EMPLOYMENT TRIBUNALS

Claimant: **Miss M Mettle**

Respondent: **HCRG Care Limited**

Heard at: **London South (Croydon) via CVP** **On: 15/4/2024 - 19/4/2024**

Before: **Employment Judge Wright**
Ms Y Batchelor
Mr S Sheath

Representation:
Claimant: **In person**

Respondent: **Mr O Lawrence - counsel**

REQUEST FOR WRITTEN REASONS

Oral judgment having been given on the 19/4/2024 and further to the claimant's request for written reasons, these written reasons are provided.

WRITTEN REASONS

1. It was the unanimous Judgment of the Tribunal that the claimant's claims under the Equality Act 2010 (EQA) are not well founded, they therefore fail

and are dismissed. The claim of breach of contract also fails and is dismissed.

2. The claimant presented a claim form on 25/12/2022 following a period of early conciliation which started on 21/11/2022 and ended on 21/12/2022. The claimant was employed as a rapid response nurse between 9/1/2017 and 19/11/2022.

3. A case management hearing took place on 13/7/2023 and that resulted in an agreed list of issues. The claimant made subsequent application to amend her claim and that was considered at a hearing on the 19/2/2024. That resulted in a final agreed list of issues. The claimant confirmed that she pursued all of the allegations:

1. **Time limits**

   1.1 The claims of constructive dismissal and breach of contract/wages are in time, because the claim form was presented within three months of the end of her employment.

   1.2 For complaints of discrimination, there is also a three month time limit, but time begins to run from the last act of discrimination.

   1.3 Early conciliation through ACAS began on 21 November 2022 and so any act or omission before 22 August 2022 are potentially out of time. So, to pursue a claim of discrimination based on earlier events the Claimant must either prove that:

      1.3.1 the discrimination was in fact conduct extending over a period of time and ending after this last act, or

      1.3.2 it would be just and equitable to extend the normal time limit. That depends on all the circumstances of the case and it will be for the Claimant to satisfy the Tribunal on this issue.

2. ***[Background events***

This section has been removed by the Tribunal. The Tribunal made clear that it did not intend to made findings in respect of background events. It is not proportionate to do so. Furthermore, it is not just to allow the claimant to make assertions of wrongdoing by the respondent, without them being rebutted and it is disadvantageous to the respondent if those allegations are referred to.]

Core Issues: The complaints below are those about which the Tribunal particularly needs to make findings.

3. **Constructive Dismissal**

3.1 Each contract of employment has an implied duty of trust and confidence. The Claimant says that the company was in breach of this duty by:

3.1.1 The changes made to her rota in July 2022 by Ms Godden, despite the fact that other members of staff were not affected and that her previous line manager had already done the rotor for August.

3.1.2 Mr Tizora telling her in August 2022 not to say too much to the CQC about her concerns.

3.1.3 In September 2022, when she made a request for a reduction in hours, agreeing to the request within an hour.

3.1.4 Suspending her for things which had appeared online much earlier, indicating that people were looking for reasons to criticise her.

3.1.5 Trying to get her to sign a new contract reducing her hours while she was suspended.

3.1.6 Being given no explanation for her suspension for about five weeks.

3.1.7 The delay in the investigation generally

3.1.8 Being sent an email from Mr Tizora to say that it had been decided on 15 November, pending the completion of the investigation, that she should go and start work on 21 November at Gravesend.

3.1.9 The last of these is said to have been the final straw, which led to her resignation.

3.2 Did the Claimant resign because of the breach(es)?

3.3 Did the Claimant delay too long before resigning and so affirm the contract?

4. **Harassment on grounds of race**

4.1 Were any of the above acts set out at paragraph ~~37~~ 3.1 unwanted conduct?

4.2 If so, in each case was it related to her race? (She describes herself as Black).

4.3 Did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

5. **Harassment on the grounds of religion**

5.1 The Claimant submits that the following acts amounted to acts of harassment relating to the Claimant's religion. The Claimant is Christian:

5.1.1 On 22 September 2022, the Respondent suspended the Claimant

pending investigation due to a video of the Claimant appearing on a religious online programme to promote her book;

5.1.2 On 29 September 2022, [NO], Safeguarding Lead, said that the Claimant was "indirectly promoting violence against children whilst using Christian ways as a cover up".

5.1.3 On 27 October 2022, the Respondent invited the Claimant to an investigation meeting on the basis of the Claimant's comments to the religious online programme;

5.1.4 The Respondent failed to provide the Claimant with any reason for her suspension;

5.1.5 On 15 November 2022, the Respondent emailed the Claimant to say that it had decided that the Claimant should work from Gravesend from 21 November 2022 onwards.

6. **Direct discrimination on grounds of race**

6.1 Did the company, in

6.1.1 dismissing her

6.1.2 suspending her

6.1.3 subjecting her to any of the treatment not found to have been harassment treat her less favourably than it treated or would have treated someone else in the same circumstances apart from her race.

7. **Victimisation**

7.1 Did the Claimant make a complaint at work about discrimination, or about a breach of the Equality Act? This is known as carrying out a "protected act"? She relies upon an email she sent on Friday, 22 January 2021 at 1021

7.2 If there was a protected act, did the company carry out any of the treatment mentioned in paragraph ~~37~~ 3.1 above as a result?

8. **Breach of contract / wages**

8.1 Was there an agreed variation of contract in September 2022 to reduce her hours?

8.2 If not, what was the shortfall in the Claimant's wages in November 2022?

9. **Remedies**

9.1 If the Claimant wins her claim for unfair dismissal she may be entitled to

9.1.1 reinstatement or re-engagement

9.1.2 compensation for loss of earnings and/or

9.1.3 an uplift in respect of any failure to follow the ACAS Code in relation to her dismissal or in relation to her grievance.

9.2	If she wins her discrimination claim she may also be entitled to	
	9.2.1	compensation for injury to feelings
	9.2.2	interest and/or
	9.2.3	a declaration or recommendation.

4. Under the Equality Act 2010 (EQA), the claimant claims the protected characteristic of race (s.9 EQA), she describes herself as black. By amendment, she was also permitted to rely upon the protected characteristic of religion or belief (s.10 EQA); the claimant is a Christian. The prohibited conduct upon which she relies is: direct discrimination (s.13), harassment (s.26 EQA) and victimisation (s.27 EQA). The complaint is dismissal or detriment (s.39(2)(c) and (d) EQA).

5. For the claim of constructive unfair dismissal, the claimant relies upon a breach of the implied term of mutual trust and confidence, as set out in the list of issues.

6. The Tribunal heard evidence from the claimant. The claimant had indicated at the preliminary hearing on 13/7/2023 that she intended to call four further witnesses, besides herself. That included her former line manager Ms Ajibade. The claimant's solicitors came on the record on 31/8/2023. A witness statement for Ms Ajibade was sent to the Tribunal at 10:04 on the 15/4/2024, after the hearing had started. The witness statement was dated 7/12/2023. There was no explanation provided for the late disclosure of this statement, nor why it was not sent until the hearing had commenced. Furthermore, the claimant's witness statement was dated 28/3/2024, as were the respondent's and it can therefore be assumed witness statements were exchanged after this date.

7. The Tribunal found it curious that the claimant's legal representative, who had represented her at the preliminary hearing on 19/2/2024 did not attend the hearing; although he sent in Ms Ajibade's witness statement. No explanation was provided to the Tribunal as to why, a legal representative who was on the record, did not attend the hearing. Furthermore, the claimant's legal representative sent written submissions 12-minutes before the hearing resumed on day three. Overall therefore, it is not clear how it was the claimant's representative was in fact representing her.

8. For the respondent the Tribunal heard from: Kelly Budgen (Clinical Services Manager); Lindsay Godden (Clinical Service Manager); and Matthew Tizora (Head of Operations).

9. There was a 436-page electronic bundle.

10. Submissions were heard and considered. The parties provided written submissions 34 minutes and 12 minutes before the hearing started. This is not helpful and it is unclear how the parties expected the panel to have read the written submissions before the hearing resumed.

11. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by the witnesses during the hearing. That included the documents referred to by them and took into account the Tribunal's assessment of the evidence.

12. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

Findings of fact

13. As can be seen from the list of issues, background matters were referred to. Both parties referred to them in their witness statements, presumably as they both wanted to set out their version of events. They were not however matters upon which the Tribunal will make any findings and the Tribunal declined to do so as it was not necessary.

14. The first matter to determine chronologically is the allegation that the claimant did a protected act on the 22/1/2021 in an email she sent to Ms Budgen (page 122). It is a purely factual matter as to whether or not the claimant said anything in this email which brings it within s.27(2) EQA.

15. The claimant said in evidence (paragraph 5):

'5. I asked that everybody be treated fairly and noted that I had stayed quiet to this point about the "inequalities in the workplace" as I did not want to be seen as "the angry black woman". I made it quite clear that I was concerned about people being treated differently because of their race.'

16. The actual email speaks for itself and reads differently. The claimant was in essence reporting an incident in respect of a patient to which she attended. The email reads (page 122):

'I am sending this email because of what happened wednesday 20/1/21. Not that I cant read between the lines but I played along for obvious reason.

I can see there is alot of inequalities within the workplace and I am not happy about it. Agreed there has been gross medication error in the last 2 weeks. I went to administer crisis medication to a patient who complained about a DN who declined administering injection to her mother saying the "patient is not distressed enough". Her daughter had to call the hospice nurse who in turn called the office and spoke with Ali who passed on the message to me, requesting that we increase the dosage being administered. The patient was in agony upon my arrival to the extent where I could hear her cries of pain from the outside door. I asked the patient's daughter what the nurse came to do, if not to give the injection, she advised that the nurse only came and signed a form.

After administering the injection, I picked up the record sheet and saw a signature, SB did a stock check at 14:05 by writing 0 on the line and final balance.

At 14:12, she documented that Levomepromazine was not balanced and that she would raise it with senior team leaders. On coming back to the office, I came to you and asked who SB is and you told me. I then heard muttering in the office about the missing medication so I walked made it known that the missing Levo must have been administered by the medocc as some morphine was also missing and the patients daughter advised that medocc gave some injections few days ago. You defended the DN very well which is what any leader should do. However, that was not what happened. She had been asked to go sign a fast track form prepared by Sandra and probably asked to check the controlled drug because of recent events. But your response to me was that there was no stock check when patient commenced crisis meds ? Despite the fact that I clearly saw that there was.

I have been working in virgincare since 2016, there has never been anytime when a stock check is allocated to anyone not even when I found out control drug discrepancies caused by a very senior member of staff 2 times. It did not go well with the person in question. I really dont know what exactly is it with Rapid, what is going on feels more like a witch hunt which I find very unpalatable. It is an uncomfortable feeling to know that my team and I are constantly under watch as if someone is just waiting for us to mess up. Sometimes I hear things but pretend not to because I have not been confronted with it and would hate to to be labled as the angry black woman in the work place.

Kelly this is the third time similar thing is happening,Ithat is why I am sending you an email of this nature to appeal to you to treat every one fairly and equally.'

17. Although the claimant makes the assertion that this email was a protected act and quotes from it, she does not address causation; that is to say, how it is that sending the email to Ms Budgen, then resulted in the matters which she says were the acts of detriment (in essence the retaliation for raising the matters which she referred to in the email).

18. The email was sent to Ms Budgen on 22/1/2021. It was copied to the claimant's then line manager (Ms Ajibade) and two others. The Tribunal does

not know who the two other recipients are and they do not feature on the cast list. The claimant's allegations of detriment (3.1) are all directed at Ms Godden and Mr Tizora. No allegation is directed at Ms Budgen and the claimant has not suggested how Ms Godden or Mr Tizora became aware of her email of the 22/1/2021 and in addition to that, what it was in that email which she says brings it within s.27(2) EQA.

19. It is accepted that Ms Budgen and Ms Godden's management of the claimant overlapped (Ms Godden is not a nurse and so Ms Budgen would take the lead on nursing matters and review nursing incidents even though Ms Godden was the claimant's line manager). Furthermore, it is accepted Mr Tizora is the line manager of Ms Budgen and Ms Godden. Those facts, of themselves do not provide the link to show how as a result of the email of the 22/1/2021, it motivated Ms Godden and Mr Tizora to subject the claimant to detriments, from 19/7/2022. The claimant has not invited the Tribunal to make such a link and has not advanced any evidence as to what the link between the email is; and the subsequent events which happened 18 months later.

20. In her written submissions, the claimant referred to events which took place immediately after her email (the following week). This however was not the claimant's pleaded case.

21. The claimant relies upon the next eight allegations as a breach of her contract of employment, as racial harassment, upon some as religious harassment and as detriments for the victimisation claim. Those are allegations 3.1.1 to 3.1.8. and in respect of religious harassment are 5.1.1, 5.1.4 to 5.1.5

    3.1.1

22. On 19/7/2022 there was a change to the rota made by Ms Godden. It is accepted by the respondent Ms Godden did so.

23. In her evidence-in-chief, the claimant does not set out how this action was related to her race/religion, or how it was because of her email of the 22/1/2021.

24. The claimant's line manager Ms Ajibade left in June 2022. The claimant's case is that she had prepared a rota for 15/8/2022 to 11/9/2022 which was perfectly acceptable. Understandably, the rota has to be prepared some time in advance. The claimant then claims that Ms Godden took over the rota and changed it to her disadvantage; as an act of retaliation against her, by listing her to work two consecutive weekends, rather than the working pattern she had been accustomed to (since the start of her employment) of working every other weekend.

25. The claimant was not the only member of staff who complained about the rota; her colleague also complained to Ms Godden on the 21/7/2022 (page 129). Therefore, it was not only the claimant who was affected by the change to the rota.

26. This prompted Ms Godden to send an email to the team explaining the current staffing position and the need to cover shifts (page 134).

27. Ms Godden's explanation was that when she checked the rota, there was a weekend in August without cover and so she amended the rota to ensure that there was a permanent member of staff working on those shifts.

28. There was then an email exchange between the claimant and Ms Godden. In short and in response to the claimant's email of 19/7/2022 Ms Godden suggested that the claimant swap the shift with a colleague as a first option, or if no one was willing to swap, she would see if she could get agency cover.

29. The claimant suggested to the Tribunal that agency cover was the default option to cover a shift if there was no permanent member of staff. Ms Godden explained that agency staff are unreliable. They either do not volunteer for the shifts that require cover, or they accept the shift and then do not attend. They do not have access to the respondent's systems and there is not the same continuity of care.

30. The Tribunal is prepared to accept the difficulties using agency staff causes the respondent and that besides the cost, it is a last resort. The Tribunal also takes judicial notice that August is the peak holiday season and that therefore cover of shifts on a weekend will be more difficult.

31. The claimant did not inform Ms Godden she had swapped the shift and so Ms Godden expected her to present herself for work. The claimant did not attend work and said she was ill.

32. No disciplinary action was taken against the claimant by the respondent.

33. A change in the usual working pattern may be detrimental to the claimant; however she was on notice of the change and the respondent was contractually able to make the change. Irrespective of that, the claimant did not seek to swap her shift or inform Ms Godden that she would like to take up her (Ms Godden's) suggestion that she would explore the option of using agency staff.

3.1.2

34. The claimant relies upon the allegation that Mr Tizora told her in August 2022 'not to say too much to the CQC about her concerns'. The background to this is that a CQC inspection was due. Ms Godden had informed Mr Tizora (as her line manager) of the issue the claimant had with the rota. As Mr Lawrence submitted, there may have been a miscommunication between the claimant and Mr Tizora.

35. A colleague of the claimant's had reported to Ms Godden that the claimant was going to speak to the CQC and tell them 'exactly what she thought about the place' (witness statement paragraph 33). Ms Godden reported this to Mr Tizora and he said he would speak to the claimant. Mr Tizora called the claimant in August 2022 and informed her that the CQC would not be interested in an internal matter such as a rota and that the claimant should raise such matters internally (the claimant did not do so).

36. Mr Tizora did in fact speak to the claimant about the CQC and about the remit of the inspection. He went as far as to say to her that the CQC would not be interested in her issue with the rota. As the rota issue had arisen the previous month, that was at the forefront of Mr Tizora's mind in respect of the claimant and that was what he perceived the claimant was unhappy about.

37. There is nothing wrong with Mr Tizora pointing this out to the claimant. It may well have been the case that the claimant interpreted what Mr Tizora was saying to her as trying to silence her; however, the claimant is a strong personality and was forthright in her views. She often misinterpreted things (as demonstrated by this case). The claimant was not prevented from presenting her views to the CQC, whether or not that was in respect of the rota or otherwise.

3.1.3

38. On the 16/9/2022 the claimant emailed Ms Godden to ask to reduce her hours from 37.5 to 22 with effect from the 1/11/2022 (page 143). She gave the reason as:

'This is to enable me take care of personal issues .I may pick up extra shifts were the team desperately needs one.'

39. Ms Godden was aware of this potential request as it had been discussed previously. When the email arrived, Ms Godden was in the middle of a one-to-one with Mr Tizora and they had also previously discussed this proposal. During the meeting Ms Godden and Mr Tizora discussed the request and Ms Godden decided to agree to it. She emailed the claimant 36 minutes later and agreed to the reduction in hours. She said (page 142):

'If you are happy this is a permanent contract change I will put it into an official letter for you and make the request to payroll to alter your contract on the 01/11/2022 as requested in your email below.'

40. The claimant had therefore proposed a variation to her contract. It was agreed by the respondent. That email exchange varied the contract and Ms Godden confirmed the variation was a permanent change and was effective from 1/11/2022.

41. The claimant took issue with the speed at which Ms Godden responded. She suggested in evidence that the respondent was obliged to investigate with her why she had requested the change and look into her personal circumstances. The Tribunal can envisage if the respondent had done so, that the claimant would then be affronted that the respondent was 'prying' into her private life (see her comments regarding the You Tube video below). In any event, the claimant had set out in her email the reasons for requesting the change.

42. The variation was not a surprise to Ms Godden and it just so happened that the claimant's email coincided with her one-to-one meeting with Mr Tizora. There was nothing nefarious about Ms Godden accepting the claimant's proposal.

3.1.4 and 5.1.1

43. On the 22/9/2022 the claimant was suspended from work for comments she had made 'via online platforms' (page 144).

44. The background to the suspension is that on 8/3/2022 the claimant had given an interview regarding a book she had written - *Sex and Sexuality Strictly for African Parents*.

45. The interview was publicly broadcasted on a Christian YouTube channel. Around the time the claimant requested a reduction in her hours, a colleague who wished to remain anonymous, received a notification which caused them to view the video of the claimant promoting her book (the video may have been on Instagram rather than YouTube). The colleague reported the same to Ms Godden. The fact the YouTube channel was a Christian video channel was immaterial; it was the vehicle which the claimant chose to promote her book and upon which she made her comments which concerned the respondent.

46. Ms Godden's initial concern was that the claimant had been doing activities whilst she was absent from work due to sickness. That issue fell away, however it was then replaced by a concern at the content of the interview; namely the claimant's comments.

47. Ms Godden reported this to Mr Tizora and he decided to look into the matter.

48. Mr Tizora viewed videos on Instagram and YouTube. He was concerned that the claimant introduced herself as a rapid response nurse and by comments she made regarding physical chastisement of children, including her own daughter. Mr Tizora was concerned that the claimant may have breached the NMC Professional Code of Conduct and had brought the respondent into disrepute. In short, there were safeguarding concerns in respect of the claimant's comments on the videos.

49. Mr Tizora spoke to the respondent's Safeguarding Lead for North Kent (NO). NO said that she would make an external safeguarding referral. Mr Tizora also consulted with the Designated Safeguarding Officer/Head of Safeguarding and a HR Advisor.

50. Mr Tizora took the decision to suspend the claimant; his justification was that he needed to be confident that there was no risk to the respondent's service users.

51. On the 22/9/2022 Mr Tizora informed the claimant during a telephone conversation that she was suspended and confirmed the same in writing the same day (page 144).

52. Insofar as the claimant takes issue with the time lapse between the YouTube interview she gave on 8/3/2022 and the respondent's decision to suspend her on the 22/9/2022; there is a simple explanation. The video did not come to the respondent's attention until September 2022. As soon as it did come to the respondent's attention, it took action promptly.

53. The claimant accuses the respondent of anonymously following her social media activity which was all to do with her personal life; notwithstanding that, the posts were public not private (witness statement paragraph 29). Clearly ***if*** the respondent had been monitoring the claimant, assuming the YouTube video was posted shortly after it was recorded on the 8/3/2022, then the video would have come to its attention much earlier. The fact that it did not come to the respondent's attention until September 2022 indicates that the situation unfolded as per the respondent's account.

    3.1.5

54. As a result of the contractual change in hours on the 16/9/2022 to take effect from the 1/11/2022, Ms Godden caused electronic paperwork to be sent to the claimant on the 27/10/2022 (page 178).

55. Ms Godden said once she became aware the claimant had been suspended, that she spoke to HR to confirm whether she would be suspended on the new or previous hours. HR advised that the reduction in hours should take effect from 1/11/2022 as per the contractual variation. That generated the paperwork to send to the claimant (page 182).

56. The claimant responded on the 2/11/2022 to say that she did not get the 'employment change' before her suspension, instead she received the email of 'what I already know about' (page 183). The claimant purported to decline the contractual change as she was on suspension.

57. Clearly, the contractual change was now disadvantageous to the claimant as from 1/11/2022, whilst suspended from work, she would only be paid for 22 hours, not 37.5.

58. The contract had already been formally amended on the 16/9/2022. This was not a proposal put to the claimant for her to accept or reject. It was a further paper trail confirming the agreement reached on the 16/9/2022.

    3.1.6 and 5.1.4

59. The claimant was given an explanation for the suspension. She was told in writing on the 22/9/2022 that the reason for the suspension was that 'concerns have been raised regarding comments that you have made via online platforms' (page 144).

60. The claimant was not provided with further details of this allegation until she was contacted by the Head of the Business Unit, Mr Tizora's line manager on 26/10/2022.

61. There was a good reason not to provide the claimant with more detailed information; which was that the evidence could be tampered with. There is an example of this. On the 15/11/2022 the respondent's Head of Safeguarding said that the relationship manager at the NMC had tried to watch the video a second time and it had been taken down. This post-dated the detail being provided to the claimant.

    3.1.7

62. The penultimate allegation in this section related to the delay in the investigation generally. The allegation is no more specific than that.

63. Factually, the chronology is the video was drawn to the respondent's attention in September 2022. Mr Tizora suspended the claimant on the 22/9/2022 after taking some initial advice. On 29/9/2022 the Safeguarding Lead for North

Kent (NO) contacted Mr Tizora and informed him Kent children's LADO (Local Area Designation Officer) said the referral did not meet their criteria as the claimant did not work with children.

64. There was then some confusion over this advice and it was queried by NO and the Designated Safeguarding Officer/Head of Safeguarding (as the experts in safeguarding). The referral was then made on the 30/9/2022. Mr Tizora had a period of annual leave between 13/10/2022 and 30/10/2022. Terms of reference for the investigation were finalised on the 20/10/2022 and passed to the investigator (Manager for Administrative Services and Transformation Lead), who had been appointed on the 17/10/2022 (page 164). In the interim, the LADO referral and a referral to the equivalent for adults had both advised the concerns should be dealt with internally. The investigation meeting with the claimant took place on the 3/11/2022 (page 214).

65. Mr Tizora returned from leave on the 31/10/2022 and saw that the respondent had had confirmation from the local authority that the matter could be dealt with internally. Mr Tizora realised that as the claimant had been suspended because of safeguarding issues and taking into account the view of the local authority that there were no such concerns; he began to review the suspension. It was only at 13.19 on the 15/11/2022 that the Head of Safeguarding confirmed that the NMC relationship manager felt that the matter could be dealt with locally (internally) (page 184). The email was not copied to Mr Tizora; it therefore must have been forwarded to him.

66. Mr Tizora correctly decided that the claimant could return to work, notwithstanding that the investigation was not complete. It was not however the case that the claimant could simply return to her substantive role. Mr Tizora had to identify an alternative non-patient facing role.

67. On the 15/11/2022 Mr Tizora called the claimant to discuss her return to work and he followed this up with an email at 18.09 (page 206). This does not demonstrate unreasonable delay by the respondent. Mr Tizora acted promptly once he received confirmation from the NMC.

68. The Tribunal is satisfied that there was no general delay in the investigation. The Tribunal has seen many investigations which have been unnecessarily protracted and this was not one of them. The claimant may not have been aware of what was going on behind the scenes. Once however, she received an explanation via the disclosure of documents and following the exchange of witness statements, she would have been able to see what actions the respondent was taking and should have appreciated that there was no general delay.

69. The claimant criticised the respondent for acting too quickly (when she asked for her hours to be reduced) and yet she seeks to criticise it for a delay in respect of the suspension, when there was no such delay.

    3.1.8 and 5.1.5

70. The final allegation and the 'last straw' is Mr Tizora's email of 15/11/2022 regarding the claimant's return to work on 21/11/2022. This followed on chronologically from the previous issue when Mr Tizora decided he could lift the suspension as it had been deemed there was no safeguarding issue (although other concerns remained). Mr Tizora took the view that the claimant could not return to her substantive role for two reasons. Firstly, that in view of the outstanding investigation, that she could not return to a patient-facing role and secondly, that there were unresolved issues with the claimant's team, (Mr Tizora said that prior to the claimant's suspension, there were issues which HR was looking into).

71. Mr Tizora called the claimant on the 15/11/2022 to explain this to her. There was a brief discussion and the claimant said that she did not want to talk to Mr Tizora and asked him to email her. He did so (page 206). Mr Tizora explained that the return to work was to a non-patient facing role from 21/11/2022 and that she would not return to her existing team, but to a rapid response role in Gravesend 'until such a time when a final decision has been made following the outcome of the investigation'. He also confirmed that travel expenses would be paid.

72. For some reason, the claimant misunderstood that this was a temporary placement and in her evidence insisted that it was a permanent change.

73. The claimant objected to this and after an exchange of emails between her and Mr Tizora, she resigned on the 19/11/2022. She did not give Mr Tizora the opportunity to address her concerns, when he indirectly asked for more time on the 18/11/2022 ('I will provide a more detailed response in writing next week on issues you have raised…') (page 204).

74. There was nothing wrong with Mr Tizora lifting the suspension. Indeed, the claimant said that she was prevented from working overtime during her suspension and if she returned to work, potentially she could then work overtime.

75. The main issue seemed to be the location she would return to. The claimant stated that her usual commute to work was a 12 minute drive; whereas the commute to Gravesend, via a motorway would take her more like 50-60 minutes. The claimant's substantive post involved driving to visit patients in their homes. In 2022 the claimant had exceeded the mileage limit at which

HMRC would allow her to be reimbursed at 45p per mile. That limit is 10,000 miles. The claimant's temporary role did not involve driving during the shift, but rather a commute at the start and end of the shift. The claimant did not appear to have an issue with driving in her substantive role.

76. The claimant did not give Mr Tizora the opportunity to discuss the role with her. In evidence, Mr Tizora said that the role would not involve attendance at the site every day, that it could be done remotely and that the respondent would provide equipment. As a non-patient facing role, the triaging aspect of the role would be done remotely, via telephone.

Harassment related to religion 5.1.2 and 5.1.3

77. 5.1.2 The allegations of harassment related to religion were allowed by amendment on the 19/2/2024. The first was in relation to a comment made by the safeguarding lead NO on the 29/9/2022 (page 176). NO said in a referral to the safeguarding team at North Kent that:

'The reason for this referral is because of [the claimant's] status as a registered nurse, it is believed that she is indirectly promoting violence against children whilst using Christian ways as a cover up'.

78. The referral went onto state that if the parents of African children followed the advice in the interview, it will adversely affect those children (the advice being physical chastisement). The claimant has not taken issue with the reference to 'African parents', however, she cannot as her book (which was the subject of the video interview) was titled – 'Sex and Sexuality Strictly for African Parents'. All that NO was doing in the referral was referencing the concerns the respondent had, about the advice the claimant was giving to parents of African children.

79. NO never intended that the claimant would see this comment. This was a disclosure by her to the safeguarding team. It is not a comment which is related to the claimant. The comment was made in the context of the perception that the claimant was using her belief (Christianity) to justify her views (promoting violence against children). This was not a finding against the claimant; it was subject to an investigation and once the agencies (the local authority and the NMC) took a view that (in the words of the NMC relationship manager) the claimant's 'intent was good but execution was poor', the matter was dropped and later the same day the suspension was lifted (page 184).

80. 5.1.3 The allegation is that on the 27/10/2022 the respondent invited the claimant to an investigation meeting on the basis of the claimant's comments to the religious online programme (page 212).

81. The claim is not made out. The suspension letter does not mention the 'religious online programme'. The letter states the reason for the investigation is:

'On 16th September 2022, concerns were identified regarding an interview that was posted on YouTube on 8th March 2022 whereby you appear to provide unsafe, incorrect advice in the capacity of a registered Nurse and the comments made also raise concerns of a safeguarding nature.'

Direct discrimination 6.1.1 and 6.1.2

82. The allegation of direct discrimination is the suspension (6.1.2) and the dismissal (6.1.1); notwithstanding that no comparator is identified.

83. The suspension was due to safeguarding concerns. As soon as the local authority and the NMC decided that the concerns were not within their remit Mr Tizora took immediate steps to lift the suspension. The immediate lifting of the suspension demonstrates that the reason was the safeguarding concerns. It was not because of the claimant's race.

84. The claimant was not dismissed by the respondent. She resigned. If it can be inferred that the reason the claimant resigned was due to direct race discrimination, then this has not been identified. If it could further be inferred that the matters set out at 3.1.1 to 3.1.8 are allegations of direct discrimination being less favourable treatment because of the claimant's race, she has not identified a comparator.

Breach of contract/wages

85. The claimant's contract was varied as per her request on the 16/9/2022 and the variation took effect on that date.

The Law

86. Mr Lawrence set out the legal principles as follows:

Constructive Unfair Dismissal 1. An employer breaches the implied term of mutual trust and confidence ('the Malik term') if it, without reasonable and proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (see Malik v BCCI [1997] ICR 606, HL). A breach of the Malik term by the employer entitles the employee to terminate the employment

contract for the purposes of section 95 ERA 1996 unless the employee affirms the contract after the breach. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract.

2. The first requirement for establishing a breach of the implied term is that there was no 'reasonable and proper cause' for the conduct in question. The second requirement is that the conduct must have been calculated or likely to seriously damage or destroy trust and confidence. A breach of the fundamental term will not occur simply because the employee subjectively feels that such a breach has occurred, no matter how genuinely that view is held. The legal test entails looking at the circumstances objectively i.e., from the perspective of a reasonable person in the claimant's position (see Tullett Prebon v BGC Brokers LP and ors [2011] IRLR 420, CA).

3. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue. Where there are mixed motives, a tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation. However, the breach need not be 'the' effective cause (see Wright v North Ayrshire Council [2014] ICR 77, EAT).

4. A claimant can be constructively dismissed on the basis of the 'last straw' principle if the whole of the respondent's approach caused him or her to resign, consisting in a series of acts which, taken together, amount to a breach of the implied term. The last action of the employer which leads to the employee leaving need not itself amount to a breach of the implied term but must be capable of contributing to the breach.

5. In Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978, the Court of Appeal provided guidance on cases of constructive dismissal which was described by the EAT in Williams v Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA as a 'helpful decision tree' for Tribunals:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act? (If so, the claim fails)

(3) If not, was that act (or omission) by itself a repudiatory breach of contract? (If so, go to (5))

(4) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term? (If it was go to (5), there being no need for any separate consideration of a possible previous affirmation)

(5) Did the employee resign in response (or partly in response) to that breach?

6. Williams establishes that the claim for constructive dismissal fails if the employee is found to have affirmed the contract after the last straw. If the employee is found to have affirmed the contract before the last straw, then the claim for constructive dismissal can still succeed if the following two conditions are met:

1) The last straw is capable of contributing to the breach/is not entirely innocuous; and

2) The conduct of the employer which took place before the affirmation amounted to a breach of the implied term, cumulatively or individually.

Victimisation

7. Victimisation claims are subject to the shifting burden of proof set out in s.136 EqA. That provides that the initial burden is on the Claimant to prove the facts from which the Tribunal could decide in the absence of any explanation, that the Respondent has contravened a provision of the Act. The burden would then pass to the Respondent to prove that discrimination did not occur. The facts which the Claimant has to prove as part of his or her prima facie case include that the alleged victimiser had knowledge of any protected act. That means that the detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, a claim for victimisation will inevitably fail (see Scott v London Borough of Hillingdon [2001] EWCA 2005 CA).

8. It is not enough for the claimant to show that the alleged victimiser knew that the claimant had made a complaint of some nature. The claimant must show that the alleged victimiser knew that the complaint was an allegation of discrimination or otherwise a contravention of the legislation (see South London Healthcare NHS Trust v Dr Al-Rubeyi UKEAT/0269/09/ at [26]-[28]).

9. Something will amount to a detriment where a reasonable person would or might take the view that the act or omission in question gives rise to some disadvantage which need not necessarily involve some physical or economic consequence (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11).

Direct Race Discrimination

10. In determining every claim of direct discrimination, the Tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. Section 13(1) EqA provides as follows:

13 Direct discrimination

(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.

Harassment

11. Section 26 EqA provides as follows:

26 Harassment

(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.

…

(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.

'Related to'

12. Section 26(1)(a) EqA requires that the conduct in question be related to a relevant protected characteristic. In Tees Esk v Islam UKEAT/0039/19/JOJ at [21], HHJ Auerbach held that whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative. The judgment continues with the following caveat:

"Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be." [25]

13. The reason for the unwanted conduct is highly relevant to the question whether it is 'related to' the protected characteristic in question, though a finding about the motivation of the individual concerned is not the only possible route to an affirmative answer to that question. For example, in Kelly v Covance Laboratories Ltd [2016] IRLR 338, the EAT considered that an instruction to the claimant not to speak in her native tongue was not related to her race or national origins because the reason for the employer's instruction was not race.

'Effect'

14. The EAT in Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT, gave some guidance as to how the 'effect' test of s.26(1)(b) EqA should be applied. It noted that the claimant must actually have felt, or perceived, his or her dignity to have been violated or an adverse

environment to have been created (the 'subjective' test). If the claimant has experienced those feelings or perceptions, the tribunal should then consider whether it was reasonable for the claimant to feel that way (the 'objective' test). If the tribunal finds that there was no such effect, then that will be an end to the matter.

15. The objective aspect of the test is primarily intended to exclude liability where B is hypersensitive and unreasonably takes offence. As noted by the EAT in Dhaliwal:

"While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the… legislation…) **it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase**…If, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question." (emphasis added)

16. Where the effect complained of in relation to the conduct is the violating the complainant's person's dignity, there can be no harassment if the complainant is not aware of the conduct (see Greasley-Adams v Royal Mail Group Ltd [2023] EAT 86).

87. S.136 EQA provides:

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> …
>
> (6) A reference to the court includes a reference to-

(a) an employment tribunal;…

88.

Conclusions

Victimisation – the protected act

89. The claimant's email of the 22/1/2021 was not a protected act. It did not come within s.27(2) EQA. It certainly is not: bringing proceedings under the EQA (s.27(2)(a)); giving evidence or information in connection with proceedings under the EQA (s.27(2)(b)); or doing any other thing for the purposes of or in connection with the EQA (s.27(2)(c))).

90. It is also not making an allegation (whether or not express) that A (in this case Ms Budgen) or another person has contravened the EQA (s.27(2)(d)). There is no allegation. There is a reference to 'inequalities in the workplace' and there then follows a complaint about a medication error. The last sentence in the penultimate paragraph; the claimant says that she does not wish to be labelled as the 'angry black women in the work place'. It is reasonable to infer that the claimant's reference to herself relates to the complaint which she is raising (that she does not wish to be perceived as a trouble-maker in respect of the complaint she has raised) and nothing else.

91. If the Tribunal is wrong in respect of the protected act, it does not accept that the matters set out in 3.1 were detriments. Furthermore, it does not accept that the claimant was subjected to the matters raised in 3.1 by Ms Budgen (person A). Even if the claim could be stretched to be interpreted as person A being Ms Godden and in the alternative Mr Tizora, there is no link between the email sent on 22/1/2021 and the detriments relied upon by the claimant, between 19/7/2022 and 15/11/2022. Furthermore, the claimant has not transferred the burden of proof.

3.1.1

92. The changes to the rota did not only impact upon the claimant, at least one other member of staff was affected by the change. Not only is it difficult to see in those circumstances how the change to the rota can be related to the claimant's race, or be a detriment as a result of her having done a protected act; the claimant has not provided any evidence-in-chief as to how this was related to her race or linked to any protected act. The claimant has not transferred the burden of proof.

93. Furthermore, there is no breach of contract. The claimant was not contractually entitled to work alternative weekends. The respondent's action was designed to ensure it was delivering the service it was contractually to provide to its service users. The claimant was asked to cover a shift and she objected. She was then given options which she did not take up. Even when the claimant did not attend work; the respondent did not take any action, disciplinary or otherwise against her.

    3.1.2

94. Mr Tizora did speak to the claimant regarding the remit of the CQC inspection and said that the CQC would not be interested in the claimant's issue with the rota. If the claimant misunderstood that, it is not the fault of Mr Tizora.

95. There was no breach of contract in informing the claimant that the CQC would not be interested in her issue with the rota. The claimant has not suggested how it was related to her race, or was a detriment as a result of her having done a protected act. She has not transferred the burden of proof under the EQA.

    3.1.3

96. The claimant proposed a variation to her contract, which the respondent accepted. There was nothing more to this allegation. There was no breach of contract; there was an agreed variation to the claimant's contract. It is impossible to see what was detrimental about agreeing to the claimant's proposal. It can only have been to her advantage that something she asked for (to enable her to take care of personal issues) was agreed to by Ms Godden. This allegation was fundamentally flawed.

    3.1.4 and 5.1.1.

97. The claimant was justifiably suspended due to safeguarding concerns shortly after the video came to the respondent's attention. The claimant was not instantly suspended and Mr Tizora quite rightly took a short period of time to initially review the evidence and to seek advice. As a result of that he took the decision to suspend the claimant. The fact the video did not come to the respondent's immediate attention after it had been posted, indicates that the respondent was not monitoring the claimant.

98. The claimant did not advance in her evidence-in-chief how the decision to suspend her was related to her race or religion or that it was a detriment as a result of her having done a protected act. The claimant did not transfer the burden of proof. The respondent's non-discriminatory explanation (the reason why it did what it did) was that it had safeguarding concerns and that it would

have suspended any employee, whatever their race or religion, in the circumstances. That explanation is accepted.

99. It was not a breach of contract to suspend the claimant. The decision to suspend was reasonable and justified in the circumstances.

3.1.5

100. The allegation is simply not made out. The respondent did not 'try' to get the claimant to 'sign a new contract reducing her hours while she was suspended'. The contract had been varied on the 16/9/2022 and this was simply further paperwork confirming the variation.

3.1.6 and 5.1.4

101. The claimant was given an explanation for her suspension. It is correct to say that she was not given further details until 26/10/2022; however, she was informed in the suspension letter of the 22/9/2022 the reason for the suspension (page 144). The claimant did not transfer the burden of proof and there was no breach of contract.

3.1.7

102. There was no general delay in the investigation. The respondent acted reasonably and promptly during the process. Additionally, as soon as Mr Tizora realised the safeguarding concerns had fallen away, he took steps to lift the suspension and to return the claimant to work. The claimant did not transfer the burden of proof and there was no breach of contract.

3.1.8 and 5.1.5

103. Being informed that the suspension was lifted and the claimant could return to work, was not a detriment. The claimant has complained that various aspects of the suspension were detrimental and so lifting the suspension removed those detriments.

Harassment on the grounds of religion 5.1.2 and 5.1.3

104. 5.1.2 The comment by the Safeguarding Lead may well have been unwanted by the claimant once she became aware of it. By this time however, she was aware that the respondent had dropped the safeguarding issue and had lifted the suspension.

105. The claimant's written submissions made the point that the comment was intrinsically linked to her religion. The claimant's video interview was

posted on a Christan YouTube channel and therefore that was the context of the video containing her comments.

106. Providing the comment in context, certainly did not have the purpose or effect of violating the claimant's dignity. The Tribunal took into account the authorities and in particular that 'violating' is a strong word and the other components of s.26 EQA look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence (Betsi Cadwaladr University Health Board v Hughes). This comment does not cross the threshold of contravening the proscribed elements of s.26.

107. Furthermore, the claimant, other than making the assertion that this was harassment related to her religion, has not addressed the burden of proof to show how this comment in the factual context in which it was made, had the purpose or effect of: creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

108. Certainly, the claimant was not aware of the 'environment' whilst she was in the respondent's employ and it is therefore difficult to understand how she could retrospectively find this offensive. There was no 'environment' by the time the claimant became aware of the comment. It is perfectly understandable that the claimant was disgruntled by the statement; however that is far removed from it being unlawful harassment contrary to the EQA.

109. 5.1.3 The allegation is not made out. The respondent did not refer to the 'religious online programme' in the invitation of the 27/10/2022.

Direct discrimination on the grounds of race

110. 6.1.2 The suspension was demonstrably due to other reasons and was not because of the claimant's race. The respondent had legitimate safeguarding concerns, which it needed to investigate. The claimant did not transfer the burden of proof.

111. 6.1.1 In respect of the dismissal, even if it is assumed the comparator is a hypothetical comparator, either the allegation is simply not made out (3.1.3, 3.1.4, 3.1.5, 3.1.6 and 3.1.7) or there is a perfectly acceptable non-discriminatory explanation. The reason why the respondent changed the rota in July 2022 was due to staffing requirements in respect of service delivery. The amended rota did not only affect the claimant. Mr Tizora spoke to the claimant about the CQC inspection in August 2022 to remind her that the CQC would not be interested in an internal matter and that she should raise it internally in accordance with the respondent's policies. Finally, Mr Tizora was entitled to lift the claimant's suspension once the agencies had confirmed the concerns could be dealt with internally. The fact the return to work was

conditional was not because of the claimant's race. The claimant did not transfer the burden of proof.

Breach of contract/wages

112. There was no breach of contract. The claimant's contract was varied at her request on the 16/9/2022. There was no shortfall of wages in November 2022.

113. For those reasons, the claimant's claims fail, are not well-founded and are dismissed.

10 May 2024

Employment Judge Wright