EMPLOYMENT TRIBUNALS

Claimant: Mr E Daramy

Respondents: 1) Ms S Dibben;
2) South London & Maudsley NHS Foundation Trust;
3) Ms R Hogg; and
4) Ms C Sodeinde

Heard at: London South Croydon, in public, in person

On: 11-18 September 2023, deliberating in chambers part of 18 September and on 25 September 2023

Before: Employment Judge Tsamados
Mr R Singh
Ms B Leverton

Representation
Claimant: Ms Babalola, Solicitor
Respondents: Ms Ibbotsom, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:

1) The Claimant was subjected to direct race and sex discrimination and harassment related to race and sex by the second and third Respondents in respect of not asking him to be the Dual Diagnosis lead in place of two other employees who had completed the training in 2017 (paragraph 2. b. ii. of the agreed list of issues. There will be a remedy hearing if required.

2) His other complaints of direct race and sex discrimination and harassment are unfounded and are dismissed.

3) His complaints of constructive unfair dismissal, damages for breach of contract in respect of entitlement to notice pay and to payment of accrued but untaken annual leave are unfounded and are dismissed.

REASONS

Background

1. The Claimant, Mr Daramy, has brought two claims against his ex-employer, South and Maudsley NHS Foundation Trust, the second Respondent, and three named individuals, who at the time of the events in question all worked for his ex-employer.

2. The first claim, in case number 2301275/2019, was received by the Employment Tribunal on 21 March 2019 following a period of Early Conciliation between 31 January and 22 February 2019. This claim was brought against all of the second Respondents. At that time, the Claimant was still employed by the second Respondent. This raised complaints of race and sex discrimination and victimisation. Whilst the Claimant named five Respondents in this claim, there were in fact only four Respondents, the fifth Respondent being a repetition of the fourth Respondent. A response was sent to the Tribunal on 24 June 2019 on behalf of all of the Respondents in which the claim was denied in its entirety.

3. A case management discussion was conducted by Employment Judge Blackwell on 28 November 2019. At that hearing, the Employment Judge did the following things setting specific time limits for each: required the parties to provide dates of availability during January to March 2021 so as to list the final hearing for 4 days; required the Claimant to respond to the respondents' solicitors' request for further information; and the parties to agree a list of issues.

4. The Claimant presented a second claim, in case number 2301697/2020, on 27 April 2020, following a period of Early Conciliation between 28 February and 28 March 2020. This claim was brought against the second Respondent and set out complaints arising from his subsequent dismissal. It raised complaints of constructive unfair dismissal, entitlement to notice and holiday pay. In its response received on 18 September 2020, the second Respondent denied the claim in its entirety.

5. Amended grounds of resistance were subsequently submitted and accepted by the Tribunal on 3 March 2021 and the two claims were consolidated.

6. It does appear from the Tribunal's file, that, thereafter, the second claim was erroneously listed for one day on the basis that it appeared to be a stand-alone unfair dismissal, notice pay and holiday pay claim. The date given was subsequently vacated. However, in the meantime no further action was taken to list the first claim as directed by Employment Judge Blackwell.

7. On 16 August 2021, the claims were listed for a telephone case management discussion to be heard on 2 March 2022. That hearing was conducted by Employment Judge Self. The final hearing was listed for 6 days between 11 and 18 September 2023. A list of issues was finalised and agreed. The second Respondent was ordered to set out in writing a substantive response to the holiday pay complaint. Case management orders were set to prepare the case for the final hearing.

8. The agreed list of issues is set out at paragraph 24 of the record of that case management discussion. This can be found at pages 150 to 151 of the bundle of documents provided to us today. This comes with a schedule

setting out a list of the false allegations that the Claimant relies upon as having been made against him by the Respondents.

9. In essence, the first claim against all four Respondents raises complaints of direct race discrimination, direct sex discrimination, harassment relating to race and/or sex and victimisation. The second claim against the second Respondent only raises complaints of constructive unfair dismissal, damages for breach of contract in respect of outstanding notice pay and payment in respect of accrued but untaken annual leave. The agreed list of issues should be referred to for the specifics of each of these complaints.

Documents and evidence

10. We were not provided with any documentation in advance of the start of the hearing. On the morning of the first day we were provided with paper and electronic documents consisting of: a bundle of documents containing 876 pages; an index to the bundle; a witness statement bundle consisting of 51 pages; a suggested timetable for the hearing; a cast list and chronology and a separate chronology from the Claimant; and a document reproducing the agreed list of issues from the record of the case management hearing discussion and the schedule referred to above. In addition, during the course of the hearing, the Claimant provided us with an extract from a work rota dated 1 August 2018 and a number of emails relating to job applications and interviews.

11. We will refer to the bundle by using the prefix “B” followed by the requisite page number(s).

12. We heard evidence from the claimant and on behalf of all of the Respondents from Ruth Hogg (the third Respondent), Cyprianah Sodeinde (the fourth Respondent), Simon Donnelly and Sally Dibben (the First Respondent). Evidence was given by way of written statements and in oral testimony.

Conduct of the hearing

13. We spent the morning the first day of the hearing reading the witness statements and referenced documents. On the second day and on the morning of the third day, we heard evidence from the Claimant. On the afternoon of the third day until the fifth day, we heard evidence from the Respondents’ witnesses. On the morning of the sixth day we heard closing submissions having been provided with written submissions by both representatives. We then deliberated in chambers but were unable to reach a decision by the end of the day and indicated to the parties that we would be giving a reserved decision. We subsequently met on 25 September 2023 to conclude our deliberations and to reach our Judgment.

14. I would apologise to the parties for the length of time that it is taken to perfect the judgment and send it out. This unfortunately is due to my part-time sitting pattern and volume of work.

Findings

15. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

16. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

17. The Claimant is a Black African male. He was employed by the Second Respondent as a Band 6 Care Co-ordinator/Community Psychiatric Nurse from 3 March 2004 until his resignation on 9 December 2019. His role, in summary, consisted of working as a care coordinator and providing community-based nursing interventions to patients with severe mental illness, complex health and social care needs in the community. This involved multi-disciplinary work, amongst other things, including medication administration and monitoring treatment results. His position involved a high degree of autonomy. The Claimant was part of the Alliance Rehabilitation Team ("ART").

18. The First Respondent, Ms Dibben, was at the material time employed by the Second Respondent, as the Head of Employee Relations. The Third Respondent, Ms Hogg, was the Head of ART from May 2015 onwards and had known the Claimant since 2011. She described their previous relationship as cordial.

19. In June/July 2016, the Second Respondent changed the line management structure within ART with the introduction of a Band 7 role. From this point, Ms Hogg ceased to line manage the Claimant and this passed to the Fourth Respondent, Ms Sodeinde. She had worked with the Claimant for 10 years, before becoming his line manager, when she was also employed as a Band 6, without any issues. She described their relationship as close, both at work and outside of work.

20. The Claimant did not accept that he was close to either Ms Hogg or Ms Sodeinde. He described himself as a very private person and stated that his relationship with them was purely professional.

21. Ms Sodeinde said in evidence that from the moment she became the Claimant's line manager "everything changed". We can see from the evidence before us that the Claimant certainly began raising concerns about her in at least June 2017. We could not identify the exact date and cause of the change in their relationship beyond her becoming his line manager given that she undertook this role from June/July 2016 and the Claimant's first documented concerns arose a year later. The obvious change was that Ms Sodeinde took over the Claimant's supervision and appraisals from Ms Hogg in 2017. We refer to supervision notes made by Ms Sodeinde dated 25 January 2017 at B344. The Claimant was notified in an email from Ms Hogg dated 26 May 2017 that Ms Sodeinde would be conducting his appraisal

under a new system in June 2017 at B345. In addition, the email asked the Claimant to ensure that he approached Ms Sodeinde with regard to all matters needing management guidance or approval. Ms Hogg said in evidence that on the change of line management, issues regarding the Claimant's communication and clinical supervision began to arise and she had concerns about his efforts in engaging with his supervisor.

22. It may well be that the trigger was that the previous management regime was more hands off and that, as we have said, the Claimant enjoyed a hitherto high degree of autonomy.

23. One of the incidents of concern was referred to as the Dual Diagnosis training. This was training for 5 days over the period 27 October 2016 to 12 January 2017. The Claimant booked himself on the training directly with the Second Respondent's Training Department. In the booking form he completed, he gave his details, the name of his line manager and the details of the course he wanted to go on. The training booking confirmation dated 2 August 2016 is at B342. It is copied to Ms Hogg and the first part of the email is addressed to her.

24. Ms Hogg only became aware that the Claimant was going on training when she became discovered that the Claimant was booked out of work shortly before the course started. It was at this point that the Claimant sent her a copy of the booking confirmation. Ms Hogg said in evidence that she did not receive the booking confirmation from the Training Department and that it was sent to "CENTRAL/rhogg" which is not her usual email address. We accept her evidence of this.

25. From her email at B341 to the Claimant she accepts that there can be communications errors and suggests that it would have been good to have discussed the matter verbally in supervision before he book it. Whilst it is apparent that the Claimant did discuss the Dual Diagnosis training during his half year performance review (at B330), by then he had already started the course. Ms Hogg suggested in evidence that it was necessary to seek pre-approval before booking training. However, the Claimant did not accept this and said that the process was to book training and the Training Department would notify the line manager to seek approval. This is what he had always done in the pass.

26. We were not pointed to any document or policy regarding booking of training. We could not see that the Claimant was at fault having followed what he thought was the usual procedure and that Ms Hogg did not receive the confirmation email.

27. We also heard about concerns as to the booking of annual leave. Ms Hogg had concerns about the Claimant not following the correct procedure to book annual leave. Specifically his not seeking prior approval for leave first but simply entering it in the work diary. She sent an email dated 26 May 2017 to the Claimant (at B345), telling him to seek Ms Sodeinde's approval ahead of time for leave. The Claimant's position is that there was no written policy as to the booking of annual leave. In the same email, Ms Hogg also mentioned

the need to seek prior approval to book training and she also notified him that she will be undertaking his appraisal that year.

28. The Claimant's position is that you write annual leave in the diary and show it to your manager. He had never had issues about booking leave before this. He replied to Ms Hogg saying as much (also at B345). Whilst he was referred to a written policy during his later grievance (at B657), the Claimant said this was the Trust's policy and not the one followed by his team.

29. We also heard about concerns as to the Claimant's use of his electronic calendar/diary. The Claimant's position is as follows. There is paper diary in which members of the team record their whereabouts (this is in line with the requirement of the lone working policy, so that the second Respondent knows where members of staff are). He also emails the team to say where he will be on a daily basis and he also puts the same information in his electronic calendar/diary.

30. Ms Hogg said in evidence that the second Respondent was migrating to an electronic diary system and she was encouraging staff to use it. Her concern was that she did not know where the Claimant was day to day because when she looked at his electronic diary it simply recorded that he was "busy". We were referred to her email to the Claimant of 6 June 2017 (at B346). However, in evidence, she accepted that this was a technical "problem", as she called it, and not the Claimant failing to disclose his whereabouts.

31. The Claimant was clearly affronted by the suggestion that he was not communicating his movements and his email to Ms Hogg of 6 June 2017 says as much (at B346 – which also sets out his position with regard to the concerns raised about his annual leave and training).

32. We have to say that the evidence of what caused the rift between the Claimant, and Ms Hogg and Ms Sodeinde is far from satisfactory. Both the witness evidence and the documentary evidence.

33. It would appear that there were issues between the Claimant and Ms Sodeinde at least as far back as January 2017 (we refer to B661 in which the Claimant makes reference to her discrepancies in his supervision notes and identifies emails he sent to her in January and February 2017; although these are not in the bundle). Then he is criticised for not following procedures in booking training and annual leave and not recording his whereabouts in the diary. 14 June 2017 was his last supervision meeting although his appraisal had been diarised for 19 June 2017.

34. On 5 June 2017, there was an incident between the Claimant and Ms Sodeinde. We heard no evidence as to what their meeting was actually about and what actually was said and by whom. The Claimant's particulars of claim and witness statement do not deal with it. The closest we get to it is Ms Sodeinde's witness statement at paragraph 31, that the Claimant raised complaints about Ms Hogg, in particular that she had been bullying him. The emails between the Claimant and Ms Sodeinde (at B355 and 353) complain about a breach of confidence and make counter-allegations of who was aggressive to who.

35. As far as we can piece together the sequence of events: there was 5 June incident; the Claimant's supervision took place on 14 June; there was another incident on 19 June between the Claimant and Ms Sodeinde; on 19 June Ms Hogg wrote to the Claimant about his behaviour towards Ms Sodeinde that day; on 21 June Ms Sodeinde wrote to the Claimant alleging that he was the aggressor on 5 June.

36. Ms Sodeinde said in evidence that she was waiting for Ms Hogg to return from annual leave so as to speak to her in person about 5 June incident. It was clear from the evidence that Ms Hogg was at work on 19 June. Given that both incidents are allegations of aggressive behaviour by the Claimant towards Ms Sodeinde, it seems strange that she did not mention the earlier incident to Ms Hogg on 19 June. Whilst both Ms Sodeinde and Ms Hogg could not recall when Ms Sodeinde told Ms Hogg about the 5 June incident, we note that it is not mentioned in Ms Hogg's email of 19 June, which suggests that Ms Sodeinde had not told her about the incident that day and then begs the question why not given that it was another example, as she put it, of the Claimant's aggressive behaviour. On balance of probability we do not accept Ms Sodeinde's evidence as to the Claimant's behaviour at the earlier meeting and we accept the Claimant's account.

37. On 8 June 2017, Ms Sodeinde sent an email to the Claimant suggesting that they meet on 14 June to go through his appraisal. The Claimant responded asking if they could separate his supervision meeting from the appraisal and conduct the appraisal and a different date. Ms Sodeinde replied that the appraisal needed to prioritised because it June at the end of the month and that supervision could take place on 19 June 2017. These emails are all at B350. The Claimant sent a further email in effect insisting that his supervision take place first and that there was sufficient time until the end of the month to complete his appraisal (at B349). The email is also contains some discussion in which the Claimant requested that Ms Sodeinde complete certain parts of the appraisal form and she in turn stated that he needed to complete them. The Claimant indicated that he would in effect respond to this in due course. However, on 19 June, he sent an email to Ms Sodeinde stating that due to other commitments he had not been able to do so and that once he had some time he would get back to as soon as possible. This meant but the appraisal did not go ahead on 19 June.

38. However, there was clearly an interaction between the Claimant and Ms Sodeinde.

39. On 21 June 2017, Ms Sodeinde sent an email to the Claimant which she copied to Ms Hogg complaining about his behaviour on 5 June 2017 (at B355-356). The Claimant's response is at B353-355 and whilst it is undated we were told that it was also sent on 21 June. In this, the Claimant said the following. He set out the wider context of the meeting and refuted the allegations. He related his concerns about her aggressive behaviour towards him on 19 June because he was unable to meet with her for his appraisal. He had sent her several emails about this but she would not listen to his explanations and continued to behave aggressively towards him. Ultimately, she said that she could no longer manage him, Ms Hogg would have to take

over and she stormed off. Shortly after this incident, Ms Hogg called him into an office to get his version of the events but he was not given the opportunity to explain and she sided with Ms Sodeinde's account of the incident. This confirmed his reservations about having a 1:1 or face-to-face discussions with both Ms Sodeinde and Ms Hogg because there is a tendency to misunderstand his well-meaning intentions by taking things he said out of context. This further confirms is well-founded fear being a victim of a witch-hunt as he had previously mentioned one of his emails. He then sets out an account of what actually happened leading up to the incident on 19 June. He ends by stating that he has contacted HR regarding his concerns and he awaits their response but in the meantime he hopes that they could draw a line under the matter.

40. In an email to the Claimant dated 19 June 2017, Ms Hogg set out her account of what happened on that day. This is at B359-360.

41. It appears that there was an attempt to reschedule the appraisal for 21 June 2017 but the Claimant declined to meet with Ms Sodeinde (at B359-360).

42. There was some interaction between the Claimant and Lesley Allan, a Senior Employment Relations Advisor, during June and July 2017, in which the Claimant raised his concerns at work. This would appear to have led to the Claimant sending her an email dated 1 August 2017 setting out his grievances. This email is at B376.

43. We heard evidence relating to the Claimant's concern that Ms Hogg did not ask him to become the Dual Diagnosis Lead in place of other white female employees.

44. The Dual Diagnosis training was 5 days of training that the Claimant had undertaken and completed between October 2016 and January 2017 (as dealt with above). The confirmation email states that the course was between 27 October 2016 and 12 January 2017 (at B342).

45. His position is that having gone on the training, which Ms Hogg falsely denied knowing of, she allowed the two women to go on the course and deliberately overlooked that he had been on the training and appointed them as the Dual Diagnosis Leads. This was certainly his position in his grievance to Ms Allan, albeit not identified as amounting to either race or sex discrimination. However, in the agreed list of issues (at paragraph 2 b. ii.) it comes down to not being asked to become the Dual Diagnosis lead in place of two other employees who had completed the training in 2017.

46. Ms Hogg's evidence is as follows. The two women had attended the training together in the next cohort after the Claimant. In January 2017, on their return from the training they said they wanted to relay what they have learned back to the team and put themselves forward to become Dual Diagnosis Leads. Ms Hogg agreed to this. At no point did the Claimant ever indicate that he wanted to undertake this role. When he raised the matter after the two individuals had taken on the role, she asked him to liaise with them to share learning from the training across the whole team. However he refused to do so. Ms Hogg denies any race and/or sex discrimination took place. The

Claimant had not volunteered to undertake the role as the 2 individuals had and when she asked him to get involved he refused.

47. In transcript of the meeting held on 13 November 2017 (which we deal with as part of the grievance subsequently raised by the Claimant) at which Ms Hogg and the Claimant both present, the following was said relation to this issue (at B425-428):

    a. Ms Hogg stated that while she was initially unaware that the Claimant had booked himself on the Dual Diagnosis training, she was subsequently aware in October 2017 that he was attending the training and it was over 5 days, and that the Claimant completed the training on 18 November 2017. She further stated that she had a discussion with the Claimant about his interest in taking Dual Diagnosis further.

    b. The Claimant's position is that he was the first person in the team to undertake this course and that the two colleagues who were given the role of Leads went on the training afterwards. He felt that he was being sidelined.

    c. Ms Hogg stated that the two other staff requested the training in January 2017 and that all she could say is that she did not know that the Claimant wanted to take on a Dual Diagnosis role and that they had asked if they could before they went on the training. She said that the time she was relieved and thought it was great because people never usually volunteer to do things. She continued by stating that she asked the Claimant and the two colleagues to share learning across the team but the Claimant declined to do so.

    d. The Claimant denied that he had been asked and stated that he had been singled out was not part of it.

48. In cross examination, Ms Hogg stated that the two colleagues who subsequent to the Claimant completed the course, came to her and expressed a wish to share their learning in a voluntary manner and that the need to have a lead had been discussed with them during the course. The idea was to bring up the team rather than bringing in a specialist. She further explained this was not something the Claimant discussed with her and that his focus was on developing his own skills rather than putting himself forward to share his knowledge with team. Her general position was that as the manager of a busy team, she was always looking for the team members to work together and share their knowledge and to take on particular areas. She added that she was really encouraged when two of the team came forward to share their knowledge.

49. We were concerned that her evidence in cross examination was at odds as to exactly when and on what basis the two colleagues approached her as set out in her written evidence and as stated at the meeting on 13 November 2017.

50. On 22 August 2017, the Claimant alleges that Ms Hogg in the presence of other colleagues talk to him in a condescending manner, pressurising him to

give her a date for a meeting despite the fact that he told her he would get back to HR with date regarding the grievance raised. We were referred to email correspondence between the Claimant and Ms Allen dated 23 August 2017 and his email to Ms Hogg dated 22 August 2017 at B402. This forms part of his allegations against Ms Hogg at paragraph 2 b. i. of the agreed list of issues. At some point the Claimant further alleges that Ms Hogg shouted at during this incident.

51. A grievance hearing under stage I of the Second Respondent's grievance procedure took place on 13 November 2017 shared by Anna Reeves, Clinical Service Lead, Complex Care Pathway, assisted and supported by Ms Allan. The notes of the meeting are at B413-418. There is also a transcript of the meeting although it is stated to be not verbatim at B422-432.

52. By a letter of 23 November 2017 (incorrectly dated 23 October 2017), Ms Reeves wrote to the Claimant with the outcome of his grievance (at B435-437). In essence, Ms Reeves did not find in the Claimant's favour. Ms Reeves expressed concern that the Claimant had not had any clinical or managerial supervision for several months, that he had been offered an alternative member of staff to Ms Hogg and his line manager to provide him with supervision but had declined this. Her letter advised the claimant that he was required to have clinical supervision with an individual identified by his line manager's in order to ensure the following: reflect on practice; to safeguard standards; to develop professional expertise; and to deliver quality care. The letter advised of the right of appeal.

53. On 8 December 2017, the Claimant sent an email in which he appealed against the outcome of his stage I grievance. This is at B449-441.

54. An appeal hearing was initially arranged for 11 January 2018 to be conducted by Gottfried Attafua, Service Director Psychosis Management Team, assisted and supported by Eamonn Moules, HR Business Partner.

55. There is somewhat protracted correspondence between the parties in which the Claimant is seeking a later hearing date so as to allow for his representative to prepare for the hearing. Ultimately the hearing is rescheduled for 8 February 2018 but the Claimant does not attend the hearing and was not represented.

56. On 13 February 2018, there was an incident during a team clinical meeting in reference to a discussion as to the allocation of a particular patient to a new Care Coordinator. In essence, when it was suggested that the patient needed a male Care Coordinator, the Claimant (the only male Care Coordinator) raised his voice stating that he would not accept this patient in his caseload and when Ms Sodeinde attempted to defuse the situation, the Claimant continued to raise is voice repeating that he would not accept the patient in his caseload, that he had the right to freedom of speech to say what he wanted and he then stormed out of the meeting. This is set out in an email to the Claimant from Ms Sodeinde at B469.

57. In a letter dated 16 February 2018, Mr Affafua wrote to the Claimant advising him of the outcome of his appeal (at B462-464). The letter starts off with a

commentary as to the attempts to hold the hearing and goes on to advise the Claimant that his appeal is unsuccessful and the reasons for this. It is clear particularly from the concluding paragraphs that the panel found no evidence to support claims allegations and gave what they referred to as non-negotiable directions for his future conduct. We refer to the following paragraphs of the letter at B464:

"It is therefore the panel's decision in this instance to make very clear to you the following, which is non-negotiable:

There is no evidence that you have been victimised, bullied or harassed by management or that management have colluded to act against you. Our expectation of managers is to carry out their job roles and that they can do so without the fear of unfounded allegations made against them of bullying or harassment. The same applies to you. The evidence suggests a defiant and intransigent attitude and approach taken by you against management in the examples cited which will not be condoned nor tolerated. Management will be supported to manage you in your job role and the Trust does not expect to receive any such further claims from you which are not supported by evidence given the seriousness of such allegations.

It was of concern that you have declined to participate in management/clinical supervision for what is now a considerable period of time. This is not acceptable and will not be further endorsed. No person has the right or option of opting out of supervision nor trying to create a situation to frustrate its occurrence within their service. You will be supervised with immediate effect conducted by your line manager or delegated authority within the team as appropriate. Please be strongly advised that in the event you choose not to fully cooperate and participate proactively and productively in this, formal action against you will be taken for non-compliance of a reasonable management instruction.

You will comply with all working procedures within the service as determined and communicated by management, including the authorisation of leave prior to communicating or taking any leave from the workplace.

It is not a usual circumstance that such non-negotiable directions need be issued within a grievance process against a claimant but such was the evidence and information supporting management in managing you within your job role, and the lack of any evidence supporting your very serious claims and allegations, that it has been deemed both necessary and appropriate."

58. On 16 February 2018, the Claimant sent an email to Ms Sodeinde responding to her email as to the incident during the clinical meeting (although he refer to it as taking place on 12 February). This email is at B 465-46. In essence, he states that he did not raise his voice or storm out. It was obvious that Ms Sodeinde has a personal vendetta against him and it affects the way she relates to him, whereby she misconstrued things that he says and does, which she has done for several months. It continues that she concocted an allegation of unprofessionalism against him and was attempting to get his colleagues to side with her in an attempt to cover-up the bullying she has subjected him to since last year.
59. It is apparent that whilst the Claimant is referring matters that have already been rejected as unfounded in the grievance process, he is raising new albeit allegations against Ms Sodeinde.

60. From this point onwards that the Claimant in effect disengages from any further line management interaction with Ms Sodeinde and Ms Hogg.

61. On 20 April 2018, the Claimant requests to move to a different team because of his treatment by Ms Sodeinde and Ms Hogg. His initial request is at B529 and is addressed to Ms Dibben (at B529). Her response dated 24 April 2018 is at B530. In this she states that the allegations that he has raised against Ms Sodeinde and Ms Hogg have been dealt with as part of the grievance process and had not been upheld, and so there is no reason for him to be

moved from the team that he is currently working in. She adds that the second Respondent does not have any sort of transfer scheme that she can direct him to and she could only suggest that he would need to apply for alternative roles in the normal way. This is a position that she repeats in response to his repeated requests for a transfer.

62. On 27 April 2018, Ms Hogg sent an email to the Claimant in which she notified him that she would be raising concerns to Victor Quarshie (Head of Nursing) and Simon Darnley (Deputy Director) with regard to his non-engagement with his line manager, with supervision and his refusal to engage and communicate reasonably in day-to-day working discussions on operational matters. This email is at B535. Her email to Mr Quarshie and Mr Darnley setting out her concerns is at B536.

63. Ms Hogg sent the Claimant a further email on 21 May 2018 regarding his conduct. She reminded him that as stated in the outcome of his grievance appeal hearing, he has a responsibility to engage with supervision and line management. She pointed out that this also includes being available and engaging in open communication with management on day-to-day operational matters outside of formal meetings. She expressed her specific concern that he has not engaged with his line management and supervision since June 2017 and in particular since the outcome of his grievance hearing in March 2018. She reminded him that his next supervision was scheduled for 24 May with Ms Sodeinde and to ensure that he attends this meeting. She warned him that he failed to attend, or failed to actively and positively engage, this will be seen as a further matter of misconduct and the Trust would be proceeding directly to a disciplinary hearing. This email is at B547-548.

64. It would appear that the Claimant's only response to this was to forward it to Ms Dibben, and various others, including Mr Quarshie, on 23 May, complaining that he was being threatened with disciplinary action if he did not meet with Ms Sodeinde 2018 (at B548).

65. Earlier on 23 May 2018, the Claimant had sent an email to Ms Dibben, copied to the same persons as above, renewing his request to be managed independently outside of ART and for a transfer citing more recent justification.

66. The Claimant did not attend his supervision with Ms Sodeinde on 24 May. As a result Ms Hogg sent him an email that morning advising him that she had no alternative but to pick the matter up with HR as a misconduct matter (at B551).
67. On 25 July 2018, Lorane Swaby, Senior Nurse Practitioner, raised her concerns about the Claimant's behaviour with Ms Sodeinde. This is in an email at B593. This included concerns as to the claimant's conduct during meetings towards his colleagues.

68. On 31 July 2018, Ms Sodeinde received reports from two band 6 Nurses and a joint report from the Team Consultant and the Team Specialist Doctor about the Claimant's conduct in team meetings. These are at B583, B594-595. This included general concerns about the claimant's conduct in team

meetings, in particular his closing his eyes during meetings, not participating in discussions and generally appearing disengaged.

69. The Claimant's general position is that these allegations are untrue and have been falsely made.

70. On 20 July 2018, Hilary Williams, the Deputy Director (Interim) - Lambeth Operational Directorate, wrote to the Claimant requesting that he attend an investigatory meeting to be held on 24 July. The purpose of this meeting was said to investigate an allegation that he had refused to carry out a reasonable management request: failure to adhere to professional standards. This letter is at B570-571.

71. The notes of the meeting with the Claimant are at B596-627. There are also notes of investigation meetings held with Ms Sodeinde at B574-595 and with Ms Hogg at B6 28-644.

72. On 31 July 2018, Ms Sodeinde collected additional evidence regarding the Claimant. It was not clear to us what happened to this and whether it formed part of the investigatory state or disciplinary stage or whether it was relied upon at all. The Claimant said in evidence that he had only seen this evidence in the bundle for this hearing. As far as we can tell the additional evidence amounts to the concerns set out by Ms Swaby and his colleagues which we have mentioned above.

73. On 3 September 2018, Ms Swaby was appointed as the Claimant's new line manager. From Ms Hogg's email to Ms Williams dated 17 September, it is clear that the Claimant has not engaged in any of the dates offered for supervision. This email is at B645.

74. In his email to Ms Dibben dated 6 September 2018, it is apparent that she advised the Claimant to attend the appraisal and supervision with Ms Swaby because she is new and has not been involved in previous issues with his line management. The Claimant's in effect refuses because Ms Swaby is part of the office clique, a friend of Ms Sodeinde and that the second Respondent has not investigated his complaints about Ms Sodeinde but simply passed the buck to Ms Swaby. He continues that he believes that Ms Swaby has been involved in directly in the previous issues that he has raised. His email then raises a number of concerns about the conduct of the fact-finding investigatory stage into the allegations made against him. This email is at B650-651. From the evidence before us it was unclear whether this email was addressed.

75. On 28 November 2018, the Second Respondent produced its investigation report into the allegation raised against the Claimant. The authors are listed as Ms Allen , Mr Akbar and Ms Williams. The report is at B 652-651. In conclusion the report determines that the Claimant has not adhered to the expectations clearly outlined in the correspondence dated 16 February 2018 (the grievance appeal outcome letter at B464) and recommends that the matter proceed to a disciplinary hearing.

76. By letter dated 6 November 2018, Ms Allan wrote to the Claimant to advise him that the investigation into his alleged misconduct has been concluded and that it has been found that there is a case to answer under the disciplinary policy. He is further advised that a disciplinary hearing has been arranged for 16 November 2018 to hear the following allegations:

    1) Failure to engage in supervision as instructed in the outcome of the Grievance Appeal hearing on 8 February 2018;

    2) Failure to comply with additional reasonable management instructions."

77. The letter warns the Claimant that the allegation, if upheld, may constitute gross misconduct and that a possible outcome could result in up to and including summary dismissal. The letter attaches a copy of the management case. This letter is at B658-659.

78. By an email dated 14 November 2018, the Claimant wrote to Ms Allan acknowledging receipt of the above letter and stated that due to brevity of time it is not possible for him to arrange a representative for the disciplinary hearing and therefore he will not be attending. His email goes on to set out his evidence in support of his own position regarding his treatment cross-referenced to previous emails that he had sent. This email is at B669-675. The Claimant sent further emails dated 15 November 2018 to Ms Allan with further evidence in support of his actions and his allegations against Ms Sodeinde and Ms Hogg. These are at B660-701.

79. The disciplinary hearing was rearranged for 23 November 2018 given the Claimant's indication that he had insufficient time to organise representation. The Claimant subsequently informed the second Respondent that he would not be attending this rescheduled hearing.

80. On 23 November 2018, the hearing was conducted in the Claimant's absence by Mr Darnley, supported by Tadgh Treacy, Associate Head of Employee Relations.

81. On 4 December 2018, Mr Darnley wrote to the Claimant advising him of the outcome of the disciplinary hearing. This letter is at B702-707. Mr Darnley indicates in the letter that he has taken into account the various emails and documentation that the Claimant submitted in advance of the hearing. He further indicates that the management case was presented by Ms Williams and that she called Ms Hogg as a witness. His letter then sets out the background to the matter and that, whilst he took into account the Claimant's mitigation evidence, as he calls it, this does not extend to matters that were thoroughly investigated as part of the Claimant's previous grievance, that having been concluded.

82. In conclusion, having questioned Ms Williams and Ms Hogg at length, he set out his decision, firmly stating that seriousness of his decision. This is as follows:

    "Despite clear non-negotiable and reasonable management instructions issued to you, you have continued not taking part in any clinical supervision up to and including 25th October as well as actively engaged in avoiding communication about this or other management issues with your line manager. You have not complied with all working procedures within the service as determined by management

such as sharing of electronic calendars and you have continued to book annual leave inappropriately and not through your line manager as clearly instructed.

I believe your continued actions are wilful and you actively avoid regular verbal communication frequently answering reasonable management questions or enquiries with "no comment". This is wholly unacceptable behaviour.

We found no evidence at all that any of the team were acting in any inappropriate manner towards you.

Therefore, having considered all the reverent information from your mitigation and the management case, my decision is to issue you with a Final Written Warning commenced on 23rd November which will remain on your file for a period of 18th (sic) months."

83. In addition, Mr Darnley stated that this final written warning comes with the following non-negotiable instruction:

"1. You immediately actively engage and seek out supervision with your supervisor Lorane Swaby. This must happen within the month of December 2018 and sustained monthly. You will also actively engage in your appraisal within the month of December 2018. This is currently booked in for Monday 10th December 12-1:30pm.

2. For any future annual leave, you must seek out and pre-agree any leave though your current line manager or delegated authority only if they are unavailable. Failure to do so will result in any absence being determined as unauthorised absence with disciplinary proceedings to follow.

3. It is also imperative for line management to have access to your calendar and you will share this within 3 working days of receipt of this letter.

4. You will work co-operatively with your management line and undertake all reasonable management instruction issued.

I want to make very clear to you the seriousness of this current situation and hope you actively engage in this, for you, your team and last but not least your service users.

Please be advised that should you fail to comply with these reasonable management requests the Trust will consider your actions to be of such seriousness that it could result in your dismissal from the Trust."

84. The letter went on to advise the Claimant of his right of appeal.

85. From 20 December 2018 onwards the Claimant was absent from work due to ill-health. He presented a statement of fitness for work certificate from his doctor's surgery indicating that he was unfit for work due to "stress at work" for the period 20 December 2018 until 13 January 2019. This is at B711. In fact the Claimant did not return to work. Whilst there is reference in the email correspondence time to further fitness for work certificates, we were not taken to them.

86. By a letter dated 21 December 2018, the Claimant appealed against his final written warning. This letter is at B712-713. It is from a Direct Access barrister and is headed "Appeal and Letter Before Action". The letter states as follows:

*"**Appeal***

I write as Direct Access Counsel on behalf of my client Mr Evans Daramy to lodge his appeal against the decision made to give him a final written warning made at his recent disciplinary hearing.

Having taken advice, he believes that he has been the victim of a continuing course of discrimination on the grounds of race and gender which was never been properly considered during his grievance proceedings earlier this year.

He is the only black male nurse in the Lambeth High Support Team (LHST) who carries out clinical duties.

He considers that this account for the way in which he has been treated since his workplace difficulties began in 2017. He notes the extraordinary fact that he had previously worked successfully for the SLAM NHS Foundation Trust since 2002.

Mr Daramy has outlined for you in correspondence matters which have occurred since his February 2018 grievance and considers that those matters, particularly the refusal to provide alternative supervision have to be considered in context of his previous complaints which therefore need to be reconsidered.

Letter Before Action

Please note that Mr Daramy has no confidence that you will fairly consider his appeal and is therefore preparing to launch discrimination proceedings based on detriment. He does not have the money to employ lawyers to do this but is prepared if necessary to act in person."

87. From the evidence that we were presented with it does not appear that there was an appeal hearing. We were not given any explanation for this.

88. It appears that thereafter, given the Claimant's ongoing ill-health absence, the second Respondent proceeded under its Sickness Policy (at B246-277) although we were not taken to it.

89. The Claimant presented his first claim to the Employment Tribunal on 21 March 2019 (at B4-20). The Tribunal sent Notice of Claim to the Respondents on 28 May 2019 (at B22-23).

90. On 29 March 2019, the second Respondent made a referral for the Claimant to its Occupational Health practitioners. This is referred to in the email correspondence at B736-737. The referral form is at B733-735.

91. On 1 April 2019, the Claimant wrote to Ms Hogg by email emphasising that sickness was caused by work-related stress stemming from his treatment by her and Ms Sodeinde. He further stated that in the interests of assisting him to return to work, requested an alternative person to chair the sickness meet due to outstanding matters raised during his disciplinary hearing into bullying never going to buy HR notwithstanding his emails to them. This email is at B737.

92. On 10 April 2019, the second Respondent held a sickness review meeting with the Claimant. This was conducted by Ms Hogg and Ms Allan. The notes of the meeting are at B739-742. It is fair to say that the Claimant is guarded in his responses to questions. It is left that there will be a further sickness review meeting in 2 to 3 weeks time to allow for the second Respondent to consider the OH report.

93. The Claimant attended an appointment with OH but declined to allow the second Respondent permission to see their subsequent report.

94. On 11 June 2019, a further sickness review meeting was held with the Claimant by Ms Hogg, Ms Swaby and Ms Allan. We were referred to the invitation letter at B749 and the notes of the meeting at B755-757. It is fair to say that the Claimant is even more guarded in this meeting. This is to the point of simply not providing any specific information as to ongoing his ill-health or as to when or if he might be able to return to work. At the conclusion

of that meeting, the Claimant was advised that he was issued with the morning given the ongoing concerns about his sickness absence.

95. On 12 June 2019, Ms Hogg wrote to the Claimant setting out what had happened at the two sickness review meetings and confirmed that he was issued with a written warning valid for 12 months. The letter records that it was not possible to continue meeting because the Claimant was not willing to share any information relating to his current health and that she was unable to see what was discussed and suggested by OH. The letter state that the written warning was issued on the basis that his sickness absence was not sustainable long-term in relation to the needs of the service and the impact this has on his other colleagues and that he was unable to given any timescales as to when he might expect to be able to return to work. The letter warned him that should his attendance not improved to a level satisfactory to Trust, the next steps would be further formal sickness review meeting at which further formal action can be taken in which could ultimately result in the termination of his employment on the grounds of capability. The letter concluded by advising the Claimant of his right of appeal. This letter is at B760-761.

96. On 9 September 2019, the Claimant is invited to a further sickness review meeting to be held originally on 17 September 2019. He is subsequently notified that the meeting has been rearranged for 20 November 2019 given his inability to attend on the original date. These letters are at B788 and 787.

97. On 20 November 2019, the Claimant notifies the second Respondent that he is not able to attend on that date but indicates that he will attend in the future and asks if he can make an audio recording of the meeting using his own recording apparatus. He gives dates for availability. His email is at B786.

98. Ultimately the meeting is rescheduled for 10 December 2019. The Claimant is notified of this in Ms Hogg's email dated 2 December at B786. On this date Ms Hogg also sent the Claimant her OH referral form (which she had inadvertently not included with her earlier email dated 11 November). These emails are at B790-792. It is fair to characterise the content of these emails as non-contentious and mundane.

99. By a letter dated 9 December 2019, addressed to Ms Sally Storey, the Associate Director of HR, the Claimant tenders his resignation. This letter is set out in full below:

"I am writing to tender my resignation in my position as Care Coordinator for South London Maudsley Foundation NHS Trust (LHST), Alliance Rehabilitation Team.

It is with great sadness that I have been left with no other alternative than to leave a job I have a passion for and had done for over 17 years, with a rewarding career allowing me to contribute to society in my clinical capacity managing mental health as part of a team.

I have now lost trust and confidence your ability as an employer in taking your duty of care to take all reasonable steps in ensuring my health, safety and well-being, the last straw being the latest effect on my well-being due to the continued requirement to correspondence with Ruth Hogg the primary subject of the reason for my sickness, designated as the chair for my sickness absence, and a named Respondent of my current employment Tribunal claim.

As a result this new-found impact this is having on me due to the last correspondence with Ruth Hogg on the 2nd December 2019, your failure in your duty to take reasonable steps with regard to ensuring

my health, safety and well- being, I have been left with no alternative to than to resign with immediate effect in response to this fundamental breach."

100. On 27 April 2020, the Claimant presented his second claim to the Employment Tribunal (at B74-94). Notice of claim was sent to the Respondents on 20 July 2020 (at B97-100).

Submissions

101. We received written submissions from both representatives which they also spoke to. We have taken these submissions fully into account and do not propose to repeat them here unless appropriate to do so.

Essential Law

102. Section 13 of the Equality Act 2010:

"(1) 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."

103. Section 26 of the Equality Act 2010:

"(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

104. Section 27 of the Equality Act 2010:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act…"

105. Section 95 & 98 of the Employment Rights Act 1996:

Section 95

"For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2). . . , only if)—

(a)the contract under which he is employed is terminated by the employer (whether with or without notice),
(b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

Section 98

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or if more than one, the principal reason) for the dismissal and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3)In subsection (2)(a)—
(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

Conclusions

106. In considering our conclusions we have gone through the agreed list of issues and referred to the paragraphs within that document.

<u>The Equality Act 2010 complaints</u>

Time Limits

107. Paragraph 1 asks us to consider whether we have jurisdiction to determine the Claimant's complaints under the Equality Act 2010. This requires us to consider a number of matters: were each of the complaints presented to the Tribunal within the requisite time limits; if any of them were not, do they form part of a continuing act; or would it be just and equitable for us to extend time so as to allow us jurisdiction to determine those complaints?
108. Section 123 governs time limits under The Equality Act 2010. It states as follows:

(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable…

(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

109. In essence, a claim has to be presented within a period of 3 months plus any extension of that period by operation of the ACAS Early conciliation process of the act complained.

110. However, an act of discrimination which *"extends over a period"* shall be treated as done at the end of that period under section 123(3) of the Equality Act 2010.

111. In addition, a Tribunal has the discretion to allow a claim outside the time limit if it is just and equitable to do so. This is a process of weighing up the reasons for and against extending time and setting out the rationale.

112. The first claim was presented to the Tribunal on 21 March 2019 following a period of early conciliation between 31 January and 22 February 2019. This has the effect that the earliest date on which an act could be in time would be 1 November 2018. Whilst the list of issues refers to this date is being 20 December 2018, we believe that this is incorrect.

113. The second claim was presented to the Tribunal on 27 April 2020 following a period of early conciliation between 28 February 28 March 2020. There is no time-limit issue arising in this claim.

114. With regard to the first claim, the Respondents' position is that the last two allegations of discrimination harassment made against Ms Hogg and Ms Sodeinde have been presented in time although there is no evidence whatsoever of the dates on which those allegations took place but the remaining allegations are out of time.

115. The Claimant's position is that all of the allegations of discrimination harassment about conduct extending over a period of time and continuing beyond the date identified above.

116. We heard no compelling evidence on which to exercise our discretion to extend time. We refer to the Respondents' submissions at paragraph 87 in this regard.

117. Turning then to the position under section 123(3). In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is "continuing discrimination".

118. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a

sequence of individual incidents were evidence of a 'continuing discriminatory state of affairs'.

119. Having considered the dates of and the nature of the various allegations of less favourable treatment, unwanted conduct and detriments, we are willing to accept that these matters are capable of amounting to a continuing course of conduct. They have a common theme running through them of what they Claimant alleges to be bullying and harassment and false allegations against him by the various Respondents and as alleged evidence a continuing discriminatory state of affairs.

Burden of Proof

120. Under section 136 of the Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

121. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof. The Court of Appeal said the Tribunal must go through a two-stage process. At stage 1, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent had discriminated against the Claimant. In deciding whether the Claimant has proved these facts, the Employment Tribunal can take account of the Respondent's evidence. At stage 2, the Respondent must prove s/he did not commit that discrimination. Although there are two stages, Employment Tribunals generally hear all the evidence in one go, including the Respondent's explanation, before deciding whether the requirements of each stage are satisfied.

122. The full guidelines (as adapted for the Equality Act 2010) are as follows:

    119.1 It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful under the 2010. These are referred to below as 'such facts'.

    119.2 If the Claimant does not prove such facts s/he will fail.

    119.3 It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few Respondents would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "s/he would not have fitted in".

    119.4 In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis

by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

119.5 It is important to note the word 'could' in section 136(1). At this stage, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage, a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

119.6 In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

119.7 These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or any other questions that fall within the Equality Act 2010.

119.8 Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

119.9 Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on grounds of a protected characteristic or act, then the burden of proof moves to the Respondent.

119.10 It is then for the Respondent to prove that s/he did not commit, or as the case may be, is not to be treated as having committed, that act.

119.11 To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic or act, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive 97/80/EC.

119.12 That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

119.13 Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

123. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be *"something more"*. There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

124. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

125. We have also taken into account the guidance from the, then, House of Lords, in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL. The House of Lords considered the classic Tribunal approach to discrimination cases, which is to first assess whether there has been less favourable treatment, and if so, consider if the treatment was on grounds of the relevant prohibited conduct and stated that it may be more convenient in some cases to treat both questions together, or to look at the reason why issue before the less favourable treatment issue.

126. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Direct Race Discrimination

127. Under section 13 of the Equality Act 2010 ("EQA"), it is unlawful to treat a worker less favourably because of a protected characteristic, in this case race, by reference to an actual or hypothetical comparator in the same or similar circumstances.

128. Paragraph 2 of the agreed list of issues asks us to consider the burden of proof in relation to the allegations made against the first, third and fourth respondents.

129. Dealing first with those in sub- paragraph a. against the First Respondent, Ms Dibben:

    i. Refusing the Claimant's requests to move teams on 20 April 2018, 27 April 2018, 23 May 2018 and 16 July 2018

    127.1 We accept Ms Dibben's evidence that it was not her decision to make as to whether or not the Claimant could move teams. However, she did not support his request to move in April and May 2018 because in her view there were no grounds to move him. He was asking to move because of the past allegations of bullying and

harassment which had been held in the grievance process to be baseless.

127.2 Her further position is that the Claimant did not raise any new complaints that could be investigated and it was not appropriate to re-investigate the old complaints because he had not produced any new evidence in support. Our view is that the Claimant did raise a new complaint in February 2018. Whilst Ms Dibben could have supported a move at this point, we accept that it was not her decision to make.

ii. Not considering and/or dealing with the Claimant's grievance properly from 2017 to 2018

127.3 We accept Ms Dibben's evidence that she was not involved in considering or dealing with the Claimant's grievance or grievance appeal. However, she was head of HR and so she should have known about it and indeed she accepted that they discussed cases at regular meetings.

iii. In failing to support the Claimant following the initial allegations of bullying in 2017

127.4 We accept Ms Dibben's evidence that she was not involved in his case until April 2018. She added that in circumstances where real doubt had been cast on the Claimant's motivations in raising allegations of bullying and harassment and where the grievance process concluded there was no evidence of this, it was not appropriate to move the Claimant from his team and steps had been taken to change his line management. We accept that she had nothing to do with this other than as head of HR. But of course she should have known about it.

iv. In failing to separate the Claimant from those he accused of bullying him from 2017 to 2018;

127.5 Ms Dibben's evidence is that whilst the Claimant complained that he was being made to attend supervision with the two line managers he had accused of bullying and harassment and making false allegations against him, the evidence did not support this. She is in effect again relying on the grievance finding that there was no case found and the Claimant had in effected acted in bad faith. Her further position is that the emails he sent to her as to their bad behaviour simply showed their reasonable and genuine attempts to manage him. However, as we have indicated the Claimant in fact raises further allegations in his email dated 16 February 2018

v. In failing to respond to the complaint of bullying dated 16.2.18 and or acknowledge the complaint;

127.6 Ms Dibben's evidence is that she did not receive this. However, it was copied to HR. We accept that HR did nothing about it because

the Claimant ended his email by stating that he was going to ask HR to look into the matter as a formal complaint but he never made a formal complaint (at B467).

vi. In subjecting the Claimant to investigations about his conduct without dealing with the outstanding complaint raised on 16.2.18;

127.7 As we have indicated above the Claimant had indicated that he was going to ask HR to look into the matter as a formal complaint. HR did not given the findings in the grievance process and because the Claimant did not raise a formal complaint as indicated.

vii. In insisting the Claimant be supervised by those alleged to be bullying him despite the new allegations raised not being dealt with.

127.8 We reach the same conclusion as indicated in paragraphs 127.6 and 1278.7.

130. That said, we feel that there are some very serious failings in the way in which the First and Second Respondents dealt with this matter. However, there is nothing to indicate that the treatment that the Claimant complains of was because of race.

131. We have identified the following shortcomings from the matters that we found:

129.1 Not appreciating that the Claimant had made new allegations;

129.2 Taking the view that it was more of the same and not enquiring into the allegations;

129.3 Taking the view that the Claimant had not formally referred the matter to HR and so there nothing was to do, rather than taking a proactive role;

129.4 As head of HR, the First Respondent was ultimately responsible for the actions or inactions of the people in her department.

132. Turning then to sub-paragraph b. of the agreed list of issues, which sets out the allegations in relation to the Third Respondent, Ms Hogg:

i. On 22 August 2017, the incident whereby Ms Hogg sought a date for a meeting with the Claimant

130.1 The allegation changed over time and now appears to be seeking a date and shouting at the Claimant whilst seeking a date.

130.2 Whilst Ms Hogg sought a date to arrange a meeting with the Claimant, she had been asked to do this as part of the informal stage of the grievance procedure (at B400-403).

130.3 We do not accept on balance of probability that Ms Hogg shouted at the Claimant whilst seeking this date. We accept her evidence in

cross examination that she was a professional manager with a strong sense of discretion and so would not have approached him in a public loud way around a matter such as this.

130.4 Further, the Claimant did not allege that Ms Hogg had shouted at him in his email at the time in which he complained about her asking him to confirm a date for the meeting (at B402).

130.5 Moreover, when the Claimant complained about Ms Hogg seeking a date for the meeting at the time, he did not allege that this behaviour amounted to race (or indeed sex) discrimination at the time or in his witness statement. This is part of a general concern about the subsequent characterisation of his various complaints.

ii. Not asking the Claimant to be the dual diagnosis lead in place of two other employees who had completed the training in 2017.

130.6 From the evidence we concluded that the other employees were not asked, they volunteered. No one was asked. Ms Hogg did not ask the Claimant because he never indicated that he wanted to take on the role and when he raised the matter and she suggested he liaise with the two other employees, he refused to do so.

130.7 In addition we note the Respondents' submission that whilst the Claimant complained about not being made shall lead in his grievance and in his witness statement, he did not allege that it was race or sex discrimination or harassment.

130.8 We also note the Claimant's email of 1 August 2017 to Ms Allen at B376.

130.9 However, this was a matter that we entirely convinced by and we decided to come back to it after considering the other complaints of discrimination.

iii. Emailing the Claimant on 10 April 2018 about his alleged conduct at a team meeting

130.10 Ms Hogg did email the Claimant about his eyes being shut (at B523). However, this allegation was supported by others (at B594).

iv. Making false allegations against the Claimant in 2017 and 2018 (see annexed schedule of false allegations); and

130.11 There are allegations but they were not found to have been false and there is no evidence to suggest that they are false.

v. Threatening the Claimant with disciplinary action if he did not attend supervision with the Fourth Respondent, on 25 May 2018

130.12 We find that Ms Hogg warned the Claimant but did not threaten him in the pejorative sense of that word.

133. Turning then to the allegations against Ms Sodeinde at sub-paragraph c. of the agreed list of issues:

i. The incident on 19 June 2017 in open office whereby the Claimant was requested to attend his appraisal meeting.

131.1 We find that this did happen although the exact nature of the incident is more likely than not something between the two versions presented to us.

ii. Making false allegations against the Claimant (see annexed schedule of false allegations)

131.2 We went through the schedule which is at the back of the agreed list of issues and considered them each in. We have already indicated that they were not found to be false and we could not find evidence to support them to be false. However, more to the point, we could find nothing to support any link to race. It was clear to us that the Claimant and Ms Sodeinde had fallen out considerably by the time of these events and that to an extent it can perhaps be said that she over egg the pudding in raising her concerns about the Claimant's behaviour. However, was nothing to support race discrimination.

134. At paragraph 3 of the agreed list of issues, the Claimant relies upon a hypothetical comparator that does not share his protected characteristic. However there was nothing to indicate that a hypothetical comparator would have been treated more favourably.

Direct sex discrimination

135. The Claimant relies on the same acts as set out at paragraph 2 a to c of the agreed list of issues. We therefore repeat our conclusions as set out. And as we have indicated we intended to come back to sub-paragraph b. ii.

Harassment related to race and/or sex

136. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

137. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his dignity is violated etc. We also took into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker

did in fact feel that his dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (Richmond Pharmacology v Dhaliwal [2009] ICR 724).

138. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

139. The Claimant's complaints of harassment is set out at paragraphs 8 to 11 of the agreed list of issues. He again relies on the matters set out at paragraph 2 a to b, in this context as amounting to unwanted conduct. We therefore rely on above conclusions as set out above, although intending to come back to sub- paragraph b. ii).

140. The difficulty for the Claimant is that we could not find that any of the unwanted conduct related to either his race or to his sex.
141. At this point we turned to the outstanding allegation at paragraph 2 b ii). We decided to take another look at this in the round in as far as it relates to the allegations of direct discrimination and harassment.

142. The allegation is that Ms Hogg subjected the Claimant to less favourable treatment because of his race/sex and unwanted conduct amounting to harassment related to his race/sex by not asking him to be the Dual Diagnosis lead in place of 2 other employees who had completed the training in 2017.

143. As we have found, in fact no one was asked, the two white women volunteered, the Claimant was offered the opportunity to liaise with them but declined. We refer to the record of the grievance meeting at B425. What Ms Hogg said in her written evidence and during the grievance meeting in November 2017 in relation to when and how the two women volunteered is inconsistent with what she said in cross-examination. But to be fair to her the Claimant is somewhat evasive as to what exactly happened in the meeting.

144. But we felt we had to ask ourselves the question why did Ms Hogg not ask the Claimant if he wanted to be Dual Diagnosis lead? He had come back from the course and as part of his appraisal she knew of his interest and she knew of the dates of the course given her concerns that he had not informed her in advance that he was booked on it. Whilst she states in the meeting

that the course completed on 18 November 2016, in fact she was sent a copy of the course confirmation email which said it ended on 12 January 2017. This is even closer to the time that she states that the two colleagues approached her and volunteered.

145. So why did she not ask the Claimant if he wanted to be the lead or even a joint lead? Of course we come back to the same answer, that as Ms Hogg states no one was asked. Perhaps the situation would have been different if they were asked and he was not.

146. However, this does look highly suspicious and is certainly not inclusive conduct. Failing to ask him does seem inexplicable given that Ms Hogg knew he had been on the training. There is no documentary evidence to support what happened. However, there is the inconsistency in Ms Hogg's evidence to the grievance hearing and what she said in her evidence at our hearing. This appears to shift the emphasis as well as the timing of when the two colleagues approached her. However, we believe that the more contemporaneous evidence is to be preferred.

147. We do feel that in respect of this allegation the burden of proof has shifted to the Respondents and that they have not convinced us that what happened had nothing whatsoever to do with the Claimant's gender and/or sex. We also rely on the Igen guidelines, especially at paragraph 104.13 and we find that the Claimant was subjected to unlawful sex and race discrimination and harassment in this regard.

148. In respect of harassment, this was clearly unwanted conduct and in the absence of the Respondents failing to discharge the burden of proof we conclude that it was related to the Claimant's race and/or sex. From the Claimant's evidence as to how he felt about what happened by Ms Hogg's conduct in not asking him to take on the Dual Diagnosis lead in place of two white female colleagues it falls within the definition of harassment. He clearly felt overlook and snubbed by not being asked when Ms Hogg knew that he had been on the training but did not ask him to take on the role but instead favoured two other white female colleagues who had attended the training after him. We also conclude that taking into account the Claimant's perception and the wider circumstances, it is reasonable for the Claimant to consider that such conduct amounts to harassment.

149. We therefore find this element of the Claimant's complaints of direct race and sex discrimination and harassment well founded. Whilst this claim is expressed to be against the third it must follow that the second Respondent is also liable as the third Respondents employer under section 109 of the Equality Act 2010 in the absence of the second Respondent pleading the statutory defence.

Victimisation

150. It is unlawful to victimise a worker because she has done a "protected act". In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 of the Equality Act 2010.

151. The Claimant's complaint of victimisation is set out at paragraphs 12 to 15 of the agreed list of issues.

152. The protected acts are raising complaints of bullying and harassment on 16 February 2018 (which is at B465-467), on 20 April 2018 (which is at B529) and in December 2017 (not 2018 set out in the agreed list of issues) (at B451). We accept that these are protected acts in as far as the first act mentions sexism, the second one mentions harassment and the third one mentions the Equality Act.

153. The detriments relied upon are on 20 July 2018 subjecting the claimant to disciplinary hearing (at B570) and on 5 December 2018 imposing a sanction of the final written warning (at B702).

154. We could not establish any causal link between the protected acts and the detriments. The Claimant was disciplined for failing to engage in supervision and he was issued with the final written warning for this failure and in order to secure his future engagement in supervision.

155. We therefore find this complaint unfounded and it is dismissed.

Unfair Dismissal

156. Section 98 of the Employment Rights Act 1996 sets out how an Employment Tribunal should decide whether a dismissal is unfair. There are two basic stages. Firstly, the employer must show what was the reason, or if more than one, the principal reason, for the dismissal. The reason must be one of the four potentially fair reasons set out in section 98(2) or some other substantial reason of a kind such as to justify dismissal. Secondly, the Employment Tribunal must then decide in accordance with section 98(4) whether it was fair to dismiss the employee for that reason.

157. For the purposes of a claim of unfair dismissal there of course has to be a dismissal. This has to fall within section 95 ERA 1996. A termination of the contract of employment between the parties by the employee will constitute a dismissal within section 95(1)(c) if s/he is entitled to so terminate it because of the employer's conduct. This is colloquially and widely known as a 'constructive dismissal'.

158. The leading case is *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, CA. As Lord Denning indicated an employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

159. Thus in order for an employee to be able to claim constructive dismissal, four conditions must be met:

    a. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

    b. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

    c. He must leave in response to the breach and not for some other, unconnected reason. S/he must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

160. If an employee leaves in circumstances where these conditions are not met, he will simply have resigned and there will be no dismissal within the meaning of the Employment Rights Act 1996 and so there can be no claim of unfair dismissal.

161. In the present case, the Claimant is relying on a breach of the implied term of mutual trust and confidence in view of the Second Respondent's conduct towards him. This is set out at paragraph 17 a. of the agreed list of issues as failure to take all reasonable steps in ensuring the Claimant's health, safety and well-being and so breach the implied term of trust and confidence as set out at paragraphs 10-12 of his second claim form:

    "10. Upon the approach of the meeting with Ruth Hogg on the 10th December 2019, my health and wellbeing was increasingly detrimentally affected. Ruth Hogg, a named Respondent in my earlier claim, was purported by the Respondent to assist me in the process of returning to work, chairing my sickness review meeting, despite my request for another person to chair the meeting after explaining to the Respondent and herself her complicity in the cause of my work related stress. Taking together with the on-going Tribunal proceedings whereby we had a hearing on 28th November 2019, when Ruth Hogg failed in her application to have her name removed as a named Respondent, was also the very person the Respondent nevertheless decided should conduct my sickness review meeting to assist me in returning to work which amounted to a fundamental breach of the implied trust and confidence.

    11. Due to the increasingly detrimental impact on my health and wellbeing I lost Trust and confidence in the Respondent in their duty to protect my health, safety, and wellbeing and resigned in response to the loss of trust and confidence.

    12. In the alternative, I plead the last straw in the chain of events covered in the earlier linked claim, the insistence by the Respondent that Ruth Hogg continue to manage my sickness absence review, despite the on-going contentious matter, her failed application on 28th November 2019 to be removed as a named Respondent in the preceding claim, and the insistence that she continue to manage my sickness absence review which is meant to assist me to return to work, but was rather detrimentally affecting my health and well being. This taken in the light of my earlier explanation and request copied to Sally Dibbens in relation to and in response to Ruth Hogg of how she could support me to return to work, taken together with the failure to refer me to the counselling support when my health concerns were brought to their attention. I resigned in response on the 9th December 2019, being constructively unfairly dismissed. I did not receive any written response or acknowledgment to my resignation except a P45 that was posted some weeks later."

162. In addition at paragraph 18, the Claimant defines the last straw as being the conduct on 2 December 2019 as amounting to the "last straw". This is defined as:

"…the latest effect on his health and well-being due to the continued requirement for him to correspond with Ruth Hogg (the Third Respondent). Ms Hogg was assigned to manage his return to work, despite HR note following their disciplinary and grievance policies in dealing with the allegations of bullying the Claimant made concerning Ms Hogg, the Claimant having explained to the First/Second Respondent that the primary subject of the reason for his sickness being the treatment meted by Ms Hogg."

163. The House of Lords in *Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606*, *[1997] IRLR 462* defined this as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and (or) likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

164. This follows the formulation adopted in a series of cases by lower courts, eg *Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347*, *[1981] ICR 666* per Browne-Wilkinson J, approved by the Court of Appeal in *Lewis v Motorworld Garages Ltd [1986] ICR 157*.

165. However, a note of caution needs to be expressed in relation to the precise terms of the formulation adopted by Lord Steyn in the *BCCI* case, as referred to above. In *Baldwin v Brighton and Hove City Council [2007] ICR 680*, *[2007] IRLR 232* the EAT had to consider the issue as to whether in order for there to be a breach the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view taken by the EAT was that this use of the word 'and' by Lord Steyn in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met ie it should be 'calculated or likely'.

166. In the *BCCI* case, the House of Lords in particular held that this term may be broken even if subjectively the employee's trust and confidence is not undermined in fact. It is enough that, viewed objectively, the conduct is likely to destroy or seriously damage the trust and confidence. The term may be broken even where the employee actually remains indifferent to the conduct in issue. Similarly it also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35, CA*).

167. In *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445. In that case the Court of Appeal confirmed that the question of whether the employer has committed a fundamental breach of the contract of employment is an objective test. It is not to be judged the range of reasonable responses test which applies to the later issue of whether a dismissal is unfair, if of course a constructive dismissal is made out. Whilst the Court of Appeal acknowledged that reasonableness could be considered by the Employment Tribunal it made clear this was not applicable as a principle of law.

168. Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident

which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship.

169. In *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, *CA*, Glidewell LJ expressly commented that:

> *"… the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?"*

170. However in *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35, *CA,* the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It follows that although the final act may not be blameworthy or unreasonable it has to contribute something to the breach even if relatively insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history.

171. In the case of *GAB Robins (UK) Ltd v Triggs* [2007] IRLR 857 by the Respondent, the Employment Appeal Tribunal derived the following principles from *Omilaju*:

    a. The final straw need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial.

    b. Where the employee, following a series of acts which amount to a breach of the term, does not accept the breach but continues in the employment, thus affirming the contract, he cannot subsequently rely on the earlier acts if the final straw is entirely innocuous.

    c. The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. It will, however, be an unusual case where the final straw consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test.

    d. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence.

172. The EAT also found that in a true final straw case the range of reasonable responses test has no application to the employer's conduct of a grievance procedure where that conduct is the final straw relied on.

173. We carried out an analysis of the sequence of events within the email correspondence.

174. In his email of 20 April 2018, the Claimant first states that mutual trust and confident has broken down (at B529).

175. He makes one written request for alternative person to chair the sickness review meeting in an email dated 1 April 2018 (at B737).

176. However, he goes onto attend two sickness review meetings and makes no further request. The first meeting is recorded and a transcript is provided (at B739-742). This contains no mention at either the start of the end of the meeting as to his objection to the conduct of the meeting. The second meeting is not recorded. The notes are at B755-757 and make no mention of any objection.

177. The Claimant participates in the arrangements for the third meeting and the OH referrals.

178. His resignation letter at B793-794 refers to Ms Hogg to emails sent to him on 2 December 2019 at B786 and 790-791 as constituting the last straw. However these emails refer to non-contentious and mundane matters and cannot be said to be unreasonable. Ms Hogg is simply attempting to manage the sickness absence process.

179. We do note that the claimant's resignation letter is undated and would appear to be putting forward a scenario and in particular a last straw incident which simply does not match up to the events on which it relies. This might indicate that it was drafted at some time before the date on which it was sent or it was drafted by someone who was not entirely familiar with what had been happening. But for whatever reason it does not match up to the events on which is purports to give rise to a constructive dismissal.

180. We first considered the issue of breach of mutual trust and confidence and we concluded that it does not meet the test in the BCCI case. Indeed, there is a gulf between the Claimant's alleged case and what actually happened.

181. In any event we then considered the incident that the Claimant relies upon as the last straw and concluded that it does not meet the test in Gabb-Robins. Again, there is a gulf between the Claimant's alleged case and what actually happened.

182. We therefore find that there was no constructive dismissal, the Claimant simply resigned and so the complaint of unfair dismissal fails and is dismissed.

Holiday pay

183. The Claimant alleges that he is entitled to accrued but untaken payment in respect of annual leave for 33 days over the financial year 2018/19 and 2019/20. This is set out at paragraph 24 of the agreed list of issues.

184. However the Claimant presented no evidence in support of either his entitlement to outstanding holiday pay or even as to how much was owed and how it had been calculated. The closest we get to it is a calculation of his entitlement within his updated schedule of loss which is at B876. However this states that he is entitled to 33 days outstanding annual leave which equates to 6.6 weeks times the figure of £581 net weekly pay and so comes to a total of £3834. This is set out as part of a compensatory award for unfair dismissal. It is not clear over what period of time it has accrued.

185. The second Respondent maintains that it paid the Claimant all of his outstanding entitlement to holiday pay on termination of employment and referred to the following documents in support: B156-157 (the response to the second claim); Ms Hogg's evidence at paragraphs 47-49 of her witness statement; the annual leave records at B798; the Claimant's final payslip dated 24 January 2020 showing a payment in lieu of annual leave (at B803). It was not put to Ms Hogg that any of the calculations of pay set out in her witness statement or incorrect such that the Claimant was owed any holiday pay. We also referred to its response to the holiday pay claim at B155-158.

186. In the circumstances, the Claimant has simply not adduced sufficient evidence so as to meet the burden of proof which is on him to show that he was entitled to accrued but outstanding holiday entitlement and therefore pay.. This complaint is therefore unfounded and is dismissed.

Notice pay

187. The Claimant's complaint is of damages for breach of contract in respect of entitlement to notice of termination which in effect he had to forego by resigning with immediate effect. It is set out at paragraph 23 of the agreed list of issues. It is said to be 12 weeks net pay again within the compensatory award for unfair dismissal and is updated schedule of loss at B876.

188. However, this complaint fails because we found that there was no constructive dismissal and so the claimant simply resigned without giving any notice. He has no entitlement to notice of termination. This complaint is therefore dismissed.

Further disposal

189. We have found in the Claimant's favour in respect of one of the allegations of direct race and sex discrimination and harassment related to race and sex.

190. We would invite the parties to attempt to resolve the issue of entitlement to compensation between themselves. If they are unable to do so by **12 February 2024**, they should let the Tribunal know and matter will be listed for a remedy hearing for half a day and case management orders issued in order to prepare for that hearing.

_____
Employment Judge Tsamados
Date: 19 December 2023

All judgments (apart from those under rule 52) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.