



EMPLOYMENT TRIBUNALS

Claimant

Miss. I. Potts

v

Respondent

**Mid Cheshire Hospitals NHS
Foundation Trust**

Heard at: Birmingham

**On: 11,12,13,14,15,16,&18 December
2023**

Before:

Employment Judge Wedderspoon

Ms. M. Stewart

Mr. K. Hutchinson

Representation:

Claimant: Miss. I Potts, In Person

Respondents: Mr. A. Gibson, Solicitor

JUDGMENT

1. The claims of direct race discrimination are not well founded and are dismissed.
2. The claims of direct age discrimination are not well founded and are dismissed.
3. The claims of harassment related to race are not well founded and are dismissed.
4. The claims of victimisation are not well founded and are dismissed.

REASONS

1. By claim form dated 25 July 2022 the claimant brought complaints of direct age and race discrimination, harassment related to race and victimisation. The claimant 's case is that she was also subject to post employment victimisation by referral to her professional regulator.
2. The claimant's case is during her employment her colleagues made derogatory remarks towards her about her race. The claimant describes herself as a "black Afro Caribbean woman". She lodged a number grievances which she says the respondent failed to investigate properly. She also states that she was subject to age discrimination when she was replaced by two younger nurses in their 20s and 30s and was told she trying to secure a pension pot at her age. The claimant describes herself as a woman in her 50s. The claimant resigned her employment on 1 April 2022 by reason of the

discriminatory treatment. The claimant alleges she was subject to post employment victimisation when the respondent referred her to the National Nursing and Midwifery Council which subjected her to restrictions on her practise.

3. The respondent disputed the claims. Its case is that the claimant was engaged initially on a probationary period. A number of serious concerns were raised about the claimant's conduct and interaction with colleagues. Due to the claimant lodging a race discrimination claim the claimant's probation review was delayed. The claimant was suspended pending a formal probationary hearing to determine whether she should be confirmed in post. The claimant elected to resign. The respondent referred the claimant to her professional regulatory body the Nursing and Midwifery Council (NMC) because it was appropriate to do so, and this cannot amount to victimisation in law. Further the respondent states it is not responsible for any decisions made by the NMC to place conditions on the claimant's practise. The respondent stated that it did not rely upon a justification defence because the respondent did not discriminate directly against the claimant by reason of her age.

List of Issues

4. The issues to be determined by the are as follows :-

Time limits

- a. Given the date the claim form was presented and the dates of early conciliation some of the discrimination complaints may not have been brought in time.
- b. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The will decide:
 - i. Was the claim made to the within three months (plus early conciliation extension) of the act to which the complaint relates?
 - ii. If not, was there conduct extending over a period?
 - iii. If so, was the claim made to the within three months (plus early conciliation extension) of the end of that period?
 - iv. If not, were the claims made within a further period that the thinks is just and equitable? The will decide:
 1. Why were the complaints not made to the in time?
 2. In any event, is it just and equitable in all the circumstances to extend time?

5. Direct race discrimination (Equality Act 2010 section 13)

- a. The claimant describes herself as a black Afro Caribbean woman.
- b. Did the respondent do the following things:
 - i. 2 February 2021 the claimant was left to clean the theatre on her own and was described by Hilary Felton (manager) as a hired help;

- ii. 22 February 2021 was required to queue with the public for a COVID vaccination jab unlike colleagues who had a specific appointment
- iii. 10 March 2021, Hilary Felton described the claimant as a “black scooby doo”;
- iv. 10 March 2021 Hilary Felton stated baa baa black sheep in front of the claimant;
- v. 1 October 2021 failed to uphold the claimant’s complaint about race discrimination
- vi. 16 February 2022 Andrew Williams informed the claimant he would take no action in respect of the formal complaint she had made;
- vii. 1 April 2022 the claimant resigned her employment and was constructively dismissed by reason of the discriminatory treatment.

c. Was that less favourable treatment?

The will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant’s.

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

d. If so, was it because of race ?

6. Direct age discrimination (Equality Act 2010 section 13)

a. The claimant describes herself as a woman in her 50s.

b. Did the respondent do the following things :

- i. replace the claimant in the urology/ENT department from September 2021 to 1 April 2022 by two younger women (one in their 20s and another in their 30s);
- ii. On 5 April 2021 Emma Reay stated to the claimant that she was “in this late stage of her life trying to secure a pension pot”.

c. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant’s.

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

d. If so, was it because of age ?

7. Harassment related to race (Equality Act 2010 section 26)

a. Did the respondent do the following things:

- i. 2 February 2021 the claimant was left to clean the theatre on her own and was described by Hilary Felton (manager) as a hired help;
 - ii. 22 February 2021 was required to queue with the public for a COVID vaccination jab unlike colleagues who had a specific appointment
 - iii. 10 March 2021, Hilary Felton described the claimant as a “black scooby doo”;
 - iv. 10 March 2021 Hilary Felton stated baa baa black sheep in front of the claimant.
- b. If so, was that unwanted conduct?
 - c. Did it relate to race ?
 - d. 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?
 - e. If not, did it have that effect? The 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.

8. Victimisation (Equality Act 2010 section 27)

- a. Did the claimant do a protected act as follows:
 - i. 11 March 2021 the claimant lodged a grievance complaining about race discrimination?
 - ii. 13 July 2021 the claimant lodged a further grievance
 - iii. 31 July 2021 the claimant lodged a further grievance about inaccurate information provided by Mr. Woodhall about her sickness absence;
 - iv. 16 February 2022 the claimant submitted a complaint to Andrew Williams.
- b. Did the respondent do the following things:
 - i. 7 May 2021 Ian Woodhall moved the claimant from the urology/ENT department;
 - ii. 7 May 2021 Ian Woodhall informed the claimant that no one would support/give evidence to support her grievance;
 - iii. 13 May 2021 the claimant was invited to an investigatory grievance meeting although the claimant said she did not wish to pursue the grievance;
 - iv. 13 July 2021 Ian Woodhall in the context of the claimant stating she was not being included in a roster that those individuals on the roster are “our own people; treated properly so they will be rostered; the claimant needed to go where she was needed.”
 - v. 13 July 2021 the claimant was informed she would not be confirmed in post;
 - vi. 30 July 2021 in notes of the meeting of 13 July it was suggested that the claimant had 3 periods of sick leave when she had only 1 ¾ days of absence;
 - vii. 1 October 2021 failed to uphold the claimant’s complaint about race discrimination;

- viii. In notes provided to the claimant dated 15 February 2022 wrongly stated the meeting was the first and not the second milestone meeting.
 - ix. 16 February 2022 suspended the claimant;
 - x. 16 February 2022 Andrew Williams said he could take no action about the claimant's complaint submitted on that date;
 - xi. 5 May 2022 the respondent referred the claimant to her regulatory professional body the Nursing and Midwifery Council.
- c. By doing so, did it subject the claimant to detriment?
 - d. If so, was it because the claimant did a protected act?
 - e. Was it because the respondent believed the claimant had done, or might do, a protected act?

9. Remedy for discrimination or victimisation

- a. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- b. What financial losses has the discrimination caused the claimant?
- c. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- d. If not, for what period of loss should the claimant be compensated?
- e. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- f. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- g. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- h. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- i. Did the respondent or the claimant unreasonably fail to comply with it?
- j. If so is it just and equitable to increase or decrease any award payable to the claimant?
- k. By what proportion, up to 25%?
- l. Should interest be awarded? How much?

The Hearing

4. The Tribunal was provided with a bundle of 777 pages. The Tribunal heard from the claimant. The respondent called 8 witnesses; Jane Platt, Practise Development Co-ordinator in the theatre department; Sarah Mitcham band 5 theatre nurse; Susan Sarson Divisional Head of Nursing for Surgery and Cancer Division; Andrew Williams, Divisional Director for Surgery in cancer; Ian Woodall, Theatre Lead; Emma Reay, Theatre Service Manager and Samuel Cross, Cancer Services Manager in the Surgery and Cancer division and Hilary Felton, Band 5 theatre nurse. The Tribunal determined to hear evidence on liability first.

5. At the commencement of the hearing, the claimant applied to add two documents to the bundle the first document is an e-mail dated 8 May 2021 sent by the claimant to Laurence Bell and Ruth Hough where she refused to accept

the invitation for an investigatory interview. The Tribunal determined to include this document as it was relevant to the issues to be determined in the case. The claimant also sought to rely upon a complaint report from a patient which was disclosed inadvertently by the respondent to the claimant. The respondent objected to the inclusion of the document because it stated it was not relevant to the issues to be determined by the Tribunal. The claimant submitted that it should be included because she had been blamed for lots of things which were not her fault. There was no suggestion by the respondent that this particular incident was caused by the claimant and in the circumstances the Tribunal determined it was not relevant to the issues to be determined by the Tribunal and refused to add to the document to the bundle.

6. On the application of the claimant, the Tribunal made a reasonable adjustment to the proceedings by holding the hearing remotely. The Tribunal's proposal to take regular 10 minute breaks every hour in the course of the hearing day was agreed by the parties. Neither party asked for any further reasonable adjustments to be made but they were informed if this changed they should raise it.

7. The Tribunal used the first day for reading and read all the witness statements and documents referred to therein and further read the investigation report page 225 to 245 and probationary report at page 389-407 (as they were invited to do by the respondent). The Tribunal added to the bundle with the claimant's consent the respondent's grievance complaints and disputes policy and procedure and the bullying and harassment dignity at work policy and procedure. The claimant objected to the respondent adding a letter to her dated 24 May 2021 from Laurence Bell and a letter from Sue Sarson reported to have been sent by Royal Mail signed for 14 April 2022 on the basis that she had not received these documents. The Tribunal determined that they were relevant to the issues and were added to the bundle but allowed the claimant to give some additional evidence about these documents.

Facts

8. The claimant was employed by the respondent from 4 January 2021 as a band 5 nurse located at Leighton Hospital, Crewe. The claimant had previously worked at the Trust as an agency nurse for a period of seven months in 2015. The claimant was employed as a theatre practitioner in the Surgery and Cancer division. Her line manager was Ian Woodall, Theatre Lead. Her induction mentor was initially to be Sarah Mitcham. However, Sarah Mitcham, Band 5 nurse explained to Jane Platt, Practice Development Co-ordinator that she did not believe that she could act as a mentor, as a band 5 and newly transferred employee of the Trust, to the claimant but would be willing to show the claimant what she knew about the department, namely carrying out a buddy role. In the circumstances Darren McIvor Senior Theatre Practitioner, Band 6 agreed to act as the claimant's mentor.

9. At the time of the claimant joining the respondent it was in the third wave of the COVID pandemic. The ICU department which was located next to the claimant's department was very busy and the hospital was chaotic. It was a very difficult time for nursing staff; some staff had to be sent to work in the Accident and Emergency Department although not fully trained by reason of the demand for its service. There was a lot of stress; it was a very unusual situation. Intensive care consisted of COVID positive patients and non-COVID patients were placed into the recovery area. Stress was suffered by managers trying to allocate staff.

Mr. Woodall explained there was a lot of struggles; upset and tears. By Easter 2021 the highest number of COVID positive individuals were in intensive care. The hospital was having to function with some staff isolating or off sick themselves with COVID. The hospital was also subject to a regime of regular cleaning by all staff.

Claimant's contract of employment

10. Pursuant to her contract of employment, page 151-159, the claimant's appointment was subject to a six month's probationary period during which time the claimant's performance, conduct and attendance would be monitored. The contract stated that failure to reach the expected standards during probation, despite the support and assistance offered, may result in an extended probation period or exceptionally, termination of the contract of employment subject to four week's notice. The contract also referred to the Trust's disciplinary procedures and grievance procedures.

Induction

11. The claimant underwent her induction from about 11 of January 2021 to end of February 2021. The claimant's mentor was Darren McIvor (band 6) who signed off the claimant's training programme as satisfactory. The final induction was signed off and completed (page 203) on 24 February 2021. Induction is different from a milestone meeting which the Tribunal deals with below.

Concerns of Mr. Jones

12. On 18 February 2021 (page 477) Mr Woodall met with the claimant and Jane Platt when the surgeon, Hugh Jones (registrar) had raised with him that he was unhappy with the standard of the scrub assistance from the claimant. Mr. Jones said she did not know some of the instruments by name. The claimant was not agreeable to pass instruments to the surgeon in a way that the team were used to within the speciality. He suggested there was a lack of insight by the scrub nurse. Mr Woodall confirmed in evidence that the theatre team had stated that the consultant, Mr Karkenavatos, had also requested the claimant does not scrub for major ear disease cases in the future. Mr. Woodall met with the claimant and Jane Platt to discuss the doctor's concerns. The claimant did not accept these concerns (see page 477). On 23 February 2021 (page 475) Mr. Woodall met with the claimant again to discuss concerns that the claimant appeared reluctant to follow direct instructions from her colleague and senior stated practitioners. The claimant stated she should not be expected to do anything she felt was against her principles and described her mentor as "her enemy". The claimant maintained she was right (p 475). Mr. Woodall informed the Tribunal that the claimant did not accept that she was at fault in any way.

Events of 9 March 2021

13. On 9th March 2021 Hilary Felton (page 479) came into the band 7 office upset and told Mr. Woodall that she was not able to continue working with the claimant because of ongoing issues; voices were raised. Miss Felton asked the claimant to continue the conversation in the band 7 office; the claimant refused. Hilary Felton had left theatre. Following speaking with Jane Platt and Mr. Woodall, Ms. Felton felt able to return to theatre. Sarah Mitcham also came to the band 7 office recounting her observations of the incident. She stated that she had been accused of being a bully by the claimant because she suggested to the claimant that it was not appropriate to discuss issues during the theatre list. Then the claimant came into the office and asked to speak to Jane Platt and Mr. Woodall. The claimant stated she was being bullied by Hilary Felton and Sarah Mitcham.

The claimant was told by Mr Woodall that he was aware of the situation in the theatre that afternoon and asked the claimant to write a statement of events and he would meet with the claimant the following morning. Later Hilary came into the office and stated that the claimant would not take the direction during the potting of specimens. She stated the situation was dangerous and that she had told the claimant this. Mr. Woodall asked Hilary to make a statement of events and reassured her that we would address the issues raised by all involved.

14. On 9 March 2021 Mr Woodall asked Dr. Jones following a chat about the scrub nurse incident to set out an e-mail related to the issues. By e-mail dated 10 March (page 324) Mr. Hughes stated there were good points namely microscope draped well, position opposite the patient was good and patient appropriately draped. Points of concern included incorrect instruments handed to me at least 20 times during case using usually taking several guesses before the correct one arrived had to get up from microscope walk round the table and help myself to the instrument at least four times during the case; instruments often not placed in my hands correctly so readily had to come off the microscope to reposition the hands; 15 blade handed to me in kidney dish again having to take eyes off microscope to pick up instrument; didn't know how to give me gel foam on a needle for dressing at the end. He described the scrub nurse's role being important in these sorts of cases; instruments have to arrive exactly to hand as the surgeon is blind to the external environment; every time the surgeon's eyes come off the microscope it takes at least 30 seconds to refocus back on the target. It is impossible to do a case like this with disruption every minute when a change of instrument occurs. He described having worked in over 6 hospitals around the northwest and being on many ear courses around the world I can say with confidence that the otology operating at Leighton is exactly the same as everywhere else I've worked. I have never heard the aftermentioned instruments called anything other than the names mentioned above, (rose elevator and frying pan). Without a period of mentorship and improvement in performance I won't be able to do any major ear cases safely with the scrub nurse in question. This is a personal assessment of a performance in a single otology case and may not reflect her ability in other surgical fields.
15. Under cross examination the claimant alleged that the doctor said this to cover up for the consultant being late to attend to a patient. The claimant said a patient was under anaesthetic for 2 hours longer than they should have been because the consultant was not there. The Tribunal rejected that assertion as incredible.

Grievance Procedure

16. The respondent's Grievance, Complaints and Disputes Policy and Procedure refers to an informal and formal grievance. An employee should first raise a grievance by discussing it informally with their immediate manager in accordance with the trust procedure. If an employee was dissatisfied with the outcome of that they should set out the grievance in writing and send it to an immediate manager.

Bullying and Harassment (Dignity at Work) Policy & Procedure

16. The respondent's policy provides again for an informal and formal grievance process.

Grievance 10 March 2021

17. By email dated 10 March 2021 (page 246) the claimant lodged a grievance complaining about race discrimination. The claimant sent her grievance to Mr Woodall stating that she wanted to lodge a formal complaint of harassment. The claimant stated that the *unwanted behaviour and humiliation comes from two*

members of staff within the ENT team with whom I often work for long hours their names are Hillary and Sarah Mitcham the claimant described on the 8th occasion since working with the Trust both nurses have made derogatory comments about my ability to work as a scrub nurse for ENT surgical procedures; Hillary imitates my foreign accent both in my presence and behind my back; on three occasions Hilary sang the song baa baa black sheep have you any wool yes Sir yes Sir within her earshot; Hilary and Sarah have refused to help me when i reached out to both nurses for clarity on what instrument the surgeon referred to his frying pan. She verbalised knowledge of what the name implied three weeks after the situation. The claimant also alleged that safety procedures had been compromised on three occasions when Hillary was the scrub nurse and herself the circulating nurse. In the presence of all team members Hilary shouted at me while describing me as dangerous and stated I should not be in theatre. I was following the correct procedure for taking a specimen when Hillary refused to read the patient label. Or more than one occasion I've heard Hillary making derogatory comments to others in the coffee room about myself Hillary has stated i'm a glorified cleaner. As a new member of the team I'm trying my best but yesterday situation theatre left me feeling humiliated and disrespect it to the point of which I consider giving up my nursing career.

Allegations

18. The claimant alleged that on 2 February 2021 she was left to clean the theatre on her own and was described by Hilary Felton (manager) as a “hired help”. The claimant’s allegation was slightly different in her grievance; at page 246 where she complained that Hilary had stated she was “a glorified cleaner”. The claimant alleged during the grievance investigation meeting that this was in front of Darren McIvor and she also alleged that the consultant Mr Tak referred to the claimant as a “fucking idiot” also in front of Darren (page 257). Darren McIvor was interviewed and stated he had not heard these comments (page 302). He stated he had not heard Hilary or Sarah making any derogatory comments to the claimant but instead that the claimant had made derogatory comments about Miss. Felton and Miss. Mitcham when they have offered her advice about procedures. In her evidence to the Tribunal, Miss Felton denied ever making these comments. The Tribunal found Miss Felton to be genuine and credible and accepted her evidence that she had not made these comments to the claimant. The Tribunal also took into account the context of COVID and the witness evidence of Mr Woodall and Miss Reay namely all members of staff no matter what grade were required to clean at that time; and took account of the evidence of Ms. Mitcham who stated all scrub nurses clean. On the balance of probabilities, the Tribunal found that the claimant would not have been left alone to clean on her own; all scrub nurses had the responsibility of doing so. The Tribunal determined that this allegation was untrue.
19. The claimant alleged that on 22 February 2021 she was required to queue with the public for a COVID vaccination jab unlike colleagues who had a specific appointment. This was not a matter that the claimant had formalised in her grievance dated 10 March 2021. Mr Woodall's evidence to the Tribunal was at the time when the claimant joined the Trust, employees had already been emailed appointments to attend for a vaccine. The claimant expressed concern she had not been vaccinated. Mr Woodall therefore arranged for the claimant to have the vaccine at the earliest opportunity. He was unclear whether the claimant would have had to queue with the public.

20. The claimant alleged as part of her case that on 10 March 2021, Hilary Felton described the claimant as a “black scooby doo”. This was not an allegation pleaded in the claimant's original ET1; and did not feature in any of the claimant's four complaints raised with the respondent. The Tribunal determined that this was a very serious allegation. The claimant 's explanation that she failed to refer to it, was because she was less experienced when she lodged her claim form, and her grievance was not considered credible by the Tribunal. Miss Felton in evidence denied she had said this. The Tribunal preferred the evidence of Miss. Felton and found that she had not used this phrase towards the claimant.
21. The claimant also alleged that on 10 March 2021 Hilary Felton stated Baa baa black sheep in front of the claimant. The claimant identified that Danielle and Amir had heard this (page 252). When interviewed pursuant to the grievance investigation neither witness (see pages 292 and 317) had heard this phrase. Hilary Felton disputed that she said ever this, and the Tribunal preferred her evidence for the full reasons set out in the credibility section of the judgement.
22. On 10 March 2021 (page 484) the claimant met Jane Platt and Ian Woodhall to discuss the grievance that she lodged. The claimant was happy to have a facilitated meeting and stated she only wanted to concentrate on the general team issues rather than the points raised in her e-mail. Mr. Woodall explained to the claimant that he could offer her a temporary move into another team but the claimant did not want to move. Mr Woodall agreed to separate the claimant from Hilary and Sarah wherever possible although off duty may not always allow this. The claimant said she was happy with this approach.
23. Following further discussion about the content of the grievance Mr Woodall and Miss Platt determined that an informal approach did not address the serious allegations in the claimant's e-mail. Mr Woodall decided to speak to HR (page 485).
24. The claimant alleged on 5 April 2021 Emma Reay stated to the claimant that she was *“in this late stage of her life trying to secure a pension pot”*. This allegation did not form any part of the grievance dated 18 February 2022 lodged against Emma Reay. The claimant did not raise this at the meeting with Emma Reay on 13 July 2021 or in a grievance lodged against Mr. Woodall dated 31 July 2021. Ms. Reay disputed saying this and stated that this is something she would never say. The Tribunal accepted this evidence and found Ms. Reay credible.

Investigation of Grievance

25. On 28 April 2021 page 207 -210 Emma Reay service manager appointed Laurence Bell assistant service manager with Ruth Hough (supporting) to investigate the formal grievance lodged by the claimant dated 10 March 2021 regarding behaviour of Sarah Mitcham and Miss Felton. On 5 May 2021 (page 211) Emma Reay wrote to the claimant confirming a discussion which took place during a meeting with the claimant and Mr Woodall. The claimant raised concerns about Hilary Felton and Sarah Mitcham; she stated that given the serious nature of the claimant's allegations a formal investigation process was to be launched in line with the Trust's dignity at work policy and procedure. Lawrence Bell was appointed as the investigating officer. The claimant was informed following the conclusion of the investigation Laurence Bell will confirm his findings in the form

of the report by 18 June 2021. A determination would then be made as to the outcome namely no further action required; informal action required; formal action required in line with trust policies and procedures. The claimant was invited to an investigatory interview on 13 May 2021. The conclusion of the report was delayed to September 2021. Miss Reay's evidence to the Tribunal was that due to the COVID pandemic; staff isolating; staff rostering and staff absence it was not possible to complete the report before then. The Tribunal accepted this evidence.

26. By letter dated 6 May 2021 (page 213) the claimant was invited to attend an investigation interview. By e-mail dated 8 May 2021 page 778 the claimant rejected the investigation interview stating that *"unfortunately I am unable to accept the invite for investigation interview. I do not believe a change will happen. On Friday I was made to believe that no one who was present on the days when I was abused by my colleague Hillary will support my claim support for both nurses were strongly given by my line manager is making the investigation process mockery in my opinion"*.
27. The claimant did attend an interview on 13 and 19 My 2021 (see pages 251 to 260). The claimant was asked by Ruth Hough, Deputy workforce business partner whether she was happy to proceed with this investigatory interview and the claimant said yes. The respondent did encourage the claimant to engage in the process and the claimant did so. The Tribunal did not find that the claimant was forced to attend the interview taking into account that on 13 May 2021 the claimant said she was happy to proceed with the investigatory interview at page 251.
28. In the course of that interview the claimant identified a number of witnesses. The respondent interviewed the witnesses identified by the claimant save for Sarah Blasé. Her evidence concerned on the claimants account a reason why Miss Mitcham did not wish to be the claimant's mentor. She was not a witness to the allegations specifically made by the claimant in her grievance. The claimant did not ask the respondent's witnesses as to why Sarah Blase was not interviewed. The Tribunal heard the direct evidence from Sarah Mitcham as to why she did not feel she could be the claimant's mentor as set out above. The Tribunal found her explanation to be credible as set out above.

Relocation of the claimant

29. The claimant alleged on 7 May 2021 Ian Woodhall moved her from the urology/ENT department as an act of victimisation. Mr Woodall referred the Tribunal to a file note dated 10 May 2021 at page 495. His evidence was that due to the department now running at pre COVID operating sessions it was becoming increasingly difficult to keep the claimant in urology without affecting the safe staffing requirements of other theatre sessions. The claimant had suggested that harassment was ongoing from other members of the team. Mr Woodall offered the claimant a move to another theatre and offered her a move to her preferred place. The claimant agreed to move to the general surgical team. The claimant informed the Tribunal in her evidence that she loved general surgery.
30. On 7 May 2021 the claimant alleged that Ian Woodhall informed her that no one would support/give evidence to support her grievance. The claimant relied upon her e-mail dated 8 May 2021 at page 778 when she stated *"on Friday I was made to believe that no one who was present on the days when I was abused by my colleague Hilary will support my claim"*. Mr Woodall disputed this in cross examination. The Tribunal found Mr. Woodall credible; he tried to assist the

claimant by inviting her to write down her complaints; and on the balance of probabilities determined he did not say that to the claimant.

Claimant's investigatory Interview

31. The claimant was interviewed on 13 and 19 May 2021 page 251 to 260 by Mr. Bell in the presence of Ruth Hough. The claimant identified that Danielle and Amir had witnessed Hilary singing Baa baa black sheep. She said Jenny Hemmings and Danielle had witnessed Hilary stating why don't you speak like you do in the Caribbean don't you say yeah mon". At page 257 she described Hilary stating that the claimant was a glorified cleaner in front of Darren McIvor. She alleged Sarah Blase said to her "*you have met your mentor but I know why she doesn't want to be your mentor*". The claimant signed the investigation notes a page 260 on 4 June 2021; she did not make any hand written amendments to her statement. There was a dispute of evidence as to whether the claimant had attempted to change the investigatory interview notes. The respondent added to the bundle with the claimant's consent the letter of 24 May 2021 sent by Mr Bell the investigating officer to the claimant it states *please find attached the typed up notes taken at the investigatory interviews you attended on 13 and 19 May 2021. Please can you check them for accuracy and make any amendments in pen. You will then need to sign one copy and return that copy to me by no later than 7 June 2021 the second copy is for your records*". The claimant alleged at the Tribunal hearing that she had contacted HR by e-mail to add in some additional comments. The claimant had not raised there was a missing e-mail in the document bundle. The Tribunal did not accept the claimant's evidence and concluded when the claimant signed on 4 June 2021 that the interview notes were accurate, she meant it.

Milestone Review 13 July 2021

32. The probation period policy and procedures (page 60) refers at paragraph 2.3 page 63 to milestone review meetings; There will be two milestone review meetings during the probationary period. Under normal circumstances the reviews should be undertaken in months three and six. In exceptional cases it may be apparent very early in the probationary period that an individual is unsuitable for the role and it is not appropriate to hold a first or second milestone review. In these scenarios a formal hearing should be arranged to consider termination of the employee's contract. At the first milestone review meeting the line manager should conduct it and consider job performance including attendance and conduct issues. Progress towards standards will be closely reviewed and managers will seek to establish whether the employee is making satisfactory progress in assuming the responsibilities of the job.
33. The second milestone review meeting discusses again job performance and if the employee's performance is satisfactory in all aspects it will consider whether an employee can meet the requirements and suitability for the role namely considering attendance, time keeping, conduct, capability including progress with any required programme of education/training. It also sets out that an employee, if satisfactory, an employee can be confirmed in post where probation has been successfully completed after six months. An extension to a probationary period may occur if there is evidence to support a likelihood that the employee's performance will improve to an acceptable standard they may extend the probationary. Where the manager feels that even with support in place the employee cannot meet the standards required for the role they can be fast tracked to a formal hearing. Appendix 2 attached to the policy sets out a particular

- form which should be completed at the time of the first milestone review and a further form at page 72 to be completed on the second milestone review meeting.
34. It was proposed that the first milestone probation review should take place on 4 April 2021; the second milestone meeting for July 2021 and annual appraisal conversation for January 2022 (see page 196).
 35. There was a significant dispute of fact as to whether the claimant's first milestone meeting took place in April 2021. The claimant's case is that it did and took place on 7 of April 2021 and she relied upon a document at page 781 which against the date of the planned first milestone meeting there is a signature. The claimant contended Jane Platt signed her off acceptable at this stage. The respondent disputed this. Jane Platt contended she did not conduct the first milestone review and it was not in her remit to do so; it is a matter conducted by the line manager, not her. Furthermore, she did not recognise the signature on the induction material provided by the claimant as hers. Her evidence was that the claimant appears to have confused induction with milestone reviews. This was also the opinion of Mrs. Sarson who chaired the claimant's probation review hearing; she was presented with the claimant's induction material which the claimant contended was proof of a successful milestone meeting in April.
 36. The Tribunal determined that the claimant's first milestone review did not take place in April 2021 because on 10 March 2021 the claimant raised a grievance against two colleagues (page 246). The grievance investigation commenced prior to the first milestone review being held in July 2021. On the balance of probabilities, the Tribunal determined that the first milestone meeting did not take place on the 7 of April 2021; there is a formal process to be followed and particular documentation to be completed. The Tribunal was not satisfied that a simple signature at page 781 against the date of 4 April 2021 evidenced that the process had been followed. The Tribunal determined it was more likely than not that the first milestone meeting was postponed so that the grievance of the claimant could be investigated and the claimant had confused the signing off of her completed induction with the separate process of the first milestone meeting.
 37. On 13 July 2021 (page 215-223) the claimant had her first milestone review meeting with Ian Woodall and Ruth Hough, HR. The grievance investigation should have been completed by 18 June 2021 but due to the COVID pandemic it was significantly delayed. Ruth Hough, HR explained that the investigation was ongoing and the respondent did not want to delay the first milestone meeting any further. It is noted that the claimant disputed the concerns that were raised namely unwillingness to take advice from colleagues and unwillingness to take direction from colleagues. The claimant discussed the incident on 23 February 2021 involving a frying pan. It was explained to her that the department was unable to sustain a situation in which issues continue to arise regarding her refusal to accept advice or direction from colleagues. It was explained that theatre teams need to function effectively which required colleagues to support one another and to work collaboratively to ensure patient safety. It was outlined that the claimant needed to improve on how she interacts with her colleagues to reduce the incidence of conflict. The claimant disputed there was any conflict; the claimant said she felt she was being bullied. It was highlighted that the common theme from the colleagues is that she doesn't accept advice or instruction which can result in some difficult and challenging interactions during theatre. It was agreed that should any further incidents occur a theatre lead will address this situation in a timely manner and may need to speak to other colleagues to establish the circumstances around the incident. The provisional date for the next

probationary review was 14 September 2021. The claimant signed this document (page 216) stating that she strongly disagreed with the content.

38. Mr Woodall's evidence was that there was no acceptance on the part of the claimant that a degree of adjustment in how she does things could be required. Mr. Woodall explained that colleagues would provide advice to support their team and that if she was willing to take on board the advice it may avoid some of the situations she and the team are experiencing. In respect of an incident on 15 April 2021 the issues raised were being unsure of the dental instruments on the set; the nurse said to the claimant that if she had known that she unfamiliar with the dental set then she would have done the first case herself in order for the claimant to gain some familiarity with the instruments; the claimant stated she had done a lot of dentals. The claimant refused to take advice regarding the drill set which needed attention and she was said to be rude and abrupt with the nurse concerned. The claimant refuted these comments. There was also alleged to have been some conflict between Ashrav Nikraves and the claimant relating to the procedure for the checking of instruments; going for breaks when she was asked to do so and not completing a computer document when asked to do so. The claimant disputed that she had any part to play in the incident. It was proposed that the claimant should raise any concerns from her perspective; fortnightly reviews should take place as an additional source of support to discuss issues/concerns. The claimant should be allocated a band 6 mentor. The claimant objected to the suggestion of Helen Lancaster saying that she was inexperienced and still learning and she felt that she had been influenced by Darren McIvor. In the circumstances a different mentor was appointed Emma Myswiongo and the respondent suggested a referral to occupational health should take place in the circumstances that the claimant had been absent the previous day due to work related stress. The claimant stated she did not need to go to occupational health; she just wanted the bullying to stop. She stated that stereotypes were at play; that she's being seen as a black woman who creates conflict and is disruptive. The claimant stated that she could see what was happening; her name was not included on the daily work sheet allocation and like everybody else. Mr Woodall explained that this sometimes happens because the claimant is listed on the health roster under ENT but has temporarily been moved while the investigation is ongoing to ensure that she is working in a team to which she feels supported. He explained that because the health roster has her recorded under ENT the theatre team have to manually assign her to general surgery lists. Mr. Woodall stated he did not want her out of theatres.
39. By the claimant's reference, at page 222, that stereotypes are at play and that she is being seen as a black woman who creates conflict and is disruptive, in the context that the claimant alleged she was being bullied, the Tribunal found that the claimant did make allegations of race discrimination at this meeting.
40. In respect of the meeting on 13 July she described it as an impromptu meeting and knew nothing of it before. She was signing the documents as acknowledgment of receipt but did not agree the contents.
41. The claimant alleged that on 30 July 2021 in notes of the meeting of 13 July it was suggested that the claimant had 3 periods of sick leave when she had only 1 $\frac{3}{4}$ days of absence. The notes of the meeting of 13 July 2021 from page 215 to 223 do not suggest that the respondents thought that the claimant had three periods of sickness. The respondent informed the Tribunal and the Tribunal accepted that the respondent had no concerns about the claimant's attendance

at this time. By e-mail dated 18 July 2021 the claimant emailed Ian Woodall and Ruth Hough alleging falsified data input. She described her sick leave on 24 May as stress related brought on by bullying by her team leader Darren and that she had annual leave on 13 April and 14 April. By e-mail dated 21 July the claimant contended there was a fraudulent input on e-rostering and that stress was not entered; annual leave has been recorded as extended sick leave and the reason was not stress. There were no concerns about the claimant's attendance.

Grievance dated 31 July 2021

42. On 31 July 2021 (page 223) the claimant lodged a further grievance. The claimant alleged Mr. Woodall had mismanaged her probationary period. She further alleged that she was being racially discriminated against by Ian Woodall and was being victimised by Mr. Woodall. She alleged that she had experienced deception and blackmail at the hands of Mr Woodall. The claimant requested a formal investigation into Mr Woodall's mismanagement of her probation. The claimant objected to the notes/record of the meeting on 13 July 2021 stating that she was being racially discriminated against by Ian Woodall and was victimised referring to deception and blackmail experienced at the hand of Ian Woodall. She described the first milestone review as an impromptu meeting which he knew nothing about before. She stated she had respectfully signed the meeting notes to acknowledge receipt of the same but she did not agree the contents of the document. She further stated that she deserved to be treated like my other colleagues at work.
43. Mr. Cross was appointed to investigate the grievance. Emma Reay sought further information about her complaints at pages 539 to 540. The claimant stated "no further comment at this moment" (page 539) and "I will be able to substantiate all my concerns during the investigation." Mr. Cross met with the claimant on 2 November 2021 and at page 546 encapsulated the main points of the claimant's grievance. The claimant alleged that the investigation was reopened relying upon the letter dated 10 December 2021 at page 768. Mr. Cross disputed this stating that he wrote to the claimant to advise that he was evidenced gathering and required more time to complete this and invited the claimant to provide information in respect of her probation namely dates and nature of any incidents; full names of witnesses; and any written feedback by 22 December 2021. The claimant failed to do this so that Mr. Cross met with the claimant again on 27 January 2022 to give her his outcome to the grievance. Mr Cross decided that he could not agree the claimant had been subjected to racial discrimination from Mr Woodall as alleged nor had she been victimised or subject to deception or blackmail. In Mr. Cross's view Mr Woodall appeared to have done nothing wrong in seeking to get her milestone process back on track. He confirmed his decision to the claimant and reasons for it in writing in a letter dated 3 March 2022 p.686-690. The claimant was advised in the letter that if she was unhappy with the decision, she had the right to appeal. She did not appeal. The claimant questioned Mr. Cross and alleged Ms. Hough was removed from this grievance investigation. Mr. Cross disputed this stating that Ms. Haslan supported him.
44. The claimant was sent an appointment for occupational health. The claimant suggested that this was an instance of gross misconduct (page 555). Miss Reay wrote to the claimant on 16 August explaining it was a supportive measure and the claimant stated she did not need an OH appointment (page 327 to 328).
45. The claimant also alleged that she was replaced in the urology/ENT department from September 2021 to 1 April 2022 by two younger women (one in their 20s

and another in their 30s). Ms. Reay informed the tribunal that it was involved with a number of other trusts in the UK with international recruitment new staff; there was a national shortage of nurses. Two women did come into the department at a time when the claimant had moved to general surgery. There were vacancies there and they were filled by these two international nurses. They were paid as HCAs awaiting registration from the NMC.

Investigation report September 2021

46. In September 2021 Laurence Bell Deputy Service Manager for Obstetrics and Gynaecology produced the investigation report findings to the claimant's complaint (page 225 to 245). As part of his investigation, he had interviewed Mr Woodall; the claimant on two occasions, Danielle Sheehan, Kelly Maddocks, Sue Anderson, Sarah Mitcham, Hilary Felton, Jenny Henning and received written statements from Karen Gammage, Sandra Stephen and Darren McIvor. There was a delay in concluding the report due to covid, staff isolation and staff sickness.
47. Ms. Bell concluded (see section at page 240-245) the investigation found the allegation that Hilary Felton had made derogatory comments regarding the performance of the claimant regarding two procedures was closely linked to her other allegations; the incidents on 23 February 2021 and 9 March 2021. The claimant alleged that Hilary Felton had refused to help her when she asked for assistance about clarifying the instrument required by the surgeon called "a frying pan". This incident occurred during the myringoplasty surgery on 23 February 2021. The claimant alleged she did not know what the instrument meant by frying pan and felt that Hilary Felton intentionally did not assist her and pretended she did not know what he meant. The investigation found the "Rosen elevator" is commonly referred to as "a frying pan". Hilary stated that the surgeon may have used both names and also the instrument more than twice. Sarah Mitcham confirmed the surgeon requested the instrument by its proper name "Rosen elevator" before referring it to it as "a frying pan". Miss. Felton's account is that the claimant had failed to set out the instruments in the way she or any of her colleagues would have done so. The claimant handed the surgeon the wrong instrument which resulted in him looking away from the microscope. It was difficult for Hilary to identify which of the instruments was in fact the frying pan because the claimant had mixed up the usual order. Sarah Mitcham confirmed the claimant had set up upside down which meant that it was difficult for her to help the claimant identify the instrument. Both confirmed they knew what the frying pan is they just could not identify it from the way the claimant had laid out the set. Ms. Bell also took into account the e-mail submitted by Mr. Jones which documented his concern of the claimant's performance during the procedure and referenced in that she handed the incorrect instrument to him 20 times. They said the claimant did not ask for help but they saw she was struggling and tried to assist in the circumstances. The investigation did not uphold the allegation and found that the claimant had refused the offer of help from the team namely on 9 March when the claimant refused to tie Sarah Mitcham's apron; on 16 March ignored Hilary Felton when she was trying to give the claimant the drapes; and on 16 March ignoring Hilary when she was offering the claimant saline. In respect of the allegation that Miss. Felton imitated the claimant's accent in her presence and behind her back, alleging that Hilary Felton stated "*why don't you seek like you do in the Caribbean don't you say yeah mon*" and when the claimant was asked her name Hilary responded on her behalf its *Isalyn Marijuana*, the claimant identified that Jenny Hemming and Danielle Steele were present. They were

interviewed and they said they had never heard Hilary imitate the claimant's accent or say "yeah Mon" comment. Hilary denied the comment stating *we work with people from all religions ethnicity and sexual orientation you can't work there if you have any problems with diversity*. The allegation was not upheld in respect to the suggestion that Hilary Felton had sung the nursery rhyme *baa baa black sheep* within the claimant's ear shot, the claimant had suggested that Amir, Danielle, Karen and Kelly had witnessed these incidents. When interviewed all confirmed they had never heard Hilary sing this. Hilary stated this had never happened that she had never sung or said this. All interviewees were asked whether they had ever witnessed any behaviours towards that fell short of the trust values; everyone confirmed they had not observed any unprofessional or inappropriate behaviour towards the claimant. In respect of Hilary Felton shouting at the claimant in the presence of others whilst questioning her performance the investigation found that Hilary Felton did make the comment to the claimant that her practise was dangerous and unsafe in the context that the speed at which the claimant was working with a specimen which took place during the FESS procedure; she remarked that you can have specimens coming out very quickly there could be 6-7 or 8 and you need to be quick otherwise you run the risk of getting them mixed up. The claimant had shouted or became angry on a number of occasions including with Kelly Maddox regarding the bus incident/leaving early. Kelly alleged the claimant shouted "*how dare you*" "*who are you*" down the corridor. Kelly described an incident involving specimens in which she felt uncomfortable when the claimant started shouting "*God will prevail*" "*God will see all*". When Sue Anderson tried to speak to the claimant about ignoring Hilary, Sue stated that she felt the claimant became angry and denied the behaviour that Sue had observed. Danielle Sheehan alleged the claimant being confrontational and in Hilary's personal space. Sarah Mitcham felt that the claimant raised her voice at her during the SS procedure. Darren McIvor commented in his statement that the claimant had not shown any Trust values within her time in the team and the claimant had made derogatory remarks about Hilary Felton when she was offered advice about procedures. In conclusion Mr. Bell held there is insufficient evidence to substantiate the allegations made against Hilary Felton.

48. By letter dated 15 October 2021 Ms. Reay commissioning officer of the grievance investigation failed to uphold the claimant's complaint about race discrimination and adopted the conclusions of Mr. Bell page 562/4. The claimant was given a right of appeal but the claimant did not appeal. The usual procedure of the trust is that it does not share the grievance investigation report with the complainant.
49. On 6 October 2021 the claimant refused to go and work in theatre (page 581) because her name was not on the daily worksheet. Sara Watson in the presence of Ms. Platt tried to explain that sometimes staff are missed off the worksheet but it is not personal; staff are moved around all the time.
50. On 15 October 2021 Ms. Platt inquired whether the claimant would be attending a meeting to discuss the conversation on 6 October. The claimant became aggressive and shouted over Ms Platts and suggested they had never had a conversation in the office. Ms. Platt put the receiver down as the claimant continued to shout (page 584).
51. The claimant alleged that notes provided to the claimant dated 15 February 2022 wrongly stated the meeting was the first and not the second milestone meeting. The notes provided to the Tribunal dated 15 February 2022 indicate that this is the second milestone meeting see page 380 to 386. The claimant refused to attend this meeting.

Suspension of the claimant

52. On 16 February 2022 Ms. Reay suspended the claimant in the context of a number of concerns raised about the claimant's behaviour; page 680. A probationary review hearing was to be arranged.

18 February 2022 grievance

53. The claimant made a formal complaint on 18 February 2022 at page 683. The claimant stated she was submitting a formal letter of complaint against Emma Reay who destroyed her nursing career. She alleged Ms. Reay had allowed "*a culture of racial discrimination victimisation and misogyny to flourish in the operating I'm not a whistleblower I therefore enlist your support for an investigation into the misconduct of Emma to be considered please*". On 21 February 2022 Andrew Williams page 686 said noting that a probation hearing is in the process of being convened and the concerns you raise in your e-mail can be discussed as part of that process, he decided not to initiate any separate investigation into the conduct of Emma. He suggested that to the claimant to attend the probation hearing where her concerns could be raised and addressed. Mr. Williams explained his thought process to the Tribunal. He considered that if the claimant raised these concerns to an independent manager Mrs. Sarson, she could then determine whether a further grievance investigation should take place. The Tribunal found this was a reasonable suggestion.

54. On 21 March 2022 a meeting was set up with the claimant for 1 April 2022 (page 691-692) for a probationary review. The claimant accepted the invitation (page 693).

Probation Review Report

55. A detailed report prepared by Emma Reay (page 389 to 404) was provided to the claimant. In the report Miss Reay identified a number of specific incidents which were discussed during the first milestone review from 15 April to 7 July 2021. She further detailed instances after the first milestone review; on 16 July 2021 Donna Clasper complained the claimant had failed to do any observations or documentation about a patient; on 15 August 2021 a student ODP Tom Clasper raised with the claimant she had brushed past him and unintentionally de-sterilised him; when raised he found the claimant aggressive and offensive; on 31st August 2021 Di Croucher raised that she had to ask the claimant to get past her; the claimant ignored her so she accidentally brushed past the claimant and the claimant then shoved her and sent her flying; on 6 of October 2021 the claimant was not on the daily worksheet allocation; it was explained it was not deliberate; the claimant continued to talk over her; on 12 October 2021 Ms. Platt emailed the claimant to attend a meeting on 15 October 2021; having not received a reply she telephoned the claimant; the claimant stated "no I will not be attending" and the claimant was shouting; on 25 October 2021 Di Croucher escalated an incident involving the claimant when she mentioned to the claimant they may not require laser goggles; the claimant shouted "*don't talk to me, don't speak to me, you are a bully*"; on 10 November 2021, the claimant disagreed with the trial of a new way of setting up theatre cases in front of a patient, the claimant stated "*you stabbed me in the back*"; the claimant was described as obstructive and quite aggressive; another colleague described being around the claimant as like "walking on egg shells"; on 7 December 2021 the claimant was alleged to have shouted at Vivian Bell in an aggressive manner; on 21 December 2021 Nisha described the claimant shouting at her; on 7 January 2022 there was a conflict between the theatre practitioner, Alex Rogerson and the claimant; the

claimant's conduct was described as “*aggressive, antagonistic and unpredictable*”; on 9 January 2022 an incident took place involving a new international nurse Saji who found that the claimant continued to talk to her whilst trying to find instruments for the surgeon; on 21 January 2022 STP Michelle Neild outlined concerns about the claimant's behaviour on the team; she expressed concern for the claimant's well-being and her behaviour seemed to demonstrate to me as someone who is deeply unhappy and mistrusting of everyone around her.

56. On 28 March 2022 (page 695-696) the claimant commented on the report in her letter. The claimant suggested that her probationary period was deliberately mismanaged by theatre management and she had been illegally treated. The claimant alleged that Emma Reay had been illegally papering her file to justify firing her. The claimant described her treatment as a “witch hunt”. She further raised issues of infection control and patient safety and that the respondent had turned a blind eye to concerns. In cross examination, the claimant suggested to Mrs. Sarson that she had not been permitted at the hearing on 1st April 2022 to raise any of these concerns about health and safety. Mrs Sarson said the claimant had every opportunity to state her case; the claimant had talked over Mrs Sarson and determined halfway through the hearing to resign. The Tribunal having heard the evidence found that the claimant in the presence of her RCN representative was not prevented from raising any matters she wished to.

Meeting 1 April 2022

57. The claimant attended the meeting with her RCN representative. Mrs. Sarson was chairing the meeting. The Tribunal found that the claimant was able to raise any matters she wished; frequently talking over Mrs. Sarson and the claimant resigned halfway through the meeting. The claimant informed the Tribunal that since being suspended on 16 February she had been looking for other jobs and actually flew out for a job in Saudi on 2 April 2022 and started work there on 4 April 2022. The claimant's resignation letter (page 706) dated 1 April 2022 states *I hereby submit my letter of resignation due to the continued racial discrimination victimisation and lack of support from the mid Cheshire NHS Trust hospital. My position at this trust has become untenable and unbearable. My resignation today is with immediate effect. It is clear that i'm not being listened to supported nor valued today's hearing was another day for Emma ray and her manager Ruth huff and her manager to perpetuate the intentional infliction of emotional distress by your outrageous conduct.*
58. By letter dated 8 April 2022 (page 707) Mrs. Sarson confirmed matters discussed at the probationary review period hearing. Mrs Sarson stated that the NMC code of conduct states that to work cooperatively one must maintain effective communication with colleagues; respect the skills, expertise and contributions of your colleagues; work with colleagues to preserve the safety of those receiving care and gather and reflect on feedback from a variety of sources using it to improve your practise and performance. Mrs Sarson found there were times at the probation hearing where the claimant was unwilling to allow others to speak to ask supplementary questions to some of the points you raised. As such our ability to explore some of the issues in detail was hindered by the way you responded to questions and we did not find that your responses addressed the specific issues that had been raised by Emma and this view was formed despite you speaking for a considerable amount of time. Mrs Sarson informed the claimant she would be discussing the matter with the director of nursing and

quality determine whether it was deemed appropriate to refer the points contained in the management port to the NMC.

Referral to the NMC

59. On 5 May 2022 the respondent referred the claimant to her regulatory professional body the Nursing and Midwifery Council.

The Law

Harassment

60. A person A harasses another B if A engages in unwanted conduct related to a relevant protected characteristic and B the conduct has the purpose or effect of (i) violating their dignity or (ii) creating an intimidating hostile degrading humiliating or offensive environment for B.
61. Harassment must be unwanted. Whether particular conduct is unwanted is a question of fact for the Tribunal. It is not sufficient that the unwanted conduct occurs, it must be shown to be related to the relevant protected characteristic.
62. In deciding whether conduct has the effect of creating an intimidating hostile degrading humiliating or offensive environment for B the Tribunal must consider the factors set out in section 26 (4) of the Act namely the perception of B and the other circumstances of the case to see whether it is reasonable for the conduct to have that effect. Not every adverse comment or conduct may constitute a violation of a person's dignity. In **Richmond Pharmacology v Dhaliwal (2009) IRLR 336** Tribunals were advised not to encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase and not to cheapen the significance of the meaning of the words used in the statute i.e. intimidating hostile degrading which were an important control to prevent trivial acts causing minor upset being caught in the concept of harassment.

Direct discrimination

63. Section 13 of the Equality Act 2010 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.
64. Under section 23 (1) of the Act, where a comparison is made there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.
65. In order to find discrimination has occurred there must be some evidential basis on which the Tribunal can infer that the claimant's protected characteristic is the cause of the less favourable treatment. The Tribunal can take into account a number of factors including an examination of circumstantial evidence.
66. The Tribunal must consider whether the fact that the claimant had the relevant protected characteristic had a significant or more than trivial influence on the mind of the decision maker. The influence can be conscious or unconscious. It may need not be the main or sole reason but must have a significant that is not trivial influence and so amount will be an effective reason for the cause of the treatment.
67. In direct discrimination cases it is appropriate for Tribunal to consider first whether the claimant received less favourable treatment than the appropriate comparator and then whether the less favourable treatment was because of the protected characteristic. In some cases, for example where there is only a hypothetical comparator these questions cannot be answered without first considering the reason why the claimant was treated the way she was.

68. Section 136 of the Equality Act sets out the relevant burden of proof that must be applied. A two stage process is followed. Initially it is for the claimant to prove on the balance of probabilities, primary facts from which we could conclude in the absence of an adequate explanation from the respondent that the respondent committed an act of unlawful discrimination.
69. At the second stage discrimination is presumed to have occurred unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to, discharge that burden of proof the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's protected characteristic. The respondent does not have to show that its conduct was reasonable or sensible for this purpose merely that its explanation for acting the way that it did was non-discriminatory.
70. Guidelines on the burden of proof was set out by the Court of Appeal in **Igen Limited v Wong 2005 EWCA Civ 142** and the Tribunal has followed those as well as the direction of the Court of Appeal in the **Madarassy** case. The decision of the Supreme Court in **Efofe v Royal Mail Group Limited 2019 ICR 750** confirms the guidance in these cases applies under the Equality Act 2010. The Court of Appeal in the case of **Madarassy** stated the bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination.
71. It may be appropriate on occasions for the Tribunal to take into account the respondents explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. In the case of **Laing v Manchester City Council and others 206 IRLR 748; Nomura international PLC 2007 IRLR 246** it may also be appropriate for the Tribunal to go straight to the second stage where for example the respondent asserts that it has a non-discriminatory explanation for the alleged discrimination. The claimant is not prejudiced by such an approach to effectively assumed in his favour that the burden at the first stage has been discharged.
72. In some cases as observed in **Hewage v GHB 2012 ICR 1054** and **Martin v Devonshires solicitors 2011 ICR 352** the burden of proof provisions will require careful attention however they may have little to offer where we are in a position to make positive findings on the evidence one way or the other. Where such an approach is adopted however it is important that the Tribunal does not fall into the error of looking only for the principle reason for the treatment but probably analyses whether discrimination was to any extent an effective cause of the reason for the treatment.

Victimisation

73. Section 27 of the Equality Act provides that “a person A victimised another person B if A subjects B to a detriment because B does a protected act or A believes that B has done or protected act”.
74. Pursuant to 27 (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 making an allegation whether or not express the a or another person has contravened this act

(d) giving information or making a false allegation is not a protected act if the evidence or information is given or the allegation is made in bad faith.

75. The claimant has to show that she has been subject to a detriment plus the necessary causal link to the actual or perceived protected act; see **Woodhouse v West NW Homes Leeds limited (2013) IRLR 733**. The test to be applied by a Tribunal is whether the treatment was by reason of the protected acts which requires a consideration of the employer's motivation conscious or unconscious; it is not enough merely to consider whether the treatment would not have happened but for the protected act; **Chief Constable of Greater Manchester Police v Bailey 2017 EWCA Civ 425**.

Time limits

75. The relevant time limits are set out in section 123 of the Equality Act 2010. According to section 123 (1) the Tribunal has jurisdiction to hear a claim where a claim is presented within three months of the act to which the complaint relates. The normal three months time limit needs to be adjusted to take into account the early conciliation process in any extensions provided for in section 140B Equality Act.

76. By section 123 (3)(b) failure to do something is treated as occurring when a person in question decided on it. In the absence of evidence to the contrary a person is taken to decide on "fail to do something" when that person does an act which is inconsistent with doing it. In the absence of such an inconsistent act on the expiry of the period on which that person might reasonably have been expected to do it.

77. By subsection 123(3)(a) conduct extending over a period is to be treated as done at the end of the period. In **Hendricks v Metropolitan Police Commissioner 2002 EWCA Civ 1686** the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or continuing state of affairs which the claimant was treated less favourably. An example is found in the case of **Hale v Brighton and Sussex University hospitals NHS Trust UK E80/0342/17** where it was determined that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.

78. Alternatively, the Tribunal may still have jurisdiction if the claim was brought within such other period as the Tribunal thinks just and equitable in section 123(1)(b).

79. The Tribunal has a wide discretion to extend time on a just and equitable basis. The Court of Appeal confirmed in the case of **Adeji v the University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23** the best approach is for the Tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. This will include the length of and reasons for the delay but might depend on the circumstances include some or all of the suggested list from the case of **British Coal Corporation v Keeble 1997 IRLR 36**.

80. It is for the claimant to show that it would be just and equitable to extend time. The exercise of discretion should be the exception not the rule **Bexley Community Centre (trading as leisure link) v Robertson 2003 EWCA Civ 576**. Whether reason for the delay is because a claimant has waited for the outcome of his or her employer's internal procedures before making a claim the Tribunal may take this into account see **Pelagon Gabriels v London Borough of Lambeth and another 2002 ICR 713** Court of Appeal. Each case should be determined on its

own facts however including considering the length of time the claimant waits to present a claim after receiving the outcome.

Submissions

81. The respondent submitted that the time limits are relevant here. The claim was issued on 1 July 2022. The claimant's race complaints are dated 2 February 2021; March 2021; and October 2021. The victimisation complaint has some additional elements. If the Tribunal finds there is no continuing discriminatory treatment, the claimant's complaints are not made in time. In March 2021 the claimant raised a grievance which is over 12 months before she brought her claim. The claimant's allegations against Mr. Woodhall were made some 12 months before issuing her claim. There was no evidence of continuing acts of discrimination.
82. The respondent submitted there were significant disputes of fact between the parties. The weight of the evidence demonstrates that there was no discrimination.
83. Further the direct age discrimination claim is out of time. The claimant alleges that she was replaced between April 2021 to September 2021. The claimant relied upon similar incidents for her harassment related to race claim; it can not be both direct or harassment in accordance with section 212 of the Equality Act 2010. The respondent's witnesses who should be believed say there was no harassment.
84. In respect of the victimisation complaint the claimant relied upon 4 alleged protected acts. The respondent conceded the first one is a protected act dated 11 March 2021 but maintained all the others did not satisfy the statutory provisions.
85. On 7 May 2021 the claimant was moved to general surgery; the claimant was happy to go to general surgery. On 13 May 2021 the respondent encouraged the claimant to continue as it was a serious complaint; the claimant attended willingly two meetings with Mr. Bell. The claimant could not be confirmed in post on 13 July as it was the first milestone meeting. The respondent has no issue with the claimant's sick leave. The claimant was suspended for the reasons set out by Ms. Reay. There was no failure to investigate the claimant's concerns. The Tribunal was invited to dismiss all of the claims .
86. The claimant submitted that the respondent had violated UK law. The claimant described her 14 months experience at the Trust as being marred by issues of discriminatory treatment. The claimant submitted her evidence was substantial and supported her claim; she had been honest and given a credible account of events. The claimant submitted the respondent's eight witnesses were inconsistent on numerous occasions in respect of the reasons for the probationary period and the referral to NMC. The claimant submitted the respondent's actions were deliberate so that she suffered injury to feelings. The claimant submitted her damages were aggravated especially by the conduct of Emma Reay and Sue Sarson. The claimant stated she required counselling because of this. Further the claimant submitted she has suffered post employment victimisation. The Tribunal were requested to rule in her favour. The claimant submitted that the evidence presented by the respondent was a pretext for discrimination. The Tribunal had heard lies; and cross stories from senior people and there was mismanagement in operation theatre.

Credibility

87. The Tribunal found the claimant's evidence to be inconsistent and she had a tendency to embellish her evidence. In the course of evidence, she added that Mr. Woodhall tore up her application for a grade 6 post. All applications for NHS jobs are on line and are not printed unless a candidate is selected for interview. The claimant had not applied or been selected for a grade 6 post interview. In her claim form dated 25 July 2022, the claimant contended that she had been subject to racially discriminatory comments. At the case management discussion on 10 February 2023 the claimant clarified these matters as including on 2nd February 2021 the claimant was left to clean the theatre on her own and was described by Hilary Felton manager as a hired help. The Tribunal heard evidence that everyone was cleaning at this time in the context of COVID. Furthermore, the claimant referred to the fact that she was described on 10 March 2021 by Hilary Felton as a black scooby-doo and she alleged on 22 of February 2021 that she was required to queue with the public for a COVID vaccination job unlike colleagues who had a specific appointment. In the course of the claimant's employment, she made four complaints dated 11 March 2021; 13 July 2021; 31 July 2021 and 16 February 2022. The claimant did not allege in the grievances or the respective investigatory meetings the allegation about "black scooby-doo". In the claimant's witness statement to the Employment Tribunal for the first time she stated at paragraph 3.5 on 10 March 2021 Ms. Felton began calling her a black scooby-doo which went on until the 15 of May 2022. The Tribunal was not satisfied with the claimant's explanation about this omission; the claimant explained that she wanted her grievance witness statement changed; the claimant had, despite invitations to do so not made any hand written alterations to the statement which did not include the black scooby doo allegation and had signed it on 4 June 2021 as being a true record. Furthermore, the allegation as to Hilary Felton describing the claimant as a hired help was not contained within the investigation or grievance; the phrase used was "glorified cleaner". Further in her witness statement she alleged she was called Windrush BOAA that's black old agency OTC (agency on the cheap) on a regular basis she also contended she was subjected to monkey chants on a severe and pervasive basis. These allegations were only made within the claimant's witness statement; not in her grievance or ET1 or identified at the case management hearing and were extremely serious. In answer to the Tribunal's members questions, the claimant said that she was less experienced when she lodged her complaint and that is why she failed to include them. The Tribunal was not satisfied with this explanation and did not find it credible. These were very serious allegations the claimant had taken a number of opportunities to complain (four complaints) along with the support of a RCN representative at the probationary review hearing and had not raised these previously.
88. The claimant was asked under cross examination why witnesses she had identified to her allegations when interviewed stated that they had not heard the derogatory and discriminatory comments or behaviours contended. In particular at the investigation meeting interview of the claimant by Laurence Bell and Ruth Hough the claimant identified at page 252 Danielle and Amir had been present when Hilary sang Baa Baa black sheep. Further it was noted at page 253 that when Hilary was critical of the claimant's Caribbean accent Jenny Hemmings and Danielle were present. All individuals were interviewed and did not support the claimant's allegations stating that they had not heard those comments in the team. The claimant stated that the notes were wrong at page 252 when it was suggested that Amir and Danielle had heard the singing comments. When it was

pointed out to the claimant that she had signed the interview notes and did not correct them, she further stated that everybody was just sticking together to look after their jobs. The Tribunal was not persuaded by this explanation. The claimant further alleged that she was forced to attend a meeting about her grievance when she didn't want to pursue. It was a matter for the claimant as to whether she pursued the grievance and there was no evidence that the claimant had been forced to attend any meeting. It was noted at the grievance hearing that the claimant stated she was happy to proceed.

89. The Tribunal found the evidence of Ms. Felton and Ms. Mitcham to be credible. The Tribunal found that Mr. Woodall was a reliable witness who was struggling to deal with the claimant's refusal to acknowledge that concerns were being raised by her. Mrs Reay's evidence was found to be credible. The Tribunal noted that the usual process adopted by this Trust by failing to share the grievance report may have led an employee to be suspicious of the reasons not to uphold a grievance where the collection and content of the evidence was not shared and was not transparent. Ms. Platt's evidence was found to be credible.
90. The Tribunal found the evidence of Mr. Cross to be credible and robust. The claimant cross examined him on the basis that the grievance which he heard was re-opened and Ms. Hough as HR professional had been removed. Mr. Cross disputed this and relied upon documentation at page 768 10 December 2021 which indicated in accordance with his evidence (and inconsistent with what the claimant sought to suggest) that he had given the claimant another opportunity by adjourning off the meeting to another date so that the claimant could put together any further evidence she wished. There was no evidence that the grievance had been closed/reopened or Ms. Hough had been removed.
91. The Tribunal found Mrs Sarson to be an impressive and credible witness with extensive nursing expertise in the Trust. She had informed the Tribunal that in the course of the probationary meeting the claimant was represented by an RCN representative but the claimant continued to talk over Mrs Sarson and failed to discuss any issues of concern that she had stated in her e-mail dated 28 March 2021 and decided to resign. The claimant accepted Mrs. Sarson's evidence. Mrs. Sarson was clear in her evidence that it was her duty having had a number of concerns raised by different individuals that it was appropriate to refer the claimant to the Nursing Midwifery Council and it had nothing to do with the fact that the claimant had made allegations of race discrimination to the Trust. The Tribunal found her evidence to be credible and compelling.

Findings

Direct race discrimination (Equality Act 2010 section 13)

92. 2 February 2021 the claimant was left to clean the theatre on her own and was described by Hilary Felton (manager) as a hired help

The Tribunal did not find this allegation made out on the evidence. At the relevant time, in the midst of the pandemic, witnesses stated that all staff were required to clean; even Ms. Reay was required to clean. The practise as indicated by Ms. Mitcham was that all scrub nurses would assist in the theatre to clean. The Tribunal found that in this context it was unlikely that the claimant was left to clean the theatre on her own. Furthermore, the allegation made by the claimant that Hilary Felton referred to her as a "hired help" was different to the allegation that she made on 10th March 2021 in her grievance when she contended she was described as a "glorified cleaner". There was a

direct conflict of evidence between the claimant's and that of Ms. Felton. On the balance of probabilities, the Tribunal rejected this allegation and preferred the evidence of Ms. Felton. The detailed investigation of Mr. Bell did not find any behaviour demonstrated by colleagues which was against the principles of the Trust's accepted behaviours.

93. 22 February 2021 was required to queue with the public for a COVID vaccination jab unlike colleagues who had a specific appointment.

Mr Woodall explained to the Tribunal that when the claimant joined the Trust, the staff had already been emailed about a COVID vaccine. Once the claimant raised the fact she was unvaccinated Mr Woodall made arrangements for the claimant to have a COVID vaccine. Mr. Woodhall was unclear as to whether the claimant had to queue up; he was ensuring that she was vaccinated outside of the vaccination programme which had been set up prior to her arrival. Mr. Woodhall stated that nurses and the public went for vaccinations. The Tribunal determined even if the claimant had to queue up with the public as opposed to having a fixed appointment, this had nothing whatsoever to do with race. Nurses were already booked for vaccinations prior to the claimant's arrival at the Trust. They were not comparators for the purposes of this allegation. Due to the efforts of Mr. Woodhall he arranged for the claimant to obtain a vaccination outside this time line. The Tribunal determined that the alleged treatment of the claimant had nothing whatsoever to do with her race.

94. 10 March 2021, Hilary Felton described the claimant as a "black scooby doo";

The Tribunal rejected the allegation that Hilary Felton described the claimant as "the black scooby-doo". The Tribunal noted that the claimant raised four complaints and she did not make this allegation in any of them. Furthermore, she had attended an investigation into a grievance on 13 and 17 May and did not articulate this as a complaint. This allegation was not included in the claimant's ET1 but was mentioned at the preliminary hearing in February 2023. The claimant was given an opportunity to sign off her grievance investigation notes which were sent to her. In the letter which attached the notes the claimant was invited to make any amendments in pen and return them. The claimant made no amendments to the statement but signed it as being true. The claimant informed the Tribunal that she had e-mailed the respondent to Ms. Hough, HR which detailed this allegation and sought to amend the statement. The claimant had not mentioned this missing e-mail before. The claimant had also alleged for the first time contained within her witness statement that she had been subject to monkey chants; an extremely serious allegation never mentioned in the claimant's grievances or her ET1; or at the case management discussion. None of the witnesses who were interviewed by the respondent who had been identified by the claimant as singing baa baa black sheep supported the claimant's allegation. The Tribunal did not find this allegation had any credibility and the Tribunal determined that the claimant had embellished her evidence and that Miss Felton at no time described the claimant as a black scooby-doo.

95. 10 March 2021 Hilary Felton stated Baa baa black sheep in front of the claimant;

The claimant made this allegation in her grievance dated 10 March 2021. The claimant identified a number of witnesses including Danielle and Amir as hearing this. Neither Danielle or Amir stated that they had heard the comment see pages 292 and 317. In her evidence the claimant suggested that this had continued for some time. Miss Felton before the Tribunal and at her

investigation meeting had disputed this. The Tribunal rejected this allegation. On the balance of probabilities the Tribunal determined that this did not occur.

96.1 October 2021 failed to uphold the claimant's complaint about race discrimination

Following the claimant raising a complaint of race discrimination on 10 March 2021 the respondent embarked on an investigation into the issues. Miss Reay commissioned the report on 28 April 2021 and appointed Mr. Bell to investigate (see page 207-209). He spoke to all of the witnesses identified by the claimant except Miss Blasé who was a witness on the claimant's account to a comment about Ms. Mitcham not wishing to be her mentor. It was noted suggested she was a witness to any other allegation.

97. None of the witnesses supported the claimant's claim of discrimination. The report was delayed by reason of COVID; absence and sickness of staff. In his report dated September 2021 Mr Bell concluded there was insufficient evidence to establish the complaints raised by the claimant against her colleagues Hilary Felton and Sarah Mitcham. Ms. Reay reviewed the report of Mr. Bell and determined that the grievance was not upheld and confirmed this in writing to the claimant. The grievance was not upheld because there was insufficient evidence to establish that the claimant had been racially discriminated against. The respondent's finding was based on the witness evidence available and had nothing whatsoever to do with the claimant's race. However, in the absence of sharing the full report with the claimant, which showed the claimant's allegations were not supported by a wide range of individuals, the Tribunal noted that an individual may well be suspicious as to why the grievance was not upheld.

98.16 February 2022 Andrew Williams informed the claimant he would take no action in respect of the formal complaint she had made;

On 16 February 2022 the claimant raised a further complaint against Ms. Reay to Mr. Williams, Divisional Director where she described Ms. Reay having destroyed her career (page 683-4). The evidence of Mr. Williams to the Tribunal corroborated by his letter to the claimant dated 21 February 2022 (page 686) was that there was an ongoing process in terms of the claimant's probation and that she had the opportunity to raise her concerns within the process. The claimant was attending a probationary review before Mrs. Sarson. Mr. Williams' opinion was that the claimant raise her concerns about Emma with the independent manager, Mrs. Sarson. The chair of that panel could have elected also to pursue the grievance process raised by the claimant first had that been considered the appropriate way forward. The Tribunal accepted Mr. Williams evidence that he was not refusing to consider the claimant's grievance and he viewed the matters which the claimant raised as against Ms. Reay could be dealt with and in accordance with the probationary procedure and raised in the course of the probationary meeting. His decision had nothing whatsoever to do with the claimant's race. The allegation is dismissed.

99.1 April 2022 the claimant resigned her employment and was constructively dismissed by reason of the discriminatory treatment.

The claimant resigned her employment in the middle of the probation review meeting. At that time Mr Sarson presented the claimant with the probationary report which consisted of a number of statements from a number of individuals who raised concerns about the claimant's conduct and performance. The claimant's evidence to the Tribunal was that at the time of her suspension on 16 of February 2022 the claimant had been looking for alternative work. She

flew to Saudi on 2 April 2022 and she was confirmed in a nursing post on the 4 of April 2022. The Tribunal rejected that the claimant was subject to discriminatory treatment as contended or that the claimant was constructively dismissed in these circumstances. The Tribunal determined on the balance of probabilities that the claimant decided to resign having seen the extensive probationary report critical of her conduct and had taken steps to secure alternative work.

100. **Direct age discrimination (Equality Act 2010 section 13)**

The claimant describes herself as a woman in her 50s. The Tribunal found as follows :

Replaced the claimant in the urology/ENT department from September 2021 to 1 April 2022 by two younger women (one in their 20s and another in their 30s);

The Tribunal was told and accepted that the respondent engaged on an international recruitment drive for nurses. There were two vacancies within the urology/ENT department from September 2021 and two younger women one in their 20s and another in their 30s were placed in these departments. The claimant by this stage had moved into general surgery. The claimant told the Tribunal that she loved general surgery. The Tribunal did not find that the two younger women replaced the claimant in the urology/ENT department. The Trust had a number of vacancies including two spaces in the urology/ENT department. It recruited two women from international destinations to fill these vacancies. Initially they were employed as healthcare assistants until their registration was received from the NMC. By this point the claimant had already moved by consent to general surgery; a department she loved. The claimant was not replaced and the individuals were not actual comparators. This allegation is not well founded.

On 5 April 2021 Emma Reay stated to the claimant that she was “in this late stage of her life trying to secure a pension pot”.

This allegation did not feature in the claimant’s grievance against Emma Reay; see page 683-4 and the claimant did not adequately explain why this was missing. Miss Reay gave evidence to the Tribunal that this is not something that she would have ever said. The Tribunal found Miss. Reay’s evidence to be credible and rejected the allegation that she made this comment to the claimant.

101. **Harassment related to race (Equality Act 2010 section 26)**

The Tribunal determined as follows :

- a. 2 February 2021 the claimant was left to clean the theatre on her own and was described by Hilary Felton (manager) as a hired help;

For the reasons set out above the Tribunal did not find this allegation made out on the facts and it is dismissed.

- b. 22 February 2021 was required to queue with the public for a COVID vaccination jab unlike colleagues who had a specific appointment

The Tribunal repeats the factual findings made above. Due to the fact that the claimant came to the department when colleagues had already had an e-mail to accept a covid vaccination and Mr Woodhall had to arrange this

for her, the claimant may well have had to queue up with members of the public and others to get her COVID vaccine by reason of the fact that she joined the department slightly later than colleagues. The Tribunal noted that the claimant did not raise any concerns about having to queue for a COVID jab with the public in any of her 4 complaints or in any of her investigation meetings. Further it determined that the requirement to queue with the public did not meet the threshold of adverse environment namely had the purposes or effective creating an intimidating hostile degrading humiliating or offensive environment. The Tribunal is mindful that it should 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. In any event as set out it was unrelated to race.

- c. 10 March 2021, Hilary Felton described the claimant as a “black scooby doo”;

The Tribunal repeats its findings of fact above. The Tribunal found this did not occur as alleged. The allegation is dismissed.

- d. 10 March 2021 Hilary Felton stated Barber black sheep in front of the claimant.

The Tribunal repeats its findings of fact set out above; this did not occur as alleged and the allegation is dismissed

102. **Victimisation (Equality Act 2010 section 27)**

Protected acts

The Tribunal found that the claimant did make four protected acts. Pursuant to section 27 (2)(d) of the Equality Act 2010 a protected act includes making an allegation (whether or not express) that A or another person has contravened this Act. There is no dispute that the claimant made a protected act in her grievance dated 11 March 2021. The Tribunal also found at the first milestone meeting dated 13 July 2021 that the claimant made a complaint about race discrimination. There was a reference to being bullied page 220 but also a reference to “*stereotypes are at play and that she's being seen as a black woman who creates conflict and is disruptive*”. The Tribunal determined that this was sufficient to establish a protected act within section 27(2)(d).

In respect of the claimant’s formal grievance against team Mr. Woodall regarding the mismanagement of her probationary period on 31 July 2021 page 223, the claimant expressly states *I firmly believe that I'm being racially discriminated against the racial discrimination comes from ODP in Woodall band 7 theatres*. The Tribunal determined that this was sufficient to establish a protected act pursuant to the provisions. Further in the document dated 16 February 2022 page 683-4, the claimant submitted a complaint to Andrew Williams. She writes *Emma Reay has destroyed my nursing career. Emma Reay has allowed a culture of racial discrimination, victimisation and misogyny to flourish in the operating. I am not a whistleblower. I therefore enlist your support for an investigation into the misconduct of Emma Reay to be considered please.*” The Tribunal determined by reference to a complaint about racial discrimination that the claimant did establish she had done a protected act within the provisions.

Acts of Victimisation

On 7 May 2021 Ian Woodhall moved the claimant from the urology/ENT department;

103. On 7 May 2021 Ian Woodhall moved the claimant from the urology/ENT department; see page 495. Mr Woodall explained to the Tribunal he did so because despite having moved her to urology it was difficult to keep the claimant away from the staff who she alleged were bullying her. Staffing pressures meant that the theatre staff could be required to attend ENT and urology procedures and therefore found themselves together. The move to general surgery was not a demotion and the claimant was employed at the same level and had relevant experience. The claimant informed the Tribunal that general surgery was an area which she loved. Although the claimant initially refused to move on 10 May 2021 having discussed it with the claimant as a supportive measure and in the context that the claimant complained that she was continuing to suffer bullying it seemed sensible to move her elsewhere. The Tribunal determined that it was a reasonable decision to move the claimant. The Tribunal determined in the circumstances that the claimant loved the general surgery team and agreed to move; it was not a detriment to move to an area which she loved. Further it was a supportive step in the context of complaining that she continued to allege she was bullied. The Tribunal did not find it was by reason of her protected act.

104. 7 May 2021 Ian Woodhall informed the claimant that no one would support/give evidence to support her grievance;

There was a direct conflict of evidence between Mr Woodall and the claimant. Mr Woodall denied that he told the claimant that no one would support or give evidence to support her grievance; he stated that this is not something that he would say. The claimant relied upon her email dated 8 May 2021 at page 778. In the context that Mr. Woodall had been helpful to the claimant suggesting that she should put her complaints in writing and note any incidents that occurred and his efforts to ensure that the claimant had a COVID vaccination, and taking account that the claimant tended to embellish allegations, the Tribunal determined on the balance of probabilities that Mr Woodall would not have said this. The allegation was rejected.

105. 13 May 2021 the claimant was invited to an investigatory grievance meeting although the claimant said she did not wish to pursue the grievance;

By her grievance dated 10 March 2021 the claimant made serious allegations of race discrimination against colleagues. The respondent although initially thought this could be dealt with informally with a facilitated meeting with the claimant's agreement, on reflection considered by reason of the serious allegations that a formal investigation should take place. The Tribunal noted that the claimant was more interested in the general working environment being considered rather than the specific allegations of race discrimination she had made against her colleagues. Nevertheless, the claimant was invited on 6 May 2021 to attend an investigation interview on 13 May (see page 213). The claimant attended the meeting and was asked at page 251 whether she could confirm she was happy to proceed with the investigatory interview. The claimant replied yes. The notes of this interview were signed by the claimant as true and accurate on 4 June 2021 page 260. The Tribunal rejected the suggestion the claimant did not wish to pursue the grievance. She did not state that at the investigation meeting on 13 or 19 May 2021 she did not wish to pursue it and in fact had said and confirmed she was willing to proceed with the investigatory interview page 251. The allegation was not made out on the

facts. Furthermore, the claimant was invited to an investigatory interview because she had lodged a grievance. This was not a detriment but a supportive step by the respondent to investigate the serious allegations made by the claimant which she was willing for them to investigate.

106. 13 July 2021 Ian Woodhall in the context of the claimant stating she was not being included in a roster that those individuals on the roster are "our own people; treated properly so they will be rostered; the claimant needed to go where she was needed."

The Tribunal found that the claimant was not included in a roster. This is because there was a requirement to be flexible in terms of where staff were placed in the context of COVID. Mr Woodall disputed this allegation as stated that this is something he would not say. The Tribunal found Mr Woodall did not say that people including the rosters are our people so that they will be rostered and the claimant needed to go where she was needed. Miss Mitcham's evidence to the Tribunal was that during COVID although she had been allocated to the ENT department, she was finding herself working in Accident and Emergency dealing with COVID patients. The nursing staff had to be flexible in the exceptional circumstances of COVID. The Tribunal rejected this allegation was made out on the facts.

107. 13 July 2021 the claimant was informed she would not be confirmed in post;

The claimants first milestone meeting was meant to take place on the 4 of April 2021. By reason of the fact that the claimant lodged her grievance on 10 March 2021 the respondent took the decision to investigate the serious allegations before dealing with a first milestone meeting. The report was meant to be completed by the 18th of June but by reason of COVID absence and sickness of staff the conclusion of the investigation report was delayed to September 2021. It was determined that by 13 July 2021 the first milestone meeting should take place. Pursuant to the probationary procedure at page 63 the first milestone review meeting is to review job performance including attendance and conduct issues. Progress towards standards is reviewed by management and they will seek to establish whether the employee is making satisfactory progress in assuming the responsibilities of the job. It is not the purpose at the first milestone review meeting to confirm an individual in post. In the circumstances the claimant was not confirmed in post because the procedure dictates that this is not confirmed until the second milestone meeting at the earliest. The non confirmation in post at the first milestone meeting had nothing to do with the fact that she had raised complaints of discrimination .

108. 30 July 2021 in notes of the meeting of 13 July it was suggested that the claimant had 3 periods of sick leave when she had only 1 ¾ days of absence;

The Tribunal have been shown notes of the meeting on 13 July and they do not state that the claimant had three periods of sick leave. The evidence of the respondent is that there was no issue with the claimant's attendance. The Tribunal preferred the respondent's evidence and rejected this allegation.

109. 1 October 2021 failed to uphold the claimant's complaint about race discrimination

The Tribunal repeats its findings above. None of the witnesses identified by the claimant supported the claimant's claim of discrimination in the course of the grievance investigation. The report dated September 2021 by Mr Bell found there was insufficient evidence to establish the complaints raised by

the claimant against her colleagues Hilary Felton and Sarah Mitcham. Ms. Reay reviewed the report of Mr. Bell and determined that the grievance was not upheld and confirmed this in writing to the claimant. The grievance was not upheld because there was insufficient evidence to establish that the claimant had been racially discriminated against. The respondent's finding was based on the witness evidence available and had nothing whatsoever to do with the fact that the claimant had done a protected act.

110. In notes provided to the claimant dated 15 February 2022 wrongly stated the meeting was the first and not the second milestone meeting.

The claimant appeared to confuse the signing off for induction and the signing of the first milestone meeting. Miss Platt inform the Tribunal that the line manager has to sign off the claimants induction and this was not her responsibility. Following the claimant's completion of her induction in January 2021 Miss Platt met with the claimant to commend her that she had completed the induction promptly. The claimant provided to the Tribunal a copy of her induction material with the scheduling of the first milestone meeting which appeared to be signed on the planned 4 April 2021 date (page 781). Miss Platt informed the Tribunal that that was not her signature and she did not recognise it. From the probation material, a specific meeting and specific documentation needed to be completed for the first milestone meeting. This was not done until 13 July 2021. The first milestone meeting was postponed from the original listing by reason of the fact that the claimant had lodged a race discrimination grievance on 10 March 2021 and the respondent determined to investigate this. The Tribunal therefore found that the second milestone meeting took place on 15 February 2022. The respondent provided letters dated 3 February 2022 page 369 to 372 from Miss Reay describing a second milestone review and seeking the claimant to attend on 15 February 2022. The Tribunal was not taken by the claimant to any note where 15 February 2022 was wrongly stated as the first milestone meeting. This allegation is rejected.

111. 16 February 2022 suspended the claimant;

Miss Reay took the decision to suspend the claimant (page 385) in the context of a number of concerns and the severity of her concerns raised about the claimants behaviour; the behaviour was alleged to be a disruption to the team harmony and potential patient harm pending a probationary hearing which would be arranged. By this point Miss Reay had been provided with a number of issues from 16 July 2021; a concern was raised that the claimant had not undertaken basic observations or documentation on a recovery patient whilst another nurse was out of the room assisting with the poorly patient; on 16 August 2021 a concern was raised in relation to how the claimant communicated with a colleague regarding the de-sterilisation of them; on 6 October 2021 an incident occurred in which she refused to go into theatre as her name had not been included on the daily worksheet; on 15 October 2021 a difficult interaction took place with the theatre lead when an attempt was made to discuss the incident which occurred on 6 October 2021; on 15 October 2021 a concern was raised when a colleague tried to offer the claimant some advice; the claimant shouted at her and told her not to bully the claimant; on 10 November 2021 an incident occurred in theatres when the claimant expressed she did not agree with a colleague; this caused disruption

in starting the list and upset team members; in November 2021 a HCA raised concerns regarding the claimant's behaviour towards her stating the claimant picked fault with everything that she did; 7 December 2021 a concern was raised that the claimant used an intimidating tone with a colleague and refused to listen to their explanation; on 21 December 2021 a concern was raised that the claimant had shouted at one of the department's with NYU international nurses; on 7 January 2022 a situation of conflict arose in theatre as a result of a disagreement between the claimant and a colleague regarding which rules to be brought into theatre; on 9 January 2022 a concern was raised regarding the manner in which the claimant supported a new international nurse and the way the claimant spoke to a senior colleague; on 31 August 2021 a colleague asked if she could get past the claimant; the claimant unfortunately ignored her and she had no option but to slightly touch the claimant as she passed; the claimant then shoved her sending her flying across the room; on 4 February 2022 when asked to clean the claimant's own area in the coffee room a colleague witnessed the claimant refusing to do this despite being asked politely to do so by HCA; this was contrary to the time to shine trust campaign during the COVID pandemic.

Miss. Reay's thought process at this time was taking account of the number and the severity of the concerns raised about the claimant's behaviour that she ought to suspend the claimant pending the probation review meeting. The Tribunal accepted Ms. Reay's evidence and in the circumstances the decision to suspend the claimant had nothing whatsoever to do with the fact that the claimant had done a protected act.

112. 16 February 2022 Andrew Williams said he could take no action about the claimant's complaint submitted on that date;

113. The Tribunal repeats its findings above. On 16 February 2022 the claimant raised a complaint against Ms. Reay to Mr. Williams, Divisional Director where she described Ms. Reay having destroyed her career (page 683-4). The evidence of Mr. Williams to the Tribunal corroborated by his letter to the claimant dated 21 February 2022 (page 686) was that there was an ongoing process in terms of the claimant's probation and that she had the opportunity to raise her concerns within the process. The claimant was attending a probationary review before Mrs. Sarson. In Mr. William's opinion the claimant could raise her concerns about Emma with Mrs. Sarson. The chair of the panel could have elected to pursue the grievance process if considered the appropriate way forward. The Tribunal accepted Mr. Williams evidence that he viewed the matters which the claimant raised as against Ms. Reay could be dealt with and in accordance with the probationary procedure and raised in the course of the probationary meeting. His decision had nothing whatsoever to do with the fact the claimant had done a protected act.

114. 5 May 2022 the respondent referred the claimant to her regulatory professional body the Nursing and Midwifery Council.

115. A referral of the claimant by the respondent (see pages 743-754) to the regulatory professional body, the Nursing Midwifery Council was a detriment. However, the Tribunal accepted Mrs. Sarson's evidence; Mrs. Sarson was clear in her evidence that it was her professional duty having received a number of concerns, raised by a number of different individuals about the claimant's conduct towards colleagues, that it was appropriate to refer the claimant to the Nursing

Midwifery Council. The Tribunal accepted Mrs. Sarson's evidence that the behaviours seen exhibited by the claimant towards her work colleagues was conduct she considered not expected of a nurse. The evidence provided by Emma Reay was from a whole range of people not against those who the claimant had raised grievances against. The Tribunal found Mrs. Sarson's evidence credible. The decision of Mrs Sarson to refer the claimant to her regulatory professional body, the NMC, had nothing whatsoever to do with the fact the claimant had made allegations of race discrimination.

116. In the circumstances, all of the claimant's complaints are dismissed.

Employment Judge Wedderspoon

18 December 2023

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