EMPLOYMENT TRIBUNALS

Claimant:	**Mrs. M Chapi**
Respondents:	**United Lincolnshire Hospitals NHS Trust**
Heard at:	**Nottingham (and via CVP as a hybrid)**
On:	**23rd September 2022 (reading in for the Tribunal)** **26th September 2022 (reading in for the Tribunal)** **27th, 28th, 29th & 30th September 2022** **6th November 2023 (reading in for the Tribunal)** **7th, 8th, 9th, 13th and 14th November 2023** **27th and 28th November 2023 (in Chambers)**
Before:	**Employment Judge Heap**
Members:	**Ms. K Srivastava** **Mr. C Bhogaita**

Representation

Claimant:	**Ms. N Mallick - Counsel**
Respondent:	**Ms. A Niaz-Dickinson - Counsel**

RESERVED JUDGMENT

1. The complaints of harassment related to the protected characteristic of race are dismissed on withdrawal by the Claimant.

2. The Claimant was subjected to direct race discrimination and victimisation in respect of completion of a Datix report by Catherine Havard on 21st June 2019 making an allegation of theft against her and the Respondent has secondary liability for that act.

3. The Claimant was subject to direct race discrimination in respect of the Respondent's failure to conclude the disciplinary investigation swiftly or at least within a reasonable period of time and the Respondent has secondary liability for that act.

4. The Claimant was subject to direct race discrimination in respect of the outcome of the disciplinary process taken against her which was communicated on 31st December 2020 and the Respondent has secondary liability for that act.

5. All other complaints of direct discrimination and victimisation fail and are dismissed.

6. The complaint of constructive unfair dismissal fails and is dismissed.

7. The claim will be listed for a Preliminary hearing for case management in order to list a Remedy hearing and to make Orders for preparation for the same. Notice of hearing will follow.

REASONS

BACKGROUND & THE ISSUES

1. There are three claims brought by Mrs. Mary Chapi (hereinafter referred to as "The Claimant") against her now former employer, United Lincolnshire Hospitals NHS Trust (hereinafter referred to as "The Respondent" or "The Respondent Trust") presented by way of a Claim Forms received by the Employment Tribunal on 18th October 2019, 16th February 2021 and 9th September 2021. We refer to those Claim Forms collectively as the claim.

2. The Claimant had also presented a second near identical Claim Form to her first the following day naming Catherine Havard as the Respondent to that claim. Those first two Claim Forms were consolidated by Regional Employment Judge Swann although the claim against Ms. Havard was later withdrawn and it is not before us for determination.

3. The claim has been the subject of a number of Preliminary hearings designed to clarify the complaints and the issues. The first of those took place on 10th February 2020 before Employment Judge Jeram who made Orders for further information about the complaints made to be provided by way of the preparation of tables. Those were completed by the Claimant and appear in the hearing bundle at pages 39 to 60. They set out that the Claimant was advancing complaints of direct discrimination, indirect discrimination[1], victimisation and harassment. All complaints relied on the protected characteristic of race. The Claimant identifies as having Black African origins for the purposes of the definition of race.

4. Employment Judge Jeram listed a public Preliminary hearing for 28th May 2020 with the purpose of considering whether any part of the claim should be struck out under Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("The Regulations") or made subject to a Deposit Order under Rule 39 of the Regulations. That hearing came before Employment Judge Ahmed although it proceeded as private Preliminary hearing conducted by telephone because of the Covid 19 pandemic and the Presidential Guidance arising from it. The Claimant had by that stage instructed a solicitor although at that time her only involvement was to conduct the Preliminary hearing.

[1] The indirect discrimination complaint had been withdrawn before the claim reached this Tribunal and was dismissed by way of a Judgment sent to the parties on 2nd November 2020.

5. It was agreed that the claim should be relisted for the substantive Preliminary hearing identified by Employment Judge Jeram although an additional issue was added for consideration as to whether the claim should be struck out as having been presented outside the time limit provided for by Section 123 Equality Act 2010. That further Preliminary hearing was listed for 5th October 2020.

6. In the meantime, the Claimant made an application to amend the claim on 25th June 2020 and attached a number of tables of the same sort prepared after the Orders of Employment Judge Jeram, but including a number of further allegations of discrimination. As a result, a further telephone Preliminary hearing was listed for the purposes of dealing with that application. The Claimant by that stage was again representing herself.

7. That Preliminary hearing came before Employment Judge Broughton on 4th September 2020. At that hearing the Claimant withdrew the complaints of indirect discrimination and a Judgment dismissing that complaint was sent to the parties on 2nd November 2020. We are therefore not concerned with those complaints.

8. Ms. Mallick also withdrew the complaints of harassment related to the protected characteristic of race at the hearing before us. She believed that the Tribunal had previously been notified of that although we cannot locate any record to that effect. In all events, those complaints are now dismissed on withdrawal as above. Those complaints therefore no longer remained live before us and accordingly we have not determined them.

9. At the hearing before Employment Judge Broughton the amendment application was discussed but it was not able to be determined because of the length of time that the hearing had been listed for (90 minutes over the telephone) and the fact that the Claimant could not locate her copy of the Claim Forms. Employment Judge Broughton therefore directed that the Preliminary hearing listed for 5th October 2020 would determine the amendment application as well as the other issues that it had been set down to determine. Employment Judge Broughton also directed the Claimant to amend the schedules that she had created so as to make it more easily identifiable where an allegation featured in the original claim.

10. The hearing on 5th October 2020 took place before Employment Judge Clark and largely concerned the amendment application.

11. By that stage the claim had been listed for a final hearing on 1st to 3rd March 2021. However, on 16th February 2021 the Claimant presented a further Claim Form complaining of race discrimination and victimisation in which she set out that it was relevant to the earlier proceedings.

12. The Respondent made an application for a postponement of the final hearing as a result of what was said to be the Claimant's failure to comply with Orders for disclosure. An urgent Preliminary hearing was listed which came before Employment Judge Jeram on 22nd February 2021. By that stage the Claimant was represented by Ms. Mallick of Counsel who appeared before us. Ms. Mallick is retained by the Claimant on a direct access basis.

13. It was disputed that the Claimant had not complied with her disclosure obligations but by the time of the hearing she was in agreement that the hearing should be postponed on account of the new Claim Form which had by that time been issued. The hearing was postponed by Employment Judge Jeram on that basis and because the existing claim was not ready for hearing.

14. A further Preliminary hearing was then listed to consider whether to strike out the claim or part of it and make Orders for deposits and to deal with any further necessary case management. That Preliminary hearing came before Employment Judge Clark on 28th June 2021. The focus was not on the merits of the allegations made in the first proceedings and those then issued in February 2021 but what was said to be the overlap, jurisdictional issues and arguments as to abuse of process. Employment Judge Clark struck out part of the second set of proceedings on the basis that they had been part of an earlier amendment application which he had refused at the 5th October 2020 Preliminary hearing or had been abandoned at that point as potential claims within the first set of proceedings. He refused an application to strike out two allegations in the second claim on jurisdictional grounds and that still remained a live issue for us although, as we shall come to in our conclusions below, it has not been necessary for us to determine it.

15. Employment Judge Clark was told at that hearing that the Claimant had by that stage resigned from employment and a further claim for constructive dismissal was anticipated. On that basis a further Preliminary hearing was listed for 25th November 2021 at which time that further claim should have been presented. The parties were agreed that the final hearing should be listed for a period of six days and that was listed to commence on 23rd September 2022. That is when it first came before this Tribunal although, as we shall come to, it transpired to be an insufficient time estimate for a variety of reasons.

16. On 9th September 2021 the Claimant issued the further Claim Form presenting additional complaints of race discrimination and constructive unfair dismissal.

17. Employment Judge Clark also dealt with the November 2021 Preliminary hearing. At that hearing he consolidated the then third claim with the earlier two and clarified the issues that arose in that claim albeit there was some further change to that after the hearing that arose from communications from the Claimant's side. The claim remained listed for hearing to commence on 23rd September 2022 and various Orders for the timely preparation for that hearing were made albeit the parties largely failed to comply with them.

THE HEARING

18. The claim was originally listed for 6 days of hearing time which took place between 23rd and 30th September 2022. The first two days of hearing time were dealt with for reading in by the Tribunal and the parties were not required to attend. That had been longer than anticipated but was necessary because of the length and number of the witness statements and bundle that we were required to read.

19. Unfortunately, despite the fact that there had been significant case management intervention and more than ample time to prepare for the hearing by the time that it came around the parties were anything but. We say more about that below.

20. It rapidly became clear that as a result of the reading time required, the preliminary matters that needed to be attended to, the very late disclosure of witness statements and the number of witnesses that we had to hear from that the 6 days of Tribunal time initially allocated would be insufficient. The hearing was therefore relisted for a further 8 days of hearing time in May 2023. That hearing was postponed on the application of the Respondent as a result of the unavailability of one of their witnesses, Tracey Robson.

21. Unfortunately, as a result of availability issues the hearing could not be relisted until November 2023. The first day of resumed hearing time was spent re-reading into the case as a result of the passage of time between the first tranche of hearing dates and the second.

22. Whilst evidence and submissions were able to be concluded within that additional hearing time, there was insufficient time for deliberations and so a further two days of Tribunal time were added on 27th and 27th November 2023.

23. As we have already observed, there has been a significant amount of case management intervention, but it rapidly became clear that there remained significant issues to be dealt with before the evidence was able to commence.

24. In particular, we raised with Ms. Mallick that a number of allegations that featured in the agreed list of issues did not appear to be dealt with at all in the Claimant's witness statement and it was therefore unclear how she was proposing to lead evidence in that regard. Ms. Mallick indicated that she intended to ask the Claimant to adopt the list of issues as part of her evidence. Although a rather unusual course, that did not attract any objection from Ms. Niaz-Dickinson.

25. We also raised with Ms. Mallick that the Claimant's witness statement did not deal anywhere with any issue about jurisdiction and, in the event that we found any complaint to be out of time, the position on a just and equitable extension of time. Ms. Mallick accepted that and indicated that she would deal with it by a small number of supplemental questions. Ms. Niaz-Dickinson did not object to that if the number of questions were limited.

26. There also remained significant issues as to disclosure and even after the first set of hearing dates documentation continued to be disclosed on both sides which had the result that we had no less than 8 different versions of the bundle index produced during the course of the hearing dates.

27. A further issue arose at the outset of the hearing in respect of the witness statement of Tracey Robson. That had not been sent to the Claimant until the hearing had already begun and the Tribunal was reading into the papers. Ms. Niaz-Dickinson made an application to adduce late evidence in that regard and told us that Ms. Robson no longer worked for the Respondent and there had been difficulties in getting her instructions over a draft statement that had been prepared. That had only been able to be undertaken at a conference and the statement had then been sent to the Claimant. Ms. Niaz-Dickinson submitted

that the Respondent would be prejudiced if they could not adduce Ms. Robson's evidence because it dealt with one of the allegations that the Claimant makes in these proceedings.

28. Ms. Mallick opposed the application. She told us that she had not received the statement until after 10.00 p.m. the day before and the Claimant had not been put on warning at the time of exchange that there may be an additional statement. She referred to a concern that given the number of witnesses additional time would be needed if we were to now hear from Ms. Robson and that she had already had to cut down her cross examination because of time constraints. We made it plain that we did not want Ms. Mallick to have to pare down her cross examination because that was not fair to her or the Claimant and that the hearing would take as long as it took and if it went part heard then so be it.

29. However, we initially refused the application to hear from Ms. Robson with reasons given orally at the time. We did, however, revisit that at a later stage on the fourth day of hearing time when Ms. Niaz-Dickinson made an application for reconsideration based on the fact that we had since observed that we would not guillotine Ms. Mallick's cross examination and did not take issue with the hearing going part heard. She submitted that Ms. Robson could then give evidence at a resumed hearing which would allow Ms. Mallick sufficient time to prepare cross examination questions. We were also provided with further details about the attempts that had been made to obtain instructions from Ms. Robson on her witness statement and the fact that the Claimant had in fact been on notice of the fact that two witness statements were to follow, with one of those being Ms. Robson's. We granted the Respondent's application with oral reasons given at the time. No one has asked that those reasons be embodied within this Judgment and therefore we say no more about them.

30. As it was witness statements had only been exchanged at the eleventh hour before the hearing was due to commence and we raised with the parties how the situation had been able to reach this state. Other than there appeared to be fault on both sides there was not any reasonable explanation for how preparation had stalled so very badly and particularly in view of the significant case management intervention that this claim has attracted.

31. We also raised the fact that we appeared to be missing from the bundle a grievance dated 19th October 2015 which was relied on by the Claimant as a protected act. That had not been included because Ms. Niaz-Dickinson told us that it was conceded as a protected act, but the relevant witnesses would say that they were not aware of it. Given that witnesses would be asked about it we felt it necessary that it was in the bundle and Ms. Niaz-Dickinson agreed to obtain it and also to take instructions in respect of a number of other documents and issues that we had raised as a result of our reading in. That included documents relating to the circumstances of another Band 6 nurse who had been accused of the theft of medication but which had not been disclosed and a suspension checklist on which the Claimant relied to say that she had been suspended. In respect of the former document Ms. Niaz-Dickinson told us that that information had not been in the scope of a request made by Ms. Mallick for further information about people who had been disciplined in respect of medication errors which featured at page 277 of the hearing bundle. Her instructing solicitor

had not considered any documents relating to the Band 6 nurse to be relevant to the issues in the claim such that they had not been disclosed. We were subsequently provided with copies and we refer to them further in our findings and conclusions below. Ms. Mallick's position was that the Claimant had made a freedom of information request which featured in a supplementary bundle that we had been provided with at S31 which covered such documents and had not been responded to.

32. We also raised with Ms. Mallick in respect of the list of issues what the breaches of the ACAS Code were said to be. That was identified as being paragraph 4 of that Code. At the close of the first tranche of hearing dates Ms. Mallick revisited that matter and said that she would invite us to draw our own conclusions as to any breach. We consider that that would be a matter best left for submissions at any Remedy hearing as we have referred to further in our conclusions below.

33. A further Preliminary issue arose in respect of the scope of the allegations at 16.9 and 16.10 of the list of issues. That concerned the dismissal/demotion of the Claimant to a Band 5 position on 31st December 2020 and the imposition on the same date of a requirement to write a reflective piece. Ms. Niaz-Dickinson submitted that that related to the disciplinary outcome only whilst Ms. Mallick submitted that it also included the appeal outcome. We heard submissions from both parties on that issue. It is unnecessary to set out those submissions here. We determined that the allegations were limited within the list of issues, which had been agreed, to the disciplinary outcome and not to any later appeal. We gave our reasons orally at the time and so we do not need to repeat those here as neither party has asked us to do so.

34. The Claimant's evidence concluded at just past mid-day on the sixth and final day of the first tranche of hearing dates. Ms. Mallick submitted that we should not begin hearing the Respondent's witnesses – which would have been Ms. Havard – that day because she was an important witness, we ran the risk of not completing her evidence and there was a concern that she may discuss her evidence in the interim. Ms. Niaz-Dickinson objected to that and submitted that because we had heard from the Claimant we ought to also hear from Ms. Havard, that she would not discuss her evidence and that it would be a waste of costs in respect of the remainder of that day. We determined that we would not commence Ms. Havard's evidence that day with oral reasons given at the time. No one has asked that those are recorded within this Judgment and so we need say no more about them.

35. Following that decision, Ms. Mallick made an application for disclosure of documents relating to the Band 6 nurse accused of the theft of medication whose details appeared at page 277 of the hearing bundle and who it was clear had been given a lesser sanction to the Claimant. The Respondent did not object to that course and the relevant documents were subsequently disclosed and were before us. We deal with them within our findings and conclusions below.

36. The hearing was relisted with the parties present for a further seven days of hearing time. Regrettably, availability issues meant that the hearing was unable to resume again until 6th November 2023. Given the gap between the two tranches of hearing time we spent the first day of that seven day period re-reading into the papers and our notes of evidence. By that time further

documents had been disclosed and were added to the hearing bundle. That included an unredacted email which appeared in the Claimant's supplementary bundle at page S26. That email was important because Ms. Mallick had put it to Ms. Havard on the Claimant's instructions that the top email, which was positive about her, was not from Ms. Havard but from Yvonne Meadows, another of the Claimant's then line managers. The sender had been redacted because, as we understand it, those documents had been obtained via a Subject Access Request. When the unredacted email was provided it was clear that the sender was in fact Ms. Havard. That is relied upon in connection with submissions made on behalf of the Respondent as to the Claimant's credibility and we deal with such matters further below.

37. Finally, it was agreed on the eighth day of hearing time that submissions would be made by both Counsel by CVP at the request of Ms. Niaz-Dickinson. The day before that was to take place Ms. Mallick indicated that she wanted to attend in person instead. Ms. Niaz-Dickinson objected to that because she felt that it would prejudice her submissions and she was unable to attend in person because of commitments which she could not now rearrange and which had been why she had requested to give submissions by CVP in the first instance. Given that the Claimant intended to physically attend, which we had not previously known, and we did not feel that we could refuse her attendance but it would not be appropriate for the Tribunal to just be in the room with the Claimant and no one else from the Respondent we agreed that Ms. Mallick could physically attend also. We did not consider that that placed Ms. Niaz-Dickinson at any prejudice because hybrid hearings were by that stage commonplace.

38. The Judge sincerely apologises to the parties for the delay in promulgating this Judgment which has been caused, in part at least, as a result of other Judicial work, periods of leave from the Tribunal, illness and difficult and unexpected personal circumstances of which the parties were both made aware and which thereafter further developed. The patience of the parties in awaiting the Judgment has been very much appreciated.

WITNESSES

39. During the course of the hearing, we heard evidence from the Claimant on her own behalf.

40. We also heard from a number of individuals on behalf of the Respondent. Those individuals were as follows:

    a. Catherine Havard – one of the line managers of the Claimant who the Claimant contends subjected her to direct discrimination and victimisation and who was the subject of a grievance from the Claimant;

    b. Diane Eady – the Matron for the Hospital at Night team who was the line manager of Ms. Havard and the others who at the time line managed the Claimant;

    c. Tracey Wall – the chair of the disciplinary hearing who made the decision to impose disciplinary sanctions against the Claimant;

d. Tracey Robson – the Human Resources officer appointed to provide support in respect of the allegations made against the Claimant which led to the later disciplinary process; and

e. Sarah-Jayne Taylor who dealt with the Claimant's sickness absence. Ms. Taylor gave evidence remotely via CVP by agreement. We are satisfied that this gave rise to no issue of unfairness and no one suggested to the contrary.

41. We also had witness statements from Lisa Pim and Sheila Donaldson. They dealt respectively with the appeal against the Claimant's disciplinary sanction and providing support in relation to her grievance appeal. Neither of them gave live evidence. We do not place any weight on their untested evidence and in all events it is not necessary for us to do so for the purposes of the issues that we are required to determine.

42. We make our observations in relation to matters of credibility in respect of each of the witnesses from whom we have heard below.

43. In addition to the witness evidence that we have heard, we have also paid careful reference to the documentation to which we have been taken during the course of the proceedings and also to the very helpful written and oral submissions made by both Ms. Mallick on behalf of the Claimant and Ms. Niaz-Dickenson on behalf of the Respondent. We are grateful to both of them for their helpful submissions.

CREDIBILITY

44. One issue that has invariably informed our findings of fact in respect of the complaints before us is the matter of credibility. Therefore, we say a word about that matter now.

45. We begin with our assessment of the Claimant. Ultimately, we accepted the Claimant's evidence as being credible and reliable. Whilst Ms. Niaz-Dickinson submits that her evidence was evasive we did not reach that same conclusion. It was clear that the Claimant is, and has been for some time, unwell. It was not easy for her to focus and she was often emotional. Whilst it is true to say that her evidence frequently went off at a tangent and she gave extremely lengthy answers to questions which went off topic, we did not consider that to be evasive but indicative of what the Claimant clearly saw as a need to tell the Tribunal what she considered to be important points that she believed that we might otherwise have missed. That was clear from comments made to that effect during her evidence.

46. We have taken into account that there have been some discrepancies with regard to the account given by the Claimant in respect of the incident which led to disciplinary proceedings being commenced against her but those were minor in nature (and certainly less than those of Catherine Havard as we shall come to below) and she was consistent on the core facts.

47. Further criticisms of the Claimant's credibility by the Respondent included instructions that she gave to Ms. Mallick concerning an unredacted email which

appeared in the Claimant's supplementary bundle at page S26 and which we have already touched upon above. That email was important because Ms. Mallick had put it to Ms. Havard on the Claimant's instructions that the top email, which was positive about her, was not from her but from Yvonne Meadows, another of the Claimant's then line managers. The sender had been redacted because, as we understand it, those documents had been obtained via a Subject Access Request. When the unredacted email was provided it was clear that the sender was in fact Ms. Havard. We do not consider that to be damaging to credibility on the basis that the Claimant was giving instructions based on her understanding and there is nothing to say that she had seen the unredacted document previously and was giving deliberately misleading instructions.

48. We turn then to the evidence given on behalf of the Respondents. We begin with the evidence of Catherine Havard. We did not consider her to be a satisfactory witness. There were times when she simply failed to answer what might be seen as a difficult question and had to be pressed to do so. Her accounts at various times have also been inconsistent as to the medicine incident and much more so that the criticisms made of the Claimant in that regard. Particularly, we were of the view that over time Ms. Havard came to embellish her account of the 21st June 2019 so as to bolster her position that she should be believed over the Claimant about what had happened. In this regard over three months after she had submitted the Datix and when being interviewed she claimed that the Claimant had later seen her and admitted what she had done was wrong and apologised. That was not recorded in the Datix. We did not accept her evidence – which was unclear in all events as to timings – that this was either because the Datix was a high level document which would not record every thing because such an admission would be an important matter and we also did not accept that it was missing because she had completed it before the Claimant came to see her.

49. There were also discrepancies as to the timing of the medicine incident with regard to the accounts given by Ms. Havard. The Datix – which we remind ourselves is an important document and which accordingly should be accurate – set the time at 5.40 a.m. By the time of the investigation that had changed to 5.10 a.m. and neither of those times could have been accurate because as we shall come to when the incident occurred the Claimant was reading messages sent to her work iPhone which were sent at 4.34 a.m. and which accorded with the Claimant's account as to when she took her breaks.

50. We were also unimpressed with the evidence of Diane Eady. She was often argumentative during her evidence and stuck to the party line adopted by other witnesses for the Respondent that what the Claimant was alleged to have done was extremely serious. Particularly, she was unprepared to make what would clearly have been a sensible concession that the use by a nurse on duty of Entonox – which she accepted was a prescribed drug – was more serious than the Claimant taking a dose of a home remedy. That was not to her credit.

51. We turn then to the evidence of Tracey Wall. We did not find her to be an entirely satisfactory witness. She was not prepared to make much if anything by way of sensible concessions and who appeared to simply be sticking to script. Particularly, she was insistent in her evidence that what the Claimant was said to have done was gross misconduct when, as we shall come to, it was in fact a

minor breach of the Respondent's Homely Remedies section of the Medicines Policy. She was not prepared to make any concession about that issue and simply stuck to the Respondent's position that what the Claimant had been said to have done was so serious as to amount to gross misconduct when the evidence standing back and looking at matters in the round simply did not support that.

52. We were also not particularly impressed with the evidence of Tracey Robson. She appeared to us to be defensive in her evidence and failed on occasion to answer some more difficult questions in cross examination until pressed. She also stuck to the same party line as others that the Claimant taking a home remedy was an extremely serious allegation rather than a minor infringement of the Respondent's Homely Remedies Policy. Her evidence was also inconsistent. When asked about the fact that the Claimant had raised a grievance about race discrimination and that she should not have asked questions surrounding race in a second investigation interview with the Claimant, her evidence was that she was not aware of the grievance despite already having confirmed that she had been involved with the terms of reference for that complaint.

53. Finally, we deal with the evidence given by Sarah-Jayne Taylor. She could recall very little if anything that was of assistance to us and we could not be confident as to the reliability of her evidence as a result.

THE LAW

54. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

Discrimination relying on the protected characteristic of race

55. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13, 27 and 39.

56. Section 39 EqA 2010 provides for protection from discrimination in the work arena and the relevant parts provide as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a)as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c)by dismissing B;

(d)by subjecting B to any other detriment.

57. Section 13 EqA 2010 provides that:

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

58. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (see **Wong v Igen Ltd [2005] ICR 931**).

59. If the Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

60. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

61. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomura International Plc [2007] IRLR 246**:

"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only

to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like….. and available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

62. However, there must be something from which an inference could be drawn that the treatment complained of relates to the protected characteristic relied on. The fact that a person has that protected characteristic is not enough nor is a mere difference in treatment. Similarly, unreasonable treatment is not enough to establish that there has been discrimination (see **Bahl v The Law Society [2004] IRLR 799**).

63. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450.**)

Victimisation

64. Section 27 EqA 2010 provides that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

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

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

65. It will not be sufficient for a Claimant to simply use words such as "discrimination" for that to amount to a protected act within the meaning of Section 27 EqA 2010. The complaint must be of conduct which interferes with a characteristic protected by the EqA. There need not be explicit reference to the protected characteristic itself but there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the EqA 2010 applies (see **Durrani v London Borough of Ealing UKEAT/0454/2012**).

66. In dealing with a complaint of victimisation under Section 27 EqA 2010, Tribunal will need to consider whether:

(a) The alleged victimisation arose in any of the prohibited circumstances covered by Section 39(3) and/or Section 39(4) EqA 2010 (which are set out above);

(b) If so, was the Claimant subjected to a detriment; and

(c) If so, was the Claimant subjected to that detriment because they had done a protected act.

67. In respect of the question of whether an individual has been subjected to a detriment, Tribunals will need in relevant cases to consider the guidance provided by the EHRC Code (as referred to further below) and the question of whether the treatment complained of might be reasonably considered by the Claimant concerned to have changed their position for the worse or have put them at a disadvantage. An unjustified sense of grievance alone would not be sufficient to establish that an individual has been subjected to detriment (paragraphs 9.8 and 9.9 of the EHRC Code).

68. If detriment is established, then in order for a complaint to succeed, that detriment must also have been "because of" the protected act relied upon. The question for the Tribunal will be what motivated the employer to subject the employee to any detriment found. That motivation need not be explicit, nor even conscious, and subconscious motivation will be sufficient to satisfy the "because of" test.

69. A complainant need not show that any detriment established was meted out solely by reason of the protected act relied upon. It will be sufficient if the protected act has a "significant influence" on the employer's decision making (**Nagarajan v London Regional Transport 1999 ICR 877**). If in relation to any particular decision, the protected act is not a material influence of factor – and thus is only a trivial influence - it will not satisfy the "significant influence" test (**Villalba v Merrill Lynch & Co Inc & Ors 2007 ICR 469**).

70. In any claim of victimisation, the Tribunal must be satisfied that the persons whom the complainant contends discriminated against him or her contrary to Section 27 EqA 2010 knew that he or she had performed a protected act (**Nagarajan v London Regional Transport [1999] ICR 877**). As per **South London Healthcare NHS Trust v Al-Rubeyi (2010) UKEAT/0269/09** and **Deer v Walford & Anor EAT 0283/10**, there will be no victimisation made out where there was no knowledge by the alleged discriminators that the complaint relied upon as a protected act was a complaint of discrimination.

The EHRC Code

71. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The EHRC Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Constructive dismissal

72. Section 95 provides for a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

73. Tribunals take guidance in relation to complaints of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA**:-

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

74. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost always inevitably be repudiatory by its very nature.

75. The question of whether or not there has been a repudiatory breach of the term of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee is only relevant insofar as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

76. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no unconnected reasons for the resignation, such as the employee having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).

77. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions, including continuing to accept pay or a lengthy delay before resigning. In those circumstances, an employee may affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

78. Tribunals are also assisted by the guidance in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] I.R.L.R. 833** which requires consideration of the following matters when determining a complaint of constructive dismissal:

    (i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    (ii) Has he or she affirmed the contract since that act?
    (iii) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? and
    (iv) Did the employee resign in response (or partly in response) to that breach?

FINDINGS OF FACT

79. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim. We have inevitably therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaints before us. The relevant findings of fact that we have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundles before us (both the main hearing bundle and the Claimant's supplemental bundle) and which were before the Tribunal and the witnesses.

The Respondent and the commencement of the Claimant's employment

80. The Respondent is an NHS Trust operating hospitals in the Lincolnshire area. The Respondent operates Pilgrim Hospital in Boston ("Pilgrim"), Grantham District Hospital ("Grantham"), Lincoln County Hospital and County Hospital Louth.

81. The Claimant is a nurse of considerable experience. She had worked for the National Health Service for a number of years and for the Respondent for a considerable period of time. At the time of the events with which we are concerned she was a Band 6 nurse. A Band 6 is a relatively senior position. The Claimant describes herself as being of Black African origins.

Pilgrim Hospital and the Claimant's first grievance

82. The Claimant was originally based at Pilgrim. However, the Claimant experienced some difficulties at Pilgrim as a result of which she raised a grievance on 19th October 2015 against a colleague, Andrea McLeod and, albeit to a lesser degree, another colleague, Sharon Morris. That was a grievance about race discrimination and it is accepted by the Respondent that it amounted to the doing of a protected act.

83. The grievance was deal with under the Respondent's Dignity at Work Policy and the outcome was communicated to the Claimant by letter on 23rd May 2016 (see page 1157 of the hearing bundle). The majority of the Claimant's complaints, including those about racial discrimination, bullying and harassment, were not upheld but one was upheld regarding to telephone calls that had been made to the Claimant whilst she was off sick and which she had found stressful. However, no action was taken against the perpetrator of the calls as they had by the time of the outcome left the Respondent Trust.

84. Ms. Havard denied knowledge of that grievance. We did not accept that evidence. We deal with the reasons for that further below.

Transfer to Grantham

85. In early February 2017 the Claimant transferred to Grantham and was eventually settled into a vacancy for a Night Acute Care Support Services Coordinator. That was a Band 6 role within the Hospital@Night Team based within Ambulatory Care. The Claimant was one of three Hospital@Night Coordinators and their role was to pick up and allocate patient cases to doctors on the wards. It is an important role. All other Coordinators apart from the Claimant were white and there were no other black Band 6 nurses within that department. Historically, there had not been any black nurses within that particular team. There were, however, black nurses at Band 5 within the hospital generally.

86. The Claimant was, at that time at least, line managed by Jane Lyon, Catherine Havard and Yvonne Meadows. All were band 7 nurses. Ms. Havard has over 30 years of nursing experience. She is white. They in turn were line managed by a Matron which was originally John Boulton but at the material time which we are considering and after December 2018 or thereabouts was Diane Eady.

87. The Claimant was the only black member of staff on the team and the only black Band 6 nurse in the relevant department at Grantham. Ms. Havard had mentioned the vacancy which the Claimant came to be transferred into to other members of staff at Grantham in the event that they wanted to apply. All of those members of staff were white. We accept that Ms. Havard was not particularly impressed that the Claimant had joined the team when she had more than likely preferred others that she was familiar with to have filled the vacancy. Particularly, as we shall come to below, we are satisfied that she made at least one comment that the Claimant had only got the post because she had "played the race card".

88. We accept that there were some matters of concern in respect of the Claimant's work at Grantham and that there were some complaints made about her (see page 572 of the hearing bundle). However, whilst some issues were raised and the Claimant had made errors which were the subject of two earlier Datix reports, we were not taken to any evidence that the Claimant was being dealt with under any form of formal performance management or improvement plans and matters about timekeeping and the like appear to have been dealt with informally (see S28) and by way of setting objectives and monitoring competencies. We do not accept any suggestion that there were serious concerns about the Claimant's performance or that she was not able to perform her role competently. Particularly, the evidence of Diane Eady was that the Claimant was a good nurse. Our view was that comments made about competency and performance were designed only to paint the Claimant in a negative light given that any such matters in all events had nothing to do with the claim before us.

Concerns raised about Ms. Havard

89. On 5th May 2018 the Claimant raised concerns with Jane Lyon about Ms. Havard in which she referred to unconscious bias and victimisation (see S19 and S20). It is accepted by the Respondent that that complaint was a protected act. We are satisfied that the Claimant genuinely raised that concern because she was of the belief that she was being treated differently by Ms. Havard to the other members of the team. None of the other members of the team were black and we accept the Claimant's evidence that she was being treated differently.

90. That matter did not progress formally and was dealt with without escalation or any form of grievance process being commenced. We do not accept the suggestion of Ms. Havard that the Claimant had raised that grievance as a way of trying to scupper any performance management of her. We accept that the Claimant genuinely felt that she was being discriminated against and treated poorly.

91. Ms. Havard was told about the complaint by Jane Lyon. Although her evidence was initially that she could not recall if she had been told about the content that later changed to denying that he had been told about the allegations within the letter. We did not accept that evidence and we are satisfied that she would have been because it makes common sense that if someone is informed that a complaint – which Ms. Havard accepted was a serious complaint - has been made about them then as a matter of common sense they are also told about the basis for it because otherwise raising the matter is utterly futile.

92. After that complaint was raised Ms. Havard stepped back from the line management of the Claimant. Her evidence in her witness statement suggested that change had come about because the Claimant did not like having three line managers but her oral evidence was that that had in fact come about as a result of her upset about the complaint having been made about her. Again, that is indicative that she would have been aware of the substance of that complaint not just that there had been one made.

Ethnic mix within the Respondent at Bands 5 and 6

93. Following the first tranche of hearing dates some data was provided by the Respondent in reply to requests previously made by Ms. Mallick. That included information as to the ethnic mix of Band 5 and 6 nurses within the Respondent Trust. Of a total of 1,183 Band 5 nurses 314 are BAME at the material time. The position was very different in respect of the more senior Band 6 positions where only 28 out of 662 nurses were BAME with under 11 of those being Black British or Black African (see pages 272 and 273 of the hearing bundle). There were, therefore, comparatively a very small number of black Band 6 nurses within the Respondent Trust at the material time with which we are concerned.

94. Within the Hospital@Night team the Claimant was the only BAME member of staff when she first joined. The rest of the coordinators – of which there were 3 in total including the Claimant – were white. All of the Band 7 line managers were white. The Claimant's evidence was that at the end of 2017 another BAME member of staff joined the team and was promoted by Ms. Havard from Band 5 to Band 6. The Claimant described him as being of Mauritian descent and black. That changed to him being white in re-examination and what the Claimant had meant initially was that he was from an ethnic minority background. Having been subsequently provided with a photograph of the nurse in question it was clear that he was neither white nor black. His skin was darker than Ms. Havard's but much lighter than the Claimant's. He could not properly be described as being black as Ms. Havard asserted and is clearly of a different ethnicity to the Claimant.

The peptac incident

95. On 21st June 2019 the Claimant was on a nightshift. During her break she began to suffer from heartburn. That is a condition that the Claimant regularly suffers from and we accept her evidence that as a result she carries Gaviscon and other home remedies in her bag for that and other conditions that she suffers from.

96. We accept the Claimant's evidence that towards the end of her break she decided to take some Gaviscon from her bag because she was suffering with heartburn. She went out of the room where she was taking her break and into the ambulatory care treatment room which had a medicine cupboard in it. The main purpose of that medicine cupboard was to hold non-prescribed medicines which could be dispensed to patients or, as we shall come to, staff. It is common ground that the medicine cupboard was open when the Claimant was in the room and that she had her personal bag with her.

97. We accept the Claimant's evidence that she went into that room to obtain a cup and spoon to take her own Gaviscon and that she had firstly tried to go into the kitchen to get one but the door was locked. Unwisely as it came to transpire and as she now accepts, she took her bag with her into the room. Whilst Ms. Niaz-Dickenson points to the fact that the Claimant could just have drunk her medicine directly from the bottle we accept the Claimant's evidence that she did not consider that to be hygienic and that it was not something that she would have done.

98. It is not in dispute that Ms. Havard saw the Claimant in the room and that at the time that she saw her the drugs cupboard door was open. The Claimant only noticed that the cupboard doors were open when Ms. Havard drew that to her attention.

99. We prefer the evidence of the Claimant over that of Ms. Havard which, as we shall come to, was subject to change, about what happened during the incident in question. We accept the Claimant's consistent account that she had only been in the room to get a cup and spoon to take her own Gaviscon. As we accept that she carried that remedy with her in her bag there was no need for her to have taken anything from hospital stock. We accept the Claimant's evidence that once she had a cup she left the room and went into the one next door to take her own Gaviscon. We do not accept the evidence of Ms. Havard that the Claimant took hospital stock in front of her, that she had told her not to do so and that she had later admitted that she had done so and apologised.

100. As we shall come to, Ms. Havard gave a number of different times on which she said that the Claimant had taken hospital stock. The Claimant had obtained via a Subject Access Request and included within the supplementary bundle that she had prepared a nerve centre report (see S5) which showed that she had been sent a message about a catheterisation procedure on her iPhone at 4.34 a.m.

101. The Claimant's consistent account was that she was reading her messages, including that one, on her work iPhone when Ms. Havard walked into the treatment room. Ms. Havard's account was that that had definitely not happened and that in fact she had taken the Claimant's iPhone and bleep so that she was not disturbed on her break. The Claimant would not have had access to the iPhone when she was giving her account to the Respondent because she no longer had access to it after she left work on 21st June 2019 but her account was entirely consistent with the nerve centre report that she later obtained.

102. Given that position we prefer the Claimant's account that she still had her iPhone with her and that she was reading messages rather than looking into the open medicine cupboard when Ms. Havard entered the room and that it was her timing and not that of Ms. Havard that was accurate. Again, the reference which Ms. Havard made to the Claimant looking into the cupboard was not made within the Datix and not her consistent account throughout the disciplinary process. It chimes with her suspicion, to which we come further below, that the Claimant was doing something more sinister than taking a dose of peptac.

103. In this regard it is clear from her evidence and particularly that at paragraph 21 of her witness statemrnt that Ms. Havard considered that the Claimant was doing something more than taking a home remedy. She essentially thought that the Claimant was taking more medication or a more serious form of medication. We have not received any reasonable explanation why Ms. Havard would or could have thought that. As we come to further in our conclusions, we can only infer that it was the colour of the Claimant's skin that made Ms. Havard think that she was stealing medication or taking more serious drugs because of the negative stereotypical connotations about theft and drug use in respect of black people.

Datix report

104. Ms. Havard completed a Datix report into the incident. As we understand it a Datix report is an incident reporting form which is completed when something, either relating to a member of staff or a patient, occurs and which requires potential investigation.

105. The Datix completed by Ms. Havard appears in the hearing bundle at pages 504 to 512. The relevant part of the Datix describing the incident said this:

> *"I (Site Sister) was trying to locate the H@N Coordinator who had completed her break on AAC.*
> *I (Site Sister) checked the clean utility room on AAC and found the H@N Coordinator in there with the drugs cupboard open.*
> *The keys are kept in a safe in the clean utility room on AAC.*
> *She did not turn round when I walked in and I thought she was obtaining drugs for one of the wards.*
> *I (Site Sister) asked the H@N coordinator what she was doing in the drugs cupboard and she said she had heartburn and decided to try some peptic from the hospital stock.*
>
> *I informed her that it is against any hospital policy to take any form of medication from the hospital and that she should have informed me that he felt unwell and I would have referred her to OOH.*
> *She said she had never had it before and wanted to try it.*
> *I am concerned that she thought it acceptable to do this".*

106. The time on which the incident had said to have taken place was set at 05.40. That was incorrect. As we shall also come to further below, some of the Datix report was inconsistent with what Ms. Havard later came to tell the Respondent.

107. It was also inconsistent with her evidence that had the Claimant told her that she was unwell she would have provided her with some of her own home remedy which she told us that she kept in her bag in the event that any member of staff became unwell on shift and that in such circumstances she could provide them with ant-acids, paracetamol and the like.

108. The Datix was not, as would be usual practice, sent to the Band 7 on duty on the ward that night for review. Instead, Ms. Havard sent it directly to Emma Wild, a Site Duty Manager, who had in fact been transferred that day to a different hospital. Tracey Robson accepted in her evidence that it would be unusual for a Commissioning Manager to be based at a different hospital to the one where the incident had actually taken place.

109. Ms. Havard told us that that was because the Band 7 on duty that night, Louise Lai, was a new Band 7 and she did not think that she may be sufficiently experienced to deal with it. We agree with Ms. Mallick that this was on account of the fact that she wanted to push for the incident to be investigated and escalated and that Ms. Lai, as it was open to her to do, could have used the incident as a learning opportunity in the way that other Datix's that we have been taken to had been dealt with. Diane Eady accepted in her evidence that a Band 7 would have been able to investigate and deal with a Datix as part of their duties

and that there was no reason that Louise Lai could not have dealt with the Datix raised in respect of the Claimant by Ms. Havard, although that evidence later changed when Ms. Mallick suggested that it was not sent to her because of the potential that she would have dealt with it as a learning exercise as other members of staff had been dealt with. Diane Eady accepted, however, that anyone could have investigated a Datix and that would have been within the remit of a Band 7 nurse and that they could have closed it, perhaps after taking advice, and action any advice that was needed to the member of staff. Despite that, Ms. Havard selected a more senior member of staff, Emma Wild a Band 8a, to send it to.

110. In this regard, documentation disclosed by the Respondent during the course of the hearing following enquiries made by Ms. Mallick evidenced that a number of Datix's which had been completed in respect of a breach of the Medicines Policy had been closed by way of a simple discussion with the staff members concerned (see page 1211 of the hearing bundle). Whilst those were not the same circumstances as the Claimant, they involved medication errors with patients that we accept were potentially serious matters such as giving the wrong quantity of morphine. Ms. Eady accepted in her evidence that patient safety was "absolutely" more serious an issue than what the Claimant had been accused of. We agree wholeheartedly with that.

111. Even on the basis of what Ms. Havard said that she had seen the Claimant do, we accept that it was also fully open to her to have simply spoken to the Claimant about that and perhaps ask her to write a reflective piece because even on her account there had been a minor breach of the Homely Remedy policy. It was also open to Ms. Havard to have dealt with matters in that way under the Respondent's Disciplinary Policy which provides for an informal resolution of less serious matters of alleged misconduct. She could then have closed off the Datix herself without formal escalation but elected not to do so.

112. We should observe again that both Ms. Havard's evidence in her witness statement and her oral evidence was that she was not convinced that the Claimant had taken peptac. She referred in her oral evidence to not being sure that that was what the Claimant had taken and so she completed the Datix. There had been no prior incidents involving the Claimant and medicines and there was no reason for Ms. Havard to believe that the Claimant had done anything more, even on Ms. Havard's own account, other than take a home remedy from hospital stock. The real reason for completion of the Datix in our view and from that evidence was that Ms. Havard suspected that the Claimant had done something more serious than take a single dose of peptac. That is why she dealt with it as she did by later embellishing matters during the investigation so that they seemed more serious and escalating it to Emma Wild rather than Ms. Lai. As we shall come to further below, that "suspicion" was also something that came to infect the minds of others involved in the investigation and disciplinary processes.

<u>The preliminary investigation report</u>

113. On 24th June 2019 a preliminary investigation report was produced by Emma Wild and Maxine Skinner. It was a short report. It recorded that there had been a discussion with the Head of Nursing and Sheila Donaldson of Human

Resources ("HR") and that the Claimant was going to be redeployed to non-clinical practice. That was to be based within the operational centre answering telephones and undertaking other administrative work such as filing.

114. We have struggled to see why the Claimant needed to be removed from clinical practice. On the basis of the Datix all that the Claimant had done was something that, at worst, amounted to a minor breach of the Homely Remedies part of the Medicines Policy. There was no evidence that the Claimant was a risk to herself or to patients and, as we shall come to, far more serious incidents did not result in suspension from clinical practice.

115. The report also included the following entry:

> *"Phone call with MC on Friday 15.52 with Matron Skinner, who went though the incident asked if she understood which she clarified that she did and she confirmed she had taken it".*

116. "Taken it" was a reference to peptac belonging to the Respondent. In fact, that was misleading as a later interview with Maxine Skinner on 12th February 2020 confirmed. What Ms. Skinner had in fact said is that the Claimant had said that she had not done anything wrong, that she had taken it but that she had told Ms. Skinner that it was her Gaviscon. That was consistent with what the Claimant's account was and has been throughout. As we shall come to, oddly, Ms. Skinner's interview was omitted from a pack later presented to the disciplinary panel.

Next steps and redeployment

117. Following submission of the Datix the matter was escalated to Matron Diane Eady. She was on leave at that stage.

118. On the afternoon of 21st June 2019 Matron Maxine Skinner emailed a number of individuals, including Ms. Eady and members of HR concerning the Claimant.

119. The relevant parts of her email said this:

> *"Following the incident at Grantham with H@N band 6 MC regarding the taking of medication by the staff member. Tonight has been covered by another practitioner. Following discussion with HR we have made the situation safe, MC is not due back at work till Monday night. Emma can you pull a quick prelim together and discuss with Bridy/Becky/HR on Monday to see if we need to suspend prior to night shift on Monday or if we can re-deploy into non clinical duties whilst we investigate.*
>
> *Happy to assist Monday if anyone needs help/information or someone to suspend. I am in the process of trying to contact MC to inform her she does not need to attend her overtime shift tonight, let her know off* (sic) *the situation and how serious this is, ask her to write a statement whilst fresh in her mind and to let her know she will be contacted at work on Monday.*

I will continue to call MC to deal with this in person, I have pre-warned site at GDH[2] that if she does not answer before turning up to work they must not allow her to work and send her home. I have copied you in Rebecca due to being silver (sic) *in case MC wants to hear this from a more senior person."*

120. The reference to the Claimant not undertaking her shift that night was, as we understand it, that she had been due to undertake a bank shift.

121. On or around 25th June 2019 Lucy Parkes competed a suspension checklist in respect of the Claimant (see pages 517 and 1168 of the hearing bundle). It is the completion of that checklist that the Claimant contends amounted to her being suspended. That was her position as explained to us on day three of the hearing. That was not the case, however, as the Claimant was not suspended but was redeployed into non-clinical duties. That was confirmed to the Claimant by Emma Wild over the telephone and subsequently by letter (see page 516 of the hearing bundle). It was also reflected in the suspension checklist itself which was clear that immediate suspension was not necessary (see page 1169 of the hearing bundle).

122. The Claimant was informed of her redeployment into non-clinical duties by Matron Maxine Skinner on 24th June 2019. The Claimant was accordingly not suspended but we accept that she thought that she had been.

123. By early July 2019 the Claimant's other line manager, Jane Lyon, had become involved in the matter having already been informed over the telephone by Ms. Havard of what she says that she saw on 21st June 2019. There was an email exchange between herself and other individuals involved in the process during which Ms. Lyon referred to it being essential to have "clear joined up working in managing this issue". Ms. Lyon had not been present when the peptac incident occurred.

124. The reply to that communication also referred to a conversation around the Claimant's capabilities being managed as a separate process. That had not, however, been something that had previously been intimated as to capability management prior to the events of 21st June 2019.

Claimant's sickness absence

125. On 24th June 2019 the Claimant became unwell and certified herself as being unfit for work. She provided a Statement of Fitness for Work ("Fit Note") to the Respondent covering her absence until 15th July 2019. Thereafter the Claimant was on a period of pre-agreed annual leave in order to visit family in Zambia.

126. The Claimant indicated that she would be fit to return to work after 15th July 2019 and the intention was to redeploy her onto the non-clinical duties in the operational centre that we have already described above. However, on 19th August 2019 the Claimant emailed Diane Eady to explain that she was struggling with the situation and that she was not coping. She described herself as feeling broken, distraught, discouraged, disturbed, mentally tortured and frustrated (see page 541 of the hearing bundle).

[2] A reference to Grantham District Hospital.

Policy for Medicines Management

127. The Respondent has a Medicines Management Policy. Part of that policy relates to staff access to what are referred to as "homely remedies". The relevant part of that policy says this:

> ***"3.7.4. Staff access to 'homely remedies'***
>
> *There are occasions when staff develop minor ailments at work and the use of simple homely remedies will support them to remain at work and complete their duties for that shift. This policy does not replace the self-prescribing provision for medical staff described above.*
>
> *The intention of this policy is to support staff who start to develop a minor ailment at work to stay at work by enabling access to a single dose of a medicine that could otherwise be purchased from a variety of outlets, including community pharmacies (in such a context classed as a GSL or P medicine). Their use is for occasional, unexpected simple ailments where symptoms develop during a working shift and, had the member of staff being at home, they would normally have taken a similar simple remedy.*
>
> *The medicines listed in appendix B are those which have been approved to be available for ULHT employees under the conditions of this policy.*
>
> *If a member of staff develops a minor element at work (e.g. a simple headache) they should ask for a dose of the appropriate medicine from the senior manager from the ward/department who will, if appropriate, agree for the member of staff to self-administer a single dose of medication from hospital stock. Only a single dose of medication can be provided for immediate self-administration by the member of staff requesting the supply.*
>
> *A record MUST be kept by the senior manager authorising supply in a bound book which will be kept securely to maintain confidentiality, and which should be available for audit by appropriate senior managers.*
>
> *The policy is intended for single dose self-administration. If additional doses are required or the member of staff presents frequently for medication, or a medication not included in the list would be more suitable, he/she should be advised to obtain inappropriate medication from the community pharmacy or see their GP for further investigation, as appropriate.*
>
> *If a department does not routinely keep a 'homely remedy' listed in this policy they can requisition a single pack from pharmacy for the purposes of enabling this policy. Any medication must be stored according to the requirements of the Medicines Management Policy (Section 2: Ordering, Supply, Distribution and Storage) and pharmacy will verify that suitable provisions are in place before enabling such supply.*
>
> *Staff requesting medication under this policy should seek advice if they are unsure the medication is suitable for the condition being treated or if they have concerns about potential side effects, allergies or interactions with other medications they take.*

This policy applies to ULHT staff only here on duty and require the medication to remain at work. It does not cover supply to visitors, patients or their relatives".

128. Annex B of the policy makes it clear that Peptac/Gaviscon is an approved 'homely remedy' for staff (see page 462 of the hearing bundle). As we understand it from the evidence before us, Gaviscon is a brand name for peptac.

The Claimant's grievance

129. In late August 2019 the Claimant raised a grievance. The Respondent dealt with that under the Dignity at Work Policy (see pages 470 to 486 of the hearing bundle). The procedure to be used to investigate complaints under the Dignity at Work Policy is the same as that under the Respondent's Disciplinary Policy. Once the complaint has been investigated the complainant must be told the outcome as soon as possible and if there is found to be a case for disciplinary action that should be then dealt with under the Disciplinary Policy (see page 477 of the hearing bundle).

130. The Claimant's grievance said this:

"I am writing to report victimisation and racial discrimination by CH, one of my managers at Grantham Hospital. In UHL employ, I have been working with CH in the Hospital@Night team as an Acute Care Support Services Coordinator since 9 February 2017.

I have felt victimised and a negativity from CH since I joined the team. I raised concerns of victimisation on two separate occasions in 2018 (through JL and during an OH assessment). She has made offensive comments about me in the presence of staff.

I chose not to make it a formal complaint in the past and chose to resolve things informally because I felt that she was doing it unconsciously or due to unconscious bias. And I wanted to maintain good relationships and did not want to go through what I went trough (sic) *at Pilgrim hospital. The recent incident where she had made an allegation against me is, has left me no choice and I feel, is a continuation of her negativity and acts of victimisation which I feel I should report.*

May 2019. Second appraisal with JL where we discussed negativity which I have fought to overcome since joining the team.

June 2019. A situation arose from my requests for a prolonged annual leave (negativity)

20 June 2019. I worked with CH and she was very negative and hostile from start of shift to finish.

20/06/2019 CH discussed me inappropriately on the wards but did not talk to me directly or address any issues she had with me directly.

20/06/2019 I feel unwell and the incident which CH reports and gets me suspended happens (separate statement done).

Friday 21/6/2019 I receive a call from one of the matrons asking me about this incident that CH has reported.

Friday 21/6/2019 I get suspended from a scheduled overtime shift due to this allegation by CH.

Friday 21 to Monday 24 June 2019. I became very worried and anxious.

Monday 24 June 2019 Matron MS informs me that a decision has been made to remove my suspension and redeploy me to non clinical day duties instead.

24/06/2019 I contact the Trade Union for help.

25/06/2017 I report to the ops centre but I feel worsening anxiety and stress. I sign myself off sick.

25/06/2019 I receive a letter stating the allegation briefly. The letter states wrongly that the incident happened on 19/06/2019. I was not at work during this night. I worked on 20/06/2019. I have not had the opportunity to correct this record of events.

1 July 2019 I attend GP and get medication to help me sleep.

4 July 2019 I have been playing over and over what happened and feel that the incident with CH was to do with her negativity towards me.

Offensive comments made by CH including during the night that she made the allegation against me.

1. *Undermining me – I am not good enough for the job, when she is with me she is tells* (sic) *everyone that she is working alone.*
2. *Victimisation – I used the race card to get the job and that if I was interviewed I wouldn't have got the job.*
3. *Spreading false rumours – She told staff that I got someone fired from Pilgrim before I got redeployed to a Grantham.*
4. *Treated me inhumanely – when I reported to her that I had heart burn and that I was in agony she ignored me and did not help me when she could.*
5. *Spreading personal confidential information about me to staff on the wards.*
6. *Creating a situation of panic on the wards when I am on shift with her so that stuff* (sic) *feel "unsupported" by me and when she comes to me she pretends that everything is okay. Manipulating the environment so that she gets everyone on the wards sympathising with her when I am working with her.*

I am raising this as a grievance that I am experiencing victimisation and racial discrimination".

131. On 9th October 2019 Diane Eady spoke with the Claimant about the grievance. We accept that she acknowledged receipt of it. Whilst the Claimant was reluctant in her evidence to accept that there was acknowledgement of the grievance she

did accept when asked by the Tribunal that Ms. Eady had said in terms that she had received the grievance. The Claimant's concern to us appeared to be that she did not believe that her grievance was being taken seriously and that she had been expecting a formal letter of acknowledgment. To her, there was a contrast to her having by that stage received approximately six letters regarding the disciplinary investigation but nothing formal to acknowledge the grievance at that stage.

132. The initial way that Ms. Eady proposed to deal with the Claimant's grievance was that she and Ms. Havard enter into mediation rather than to deal with the matter formally (see page 558 of the hearing bundle). However, that mediation did not take place because despite having initially agreed to it Ms. Havard indicated that she no longer wished to participate when she discovered that the Claimant had brought Employment Tribunal proceedings against her. As we have already dealt with above that occurred in October 2019.

133. The Commissioning Manager in regard to the Claimant's grievance once the mediation was off the table was Diane Eady. She was not appointed until January 2022. There was then a delay in concluding the investigation into the Claimant's grievance and an investigation report was not produced until 17th April 2020 with interviews not being conducted until the month previously (see page 632 of the hearing bundle). Like the disciplinary proceedings against the Claimant that delay cannot simply be explained by the effects of Covid 19 given that the Claimant presented her grievance over 6 months before the start of the pandemic and all of those who were in fact interviewed in connection with the grievance were interviewed after the start of the pandemic and in its early stages. Whilst the evidence of Ms. Eady was that the Respondent may have been preparing for the pandemic and the pressure of day to day work may be responsible for the further delay she could not be certain about that and even then there is no explanation as to the delay after Ms. Havard withdrew from mediation.

134. Ms. Havard was interviewed during the course of the investigation. She referred to the Claimant having brought Employment Tribunal proceedings against her by that stage and her view that the grievance was motivated by her reporting of the medication incident. She denied having said that the Claimant had "played the race card" stating that she had never used that term in her life and that she hated it. That too was her evidence before us. No-one else who was interviewed was asked to comment on the "playing the race card" comment or whether they had heard it being said. We find that surprising.

135. The conclusion of the investigation report was that there was no evidence that Ms. Havard had either victimised or discriminated against the Claimant (see page 636 of the hearing bundle). That outcome was communicated to the Claimant by Diane Eady on 7th May 2020 (see page 638 of the hearing bundle) with the conclusion that there was no further action going to be taken in respect of the grievance and advising the Claimant of her right of appeal.

136. The Claimant exercised her right of appeal in a long letter dated 22nd May 2020. Amongst other things, the Claimant set out in her appeal that Ms. Havard had given different accounts in respect of the medication incident of 21st June 2019 and that she considered that to be an act of harassment and victimisation (see

page 641 of the hearing bundle). The Claimant's appeal was acknowledged by letter dated 27th May 2020 (see page 644 of the hearing bundle).

137. On the same date the appeal was sent to Karen Taylor, the Head of HR Operations to take forward. Matters stalled thereafter and the Claimant did not have any further contact about her grievance appeal until 7th August 2020 when she received contact from Chloe Thomas, an HR Operations Administrator who explained that arrangements were progressing for a hearing and proffering her sincere apologies for the delay (see page 662 of the hearing bundle). The Claimant's evidence was that the period of delay of which she complains in these proceedings are from 22nd May 2020 until she received the apology from Ms. Thomas.

138. Thereafter, there was a further delay arranging an appeal hearing. Matters were chased up by Sheila Donaldson who had been allocated as the HR point of contact in respect of the grievance appeal with Ms. Thomas who sent a letter to the Claimant a few days later on 23rd September 2020 inviting her to an appeal hearing.

139. The appeal hearing was arranged with Linda Keddie, a Deputy Divisional Nurse who had not previously been involved in the matter. That meeting was arranged for 7th October 2020 which was just shy of five months after the Claimant had appealed the grievance outcome. The Claimant submitted a number of documents ahead of the hearing but those were not provided to the Respondent until just over an hour before the meeting and Ms. Keddie unsurprisingly indicated that it was too late in the day for her to review them before the meeting commenced (see page 674 of the hearing bundle). She therefore emailed the Claimant a few minutes after she was provided with the documents by HR cancelling the appeal hearing and indicating that it would be re-arranged. It was subsequently rearranged for 27th October 2020 (see page 738 of the hearing bundle). Again, the Claimant submitted documentation too late for it to be considered despite having been reminded of the need to submit it at least five days in advance in the invitation letter.

140. The outcome of the appeal was communicated to the Claimant by letter dated 3rd November 2020. The Claimant's appeal was partially upheld in that it was acknowledged that there had been delays in the process and matters had not been dealt with in a timely way or in accordance with the Dignity at Work Policy. The remainder of the appeal, including the Claimant's assertions that she had been discriminated against by Ms. Havard, were rejected. Ms. Keddie apologised to the Claimant on behalf of the Respondent Trust for the part of the appeal which she upheld.

141. Despite the fact that the Claimant had included the 21st June 2019 incident in her grievance in which she had accused Ms. Havard of discriminating against her on the basis of her race, the grievance outcome was not before the decision makers in respect of the disciplinary case against the Claimant and there was no separate meaningful investigation before them about her contention that the colour of her skin had informed Ms. Havard's actions.

142. We should observe that the Respondent's Grievance Procedure requires a grievance meeting to be held within 15 days of the date of receipt of the

grievance and an appeal hearing to be held within the same timescale. The Claimant's grievance and appeal hearings were held significantly outside of those timescales. Ms. Robson accepted in evidence that those timescales were there to ensure that grievances were resolved within a reasonable timescale and that was necessary to ensure all there was minimum impact to all concerned.

143. However, we do take into account that by the time that the grievance and appeal came to be dealt with the UK was in the midst of the Covid-19 pandemic and that put an intolerable strain on the NHS and all of those working within it. Some delay was therefore inevitable by this point.

Knowledge of the Pilgrim grievance and playing the "race card"

144. There had in fact been an assumption that the Claimant would raise a grievance even before she did so. In this regard on 7th August 2019 Diane Eady emailed Jane Lyon with what was referred to as an update on the Claimant. The relevant part of her email said this:

"There is no information/update about any grievance so please don't be concerned – we as a team have followed all correct process to safeguard Mary but most of all to safeguard the patients so whatever pops onto our desk in the future we will address".

145. Again, there was a curious reference in that message to safeguarding the patients as, even on the Respondent's account, the Claimant had done nothing which could be categorised as having endangered patient safety.

146. We consider it more likely than not that the reason that there was a belief that the Claimant would raise a grievance was because of the fact that there was an awareness that she had raised a grievance about race discrimination whilst at Pilgrim and had made a complaint about discrimination previously to Ms. Lyon about Ms. Havard. Indeed, Ms. Havard accepted in her evidence that she believed that the Claimant would raise a grievance against her because of the 5th May 2018 letter that she had given to Jane Lyon.

147. In respect of the 2015 grievance, both Diane Eady and Catherine Havard had been attending task force meetings with Andrea McLeod who was the individual at Pilgrim against whom the Claimant had raised that grievance. That was in the context of proposals around standardisation of the Hospital@Night service which operated Trust wide and involved frequent meetings as was confirmed by Ms. Eady in her evidence.

148. Whilst both denied that they had spoken at all about that grievance and were not aware of it at that time we did not accept that evidence. It was known to those at Pilgrim that the Claimant had transferred to Grantham under the line management of Ms. Havard. It was also known to Ms. Havard from information provided by John Boulton (who was the Matron and line manager of the Band 7's around the time of the Claimant's transfer) that there had been some "issues" concerning her at Pilgrim.

149. At the time that Ms. Havard and Ms. Eady met with Ms. McLoud for task force meetings they were aware that the Claimant had been in her team prior to the

transfer to Grantham. Ms. Havard was also aware that the Claimant had raised a complaint about her by this time with Jane Lyon and as we have already found above she knew that that involved an allegation of race discrimination.

150. Against all that background it would therefore have been natural curiosity for the trio to have discussed the Claimant and the circumstances in which she had come to leave Pilgrim, particularly as there was an awareness that the Claimant had left because of "issues" there. We find it more likely than not that it was discussed that the Claimant had left after raising a grievance and that that grievance had concerned an allegation of race discrimination. We accept the Claimant's evidence that around this time Ms. Havard's attitude towards her changed. Whilst Ms. Havard denied that, we did not accept that evidence.

151. We are satisfied that that was in the knowledge of Catherine Havard because we accept the Claimant's evidence that she was told that Ms. Havard had made a comment that she had only got the role at Grantham as the H@N Coordinator because she had "played the race card". Although that was denied by Ms. Havard as not being a comment that she would ever make, we did not accept that evidence. Even though it was a serious accusation levelled at her in the proceedings this was not something that was dealt with in Ms. Havard's witness statement and, as we have indicated, we did not accept her oral evidence on the point. We find that the Claimant raised that within her grievance and before us because it is what she had genuinely been told and it was not an issue that she would simply make up. It would have been something that it would have been nigh on impossible because of the seriousness of such a comment for Ms. Havard to have admitted to the Respondent because the next step had the grievance been upheld as the Respondent was following their Disciplnary Policy was for a hearing to be convened in respect of Ms. Havard. Equally, there was also an obvious difficulty flowed for Ms. Havard in admitting to having made that comment before us and her evidence on the point we found to be self serving.

152. Although of lesser significance in our findings of fact, we accept the submissions of Ms. Mallick that this is, regrettably, a rather common phrase in modern language and certainly one that has certainly been used at least one before by someone in the Respondent Trust (see **Dr. T Ahmed v United Lincolnshire NHS Trust 2600767/2020).**

153. We are satisfied that Ms. Havard made that comment and that in doing so she was referring to the Claimant having transferred to the vacancy in Grantham because she had raised the 2015 grievance about race discrimination. We are satisfied that that was said against the backdrop of Ms. Havard having referenced the vacancy to others that she thought may be interested in it and her having formed the view – which she expressed in her evidence before us – that the Claimant's competencies were not at a Band 6 level. She had formed the view that the Claimant was not up to the job and the only reason that she had been given the role at Grantham was "because she had played the race card".

154. We also accepted the Claimant's evidence that Ms. Havard had told others that she had "got someone at Pilgrim sacked". Whilst that was factually inaccurate as we understand Sharon Morris to have left to join an agency, that does not affect what the Claimant came to hear had been said about her by Ms. Havard.

The formal investigation into the medicine allegations

155. The formal investigation into the allegations against the Claimant were assigned to Lucy Blakey.

156. There was a not insignificant delay in the formal investigation into the events of 21st June 2019 commencing because of a delay in receiving the terms of reference from Emma Wild (see page 533 of the hearing bundle). The terms of reference were eventually sent by Emma Wild to other members of HR, including Sheila Donaldson, for review on 9th August 2019 (see page 539 of the hearing bundle). We have not seen the original terms of reference only the final version after amendments had been made to it by Diane Eady. It remains unclear to us why Ms. Eady needed to become involved or what changes she made to the terms of reference. Her evidence was that this was probably some tweaking to the wording and making reference to a breach of the NMC Code of Conduct. If that was the case, then that was again seeking to make the situation appear more serious than it is fact was and, as we shall come to further below, although the allegation against the Claimant was found to be made out there never was any referral to the NMC.

157. Ms. Eady also involved herself in a review of the initial investigation report and recommending further interviews take place. We remind ourselves that she was Ms. Havard's direct line manager and also became involved in the Claimant's later grievance against Ms. Havard.

158. However, as to the original terms of reference there was a response from HR expressing concern that there had not been a police investigation and referral to the Respondent's internal fraud department. We cannot understand that reaction. Even on the Respondent's worse case as reported by Ms. Havard the Claimant had taken a small amount of hospital stock peptac in breach of the Respondent's Homely Remedies policy. All she had done even on that case was failed to ask Ms. Havard permission to take the remedy which surely would not have been refused in the circumstances. We can only infer from such an extreme reaction that there was suspicion – which was also in the mind of Ms. Havard and as we shall come to the disciplinary panel – that the Claimant had done something more serious and taken more than peptac. There was nothing at all to substantiate that suggestion we can only infer as we deal with in our conclusions that it was either a conscious or unconscious stereotypical assumption as to theft and drug use associated with the colour of the Claimant's skin.

159. There was a further delay after receipt of the terms of reference in the investigation properly commencing and by September 2019 the Claimant had still not been contacted. As she had done previously, she made plain to the Respondent via Diane Eady that the ongoing lack of contact from the investigating officer was causing damage to her health (see page 553 of the hearing bundle). Despite that, Ms. Eady did not press for the investigation to be expedited and we did not accept her evidence that she had done so. Particularly, as Ms. Mallick pointed out there was not one email from Ms. Eady pressing for the investigation to be concluded swiftly whilst there were a number of other emails updating Ms. Lyon and Ms. Havard about the position with the Claimant which in the circumstances was unnecessary. That was particularly the

case with Ms. Havard who had some time previously stepped back from line management responsibility for the Claimant.

160. The Claimant was finally contacted by letter of 1st September, but received on 9th September, to attend an investigation meeting on 16th September 2019. That hearing had to be postponed to 25th September 2019 on account of the unavailability of the Claimant's trade union representative.

161. Prior to the meeting with the Claimant Ms. Blakey had met with Ms. Havard on 17th September 2019 for an investigatory interview. Ms. Havard gave her account of the incident (albeit that this was wrongly said by Ms. Blakey to have occurred on 20th June rather than 21st June 2019). She gave a much more detailed account than had been set out in the Datix although we accept that to some degree the Datix is designed only as an overview to commence any necessary action/investigation.

162. However, there are key and important differences in the account that was given by Ms. Havard at this stage which were notably absent from the Datix and/or differences in the account which were as follows:

    a. The time of the incident was now said to be 5.10 a.m. rather than 5.40 a.m. as set out in the Datix;
    b. That she had had a verbal interaction with the Claimant and had said words to the effect "Mary you are not going to take that – meaning the peptac – are you?"
    c. That the Claimant had taken the medicine anyway;
    d. That she had been instructed to dispose of the rest of it; and
    e. That later than night she had made an admission that she knew what she had done was wrong. Ms. Havard's evidence in respect of this point was that she completed the Datix before the Claimant admitted wrongdoing but we do not accept that and at no time did she update the Datix with that information which it was open to her to do if that was correct. We did not accept her evidence that she did not know how to update a Datix given that she told us that she completes a number daily and she is a highly experienced Band 7.

163. We should observe that in respect of the timing of the incident, neither the account given in the Datix nor the account given at the investigatory meeting could be correct because the nerve centre records showed that the Claimant had accepted a patient allocation at 4.34 a.m. when she had already finished her break. That information was before the disciplinary panel as we shall come to below.

164. We accept that that further account embellished what had already been said by Ms. Havard and that it made matters appear more serious, particularly given the alleged admission that the Claimant had admitted that what she had done was wrong.

165. Jane Lyon was also interviewed on the same day as Ms. Havard. We find it difficult to understand why she was interviewed because she had not been on duty on 21st June 2019 with the Claimant and as such could not possibly have witnessed anything that would have assisted in ascertaining if she had taken

hospital stock or not. In fact, the only matters of substance that were dealt with by Ms. Lyon was about allegations concerning the Claimant's competencies, timekeeping and complaints from patients and staff. Those were not relevant matters that the investigation was concerned with. Ms. Robson could not assist us with the question of why Ms. Lyon was interviewed as part of the investigation despite providing HR advice to Lucy Blakey and could only say that line managers were often interviewed, and it may have been for her to provide background about training records or personal development reviews but again those were not relevant issues.

166. At the conclusion of the meeting Ms. Lyon was asked if it was possible to overdose from taking peptic. Again, that is concerning because it gives the impression that Tracey Robson of HR who asked that particular question viewed what it was alleged that the Claimant had done to be far more serious than it actually was. All that it had been alleged that the Claimant had done was take a home remedy. The question is indicative of the view taken at most stages that something more serious had happened than was plain on the face of it had actually occured.

167. We should observe that Yvonne Meadows was initially not interviewed as part of the disciplinary investigation, although she was as part of a later investigation into grievances raised by the Claimant but at the Claimant's suggestion. Ms. Meadows was the manager with whom the Claimant had a more positive working relationship and who had never been openly critical of her to that stage. As Ms. Robson's evidence was that line managers would often be interviewed it is difficult to see why Ms. Meadows was not interviewed as well as Ms. Lyon. Ms. Robson gave an account in her oral evidence, for the first time, that Lucy Blakey had had an "off record" conversation with Ms. Meadows who had nothing to add to the investigation. There is no note about that at all within the investigation report or elsewhere. When it was put to Ms. Robson by Ms. Mallick that there should be a record of that conversation her evidence was that if there was no certainty that she had been on shift matters might be dealt with without an investigatory interview. However, that was precisely the same issue for Jane Lyon who was not on shift either and which would have been known to Lucy Blakey and Ms. Robson at the time that they interviewed her.

168. We find it more likely than not that the investigation was looking for evidence to build the case against the Claimant rather than anything which might exculpate her. It was clear that Ms. Meadows felt positively about the Claimant being a part of the team (see page 635 of the hearing bundle) at that time albeit we accept that she did later make what might be perceived as slightly negative comments within the grievance investigation.

169. On 25th September 2019 Ms. Blakey met with the Claimant to discuss the allegation against her. During the course of that meeting the Claimant made plain that she had only been in the treatment room looking for a cup to take her antacid and that the Gaviscon that she had taken had been her own from her bag. She also explained to Ms. Blakey that she had told Maxine Skinner during the telephone call when she had first come to know of the allegation against her that it was her own Gaviscon that she had taken. That was, of course, accurate despite what had featured in the original investigation report of which Ms. Skinner was a co-author.

170. It was put to the Claimant that Ms. Havard had said that she had asked the Claimant to stop and that she was given a number of opportunities to put the medicine down but had failed to do so. The Claimant made it clear that that was not true. She equally made it plain that it was not true that she had approached Ms. Havard after the event saying that she had had a think about things and wanted to talk.

171. On 29th October 2019 Ms. Blakey sent her investigation report to Emma Wild for review (see page 593 of the hearing bundle). Again, there was delay in the matter being dealt with and the Claimant continued to express to the Respondent that her health was being impacted by not knowing what was happening with the investigation (see for example pages 594, 596, 597 and 598 of the hearing bundle).

172. Ms. Blakey sought a second meeting with the Claimant on 2nd December 2019. We find that she had been asked to do that by Diane Eady and we do not accept her evidence that that was not the case. Given that she had instructed Ms. Blakey to interview others on receipt of the investigation report – which we deal with below - we find it more likely than not that she also gave the instruction to re-interview the Claimant. Ms. Eady's evidence on this point also directly contradicted evidence that Tracey Robson gave which was that the reason for the second interview was at the request of Ms. Eady. The main topics of conversation involved the Claimant's medical conditions and her assertions that Ms. Havard was unfriendly towards her and that the colour of her skin was a factor. Despite the issue of skin colour being an issue for discussion, no finding was ever made about that in the disciplinary context.

173. On 31st January 2020 Diane Eady, who was by that stage the commissioning manager of the investigation because Emma Wild was on maternity leave, emailed Lucy Blakey to direct her to interview more witnesses as part of the investigation. Those were Maxine Skinner and Yvonne Meadows who, as we have observed above, had not initially been interviewed despite being one of the Claimant's line managers. Her email to Ms. Blakey also made reference to the possibility of undertaking a pharmacy audit of the Ambulatory Care cupboard over a period of six months prior to the incident involving the Claimant. Again, the only basis for that it appears to us was a suspicion that the Claimant had been taking more than a single dose of home remedy and that she had taken other drugs over a prolonged period. That must be the case given that it is common ground that there could be no audit of the amount of peptac used because that was stored in a bottle and not as identifiable units. We did not accept Ms. Eady's evidence, which was self serving, that the suggestion that any audit could have possibly uncovered that the Claimant had not taken anything because she had to accept when it was put to her by Ms. Mallick that peptac could not be audited because it was a liquid. Again, it was a wider suspicion that the Claimant had taken something more than one dose of peptac.

174. The email had been copied to Tracey Robson in HR who agreed with Ms. Eady's view. There was no basis to suggest that the Claimant had taken other drugs over a prolonged period of time and that was not what Ms. Blakey had been tasked with investigating. The suggestion was again indicative of a wider suspicion about the Claimant.

175. An updated investigation report was circulated on 23rd June 2020. In reply Tracey Robson made a comment that there would be a difficulty integrating the Claimant back into the team once the matter was concluded. She also made a later comment having "tidied up" parts of the investigation report referring to Ms. Havard having integrity as a manager and also querying with Sheila Donaldson if reference should be made to the fact that the Claimant had raised a previous grievance (see page 648 of the hearing bundle). In answer to questions from the Tribunal Ms. Robson said that she believed that the grievance that she was referring to was the 2015 grievance that the Claimant had raised at Pilgrim. That was of course a grievance concerning race discrimination.

176. Ms. Robson's evidence did not assist us as to why that previous grievance would have had any relevance to the allegations against the Claimant and there is force in our view in Ms. Mallicks position that the report was emphasising the integrity of Ms. Havard and seeking to find way of undermining the integrity of the Claimant by suggesting that it was in some way improper for her to have raised a grievance concerning race discrimination. That is certainly how the email at page 648 of the hearing bundle reads.

177. There was, in fact, nothing as to any allegations having been made against the Claimant within her 21 years service with the NHS yet nothing was said about her integrity within the report or at a later disciplinary hearing. That was in sharp contrast to how Ms. Havard was portrayed.

178. Ms. Donaldson advised Ms. Robson that the report should not include reference to the previous grievance.

179. The final investigation report also made the allegation against the Claimant appear more serious that it in fact was. Again, at worst on the Respondent's own case, the Claimant had breached the Homely Remedies part of the Respondent's Medications Policy whereas the investigation report raised an allegation of theft of hospital medication and whether there had been a breach of the NMC Code of Conduct (see pages 651 and 652 of the hearing bundle). The investigation had had input from both nursing staff and HR who would have been aware of the relevant policy – although oddly they did not have a copy of the policy to see the whole of the content during the investigation - and again was indicative of a wider suspicion that the Claimant had taken other medication or had done so on more than one occasion when there was no evidence of that.

180. The investigation report also referred to Ms. Havard's 30 year length of service, her being a well respected senior manager and that her integrity was not in doubt. No such comments were made about the Claimant's length of service, seniority or integrity and we remind ourselves that in the context of Ms. Havard's integrity and in support of that position Ms. Robson had been querying whether to raise the fact that the Claimant had raised an earlier grievance.

181. The report concluded that:

"Due to the conflicting accounts of the night in question I do believe there is a case to answer on the balance of probabilities".

182. It is not clear why the conflicting accounts led to Ms. Havard's account being accepted over that of the Claimant other than in respect of her length of service and perceived integrity. That is supported by an account that Ms. Blakey later gave at a disciplinary hearing when asked that question by the Claimant (see page 928 of the hearing bundle).

183. There was yet a further delay in arranging for the Claimant to attend a disciplinary hearing to deal with the allegations against her. In that regard she was not contacted until 19th November 2020 when she was directed to attend a disciplinary hearing on 3rd December 2020. That was over 16 months since the allegation had been made against the Claimant by Ms. Havard. Again, the allegation against the Claimant was phrased in a serious way as to alleged theft rather than a breach of the Home Remedies section of the Medications policy. The letter set out that if proven the allegation could amount to gross misconduct and result in the termination of the Claimant's employment.

184. The disciplinary hearing did not go ahead on 3rd December because the Claimant requested a postponement on the basis that her companion was unavailable. The hearing was rearranged for 22nd December 2020.

185. Prior to the hearing taking place a disciplinary hearing pack had been provided to the Claimant and to the panel. The pack contained the interview statements of the Claimant, Ms. Havard and Ms. Lyon. It did not contain the interview with Maxine Skinner which, contrary to the terms of reference, made it clear that the Claimant had always maintained that it was her own Gaviscon that she had taken and not anything from hospital stock.

186. The pack also included the Medicine Management policy which included the Homely Remedies section.

187. Ahead of the hearing the Claimant submitted a lengthy 57 page statement. Amongst other things the Claimant made plain that the account given by Ms. Havard was not accurate and set out a number of inaccuracies in the various accounts that she had given.

188. That statement was accepted by Tracey Wall, a Deputy Divisional Nurse, who was to chair the hearing. The Claimant also sent over a number of attachments, albeit late, in support of her position that it was her own mediation that she had taken. Ms. Wall accepted that she had seen those in her evidence. Those attachments included photographs of the Gaviscon that the Claimant carried in her bag and receipts showing purchase of such medication. Ms. Wall was made aware by the Claimant that she had long standing problems with her stomach which rendered it necessary for her to take medication such as Gaviscon.

189. As we have already observed, what was notably missing from the disciplinary hearing pack was the statement of Maxine Skinner. That came to light during the course of the hearing itself (see page 925 of the hearing bundle) and it was also identified that that omitted information contradicted other information within the hearing pack.

190. During the hearing questions were asked by the panel – who were all white - of both Ms. Havard and the Claimant. The questions asked of Ms. Havard were

mainly factual but also included whether she had ever had her integrity questioned in the past. There was no similar question asked of the Claimant despite her also being a nurse of long standing service and with a previously unblemished disciplinary record. As we shall come to further below, the integrity of Ms. Havard in contrast to the Claimant became a key issue for the panel as well as it had at the point of investigation.

191. During the course of the hearing the Claimant sought to address both the motivation for Ms. Havard making the allegation against her and the inconsistencies in the accounts that she had given at various stages. In relation to the former issue she was stymied by the panel from exploring what might best be described as Ms. Havard's motivation for making the allegation against her despite that clearly being a relevant issue. The focus was in our view on protecting Ms. Havard from what was viewed as inappropriate questioning by the Claimant.

192. After an adjournment the disciplinary panel discussed the issue and sanction. We understand those deliberations to have run to five days of discussions. The notes of those deliberations appear at pages 936 to 938 of the hearing bundle. The panel was critical of the Claimant for not having "reflected". Reflection is an important issue in the nursing world and matters are often dealt with by practitioners being required to complete reflective statements. However, that assumed that something had happened that the practitioner could reflect on. It is hard to understand how the Claimant could be criticised for not reflecting on something that she said that she had not done. In order to reflect, the Claimant would have had to have admitted conduct that she was clear that she had not committed. Ms. Wall accepted in her evidence that the Claimant had, however, reflected and shown insight that she should not have had her bag in a clinical area. It was not, therefore, on what the Claimant was saying and had said fair to say that she had not reflected.

193. The Claimant was also criticised for her alleged inappropriate behaviour towards Ms. Havard in the hearing. It is difficult to see how that is relevant to the allegation against the Claimant or how it could inform the panels decision making but it was clear from Ms. Wall's evidence in response to questions from Mr. Boghaita that that played a not insignificant part of their decision making. It also failed to recognise that the Claimant's health had been impacted both by the allegation – which she said was false and had been made for discriminatory reasons – and the delay in the matter being concluded and that would naturally affect the way that she presented. We accept Ms. Mallick's position that no thought was given by the disciplinary panel to any of that and that the Claimant was not ever asked at any point if she was alright which was in contrast to Ms. Havard who was asked if she was ok after the Claimant had questioned her.

194. What is also of note in the handwritten notes is the following entries:

- What is the risk?
- Who is lying?
- What is going on – something is going on.

195. The issue of risk was mentioned more than once. It is again difficult to see what possible risk the Claimant could have posed given that the allegation against her was that she had taken a home remedy for personal use. She could not possibly have posed any risk to herself, staff or patients and that reference and the reference to "something going on" was indicative of a suspicion that the Claimant had done far worse than that and Ms. Wall's evidence was clear that that was a concern to the panel. There was, however, in our view no basis for that wider suspicion and we did not accept Ms. Wall's evidence that there was a discussion between the panel and focus on the issue of unconscious bias. The handwritten notes which we have referred to above make no mention of that. We found that evidence to be self serving.

196. It was also clear that some of the panel were pushing for dismissal for gross misconduct (see page 938 of the hearing bundle). Given other sanctions applied to more serious acts of misconduct which we shall come to below, and the fact that all that the Claimant had done was a minor breach of the Home Remedies part of the Medicines Policy, that was also indicative that there was a suspicion that the Claimant had done more than simply take a home remedy.

197. Ms. Wall's evidence before us was also indicative of a wider suspicion about the Claimant on the basis that she had had her bag with her in the clinical room and that that "raises concern because it is irregular" and that it "concerned the panel". We cannot see why the Claimant having her bag in the treatment room – something which she had accepted was a mistake – was relevant to the question of whether she had taken home remedy from the Respondent or her own Gaviscon which was the only issue that the panel needed to decide. Again, we consider that it was indicative of a wider suspicion that the Claimant had been doing something else other than taking a single dose of a homely remedy.

198. The panel did not appear to us to take into account or reach any conclusions about the relationship between the Claimant and Ms. Havard – other than in a way which was biased in favour of Ms. Havard from what they considered that they had seen at the hearing - which is surprising given that a significant part of the Claimant's defence was that Ms. Havard had essentially set her up. Whilst Ms. Wall's evidence was that the panel were aware of that when making their decision, no conclusions about that are set out in the outcome letter and when asked about that issue by the Tribunal Ms. Wall's emphasis was again on the Claimant's presentation at the disciplinary hearing.

<u>Disciplinary hearing outcome</u>

199. The disciplinary outcome was delivered to the Claimant by letter dated 31st December 2020 (see page 939 to 944 of the hearing bundle). The relevant parts of the decision said this:

"After due consideration of all the points raised and mitigation presented the panel summarise their decision making as follows:-

- *The panel considered why a Senior Manager (CH) would submit a DATIX (which was read by the panel) so soon after events on the 21st June that was very clear and concise, if the event had not occurred.*

- *You did not demonstrate throughout the hearing that you had professionally reflected on the allegation and what you would or would not do differently if faced with this allegation or similar again.*
- *You did not show any reflective or structured insight into your behaviours or communication and how they may be perceived by others.*
- *You did not reflect to the panel any coherence of defence against the allegation.*
- *There were numerous times during the hearing that your values and behaviours were questioned by the Panel due to you over talking, interruptions and apparent inability to ask direct questions of the witness despite the Chair reminding you of this on more than one occasion.*
- *Your closing statement was patronising and at no time did you offer an apology for your actions.*
- *The panel were informed by you that you had raised a grievance (that was being managed separately through Trust Policy) regarding the relationship between you and CH.*
- *You did not explain to the panel why you had not informed your Line Manager of feeling unwell on your shift.*
- *The panel accepted that there had been a considerable delay in the investigation process, and indeed the case being heard by a panel.*
- *The panel considered over a 3 day period the differing accounts of what happened however on the balance of probability, the panel reached a unanimous decision that the allegation is upheld.*

In conclusion having considered all of the sanctions available within the Trust's Disciplinary Policy, I am writing to confirm the unanimous decision of the panel is to issue you with a sanction of Action Short of Dismissal as this action stops short of dismissal it will involve a contractual change and in this case you will automatically be down banded to a Band 5 Registered Nurse role within the Trust. This sanction will automatically include a Stage 3 Final Written Warning which will remain on your personnel file for a period of 24 months.

In conjunction with the above, the panel also recommend the following actions are completed:

- *You are allocated a Clinical Supervisor.*
- *You write a reflective piece on the intrinsic learning that you have gained during this process, this should be completed and submitted to myself by 31st January 2021.*
- *An action plan is agreed with your line manager to include self-awareness, conflict resolution and communication awareness techniques. A timescale will need to be agreed with your Line Manager.*
- *I will inform Michelle Harris (Deputy Chief Operating Office – Urgent Care) of the outcome so that she can lead on the redeployment process."*

200. The decision of the panel did not, according to Ms. Wall's evidence when asked by the Tribunal, make any finding on what the Claimant was saying in respect of her relationship with Ms. Havard and why accordingly she may have decided to

make the allegation. As we have already observed, that was a key part of the Claimant's case yet it was completely overlooked and is consistent with the way in which she was closed down in exploring that at the disciplinary hearing and the desire to protect the integrity of Ms. Havard.

201. The Claimant was advised of her right of appeal against the sanctions imposed which she later exercised. We shall come to the details of that appeal below. The Claimant accepted in her evidence that Tracey Wall had no knowledge of the 2015 Pilgrim grievance. Ms. Wall's evidence was that whilst she did not know about that particular grievance she was aware that the Claimant had made a complaint of race discrimination against Catherine Havard in her later grievance.

202. The demotion of the Claimant to a Band 5 had implications for her salary which would see a reduction from £33,779.00 per annum to £30,165.00 (see pages 975 and 976 of the hearing bundle).

203. Despite the fact that the Respondent had concluded that the Claimant was guilty of the allegation of theft of medication and had referred to that being a breach of the NMC Code of Conduct, as we have already touched upon no reference of the Claimant was in fact made to the NMC. There is force in the submission made by Ms. Mallick that that is likely because of the fact that this was a minor breach of the Homely Remedies Policy and would not have been a matter that passed the initial stages of consideration by the NMC.

204. The sanction imposed against the Claimant was not consistent with how other nurses had previously been treated. None of the other nurses whose information we were provided with by the Respondent by agreement following the first hearing dates which concerned medication errors or breach of the relevant policy were demoted. All of them were white (see pages 276 and 277 of the hearing bundle). There was, in fact, no need to demote the Claimant. Ms. Eady accepted in her evidence that the Claimant could have continued in the role of Nerve Centre Coordinator without any requirement to move medication and so if there had been any perceived "risk" in respect of such issues then that could easily have been eliminated.

205. The nurses to whom we have referred above included one notable example which was a Band 6 nurse who was sanctioned for the theft of medication. It is worth setting out the circumstances of that particular nurse. The details appear at pages 1195 to 1210 of the hearing bundle. The Band 6 is question was a midwife. During the course of one of her shifts she was witnessed sucking on a pipe dispensing Entonox. The Tribunal are aware, and it does not appear to be disputed, that Entonox is otherwise known as laughing gas and is used as pain relief during events such as labour. It has a relatively strong effect. It is medication that needs to be prescribed. The Band 6 was on shift at the time and had to be searched for when it was noticed that she was missing from the ward.

206. After she had been witnessed as sucking directly from the Entonox head she was described as glazed over and unstable on her feet and a view was expressed that she had not been looking after her patients. Due to concerns with how she was acting the Band 6 was sent home from her shift.

207. The misconduct was admitted and an explanation given that she had been in abdominal pain but that she realised that use of the Entonox amounted to theft. She also admitted that she had an unhealthy relationship with drugs.

208. The investigation report – which was not originally disclosed despite clearly being relevant - set out that the Band 6 had appeared to lack insight as to patient safety whilst under the influence of Entonox whilst on duty and that she had previously been witnessed slurring her words which was a side effect of the use of Entonox.

209. The sanction imposed was one of a 12 month final written warning, support with a three month non-clinical role, a supernumerary period when returning to her substantive position and named support and a point of contact. There was no demotion as part of that nor was a clinical supervisor appointed as it was with the Claimant.

210. When comparing their circumstances it is abundantly clear that the Claimant was not only treated much more harshly than the other Band 6 nurse but what that nurse had done – and which had actually been witnessed and admitted to – was much more serious than what the Claimant had been accused of. Indeed, Ms. Wall accepted in her evidence that the nurse would have been a danger to patients if under the influence of Entonox.

211. Whilst it is pointed out by Ms. Niaz-Dickinson that Ms. Wall was not the decision maker in relation to those other cases, she did of course have the benefit of Human Resources support whose role should have included ensuring that sanctions that were being applied were fair and consistent. Again, we consider that the sanction was indicative of a wider suspicion about the Claimant.

212. Ms. Wall accepted that she was aware that the Claimant had raised a grievance against Ms. Havard complaining of race discrimination although she could not say whether she became aware of the specifics and that it was a discrimination complaint at the time of dealing with the disciplinary decision or during the course of the appeal. However, we accept that she was not aware of the 2015 Pilgrim grievance against Andrea McLeod.

213. Whilst it is also pointed out that the Band 6 apologised for her actions whereas the Claimant did not, we remind ourselves that in the case of the use of Entonox the misconduct was openly admitted. That was not the case for the Claimant who consistently denied taking hospital stock and would have been apologising for something that she was saying that she had not done.

214. There was, in fact, no reason why the Claimant could not have continued in her Band 6 Nerve Centre Co-ordinator position because, as Diane Eady accepted in her evidence, the Claimant could have performed that role without needing to access and move around medication if there was a concern about that particular "risk". Demotion and re-deployment away from the Hospital@Night team would, however, conveniently eliminate Ms. Robson's concerns about any difficulty reintegrating the Claimant back into the team where Ms. Havard remained.

215. We do not accept the evidence of Ms. Wall that it was necessary to appoint a clinical supervisor to the Claimant or that it was some form of supportive measure. The Claimant had not made any medication or other error in relation to

a patient nor, as in the case of the other Band 6 nurse, had she been treating patients under the influence of drugs. She had taken, on the Respondent's own case, a single dose of a home remedy and there could be no reasonable suggestion that her practice was potentially impaired so as to need a clinical supervisor.

216. As we have already observed, there was a considerable delay in much of the stages of the investigation and disciplinary process. Despite the Claimant making it plain that her health was being made worse by the delays the outcome of the disciplinary process was not delivered until 31st December 2020 which was over 18 months after the Datix report by Ms. Havard.

217. That is said to be explained by annual leave commitments over the summer period and later delays (after March 2020) being caused by the Covid 19 pandemic and the pressure that that caused on the NHS. We do not accept that the investigation and the outcome had to be delayed to the extent that it was in these circumstances and it is worthy of note that investigations taking place around a similar time and during the midst of the pandemic were concluded much more swiftly than the Claimant's.

218. As a result of a request for information made by Ms. Mallick which was provided by agreement during the first tranche of hearing dates we were provided with details of the length of time to conclude disciplinary processes in respect of breaches of the Respondent's Medicines Management Policy. All of those nurses whose investigations concluded much more swiftly than the Claimant were white and the vast majority of cases were concluded within a four to six month period (see pages 277 and 288 of the hearing bundle).

219. Three of those cases occurred during the midst of the Covid 19 pandemic and were all concluded within four months.

220. The lengthiest case to conclude other than the Claimant's took a period of 14 months. That involved what was referred to as multiple medication errors and as such would doubtless have been a more complicated investigation than that involving the Claimant's circumstances.

221. We should also refer here to the fact that the Respondent had a Covid agreement to manage operations during the pandemic. Part of that agreement related to disciplinary and grievance matters (see page 996 of the hearing bundle). Amongst other things this provided for cases that had been paused the Respondent should consider pragmatic outcomes without the need for a formal process which was said to be consistent with learning and culture principles, the seriousness of the case, getting staff back into work and the health and wellbeing of the employee. That was not considered for the Claimant despite the fact that what she had been said to have done amounted to a minor breach of the homely remedies policy, she was an experienced nurse who could have been of assistance in a clinical environment during the pandemic and she had expressed on a number of occasions how the delays in concluding matters were impacting her mental health.

222. Whilst much has been made of the fact that there was delay to investigate the Claimant's grievance which it is said had to be done before the disciplinary

because, in Ms. Robson's words, it may "shed light on the investigation itself" if it was upheld, that cannot have been a particularly important issue because the outcome was never before the disciplinary panel who also made no findings on the Claimant's contention that Ms. Havard had been motivated by her race.

223. We find it very concerning that the investigation into what was a very straightforward issue – whether the Claimant had taken hospital stock or her own Gaviscon and involved only two witnesses – became so protracted. That is all the more so when the Claimant was signed off work because of her mental health that she was making plain that her health was being exacerbated because of the delay.

Redeployment into a Band 5 role

224. We accept the evidence of Ms. Wall that once she and the panel had communicated the sanction to the Claimant that was the end of her involvement save as for any role she might be required to play in respect of an appeal against their decision. That was clear from her outcome letter to the Claimant. She communicated the outcome to the Claimant's line management and it was then a matter for senior management to identify redeployment opportunities and raise those with the Claimant.

225. That did in fact not happen before the Claimant's resignation. It was unclear to us exactly who was supposed to be responsible for looking into and arranging redeployment opportunities but ultimately the witnesses before us denied any responsibility for that position. However, whilst no opportunities were raised with the Claimant between the outcome of the disciplinary on 31st December 2020 and her resignation over 6 months later, during this time she remained off sick and without a specified date on which she was looking to return to work. She was also in contact with Jamie Hodgkiss and as we shall come to further below who was setting up meetings with her with a view to looking at such a return to work.

Appeal against the imposition of the disciplinary sanction

226. On 20th January 2021 the Claimant submitted a long letter of appeal against the decision of the disciplinary panel. The letter made plain that the Claimant denied the allegations that had led to the disciplinary sanction and raised her belief that she was being victimised because she had raised complaints of discrimination.

227. An appeal hearing took place on 11th February 2021 which was chaired by Lisa Pim. Again, reference was made by the appeal panel to the Claimant being a "risk to others and the organisation". That was also indicative of a view that there was something more to the matter than the allegation made which, again, amounted only to a minor breach of the Homely Remedies part of the Medication Policy.

228. The appeal outcome was sent to the Claimant on 15th March 2021. The panel dismissed all of the Claimant's grounds of appeal and in fact went a stage further and recommended that a separate investigation be conducted into what was referenced as the Claimant's integrity and probity. Much was made as to the

integrity of Ms. Havard during both the disciplinary and appeal processes and the two were treated very differently in that regard.

229. The relevant parts of the outcome letter said this:

"Based on the information available to me, I believe the Disciplinary hearing panel were fairly and reasonably commenting on the evidence presented. Whilst you may disagree, this is their perception in the absence of evidence of your apology or rationale of your actions, I believe this was a logical conclusion. I do not uphold this line of appeal.

After due consideration of all the points raised and mitigating circumstances, the Disciplinary Appeal Panel were satisfied that the Disciplinary Panel paid due regard to all the evidence and mitigation presented on the day of the Disciplinary Hearing. It is therefore the decision of the Disciplinary Appeal Panel to uphold the management case do not uphold your appeal on the grounds that there were no evidenced grounds to change the decision of the original hearing panel.

Nevertheless, similar to feedback from the disciplinary panel I found the delivery of your version of event and summary of your grounds of appeal to not only be incoherent and difficult to understand, but there were inconsistencies in your evidence, as well as your counter claims towards Cathy. This continuation of behaviour has led me to conclude that you have not acted with integrity and probity, which is exacerbated by such conduct happening whilst having a live warning on record. Therefore, whilst I believe this formal process has now been concluded, it is my recommendation that a subsequent, independent investigation is pursued into your integrity and probity".

Referral to occupational health and welfare meetings

230. Prior to the disciplinary and appeal outcomes the Claimant had been referred to Jane Lyon to occupational health as a result of her ongoing ill health absence. A report was produced by a consultant on 16th December 2019. The report opined that the Claimant was not at that time fit for work and made it plain that the investigatory process was impacting her. The relevant part of the report said this:

"The single most important thing to potentially bring about improvement in her health would be to conclude the outstanding management matters. It may be very difficult for her to get fully better and return to work until that has occurred. Some talking therapy might help, but I very much doubt it would bring about a substantial improvement without resolution of outstanding managerial matters."

231. Despite it again being plain to the Respondent that the Claimant's health was being impacted by the delays in the ongoing process, nothing was expedited and it took almost a further year from the report being sent for the Claimant to be invited to a disciplinary hearing.

232. Despite being the Claimant's line manager, Ms. Lyon indicated that she wanted to step away from dealing with the Claimant's sickness absence and the issue of her redeployment during the course of the disciplinary process. Prior to stepping back from the role Ms. Lyon had had one welfare meeting with the Claimant.

233. Ms. Robson was also involved in the management of the Claimant's sickness absence and she asked Jamie Hodgkiss if he would be prepared to have welfare meetings with her after Ms. Lyon stepped back from dealing with that. She emailed him on 4th August 2020 asking him about dates when he could attend a face to face meeting with the Claimant.

234. There were formal welfare meetings with the Claimant on 21st August 2020, 8th September 2020 and 23rd October 2020 (see pages 665 to 667 of the hearing bundle). Again, the Claimant made plain that the resolution of the investigation was an important issue to aid her recovery. The Claimant's position in respect of this meeting as set out in the list of issues was that she made it plain on 23rd October that she wanted to return to work but that she was told by Mr. Hodgkiss that it would be better to wait until after the conclusion of the disciplinary process. That was not within the Claimant's witness statement and we heard no direct evidence about it. We have seen a handwritten note of the meeting at page 740 of the hearing bundle which contains a reference to "If resolved – can return to work". However, we do not know who said that and in what context and absent direct evidence we are not able to conclude that the Claimant was able to return to work but was prevented from doing so by Mr. Hodgkiss.

235. There was a further meeting arranged for the purposes of welfare and absence issues but the Claimant did not attend that as she had not received the invitation given that it was sent to her work email which she was not accessing. No attempt was made to telephone her to discover the reason for non-attendance and if she was able to join although there was no reason to assume that she had not received the invitation as it had also been sent by post.

236. Ms. Robson agreed in her evidence that there would usually be regular contact with a member of staff who was on long term sickness absence and that there would generally be a meeting at least once per month. There is only evidence of the Claimant having had three formal welfare meetings within the 18 month period of her absence and one prior discussion with Ms. Lyon before she stepped back from dealing with matters.

237. The Respondent wrote to the Claimant on 24th May 2021 inviting her to a long term absence meeting on 7th June 2021 under the managing attendance policy (see page 1008 of the hearing bundle). The Claimant emailed Jamie Hodgkiss on 18th June 2021 to say that she had only just read the letter that day. It had been sent to her work email address which she explained that she accessed rarely because of the impact on her mental health. Whilst we accept that it had also been sent by post we also accept that the Claimant did not receive it. She referred to being in a very bad state mentally, that she had written to HR about who her manager was for the purposes of redeployment and to approach for an occupational health referral to facilitate a return to work and that she had been put as absent on sick leave until June 2022 and her salary had changed. She asked for details of who to speak to about that.

238. Mr. Hodgkiss replied the same day apologising that the Claimant had not received the invitation letter, setting a new meeting date of 28th June 2021, advising that the salary change had been done on his instruction but that it could be discussed further in the meeting and advising her that her new manager would be Kate Shaw. He also advised the Claimant that Ms. Shaw was away for

the next two weeks but that he could arrange a meeting with her on her first day back so that she could see what support the Claimant needed and take matters forward.

239. That meeting did not take place on 28th June 2021 as the Claimant resigned before that point and clearly in those circumstances there was nothing that could be progressed in terms of a return to work. We come to the circumstances of th resignation further below.

The Claimant's resignation

240. On 25th June 2021 the Claimant emailed a letter of resignation to Jamie Hodgkiss. It is a lengthy letter running to six closely typed pages and so we do not set out the content in full but the Claimant made the following points as to why she was terminating her employment with the Respondent:

(a) That she had been redeployed during the investigation into the Datix report when there was no reason that she could not have remained in post;

(b) That the delay in dealing with the disciplinary had been detrimental to her health and in breach of the disciplinary procedure;

(c) That there had been a flawed investigation and disciplinary hearing and that she had been subjected to a number of sanctions as a result which were disproportionate;

(d) That the actions of Ms. Havard had been contrary to the Home Remedies policy in what she had reported;

(e) That a white nurse would not have been subjected to disciplinary proceedings in respect of the same allegations;

(f) That the allegation and the decision to proceed to a disciplinary may have been subconscious discrimination;

(g) That Linda Keddie had made comments in a grievance hearing that the Claimant had called colleagues racist when she had not done so and that that was offensive and victimisation;

(h) That she had made friends and that a nurse had commented that she initially did not like her because of what she had been told and that she had appeared in a Band 6 role out of nowhere but that her perception had changed;

(i) That she was aware that Jane Lyon had made negative comments about her when she received a response to a subject access request when she thought that they had a positive relationship;

(j) That negative rumours had been raised about her which had an effect over staff trusting her;

(k) That Jane Lyon was biased against her on the basis of her race or that she had raised complaints about discrimination and that she had building negativity and sending offensive emails about her;

(l) That she had been marginalised and treated less favourably by Ms. Lyon;

(m) That she had explained that she understood the medications policy and that mitigating factors had been ignored and irrelevant ones had been taken into account;

(n) That there had been a failure to communicate with her about where she was to be redeployed as a Band 5 nurse;

(o) That there had been a failure to provide her with support during her sickness absence;

(p) That Mr. Hodgkiss had said when the Claimant wanted to return to work at a meeting on 23rd October 2020 he had told her that she should await the outcome of the disciplinary and grievance outcomes;

(q) That that comments had made the Claimant feel stress and anxiety and obligated her to obtain Fit Note and that she had felt that she was not wanted or needed;

(r) That she should have been placed on special leave when her sickness absence came to an end which should have been full pay but instead she should had been placed on nil pay;

(s) That she had written to Tracey Robson querying her salary entitlement but that was not explained to her;

(t) That there had been delays in the disciplinary appeal process even after the Dignity at Work outcome acknowledged that there had already been delay;

(u) That the disciplinary appeal outcome had not been processed in the ten days that were required under the policy and the outcome did not address the issue of the Claimant's salary entitlement;

(v) That the appeal panel had made further unfair conclusions and recommendations;

(w) That a decision was communicated to have changes was made to her salary to reduce it before the appeal outcome was to hand;

(x) That she was not told who her line manager was; and

(y) That she was not being paid and she had not been redeployed even though the Respondent was aware that she was available for work on 25th April 2021.

241. The Claimant identified the last straw that prompted her resignation as being that she had seen that the Respondent's electronic staff record had recorded her as being absent until June 2022. The Claimant raised that she did not believe that

that was an error because she contends that it coincided with an indication given by an Employment Judge in these Tribunal proceedings as to when the hearing may be listed and that information was being fed back to HR and she referenced her view that this was indicative of the fact that the Respondent did not intend to redeploy her until after the conclusion of the Employment Tribunal proceedings that she had commenced.

242. The Claimant also referenced her belief that she had been treated less favourably because of her race and that she had raised a complaint and that if she had been a white employee then none of the things that had happened to her would have happened. She equally raised her belief that the failure to provide her with special leave, provide her with redeployment details and the failure to have welfare contact days was as a result of her having commenced Employment Tribunal proceedings.

CONCLUSIONS

243. Insofar as we have not already done so within our findings of fact above, we deal here with our conclusions in respect of each of the complaints made by the Claimant. We have adopted the same numbering system as appears in the list of issues for ease of reference.

Claim number 2603006/2019

Allegation 4.1

244. The first complaint with which we need to deal in these proceedings is the allegation that was made by Catherine Havard of theft against the Claimant in respect of the peptac incident on 21st June 2019. That is pursued as an allegation of direct discrimination and of victimisation.

245. We deal firstly with the allegation of direct discrimination. We deal firstly with the question of whether the Claimant was subjected to a detriment. We have little hesitation in concluding that she was. The raising of the Datix report in the terms of that it was led directly to disciplinary proceedings being commenced against the Claimant and a serious sanction being imposed against her. Theft is also a serious allegation which has reputational consequences.

246. We then need to consider whether the Claimant has proved facts from which we could infer, absent a non-discriminatory explanation from the Respondent, that Ms. Havard acted as she did because of race.

247. We are satisfied that standing back and looking at matters as a whole there are such facts which are as follows:

a. That Ms. Havard had used the term "played the race card" which suggested a negative view of the Claimant because of race;

b. That she treated the Claimant differently to other members of the team, none of whom were black;

c. That she embellished the account that she had given between the Datix and the investigation to suggest that the Claimant had apologised and accepted wrongdoing in order that her version of events would be preferred;

d. That her evidence was that she was suspicious that the Claimant had taken something other than peptac – what she referred to as a "more significant drug" (see paragraph 21 of her witness statement). There was no reasonable basis for that suspicion on the basis of the account that she gave to us other than a stereotypical link between black people and drugs and theft. Particularly, the Claimant had a clean disciplinary record and had clearly explained that she had taken her own Gaviscon; and

e. That she could have elected to have dealt with the matter informally by way of words of advice and reflection and as a learning opportunity but chose to escalate the matter for investigation and specifically selected the manager that she wanted to escalate it to in order to ensure that it was dealt with formally.

248. We are satisfied that no allegation of theft would have been made against a white nurse in the same circumstances as the Claimant and that the reason for a greater suspicion of her and that she had been doing something more serious than taking a home remedy was because of her race and the stereotypical link between black people, drugs and theft.

249. The burden therefore passes to the Respondent to persuade us of a non-discriminatory explanation for the allegation of theft having been made against the Claimant. We are not satisfied that the Respondent has discharged that burden. The Claimant had not committed theft or gross misconduct. The most that she had done on the Respondent's case is committed a minor breach of the Homely Remedy policy of which Ms. Havard was aware. We do not need to determine if Ms. Havard's actions were conscious or unconscious but we do need to be satisfied by the Respondent that the Claimant's race played no part in the treatment afforded to her. We are not satisfied of that. This allegation is therefore well founded and succeeds.

250. We turn then to the complaint of victimisation. There can of course by no victimisation if the alleged perpetrator was not aware of the protected act that is being relied on. For the reasons that we have already given above, we are satisfied that Ms. Havard was aware of the 2015 Pilgrim grievance and that when she made the comment to others that the Claimant had "played the race card" that was plainly what she was referring to. No alternative explanation has been provided, only a denial as to the comment and we have found that denial not to be made out.

251. We are also satisfied, for the same reasons as in respect of direct discrimination, that Ms. Havard's actions amounted to a detriment to the Claimant.

252. Again, we are satisfied that the burden of proof is reversed on the basis that we accept that Ms. Havard used the term "played the race card" when referring to how the Claimant came to move from Pilgrim. She can only have done so in the

knowledge that the Claimant had raised a grievance about race discrimination and it is clear from the words used that she viewed that in a negative way with the Claimant somehow unfairly extracting an advantage.

253. Again, for the same reasons as in respect of the direct discrimination complaint we do not accept that the Respondent has discharged the burden of establishing a non-discriminatory reason for treatment complained of and as such the complaint of victimisation is well founded and succeeds.

254. This complaints of direct discrimination and victimisation are therefore well founded and succeed.

Allegation 4.2

255. The second allegation is the Respondent's failure to conclude the disciplinary investigation swiftly or at least within a reasonable period of time. We start with the complaint of direct discrimination and by considering whether the delay amounted to a detriment to the Claimant. We are satisfied that it was. The documents to which we have referred above made it plain that the Claimant's mental health was being severely impacted by both the allegation and the continued delay in relation to any outcome being delivered. It is plain that having a disciplinary investigation in relation to alleged theft and gross misconduct hanging over you for 18 months would amount to a detriment.

256. Again, standing back and looking at the whole picture that then brings us to the question of whether the Claimant has proved fact from which we are able to draw an inference that the delay was due to race. We are satisfied that we are able to draw that inference for the following reasons:

    a. That far more complicated investigations than the Claimant's circumstances – which involved a simple allegation and in reality the need for only two witnesses to be interviewed – were concluded within a very much shorter timescale and all involved white members of staff. That included ones that took place during the pandemic and which were concluded in approximately a quarter of the time that it took to conclude the Claimant's case;

    b. The Respondent failed to comply with their own disciplinary policy in respect of the timescales for completion of what was, again, a very simple investigation;

    c. The Claimant made it plain that her health was suffering considerably as a result of the delays yet the Respondent failed to take no action at all to expedite matters; and

    d. That the Respondent's own Covid Agreement could have been implemented to deal with the matter without the need to progress formally and in view of the delay.

257. We are satisfied for those reasons that a white nurse against whom a very simple allegation involving only two people would not have had to wait for 18 months for a disciplinary outcome.

258. We then to consider if the Respondent has provided us with a non-discriminatory explanation for that delay. The Respondent relies on the effects of the Covid-19 pandemic and the delay occasioned by investigating the Claimant's grievance. However, we do not accept those explanations. Firstly, in relation to the issue of the pandemic as we have set out above the Respondent was able to conclude much more complex investigations within a much shorter timescale during the pandemic. Secondly, whilst it is true to say that there was a grievance investigation during the course of the disciplinary process that was clearly not an issue that needed to hold up the process given that the outcome was never before the disciplinary panel and they never reached any conclusion in respect of the Claimant's contention that the allegation made by Ms. Havard were motivated by race.

259. The Respondent has therefore not discharged the burden on them and for all of those reasons this complaint of direct discrimination is well founded and succeeds.

260. We then turn to the complaint of victimisation. Other than Diane Eady who had relatively minor part to play in respect of the disciplinary proceedings and we do not find took any steps to delay matters, we were not satisfied that any of those who were materially involved had any knowledge at the time that the Claimant had raised a grievance in 2015 at Pilgrim. That being the case if there was no knowledge of the protected act the Claimant cannot have been subjected to victimisation because of it and this part of the claim fails and is dismissed.

Allegation 4.3

261. The next allegation is the failure to acknowledge receipt of the Claimant's grievance dated 19th August 2019 or to acknowledge receipt of it within a reasonable period of time. This allegation fails on its facts because it is not in dispute that Diane Eady verbally acknowledged the grievance shortly after it was raised.

262. However, the Claimant's position in her evidence was that she wanted a written acknowledgement of the grievance because it was a contrast to being written about in respect of the disciplinary proceedings. That was not the way that the allegation was framed but even if it had been the failure to acknowledge the grievance in writing did not in our view amount to a detriment. The Claimant knew that it had been received and the way in which Ms. Eady proposed to deal with it by way of suggesting mediation. Whilst that did not come about because of Ms. Havard's refusal to participate after she discovered that the Claimant had issued Employment Tribunal proceedings against her, the Claimant was placed at no disadvantage because she did not have a written acknowledgment.

263. However, we have nevertheless gone on to consider if we had found the failure to have acknowledged the grievance in writing to amount to a detriment whether there were any facts from which we could conclude that race played a part in that. We were not satisfied that there were any such facts and for all of those reasons this allegation fails and is dismissed.

Allegation 4.4

264. This allegation is the failure to conclude the grievance investigation dated 19th August 2019 within a reasonable period of time.

265. We remind ourselves that the Claimant raised her grievance on 19th August 2019. The grievance investigation report was not completed until 17th April 2020 and that was not communicated to the Claimant until 7th May 2020. The process therefore took just over eight months to conclude. The Respondent's grievance policy provides that the process should be concluded within 15 working days although in our collective experience that appears to be somewhat optimistic.

266. We begin with considering the complaint of direct discrimination and the first question is whether the Claimant was subjected to detriment. We are satisfied that the delay in investigating the grievance did subject the Claimant to detriment because she did not have an outcome in respect of serious issues that she had raised within a reasonable time frame.

267. We turn then to the question of whether the Claimant has proved facts from which we could conclude that the delay was because of her race. We are not satisfied that there are any such facts. Whilst the timescale was not in accordance with the Respondent's policy that in our view in the circumstances is not enough and unlike the disciplinary investigation we did not have any information as to the length of time that other grievances had been completed in respect of white members of staff during a similar period of time. As such the burden of proof does not in these circumstances pass to the Respondent. This complaint of direct discrimination therefore fails and is dismissed.

268. We consider separately the complaint of victimisation. Again, for the same reasons as in relation to direct discrimination we are satisfied that the delay in concluding the grievance did subject the Claimant to detriment.

269. We turn then to consider whether the Claimant has proved facts from which we could conclude that her 2015 grievance at Pilgrim was the reason for that treatment. We are not satisfied that any such facts have been proved and as such the complaint of victimisation also fails and is dismissed.

Claim number 2600355/2021

270. There are four allegations of both direct race discrimination and victimisation within the second claim. We take each of the in turn again adopting the same numbering system as within the list of issues.

Allegation 4(v)

271. The first allegation is said to be the inordinate delay in the handling of the Claimant's grievance appeal with the outcome being communicated on 3rd November 2020. The Claimant's evidence as to the period with which that delay is said to be concerned is between 22nd May 2020 when she raised her appeal until 7th August 2020 when she received an apology from Chloe Thomas of HR.

272. In respect of both the complaints of direct discrimination and victimisation we are satisfied that the delay over that period did cause the Claimant detriment because it prolonged her receiving any outcome to her appeal and made it appear to her that the matter was not being taken seriously.

273. However, we are not satisfied that the Claimant has shown any facts from which we could conclude that the delay over this period was caused by either her race or any of the four protected acts on which she relies[3]. Unreasonable treatment is not enough and there needs to be "something more" which is lacking here. We do not have any evidence to show that a hypothetical comparator in the same circumstances as the Claimant and noting that this period was at the height of the pandemic would have been treated any differently.

274. The burden therefore does not pass and the complaints of direct discrimination and victimisation therefore fail and are dismissed.

Allegation 4(vi)

275. The second allegation is the grievance appeal outcome letter of 3rd November 2020 by which Ms. Mallick confirmed that it is the whole of the outcome with which the Claimant takes issue.

276. Again, in respect of both the direct discrimination and victimisation complaints we are satisfied that the Claimant was subjected to a detriment because it only partially upheld her complaints.

277. However, there are no facts which have been proved by the Claimant from which we could conclude that the reason that the grievance appeal was not completely upheld was either because of race or any of the four protected acts relied on by the Claimant. The burden of proof accordingly does not pass to the Respondent and the complaints of direct discrimination and victimisation fail and are dismissed.

Allegation 4(viii)

278. The next complaint is the disciplinary outcome of 31st December 2020 whereby it is said that the Claimant was effectively dismissed from her Band 6 role and redeployed to a Band 5 role and/or by applying the sanction of a 24 month warning.

279. We start with considering the direct discrimination complaint.

280. It is without doubt that this action amounted to a detriment to the Claimant. It removed the Claimant from a highly regarded Band 6 position and the loss of her Nerve Centre Coordinator role. It also resulted in a financial detriment to the Claimant given that the demotion from her role also resulted in a reduction in her salary.

[3] Those being the complaint about Ms. Havard dated 14th July 2019, her grievance of 19th August 2019, the first Employment Tribunal claim and her grievance appeal dated 22nd May 2020 all of which are conceded by the Respondent to amount to protected acts.

281. We turn then to whether the Claimant has proved facts from which we could infer that her race played a part in the decision to demote her and impose the sanctions that were decided upon. We are satisfied that again standing back and looking at the whole picture there are such facts which reverse the burden of proof which are as follows:

    a. The categorisation of the Claimant's conduct as gross misconduct when even on Ms. Havard's account it amounted only to a minor breach of the Homely Remedies Policy;

    b. The failure of the panel to properly grapple with the issue of the discrepancies in the account given by Ms. Havard which were clearly pointed out by the Claimant. Instead, the panel preferred that account over that of the Claimant who had consistently said that she had taken her own remedy. The panel and Ms. Havard were all white;

    c. The focus of the panel being on Ms. Havard's integrity when no such consideration was given to the Claimant despite her lengthy service and previously unblemished record. Again, the panel, like Ms. Havard, were all white;

    d. The suspicion that the Claimant had done something other than take a single dose of peptac, including the suggestion of undertaking an audit over a six month period which could only have been done to try and find further evidence against her because it is not in dispute that it would not have been possible to audit liquid peptac. There was no reason for that suspicion even on the account that Ms. Havard had set out and again there is a stereotype to consider of black people and theft and drug use;

    e. The fact that the sanction handed out to the Claimant was entirely disproportionate to the way in which white members of staff were treated. Of particular note is the Band 6 midwife who had stolen regulated drugs whilst responsible for the care of patients and who was treated much more favourably than the Claimant was. It is no answer to say that the panel did not make the decision in that case because the role of HR should have been to ensure consistency of treatment;

    f. That the panel were focused on the fact that the Claimant posed a "risk" when, even if Ms. Havard had been correct in what she said that she had seen, the Claimant could not possibly have posed a risk to the Respondent Trust, patients, staff or herself;

    g. That the panel were focused on irrelevant factors such as the Claimant's behaviour towards Ms. Havard – who again shared the same skin colour as the panel – without consideration for the Claimant's health;

    h. The fact that there was no reason that the Claimant needed to be demoted to a Band 5 role and that had not happened to any other member of staff, including the white Band 6 nurse who had committed far worse conduct that it was alleged that the Claimant had. As we

have set out above, the Claimant could still have continued in her Band 6 role with restrictions on her dealing with medication if that was genuinely felt to have been necessary. Instead, the issue as to demotion appears to us to go to solve the issue of Ms. Robson's concern as to reintegrating the Claimant back into the team;

i. hat there were significantly more black Band 5 than Band 6 nurses at the Respondent Trust which consciously or subconsciously could be seen as a better "fit" for the Claimant when it is considered that demotion was unnecessary and had not featured in the outcome for the white Band 6 nurse; and

j. The unexplained failures of the Respondent to properly deal with disclosure, including resistance to highly relevant documents relating to the Band 6 nurse to whom we have referred above.

282. We are satisfied for all of those reasons that a hypothetical comparator who had had the same allegation made against her would not have received the same disciplinary sanction as the Claimant did.

283. The burden therefore passes to the Respondent to persuade us that there was a non-discriminatory explanation for the treatment meted out to the Claimant. We do not accept that the Respondent has discharged that burden. It relies on the Claimant having committed theft and thus gross misconduct but as we have already set out above that was not the case and all that the Claimant had done on the Respondent's own case was a minor breach of the Homely Remedies policy. We cannot therefore be satisfied that the Claimant's race – either consciously or unconsciously – did not play a part in the treatment which forms the basis of this allegation.

284. The complaint of direct race discrimination in respect of the Claimant's demotion and the disciplinary sanction applied to her is therefore well founded and succeeds.

285. We turn then to the complaint of victimisation. For the same reasons as in relation to the complaint of direct discrimination we are satisfied that the imposition of this disciplinary sanction amounted to a detriment to the Claimant.

286. We are also satisfied that there are facts which allow us to draw an inference that the Claimant was subjected to victimisation. We focus in this regard on the complaint which had been raised against Ms. Havard given that it was accepted by the Claimant that Ms. Wall was not aware of the 2015 grievance, there are no facts to support the fact that the first Tribunal claim was considered relevant and none of the grievance appeal materials were before the panel so that they would have known of the content.

287. The facts that allow us to draw that inference that the complaint against Ms. Havard played a part so as to reverse the burden of proof are as follows:

a. The fact that Ms. Robson made reference to the Claimant having issued a previous grievance and whether that should be included in the investigation report when referencing Ms. Havard's integrity with the

suggestion being that raising that grievance was in some way a negative thing about the Claimant;

b. That Ms. Robson focused on the difficulty with the Claimant being re-integrated into the team and a focus of the disciplinary panel was on the Claimant's relationship with Ms. Havard. The allegation against the Claimant would not cause a difficulty with reintegration but the allegations of discrimination would be a different matter;

c. The disciplinary panel perceived the Claimant as being a "risk" but that could not be anything to do with a clinical risk for the reasons that we have already given. We have not had any reasonable explanation as to what that risk was;

d. That there was an unnecessary emphasis on Ms. Havard's integrity and protecting her position when the same was not the case for the Claimant despite her unblemished record and service; and

e. That there was no need to demote the Claimant to a Band 5 role, the result of which was to remove her from Ms. Havard's team.

288. We are therefore satisfied that a hypothetical comparator in the same circumstances but who had not raised grievances concerning race discrimination would not have been treated in the same way.

289. The burden of proof having been reversed we look to whether the Respondent has provided us with a non-discriminatory explanation for the treatment complained of. For the same reasons as in respect of the direct discrimination complaint we are not satisfied that the Respondent has discharged that burden.

290. For all of those reasons the complaint of victimisation is well founded and succeeds.

Claim Number: 2602196/2021

291. The third claim is concerned with complaints of direct race discrimination, victimisation and constructive unfair dismissal and we take each of those in turn.

Direct race discrimination

292. The Claimant advances four complaints of direct race discrimination in the third claim and we deal with each of those separately and again by reference to the numbering within the list of issues.

Allegation 21.1

293. The first allegation is the Respondent's failure to inform the Claimant where she was to be redeployed after her disciplinary hearing outcome was communicated to her on 31st December 2020. We cannot make any finding that this amounted to a detriment to the Claimant because she did not deal with it at all in her witness statement and simply adopting the list of issues does not assist us with that matter. Whilst we have been able to make findings of detriment where it is

obvious that the things that we have found to have happened would amount to detriment, we cannot do so in less obvious cases and this is one of them. Particularly, the Claimant was still off sick and had not, on our findings, intimated at this stage an intention to return to work. We cannot make any finding absent any evidence from the Claimant that she was in any way disadvantaged by not being told where she was to be redeployed shortly after the disciplinary hearing outcome was communicated to her.

294. However, even if that had not been the case then this allegation would have failed as a complaint of direct discrimination because there were no facts made out which would have enabled us to draw an inference that the Claimant's race was a reason for the treatment of which she complains and the burden does not pass to the Respondent.

295. This allegation of direct race discrimination therefore fails and is dismissed.

Allegation 21.2

296. The second allegation of direct race discrimination is the HR department of the Respondent's failure to contact the Claimant to inform her who her line manager was to be when she was to be redeployed as a Band 5 nurse. This is essentially the same but a slightly differently worded allegation 21.1 above. We reach exactly the same conclusions in respect of this allegation as we did in respect of allegation 21.1 as to both detriment and there being no facts made out which would allow us to draw an inference that the Claimant's race played a part in the treatment of which she complains. We have reached those conclusions for the same reasons as we did in respect of allegation 21.1 because the same issues apply.

297. This allegation of direct discrimination therefore fails and is dismissed.

Allegation 21.3

298. This allegation is said to be the failure of the HR department to contact the Claimant after 25th April 2021 to make arrangements for her redeployment. The significance of that date is that we understand from paragraph 105 her witness statement that the Claimant says that she had sent an email on 1st April 2021 enquiring about redeployment. We should say that that email was not within the bundle or supplementary bundles and so we can make no positive finding that it was sent or what the contents were. If it was then it is fair to say that the Respondent did not make prompt contact, but we remind ourselves that the Claimant was at this stage still absent on sick leave and there was no date identified for when a return to work was planned. The Claimant was written to on 24th May 2021 to invite her to a welfare meeting on 7th June 2021 at which arrangements could be discussed for a return to work. That only did not take place because the Claimant did not receive that correspondence and once Mr. Hodgkiss became aware of that from the Claimant he took prompt steps to re-arrange the meeting. That meeting only did not take place because the Claimant resigned before it could happen.

299. Neither paragraph 105 nor any other part of the Claimant's witness statement dealt with the way in which it is said that this issue subjected her to detriment and

again it is not a matter that we can infer caused her some disadvantage absent direct evidence from her for the reasons that we have already given in respect of allegation 21.1.

300. However, even if we had been satisfied that the Claimant had been subjected to detriment in respect of this particular allegation, then again there were no facts proved from which we could have drawn an inference that any delay in contacting the Claimant about redeployment had anything to do with her race. The burden does therefore not pass to the Respondent.

Allegation 21.4

301. The final allegation of direct discrimination is the failure to inform or explain to the Claimant significant changes in her salary as a result of her redeployment. Again, the Claimant did not deal with this issue in her witness statement and, particularly, no reference was made to the issue of detriment. For the reasons that we have already given in respect of the earlier allegations we therefore cannot make any finding that the Claimant did not understand the implications to her salary from a demotion to Band 5 or that the failure to explain that to her amounted to a detriment to her.

302. However, again even if we had been satisfied that the Claimant had been subjected to detriment in respect of this particular allegation, then again there were no facts proved from which we could have drawn an inference that any such failure had anything to do with her race. The burden does therefore not pass to the Respondent and this allegation of direct discrimination also fails and is dismissed.

Victimisation

303. There are two protected acts relied on by the Claimant for the purposes of the third claim which are both sets of earlier Employment Tribunal claims. It is sensibly conceded by the Respondent that these amounted to protected acts. There are three acts of detriment relied on by the Claimant and again we take each of those in turn with reference to the numbering used in the list of issues.

Allegation 25.1

304. The first allegation is what is said to be the failure of the Respondent to inform, decide or make arrangements on where the Claimant was to be redeployed as a Band 5 nurse. We deal firstly with whether this amounted to a detriment to the Claimant. We can deal with this in short order because our conclusions in respect of the question of detriment are the same and for the same reasons as we have already given in respect of allegations 21.1 and 21.3 above.

305. However, we have nevertheless gone on to consider if we had found the Claimant to have been subjected to detriment whether there have been facts proved from which we could have drawn an inference that the earlier Employment Tribunal proceedings had a material influence on the redeployment issues. We are not satisfied that there were any such facts to suggest that the either or both of the Employment Tribunal claims had any bearing over this issue and as such this complaint of victimisation fails and is dismissed.

Allegation 25.2

306. The second allegation of victimisation is what is said to be the Respondent's failure to contact the Claimant from 25th April 2021. Again, we can deal with the question of detriment in short order because we repeat our conclusions in respect of paragraph 21.3 above.

307. However, again we have nevertheless gone on to consider if we had found the Claimant to have been subjected to detriment whether there have been facts proved from which we could have drawn an inference that the earlier Employment Tribunal proceedings had a material influence on this issue. We are again not satisfied that there were any such facts to suggest that the either or both of the Employment Tribunal claims had any bearing over this issue and as such it follows that this complaint of victimisation fails and is dismissed.

Allegation 25.3

308. The third and final act of victimisation is said to be the marking down of the Claimant as absent until June 2022. Firstly, we have no evidence before us other than what the Claimant has told us (and we remind ourselves that she has been wrong before in respect of the instructions given to Ms. Mallick regarding Ms. Havard's email) to make a positive finding that she was recorded as absent for that period of time. We agree with Ms. Niaz-Dickinson that the documentation that the Claimant referred to in her evidence under cross examination (see pages 991 and 992 of the hearing bundle) did not show what she believed that it did.

309. However, even if we had determined that the Claimant had been recorded as being on sickness absence until June 2022, we would not have concluded that this amounted to a detriment to her. That is again because there was a paucity in the Claimant's evidence as to that issue and her witness statement dealt with the issue only in the vaguest terms, but also because it would have been clear that that had been done in error because she was aware that Mr. Hodgkiss was making positive arrangements to resolve the issue of redeployment with regard to a meeting that was to take place imminently.

310. We have nevertheless gone on to consider if we had found that the Claimant had been subjected to detriment in respect of this issue whether she has proved any facts from which we would have been able to infer that the Employment Tribunal claims had materially influenced the treatment complained of. We are not satisfied that there are any such facts. Whilst the Claimant's case is that there is a link because a Judge at a Preliminary hearing had indicated that the final hearing was not likely to take place until June 2022, we have no record of that before us in any of the Orders within the hearing bundle and again remind ourselves that the Claimant has been wrong about things before.

311. For all of those reasons this allegation of victimisation also fails and is dismissed.

Constructive dismissal

312. We turn then to the complaint of constructive unfair dismissal.

313. The Claimant relies of a breach of an express term of her contract of employment or alternatively a breach of the implied term of mutual trust and confidence.

314. We begin with what is said to be the breach of the express term of the Claimant's contract of employment. This is said to be an express term as to pay which related to her demotion to a Band 5 role. The Claimant's witness statement did not address this issue at all. We were not taken to the Claimant's contract of employment or the precise contractual term which is relied upon and have no basis on which to say that there was not some entitlement to demote the Claimant as part of a disciplinary process (the reasonableness of that sanction being a different question). Those matters not having been addressed and the Claimant giving no evidence that the breach of any such unidentified term led her to resign, it follows that this aspect of the complaint of constructive dismissal fails and is dismissed.

315. The remaining part of the constructive dismissal claim involves, as we have touched upon above, a breach of the implied term of mutual trust and confidence and the Claimant relies on 16 acts as being destructive of that implied term with the last straw being the marking down of her as being off sick until June 2022.

316. The first issue is the allegation made by Catherine Havard which led to the Claimant being subjected to a formal disciplinary investigation and hearing. For the reasons that we have already said we are satisfied that it was open to Ms. Havard to have dealt with the matter informally and to close down the Datix having simply spoken to the Claimant. It was entirely unreasonable to have made an allegation of theft and, particularly, to have done so on some wider suspicion that had no factual basis.

317. The second issue relied upon is what is said to be the unsatisfactory way in which the Claimant's grievance against Ms. Havard was dealt with. Whilst there was a delay in dealing with the grievance given the circumstances that was understandable due to the effects of the pandemic on the Respondent and the Claimant received an apology in respect of that delay. Given the evidence before those dealing with the grievance we do not consider that they reached an unreasonable conclusion. Whilst we have reached differing conclusions we remind ourselves that we have had the benefit of a considerable amount of additional evidence and cross examination of both the Claimant and Ms. Havard.

318. The next issue is what is termed as a skewed and unfair disciplinary process which took an inordinate amount of time to complete. For all of the reasons that we have already given we are satisfied that that is an accurate description of events. The process was skewed to favour Ms. Havard because of her perceived integrity and skewed against the Claimant to suggest that she lacked integrity and to attempt to find ways to bolster that such as the suggestion to include reference to her previous grievance in the investigation report. It was also an unfair process culminating in a wholly disproportionate sanction being imposed on the Claimant which was outwith the sanction given in an entirely more serious case. We also agree that the time taken to deal with what was an

entirely straightforward allegation was an inordinate amount of time. That is not explained by the effects of the pandemic nor upon the Claimant raising a grievance given that that was never before the disciplinary panel and on the basis of the information that was before us much more complicated investigations were concluded in a considerably shorter period than for the Claimant including during the pandemic.

319. The next issue is what is said to be the suspension of the Claimant when the nature of the disciplinary investigation did not require her removal from post. In her evidence on day three the Claimant confirmed that the issue taken here was the completion of a suspension checklist by Lucy Parkes. As a matter of fact the Claimant was not suspended. She was temporarily redeployed to a non-clinical role but that did not progress because of a mixture of sickness absence and pre-planned leave.

320. The fifth matter relied on is the redeployment of the Claimant to the operations room (i.e. the non-clinical role) with no clear plan and being stripped of her Band 6 uniform for an unspecified period. We know as a matter of fact that the Claimant was to be redeployed into a non-clinical role but we know nothing as to what the Claimant means in respect of there being no clear plan or being stripped of her uniform because we have heard no evidence at all from her about that and it was not dealt with at all in her witness statement and the redeployment in fact never took place as a result of her sickness absence.

321. We turn then to the next matter which is the disciplinary relying on the conflicted account of Ms. Havard and the assertion that when faced with conflicting accounts they should not have concluded to find against the Claimant. It is clear to us that this issue is made out. The discrepancies in Ms. Havard's account were pointed out by the Claimant but were not properly taken into account and the focus was firmly on her perceived integrity. The Claimant had given a more consistent account than Ms. Havard which was also not properly taken into account by the panel. It appeared clear to us that Ms. Havard was believed over the Claimant from the get go and particularly we have in mind the emphasis in the investigation report as to her integrity and Ms. Robson's query in an attempt to bolster that. This particular issue is also made out.

322. The next issue relied on by the Claimant is not allowing her to return to work from sickness absence on 23rd October 2020 when it is said that she was told by Jamie Hodgkiss to wait for the disciplinary outcome. This was also a matter which was not covered in the Claimant's witness statement and was only dealt with by Ms. Mallick putting – as she had to do – in cross examination that Mr. Hodgkiss had said that and referring to the record at page 740 of the hearing bundle. That would have been on the Claimant's instructions and we remind ourselves that the Claimant had been wrong before in terms of her instructions as to who had been the author of a positive email about her. Absent any direct evidence from the Claimant on this issue and us being unable to determine from the note at page 740 exactly who it was who had made the comment relied on and in what context we have not been able to make any positive finding that the Claimant was not permitted to return to work.

323. The eighth issue relied on by the Claimant is not providing her with special leave with full pay during the course of the disciplinary process or part of it. This

essentially relies on the same matters as immediately above and for the same reasons we do not accept that the Claimant should have been placed on special leave. As far as the Respondent was concerned, she was either on pre-booked leave or sickness absence and we accept that there was no reason to place her on special leave.

324. The next issue is what is said to be the demotion/dismissal of the Claimant from her Band 6 role to a Band 5 role. Again, this was an issue which was not covered in the Claimant's witness statement but we know as a matter of fact that the Claimant was demoted from Band 6 to Band 5 as part of the disciplinary outcome. For the reasons that we have already given in our findings of fact there was no need to remove the Claimant from her Band 6 position and doing that was in sharp contrast to the white Band 6 nurse whose actions had been far more serious than what it was alleged that the Claimant had done and who plainly posed a risk to patients, herself and the Respondent Trust. This issue is therefore made out.

325. We turn then to the next issue relied on which is the second part of the disciplinary outcome which was the requirement to write a reflective piece which stays on file for 24 months, the failure to consider unnecessary delays or state when the 24 months started and ended. Again, none of this was dealt with in the Claimant's witness statement. However, it is not in dispute that the Claimant was required to write a reflective piece which, as we have already observed, was non-sensical in the context of what it was alleged that she had done because it would require her to admit to doing something which she had consistently said that she had not done. Moreover, the Claimant had already shown reflection in respect of her acceptance that it had not been sensible to have her bag with her in the treatment room. However, we have nothing to say that the Claimant was unaware of when the 24 month period started and ended because, again, there was nothing in her witness statement about that.

326. The next issue relied on by the Claimant is not informing the Claimant who her Band 6 Line Manager was to be and/where she was to be redeployed. Again, this was not something that was dealt with in the Claimant's witness statement but it is plain from the documentation to which we have been taken that little was done between 31st December 2020 when the Claimant was informed of the disciplinary sanction against her and 18th June 2021 when she received a reply from Mr. Hodgkiss in respect of her enquiry about those matters. However, we accept that at this stage the Respondent was under the impression that the Claimant remained unfit for work and she was submitting statements of fitness for work. We do not consider it unreasonable for them to have awaited the Claimant indicating that she was fit to return to work before making arrangements to inform her about redeployment issues and who her line manager was to be upon that return and we remind ourselves that Mr. Hodgkiss had arranged an earlier meeting to seek to discuss those matters which the Claimant had been unaware of and unable to attend.

327. We then turn to the next matter which is the failure to provide the Claimant with support or contact days during sickness absence, particularly from January 2021 onwards. There was a failure to properly maintain contact with the Claimant during the period of her absence with only a small handful of attempts to meet with her and so this issue is made out.

328. The next issue is what is said to be the inordinate delay in the appeal against the outcome of the disciplinary. Again, there was nothing in the Claimant's witness statement about this matter and we have to look to the documents in order to deal with this issue. The Claimant appealed against the disciplinary outcome on 20th January 2021. She attended an appeal hearing on 11th February 2021 and the appeal outcome was delivered to her on 15th March 2021. Given the timeline and the fact that, by that time, the Respondent was still dealing with the effects of the pandemic we do not consider that there was any inordinate delay in dealing with the appeal.

329. The next issue is the failure to contact the Claimant on 25th April 2021 or soon thereafter for the purposes of making arrangements for her to return to the workplace. Again, the significance of that date is that we understand that the Claimant says that she had sent an email on 1st April 2021 enquiring about redeployment. As we have already remarked above that that email was not within the bundle or supplementary bundles and so again we can make no positive finding that it was sent or what the contents were. It is fair to say that the Respondent did not make prompt contact, but we remind ourselves that the Claimant was at this stage still absent on sick leave. Attempts were made on 24th May 2021 to invite the Claimant to a welfare meeting on 7th June 2021 at which arrangements could be discussed for a return to work. That did not take place because the Claimant did not receive that correspondence and once Mr. Hodgkiss became aware of that from the Claimant he took prompt steps to re-arrange the meeting. That meeting only did not take place because the Claimant resigned before it could happen. We do not therefore find this issue to be made out.

330. We turn then to the last straw. We remind ourselves that the last straw does not have to be a breach of itself but it must be something which is not entirely innocuous and is capable of adding something. In these circumstances the last straw is said to be the Respondent marking the Claimant down as being absent until June 2022. As we have already remarked above in respect of allegation 25.3 above, we have no evidence before us other than what the Claimant has told us (and we again remind ourselves that she has been wrong before) to make a positive finding that she was recorded as absent for that period of time. The documentation that she referred to in her evidence under cross examination (pages 991 and 992 of the hearing bundle) did not show what she believed that it did.

331. However, even if we had we would not have concluded that the Claimant had been recorded as absent for that period of time we would not have found that sufficient to amount to the last straw. It would clearly have been an error because the Claimant was already aware from Mr. Hodgkiss that there had been a meeting arranged on 7th June 2021 to make arrangements for her return to work to be discussed and that when he discovered that she had not received the invitation letter another meeting had been promptly scheduled. Even had we been able to make a positive finding as to this matter we would have found it to have been an innocuous matter.

332. However, we should say that the matters that we did find to be made out above in respect of the earlier issues which the Claimant relied upon were capable of cumulatively breaching the implied term of mutual trust and confidence because of their severity and impact.

333. However, the claim would still have failed because of the paucity of the evidence from the Claimant herself at this hearing as to the reason for resignation. The vast majority of the matters relied on were not mentioned at all in the Claimant's witness statement and even adopting the list of issues as part of her evidence was not sufficient to replace actual evidence from her about why she decided to resign. The only thing that was mentioned at all in her witness statement as to the reason for resignation was the "last straw". We could not, therefore, make any positive finding on the Claimant's own evidence that the issues that we have identified as being made out caused her to resign. Whilst we have seen her resignation letter, that too is in our view not sufficient and the Claimant's witness evidence needed to spell that out but it did not.

334. However, even if we had been able to make a finding that those matters formed part of the reason for resignation absent the "last straw", the Claimant had affirmed the contract in respect of those issues. That is not only because of the delay in her resignation but more importantly on her own case up until "the last straw" she was awaiting – and indeed on her own case chasing - redeployment into a Band 5 role with the intention then to return to work. Her desire and intention to continue in employment with the Respondent in the Band 5 role until the "last straw" clearly in our view amounted to affirmation.

335. For all of those reasons the constructive dismissal claim fails and is dismissed.

336. We have not reached any conclusions as to whether the Claimant or Respondent breached the ACAS Code of Practice on Grievance and Disciplinary Procedures as recorded in the list of issues because we have not received any specific submissions on that. We do not consider that it is a matter that should simply be left to us to consider. We will therefore deal with that in the context of remedy to any extent that either party take a point on it in light of the findings of fact that we have made above.

<u>Jurisdiction</u>

337. We have not had to reach any conclusions in respect of the issue of jurisdiction because only allegations 4(v) and 4(vi) were said by the Respondent to have been presented out of time but we have not found either of those allegations to have been made out.

Remedy

338. We have not heard any evidence as to remedy because we were tasked with dealing with liability only as a result of Orders made by Employment Judge Clark. In the event that remedy cannot be agreed between the parties there will be a Remedy hearing and a Preliminary hearing will be listed as a matter of priority to make arrangements for the same.

Employment Judge Heap

Date: 23rd April 2024

Note:

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