EMPLOYMENT TRIBUNALS

Claimant: **Ourida Khaddar**

Respondent: **University Hospitals Sussex NHS Foundation Trust**

Heard at **LONDON SOUTH**
In person

On: **12-16 August 2024**

Before
Chairman: EMPLOYMENT JUDGE N COX
Tribunal Member: Julie Cook
Tribunal Member: Sue Evans

Appearances:

For the Claimant: **Ms Khaddar in person**
For the Respondent: **Ms Crawshay-Williams of Counsel**

JUDGMENT

The unanimous judgment of the tribunal is :-

1. The complaint of detriment arising from a public interest disclosure is not well-founded and is dismissed.

2. The complaint of direct race discrimination is not well-founded and is dismissed.

3. The complaint of harassment related to race is not well-founded and is dismissed.

Employment Judge N Cox

Date: 16 August 2024

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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WRITTEN REASONS

Provided pursuant to a request by the claimant dated 10 October 2024

References in square brackets are to pages in the main hearing bundle.

Claims and Issues

1. The claimant brings the following complaints:

   1.1. Protected disclosure detriment (s.47B and 48 Employment Rights Act 1996);

   1.2. Direct race discrimination (s 13 Equality Act 2010); and

   1.3. Harassment related to race (s 26 Equality Act 2010).

2. The claimant's engagement with the respondent as a bank worker Band 2 Healthcare Assistant, (HCA) was terminated by the respondent on 15 August 2022.

3. In summary the claimant claims that her contract was terminated and that the respondent mishandled a grievance she raised about the decision to terminate because she raised concerns about bullying and about patient safety.

4. She says also that she was subjected to discrimination on the ground of her race, both in respect of the decision to terminate her engagement as a bank worker and in respect of comments allegedly made to her by a colleague, Amanda Edmonds.

5. There was no complaint of breach of contract in relation to the termination of the claimant's contract with the respondent.

6. Early conciliation started on 5 November 2022 and ended on 7 November 2022. The claimant presented her claim form on 7 November 2022.

7. The respondent denies the claims and raises an issue about time limits. We determined the time limits issue as part of our consideration after hearing the evidence.

8. The issues were discussed at a case management conference before EJ Leith on 10 July 2023 and are attached to these written reasons. The claimant withdrew an earlier claim of unfair dismissal following clarification of the case at that hearing.

The Hearing

9. The hearing took place over three days. We deliberated for part of the third and the fourth day and gave an oral judgment on the fifth day.

10. At the beginning of the hearing, we discussed and agreed a timetable with the parties. It was agreed that the issue of remedy would be dealt with at the end of the hearing after judgment on liability. As part of that plan we discussed the need for an updated Schedule of Loss from the claimant. We explained the purpose and broad content of that document and she agreed that she would be able to provide an updated document overnight on Day 1. She provided the updated schedule on the morning of Day 2. However, in light of our conclusion on liability it was unnecessary to consider remedy.

11. The claimant represented herself and also gave evidence on her own behalf.

12. We took time to explain to the claimant how to approach cross-examination and make submissions in a structured way responsive to the issues in the claim.

13. The respondent was represented by Ms Crawshay-Williams of counsel.

14. The respondent's witnesses were:

    14.1. Catherine Purdie. Ms Purdie was employed as the respondent's Strategic Temporary Staffing Manager. She gave evidence about the claimant's work history with the respondent, the background to the decision to remove the claimant from the Bank and the process of her challenge to that decision. She also gave evidence about the comparators relied upon by the claimant. Ms Purdie also made comments about the claimant's remedy claim.

    14.2. Riezel Paniza; Ms Paniza was at the relevant time Matron on the Acute Admissions Unit (AAU). She gave evidence about her involvement in the aftermath and investigation of an incident involving the claimant on 27 July 2022.

    14.3. Lisa Mugan: Ms Mugan was the Service Delivery Manager, reporting to Ms Purdie. She gave her account of the process and discussions which led to the claimant's removal from the Bank. Ms Mugan took the decision to suspend the claimant from the Bank and cancel her shifts in early August 2022 and, together with the Divisional Director of Nursing and clinical lead for bank staff Ms Beverley Hales, made the decision to remove the claimant from the Bank permanently on about 12 August 2022.

15. There was no witness statement from Ms Hales, who is retired.

16. There was no witness statement from Ms Sarah Shoesmoith, head of Resourcing and Talent – who conducted and rejected an appeal by the claimant against the termination decision.

17. A witness statement was submitted by Amanda Edmonds. Ms Edmonds was employed by the respondent as an HCA. She was involved in an incident on 27 July 2022 which is at the heart of the race claims in this case and her witness statement concerned that incident. However, she did not attend to give evidence, and we afforded no weight to her statement in making our findings of fact or reaching our conclusions.

18. We had an agreed hearing bundle of 461 pages plus a witness bundle, and a chronology and a cast list prepared by the respondent.

19. Both parties provided oral submissions, the respondent provided written submissions supplemented orally on the conclusion of the evidence. We have taken both parties' submissions fully into account.

Findings of Fact

20. We make the following findings of fact on the balance of probabilities and in light of the totality of the witness evidence we have read and heard and the documents to which we have been referred. We reference only those matters which we have considered necessary for our reasoning.

21. The claimant was engaged by the respondent as a Bank Worker as a Level 2 Health Care Assistant. NHS bank workers are workers registered to provide work on an ad hoc basis, with no obligation for regular work. She was in broad terms a zero hours contract worker. She was not an employee of the respondent. She had worked for the respondent in this way since May 2013 (subject to a brief period of employment as a Level 3 phlebotomy assistant from which she resigned on 29 December 2021 for unrelated reasons).

22. She was dependent for her income on shifts worked as a Bank HCA. Her rotas showed that she frequently worked very long shifts of up to 11.5 hours per shift.

23. She was deployed on various wards during her time with the respondent including relevantly the Acute Medical Unit (AMU), A&E, Bailey Ward, Level 8 West, and the Acute Admissions Unit (AAU).

24. The terms of her work with the respondent were contained in a 'Statement of Main Terms and Conditions of Service – Bank Staff' dated 13 May 2014 [290]. That contract provided amongst other things:

    "Personal Conduct:

    the trust is committed to supporting, valuing and rewarding the contribution

of its work force and ensuring temporary workers are treated with the (sic) *dignity and respect by the organisation and its staff.*

Individual Grievance:

Any grievance related to your provision of services to the trust should be raised in the first instance with your immediate supervisor. A copy of the Trust's grievance procedure is available from the Human Resources department.

Health and safety

The trust's health and safety policy applies to all temporary and permanent staff. ...

Disciplinary Rules

The bank worker is referred to the trust's disciplinary procedure a copy of which is available from the personnel department. In the event that you wish to appeal against a disciplinary decision the appeal should be made in accordance with the procedure to the head of Human Resources.

Changes to Contract terms

The terms and conditions of service ...are binding and may be changed from time to time after negotiation with staff organisations in the trust council. ...."

25. The Disciplinary Policy referred to [328] provided, amongst other things for a fact find investigation and, for more serious conduct issues a formal disciplinary process with the usual rights to information in advance, copies of evidence, details of witnesses and a right to be accompanied, a prompt hearing with an opportunity to ask questions and a written outcome with a scale of sanctions and a right to appeal.

26. The respondent also had other relevant policies including a whistleblowing Policy entitled 'Freedom to Speak Up (Raising concerns) Policy' [310] dated 17 July 2019. This provided amongst other things:

> *2.0 WHAT CONCERNS CAN I RAISE?*
> *You can raise a concern about risk, malpractice or wrongdoing you think is harming the service we*
> *deliver/commission. Just a few examples of this might include (but are by no means restricted to):*
>
> - *unsafe patient care*
> - *unsafe working conditions*
> - *inadequate induction or training for staff*
> - *lack of, or poor, response to a reported patient safety incident*
> - *suspicions of fraud (which can also be reported to our local counter-*

*fraud team (see page
on staff net or click here)*
 a bullying culture (across a team or organisation rather than individual instances of bullying).

This policy is not for people with concerns about their employment that affect only them – that type of concern is better suited to our grievance policy.

27. We were not provided with a copy of any grievance policy (as envisaged in the claimant's terms and conditions of service) but we were provided with a copy of an appeals guidance document [354]. This was expressed to apply to trust staff, and therefore had no express application to the claimant. However, it appears to have been understood by Ms Purdie to be a process which she should follow in reviewing the decision to terminate the claimant's engagement as a bank worker following the claimant's complaint about that decision.

28. The claimant had temporarily suspended on a previous occasion and her bookings cancelled. This was in early 2019 [149] and it occurred after she raised a concern about two other workers. By being suspended in the way she was she was unfairly treated by the trust. When her union representative intervened on her behalf Ms Purdie for the respondent acknowledged the trust had treated her unfairly and she was reinstated and her back pay restored.

29. On 1 April 2021 the respondent was formed as the result of a merger between Western Sussex Hospitals (in Worthing) and Brighton and Sussex University hospital.

30. We were told by Ms Purdie and we find that:-

    30.1. the consequence of the merger resulted in a major HR restructuring;

    30.2. for a period of time, including the period covering the events in issue, there were two temporary staffing teams operating separate processes and recording systems. Members of temporary staffing teams operating one system would not have access to information on the other system;

    30.3. There were two sets of policies and procedures in operation until July 2023;

    30.4. Ms Purdie's workload was significantly increased as a result.

31. We find also that as part of the merger process Ms Purdie had assumed

that, that bank workers, including the claimant, had automatically transitioned to be governed by the terms of a Temporary Workers Agreement [emails of September 13 [164]: December 2022 [276]]. Notwithstanding that the claimant informed Ms Purdie that she remained subject to the 2014 contract [164] it is clear from the emails with the claimant around late 2022 that Ms Purdie did not have a copy of the claimant's original 2014 Terms and Conditions of Service and she appears not to have carried out a check or sought advice. She simply assumed that the claimant was subject to the new Temporary Workers Agreement terms. The claimant provided Ms Purdie with a copy of her original 2014 Terms and Conditions of Service on 5 January 2023 [289].

32. We find also that the same assumption was made by Ms Mugan and (we infer) Ms Hales in August 2022 when they made a decision to terminate the claimant's bank contract. Our conclusion is supported by Ms Mugan's email to Mr Scarborough on 3 August after the claimant had failed to attend a meeting planned for the 3 August 2022 [121].

33. These assumptions were as a matter of fact and law incorrect. As set out above the 2014 Terms and Conditions of Service provided that the terms and conditions of service may be changed from time to time "*after negotiation with staff organisations in the trust council*. ...." . It was accepted by the respondent that there had been no consultation or negotiation and therefore that the claimant's terms and conditions of work had not changed from the 2014 document.

34. The evidence before us discloses that before the beginning of 2022 the claimant had a generally good conduct record. Although there are references elsewhere in the documents (e.g concerning her resignation letter from her phlebotomy employment [61] in February 2022; in an email from from 'Natalie' 1 August 2022 [236] to previous incidents with various members of staff on various wards 'for as long as I can remember') we make no finding about any history of previous incidents.

35. The claimant was regarded by ward supervisors, matrons and managers, as generally having high standards of care and conscientiousness.

    35.1. Ms Bisi described her as [469] "a really good healthcare assistant . I have seen her delivering excellent care to patients. She has high standards of work". Significantly Ms Bisi goes on to add: "I can see how she always wishes that everyone met the same standards".

    35.2. Ms Paniza said in her evidence that "the claimant worked hard and genuinely cared for the patients". She added however that: "I did observe that she would regularly complain about other members of staff, and "I can see that her personality is quite strong and forceful which upsets some members of staff".

36. We find that she expected her own standards of care and diligence to be manifested by others with whom she worked. There was a perception, which was held by a number of ward managers, matrons and members of staff that the claimant readily and frequently complained and commented on other staff members' shortcomings as she perceived them, both to those members of staff and to superiors. Mr Purdie stated in her witness statement that:

> *"I think it is also only fair to note that, in my opinion, the Claimant's own complaints about her colleagues and their commitment to their work were most likely well founded. However, the Claimant went about raising those concerns in completely the wrong way: it was not the Claimant's role as an HCA to rebuke others for not performing their roles to the expected standard. What the Claimant should have done is to report those concerns to the Nurse in Charge, who would have taken the appropriate action. Instead, she took it upon herself, and often it would appear rather undiplomatically, to challenge bank colleagues and even substantive workers on their performance, or perceived conduct, even when they were in different roles or higher grades than the Claimant. This no doubt got a lot of her co-workers' backs up: at the Trust, as in all employers, some workers do tend to drift and occupy themselves with anything but the jobs they are supposed to be doing at that time, but it is not helpful for other colleagues, as the Claimant did, to directly accuse them of being 'lazy' (page 80), or regardless of the context or situation to shout at colleagues or to make them feeling insignificant or stupid (pages 63). In my opinion, because of those behaviours, and because of the discord and disharmony that the Claimant brought to the various wards on which she worked over the years, it was in the wider interests of colleagues, patients and ultimately the Trust itself that the Claimant was removed permanently from the bank.*

37. We find that this statement from Purdie reasonably accurately summarises the general perception of the claimant amongst ward managers, matrons and staff and the effect of the claimant's behaviours in this regard.

38. The number of incidents involving the claimant and other members of staff/workers began to increase after she resigned her employment as a Phlebotomy Band 3 in February 2022. We find, as we explain below, that when they considered the claimant's engagement in mid-August 2022 Ms Mugan and Ms Hales regarded this increase in frequency of incidents as evidence of a pattern of escalation.

39. The question of who was to 'blame' for these incidents and their escalation, and indeed the accuracy of the records and truth and reliability of the accounts of them, was very much in issue in the hearing. The claimant in her evidence vigorously defended her own conduct and gave her own

account of the incidents. She argued that she was never given notice of the incidents which the respondent relied upon in taking its decision and was never given an opportunity to give her account of the events. She also pointed out that it was unusual that her previously good conduct record should suddenly deteriorate in this way and invited us to make adverse inferences about the respondents' staff's motives.

40. However, the issue before us was not whether the claimant was to blame, or even whether incidents in fact took place. The important and relevant point was what we conclude those taking action in relation to the termination of the claimant's engagement genuinely believed to be the position when making their decision.

41. However, since a great deal of time was taken up in the hearing addressing the complaints about the claimant that were, as we find, taken into account by Ms Mugan and Ms Hales in making the decision to terminate the claimant's engagement, we summarise them briefly as follows:

    41.1. Complaint 1 was from Jenna Neilson. It is dated 16 February 2020 [209]. It refers to the claimant interrupting, shouting at a nurse (Nurse Thornton) and wagging her fingers at her during a handover. The claimant said that she considered it was inappropriate for Nurse Thornton to have become involved and speak to Ms Neilson about the matter. The claimant in her questioning relied on the point (which is factually correct) that the letter of termination sent to her refers to an incident dated 16 February 2022 when the incident report for this incident clearly shows a date of 16 February 2020. She suggested that the termination letter referred to a different incident. Ms Mugan confirmed that the date in the termination letter should have been 2020. We find that Ms Mugan and Ms Hales believed that this complaint involved the claimant.

    41.2. Complaint 2 was made by Jessica King on 21 March 2022 [214]. It describes an incident in which a person referred to as 'Adena' becoming "very angry", necessitating Ms King taking a break, raising her voice and speaking (to Ms King) in a way that was "really out of order in front of patients" when she came back. The claimant argued that this incident did not refer to her and that she was not working on 21 March 2022. However, a Temporary Staffing Concern Statement Form submitted on 21 March 2022 by Chantel Villiers and provided by Ms Deacon to Ms Mugan identified the claimant as the person involved in this incident and that it took place on 15 March 2022, a day on which the records showed that the claimant was working [58]. We find that Ms Mugan and Ms Hales believed that this complaint involved the claimant.

    41.3. Complaint 3 was sent by Alison Whiteley on 15 June 2022 [74]. It referred to a patient (Ms Shaker) being distressed by the care she had

received from an HCA referred to as “Rose” who had shouted at her for not having her own shower gel and shouted at her about an untidy bedside table. The claimant suggested that this complaint was not about her, although she told us her name means ‘Rose’ in Arabic and that she was sometimes referred to as Rose by some staff. We find that Ms Mugan and Ms Hales believed it was it was about the claimant.

41.4. We interpose into the chronology of complaints against the claimant that were taken into account reference to an incident which was the subject of complaint by the claimant. On 13 June 2022 [230]the claimant complained in an email to Francesca Bosworth, the Manager of Bailey Ward, about an incident involving her and HCA Linda Stevens that had occurred on 11 June 2022. The claimant alleged, in summary, that she could not find HCA Stevens when she (the claimant) needed help with a patient, and that a basket of soiled laundry broke and overturned when the claimant moved it. She found HCA Stevens and another HCA having tea in a room and commented on overfilling laundry baskets. The claimant then reported that HCA Stevens responded in an aggressive tone and pointing. Shortly afterwards the claimant overheard HCA Stevens talking to a colleague about the basket and another shouting incident occurred between the claimant and HCA Stevens. The claimant said that she ‘completely lost it’ and told HCA Stevens that she had had a bullying attitude for years. In her email of complaint she asserts that, in effect, HCA Stevens did not work full shift hours, and did not work as much as she should have, and that as a staff members HCA Stevens took advantage of bank staff and created a ‘dramatic and unhealthy’ atmosphere on the ward so that other bank workers did not want to work on Bailey Ward.

41.5. Complaint 4 was sent by John Mallett (another Band 2 HCA but an employee) on 14 July 2022 [240-241]. Mr Mallett reported that the claimant intervened to offer to act as an Arabic translator but that he had declined because the claimant was carrying out “2 to 1 care” (i.e with a security guard) for another patient and Mr Mallett had already got someone to talk to the patient. Mr Mallett reported that the claimant then “*proceeded to become aggressive in front of patients and colleagues, raising her voice loud enough to be heard clearly in the neighbouring bay and later again with raised voice pointing and entering personal space in a threatening manner as she came around nursing desk to again to intimidate both myself and this time also addressing TNA Kim. This was all in front of other staff and patients. Though I tried to deescalate the confrontation and remained calm and polite as a neurodiverse member of staff I found this to be very distressing as I have never in my professional career been so inappropriately or publicly dressed down”*. The claimant said that she had made previous complaints about Mr Mallett and suggested that that had motivated his complaint. She also suggested she was not working on 15 June 2022

the day the complaint was made. We find, however, that the email indicates the incident took place on 14 June 2022 [74] and that the claimant was working on that day [59]. We find that Ms Mugan and Ms Hales believed Mr Mallet's complaint was about the claimant.

41.6. Complaint 5 relates to an incident involving Ms Edmonds and the claimant on 27 July 2022. In broad terms, the claimant complained to Ms Bisi about Ms Edmonds not helping. She believed that Ms Bisi had then told Ms Edmonds and there was then a heated exchange between the claimant and Ms Edmonds on the ward (or the corridor as the claimant asserted) and a further exchange in Ms Bisi's office. Ms Edmonds sent a complaint by email to Ms Bisi and Ms Paniza on 27 July 2022 detailing an incident that took place involving her and the claimant on that day [80]. She alleged that claimant said that she [the claimant] had complained about Ms Edmonds because Ms Edmonds was lazy, and that 'people like' Ms Edmonds did not like 'people like' the claimant because she [the claimant] does work and they do not. Ms Edmonds' emails recounts that she asked the claimant four to five times to "go away get away from me please". The claimant had then said, "Do you know what I am going to do… I'm going to wait for you outside". A Mr Saur, a catering assistant who witnessed the incident submitted a statement dated 27 July 2022 [82-83]. in which he says the claimant said to Ms Edmonds, "people like you are lazy. You are lazy" and that the claimant invaded Ms Edmund's personal space while being verbally aggressive. On 27 July 2022, Ms Bisi also submitted a statement about the incident [467-469]. Ms Bisi's statement said the claimant told her she thought Ms Edmonds was lazy and that "this is the reason why people don't want to come to come to work here, because of people like her that are lazy and don't do their job properly". Ms Bisi said the claimant had previously complained to her about other members of the team not meeting standards, and that the claimant herself had high standards of work and wished everybody met those standards. Ms. Bisi said that after the incident Ms Edmonds apologised to her [Ms Bisi] for reacting in that way in front of patients. Ms Bisi said that she asked the claimant if she was OK to finish her shifts, but that the claimant wanted to leave, which she did at 12.30. The claimant argued before us that there was a rule that bank workers should leave the premises if they have an argument with another worker. Ms Mugan in evidence said she was not aware of that rule. The claimant told us that she did not use the word lazy at any point as that would have led her to be disciplined. She said during cross-examination that she considered that Ms Edmonds' (personal) 'circumstances' might have "explained her behaviours": the claimant had learned of those circumstances for the first time when reading the hearing bundle. We find that Ms Mugan and Ms Hales believed the account of the claimant's actions was broadly as alleged by Ms Bisi and that the claimant had provoked a response from Ms Edmonds by referring to her as lazy or unhelpful. In response [235]

Ms Bosworth said she would discuss it with the ward matron and proposed a meeting with Ruth Deacon. On 15 June 2022 [234] the claimant declined to attend such meeting but re-iterated her complaints about HCA Stevens' attitude and her opinion that the atmosphere for bank staff on the ward was unwelcoming.

41.7. Complaint 6: This was a complaint sent in by Christopher Bray on 1 August 2022 [237-238]. It refers to two HCAs fighting verbally on the ward. The claimant accepted in evidence she was the person referred to as 'HCA1' in the complaint. HCA 2 was a medical student acting as an HCA and referred to as Hassan. The email states Hassan said the claimant was shouting at him because he refused to help her. It is said when Hassan had refused to help because he said his back hurt, the claimant had said; "How can your back hurt, you've been sitting on your phone all day while we are all working hard". It said the two HCAs were having a "screaming match" and that the claimant left early. Mr Bray said "*I would also be grateful if you did not book these two members of staff for shifts on 8a West in the future. Staff publicly shouting at each other and then leaving early is obviously detrimental to the good of the ward"*. The claimant suggested this incident took place on a day she was not working. Although the complaint was sent on 1 August 2022, Mr Bray said the incident happened on 10 July 2022. The claimant was working on that date [60]. We find that Ms Mugan and Ms Hales believed the complaint was about the claimant. Mr Bray's complaint was sent to Lisa Mugan by Natalie, Temporary Staffing Coordinator [236]. Natalie's email said, *"Ourida has been involved in numerous incidents with various members of staff on various wards for as long as I can remember. There are countless issues with her conduct towards other members of staff and she's also extremely rude to us on occasion. Although she isn't currently banned in any areas, Ruth has I believe an extensive history of issues involving this HCA*". When asked about this in cross-examination, the claimant suggested this was made up. She did not know a Natalie and booked shifts through the e-booking system. We note that despite Natlie's observation there were no historical records in the evidence before us of issues regarding complaints about the claimant's conduct towards staff with staff. We find that this comment as well as Mr Bray's complaint was taken into account by Ms Mugan and Ms Hales.

41.8. Complaint 7 was submitted by John Mallett on 3 August 2022 [267-268]. Mr Mallett said a patient (Barbara) and her family had spoken to him about a concern involving the claimant. He said: *"What was brought to my attention by the family and patient was an incident involving a bank member of staffs inappropriate, neglectful and abusive behaviour towards the patient. She reportedly used foul language when addressing the patient and proceeded to belittle her in front of other patients. She then refused to assist the bed bound patient or respond*

to call bells….. It is a serious concern to me that this has occurred on our unit as neglect, intimidation and abusive behave is something we are trained on so and patient safety should always be at the forefront of our actions." The email was sent to Coleen Cloherty. Ms Cloherty spoke with Barbara. She reported to Ms Purdie that Barbara was extremely distressed and crying as she explained what had happened involving this member of staff and that she had informed Matron Riezel Paniza about this complaint who she (Ms Cloherty) understood spoke with the patient that day" [265]. The claimant suggested this complaint could not be about her because she was not working on the day the complaint was made. Although the complaint was made on 3 August 2022, Mr Mallett said the incident occurred "a few days ago". The claimant accepted she had been involved in lifting Barbara on 27 July when she had been asked to do so by a staff member called Theresa. A complaint by Barbara against the claimant is something which was recorded as having been raised by Amanda Edmonds in the course of the argument on 27 July 2022 in Ms Bisi's office and Ms Paniza's email of 3 August 2022 at 16:28 refers to '*another concern now from a patient via our AU staff. This happened on the day we had the incident with [the claimant] and the AAU HCA*. We consider that Ms Mugan and Ms Hales believed that the claimant was the subject of this complaint.

The claimant pointed out that Barbara was a bariatric patient who had in the past made clear to nurses her preference for white British carers and had in the past been insulting and racist towards the claimant. As a consequence, the claimant told us, she was not required to work directly or alone with this patient. Her account of events involving Barbara was that (i) she was asked by Teresa to join as a fourth helper to turn over Barbara (ii) she expressed concern about that because of her previous experiences and the fact that she was not expected to deal with Barbara, and (iii) she was assured by Teresa that three others would be present and that the assistance involved only changing her position. The claimant therefore assisted. She also told us that she was asked by another HCA to make Barbara a cup of tea. The claimant said she could not do that because she was in gloves and apron on another task at that moment, but that she put her head into Barbara's bay to say that someone else would bring her some tea shortly. We consider that Ms Mugan and Ms Hales were nevertheless that a complaint had been made by a patient's family about the care given by the claimant.

The Termination process

42. The decision-making process and procedure adopted ahead of the decision to terminate the claimant's engagement was difficult to follow, and was likely to have been opaque to the claimant.

43. Our findings about the process of termination are as follows:

44. On 29 July 2022 [97] Ms Paniza invited the claimant to an informal fact-finding meeting to take place on 3 August 2022 to discuss the incident involving Amanada Edmonds which had occurred on AAU on 27 July 2022. She added that Mr Scarborough would also attend [96]. The claimant replied, on 1 August 2022 at 10:51 thanking Ms Paniza for her support and saying she would try to attend on 3 August 2022.

45. In the background, unbeknownst to the claimant, at 16:38 on 1 August 2022 [237] Mr Bray (ward manager for Ward 8a West) reported that he had been reviewing a backlog on Datix which had arisen during his leave, and reported to the nursing Bank email address that an incident had happened on 10 July 2022 (The incident was the incident involving Hassan –the medical student acting as an HCA - Complaint 6). In broad terms the incident as reported on Datix by the Nurse in Charge (Nurse Mina Lee) was that the claimant and Hassan had had an argument about the latter not helping out and watching videos on his mobile with headphones. The Nurse In Charge sent them both away. The claimant then said she was disappointed that the Nurse in Charge had not supported her and left her shift early. Mr Bray in his email had requested that both Hassan and the claimant not be booked for shifts on his ward, 8a West in the future.

46. The staff member who received this email (Natalie) forwarded it immediately to Ms Mugan at 16:42 on 1 August 2022 [236]. She asked if she should action Mr Bray's request not to book the claimant and Hassan on ward 8a West in future and she added to the forwarded email her own comment that the claimant had been involved in numerous incidents with other members of staff on various wards '*for as long as I can remember'* and she said that the claimant was '*extremely rude to us on occasion'* and that '*Ruth Deacon had information about a history of complaints involving the claimant'*.

47. In her evidence the claimant was adamant that she only used an e-booking system and had no knowledge of Natalie and did not deal with individuals at bank staffing. On the balance of probabilities we find it is inherently likely that the claimant would have had to and did interact in person with bank staffing 'on occasion' and we find that Natalie was genuinely reflecting the impression held by her or her colleagues about their interactions with the claimant, although we record that so far as the evidence before us is concerned there were only two reports of incidents involving the claimant before June 2022, and none involving Bank staffing. We make no finding as to whether any of incidents to which Natalie was referring in fact occurred.

48. On 2 August 2022 [245] Chris Scarborough sent an email to Ms Mugan copying in Matron Paniza informing them that AAU staffing had referred to the claimant having made a complaint against Amanda Edmonds alleging abusive behaviour and threatening behaviour. He says there was a witness and his email records that he had arranged to meet the next day (3 August 2022) with the clamant and Ms Paniza.

49. In the morning of 3 August 2022 at 9.45 [245] Ms Mugan responded to Mr Scarborough saying that the incident with the claimant was not isolated as she had received another complaint regarding her shouting at other team members (we infer that this was a reference to the Hassan incident). She asked to be updated after the fact-finding meeting: '*As following review we may decide to remove her from the bank.*' We find that this possible course of action was informed by the information and suggestions contained in Natalie's email. We infer this because Ms Mugan's email was also copied to Ruth Deacon (the Temporary Staffing Manager) who was asked to confirm Ms Mugan's belief that there were numerous other complaints against the claimant.

50. We pause to observe that the evolving situation was confusing because there were two threads relating to investigations into two separate complaints concerning the claimant, and also an overarching question of whether the claimant should be stopped from future bookings on Ward 8a West (as Mr Bray had requested). All of these were coming together at the same time ahead of the meeting with the claimant which had been arranged for later in the day on 3 August 2022. It is clear to us, and we find, the claimant was not aware that matters other than the Amanada Edmonds complaint by her were to be discussed at that meeting or were under consideration.

51. To make matters even more opaque, a further thread emerges initiated by John Mallett [99] he emailed at 11:33 on 3 August to Coleen Cloherty [99] (who was covering for Ms Bisi) copying Ms Paniza. He records that the family of a patient referred to as Barabara had raised a concern with him on that day (3 Aug 2022) relating to an incident that occurred 'a few days ago' (this is Complaint 7 above). He informs Ms Cloherty that he was reporting the matter '*due to impending events and the concerns of the family'* and that *'the staff member is due to work on our unit [AAU] this week'*. He records that the family said that that the HCA (who was the claimant) used inappropriate, neglectful and abusive behaviour towards the patient, foul language and belittled her in front of other patients: she then refused to assist the bed-bound patient or respond to call bells. His email records that Ms Cloherty had herself already spoken to the patient about the matter, and that the patient was distressed about the incident.

52. The meeting planned for 3 August 2022 did not take place. On 3 August at 13.19 [94] Ms Paniza emailed the claimant to say they were waiting for her. The claimant responded at 16:26 that she had completely forgotten about the meeting because she had taken a dentist appointment [94]. She told us this was an opportunity to deal with a problematic dental problem she had at the time.

53. At 15.51 [244] Mr Scarborough, emailed Ms Mugan, copying in Matron Paniza and Ruth Deacon. He noted that the statements of Amanda

Edmonds and Mr Saur (a witness) both described aggressive action by the claimant. He suggested that the claimant's shifts booked for AAU during the coming weekend be cancelled and that she not be allowed to book any further shifts pending an opportunity to investigate.

54. On the same day, in response at 16:03 243 Ms Mugan cancelled the claimant's bookings and stopped future bookings until the issues had been resolved [243].

55. On 4 August 2022 [122] Matron Paniza emailed the claimant that she was handing over the matter to Mr Scarborough. The claimant thanks her and says that someone (in fact Ms Mugan) had cancelled all her shifts and deprived her of her livelihood, stating that: "*in doing so they put patients last! Not first since the Trust has a shortage of HCAS*". She said her union was taking up the matter [122]. Matron Paniza forwarded this email to Ms Mugan. Ms Mugan explains she has cancelled the claimant's shifts stating: *"As a bank worker we are not obligate (sic) to offer shifts to her and we are following the Temporary Worker Agreement terms stating shifts can be withdrawn whilst we are investigating a complaint"*.

56. Mr George, the claimant's GMB union Representative set out concerns on the claimant's behalf in an email dated 5 August 2022 [102-3] to Ruth Deacon, copied to Ms Purdie and Ms Mugan. He requested immediate lifting of the suspension, pointed out that the suspension occurred after the claimant herself had complained about treatment of her by another worker, and that her complaint articulated concerns that (i) she may have been discriminated on the grounds of race and that (ii) her complaint constituted a protected act (in effect a public interest disclosure). He suggested a more limited restriction on working with certain colleagues pending investigation and informal resolution initially. He also pointed out that the claimant was dependent on the shifts for her income and that she had good reason for not attending the meeting which in any event should have been fixed so she had representation with her. His email refers to an *'acceptable grievance outcome'*. We find that this email initiated a formal grievance by the claimant.

57. The original fact-finding meeting which had been convened to discuss the incident on 27 July 2022 with Amanda Edmonds [126] was re-convened on 9 August 2022. The claimant attended accompanied by with Mr George. Ms Ruth Deacon, Mr Scarborough and Matron Paniza attended for the respondent. There were no notes of that meeting in evidence before us. However, at 13:14 that same day [117] Ms Deacon reported back on the meeting to Ms Mugan by email copying Mr Scarborough and Ms Hales.

58. Ms Deacon advised Ms Mugan about the fact-finding meeting Mr George had invited the respondent to review the suspension, and the claimant had chased up on the grievance she had previously submitted. Ms Deacon

added that other concerns about the C had emerged. We find that those other concerns were not expressly discussed at the fact-finding meeting and the claimant was not informed of the detail of them. This is supported by the claimant's email of 11 August to Ms Deacon where she states that" 'you implied I had other issues with the trust', and asked for a list of pending or unresolved issues of which she was unaware.

59. On 9 August 2022 [101] Ms Mugan responded to Mr George's 'grievance' email. She refers to worrying concerns about the claimant's 'interaction with colleagues' relating to unprofessional behaviour in front of and witnessed by staff and patients. She explains that the claimant was suspended pending investigation because she failed a reasonable management request to attend the meeting on 3 August 2022. She referred to three other complaints recently received (on AAU, A&E and 8aWestt) and that the matter was being referred up to Ms Hales. She pointed out (incorrectly) that the Trust had a right under the Temporary Workers Agreement (a copy of which she attached [105] under which, she asserted, the claimant was managed, to cancel bookings pending investigation. She noted also that she had received on that day the claimant's own statement of concern about work on the wards (this is a reference to the argument with staff HCA Linda Stevens on 11 June 2022 and reported in the claimant's email of 13 June 2022) and that in that statement the claimant admits to having '*completely lost it'* which Ms Mugan states she took as an admission of poor behaviour by the claimant.

60. We find that Ms Mugan genuinely believed that the claimant's engagement was covered by the TWA. She explained to us that a similarly worded agreement existed at her own trust, Western Sussex, before the merger [para 23].

61. On 10 August 2022, in response to a request, Ms Deacon sends a 'timeline' of complaints to Ms Mugan with accompanying statements and emails relating to the complaints. She sets out the seven complaints which we have referred to above [207].

62. The claimant herself then begins actively to seek further information about the Amanda Edmonds incident. On 11 August 2022 she asks for a statement from Ms Bisi and Ms Paniza and asks Ms Deacon [135] for a list of the other issues of concern.

63. On 12 August 2022 we find that a meeting took place between Ms Mugan and Ms Hales to consider the decision to cancel the claimant's bookings and to terminate her engagement as a bank worker for the future.

64. We accept Ms Mugan's evidence of that meeting. She says that she updated Ms Hales in light of Ms Deacon's timeline and that they 'jointly decided' to disengage the claimant '*having regard to the number and seriousness of the complaints*'. She said that the decision was taken,

despite the Trust's desperate need for staff - especially experienced staff such as the claimant – because her misbehaviour was regarded as serious and there had been so many complaints, and the claimant had not recognised their seriousness. They therefore determined jointly that the appropriate action was to terminate the claimant's position on the bank.

65. Ms Mugan at Ms Hale's request set out these points in a letter to the claimant terminating her engagement on 15 August 2022 [144].

66. The claimant immediately sought help from her union [147].

Handling of the claimant's grievance

67. The claimant chased up her grievance on 25 August 2022 with Ms Purdie [157]. It will be recalled that his had been commenced in the form of Mr George's email of 5 August 2022. She however attaches another short document addressed to Ms Purdie making clear that she was initiating a grievance about the trust's failure to follow a disciplinary procedure and alleging she was terminated and victimised after making a Public Interest Disclosure and because of racism. She provided a detailed statement on 13 September 2022 to Ms Purdie [166]. In this she refers to several incidents over the previous 8 years which she says were not investigated or dealt with by the Trust and involved white British people. She complained that the investigation of the Linda Stevens and Amanda Edmonds incidents was '*one way'*.

68. A meeting was fixed, initially in September and ultimately rearranged for 4 October with Ms Hales. The suspension of bookings remained in place during this time.

69. There was some confusion over the process which was being conducted. Ms Purdie thought she was conducting an appeal against the suspension/termination decision. The claimant thought she was pursuing a grievance. We find that Ms Purdie's confusion arose from her misunderstanding of the correct legal and contractual position. In any event Ms Purdie decided that she could remedy any previous failure to hold a full disciplinary hearing by proceeding with an appeal.

70. The grievance/appeal process was extensively delayed. Ms Purdie attributes this to high workload in bringing two HR teams together. We find that this was likely to have been a factor in the delay. However, the practical reality was that the claimant was no longer at the hospital, and we find that the principal reason for the delay in addressing the claimant's grievance was that it was not afforded any real priority by Ms Purdie. A delay of this length in conducting what was in effect a disciplinary procedure or review would be unfair to any bank member, but it was particularly unfair to the C who, to the respondent's knowledge was dependent upon bank work as her sole or main source of income and who had been a regular worker for 8 years. The

claimant became visibly distressed when putting to Ms Purdie in cross-examination the impact on her of this delay and uncertainty and the decision to suspend and later terminate her engagement. Ms Purdie (and later Ms Shoesmith in her outcome letter) acknowledged the delay was unacceptable. We agree.

71. On 4 October 2023 the grievance/appeal meeting took place remotely. It was attended by the claimant accompanied by Mr George and, on behalf of the respondent, by Ms Purdie, Mr Scarborough and Ms Deacon.

72. After the meeting Mr George sent a detailed statement [186] setting out the claimant's position, including a clear statement that she was not subject to the Temporary Workers Agreement. The claimant sent her own statement about her complaints which she had made to the wards and to Ms Deacon [202]. The claimant highlighted concerns about unfair treatment in relation in particular to the incidents on Level 8a ward (the Hassan incident), the incident on Bailey Ward (Linda Stevens) and incidents on the AAU (Patient Barbara and the altercation with Amanda Edmonds.

73. Ms Purdie began seeking information after the meeting. She asked for a timeline from Ms Deacon, but then went on annual leave. She interviewed Sister Mina Lee on 1 November [263] and also Jo Simpson and Gemma Harden. In relation to the incident Linda Stevens incident she spoke with Ms Bosworth [270], Linda Stevens and Bailey ward Matron, Ms Pearson, she also spoke with Ms Paniza, Mr Mallett and Ms Edmonds.

74. The claimant was highly critical of Ms Purdie's failure to interview more of the many witnesses she had referred to in her materials. We find that Ms Purdie's investigation was limited to the steps referred to above and as summarised in the Appeal outcome letter [464].

75. The claimant commenced ET proceedings on 7 November 2022. She thereafter declined to meet with Ms Purdie to discuss the matter.

76. There was then a further lengthy delay. A residual degree of confusion continued over contractual terms and the correct characterisation of the process. The claimant provided Ms Purdie with a copy of her 2014 contract in January 2023. Ms Purdie did not interview Amanada Edmonds until 12 July 2023. She then decided to recuse herself from the process and delegated the matter to Sarah Shoesmith (Head of Resourcing and Talent).

77. Ms Purdie therefore did not issue a grievance outcome letter.

78. Ms Shoesmith undertook a review of the process she had inherited and issued her outcome letter on 20 March 2024 [461]. We find from the terms of her letter that Ms Shoesmith considered that she was conducting an appeal. Ms Shoesmith accepted that there had been an error in applying the Temporary Worker Agreement procedure. But she concluded that there

would not have been a material difference in outcome.

78.1. She rejected the argument that the reason for the claimant's removal from the bank was because she made protected disclosures.

78.2. She observed that there had been a number of varied complaints from different individuals on various wards about the claimant's behaviour, which were increasing in frequency during the first half of 2022 and these were serious matters and could not be left without being addressed. She concluded that Ms Purdie's investigation had been adequate (although delayed) and showed that the claimant had had arguments with others in front of patients and several altercations with various staff and workers with no common factor of age, culture, skills or background.

78.3. She concluded that the claimant's approach to working with different teams at the Trust demonstrated that the claimant had (i) a challenging and confrontational approach to work colleagues (ii) repeatedly bypassed and undermined management structures and (iii) embarrassed colleagues by challenging them within the earshot/in front of patients, which also may have upset patients. She considered that the way the claimant challenged others lacked tolerance and demonstrated little insight into collegiate working, appreciating diversity and celebrating difference which resulted in altercations in front of patients; and that this justified her removal from the temporary staffing register.

78.4. She therefore upheld the decision to terminate.

79. We now turn to consider our own conclusions in relation to the specific complaints brought by the claimant. We set out the applicable law and our conclusions under each category of complaint.

Detriment arising from Protected Disclosure

Applicable Law

80. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by an employer, a colleague acting in the course of his/her employment or an agent acting in within the employer's authority, on the ground that the worker made a protected disclosure.

81. If the complaint succeeds the tribunal must award such amount as it considers just and equitable having regard to: a) the infringement to which the complaint relates and b) any loss which is attributable to the act or failure to act which infringed the claimant's right [ERA s 49(2)].

82. The burden is on the claimant to show that:

    a) there was a protected disclosure;

    b) he or she had suffered an identifiable detriment; and

    c) the respondent, worker or agent had subjected the claimant to that detriment by some act, or deliberate failure to act.

83. If the claimant establishes each of these elements the burden shifts to the respondent to prove that the worker was not subjected to the detriment on the ground that the worker had made the protected disclosure.

84. The principles applicable to each element are set out below.

Protected disclosure:

85. In order for a disclosure to be a protected disclosure it must satisfy three conditions set out in Part IVA of the ERA: namely:

    85.1. it must be a 'disclosure of information'

    85.2. It must be a 'qualifying' disclosure — i.e. one that, in the reasonable belief of the worker making it, (i) tends to show that one or more of six 'relevant failures' has occurred or is likely to occur and ii) is made in the public interest; and

    85.3. it must be made in accordance with one of six specified methods of disclosure.

86. The ordinary meaning of giving 'information' is conveying facts. There is a distinction between "information" and an "allegation" for the purposes of the Act: Cavendish Monroe Professional Risk Management v Geduld [2010] IRLR 38.

87. The relevant failures that a claimant must prove he/she reasonably believed the information tended to show had or were likely to occur are set out in Section 43B ERA 1996. So far as relevant these include:

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *.....*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
>
> *.....*

(d) that the health or safety of any individual has been, is being or is likely to be endangered.

88. A disclosure of information must further identify, albeit not in strict legal language, the breach of the legal obligation relied on: Fincham v HM Prison Service EAT/0925/01 paragraphs 32-33.

89. In relation to whether a disclosure is in "the public interest" or not, the Court of Appeal in Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979 provided the following guidance:

89.1. the tribunal has to determine whether the worker subjectively believed at the time that the disclosure was in the public interest; and

89.2. if so, whether that belief was objectively reasonable.

89.3. There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the tribunal should not substitute its own view.

89.4. In assessing the reasonableness of the worker's belief, the tribunal is not restricted to the reasons that were in the mind of the worker at the time. The worker's reasons are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to a tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

89.5. Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief…" which is not same as "motivated by the belief…".

89.6. There are no "absolute rules" about what it is reasonable to view as being in the public interest. Parliament had chosen not to define what "the public interest" means in the context of a qualifying disclosure, and it must therefore have intended employment tribunals to apply it "as a matter of educated impression".

89.7. In a whistleblowing case where the disclosure relates to a breach of the worker's own contract of employment or some other matter in which the worker has a personal interest, there may be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the case.

89.8. Tribunals are to be cautious of offending the "broad intent" behind the public interest test, which was to prevent whistleblowing laws being prayed in aid over "private workplace disputes", Four factors are highlighted as "a useful tool":

89.9. The numbers in the group whose interests the disclosure served - the larger the number of persons whose interests are engaged by a breach of their contracts of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

89.10. The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. Disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, or where the effect of the wrongdoing is marginal or indirect.

89.11. The nature of the alleged wrongdoing disclosed. Disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people.

89.12. The identity of the alleged wrongdoer. The larger or more prominent the wrongdoer (in terms of the size of its relevant community, that is, its staff, suppliers and clients), the more obviously a disclosure about its activities could engage the public interest, although this principle "should not be taken too far".

90. It is not necessary for the information itself to be actually true. It follows that a disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect: Darnton v University of Surrey [2003] IRLR 133, EAT).

91. The statutory test is a subjective one. It follows that the individual characteristics of the worker need to be taken into account. The relevant test is not whether a hypothetical reasonable worker could have held such a reasonable belief, but whether the worker in question in fact did so: Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT.

92. The disclosure must be made in one of the ways prescribed in ERA ss 43C to H. A qualifying disclosure that is made to the worker's employer will be a protected disclosure: ERA s.43C(1)(a).

The claimant has suffered an Identifiable detriment

93. A detriment 'exists if a reasonable worker would or might take the view that

[the action of the employer] was in all the circumstances to his detriment.': see Shamoon v Chief Constable or the Royal Ulster Constabulary 2003 UCR, HL and Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA.

94. A claimant would normally have to show that he or she suffered a disadvantage (which need not be physical or financial) compared to other workers (hypothetical or real): Shamoon. Someone who is treated no differently to other workers will find it difficult to show that he/she has suffered a detriment; for example see Chattenton v City of Sunderland City Council ET case 6402938/99).

The Respondent subjected the claimant to the detriment by an act or deliberate failure to act

95. A claimant may be subjected to a detriment in the form of (i) an act or (ii) a deliberate failure to act. But only a deliberate failure to act counts – there must be a conscious decision made. Whether there was a deliberate failure to act must be viewed in the context of the applicable contractual powers and duties as well as statutory regulation: Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT.

96. For the purposes of the statutory time limit ERA s48(4) provides that a deliberate failure to act shall be treated as done when it was decided on and 'in the absence of evidence establishing the contrary, an employer… shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done'.

On the ground that the claimant had made the protected disclosure

97. The burden of proving on the balance of probabilities the ground on which the employer (co-worker or agent) acted (and that it was not therefore on the ground that the claimant had made a protected disclosure) falls on the respondent: ERA s 48(2).

98. The words 'on the ground that' require a causal nexus between the fact of making a protected disclosure and the decision of the employer to subject the worker to the detriment: Aspinall v MSI Mech Forge Ltd EAT 891/01 and London Borough of Harrow v Knight 2003 IRLR 140, EAT. A causal nexus requires something more than a mere connection or link with the protected disclosure. The protected disclosure has to be causative in the sense of being "*the real reason, the core reason, the causa causans, the motive for the treatment complained of*"'. The words 'on the ground that' require consideration of whether the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower: Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012

ICR 372, CA, per Lord Justice Elias (obiter).

99. It does not matter for the purpose of a S.47B claim whether the employer intends to do the whistleblower harm, so long as the whistleblower has, as a matter of fact, been subjected to a detriment on the ground of the protected disclosure. It is not necessary as a matter of law that the detriment be maliciously motivated: Croydon Health Services NHS Trust v Beatt 2017 ICR 1240, CA.

100. Given the importance of establishing a sufficient causal link between the making of the protected disclosure and the detriment complained of, a tribunal may need to draw inferences as to the real reason for the employer's (or worker's or agent's) action on the basis of its principal findings of fact. The EAT summarised the proper approach to drawing inferences in a detriment claim in International Petroleum Ltd and ors v Osipov and ors EAT 0058/17:

100.1. the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made;

100.2. by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) — see London Borough of Harrow v Knight 2003 IRLR 140, EAT

100.3. however, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

101. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default. If it rejects the reason for dismissal advanced by the employer, a tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party: Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14.

Guidance

102. In the case of Blackbay Ventures Ltd (t/a Chemistree) v Gahir 2014 ICR 747, EAT Serota QC provided the following guidance to enable Tribunals to properly determine whistleblowing claims:

102.1. Each disclosure should be identified by reference to date and content.

102.2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

102.3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

102.4. Each failure or likely failure should be separately identified.

102.5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

102.6. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in S43B(1) that it was made in the public interest.

102.7. Where it is alleged that the Claimant has suffered a detriment short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

102.8. The Employment Tribunal should then determine whether the disclosure was made in the public interest.

Protected Disclosure Detriment : Analysis and conclusions

103. The claimant's case was that she was subjected to a certain detriments because she made three protected disclosures.

Detriments

104. The detriments she relied upon were :-

104.1. The decision to terminate her engagement as a bank worker;

104.2. The invitation to an informal meeting on 3 August 2022

104.3. The making of other allegations against her in a letter dated 9 August 2022.

104.4. The reliance by the respondent of other allegations in the letter dated 15 August 2022 notifying her of the termination of her engagement;

104.5. Failure by the respondent to follow its disciplinary procedures in relation to allegations against the claimant to which she was entitled under the terms of her contract of engagement with the claimant;

104.6. Initial and protracted failure by the respondent to deal with her grievance about the termination;

104.7. The invitation to a meeting on 23 November 2022 to further discuss the outcome of her grievance;

104.8. Failure to provide her with a grievance outcome letter.

105. As is clear from the findings of fact above we are satisfied that all of these actions and failings towards the claimant in fact occurred.

106. We find that all of them were detriments for the purposes of her complaint of protected disclosure detriment.

Disclosures

107. The claimant relied on three disclosures. We set out our analysis and conclusions by reference to each disclosure

Disclosure 1

108. Disclosure 1 was said to be made in the email [69] to Francesca Bosworth (ward manager) and copied to Ruth Deacon (Temporary Staffing Lead) dated 13 June 2022 referring to the incident with HCA Linda Stevens. The email referred to an incident of alleged bullying by an employee, HCA Stevens, towards the claimant.

109. The claimant relied on Disclosure 1 as tending to show that a person was failing or was likely to fail to comply with the respondent's duty to protect the claimant from bullying or harassment.

110. We note that although the email made reference to matters potentially relevant to patient care/health and safety (a torn laundry basket, allegations that Ms Stevens was missing from the ward during shifts and did not do observations, take bloods or provide personal care to patients, and the atmosphere on the ward making it difficult to attract bank staff to work on the ward) the claimant does not rely on this disclosure in relation to health and safety breaches. We did not therefore consider the disclosure in relation this category of breach of duty.

111. We assume in the claimant's favour that the respondent owed the claimant a duty to protect her from bullying or harassment in the course of her work with the respondent. The claimant's applicable contract [292] provides that "*the Trust is committed to supporting...its workforce and ensuring that temporary workers are treated with dignity and respect*".

112. We find that the disclosure was made to the claimant's employer, via her direct and superior managers on the ward in question as required by ERA 1996 s 43C(1)(a).

113. The respondent submitted that this disclosure did not amount to a qualifying disclosure because it did not tend to show any breach of duty because it does not suggest failures by the respondent to act to discipline Ms Stevens. Further that because the claimant made an allegation which was focussed on her alone, it was not a disclosure made in the public interest.

114. In our judgment Disclosure 1 did not amount to a protected disclosure for the following reasons:

114.1. The disclosure contains information about the encounter such that it was more than a mere allegation of misconduct by HCA Stevens. However, it does not contain information regarding a failure to discipline or restrain Ms Stevens. Although it urges Ms Bosworth to take action. It does not give information about failures to do so. The claimant refers to having been '*very patient and ignored [Ms Stevens] for years* ' and that Ms Stevens would '*bully bank staff on a daily basis and she (sic) getting away with it for years*', but in our judgment these are no more than expressions of opinion by the claimant unsupported by reference to information supporting historical failures to discipline Ms Stevens. The claimant's statement that she had 'been patient and ignored Ms Stevens' suggests on the contrary that bullying complaints had not been made in the past, at least not by the claimant, and not dealt with. The claimant also expresses the opinion that Ms Stevens' conduct was the cause of the difficulty of recruiting workers for Bailey ward, but she does

not provide any information to support that view. Again, this is no more than an expression of her opinion and does not involve the conveying of information, or of information tending to show the breach relied upon.

115. Furthermore, even if our conclusion above is wrong, we consider that Disclosure 1 does not amount to a protected disclosure because, although the claimant had, we find, a genuine belief that the disclosure she was making was in the public interest, that was not, objectively assessed, a reasonably held belief in all the circumstances:

115.1. We took account of the fact that the claimant had high clinical standards of her own, was hardworking and the accounts of her interventions and complaints show a tendency on her part to express her perceptions of others' shortcomings as being matters of wider concern about their professionalism, as amounting to a risk to patient care and as a wider failure on the part of the trust. We conclude that, having regard to her personal characteristics, the claimant had the subjective belief that the conduct of HCA Stevens towards her was a matter of public interest.

115.2. However, in our judgment her belief in connection with Disclosure 1 was not, objectively assessed and taking care not to substitute our own views, a reasonably held belief. Although in the email more wide-ranging general assertions are made, the information disclosed related to bullying and harassment relates only to HCA Stevens' conduct towards the claimant. It involved, in short, a report of a row on the ward involving her and another relatively junior staff member. It did not involve the disclosure of information about previous failures to discipline the person concerned. The information did not relate to other workers (although her opinions did).

115.3. Our conclusion that the claimant's belief that disclosure 1 was made in the public interest was not , objectively, reasonably held is consistent also with the distinction drawn in the Whistleblowing guidance document from 2019 to which we have referred above.

116. We therefore conclude that Disclosure 1 was not a qualifying disclosure and, in any event, was not made by the claimant in the reasonable belief that it was a disclosure in the public interest.

<u>Disclosure 2</u>

117. Disclosure 2 refers to the email dated 11 July 2022 by the claimant to Ruth Deacon [75].

118. The claimant relies upon this disclosure as tending to show that the following had occurred or was occurring or was likely to occur:

118.1. Breach of the duty to protect the claimant from bullying/harassment (ERA 1996 s 43B(1)(b)). As above we assume in the claimant's favour that the respondent was subject to this duty towards the claimant while acting in the course of her contracted work.

118.2. That the health or safety of patients of the respondent had been, were being or were likely to be endangered (ERA 1996 section 43B (1)(d). We are satisfied that the respondent was under a duty of care to ensure the health and safety of patients in its care.

119. The disclosure was made to Ms Deacon as Temporary Staffing Lead. As an employee of the respondent with managerial responsibilities for bank staff, the disclosure was made to the respondent as required by ERA s 43C (1) (a).

120. The email refers to the incident with Hassan on Level 8 West Ward. The claimant refers to "*abusive and utterly unacceptable behaviour of a few medical students working as HCAs*" . It continues: "*I had an issue yesterday on level 8 West, with someone called Hassan. My colleagues including nurses and HCAs were appalled by his behaviour and we will all talk to Jo Simpson, the matron, which (sic) knows me very well, to raise our concerns. I will put my complaint in writing and will copy you*". The email also states suggest that it is unacceptable that medical student HCAs sit outside bays with mobile phones and earphones. It mentions that the claimant is *'trying hard to get the managers involved in this but most of them are so busy they forget to feedback to the bank office*".

121. We find that this email was not a protected disclosure because it does not contain information tending to show either of the above breaches had, was or was likely in future to occur. Our reasons are:

121.1. The email itself does not give any information about the 'issue' with Hassan. There was no information at all connected with bullying or harassment relating to Hassan. Indeed the claimant accepted in cross-examination that she did not say in the email what the issue she had with Hassan was. She said, and this is consistent with the contents of the email, that she "was to speak to Jo Simpson [Matron] about the issue and how we can handle it before escalating it".

121.2. As regards the claimant's more general statements about other medical students acting as HCAs, we consider that although the provision of information of specific instances of abusive or unsafe behaviour of a group of HCAs could constitute a protected disclosure, the claimant's email conveyed opinions or allegations: It did not provide information of the kind or to the specificity necessary to constitute the provision of information required to constitute a protected disclosure. Disclosure 2 does not constitute a protected disclosure.

122. Notwithstanding this conclusion, having regard to the factors and personal characteristics of the claimant set out above in connection with Disclosure 1 we find that she had a subjective belief that the conduct of Hassan and/or other medical student HCAs in general was a matter of public interest

123. Nevertheless, in our judgment her subjective belief that Disclosure 2 was made in the public interest was not, objectively assessed and taking care not to substitute our own views, a reasonably held belief. Our reasons are:

123.1. It was lacking in detail and specificity in relation all of the allegations referred to.

123.2. It is expressed in conditional terms and contemplates the provision of further information at a later date. While more detail was later provided of the incident with Hassan, no further detail was ever provided about medical students in general or reports made to managers about them.

123.3. Even if this email is read together with the later information provided about the Hassan incident with the claimant as together constituting the provision of information about that incident, information concerning the single incidence of an altercation between the claimant herself and another temporary worker without more is not, objectively assessed, a disclosure of information which is in the public interest.

124. We therefore conclude that Disclosure 2 was not a qualifying disclosure and, in any event, was not made by the claimant in the reasonable belief that it was a disclosure in the public interest.

<u>Disclosure 3</u>

125. Disclosure 3 [84] was made in the email dated 29 July 2022 from the claimant to Lucia Bisi (AAU Unit manager) and copied to Christopher Scarborough, Craig Marsh, and Riezel Paniza (ward matron).

126. The claimant relies upon this disclosure as tending to show:

126.1. Breach of the duty to protect the claimant from bullying/harassment.

126.2. That the health or safety of patients of the respondent was or was likely to be endangered.

127. As stated above we are satisfied that the respondent was subject to both duties.

128. The disclosure was made to the respondent (specifically to Ms Bisi as the responsible Unit Manager) as required by ERA s 43C(1!(a).

129. The purpose of the email was to '*report a conflict the claimant was having with Amanda Edmonds*" who, the claimant stated *"refuses to listen or consider my feelings"*. The email describes the incident between them which involved an exchange of abusive and hostile language and on the ward and which continued in a heated exchange in the office of Ms Bisi. The exchange in the office included the claimant taking objection to Ms Edmonds alleging that patient Barbara had complained about the claimant. In the email the claimant provided information about what Ms Edmonds had said to her, and in particular alleged that she felt a fear of attack outside the hospital by Ms Edmonds or her associates. In the email the claimant states that she made critical statements to Ms Edmonds during the argument and in the email the claimant is generally critical of Ms Edmonds' etiquette, work and work ethic. Of Ms Edmonds the claimant stated; " *she has no caring intentions and no interest in helping when colleagues need support*". The claimant stated that she *"would appreciate the company's help in stopping behaviour that doesn't belong in the workplace"*, and that "*action should be taken to eradicate this type of behaviour in AAU for the sake of the patients and to establish standards and bring in quality staff"*. She added that *"Mandy's like*' puts off bank staff from coming to help on AAU.

130. In our judgment this email does not satisfy the criteria for a protected disclosure. Our reasons are as follows:-

130.1. It does not provide information tending to show that breach of the respondent's duty to protect the claimant had occurred or was occurring or was likely to occur. There is no information which relates to any failure by the respondent's staff or managers to take action to protect the claimant from bullying or harassing conduct on the part of Ms Edmonds. The email asks the responsible manager for steps to be taken in response to what was, so far as the evidence before us is concerned, a first report of bullying behaviour directed at the claimant by another worker.

130.2. In relation to the allegation of health and safety risk to patients, the email expresses the claimant's opinion that Ms Edmonds' behaviour or her (in the claimant's opinion) low professional standards represent a risk to patients and a problem with recruitment or with obtaining bank staff to work with her. It is a statement of the claimant's opinion. It sets out the details of the altercation as experienced by the claimant, but it does not contain any information of the required specificity which tends to show that there was, is or is likely to be a risk to patients, or what breaches of duty had occurred. As regards health and safety risks said to arise from staffing difficulties there is no information that other staff had said that they were unwilling to work on the AAU for the reasons the claimant gives.

131. As with the other disclosures, and for the same reasons having regard

to the claimant's characteristics we find that in relation to this disclosure the claimant herself had a subjective and genuine belief that her email related to matters of public interest.

132. Nevertheless we are not satisfied that that belief was, objectively assessed, a reasonably held belief. In so concluding we had regard to (i) the purpose for which the document is expressed to have been prepared (to report a conflict and seek remedial action) (ii) the fact that, notwithstanding that in part it took place in front of patients, the incident involved a one-off altercation between the claimant only and Ms Edmonds (iii) no other staff were involved or the subject of the disclosure (iv) the absence of any specific information about wider patient safety issues or the unwillingness of staff to work with Ms Edmonds (v) there was no information or allegation about previous or ongoing unresolved problems.

133. Disclosure 3 is therefore not a qualifying protected disclosure.

134. The claim for detriment arising from protected interest disclosure fails on the ground that none of the disclosures relied upon constitute a qualifying protected disclosure.

Detriment

135. In any event, even if we are wrong and the disclosures were qualifying protected disclosures, we find on the balance of probabilities that the detriments to which the claimant was subjected were in no way because of those disclosures.

136. We are satisfied on the evidence that the procedural detriments were because of administrative mistakes, misunderstandings and failures (albeit of a marked degree) by numerous staff, in particular Ms Mugan and Ms Purdie which find their origin in the 2021 merger between the two hospitals.

137. We are satisfied that the substantive decision to terminate the claimant's engagement made jointly by Ms Mugan and Ms Hales was likewise in no way because of the protected disclosures.

138. We reach the like conclusion in relation to the decision to uphold the termination by Ms Shoesmith.

139. We provide more detail of the reasons for and evidence supporting our conclusion that the claimant was not subjected to detriment because she made a protected interest disclosure in the following section, where we conclude also that the detriments to which the claimant was subjected were not because of her race.

Direct Race Discrimination

Applicable Law

140. Equality Act 2010 s 13 provides that: *(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*.

141. The claimant must therefore identify an actual or hypothetical comparator whose circumstances are the same, or not materially different from those of the claimant, but without the relevant protected characteristic: EA s 23(1). That is to say the comparator's circumstances must be sufficient to enable an effective comparison: Hewage v Grampian Health Board [2012] UKSC 37.

142. S 136(2) EqA deals with the burden of proof. It provides that: "*If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred.* Section 136(3) provides: "*But subsection (2) does not apply if A shows that A did not contravene the provision".*

143. The first step is to determine, on the balance of probabilities, the primary facts proved, including any appropriate inferences which can be drawn from those facts: i.e is there a prima facie case of discrimination. The burden at this stage is on the claimant and a respondent's explanations are disregarded. If the claimant has proven the facts sufficient to support this conclusion at Stage 1, the burden of proof shifts to the respondent to prove, again on the balance of probabilities, that what happened to the claimant was '*in no sense whatsoever'* because of the relevant protected characteristics – in this case race.

144. For the purposes of Stage 1 it is not sufficient for a claimant merely to prove a difference in protected characteristic and a difference in treatment. Unfair or unreasonable treatment on its own is not enough to shift the burden: Glasgow City Council v Zafar [1998] IRLR 36. Something more is required: Madrassy v Nomura International plc [2007] EWCA Civ 33, although that does not need to be a great deal: Denman v Commission for Equality and Human Rights [2011] CP Rep 12 CA para 19. The mere fact that a claimant believes they have been treated less favourably does not suffice. There must have been, objectively, less favourable treatment: e.g. Burrett v West Birmingham Health Authority 1994 IRLR 7, EAT. It is important for the tribunal to stand back from the detail and look at the cumulative picture: Anya v Oxford University [2001] IRLR 377 CA: Ayodele v Citylink Ltd [2017] EWCA Civ 1913. .

145. A tribunal should expect cogent evidence for the respondent's burden to be discharged. But the respondent only has to prove that the reason was not the forbidden reason, it does not need to show that it acted fairly or reasonably: Law Society v Bahl [2004] EWCA Civ 1070. Tribunals must be careful to test simplistic defences that a respondent was disorganised,

inefficient or generally unfair: Komeng v Sandwell MBC UKEAT/0592/10.

146. In determining whether a claim for direct discrimination succeeds, the Tribunal must ask itself in all cases the reason why the treatment complained of occurred, and whether it was because of the protected characteristic: Shamoon v Royal Ulster Constabulary [2003] UKHL 11. If the decision in question was significantly (that is more than trivially) influenced by the protected characteristic, the treatment will be because of that characteristic.

147. The reason why a person acted as he or she did is a question of fact, but their reasons may be conscious or unconscious: CC of West Yorkshire v Khan [2001] ICR 1065 HL (obiter) at paragraph 39 per Lord Nicholls : R (on the application of E) v the Governing Body of JFS and the Admissions Appeal Panel of JFS and others [2010] IRLR 136 SC per Lord Phillips (p) at paragraph 21.

148. Where a tribunal feels able to and does make an explicit finding as to the reason for the claimant's treatment, it is not an error of law to do so, and in so doing the application of the above guidelines on the stage 1 and stage 2 reverse burden of proof approach becomes otiose: Fraser v University of Leicester UKEAT/0155/13/DM; Hewage v Grampian Health Board [2012] IRLR 870 SC.

149. There must be a causal connection between the characteristic and the treatment based on the wrongdoers' conscious or subconscious reason for doing what they did: Nagarajan v London Regional Transport [1999] IRLR 572. It is usually the state of mind of the person carrying out the act which is determinative of the question, but where that person is acting on information or instructions provided by another person whose actions are due to their conscious or unconscious bias, the thought processes of the supplier of the information or instructions must be considered in relation to their own actions rather than those of the person carrying out the treatment directly : CLFIS v Reynolds [2015] ICR 1010.

Analysis and conclusions - Direct Race discrimination

150. The claimant describes her race as Arab from North Africa. She compares herself to white British colleagues.

151. The first allegation of direct race discrimination relied upon by the claimant is that on 27 July 2022 Amanda Edmonds said to the claimant: *"we don't want you here"* on two occasions. First by the cart of food, in front of Will and Craig (Team Leader) and secondly in the office while the claimant was talking to Lucia Bisi. In her email of 29 July 2022 [84] the claimant says that Ms Edmonds said *'get out of this ward, no-one likes you here'*.

152. We are satisfied that Ms Edmonds said these words or similar words to

the claimant in the course of the altercation by the food cart on the AAU on 27 July 2022. Ms Edmonds admitted to saying *'we don't want you here'* in the course of an interview with Ms Purdie on 12 July 2023 [302].

153. We find that they were not repeated in the course of the discussion on the office involving the claimant, Ms Edmonds and in the presence of Ms Bisi. Although the claimant was robust in her evidence that this was repeated, Ms Bisi makes no mention of it in her near contemporaneous record of the incident [468] and the claimant does not mention in her email to Craig Marsh on 15 August 2022 [153] that it was repeated.

154. Being spoken to in this way was unfavourable treatment by Ms Edmonds who was an employee of the respondent.

155. The claimant's second allegation of direct race discrimination is that she was treated less favourably because of her race by reason of the termination of her bank worker engagement.

156. It is clear that her engagement was terminated and that the process leading up to that was not compliant with the procedures the claimant was entitled to expect the respondent to follow. We find that that amounts to unfavourable treatment.

157. However, in this case we are satisfied that there is no basis upon which a tribunal could infer that the conduct identified by the claimant was in any way because of race, and we are satisfied that as regards both allegations we are in a position to reach a clear finding as to the reason why the conduct occurred, and that the reason in each case was not because of race.

158. There is no evidence at all that Ms Edmonds had used racist language or racist behaviour towards the claimant or any other worker in the past. The language used does not in terms convey an express racial element, nor in our opinion are there are grounds upon which the intention to convey such a meaning was intended could be inferred. The claimant did not mention in her email report of 29 July 2022 about the incident a concern about race. The first mention of race by the claimant in connection with the incident appears to be on 15 August 2022 in an email to her union [147]

159. In relation to the comment by Ms Edmonds that *'we don't want you here'* or words to that effect we find that the reason for those words being used towards the claimant was because Ms Edmonds had been provoked by the claimant's comments about Ms Edmund's work and work ethic – that she was lazy or, as the claimant maintained before us, that Ms Edmonds was not helping (she said would not have used the word 'lazy') and that she found the claimant a difficult person to work with because of the claimant's tendency to give the impression that she (the claimant) was the only person doing the work and that other staff were lazy. This is the explanation she gave in her interview with Ms Purdie in July 2023 [303]. We accept it

because it is consistent with other examples of a propensity on the part of the claimant to criticise other staff and bank workers - directly and to ward managers and matrons – often in terms which are liable to excite a combative reaction. One example is in Ms Bisi's near contemporaneous note. This records that in the office alone with the claimant the claimant had asked why Ms Edmonds had not been sacked and that people did not want to work on the ward '*because of people like her that are lazy and don't do their job properly'* [468]. Ms Bisi also records that the claimant had made complaints about other staff not meeting standards. We note that the claimant admitted in evidence that had she known more about Ms Edmund's personal circumstances at the time (matters which we need not set out in detail but which the claimant discovered after receiving the hearing bundle) which she thought 'explained her behaviours', she might have used different language. This is evidence from which we can infer that the claimant's language was liable to provoke Ms Edmonds.

160. As regards the unfavourable treatment by way of the decision to terminate the claimant's engagement:

161. We have found that the initial decision to terminate the engagement was made by Ms Mugan together with Ms Hales. We consider that there is no evidence adduced by the claimant from which a tribunal could infer that that decision was because of the claimant's race. Unfavourable treatment of the claimant alone is not enough.

162. Alleged differential treatment by the respondent of three actual comparators referred to by the claimant do not assist the claimant with this stage. None was in substantially the same position as the claimant such that a meaningful comparison can be made. The claimant complains that, unlike her, they were the subject of complaints but not investigated and not dismissed. In summary:

162.1. Amanda Edwards: her circumstances differed from the claimant in that Ms Edmonds was an employee, not a bank worker. Ms Purdie told us, and we accept, that complaints against Ms Edmonds as an employee would have been dealt with by HR, and would not have come to the attention of the temporary staffing team. Ms Edmonds was the subject of an investigation leading to a note on her personnel file, and in her case there were mitigating personal circumstances which were weighed by the Trust and, unlike the claimant, she had immediately apologised for the use of bad language and had remained on site [Purdie para 16-17].

162.2. Linda Stevens: was an employee and not a bank worker. There were no records of complaints other than the one made by the claimant [Purdie para 18], whereas the claimant was the subject of a number of complaints.

162.3. Julie Ann Sewell: was a bank worker but was not the subject of any complaints and was removed from the bank because she did not satisfy minimum availability requirements. [Purdie para 19]

163. In any event we are satisfied on the evidence before us that the reason for the claimant's dismissal was nothing to do with her race. The reasons for our conclusion are as follows:

164. We accept Ms Mugan's evidence about the reasons in her mind for the decision to terminate. We did not have direct evidence from Ms Hales. However, there is no evidence from which a tribunal could infer that Ms Hales decision was in any way connected with the claimant's race and we infer that the reasons in Ms Hales' mind were similar to those of Ms Mugen, because they discussed the matter together and she approved the termination letter.

165. We find that the decision to terminate was made for the reasons set out in Ms Mugan's witness statement [at para 19] and her evidence and summarised in the termination letter of 15 August 2022. They acted on the basis of the information summarised in Ruth Deacon's timeline dated 10 August 2022 [207 –255] and the attached emails. They had also been informed by Ruth Deacon following the meeting on 9 August 2022 that the claimant had failed to take responsibility for the complaints.

165.1. The reasons were, we find:

165.1.1. They believed that there had been an increasing number of complaints relating to the claimant;

165.1.2. The incident with Ms Edmonds they considered involved unprofessional behaviour in a healthcare setting witnessed by staff and patients and so was of a serious nature;

165.1.3. The claimant had in her own statement admitted that in the course of the incident on 14 July 2022 she had 'completely lost it'.

165.1.4. Two complaints regarding the claimant's interactions with patients (15 June 2022 and 3 August 2022);

165.1.5. Three other complaints which had been received about her interactions with colleagues;

165.1.6. They had been informed by Ruth Deacon following the meeting on 9 August 2022 that the claimant had failed to take responsibility for the complaints;

165.1.7. The claimant had failed to attend the reasonable management request for a meeting on 3 August 2022;

165.1.8. They believed that they were legally entitled to simply decline to give the claimant further shifts under the terms of the Temporary Workers Agreement of 2021.

166. In reaching our conclusion we have taken fully into account that the decision above was reached on the basis of, as the claimant put it, a one-way investigation. Virtually no attempt was made to discuss the allegations relied upon with the claimant to enable her to explain or refute the complaints or to give her a chance to ask for a lesser sanction or provide mitigation or an explanation. The allegations relied upon were in the main not even known to the claimant.

167. In considering whether these were the true reasons for the decision we have taken account also of the fact that, even though (which we find to be true) Ms Hales and Ms Mugan (and Ms Purdie who later became involved through the confused and confusing grievance/appeal process) believed the Temporary Workers Agreement to apply, the process undertaken did not comply even with the terms of that agreement. That agreement envisages in the case of serious misconduct that there will be a meeting and a brief investigation [110] which would be conducted as a two-way process with the worker having the opportunity to make a statement related to the issues raised, and a discussion of the outcome. None of these steps appear to have been followed.

168. The position is even more stark if the disciplinary process had been applied, as the claimant was entitled to expect they would under the terms of the 2014 contract for services. The disciplinary policy [329] envisaged a fact find investigation and, for more serious conduct issues a formal disciplinary process with the usual rights to information in advance, copies of evidence, details of witnesses and a right to be accompanied. A prompt hearing with an opportunity to ask questions and a written outcome with a scale of sanctions and a right to appeal. None of these steps were applied (save for a form or reconsideration/appeal) which concluded in March 2024.

169. As regards the appeal process, the procedural deficiencies which afflicted the initial decision were somewhat attenuated by the fact that the claimant was given an opportunity to meet Ms Purdie with her union representative and to submit written points and a statement by her representative. However, the grievance/appeal process itself suffered from very protracted delay due, we find, to Ms Purdie's prioritising her efforts elsewhere and misunderstanding the task before her, and the claimant did not have a fair opportunity to address flaws in the investigation by Ms Purdie, or to present mitigations. Ms Shoesmith's review was a review of the evidence collected by Ms Purdie without any input from the claimant.

170. We nevertheless find that the reasons for Ms Shoesmith's decision were those set out in her appeal outcome letter and were in no way connected

with the claimant's race.

171. The fact that the procedure adopted in relation to the initial and final decision to terminate the claimant's engagement may have been procedurally unfair and in breach of the terms of her contract of services however, does not of itself lead to a remedy. There is no complaint before us of breach of contract, and the claimant had no right not to be unfairly dismissed.

172. The relevance of the procedural deficiencies lies in the fact that the tribunal should adopt a sceptical approach when a respondent's defence to a discrimination claim is that its conduct was unfair or incompetent and not, for that reason, discriminatory. That scepticism should be all the more acute where, as here the process adopted appears to have involved procedural unfairness to a marked degree, and where the reasons expressed are relied upon as being true when the investigatory process was flawed.

173. Nevertheless, even adopting that sceptical lens, we are satisfied on the totality of the evidence that this is a case in which the reason for the procedure adopted and the decisions reached is clear. We find they were based on mistaken understandings of the contractual landscape and the claimant's rights, and on a summary of records and reports of complaints which appeared to those making the decisions to evidence an escalating number of incidents involving the claimant, including one or more regarded as serious. We consider that what appears to have been a complex and time-consuming merger, with which Ms Purdie and others appeared to struggle, provides the context for these errors which makes the explanation of unfairness due to incompetence compelling in this case.

174. A hypothetical white British bank worker comparator in substantially the same position as the claimant would have been dealt with, we consider, in the same (flawed) way.

175. We are satisfied that race played no part in the decision to terminate the claimant's engagement.

176. For substantially the same reasons we are satisfied that the respondent did not terminate the claimant's engagement because of any protected disclosures.

Harassment

Relevant Law

177. Section 26 of the EA provides (so far as relevant) that:

(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.

178. The unwanted conduct may be intended to violate the claimant's dignity or create the relevant environment, or it may have that effect. Harassment may therefore be either intentional or unintended.

179. The words in the statute describing the relevant effect and characteristics of the environment are salutary. The respondent referred us to the observations to this effect in Betsi Cadwaladr UHB v Hughes (UKEAT/0179/13/JOJ) per Langstaff J and Land Registry v Grant (EHRC Intervening) [2011] ICR 1390 Per Elias LF. And in the context of the creation of an environment in GMB v Henderson [2015] IRLR 451 Mrs Justice Simler gave guidance that the conduct complained of "*must reach a degree of seriousness" before it can be regarded as harassment, in order not to "trivialise the language of the statute"*. It is important not to encourage a culture of hypersensitivity. The claimant must have felt or perceived their dignity to have been violated, mild upset or offence is not enough: Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT. When assessing the effect of a remark the context in which it is given is always highly material: Land Registry v Grant [2011] ICR 1390. Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09 [2010] ICR 1225

180. A tribunal must consider all of the acts relied upon together in determining whether or not they might be regarded as harassment: Driskel v Peninsula Business Services Ltd [2000] IRLR 151. The conduct must be related to the protected characteristic: Harvey para 426.01.

181. Where reliance is placed on the creation of the relevant adverse environment, a tribunal should adopt a two-stage test: Pemberton v Inwood [2018] EWCA Civ 564: (i) Did the claimant genuinely perceive the conduct as having that effect? and ii) Was that perception reasonable ?

182. An environment is a 'state of affairs'. It may be created by a single incident but the effects are of longer duration: Weeks v Newham college of Further Education UKEAT/0630/11.

183. Finally, we note that EqA 2010 s 212 provides that harassment is not a detriment. A tribunal cannot therefore find that the same conduct was both harassment and discrimination.

Analysis and conclusions – Harassment

184. The conduct relied upon by the claimant are the statements alleged to have been made to her by Amanda Edmonds on 27 July 2022.

185. As we have explained above, in our judgment the words used by Ms Edmonds (whether they were those recalled by Ms Edmonds in July 2023 [302] or those referred to by the claimant in her email report of 29 July 2022 [84] did not convey, nor could they be or were they reasonably understood in the context in which they were made to convey a racial element:

185.1. There was no evidence of complaints or accounts of any previous conduct by Ms Edmonds which related to race, suggested a racial aspect or which might have provided a different context within which the claimant might reasonably have understood those words differently.

185.2. There was no reference to race in the claimant's report of the incident on 29 July 2022 [84].

186. We find on the balance of probabilities that at the time they were uttered the claimant did not consider that the words used were directed at her race or created the proscribed effects under the statute. Even if she did, we find nothing in the words used in the context in which they were used which would make such a perception on her part reasonable when objectively assessed.

187. The incident relied upon was a single incident, and for the same reasons did not, in our judgment, create a proscribed environment which was related to the protected characteristic of race.

188. We therefore find that the claim of harassment on the grounds of race is not well-founded.

Time Limits

Relevant Law - Time Limits

189. Section 48 of the ERA 1996 provides for a time limit of three months for bringing a whistleblowing complaint from the date of the act or failure to act, unless it can be shown that the acts extended over a period (section 48(4)) or where the act or failure to act is part of a series of similar acts or failures, the last of them (ERA section 48(3)(a)).

190. To establish that acts or failures to act were part of a series of similar acts, the claimant must show some relevant connection between the acts within and those before the three- month period, taking into account all the circumstances including connections between alleged perpetrators, whether actions were organised or concerted and their reasons for doing what was alleged: Arthur v London Eastern Railway Ltd [2006] EWCA Civ

1358 per Mummery LJ.

191. For the purposes of the statutory time limit ERA s48(4) provides that a deliberate failure to act shall be treated as done when it was decided on and 'in the absence of evidence establishing the contrary, an employer… shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done'.

192. The test for extending time for Whistleblowing complaints is a stricter test: the claimant must show that it was not reasonably practicable to lodge the claims in time, and that they were in fact presented within a reasonable time. The claimant bears the burden of proof.

193. Section 123 (1)(a) of the Equality Act 2010 provides that proceedings may not be brought after the end of a period of three months starting with the date of the act to which the complaint relates or within such other period as the tribunal thinks just and equitable. An act which extends over a period must be treated as done at the end of the period (EqA s 123(3).

194. When considering whether acts of discrimination (or detriments arising from whistleblowing) extend over a period, the correct focus for the tribunal is on whether the employer was responsible for an ongoing situation or continuing state of affairs in which the complainant or group were treated less favourably: Hendricks v Metropolitan Police Commissioner [2003] IRLR 96.

195. It is for the claimant to persuade the tribunal to exercise its discretion to extend time: Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298).

196. In considering whether to extend time for discrimination complaints brought out of time, the tribunal has a broad discretion. which is to be exercised in response to the particular facts or circumstances of the case in question (Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 CA; University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23). The factors referred to in the Limitation Act 1980 s33 can provide a useful starting point: i) the length of and reasons for the delay ii) effect of delay on the quality of the evidence iii) the conduct of the respondent after the cause of action arose iv) the duration of any difficulty the claimant was experiencing in commencing proceedings after the date of accrual of the cause of action and v) the steps taken by the claimant to get relevant medical, legal or other advice and the nature of the advice received.

197. If claims are brought out of time and time is not extended, the tribunal has no jurisdiction to hear them.

Analysis and conclusions – TIme Limits

Protected Disclosure detriment

198. The claimant's claim was presented on 7 November 2022. Taking into account the extension for early conciliation the claimant's claims for detriments arising from protected interest disclosure which relate to acts or omissions before 6 August were prima facie out of time.

199. We find that the decision to terminate the claimant's engagement was made between Ms Hales and Ms Mugan on 12 August 2022. This was the relevant act from which time begins to run in relation to the termination detriment.

200. The only two acts relied upon by the claimant which prima facie fall outside of the time limit are:

200.1. the allegation that the decision to dismiss was made on 28 July 2022. This does not arise because we have rejected that as the relevant date, so no detriment was suffered on that date.

200.2. The invitation to the formal meeting which the claimant missed on 3 August 2022.

201. We are satisfied that the invitation to the 3 August meeting was part of a series of actions which were part of the process leading to termination – it is specifically referred to in the August 2022 termination letter. In the circumstances that claim is also in time.

202. Although we have dismissed the claimant's claims for protected disclosure detriment for the reasons we have given, we consider that we had jurisdiction to determine them.

Race discrimination/Harassment

203. For the same reason, we find that the claimant's claim for discrimination by reason of the termination of her contract was brought within 3 months (as adjusted for early conciliation) of the date (12 August 2022) that the decision was taken to terminate the claimant's engagement.

204. The claim for discrimination or harassment arising from the use of allegedly racist language by Amanda Edmonds took place on 27 July 2022. On the face of it is out of time.

205. However, we consider that it is just and equitable to extend time to allow that claim to be determined. The delay in presenting the claim was modest, the event was a matter extant and referred to by Ruth Deacon on 10 August

2022 when she produced the briefing pack for the Mugan/Hales decision [207], the act was therefore part and parcel of the background of the termination complaints, the respondent was not exposed to particular prejudice by the matter being determined on the merits. It was able to prepare a witness statement by Amanda Edmonds to deal with the matter and other closely related issues needed to determined at the same hearing, which was not significantly further complicated or extended by reason of the need to deal with these allegations.

206. In the event these claims have been dismissed but we consider that we have jurisdiction to determine them because it is just and equitable and appropriate to extend time to hear these claims.

Employment Judge N Cox
Date: 4 November 2024

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ANNEX TO WRITTEN REASONS

List of Issues

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 6 August 2022 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the protected disclosure detriment claim made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?

1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Protected disclosure

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the claimant say or write? When? To whom? The claimant says she made disclosures on these occasions:

2.1.1.1 13 June 2022 – in an email to Ruth Deacon and Francesca Bosworth (Ward Manager), regarding bullying by Linda Stevens (“Disclosure 1”)

2.1.1.2 10 July 2022, in an email to Ruth Deacon, regarding an incident with a colleague who refused to assist the claimant and shouted at her (“Disclosure 2”).

2.1.1.3 27 July 2022, in an email to Lucia Bisi and HR, regarding an incident where Amanda Edmonds refused to assist the claimant and spoke abusively towards her (“Disclosure 3”).

2.1.2 Did she disclose information?

2.1.3 Did she believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?
2.1.5 Did she believe it tended to show that:

2.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation (Disclosures 1, 2 and 3) – the legal obligation relied upon is the duty to protect the claimant from bullying/harassing behaviour;

2.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered (Disclosures 2 and 3) – the persons whose health and safety was said to have been endangered was in each case patients of the respondent, whose care was impeded by colleagues refusing to assist the claimant.

2.1.6 Was that belief reasonable?

2.2 If the claimant made a qualifying disclosure, was it made:

2.2.1 to the claimant's employer?
2.2.2 Otherwise in accordance with section 43C, 43D, 43E, 43F, 43G, or 43H of the Employment Rights Act 1996?

If so, it was a protected disclosure.

3. Detriment (Employment Rights Act 1996 section 48)

3.1 Did the respondent do the following things:

3.1.1 Terminate the claimant's bank worker engagement? In that regard, the claimant says that:

3.1.1.1 The decision was made on 28 July 2022;
3.1.1.2 The claimant was invited to an informal meeting on 3 August 2022;
3.1.1.3 A letter was sent to the claimant on 9 August 2022 referring to further allegations;
3.1.1.4 On 15 August the claimant was sent a letter explaining that her engagement was terminated, and

referring to further complaints;
3.1.1.5 The respondent should have followed its disciplinary process in respect of the allegations against the claimant, as that was a term of her engagement with the respondent.

3.1.2 Initially fail to deal with the claimant's grievance about the termination of her engagement (submitted on 3, 9, 12 and 15 August 2022)?

3.1.3 Fail to deal with the claimant's grievance in a timely manner? The claimant says that:
3.1.3.1 She attended a grievance meeting on 4 October 2022;
3.1.3.2 She was then invited to a meeting on 28 November 2022 to discuss the outcome of her grievance (which she did not attend);
3.1.3.3 She has never been given an outcome in writing.

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

3.3 If so, was it done on the ground that she made a protected disclosure?

4. **Direct race discrimination (Equality Act 2010 section 13)**

4.1 The claimant describes her race as Arab, from North Africa. She compares herself to White British colleagues.

4.2 Did the respondent do the following things:

4.2.1 On 27 July 2022, Amanda Edmonds telling the claimant "we don't want you here" on two occasions:
4.2.1.1 By the cart of food, in front of Will and Craig (Team Leader)?
4.2.1.2 In the office while the claimant was talking to Lucia Bisi?

4.2.2 Terminate the claimant's bank worker engagement?

4.3 Was that less favourable treatment?

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

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

In respect of 4.1 the claimant has not named anyone in particular who she says was treated better than she was

In respect of 4.2.2, the claimant compares herself to:

Amanda Edmonds, who was subject to complaints that she had abused the claimant and sold drugs to patients, but was not terminated/dismissed
Linda Stevens, who was subject to complaints that she had abused colleagues and patients, but was not terminated/dismissed
Julie-Ann Sewell, a bank worker, who was subject to complaints that she had drunk alcohol on the ward on shift and was not terminated/dismissed.

4.4 If so, was it because of race?

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

5.1 Did the respondent do the following things:

5.1.1 On 27 July 2022, Amanda Edmonds telling the claimant "we don't want you here" on two occasions:
5.1.1.1 In front of the cart of food, in front of Will and Craig (Team Leader)?
5.1.1.2 In the office while the claimant was talking to Lucia Bisi?

5.2 If so, was that unwanted conduct?

5.3 Did it relate to race?

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

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

6 Remedy

[In light of our conclusions the issues relating to Remedy are not relevant]