to shift the burden of proof in the direct race discrimination claim, simply because of the word which he used.

Allegation three

221. Allegation three in the schedule of allegations was stated to be direct discrimination relying upon Ms Dale as the actual comparator. It was said that Ms

Smith failed to support the claimant when she was told by the claimant about the incident on 18 March and that Ms Smith told the claimant to email details of the incident to her. It was contended that Ms Smith would not have done this to a white woman.

222. There were three people present when the incident on 18 March occurred. The three people were all told to email their accounts of what had occurred when they were spoken to. We found that Ms Dale and the claimant were treated the same, as they were both asked to email their accounts. We did not find that the claimant was treated less favourably than her comparator was treated or that she was treated less favourably than a hypothetical comparator in the same circumstances of a different race would have been. A difference in treatment between the claimant and Ms Dale occurred because Ms Dale was spoken to that morning by Mrs Hinchcliffe (albeit that was not what was alleged in the schedule of allegations as the allegation was focussed on Ms Smith). That difference occurred because Ms Dale was present in the office when Mrs Hinchcliffe visited, and the claimant was not. Ms Jolley's statement was provided first, and Ms Dales' provided second. The fact that the claimant's statement was provided later did mean that it was considered later and that the decision to instigate the investigation as a disciplinary allegation involving the claimant had already been made. That was not less favourable treatment because of the claimant's race, it was because the claimant was not in the office when Mrs Hinchliffe visited and because her statement was provided later than the others.

Allegation four

223. Allegation four was that Mr Chambers informed the claimant that he would be instigating disciplinary investigations against her following the incident on 18 March 2020. This was an allegation of direct race discrimination with Ms Dale as an actual comparator.

224. We found that the claimant was treated less favourably than Ms Dale as alleged, because the claimant was subjected to a disciplinary investigation and Ms Dale was not. The respondents' witnesses told us on a number of occasions during the hearing that the two were treated comparably because the outcome of the investigation could have been that action was taken against Ms Dale. We did not find that to be true and we were unimpressed by the evidence we heard about it. The investigation undertaken was clearly one focussed upon potential disciplinary action against the claimant, as evidenced by the letter sent to her dated 19 March (but actually sent on 23 March) and the absence of such a letter sent to Ms Dale. It was also demonstrated by the terms of reference for the investigation (albeit we were not provided with a copy), the way in which the investigation was undertaken and the outcome report written, and that Ms Dale was not even informed about the outcome of the investigation.

225. However, the reason for the difference in treatment between the claimant and Ms Dale was the decision taken by Mrs Hinchcliffe. It was not due to a decision made by Mr Chambers. We have already addressed and recorded why we found that Mrs Hinchcliffe made the decision. We did not find that the reason why Mrs Hinchcliffe treated the claimant less favourably than Ms Dale by instigating a disciplinary investigation against her was because of race.

Allegations five, six and seven

226. We considered allegations five, six and seven together as they were all closely related. The allegations arose from two different matters which during the hearing were on occasion conflated and/or confused. The matters were: the decision that the claimant should relocate to Ramsgate House from Middlebrook as her base location; and the decision (initially) that the claimant should continue to attend at an office during the pandemic rather than working from home.

227. We did not find that the claimant was in fact concerned by the request to relocate to work from Ramsgate House during the investigation. The claimant's complaint and the real and genuine concern which she had at the time (understandably related to her mother-in-law's ill health and the claimant's caring responsibilities) was that she was told that she was not able to work from home. In any event, the reason why the claimant was told to work from Ramsgate House rather than Middlebrook was because she was the one subject to the disciplinary investigation. The reasons were the same as those we have already addressed for the disciplinary investigation being instigated against the claimant. For the reasons we have already outlined, that decision was not because of race.

228. In terms of the requirement for the claimant to work from the office rather than being allowed to work from home, the claimant was clearly alarmed by being told that she needed to work in the office. The suggestion that she should do so was clearly sufficient to amount to a detriment for her, even though she never in fact had to do so. The stated requirement that the claimant work from the office (and not from home) was a decision of the second respondent. The claimant was not treated less favourably than a hypothetical employee of a different race in materially the same circumstances would have been, as the second respondent required all those for whom it was responsible to continue to work in the office and not from home. The claimant was treated consistently as a result of a policy which the second respondent applied to all. Mr Chambers applied the first respondent's policy at the time and acted consistently with it. As we have found, the correspondence was insensitive and unsupported by the Government's guidance at the time. The reason for such correspondence was not race. The first respondent in fact stopped the claimant ever needing to move location or work from the office.

Allegation eight

229. Allegation eight was that Ms Smith had failed to respond to specific timed and dated emails from the claimant when Ms Smith was her line manager and was supposed to be the claimant's point of support. The allegation was dated in the schedule as being in April 2020. During the course of the proceedings the claimant had provided a list of the occasions when she alleged that had occurred (254). We considered the occasions relied upon.

230. It was not the case that Ms Smith failed to respond to many of the emails relied upon. Many of the emails received responses, albeit not the responses that the claimant wanted. On occasion, the responses failed to address some of the specific points the claimant had raised. Many of the emails relied upon related to workload and those emails have been considered in relation to allegations ten, eleven and thirteen below. The first email relied upon, was one to which Ms Smith did not reply because Mr Chambers told her not to as he wished to talk to the claimant about the process which would be undertaken following the 18 March. The last four emails relied upon were at, around, or following, the time that it had been decided that Mr Chambers would take over as the claimant's line manager.

231. We have not found that the claimant was treated less favourably than a hypothetical comparator of a different race would have been. We did not find that the claimant had shown the something more required to shift the burden of proof and show that the absence of response on occasion, or the absence of the sought response on occasion, was because of race. At the time of the initial stage of Covid we accepted that it was inevitable that some emails would be likely to go unresponded to, and none of the emails to which responses were not sent were such that it showed what is required to shift the burden of proof to show that it was on the grounds of race and/or that a hypothetical comparator of a different race would have received a response (or a different response).

Allegation nine

232. Allegation nine was that Ms Dale had ignored work emails from the claimant. That was stated to have occurred in April 2020. As with the previous allegation, the claimant had provided very clear further particulars about precisely which emails it was that she alleged Ms Dale had not responded. Those were stated to be (254) emails on 19 May 2020 at 16.03, the 12 June 2020 at 14.20, and 12 June 2020 at 14.24. When the claimant was asked about those emails in cross-examination it was identified that in fact it was only the first of those emails to which Ms Dale had not responded, the other two were chasing emails sent by the claimant following the non-response to the first (and to which Ms Dale did respond). Notably the follow-up email sent to Ms Dale by the claimant was responded to quickly.

233. We did not find that the absence of a response to one email from Ms Dale, evidenced that the claimant had been treated less favourably than a hypothetical comparator of a different race would have been, or that the absence of a response was because of race. The absence of a response was resolved and addressed when it was chased by the claimant.

Allegations ten, eleven and thirteen

234. We considered allegations ten, eleven and thirteen together as they related to the allocation of work to the claimant and, in particular, the allocation of checklists. The evidence about the assessments has been addressed at paragraphs 90-93 and 143. The evidence about how many were provided to the claimant, the extent of any discrepancy with others, and the reasons for that discrepancy, was not entirely clear or necessarily consistent.

235. The claimant's evidence was clear, that she believed that the checklists required greater time, care and detail, than the respondents' witnesses envisaged. The time which the respondents' witnesses suggested they would have taken was inconsistent with the time that the claimant said in evidence they took. We did not need to resolve any conflict about who was right, but it was clear that there was a point of difference between the claimant and the respondents about the care and time required to undertake them.

236. We found that the claimant was allocated more checklists than her comparators (even if she did not in fact undertake more than some of them). The claimant considered that the size and disparity in the allocation of checklists was to her detriment. We accepted that being allocated a greater amount of the work was sufficient to amount to a detriment for the claimant.

237. A reason for the difference in treatment between the claimant and two of her comparators (Ms Fields and Ms Jolley) was that they each worked two days per week when the claimant worked five. They were not comparators in materially the same circumstances. We found that the difference would have resulted in them both being allocated fewer checklists than the claimant, albeit we did not find that the considerably smaller allocation was entirely explained by that factor.

238. Mr McClusker was a valid comparator in materially the same circumstances as the claimant. He was given fewer checklists than the claimant. In part that appeared to be explained by the fact that he had other duties, albeit that there was limited evidence provided to us about how extensive the other duties in fact were.

239. From 17 April everyone in the team was based from home for their work. The evidence provided to us was that other members of the team undertook work outside of their homes (even though they were based at home), when the claimant did not. It was a relevant factor and a material difference between the claimant and Mr McClusker that the claimant only worked at home and therefore was allocated a greater number of checklists, when he undertook visits and other work outside of his home (and so was allocated fewer). To that extent, Mr McClusker was not in materially comparable circumstances to the claimant. There was no genuine evidence provided to us about the extent to which he was called out to other locations while working from home or the extent to which he did other work. However, there was a valid and clear distinction between the claimant and Mr McClusker because the claimant worked only at home.

240. From all the information and documents provided, the position was unclear, but we found that, on the balance of probabilities, the claimant was allocated a disproportionate number of the checklists when compared to others (and Mr McClusker in particular), because that was what appeared to be the case from the numbers Ms Smith herself recorded and outlined in her evidence to the third stage grievance (1581).

241. We went on to consider whether the claimant had shown the something more required to shift the burden of proof in her claim for direct race discrimination, if she was treated less favourably than Mr McClusker in the proportion of checklists allocated and/or she was treated less favourably than a hypothetical comparator in materially the same circumstances as the claimant would have been. We did not find that the claimant had done so, that is she had not shown the something more required to shift the burden in her claim that the allocation was because of her race. Poor management or poor or inconsistent allocation of work by Ms Smith did not provide the something more required. Like the claimant, we were confused by the various responses given by the respondents to these allegations, including in the grievance and the grievance appeal outcomes, but we did not find that the confused explanations by others in and of themselves shifted the burden of proof when we considered why Ms Smith had allocated the work as she had done.

242. Allegations ten and eleven were contended to be allegations of harassment as well as allegations of race discrimination and allegation thirteen was harassment only. When we considered issue 3.2 as it applied to those allegations, we found that the quantity of checklists allocated to the claimant (particularly when contrasted to those allocated to others) was unwanted conduct. However, when we considered issue 3.3 we did not find that the allocation (or the differences in allocation) were related to race. We also did not find that the allocation would reasonably have had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her (even if it did have that effect). It was certainly not Ms Smith's purpose to do so, when allocating the checklists to the claimant.

Allegation twelve

243. Allegation twelve was related to the other allegations regarding workload allocation but was different. The allegation arose from Ms Smith re-allocating the checklists whilst the claimant was absent and the claimant returning to find that work she had undertaken (in part) had been completed by others. In the schedule of allegations, the claimant asserted that the only thing which separated her from everyone else was her race. This was an allegation of harassment.

244. The claimant was clear in her evidence when asked, that the only thing which could be seen by the other team-members based upon the shared system, was if the claimant had completed the checklist. As a result, Ms Smith and the other team members would not have been aware that the claimant had undertaken some of the work required regarding a particular checklist.

245. In his submissions, the first respondent's counsel contended that there was no detriment to the claimant as a result. If anything, the detriment was to the colleagues who undertook work not all of which was required. We agreed with that submission.

246. In any event, we did not find that the fact that some of the checklists upon which the claimant had done some work were undertaken by others was related to race. The reasons were: because Ms Smith was trying to help the claimant and/or reduce the number of checklists outstanding; the claimant was on leave; and, as the claimant evidenced, only completed checklists could be seen by others (which was the evidence which she gave us, albeit it was not what she contended in her own submissions).

Allegation fourteen

247. What was alleged as allegation fourteen was that Christine Bracken had not spoken to the claimant as part of the investigation into the incident on 18 March. In the list of issues, it was recorded that the claimant did not know whether Ms Dale had been spoken to by Ms Dale. This was an allegation against the second respondent and was recorded in the schedule of allegations as being an allegation of harassment only (in addition to victimisation which has already been addressed when considering the protected acts relied upon). However, in the detail of the event the allegation also contained a statement that the claimant contended that she was treated differently because of her race and therefore we also considered it as an allegation of direct discrimination even though section 13 of the Equality Act 2010 was not referred to in the legal label column.

248. As part of her investigation, Mrs Bracken spoke to neither the claimant nor Ms Dale. The claimant was not treated less favourably than Ms Dale in the way alleged. Mrs Bracken did speak to Ms Jolley, but she was not a comparable alleged protagonist, she was a witness to the events.

249. We would observe that the fact that Mrs Bracken undertook her investigation without speaking to the claimant was regrettable and was not good practice. There was no good reason why Mrs Bracken did not speak to the claimant by telephone as she had committed to do. We understood that obviously the investigatory meeting undertaken at that time could not have been a face-to-face meeting (as the claimant also accepted), but it would have clearly been preferable for the investigator to have actually spoken to the claimant as part of her investigation. However, we did not find that the reason why Mrs Bracken did not speak to the claimant was race or was related to race. Mrs Bracken did not speak to the claimant because she chose not to do so and chose to rely on the written statements only of the claimant and Ms Dale.

250. With regards to the allegation of harassment, whilst we found that it was unwanted from the claimant's point of view for the investigator to complete her investigation without speaking to the claimant as part of it, we did not find that the fact that the claimant was not spoken to either had the purpose or the effect

required for unlawful harassment (violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her). Even had we found that not speaking to her in fact had the requisite effect, we would not have found it reasonable that it did so (even where it represented poor practice of the investigation).

Allegation fifteen

251. Allegation fifteen related to the outcome of Mrs Bracken's investigation and the fact that the claimant was recommended to receive informal counselling in relation to her conduct. The claimant compared herself to Ms Dale who did not receive such a recommendation. This was an allegation against the second respondent and was alleged to have been direct discrimination and/or harassment (as well as victimisation which has already been addressed).

252. We did not find that the claimant and Ms Dale were in materially the same circumstances when it came to the outcome of the investigation. As we have already explained, the disciplinary investigation was focussed on the claimant and not Ms Dale as a result of the decision made by Mrs Hinchcliffe at the outset. Mrs Bracken accordingly focussed her investigation on the claimant. Ms Dale was not in materially the same circumstances for the reasons we have already explained. In addition, the reason why counselling was recommended for the claimant was because Mrs Bracken concluded from her investigation that the claimant was at fault in the events of 18 March, or at least her degree of fault was greater than Ms Dale's. We have addressed the failings in the investigation elsewhere, but nonetheless we accepted that Mrs Bracken's conclusion based upon her investigation (in which she spoke to neither of the people actually involved) was that the claimant was the instigator of the disagreement. The reason for the recommendation and the difference in treatment with Ms Dale, was not race.

253. For the harassment allegation, it was clear that the counselling recommendation was unwanted conduct for the claimant (issue 3.2). However, we did not find that it was related to race (issue 3.3). It was related to the view Mrs Bracken took of the altercation on 18 March and the fact that she had been asked to undertake a disciplinary investigation focussed (at least primarily) on the claimant. The outcome was not related to race.

254. In any event, we would observe that the imposition of counselling on the claimant was overturned as part of the grievance process. Accordingly, whilst that did not mean that the initial decision could not have been found to have been direct race discrimination and/or harassment related to race, the detriment about which the claimant complained was resolved or rectified by the decision of Ms Brooking when she decided at the stage two grievance outcome that the informal counselling recommended as part of the findings to the disciplinary investigation, should not take place.

Allegation sixteen

255. Allegation sixteen was the claimant being given Mr Chambers as a line manager on 15 June 2020 when she had said that she felt bullied and intimidated by him in her email of 7 April 2020 to the email address provided by the first respondent for concerns about Covid. This was alleged to be direct race discrimination. The claimant contrasted her treatment with three social workers who did not have a change of line manager. It was also alleged to be harassment related to race (and victimisation, but that claim has been addressed in relation to the protected acts). This was an allegation against the second respondent.

256. We found that the change in line manager from Ms Smith to Mr Chambers was a detriment for the claimant, based upon her perception of Mr Chambers. She was also treated differently to her social worker colleagues who remained managed by Ms Smith. We have considered the other issues based upon the assumption that the treatment was unfavourable for the claimant.

257. The reason for the change in the claimant's line manager was because Ms Smith sought the change and the decision was made to ensure that she remained in active employment in the light of her health issues, and to avoid her being absent on ill health grounds. That was not because of or related to the claimant's race. That was the reason for the less favourable treatment when compared to the comparators, that is of the line management being changed.

258. The claimant had said that she felt bullied and intimidated by Mr Chambers in the email which she sent on 7 April (1781). However, Ms Hodgetts, as the recipient of that email, had focussed upon the extracts which Mr Albiston had included in his subsequent email (1780), which contained the claimant's reasons for wishing to work from home. There was no evidence that Ms Smith, Mr Chambers or Mrs Hinchcliffe had seen that email. The reason the decision was taken to make Mr Chambers the claimant's line manager when Ms Smith ceased to be her manager, was because he was the next in line management and the most appropriate person to do so. Both Mrs Hinchcliffe and Mr Chambers were unaware of the email and unaware that the claimant did not want him to be her line manager. As soon as he became aware that the claimant had raised a complaint about him (which she did in her formal grievance), he ceased to be her line manager. We have already recorded our view that Mr Chambers' emails had been completely lacking in empathy when he had threatened the claimant with disciplinary action if she insisted on working from home, but Mr Chambers was not aware of the strength of the claimant's feeling about him as a result of those emails, when he became the claimant's line manager.

259. We did not find that the claimant was treated less favourably than a hypothetical comparator in materially the same circumstances would have been. Someone else (of a different race) whose line management was being changed from Ms Smith, would also have been allocated Mr Chambers as the next most appropriate person. In any event, we did not find that the identification of Mr Chambers was because of the claimant's race.

260. In terms of harassment, we did not find that the purpose of the decision to make Mr Chambers the line manager was to have the requisite effect on the claimant. Mr Chambers made the decision to protect or support Ms Smith and he was the new identified manager because he was the next most appropriate person. We accept that the claimant felt that the effect of the change in line manager was that it created an intimidating, hostile and, potentially, offensive environment for her, in the light of her concerns about Mr Chambers. However, as part of the test for unlawful harassment we also needed to consider whether it was reasonable for the change in line manager to Mr Chambers to have had that effect in all the circumstances. We have particularly taken account of what was said in the cases of **Betsi Cadwaladr University Health Board** and **Grant** which we have addressed in the legal section of this Judgment about what is required for unlawful harassment to have the requisite effect. As a result, we did not find that it was reasonable for the change in the claimant's line manager to Mr Chambers to have had the requisite effect as it did not have the serious and marked effect required (particularly in circumstances where the claimant's line manager was changed from Mr Chambers as soon as the claimant raised a formal grievance which included complaints about Mr Chambers).

261. In any event, we did not find that the decision to make Mr Chambers the claimant's line manager was related to race. There was simply no evidence that it was.

Allegation seventeen

262. Allegation seventeen in fact contained two different allegations/issues within what was alleged. The claimant alleged that the decision to deny the claimant's request that someone other than Mrs Hinchcliffe should manager her absence was direct race discrimination, harassment related to race, and victimisation (by the second respondent). The claimant also alleged that in the meeting on 12 October 2020 Mrs Hinchcliffe suggested that the claimant look for alternative employment, and that was direct race discrimination, harassment related to race, and victimisation (by the second respondent).

263. We first considered the victimisation claim, based on the protected act of the formal grievance (or the content of the formal grievance). The reason why Mrs Hinchcliffe was made the claimant's manager during her absence, was because the claimant had raised a formal grievance which named Mr Chambers (who had been identified as her manager at the time). The change from Mr Chambers was not to the claimant's detriment. The reason for the change was not because the claimant had done a protected act, it was because the claimant had raised a formal grievance against Mr Chambers. That change was not unlawful victimisation.

264. At the time that she initially sought to change the manager from Mrs Hinchcliffe, the reasons why the claimant wished to have the change were wholly without merit. We do not find that there was any reason why a manager's manager should not be considered as an appropriate line manager or someone appropriately independent, just because a grievance has been raised against

the first manager. What was clear from the evidence was that in fact the claimant wanted Mr Fenby to be the person managing her absence, because Mr Fenby was someone who had shown empathy for her. It was Mr Fenby's evidence that he was not a line manager. The reasons which the respondent had for making Mrs Hinchcliffe the line manager at the time were entirely valid. We accept that part of the focus in the absence management was upon how and where the claimant could return to work, and that required the process to be undertaken by someone with a knowledge of, and management responsibility for, the workplace(s) to which she could return.

265. We did not find that the refusal to agree to the claimant's request to change her manager during absence from Mrs Hinchcliffe was less favourable treatment because of race. The claimant was not treated less favourably than a comparable person of a different race in materially the same circumstances would have been treated. The second respondent would also have refused to change line manager in those circumstances. The reason for the refusal was not race. It was for the reasons evidenced by the respondents' witnesses.

266. We also did not find that the refusal to change the claimant's line manager was harassment related to race. The purpose of the refusal was not those required for unlawful harassment. We also did not find that the effect of the refusal was the requisite effect. Even had the effect been what is required, it would not have been reasonable for a refusal to change a line manager to have had the requisite effect (in the circumstances which existed, the reasons for not agreeing to the change, and in the light of the lack of merit to the claimant's reason at the time for wanting the change). In any event, the refusal was not related to the claimant's race and there was no evidence that it was.

267. With regard to what was said in the meeting of 12 October 2020, we have recorded in the facts section of this Judgment what we found was said. We did not find Mrs Hinchcliffe suggested that the claimant look for alternative employment as was alleged in this allegation in the list of issues. Mrs Hinchcliffe denied that she said that, which we accept, and the claimant accepted that Mrs Hinchcliffe did not explicitly say what was alleged. We also noted what the trade union representative said in subsequent emails and did not find that to be consistent with what the claimant alleged. We did find that something was said in the meeting about the claimant looking for alternatives, but in terms of the precise nature and position of her role and the wish to identify a way in which the claimant might be able to return to work.

268. Based upon what we found was said, we did not find that it was said with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if the comment made did have that effect on the claimant personally, we found that it was not reasonable for it to have had that effect in the context of a meeting at which the claimant's return to work was being discussed including the possibility of facilitating the claimant's return to work by changing the team in which she worked or the location at which she was based. In any event, the comment made was not related to race.

269. We did not find that the comment actually made was a detriment in and of itself. The reason why Mrs Hinchcliffe made the comment we have found she made, was not because the claimant had done a protected act when she raised her grievance (or in the content of it).

Allegation eighteen

270. Allegation eighteen was brought against both respondents and was alleged to be direct race discrimination and/or victimisation. What was alleged was the failure to provide the claimant with support during sick leave. Mr Fenby was identified in the table of allegations. In her evidence the claimant accepted that this was not an allegation directed at Mr Fenby as she confirmed that he had not failed to do anything.

271. In his submissions, counsel for the second respondent submitted that it became apparent during cross-examination that this allegation was not in fact about what Mrs Hinchcliffe had done throughout the sickness absence process, but rather it was about the fact that Mrs Hinchcliffe was the person doing it. As he submitted, that meant it was a rehash of allegation seventeen and was based upon the claimant's assertion that Mrs Hinchcliffe was not impartial and therefore was not able to manager her absence at all. We agree with Mr Sugarman's submission on this allegation.

272. We would add that we also had no issue with the absence management of the claimant undertaken. We noted that there were quite a number of meetings held with the claimant during her absence. We did not find that the respondents failed to provide the claimant with anything which we would have expected to have seen during such a period of absence.

273. For the same reasons as explained for allegation seventeen, we did not find that the claimant was directly discriminated on the grounds of race as alleged by the second respondent, nor did we find that she was subjected to victimisation. We found that there was no genuine allegation against the first respondent under this allegation as in fact pursued by the claimant.

Allegations nineteen and twenty

274. Allegations nineteen and twenty were not pursued and therefore we did not need to determine what occurred or make any findings about it.

Allegations twenty-one and twenty-eight

275. We considered allegations twenty-one and twenty-eight together as they both related to the claimant's data protection subject access request. Allegation twentyone was that the delay in the response to the subject access request was an act of direct discrimination because of race by the first respondent. Allegation twenty-eight was that the failure by Ms Leyland to inform the claimant that her first subject access request to the first respondent would not result in receiving the data held by the second respondent, was an act of direct discrimination on grounds of race by the first respondent. The table of allegations had also

referred to Ms Jallow (the information access officer) as being a discriminator in issue twenty-eight, but the claimant confirmed during the hearing that she was not alleging that Ms Jallow had discriminated against her because of her race.

276. The response to the claimant's data protection subject access request was delayed. Both Ms Jallow and Ms Leyland gave evidence about why it was delayed. We accepted that evidence. There was no evidence whatsoever which could have shifted the burden of proof to show that the delay was because of race (or that someone in materially the same circumstances of a different race would have been treated differently).

277. There was also no evidence whatsoever that anyone deliberately misinformed or misled the claimant about the data protections subject access request. The claimant was not misinformed. Her case was in practice about what she was not told when she made her request rather than, as alleged, that she was misinformed about it by anyone. As the first respondent's counsel submitted, the claim must fail as a result. In any event, it was Ms Leyland's evidence that it simply did not occur to her to inform the claimant about the potential need to make two subject access requests. The first respondent responded to the request in accordance with the request made. There was no evidence that the claimant was treated differently in the response provided than anyone else was treated, or than a hypothetical comparator of a different race would have been. There were issues which arose throughout the matters about which we heard evidence as a result of the complex employment relationship and the involvement of the two respondents in the provision of the relevant service. The respondents, and Ms Leyland in particular, could have been more helpful to the claimant when she made her request and could have pointed out the potential issue, However, as we accept Ms Leyland's evidence that it did not occur to her, that was not because of race.

Allegation twenty-two

278. Allegation twenty-two was that there was a delay in holding the stage two grievance outcome meeting. That was alleged to be direct race discrimination (relying upon a hypothetical comparator as the claimant did not know anyone else who had raised a grievance) and/or victimisation by the first respondent.

279. In his submissions, Mr Boyd, drew a distinction between: the initial period between the receipt of the grievance and the meeting with the claimant; and the period thereafter. For the former he accepted that the initial period of delay was unacceptable. He confirmed that was also the conclusions reached by Ms Brooking and Mr Lewarne.

280. We agree that the grievance was unduly delayed in the period between it being raised on 3 August 2020 and being heard on 17 November 2020. There was a considerable delay whilst the two respondents addressed which of them should conduct the grievance and under which policy it should be conducted. The delay does not reflect well on either respondent or upon the way in which they worked

together in the provision of the relevant service. Nonetheless we found that there was no evidence whatsoever that the delay was either because of race or was related to race. There was no evidence that a grievance raised by a hypothetical comparator of a different race would have been treated any differently. There was nothing which showed that the delay was because the claimant had done a protected act or acts in raising the matters which she did in the grievance.

281. From 17 November 2020 onwards, once the decision was taken about who should hear the grievance and under what procedure, we did not find that the process was unduly delayed. The resolution was not unduly slow after the stage two meeting and there was no evidence that the grievance of anyone else would have been concluded more quickly (whether a hypothetical comparator of a different race or one who had not included within the grievance a protected act or acts).

Allegation twenty-three

282. As was accurately recorded in Mr Boyd's closing submission document, it was confirmed by the claimant in cross-examination that her point on the stage two grievance outcome (which was the subject of allegation twenty-three) was that she believed that the material before Ms Brooking should so obviously have led her to uphold the claimant's various grounds in her grievance, that to fail to do so could only have been explicable by discrimination on grounds of race. This allegation was brought against the first respondent and was for both direct race discrimination and/or victimisation.

283. In her outcome, Ms Brooking overturned the (effective) sanction which had been imposed following the disciplinary process and decided that there should be no requirement for the claimant to undergo counselling. She accepted that the disciplinary investigation had not been conducted in the way that the first respondent would have liked or expected. She apologised to the claimant. To an extent, Ms Brooking's outcome was supportive of the claimant and did find for the claimant in many of the issues raised. We found that the outcome letter could certainly have been better and more sympathetically written and the outcomes (which we have highlighted) could have been clearer. However, we entirely accepted Ms Brooking's evidence about the decision which she reached and why she did so. She denied that she discriminated against the claimant because of her race or because she had done a protected act. We accepted that evidence. The outcome which Ms Brooking reached in her grievance was not because of the claimant's race or because she had done a protected act. There was nothing which showed the something more required to shift the burden and show that the outcome was on grounds of race or because of the protected act. The fact that the claimant did not agree with the grievance outcome did not mean that it was unlawful discrimination or victimisation.

Allegations twenty-four and Twenty-five

284. Allegations twenty-four and twenty-five were not pursued and therefore we did not need to determine what occurred or make any findings about them.

Allegation twenty-six

285. Allegation twenty-six was that there was a delay in holding the stage three grievance appeal. This was alleged to have been direct race discrimination and/or victimisation by the first respondent. The claimant appealed on 19 January 2021. The appeal was heard on 10 March 2021. The outcome letter was dated 10 May 2021. There was seven weeks and a day between the appeal letter and the holding of the stage three appeal meeting. The claimant objected to the first manager it was proposed would hear it. Following the hearing, steps were taken to gather further information before the decision was made. Noting the senior people involved in the process and the steps undertaken, we simply did not find that there was genuinely any delay in the stage three hearing taking place or in the outcome. The time taken was not because of the claimant's race or because she had done a protected act (and there was no genuine evidence that it was or of the something more which might have shifted the burden of proof).

Allegation Twenty-seven

286. Allegation twenty-seven was not pursued and therefore we did not need to determine what occurred or make any findings about it.

Allegation twenty-nine

287. Allegation twenty-nine was that the stage three grievance outcome was direct race discrimination and/or victimisation by the first respondent (to the extent that the allegation also addressed delay, that has already been addressed for allegation twenty-six).

288. Mr Boyd summarised the claimant's case as reflecting that she put forward for the stage two grievance outcome, being that if Mr Lewarne had looked properly at the information before him, he would inevitably have upheld her grounds of appeal and that in not doing so he must have acted in a discriminatory manner (or have unlawfully victimised her).

289. We accepted Mr Lewarne's evidence that he reached the outcome which he did in the claimant's grievance appeal based upon the material before him. As a result we found that the outcome was not because of the claimant's race or because she had done a protected act. There was no genuine evidence that it was or of the something more which might have shifted the burden of proof. He accepted that things could have been done better. He recorded his outcome addressing each of the six grounds of the claimant's appeal. We, in fact, disagreed with some of the decisions made in the grievance appeal outcome for reasons which we have explained (such as regarding the equitable distribution of checklists and workload). We noted that he apologised for the

delay. We accepted that his outcome was not because of the claimant's race or because she had done a protected act in the grievance for which he was determining the appeal/third stage.

Allegation thirty

290. Allegation thirty was not an allegation of discrimination, harassment, or victimisation at all. It was however something upon which the claimant relied as being part of the alleged breach of the duty of trust and confidence for her constructive dismissal claim. The allegation arose from the claimant's email sent to Mr Lewarne following his stage three grievance outcome. The claimant's complaint is that Mr Lewarne failed to investigate when the claimant made him aware that some of the information provided to him by Ms Smith might have been fabricated.

291. We did not find that it was a breach of the duty of trust and confidence (or capable of being part of such a breach) for the chair of a grievance appeal not to consider or address further issues raised by an employee after the conclusion of the grievance appeal. The claimant had attended the appeal meeting and been accompanied by her trade union representative. She had been given the opportunity to raise the issues on appeal which she wished to. Following that hearing, further information had been obtained and a decision reached. It might have been preferable if the stage three grievance appeal hearing had been reconvened after the additional material had been obtained, to give the claimant the opportunity to respond to it. However not doing so, in and of itself, was not a breach of contract or a breach of the duty of trust and confidence. We saw no issue with the response which Mr Lewarne in fact sent to the claimant (1687).

Jurisdiction/time limits

292. As a result of the findings that we have made in the claims for direct discrimination, harassment and victimisation, it was not necessary for us to determine what we would have found regarding time/jurisdiction for each of the matters alleged. It was also not possible to find which complaints which were otherwise out of time, we could or would have found to have been part of conduct extending over a period which ended within the required time. Nonetheless we would record some matters considered when we looked at time/jurisdiction.

293. The dates of the allegations against the second respondent were: 26 May 2020; 26 May 2020; 15 June 2020; and 12 October 2020. Allegation eighteen was the one undated allegation which potentially occurred much later. That was an allegation about the decision made for Mrs Hinchcliffe to remain the claimant's manager during her absence. The decision that she should remain the claimant's manager was last made in a conversation between Ms Hodgetts and Mr Albiston on 1 April 2021 when they agreed that Mrs Hinchcliffe should remain manager. As a result that was the last date upon which any of the allegations against the second respondent could have occurred.

294. For the claims against the second respondent the dates of ACAS Early Conciliation differ from those against the first respondent. The period was from 13-16 August 2021 only. The claim was entered at the Tribunal on 21 August 2021. As a result, even on the assumption that all of the allegations made against the second respondent were part of a continuing act (a matter upon which we did not need to decide), the claims against the second respondent were entered out of time.

295. We did consider whether we would have found it just and equitable to extend time for the claims against the second respondent. We noted that the claimant was absent on ill health grounds at the relevant time, but she gave no evidence about any genuine reason for her delaying in entering her claim in time. The claimant had access to and met with her trade union official throughout the process and would have had access to advice and materials about time limits, had she chosen to ask/look. The second respondent's counsel quite rightly identified that there was substantial prejudice to the second respondent because the memories of witnesses had faded over time. There would clearly have been considerable prejudice to the claimant if we had refused to exercise our discretion to extent time but found that discrimination had occurred. On balance, for allegation eighteen, had we found that to have been unlawful discrimination, harassment, or victimisation, we would have found it to have been just and equitable to extend time for the limited period of delay based upon that last date when we found that the allegation could have occurred (1 April 2021). However, for all of the earlier allegations, had we not found them to have been part of a continuing act with allegation eighteen (ending on that date) we would not have found it to have been just and equitable to extend time.

296. For the first respondent, the last allegation was alleged to have occurred on 10 May 2021 and therefore the claim was entered in time. The claimant had a longer period of ACAS Early Conciliation from 11 June to 23 July 2021. We did not need to, and in practice could not have, determined which of the earlier things might or would have been found to have been in time and/or part of a continuing act with the later allegations (in the light of us not finding that any discrimination, harassment or victimisation occurred). However, the position would have been comparable to that which we have recorded for the second respondent in relation to the older more historic allegations, as we would not have found it to have been just and equitable to have extended time for the matters alleged to have occurred only in early/mid 2020, had we not found those allegations to have been part of a continuing series of events with later allegations.

Constructive dismissal (issues one and six)

297. In the list of issues which is appended before the schedule of allegations, issues 1.1-1.4 and 6.1-6.2 set out the matters which needed to be determined in the claimant's constructive dismissal claim. That was a claim against the first respondent only. What was said at issue six was that the claimant relied upon all of the matters recorded in the schedule of allegations as, taken together, amounting to a breach of the duty of trust and confidence. However, issues 6.1-

6.2 also set out in more detail the last straw upon which the claimant relied, and we started our determination of the constructive dismissal claim by considering the last straw relied upon.

298. At issue 6.1 (as amended) it was recorded that the final straw was that on 17 August 2021 the respondent decided to replace Mrs Hinchcliffe as the person managing the claimant's sickness absence with Ms Billington. Issue 6.2 recorded that this was offensive to the claimant because she had repeatedly asked for someone she described as impartial to manage her absence and her requests had been ignored and then the only reason Mrs Hinchcliffe was replaced was because Mrs Hinchcliffe was sent on secondment. The claimant says this showed she was not valued and caused her to resign. In summary, the claimant's last straw was that the respondent made the change which she had been seeking on 17 August, but not for the reasons which she thought it should have done.

299. The reason why the claimant's line management was changed from Mrs Hinchcliffe to Ms Billington was because Mrs Hinchcliffe went on secondment. We considered carefully what was said in the case of **Omilaju** about what is required for the final straw for a constructive dismissal claim to succeed. The last straw does not of itself need to be a repudiatory breach of contract, as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. We did not find that the decision to change the claimant's line manager to another manager because that manager had gone on a secondment did add anything to what had gone before. It did not add to anything which could have been viewed as a breach of the duty of trust and confidence. The claimant was granted the very thing which she had sought for a long time, that is Mrs Hinchcliffe ceasing to be the manager responsible for her during her absence. That occurring (and the reason for it being secondment of Mrs Hinchcliffe) was not something which added anything as required by **Omilaju**.

300. As set out in **Omilaju.** an entirely innocuous act on the part of the first respondent cannot be a final straw, even if (as here) the claimant genuinely, but mistakenly, interpreted the act as hurtful and destructive of her trust and confidence in her employer. The test of whether the employee's trust and confidence has been undermined is objective and we found that it had not. **Omilaju** also makes clear that as a result it was not necessary to examine the other conduct relied upon, as if the act relied upon as the final straw does not meet the requirements set out in that case, the claimant's constructive dismissal claim cannot succeed.

301. We did give some consideration to whether we would have found that the matters which we have addressed and which were set out in the schedule of allegations would have amounted to a breach of the duty of trust and confidence, individually or collectively. For some of the earlier matters alleged, as will have been clear from what we have found, it is possible that we could have done so. In particular, the failure to address the claimant's complaint or provide clarity about how to raise a complaint made in her email of 18 March

2020 could have been found to have been such a breach (or part of one). The delay in dealing with the claimant's formal grievance once raised when considered alongside the lack of response to 18 March email, also could have done. The failure to speak to the claimant as part of the disciplinary investigation also could have been found to have contributed to a breach of the duty of trust and confidence. We have also highlighted our concerns and findings about the wording of the disciplinary investigation letter and the requests/demands that the claimant work from the office. All of those things occurred in 2020 and prior to the stage two grievance hearing on 17 November 2020 (after which the grievance process was pursued more timeously). As a result, even had we found that there was breach of the duty of trust and confidence as a result of those things (or any of them), we would have found that the claimant affirmed the contract and/or waived the breach and implicitly accepted that her contract continued by remaining in employment and continuing to accept sick pay up until the date when she resigned on 20 August 2021.

302. In submissions we asked Mr Boyd what the first respondent's position was if we found that some of the matters which would otherwise have contributed to the breach of the duty of trust and confidence had they been actions of the first respondent, had in fact been actions of the second respondent? He submitted, based upon first principles, that the first respondent could not breach the duty of trust and confidence as a result of actions of the second respondent. On the facts of this case and in the light of the ways in which the two respondents' operation of the service was so intrinsically linked, we do not agree with Mr Boyd. We would not have found that the first respondent was simply able to deny responsibility for actions which would otherwise have breached the duty of trust and confidence in the circumstances of this case (and, in particular, where the employees of one organisation were line managed by employees of another). Albeit unusual for the employees of one organisation to be able to breach the duty of trust and confidence owed to its employees by another organisation, in this case we would have found that the actions of the second respondent's employees would have been capable of doing so.

303. In her submissions, the claimant referred to what was said in the notes of the one-to-one meeting undertaken between Mrs Hinchcliffe and Mrs Hodgetts (1593). That note was not something of which the claimant was aware at the time when she was employed. We had some concerns about what was noted and understood why the claimant emphasised it. However, it was not part of the reason why she resigned and was not contended by her to have been part of the fundamental breach of contract as set out in the list of issues.

Other issues

304. Mr Boyd submitted that we should also make findings on **Polkey** issues. As a result of our findings on the liability issues it was not necessary for us to determine that or whether we should do so. However, we would add that applying the principles in the case of **Polkey**, had we found that the claimant had been constructively dismissed, we would have found that there would have been a significant reduction in any award as it was in practice unlikely that the

claimant would have returned to active employment with the first respondent by the time she resigned.

Summary

305. For the reasons explained above, the Tribunal did not find for the claimant in any of the claims which she brought.

Employment Judge Phil Allen
21 December 2023

RESERVED
JUDGMENT AND REASONS SENT TO THE PARTIES ON 2 JANUARY 2024

FOR THE TRIBUNAL OFFICE

LIST OF ISSUES

1. **Constructive Dismissal**

1.1 Did the respondent do the following things:

1.1.1 See allegations 1-30 in the List of Allegations and paragraphs (1) and (2) above

1.2 trust and confidence case

1.2.1 Did those things breach the implied term of trust and confidence? The Tribunal will need to decide:

1.2.1.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

1.2.1.2 whether it had reasonable and proper cause for doing so.

1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2. **Direct discrimination (EqA 2010 s13)**

2.1 Did the respondent do the following things:

2.1.1 See allegations 1-5, 7-11 and 15-29 in the List of Allegations

2.2 Was that less favourable treatment than a comparator?:

2.2.1 Are there any actual comparators relied on? The claimant says they were treated worse than [see the detail contained in the List of Allegations for details of the comparator alleged, in relation to each allegation]. There must be no material difference between their circumstances and the claimant's.

2.2.2 If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether the claimant was treated worse than someone else would have been treated.

2.3 If there was less favourable treatment, was it because of the claimant's race

2.4 Did the respondent's treatment amount to a detriment?

3. **Harassment related to race (EqA 2010 s26)**

3.1 Did the respondent do the following things:

3.1.1 [See allegations 10-17 in the List of Allegations]

3.2 If so, was that unwanted conduct?

3.3 Did it relate to [race]?

3.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. **Victimisation (EqA 2010 section 27)**

4.1 Did the claimant do a protected act as follows:

4.1.1 Calls and e mail to Jayne Smith on 18.3.20 setting out the detail which appears at 11 – 11.4 of ET1? (**Protected Act 1**)

4.1.2 Call with DC on 23.3.20, during which C allegedly informed DC she was being discriminated against (as further set out at 13.2 of ET1) (**Protected Act 2**).

4.1.3 Submit a grievance dated 3 August 2020, alleging discrimination **(Protected Act 3**)

4.2 Did the respondent do the following things:

4.2.1 Commit the alleged acts at paragraphs 8-13 of the List of Allegations, in response to Protected Act 1

4.2.2 Commit the alleged acts at paragraphs 5-7 and 14-16 of the List of Allegations, in response to Protected Act 2

4.2.3 Commit the alleged acts at paragraph 17, 18, 20, 22-27 (inclusive), 29 of the List of Allegations, in response to Protected Act 3

4.3 By doing so, did it subject the claimant to detriment?

4.4 If so, was it because the claimant did a protected act?

4.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

5. **Remedy for discrimination/victimisation**

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

6. **Constructive unfair dismissal complaint**

6.1 The claimant relies on all of the allegations below, taken together, as a breach of the implied term of mutual trust and confidence in her contract of employment and says that the final straw was on 10 May 2021 in the respondent's decision to replace Emma Hinchcliffe as the person managing the claimant's sickness absence with Rebecca Billington.

6.2 The claimant says this act was offensive to her as she had repeatedly asked for someone impartial to manage her absence and her requests had been ignored and then the only reason she was replaced was because Ms Hinchcliffe was sent on secondment. The claimant says this showed her she was not valued and it caused her to resign.

7. **Discrimination complaint – Schedule of Allegations**

1.	18 March 2020	DD shouted at me in my office at location Mb in presence of MJ at around 10.15 -10.30am	S13, race MJ actual comparator	R1 (10.3)

2.	18 March 2020	DD shouted at me on my return to the office 10 minutes later calling me "pathetic" and saying she was "happy that she was getting to me" in presence of MJ	s.13 race MJ actual comparator	R1 (10.5)
3.	18 March 2020	C told JS about the shouting incidents and JS failed to support C. PROTECTED *ACT* JS told C to email details of the incident and would not have done this to a white woman.	S.13 race Actual comparator DD JS spoke to DD but made C email	R1 (11), (11.1), (11.2), (11.3), (11.4), (11.5)
4.	23 March 2020	DC informed C he would be instigated disciplinary investigations against her following the incident on 18 March 2020	S13 race DD actual comparator / she was not disciplined	R2 (13)
5.	23 March 2020	DC informs C that she is to move to work from location RH C tells DC moving her is discrimination	s.13 race victimisation protected act was telling JS by call and email on 18 March 2020 about shouting incidents	R2 (13.1), (13.2) (13.3) ,
6.	6 April 2020	DC emails C telling her to move to RH and to physically attend work (she had been working from home)	Victimisation Protected act was call and email to JS	R2 (14), (15)
7.	7 April 2020	DC emails C threatening disciplinary action if she does not start working from RH	S13 race Victimisation Protected act is 6 April conversation to DC	R2 (14), (15)
8.	In April 2020 at dates and times to be provided by claimant	JS fails to respond to specific timed and dated emails from C when JS is line manager and supposed to be C's point of support	s.13 hypothetical comparator white woman who has complained Victimisation Protected act is 18 March call and email to JS 18 March 2020	R1 (18)

9.	April 2020 dates and times to be provided by claimant	DD ignores work emails from C	s.13 hypothetical comparator white woman who has complained victimisation protected act calls with JS and DC 18 March 2020 6 April 2020	R1 (18)

Clarified on 15 December 2021

	Date	Event	Legal Label	Respondent
10.	15 May	JS emails me an excessive amount of work in comparison to colleagues – email list attaching a spreadsheet of clients to contact Less favourable treatment Comparators in my team Maureen Jolley Janice Fields Joseph McCusker Because of my race	Section 13 EQA 2010 Section 26 EQA 2010 Section 27 EQA 2010 Protected acts 18 March	R1 (21), (32.5), (39.2).
11.	8 June 2020	Jayne Smith allocates me further work in excess of that allocated to my colleagues – email list attaching spreadsheet of clients to be contacted I had 136 in total to complete the assessment over the phone Comparator colleagues had Joseph 32 JF 26 Maureen 14	13 26 27 Protected acts 18 March	R1 (22), (22.2), (32.5), (39.2)
12.	8 June 2020	C finds out that JS has shared a spreadsheet of work to be done with the team even though some of that work had been completed or was in progress with the claimant ***The only thing that separates me from everyone else is my race***	26 27	R1 (22.1)
13.	1 July 2020	Teams meeting with JS MJ JM (not Janice) C asked if some work could be taken from her …she had 61 still to do, she knew the others to have less. JS said no they weren't going to be shared	26 and 27	R1 (22.3)
14.	26 May		26	R2 (13.1),

	2020	Christine Bracken had not spoken to me as part of the investigation into the incident on 18 March (DD and I had each complained about this) I do not know if DD was spoken to directly by CB I believe I was treated differently because of my race	27	(23), 23.3) (23.2),
15.	26 May 2020	Outcome of CB's investigation was to recommend informal counselling in relation to my conduct Comparator DD who did not have to have counselling	13 26 27	R2 (23.1)
16.	15 June 2020	I was given a line manager DC about whom I had said I felt bullied and intimidated – 7 April 2020 scoicd@ – a generic email – went to R1 – next day had a	13 Less fav treatment No other colleague	R2 (15), (25) 5.1)

	AI	response from R1 employee John Fenby And I had texted JS to say I felt bullied by him At some point after 23 March C had informed Jenny Leyland	had a change of line manager Dian was admin the other three were social workers like me 26 27	
17.	12 October 2020	Denying my request that someone other than Emma Hinchcliffe manage my absence (EH is DC's line manager) Emma Hinchcliffe suggests I look for alternative employment	13 26 27 13 26 27 Protected act 18 March 2020 Grievance 3 August 2020	R2 (27), (27.1), (27.3), (44), (44.1), (44.2), (44.3) R2 (27.2)
	3 August 2020	*Lodges grievance*		
18.		Failure to provide support during sick leave John Fenby	13, 27 Comparator Hypothetical	R1 and r2 (30.3)

19.	November - 2019 2020	JS failed to support me to achieve level 3 progression I don't know who was supported by Jane Claimant cannot identify an actual comparator so relies on a hypothetical	13	R1 (30.4)
20.	17 November 2020	Failed to provide minutes of the meeting C cant identify a comparator Relies on hypothetical comparator	13 27	R1 (30.5) (30.6)
21.	25 March 21	Delay in receiving response to SAR	13	R1 (38), (38.1) Breach of contract
22.	4 January 21	Delay in holding stage 2 grievance outcome meeting	13 27 Don't know anyone who had lodged a grievance so hypothetical comparator	R1 (28), (29), (29.1) , 29.2), , (29.3) 29.4), (30), 30.1), (32)
23.	4 January 21	Ann Brookings failure to fairly investigate my grievance in that evidence had been ignored My emails Written statement that had gone to CB The grievance document itself	13 27	R1 (32.1), (32.2), (32.3), (32.4), (32.5), (32.6)
24.	11 February 21	Informing only my representative and not me directly of the stage 3 gr	13 27	R1 (36)
		appeal meeting	Hypothetical comparator	
25.	11 February 21	Initial refusal and delay in replacing Mark Albiston as chair of stage 3	13 27	R1 (30.2), (36.1), (36.2), (36.4), (36.5)
26.	11 March 21	Delay in holding stage 3 appeal	13 27	R1 (33), (34), (37)
27.	10 March 21	Conduct of stage 3 appeal unfair as claimant stopped and interrupted when seeking to ask questions of Ann and Jenny	13 27	R1 (32.6), (37)
28.	9 April 2021	Deliberately misinformed about proper procedures by Mata Jallow for making SAR – did not tell me I needed to make two requests And Jenny Leyland in January 2021	13	R1 (38.2), (38.3)

29.	10 May 2021	Stage 3 outcome discrimination Process not been followed throughout – Delay Failure to scrutinise evidence	13 27	R1 (39), (39.1), (39.2), (39.3), (39.4), (39.6), (40.3)
20.	26 May 21	Andrew Lewarne Stage 3 grievance on being made aware by C that some information may have been fabricated by Jayne Smith – failed to reinvestigate	Breach of contract only	R1 (39.5), (40), (40.1), (40.2)

Numbers highlighted in yellow denote R1's views as follows -

Issues 10/11 – the additional paragraph references are a repeat of the issue already raised and merely highlight C's evidence in support of the original allegation.

Remaining new paragraph references – R1 contends these references are background, rather than allegations for the ET to determine.

The Claimant does not agree that the paragraphs as highlighted by R1 and R2 are background information. The Claimant contends that all paragraphs included are central to the allegations.