



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Claimant

v

(1) R1;
(2) R2.

Heard at: Cambridge

On: 29, 30 April 2024 and 1, 2, 3 May 2024 (by CVP)
9 – 12 December 2024 and 16 – 18 December 2024
20 December 2024 (in person) and
27-29 January 2025 (deliberations, no parties in attendance)

Before: Employment Judge M Ord

Members: Ms C Baggs and Ms S Jenkins

Appearances

For the Claimant: In person

For the Respondents: Ms S Bowen, Counsel (29 April – 3 May 2024 incl.)
Mr C Ludlow, Counsel (9 – 20 December 2024 incl.)

RESERVED JUDGMENT

1. It is the unanimous decision of the Employment Tribunal that the Claimant's complaints:
 - 1.1. that he was unfairly dismissed;
 - 1.2. that he was the victim of unlawful discrimination on the protected characteristic of sex; and
 - 1.3. that he was the victim of unlawful discrimination on the protected characteristic of race;are not well founded and the claim is dismissed.

REASONS

Background and Progress of the Case to its Final Hearing

1. The Claimant was employed by the First Respondent from 5 March 2018 to 17 November 2021 when he resigned with immediate effect.
2. The Claimant's substantive role was as a Support Worker working in Ward K at the First Respondent's premises. In December 2020 he began additional work as a Sessional / Flexible Worker on Ward E.
3. The Claimant was the subject of allegations of inappropriate behaviour on Ward E, made first on 3 July 2021 by Complainant 2 and Complainant 4 (which allegations they later amplified), from the Second Respondent on 7 July 2021 and from Complainant 3 on 8 July 2021.
4. The Claimant was advised of these allegations by his Line Manager's Manager (RB) on 13 July 2021. Thereafter he began a period of sickness absence (the Claimant says this was forced upon him, the Respondents say the Claimant was treated as absent through sickness when he left the premises and did not return until after his pre-booked holiday) which lasted until 27 July 2021, whereafter he was on holiday and thereafter quarantined on his return from overseas (this during the period of the Covid-19 pandemic) until the Claimant was due to return to work on 15 August 2021.
5. On 10 August 2021, a letter was sent to the Claimant advising him that the First Respondent was investigating allegations that he had engaged in inappropriate behaviour towards four colleagues which was stated to amount to:
 - 5.1. sexual harassment;
 - 5.2. inappropriate touching;
 - 5.3. inappropriate conversations; and
 - 5.4. inappropriate social media contact.
6. This was said to potentially contravene the First Respondent's Code of Conduct and Dignity at Work Policy and fell short of the expectations of employees of the First Respondent and was potentially damaging to the reputation of the First Respondent.
7. There was a discussion with the Claimant on 9 August 2021 when he was advised that he was suspended from work pending the outcome of the investigations.

8. The First Respondent was aware that the Claimant was seeking alternative employment and had been since July 2021.
9. The Claimant was interviewed as part of the investigation process on 2 September 2021. On 9 November 2021 the investigation was completed and on 15 November 2021 the Claimant was advised that the matter would proceed to a Disciplinary Hearing.
10. The Claimant resigned, without notice and with immediate effect, on 17 November 2021.
11. The Respondent continued with the disciplinary process. On 19 November 2021, the Claimant was advised that the Disciplinary Hearing would take place on 15 December 2021 and the Claimant confirmed that he would not attend.
12. On 7 December 2021, the Claimant was advised of the postponement of the Hearing until 5 January 2022.
13. The Disciplinary Hearing took place on that day and on 11 January 2022 the Claimant was advised of the outcome, that the allegations against him were upheld and the First Respondent determined that the Claimant was guilty of gross misconduct.
14. Reference was made during the course of this Hearing to the Claimant being referred to the Disclosure and Barring Service (DBS). We have seen no documents about this, nor any outcome of such referral.
15. The Claimant began Early Conciliation through ACAS on 14 February 2022 and his ACAS Certificates against both Respondents are dated 16 February 2022. He presented his Claim Form to the Tribunal on 3 March 2022.
16. Thereafter the Claimant provided further and better particulars of his complaints (detail being substantially lacking in the Claim Form) and a Preliminary Hearing was held on 5 January 2023 before Employment Judge Hawksworth.
17. At that Preliminary Hearing the learned Judge made great efforts to clarify the complaints which the Claimant was pursuing, although the exact allegations and List of Issues did not become apparent until a Preliminary Hearing was held after the first five days of the Final Hearing at a further Preliminary Hearing which took place on 18 June 2024, before me. That clarified the precise allegations in relation to the Claimant's allegation that he had been (constructively) unfairly dismissed. Otherwise, the List of Issues had been clarified at an earlier stage.
18. The Claimant's complaints as set out by Employment Judge Hawksworth were:
 - 18.1. That he had been the victim of direct sex and race discrimination;

- 18.2. That he had been the victim of harassment;
- 18.3. That he had been the subject of victimisation; and
- 18.4. That he had been (constructively) unfairly dismissed.
19. On the basis of Judge Hawksworth's understanding of the issues and the number of Witnesses to be called, the case was listed for five days (by Cloud Video Platform (CVP)) from 29 April to 3 May 2024.
20. That Hearing came before this Tribunal on 29 April 2024, but as the Claimant's cross examination proceeded it was clear that there was a significant failure by the Respondents to provide full disclosure of relevant documents. Documents emerged during the course of the Hearing, it became apparent that some documents had been only partially disclosed and some disclosed "statements" from the Complainants in this case had no identification on them at all to indicate who had made them, or when. Documents regarding the Claimant's identified comparators were either said to be unavailable or, it was said on the Respondents' behalf, not considered to be relevant. The documents were produced by the Respondent during the course of the Hearing and on the Respondents' behalf Counsel accepted that the documents were clearly relevant to the issues before the Tribunal, including whether or not the individuals concerned were genuine comparators.
21. By the end of the fourth day of the Hearing, the Claimant's cross examination had stalled as a result of this want of proper disclosure and the Hearing was adjourned part heard. The remaining day of the original listing, 3 May 2024, was used for Case Management purposes and Orders were issued for the resumption of the Final Hearing on 9 – 12 and 16 – 20 December 2024, that Hearing to be conducted in person, and for a further Preliminary Hearing on 18 June 2024 to ensure all interlocutory matters were completed. Orders were made for further disclosure.
22. Pursuant to Employment Tribunal Rules 50(1) and 50(3)(b) [1993], anonymisation Orders were made initially to protect the identity of the Claimant, the Respondents and other individuals and institutions within the First Respondent's undertaking to prevent "jigsaw" identification of any of the relevant parties. This was amplified following written request from the First Respondent to deal with a number of further individuals, including a number of "comparators" which the First Respondent sought to put before the Tribunal.
23. The further Preliminary Hearing took place on 18 June 2024 at which Hearing Ms Bowen appeared for the Respondents and confirmed that in four separate ways she had – as a result of incorrect instructions received from her instructing Solicitors – made assertions to the Employment Tribunal on the first four days of the Hearing which were incorrect.
24. The incorrect assertions related to disclosure and included, of most concern to the Tribunal, a statement made by the Second Respondent to

the First Respondent which was disclosed during the earlier Tribunal Hearing. It was said during the course of the first four days of Hearing that that document had only come into the possession of Ms Bowen's instructing Solicitors during the course of the first four days of the Hearing, when in fact, it had been in their possession since 9 November 2022.

25. No explanation from the Solicitors who had had that document for more 17 months before the Hearing, has ever been forthcoming as to why this document had not been previously sent to the Claimant in accordance with the duties of disclosure.
26. Other documents which Ms Bowen had been instructed were no longer in the Respondents' possession had, in fact, been available and were subsequently disclosed. Ms Bowen stated that the Respondents' previous assertion, made through her, that the duty of disclosure had been complied with was "clearly" (her word) incorrect but that it had now (i.e. by 18 June 2024) been fully complied with.
27. As events unfolded it became apparent that that assertion was also incorrect.
28. The List of Issues set out below was finalised at the Hearing on 18 June 2024 and the Respondent advised the Tribunal that as a result of the evidence provided at the Hearing from 29 April to 3 May 2024, the First Respondent intended to call a further ten Witnesses. The Tribunal expressed concern as to the proportionality of the Respondent's attention to now call eighteen Witnesses (in the event they called "only" fifteen) and directions were given for further exchange of Witness Statements.
29. The Final Hearing, (the Claimant having been released from his duty not to discuss the case with any person during his cross examination which had stalled on 2 May 2024), began again on 9 December 2024.
30. On that date the Respondent, through Counsel, made a request for anonymisation of a further thirty individuals and identifiable locations within the First Respondent's undertaking – the request had been made in writing to the Employment Tribunal on 20 November 2024 at 6:13pm, twelve working days before the resumed Hearing and had not been referred to a Judge in the interim.
31. After discussion the Tribunal agreed to grant the further request for anonymisation and the Claimant did not object to the Application when it was made.
32. Further, the Respondent asked to rely on six purported comparators in relation to the Claimant's direct discrimination allegations and had, notwithstanding the assertion through Counsel on 18 June 2024, made further disclosure to the Claimant in this regard. This was given piecemeal on 4 September, 10 October and 25 November 2024. It was said that documents relating to the new alleged "comparators" had been related to an investigation known as "Hyena" which involved investigation into the

conduct of a number of people on one Ward within the First Respondent's undertaking (not a Ward where the Claimant worked) in 2020. No explanation whatsoever was provided from the First Respondent as to why, if these issues were relevant, they had not been disclosed earlier or referred to at any stage prior to the recommencement of the Hearing.

33. Finally, yet more documents were produced by the Respondent during the course of the Hearing and it emerged during the course of the resumed Hearing (in particular on the first morning) that many documents had been inappropriately redacted. The Tribunal had been provided with copies of these Bundles, but an unredacted copy had been sent electronically. The Respondent was directed to the Case Management Orders made on 18 June 2024 and no proper explanation for the preparation of two versions of the Final Hearing Bundle was made. The Orders made on 18 June 2024 were clear. They required the Respondent (having supplied to the Claimant one hard (paper) and one soft (electronic) copy of the Final Hearing Bundle by 16 July 2024, to lodge with the Tribunal's Document Upload Centre at least seven days before the recommencement of the Hearing one electronic copy of the Final Hearing Bundle, together with copies of the Witness Statements disclosed by both parties in accordance with Orders made that day and the finalised List of Issues. Further:

"On the first morning of the resumed Hearing, the parties and their Representatives must be in attendance by 9:30am and at that time, but not before, the Respondent must deliver to the Tribunal:

1. Four hard copies of the Final Hearing Bundle;
 2. Four hard copies of a consolidated witness statement bundle; and
 3. Three copies of the finalised List of Issues."
34. On behalf of the Respondents, Mr Ludlow (who now represented the Respondents in the place of Ms Bowen) could provide (having discussed the matter with his instructing Solicitors) no proper explanation for the preparation of two versions of the Final Hearing Bundle, nor for the failure to provide unredacted documents in hard copy (when they had been provided in soft copy).
35. During the course of the Hearing hard copies of the unredacted documents (i.e. in accordance with the Tribunal's directions and Orders) were delivered to the Tribunal piecemeal.
36. Notwithstanding the extensive requests for anonymisation which were made, at the Respondent's request (and granted) so that "jigsaw" identification of any of the First Respondent, the Claimant or Second Respondent, or the Complainants or comparators (or any of them) could be made, no application was made in relation to the identity of any of the witnesses.

37. The Tribunal has considered this as part of its deliberations and have referred to the Witnesses (insofar as they were not already covered by the Anonymisation Orders) by their initials only. Indeed, the only persons who gave evidence that were covered by the Anonymisation Orders were the Claimant, the Second Respondent and the three additional Complainants who made allegations against the Claimant.
38. The Tribunal has expressed concern during the course of the Hearing and repeats that now, regarding the lack of care and attention over the preparation of this case insofar as the Respondent is concerned. To what extent that is the responsibility of the First Respondent itself and to what extent it is the responsibility of their instructing Solicitors, we cannot know, but the failure to give proper disclosure, the failure to give proper instructions to Counsel over the availability and existence of documents (including when they came into the possession of the Solicitors representing the First and Second Respondents) the subsequent piecemeal disclosure of documents, the failure to follow the clear directions made on 18 June 2024, the very late additional disclosure by the First Respondent and the fact that original Counsel had been provided with incorrect information such that she made incorrect assertions to the Tribunal (including, sadly, a further incorrect assertion regarding disclosure which she made whilst apologising for the previous assertion in that regard) all points to a lack of care and attention in the preparation of this matter.
39. The introduction of additional “comparators” by the First Respondent (which we deal with later in this Judgment) served only to increase the number of Witnesses and increase the length of the Final Hearing. Notwithstanding the fact that at the resumed Hearing substantial progress was made perhaps more quickly than had been anticipated, the Hearing would have been much shorter and more straight forward had the parties (and in particular the Respondent because the Claimant, who is not a British National and thus whose first language is not English and who was unrepresented throughout the entirety of these proceedings) applied their minds to the List of Issues (which is relatively short) and the facts which are relevant to the issues, this case would have been – as Judge Hawksworth anticipated – resolved in five days rather than the seventeen days (including deliberations) which it has taken.

The Hearing

40. At the Hearing the Claimant gave evidence and he submitted a Character Reference from a former colleague (ST).
41. The Respondents called the following Witnesses:
 - 41.1. the Second Respondent;
 - 41.2. the Third Complainant;
 - 41.3. the Second Complainant;

- 41.4. the Fourth Complainant;
 - 41.5. MC1 – previously employed by the First Respondent as a Chief Nurse;
 - 41.6. DA – who was the Investigator dealing with the allegations made against the Claimant and who produced a Supplementary Statement dealing with the comparators relied upon by the Claimant and an investigation into a previous matter involving another individual, NW;
 - 41.7. JW – a Modern Matron employed by the First Respondent;
 - 41.8. RB – who had the initial discussion with the Claimant on 13 July 2021;
 - 41.9. NC – who was involved in the decision to suspend the Claimant and gave evidence regarding the “additional comparators” upon whom the First Respondent sought to rely;
 - 41.10. FC – who was involved as a Human Resources Advisor;
 - 41.11. ZJ – who gave evidence regarding Comparator 3 (relied upon by the Claimant);
 - 41.12. JF – who was involved in discussions around the Claimant’s suspension and discussion regarding alleged “previous events” and thereafter Chaired the Disciplinary Panel;
 - 41.13. MC2 – a member of the Disciplinary Panel;
 - 41.14. DB – who gave evidence regarding Comparator 2; and
 - 41.15. LD – who gave evidence regarding NW (one of the comparators relied upon by the Respondent).
42. Closing submissions were made by both sides in writing to which oral submissions were added.

List of Issues

- 43. The finalised List of Issues for determination by the Tribunal was as follows:
 - 1. Direct sex and race discrimination – Equality Act 2010, s.13:
 - 1.1. The Claimant is a male white European.

1.2. Did the Respondent do the following thing:

1.2.1. on 5 January 2022 a Panel decided that all the allegations against the Claimant were upheld and that the Claimant should be dismissed for gross misconduct?

1.3. Was that less favourable treatment?

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

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

In respect of direct sex discrimination, the Claimant says he was treated worse than the Second Respondent, Complainant 2, Complainant 3 and Complainant 4 in that they were also parties to conversations for which he was investigated, but no action was taken against them.

In respect of direct race discrimination, the Claimant complains that he was subject to less favourable treatment compared to each of the six comparators when he was subjected to investigation, disciplinary action, a finding of gross misconduct and dismissal. The comparators are: Comparator 1, Comparator 2, Comparator 3, Colleague J, Colleague L and Colleague N.

The Claimant says that each of the comparators was either: (a) not investigated; or (b) not subject to disciplinary action; or (c) not found guilty of gross misconduct; and / or (d) not dismissed when the complaints of a broadly similar nature were made against them. In each case the Claimant says the comparators were all accused of misconduct of a sexual nature.

1.4. The questions for the Tribunal to answer are therefore as follows:

1.4.1. Were the comparators or any of them in materially different circumstances than the Claimant?

1.4.2. If the answer is "no", was the Claimant treated less favourably than those relevant comparators?

1.4.3. If so, was that on the ground of sex or race? (In particular, has the Claimant established facts from which the Employment Tribunal could conclude that the Claimant has been the victim of discrimination on the ground of sex and / or race and if so,

has the Respondent established a non-discriminatory reason for any difference in treatment?) and

- 1.4.4. If the comparators were in materially different circumstances to the Claimant, would a hypothetical comparator (to be identified by the Tribunal) have been treated more favourably than the Claimant? If so, would that be on the ground of sex and / or race?

2. Harassment related to sex / sexual harassment – Equality Act 2010, s.26:

- 2.1. Did the Second Respondent do the following things:
 - 2.1.1. In or about May 2021, tried to kiss the Claimant with the Claimant pulling back;
 - 2.1.2. Make a false accusation against the Claimant; and
 - 2.1.3. Persuade others to make false accusations against the Claimant?
- 2.2. If so, was that unwanted conduct?
- 2.3. Was it conduct which related to sex, or conduct of a sexual nature?
- 2.4. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- 2.5. If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
- 2.6. Alternatively (s.26(3) EqA 2010), if the Second Respondent engaged in unwanted conduct as set out at 2.1.1 above and it was conduct of a sexual nature with the required purpose or effect, did the Second Respondent also do the following things:
 - 2.6.1. make a false accusation against the Claimant; and
 - 2.6.2. persuade others to make false accusations against the Claimant?
- 2.7. By doing so, did the Second Respondent treat the Claimant less favourably because the Claimant rejected the conduct?

3. Victimisation – Equality Act 2010, s.27:

3.1. Did the Claimant do a protected act as follows:

3.1.1. In or about April 2021, the Claimant made a verbal report to Zoe Jackson in the car park, that a colleague, Colleague B, had been subject to sexual harassment by another colleague, Comparator 3?

3.2. Did the Respondent do the following thing:

3.2.1. On 5 January 2022, a Panel decided that the allegations against the Claimant were upheld and that the Claimant was guilty of gross misconduct?

3.3. If so, was it because the Claimant did a protected act?

4. Constructive Unfair Dismissal:

4.1. Was the Claimant's resignation on 17 November 2021 a constructive dismissal?

4.1.1. Did the Respondent do the following things as alleged by the Claimant:

4.1.1.1. In or about July 2021, at the start of the investigation into the Claimant's conduct, was the Claimant told by RB, his Manager's Manager, that he would not be allowed to go into the grounds of the First Respondent, that he should surrender his NHS belongings and that he was not allowed to go to hospital except in an emergency and was invited not to come to work;

4.1.1.2. In July / August 2021, a colleague in the Low Secure Ward told Colleague B that he was aware that the Claimant was suspended for sexual harassment (before the Claimant was told of his suspension);

4.1.1.3. On 10 August 2021, the Claimant was suspended on full pay pending investigation;

4.1.1.4. When conducting the investigation into the allegations against the Claimant, the Investigator failed to interview relevant Witnesses; and

- 4.1.1.5. The Respondent failed to investigate the Claimant's allegations about Complainant 2 which he made during the course of the Investigation into the allegations against him.
- 4.1.2. Did that breach the implied term of trust and confidence, the Tribunal will need to decide:
 - 4.1.2.1. Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
 - 4.1.2.2. Whether it had reasonable and proper cause for doing so.
- 4.1.3. Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation; and
- 4.1.4. Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions show that they chose to keep the contract alive even after the breach.
- 4.2. If the Claimant was dismissed, what was the reason or principal reason for dismissal? i.e. what was the reason for the breach of contract?
- 4.3. Was it a potentially fair reason?
- 4.4. Did the Respondent act reasonably in all the circumstances in treating it as sufficient reason to dismiss the Claimant?

5. Time Limits

- 5.1. Given the date the Claim Form was presented and the dates of Early Conciliation, any complaint about something that happened before 15 November 2021 may not have been brought in time.
- 5.2. Were the discrimination and victimisation complaints made within the time limit in s.123 of the Equality Act 2010? The Tribunal will decide:
 - 5.2.1. Was the claim made to the Tribunal within three months (plus Early Conciliation extension) of the act to which the complaint relates;
 - 5.2.2. If not, was there conduct extending over a period;

5.2.3. If so, was the claim made to the Tribunal within three months (plus Early Conciliation extension) of the end of that period; and

5.2.4. If not, were the claims made within a further period the Tribunal thinks is just and equitable, in particular:

5.2.4.1. Why were the complaints not made to the Tribunal in time? and

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

6. Remedy Issues

6.1. The issue of Remedy, if it was necessary, was deferred to a further Hearing and the issues relating to Remedy need not be set out here.

The Law

44. Section 9 of the Equality Act 2010 provides that race is a protected characteristic and section 11 of that Act provides that sex is a protected characteristic.

45. Section 13 of the Equality Act 2010 provides:

13. Direct Discrimination

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

46. Under Section 26 of the Equality Act 2010:

26. Harassment

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if-

- (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to above.
- (3) A also harasses B if-
- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to above, and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to above, account must be taken-
- (a) the perception of B;
 - (b) the other circumstances of the case; and
 - (c) whether it is reasonable for the conduct to have that effect.

47. Under Section 27 of the Equality Act 2010:

27. Victimisation

- (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; and / or

- (d) making an allegation (whether or not express) that A or another person as 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.
48. Under Section 136 of the Equality Act 2010 (which applies to any proceedings relating to a contravention of the Equality Act):
136. Burden of proof
- (1) ...
 - (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention has occurred.
 - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
49. Under Section 123 of the Equality Act 2010:
123. Time Limits
- (1) A complaint may not be brought before the Tribunal after the end of-
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
 - (2) ...
 - (3) For the purposes of section 123-
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
 - (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-
 - (a) when P does an act inconsistent with doing it, or

- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

50. Under Section 95(1)(c) of the Employment Rights Act 1996:

95. Circumstances in which an employee is dismissed.

- (1) For the purposes of this Part an employee is dismissed by their employer if-

- (a) ...

- (b) ...

- (c) the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct.

51. The Tribunal has been referred to a number of relevant Authorities regarding the statutory principles set out above.

52. Direct Discrimination:

52.1. Chief Constable of West Yorkshire Police v Khan [2001] ICR1065, where the House of Lords determined that where a Claimant simply shows that they were treated differently to how others in a comparable situation were, or would have been, treated would not, without more, succeed in a complaint of unlawful discrimination;

52.2. Shamoon v Chief Constable of The Royal Ulster Constabulary [2003] ICR 337, where the House of Lords (Lord Scott) explained that the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim, save only that he or she is not a member of a protected class;

52.3. O'Neill v Governors of St Thomas Moore Roman Catholic Voluntary Aided Upper School and Anor. [1997] ICR 33, where the Employment Appeal Tribunal confirmed that a complaint of direct discrimination will only succeed where the Tribunal finds that the protected characteristic was the reason for the Claimant's less favourable treatment. It need not be the only reason, but it must be an effective cause (or have a "significant influence" on the treatment per Nagarajan v London Regional Transport [1999] ICR 877, where it was stated that if racial grounds or protected acts had a significant influence on the outcome discrimination is made out);

- 52.4. Chief Constable of West Yorkshire Police v Khan where the House of Lords indicated that the Tribunal should ask why the alleged discriminator acted as he or she did, and what consciously or unconsciously was his or her reason;
- 52.5. Gould v St John's Downshire Hill [2021] ICR 1, in which the Employment Appeal Tribunal explained the logic behind the requirement for the protected characteristic or step to subjectively influence the decision maker because there may be circumstances where the protected characteristic or step did not itself materially impact on the thinking of the decision maker and was not a subjective reason for the treatment (e.g. in circumstances of a dysfunctional working relationship rather than the conduct of the Claimant which caused the breakdown in those relationships);
- 52.6. Pemberton v Inwood [2018] ICR 129/1, where the Court of Appeal gave guidance in relation to the effect aspect of the harassment test. The Court of Appeal (Underhill LJ) set out that if the Claimant does not perceive their dignity as being violated or an adverse environment created, the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so;
- 52.7. Ahmed v Cardinal Hume Academies EAT0196/18, the Employment Appeal Tribunal stated that it understood the guidance in Pemberton to mean that the question of whether or not it is reasonable for the impugned conduct to have the proscribed effect is effectively determinative; and
- 52.8. Igen Limited and Ors. v Wong and Ors. [2005] ICR 931, in this case the Court of Appeal dealing with the fact that "detriment" is not defined in the Equality Act, says that it covers a wide range of conduct and treatment and that the detriment must be because of the protected act, or because the Respondent believed the Claimant had done or might do a protected act. The influence must be more than trivial (further, in Nagarajan v London Regional Transport it was stated that the motivation may be conscious or unconscious).
53. Burden of Proof:
- 53.1. Fennell v Foot Anstey LLP EAT0290/15 in relation to the burden of proof, HHJ Eady said that "Although guidance as to how to approach the burden of proof had been provided by this and higher appellate courts, all judicial authority agrees that the wording of the statute remains the touchstone".

54. Those Authorities included:
- 54.1. Igen Limited and Ors. v Wong and Ors. [2005] ICR 931;
- 54.2. Lane v Manchester City Council and Anor. [2006] ICR 1519;
- 54.3. Madarassy v Nomura International PLC [2007] ICR 867; and Hewage v Grampian Health Board [2012] ICR 1054, establishing a two stage test. At the first stage the Claimant has to prove facts from which the Tribunal could infer discrimination has taken place and only if that has been established to the Tribunal's satisfaction, does the burden then shift to the Respondent to prove the treatment in question was "in no sense whatsoever" on the protected ground. In each case the requirement is to establish the position on the balance of probabilities.
55. It is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could infer an unlawful act of discrimination (Royal Mail Group Limited v Efoji [2021] USKC 33).
56. It is insufficient for the Claimant to prove facts from which the Tribunal could conclude that the Respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination, but are not without more sufficient material from which a Tribunal "could conclude" that on the balance of probabilities the Respondent had committed an unlawful act of discrimination.
57. Further, in Madarassy the Court of Appeal stated that the absence of an adequate explanation is not relevant to whether there is a prima facie case of discrimination. The absence of an adequate explanation only becomes relevant in prima facie cases proved by the Claimant.
58. Further, in Efoji the Supreme Court confirmed that whether a Respondent does in fact have an explanation and, if so, what the explanation is, must be left out of account and no adverse inference can be drawn at the first stage from the fact that the employer has not provided an explanation.
59. Bad treatment is not sufficient to show that a Claimant has suffered less favourable treatment, see Essex County Council v Jarrett EAT0045/15 and Glasgow City Council v Zafar [1998] ICR 120, where the House of Lords said that an Employment Tribunal could not draw an inference of less favourable treatment on the ground of race from the fact that the employer had acted unreasonably in dismissing an employee.
60. Regarding time limits we note:
- 60.1. Pearce v Bank of America Merrill Lynch and Ors. 0067/19EAT – a Claimant should not get the benefit of any extension of time in complying with ACAS Early Conciliation where time has already expired before Early Conciliation begins.

61. The Tribunal should not take too literal approach to the question of what amounts to a continuing act by focusing on Policy / Rules / Schemes / regime or practice (Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, whereas one relevant (but not determinative) factor is whether the same or different individuals were involved (Aziz v FDA [2010] EWCA Civ.304).
62. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. There is no presumption of an extension of time, in fact the Tribunal cannot hear a complaint unless the Applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule (Robertson v Bexley Community Centre, t/a Leisure Link [2003] IRLR 434).
63. Regarding constructive unfair dismissal, Western Excavating (ECC) Limited v Sharp [1978] ICR 221 – for an employer's conduct to give rise to constructive dismissal it must involve a repudiatory breach of contract and an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably.
64. It is a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in the manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties (Courtaulds Northern Textiles Limited v Andrew [1979] IRL 84 and Woods v WM Car Services (Peterborough) Limited [1981] ICR 666, where the employer's conduct as a whole should be viewed to determine whether it is such that its effect, when judged reasonably and sensibly is such that the employee cannot be expected to put up with it.
65. Malik v Bank of Credit and Commerce International SA [1997] ICR 606, is a case where the House of Lords confirmed that the implied term of mutual trust and confidence in every contract of employment was a duty that neither party would, 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 employer and employee. There are two questions to be asked: namely, whether there was reasonable and proper cause for the conduct and if not, was it calculated or likely to destroy or seriously damage trust and confidence?
66. Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1, is a case where the Court of Appeal dealt with the "last straw" concept. The Court stated that an employee who was the victim of continuing cumulative breach of contract can rely on the totality of the employer's acts, notwithstanding prior affirmation. The questions to ask are:
 - 66.1. What was the most recent act or omission on the part of the employer which the employee says caused the trigger for his or her resignation?
 - 66.2. Has he or she affirmed the contract since that act?

- 66.3. Was that act or omission a repudiatory breach of contract of itself?
- 66.4. If not, was it part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to repudiatory breach of trust and confidence?
- 66.5. Did the employee resign in response (or partly in response) to that breach?
67. The breach of contract must be an effective cause of resignation (Wright v North Ayrshire Council [2014] ICR 77).
68. The Tribunal referred the parties to the relevancy of both cases (having been set out in the closing submissions advanced by the Respondents) of the case of Palmer v Leicester City Council [2024] EAT85, where the EAT stated that a blanket approach to the assessment of the shifting of the burden of proof under s.136 was acceptable. The difference in treatment of other colleagues in similar circumstances where those colleagues are of a different race, was evidence that could support a claim of race discrimination, as the Tribunal in that case had correctly found having looked at all of the evidence.

The Facts

69. Based on the evidence provided by the parties, we have made the following findings of fact. Save where facts were in dispute, we have not considered it necessary to explain the findings as they are from evidence which was not challenged, or from uncontested contemporaneous documents. Where facts are disputed we have explained which person's evidence we have accepted and why.
70. In the main, the Respondents' Witnesses simply confirmed the content and detail of the contemporaneous documents. Cross examination by the Claimant was limited and the Tribunal asked appropriate questions but essentially the majority of the facts in the case are not in dispute. The issue is the motivation of individuals.
71. The Claimant began work for the Respondent on 5 March 2018. He was employed as a Support Worker, latterly working as a Senior Support Worker (Band 4) in Ward K at the First Respondent's premises.
72. In December 2020, the Claimant also began working as a Sessional / Flexible Support Worker in Ward E. His work on Ward K was still his substantive role.
73. The First Respondent is a Healthcare provider.
74. The Second Respondent was employed by the First Respondent as a Healthcare Assistant, then as a part time Healthcare Assistant and part time Assistant Psychologist. In her role as a Healthcare Assistant, she worked from time to time alongside the Claimant on Ward E.

75. Ward E is a ten bed secure unit for men with learning difficulties.
76. The Claimant's employment continued without significant incident until July 2021.
77. On 3 July 2021, Complainant 4 emailed her Manager JW stating that she, R2, Complainant 2 and Complainant 3 (who were copied into the email) were uncomfortable with regards to,
- "the same Bank Staff member"
- due to his
- "ongoing sexual comments, remarks and behaviours as well as messaging outside of work".
78. Complainant 4's email said they were unsure what should be done, but wanted to bring the issue up,
- "before something worse happens".
79. The email was said to be from Complainants 4 and 2.
80. On 5 July 2021, the Second Respondent spoke to JW expressing her concerns regarding the Claimant and another colleague (Colleague J) and she reported this conversation to Complainant 2.
81. Complainant 2 spoke to JW on either 5 or 6 July 2021 and on 6 July 2021 submitted a written statement setting out,
- "just a few of the more recent things that have happened".
- Her statement related solely to the Claimant.
82. Complainant 2 reported the Claimant as having behaved as follows:-
- 82.1. Asking for kisses;
- 82.2. Messaging outside of work asking for hugs and that he was looking forward to seeing her;
- 82.3. Continuously asking for hugs and saying he was jealous of others hugging her (for example on a night out);
- 82.4. Smacking Complainant 2's bottom during a staff change and when Complainant 2 told him not to touch her again the Claimant was alleged to have laughed and winked;
- 82.5. Asking Complainant 2 about her sexual preferences, e.g. how she liked it, what sexy outfits she wore, what sex toys she used and her favourite positions. Complainant 2 said that when she told the

Claimant to change the subject he would revert to the question of sex;

- 82.6. Wanting to know what underwear she was wearing;
 - 82.7. Inviting Complainant 2 back to his house for drinks and persisted in this when she refused;
 - 82.8. If she has to hand the Claimant anything, he holds and strokes her hand and winks;
 - 82.9. Regular comments on her appearance saying she is attractive and has nice legs; and
 - 82.10. Saying that the Second Respondent was “weird” because she would not talk to the Claimant when he gave her a lift home after a night out.
83. Complainant 2 shared her statement with Complainant 4, but her unchallenged evidence was that she had not seen the statements produced by the Second Respondent, Complainant 3 or Complainant 4.
84. After her discussion with JW the previous day, the Second Respondent provided a lengthy statement regarding the Claimant’s conduct and the conduct of another colleague (Colleague J).
85. The essential complaints about the Claimant were as follows:-
- 85.1. Making comments such as, “I wish I was your boyfriend” and “the only thing wrong with you is that you are not with me” as well as other comments regarding her body and finding her attractive.
 - 85.2. After a staff night out on 21 May 2021 the Claimant gave the Second Respondent a lift home and asked if she was drunk. She said she was tipsy and the Claimant replied, “good because drunk people can’t lie and I need to ask you something”. The Second Respondent said she was aware of what the Claimant was about to ask and she said “no” and that she did know what the Claimant was going to ask and that she was not interested. She says she remained silent for the rest of the journey. She says the Claimant later apologised for making things “weird” and when asked about his own home relationship the Claimant said that he was in an “open” relationship and the Second Respondent said that she was not.
 - 85.3. Thereafter, mouthing to the Second Respondent “I miss you” at work, asking if she missed him and asking for hugs; telling the Second Respondent that he has been thinking about her and misses her; blowing the Second Respondent kisses and winking at her; stroking her arm and waist if they passed at work; and brushing up against her.

- 85.4. The Second Respondent said that when she asked for the behaviour to stop, the Claimant said he just wanted a hug and to spend time with her. He then sent a message saying, "I do still find you attractive though and I do miss being with you".
86. On or about 8 July 2021, (there is no covering email or other document confirming the date) Complainant 3 wrote a statement to JW. As well as complaints regarding the Claimant, she complained about the conduct of other colleagues (Colleague N and Colleague L) and referred to,
- "Most of the men on the ward [Ward E] talking inappropriately about women and about sex, including in front of patients. I feel warnings should be given."
87. Regarding the Claimant, Complainant 3 said that
- "on a couple of shifts I worked with him"
- said to be a couple of months previously, the Claimant was stroking her, rubbing her back and arms and trying to touch her thighs. She said she was concerned that the Claimant was
- "slimy"
- She said the Claimant followed her around the Ward and tried to give her notes on pieces of paper and put his hand on her shoulder. Complainant 3 was new to the Ward and says she was told that the Claimant
- "does this to a lot of young female staff".
88. On 9 July 2021, Complainant 4 provided JW with a statement and said that the Claimant:-
- 88.1. When she first began a shift on the Ward she "high fived" other members of staff but the Claimant said, "I was expecting a kiss".
- 88.2. The Claimant messaged her saying how lucky her boyfriend was and that he, the Claimant, was jealous and wished he was with her.
- 88.3. The Claimant offered Complainant 3 a lift with the words, "let me know if you need a ride and I will happily take you".
- 88.4. Subsequently, the Claimant asked Complainant 4 if she had any piercings. She replied that she did and the Claimant referred to his liking for nipple piercings.
- 88.5. By message the Claimant told Complainant 4 that he missed her when she did not attend a works drink (24 May 2021).
- 88.6. By message on 24 May 2021, the Claimant asked Complainant 4 where she was going on holiday. She said, "away with my

boyfriend” and the Claimant said he would be jealous because she is not with him. When Complainant 4 referred to the Claimant’s partner he replied saying, “yes but still would like to be with you, bet she would like you”.

- 88.7. The Claimant messaged Complainant 4 on 31 May 2021, which she ignored. On 3 July 2021, Complainant 4 said the Claimant was starting a shift as she was leaving and he licked his lips and bit his lip, looking at her and asked why she did not acknowledge him in the pub.
89. All four individuals were told that the matters raised would be fully investigated.
90. On 13 July 2021, RB spoke to the Claimant and advised him that he was the subject of complaints.
91. The Claimant says that at that meeting RB told him that he should leave the premises, hand in his NHS identity card and that except in emergency circumstances he could not come to the First Respondent’s premises.
92. RB’s evidence was that when he was told about the allegations he was shocked, saying that he had a laugh with everyone and was adamant he had done nothing wrong. She said that the Claimant said he did not feel as though he could continue his shift and went home.
93. It is agreed that from 13 July to 27 July 2021, when the Claimant commenced a pre-booked holiday, the Claimant was recorded as absent from work through sickness and that on the day she spoke to the Claimant, 13 July 2021, RB made an Occupational Health Referral regarding the Claimant.
94. RB’s evidence was that she made the Referral so that the Claimant would have additional support during what was obviously a difficult period.
95. There was no Fit Note or self-certification provided for the period in question, as far as we have been told.
96. RB said that the Claimant would have been entitled to return to work had he done so.
97. We prefer RB’s evidence on this point and find that the Claimant was, as she said, shocked by the allegations against him and was not able to continue to work. Her Referral to Occupational Health that day indicates a concern for his wellbeing.
98. The Claimant did not make any complaint at the time, or subsequently, about being excluded from the First Respondent’s premises or having to remain away from work and did not at that time suggest that this had taken place. Had he been “excluded” as he alleges, then we find it more than likely that he would have raised this with someone within the management

of R1, or at the very least with his Line Manager in his substantive post in Ward K. We know that throughout this matter no issue was raised regarding the Claimant's work or behaviour on that Ward.

99. Effectively therefore, the Claimant felt unable to continue to work and RB treated that absence, despite the lack of any Fit Note or self-certification, as sickness absence.
100. The Claimant sent a written response to the allegations on 15 July 2021, although he addressed a number of unconnected issues.
101. The Claimant said that Colleague A spoke only about her pierced nipples and that she had said it improved the look of her breasts. He referred to Colleague A being drunk and losing her balance and that he and she "normally hug" as a sign of friendship.
102. The Claimant said the Second Respondent had previously confided in him that another, married male on the Ward had asked her to call or text him when her partner was not around and had given her a note with his mobile telephone number on it. The Claimant said he "jokingly" said he was jealous and believed he told R2 to ignore the other individual and to carry on as normal.
103. The Claimant confirmed he gave the Second Respondent and others lifts from time to time, to or from work. He said when he and the Second Respondent met outside the First Respondent's premises one morning, she surprised him by hugging him, after which he recorded in his statement he "had a feeling she was expecting a kiss" and that he thought no more of it.
104. After a night out with Ward E staff, the Second Respondent went with the Claimant and others to a colleague's house. The Claimant then gave the Second Respondent a lift home and said he was going to ask her about the hug / kiss moment, but when he said he wanted to ask her something she said "no" and when he asked if she knew what he was going to ask she said, "yes, but no".
105. The Claimant said he had a good working relationship with colleagues and had been told one of the Complainants was having an affair with Colleague I but "did not think anything of this". He admitted calling her "ant" because she had two strands of hair one each side of her forehead. He denied ever touching her or her hair.
106. The Claimant said he had friends on the Ward E and they often greeted each other with a hug. He said that had anyone suggested he had crossed a boundary, he would have expected to be told. He said he respected everyone.
107. BW held a fact finding interview with the Claimant on 27 July 2021, after which the Claimant was on a period of annual leave and then was required to quarantine due to the Covid restrictions up until 15 August 2021.

108. At the fact finding interview the Claimant repeated that he had conversations with a colleague not involved in this case about body piercings and staff affairs and that she (Colleague A) had been drunk on occasion. He said he told people he was a good masseur, that R2 had told him about another member of staff in effect propositioning her and repeated the incident where he and the Second Respondent hugged each other saying he thought "maybe she was going to kiss me" and that his later attempt to discuss this was met with "no". He sends Facebook messages to colleagues but none that he sees as inappropriate. He denied that he followed anyone or blew kisses / licked his lips and denied any aspect of harassment or assault.
109. Discussions had been held within the First Respondent as to whether in the circumstances of the case, the Claimant should be suspended or whether he could be found work without the risk of repetition of the alleged behaviour and with minimal or no patient contact as some of the alleged conduct was taken place in front of patients. However, the decision was taken to suspend the Claimant on 9 August 2021 and this was communicated to him on 10 August 2021. The letter came from Case Manager (EH) saying that the Claimant was suspended pending full investigation of the complaints. He was advised of the terms of and reasons for the suspension and was directed to Occupational Health, the Employees Assistance Scheme and given the telephone number for Spiritual and Pastoral Care, if he wished to avail himself of any of those services.
110. In the meantime, the Claimant had spoken to the Clinical Team Lead (KP) and told her on 26 July 2021 that he had been applying for other jobs as he believed he had lost his job, which KP told him was not the case and that he should "hold fire". The formal investigation process was conducted by DA as Investigating Manager. The Claimant was interviewed on 2 September 2021.
111. The Claimant says that he hugged people when he meets them as

"it's a normal thing to do"

and that any discussion about body piercings was in a public area and instigated by Colleague A with several people joining in, on the Ward.
112. The Claimant said Ward E was a public place with patients and Doctors present, so he would not do things like licking his lips and biting his lip as he would be seen.
113. When asked how he would feel if things like this were said or done to him, his reply was that he

"never said anything"

and that

“the piercing conversation wasn’t brought up by me”.

114. He denied asking Complainant 2 for kisses and / or blowing kisses to her saying,

“she is not a friend on Facebook”

but also, that

“I think I have some conversations on Facebook that I could send”.

He was asked to do so.

115. The Claimant denied telling Complainant 4 that he was jealous of her boyfriend or asking for hugs, strongly denied smacking her bottom saying “as someone would see that” if he did.

116. The Claimant denied Complaint 2’s allegation that he asked her about how she liked to have sex, use of toys and wearing sexy outfits. He said,

“the worst thing we talked about is nipple piercings”,

but he could not recall if Complainant 2 was part of that discussion.

117. The Claimant said he did not know who Complainant 3 was.

118. In relation to the Second Respondent, the claimant said was told by her that Colleague J had passed her his (colleague J’s) telephone number to text or call whenever her partner was not around and that he said,

“in a kidding kind of way”

that the Second Respondent was saying that

“to make me jealous”

and that she and the Claimant were friends, meeting during cigarette breaks and that he gave her lifts home.

119. The Claimant reported that there was one occasion the Second Respondent had hugged him and said that

“it felt like she was going to kiss me, I pulled away, I gave her a lift home and it was awkward”.

He then clarified that that “awkward” discussion was later after a night out.

120. He believed that the Second Respondent felt rejected by him and denied telling others that he thought the Second Respondent was “weird”.

121. When it was put to the Claimant that the complaints all related to unwanted touching, verbal and inappropriate actions he said he hugs lots of people and that a Junior Doctor shakes his hand and touches his shoulder.
122. The Claimant said he believed that the Second Respondent felt rejected and the only time he felt uncomfortable was at that moment of the hug / kiss incident with her.
123. The Claimant was aware of the Dignity at Work Policy and said that Ward E was,
“a huggy sort of environment”.
124. The Claimant sent a note to DA with some social media messages. He had said in those messages that he was “jealous” of Comparator 2 because she was not working the next day, which he explained by saying he was jealous because she was not at work and he was. He could not recall saying to Complainant 4 that he was jealous because she was going on holiday, not because he was wanting to be her boyfriend.
125. He referred to the Second Respondent, Comparator 2 and Comparator 4 as being good friends and indicated that the suggestion seemed to be that he wanted to have a relationship with all of them. He could not recall who Comparator 3 was. He referred to having good relations with staff on Ward K and to some “gossip” that Comparator 2 was having an affair with another member of staff.
126. The Claimant says those messages exchanged with Complainant 2. They were initially humorous / friendly. On 19 June 2021 the Claimant sent a cartoon of an ant saying,
“I am crazy about you”.
127. On 24 June 2021 when Comparator 2 confirmed she was going for a drink the following day the Claimant said,
“maybe I’ll get a hug this time”,
to which the reply was,
“ha ha doubt” it”
and the following day he said,
“didn’t get my hug yesterday”
with a sad emoji face. Comparator 2 simply replied “ha ha”. He asked if Comparator 2 was working that day when she said “nope” he replied with a sad emoji,

“now I am jealous”

and no further reply was made.

128. On 2 September 2021, DA also interviewed Complainant 2.

129. Complainant 2 said that the Claimant pouts and says come on then. She said it was “not nice” and done when no one was looking.

130. She said the Claimant had given her a piece of paper with

“will you be my girlfriend?”

on it and then tick boxes for

“yes”, “no”, “not sure”,

she said it was like something that would happen at school. She said no and the Claimant told her she was making him sad.

131. Complainant 2 also said that on a night out a someone she had not seen for some time came and said hello and they hugged. The Claimant kept saying

“why didn’t I get a hug?”

and asked for hugs on other occasions, always in private and not in front of others. She said she became pressurised and uncomfortable. She asked him to stop and she did not believe there was a lot of hugging on Ward E.

132. Complainant 2 repeated the allegation of being smacked on the bottom and said that she responded,

“don’t fucking touch me again”

to which the Claimant laughed. She says the Senior Nurse, LK would have noticed this.

133. Complainant 2 repeated the allegation that the Claimant had talked to her about sex, toys, her favourite positions and so on and when she tried to change the subject the Claimant would also immediately bring the discussion back to sex.

134. Complainant 2 said she kept this to herself, but on a night out she heard others discussing similar issues with the Claimant, she joined the conversation and collectively they agreed it should be reported. The others present were said to be the Second Respondent, Complainant 4 and Colleague A (who the Claimant had identified as a friend), with Colleague A apparently saying that if they were uncomfortable it should be reported.

135. Complainant 2 confirmed the Claimant had described R2 to her as “weird”. She said a lot of people in the Ward talk opening about sex, but only the Claimant asks personal questions. She said there was flirting on the Ward but the Claimant oversteps boundaries. She said the comment the Claimant made was that he was,

“jealous of your heart beating inside you because I want to be pulsating inside you”.

We note that this was not mentioned in her original complaint.

136. On the same day, 7 September 2021, DA also interviewed Complainant 3.
137. Complainant 3 referred to carrying out observations with a patient at a table with the Claimant. He was said to have kept touching her arm, tried to put a piece of paper in her hand and then put it on her arm, then went to touch her thigh at which point she left.
138. Complainant 3 said the Claimant asked if she had a boyfriend and when she said no he said she was pretty and that she should have a boyfriend and that they would be lucky to have her. He asked her out and she refused.
139. She reported that he had “followed her” and said that she was pretty and petite and touched her.
140. Complainant 3 did not raise these issues as she was new and feeling that the Claimant appeared to get on with everyone. She felt lonely. She said in a discussion with the Second Respondent and Complainant 4 the subject of the Claimant came up and that she was able to say that he was the same with her. She realised that it was not just her.
141. Complainant 3 said others in the Ward could be inappropriate but had not touched her. Others talk about their own sex lives and she shuts the conversation down, she said the Claimant was the only one who touched her.
142. In late September 2021, DA interviewed the Second Respondent.
143. The Claimant had provided a further amplified statement regarding the Claimant and Colleague J. In the interview the Second Respondent became upset, she described the culture in Ward E as “laddish” and said the Claimant had made comments like

“you look hot today”

which she brushed off at first. When she said she had a boyfriend the Claimant had

“rolled his eyes”.

144. The Second Respondent said that the Claimant's behaviour became worse after she told him about the note she had received from Colleague J. The Second Respondent admitted being drunk after a night out and getting a lift home from the Claimant. She said that she felt he was going to,

“try it on”

and when the Claimant said,

“I want to ask you something”.

She stopped him and said, “no”. In the interview she said later she worried she had overreacted and apologised if she had been “weird”.

145. The Second Respondent reported that the Claimant would mouth “I miss you” to her and would try to stroke her and lean in to her when she was in front of him.

146. The Second Respondent referred to the Claimant as,

“not the worst I have come across”.

She had heard another colleague refer to him and said he was like that with her too. The Second Respondent had previously thought that it was only her that was the subject of this behaviour.

147. In her statement the Second Respondent referred to the Claimant asking to hug her and spend time with her and when she refused his advances he messaged her and said he was sorry for making her uncomfortable but

“I do still find you attractive though and I do miss being with you”.

148. The Second Respondent also referred to having previously been in a difficult circumstance where she had rejected another person's advances in a car and that she was,

“driven to the middle of nowhere and forced”.

149. When she spoke about this during the evidence before the Tribunal she became visibly very upset.

150. On 24 September 2021, DA interviewed Complainant 4.

151. Complainant 4 referred to the start of a shift when she “high fived” colleagues and the Claimant said he was expecting a kiss on the cheek, which she ignored.

152. She referred to messages which she later sent to DA via FC (HR Support to DA). The Claimant was saying that he was jealous of her boyfriend because he would like to be with her. Her replies were laughing emojis

because she said at the time she did not know what else to do. She stopped responding at all to his messages when he contacted her on 31 May 2021.

153. Complainant 4 said that the Claimant had asked her, online, about piercings which made her feel uncomfortable. She said he would bite his lip and lick his lips at he while she was at work.
154. Complainant 4 confirmed that she had a discussion with Complainant 2, Complainant 3 and the Second Respondent, when the subject of the Claimant came up and they felt they should collectively raise his conduct.
155. The messages from the Claimant to Complainant 4 included a statement that he would like Complainant 4 to babysit him, that he was jealous because she was with her partner and not with him. He instigated a discussion on 20 May 2021 with,

“random question. u have piercings”.

She replied asking why and he said that he was just curious. She said she had piercings in her ears and her belly button. The Claimant replied

“I was having a chat the other day about nipple piercings. I like belly.”

156. On 7 October 2021, DA interviewed Colleague A.
157. Colleague A said that she had heard colleagues talking about the Claimant on a night out while the Claimant was present and told them it was not the time or place for the issue to be discussed, but if it was serious it should be raised formally. She believed the people in the discussion were the Second Respondent, Complainant 2 and Complainant 4.
158. Colleague A said she and the Claimant would hug from time to time but there was no inappropriate or unacceptable behaviour or discussions. She said that the Claimant would hug her if something had happened on a shift and she felt this was an act of reassurance.
159. On 7 October 2021, DA also interviewed LK who was identified by the Complainant 2 as witnessing the bottom slap. She neither saw nor heard anything, had had no issues raised with her regarding the Claimant and said she would be surprised if something had happened and it was not referred to her as the Nurse in charge.
160. Thereafter, DA completed his Investigation Report which was completed on 9 November 2021. He concluded the Claimant had a case to answer regarding sexual harassment, unacceptable touching, inappropriate comments and inappropriate social media contact. This was said to be potentially gross misconduct, a breach of the First Respondent's Code of Conduct and Dignity at Work Policy, fell short of the expectations of the First Respondent and was potentially damaging to the First Respondent's reputation.

161. The Report was submitted to EH who wrote to the Claimant to say that the allegations had been investigated and the matter would proceed to a Disciplinary Hearing. Papers relevant to the Hearing would be sent to the Claimant at least seven days before the Hearing. That letter was sent by email on 15 November 2021 at 12:32.
162. On 17 November 2021 at 1439, the Claimant wrote to RB and said the allegations against him had been painful and harmed his mental health. He had been made to feel
- “like a criminal and an abuser”
- and that his behaviour was
- “consented and maybe too much wanted”.
- He said he had felt a victim of racism. He therefore was resigning from the First Respondent with immediate effect.
163. KP spoke to the Claimant on 17 November 2021 about his resignation and he confirmed that he wished to proceed with it. The Claimant was made aware that the disciplinary process would still continue and the Claimant would be advised of the detailed Report of the investigation findings ahead of the Disciplinary Hearing.
164. On 19 November 2021, the Claimant was sent, by email, details of the Disciplinary Hearing to be held on 15 December 2021. The covering email from FC invited the Claimant to attend by either Microsoft Teams or in person.
165. On 28 November 2021, the Claimant confirmed he did not wish to attend the Hearing at all.
166. On 7 December 2021 the Disciplinary Hearing was re-scheduled for 5 January 2022 and the Claimant was immediately informed. He was told the Hearing would proceed in his absence if he did not attend.
167. The Disciplinary Hearing took place on 5 January 2022. The Claimant did not attend. Whilst the Second Respondent attended, Complainants 2, 3 and 4 did not.
168. The Panel was Chaired by JF and MC1 was the other Panel Member. DA presented the evidence from the investigation.
169. JF asked DA about the absence of Complainants 2, 3 and 4 who had apparently agreed to attend on 15 December 2021. Complainant 3 had told DA that it was now too stressful for her, Complainant 4 said she wanted to start afresh in a new year and Complainant 2 had disengaged from the process.

170. DA confirmed to JF that he had done all he could to get the three Complainants to attend, including giving them Witness Guidance and offers of support.
171. Notwithstanding this MC1's first comment in the Hearing was to ask if there was any intimidation from the Claimant or others, so that the Complainants might feel that they could not come forward. He expressed no such concern regarding the Claimant. DA said that there was nothing to suggest such coercion.
172. On enquiry of DA by JF, he confirmed that the Claimant had engaged in the process at the end of the investigation, did not accept any of his behaviours could be seen as inappropriate and that it was difficult for DA to get the Claimant

“to see a different perspective on his behaviours”.

173. The conduct complained of was limited to Ward E.
174. DA confirmed that all four Complainants were young women starting in work, whereas the Claimant was an older man, established in his role. The similarities between the four Complainants were in his view “striking” and that the Claimant could not see the matters complained of as anything except a laugh and a joke. All four Complainants had separately thought that this was only happening to them. DA did not believe there had been any collusion between the four individuals, although he had been mindful of the possibility.
175. The Claimant's Statement was read by the Panel.
176. The Second Respondent was called and repeated the issues she had raised regarding the Claimant; said she had had similar issues in the past and

“couldn't be arsed with [the Claimant]”.

She said she was worried she would not be believed. She had complained about another colleague as well and that she was not told that the Claimant and the other colleague had both left the First Respondent's employment until it was simply announced to the team at large.

177. The Statements from the other Complainants and Witnesses were read.
178. The Panel upheld all the allegations. They concluded that whilst the absence of three of the Complainants was unfortunate, their Statements indicated a pattern of behaviour by the Claimant. They believed the evidence of the Second Respondent when she appeared at the Hearing. The absence of the Claimant made it difficult to consider any mitigation. His comments to DA did not indicate any understanding that his behaviour could be seen as inappropriate and thus there was no indication of possible change or personal reflection.

179. On 11 January 2022, the Claimant was sent the outcome of the Disciplinary Hearing. JF's letter states that the evidence,
- "...demonstrated a persistent pattern of sexually inappropriate behaviour".
180. The finding of the Panel was that the Claimant was guilty of gross misconduct. Although the Claimant had resigned some months previously, the outcome letter stated that the sanction was
- "summary dismissal with immediate effect"
- and that a recommendation of referral to DBS would be made. The Claimant was given a Right of Appeal which he did not exercise.
181. During the conduct of the Hearing before us, disclosure took place of a group WhatsApp chat entitled, "drinky poos". This was a group consisting of the Second Respondent and Complainants 2, 3 and 4. Although it was said to be created for "mutual support" it was purely social in nature. In that chat (not known to the First Respondent or the Disciplinary Panel at the time) Complainant 4 was asked by Complainant 3 if she would be attending the Disciplinary Hearing and she replied,
- "no ha ha fuck that I cba [can't be arsed]".
182. Complainant 3 replied, "okay neither lol [laugh out loud]"
183. When it became known that the Claimant was not attending Complainant 3 said,
- "why should I care how it will impact his life when he is the issue".
184. Part of the Bundle of documents which was put before us (although the Tribunal has reviewed these documents which we were not taken to) included bank statements from the Claimant and other mitigation documents.
185. It is noted that on 19 November 2021 (two days after his resignation) the Claimant was in receipt of payment from "Quest PA Limited".
186. Further, on 11 October 2021, the Claimant had been in receipt of an email from "United Care Co UK" regarding work as an Agency employee and on 21 October 2021 an email from Quest PA Limited was sent to the Claimant asking him to provide information as they were the payroll providers for Care UK.
187. Subsequently on 1 May 2022, the Claimant resigned from Care UK with effect from 13 May 2022 and on 2 May 2022 Care UK wished him well

saying that they had received a reference request for the Claimant and wished him well in his new role.

188. It is notable that in evidence before us the Second Respondent and Complainants 2, 3 and 4 all maintained their complaints about the Claimant. During his evidence and under cross examination, the Claimant continued to say that his conduct was both consensual and acceptable. He could not, even at this stage, see any reason why what he did could be considered incorrect or inappropriate.
189. The Claimant maintained that the Second Respondent had made an effort to kiss him and that the entirety of the complaints by the Second Respondent, Complainant 2, Complainant 3 and Complainant 4 were at the instigation of the Second Respondent because he had rejected her advances.
190. It is appropriate to show the differing versions of this alleged event from the Claimant's point of view.
191. On 13 July 2021, the Claimant told RB that he
"thought that maybe she was going to kiss me but nothing happened"
192. On 15 July 2021, in writing to RB he said,
"I had a feeling she was expecting a kiss"
193. On 2 September 2021, when interviewed by DA he said,
"It felt like she was going to kiss me. I pulled away..."
and
"I was going to ask her what the hug was all about and was she going to kiss me".
194. In his Witness Statement at Tribunal he referred to the Second Respondent making,
"a romantic advance towards myself and I refused her advance"
195. Having heard the consistent evidence from the Second Respondent about this incident and the somewhat differing accounts from the Claimant, we are satisfied, and find as a fact that the Second Respondent made no "advance" to the Claimant. Her consistent evidence, which we have accepted, was that this incident simply never happened. Even allowing for the fact that English is not the claimant's first language (although his command of the language is excellent) his report of the alleged incident is inconsistent and varies from time to time.
196. In those circumstances we have found as a fact that the Second Respondent made no advance to nor tried to kiss the Claimant, nor acted

in any way which could have led the claimant to believe that she wanted or expected him to kiss her.

Comparators

197. We now deal with the question of the comparators. We are bound to say this has been made more difficult by the piecemeal disclosure which took place in this case and the insistence by the Respondent of advancing additional (non-statutory) “comparators” for the purpose of illustration.
198. The Claimant relied on six alleged comparators for the purposes of his direct race discrimination claim.

Comparator 1

199. Comparator 1 is black Nigerian and was the subject of complaints which were made in September 2020 and investigated in December 2020, regarding alleged unwanted sexual advances and inappropriate touching, using suggestive and sexualised speech, sharing inappropriate material on social media, inappropriate use of the Ward laptop and accessing personal information of staff (telephone numbers).
200. The investigation found the allegation of unwanted sexual advances and inappropriate touching partially substantiated, the allegation of sharing inappropriate material with work colleagues via a social media were substantiated, the allegations of inappropriate laptop use and accessing information were not substantiated. The allegation of using sexualised speech was not mentioned in the outcome of the investigation.
201. The Investigation Officer considered Comparator 1 to be in breach of the First Respondent’s Dignity at Work Policy and the recommendation (which DA approved as the Case Manager) was for remedial local action rather than any disciplinary action.
202. The Respondent has identified differences in the circumstances of Comparator 1 compared to the Claimant. In particular, the alleged conduct was not current (at least six months had lapsed before the last incident of inappropriate sexual conduct complained of); there was a single complainant (in the Claimant’s case there were four) and that given what was stated in the Investigation Report to be the unreliable and conflicting evidence, together with the fact that much of the evidence was hearsay rather than direct evidence and that the sole complainant disengaged from the process. Further Comparator 1 accepted that some of his behaviour had been inappropriate and he expressed a willingness for further personal development and improvement. In the Respondent’s view these were all factors which set Comparator 1 apart from the Claimant and we agree.
203. When DA viewed the case, Comparator 1 had been working without incident for some months. DA had been absent through sickness, hence the delay. Although DA felt that the Investigation Report could be re-

written, this was not done. DA took the view that rather than re-open the case from scratch, given the passage of time and Comparator 1's return to work with no further incident reported, no further action was required.

204. It was not put to DA at any stage that race played any part in that decision.

Comparator 2

205. Comparator 2 is black Nigerian and a single complainant made a single complaint of unacceptable behaviour by Comparator 2 on 15 October 2016, the complaint being made on 19 October 2016.
206. The matter was investigated and DB was the Case Manager.
207. The allegation was that Comparator 2 had asked Colleague K to join him in his room after she had finished her Ward checks. The room was dark (which was usual when Comparator 2 was in there at work on night shift). Colleague K believed she was there to discuss patient matters, but Comparator 2 expressed how much he had enjoyed working with her on night shifts (this was his last night shift). She was seated and he put an arm around her, kissed her neck and tried to kiss her lips. Colleague K was able to release herself from Comparator 2's grasp and left the room. Comparator 2 denied the allegations.
208. There was a further allegation against Comparator 2 which emerged during the investigation that he slept whilst on night shift. There was conflicting evidence about this.
209. The Investigation Report did not substantiate the allegations regarding unacceptable conduct towards Colleague K and recommended dealing with the allegation of sleeping at work and inappropriate delegation should proceed under the Capability Policy. A six month action plan was put in place.
210. Essential differences in the case of Comparator 2 and the Claimant are that the allegation of sexual misconduct was not substantiated on investigation due to the lack of evidence. There was a single allegation from a single complainant. Comparator 2 was placed on an Action Plan and no further incident was reported.

Comparator 3

211. Comparator 3 is a black South African.
212. The allegation regarding Comparator 3 was made by the Claimant himself. He approached ZJ in the car park at the First Respondent's premises in early 2021 raising concerns that the behaviour of Comparator 3 towards Colleague B (a friend of the Claimant's partner) was inappropriate, in particular he was making unwanted advances.

213. ZJ investigated the matter as she line managed Comparator 3, by speaking to Colleague B who said Comparator 3 had been friendly with her and they exchanged flirty jokes but that she felt he had overstepped the boundary and asked him to stop, without success. She asked ZJ to speak to Comparator 3 to try and resolve this but did not wish to escalate the matter further.
214. ZJ spoke to Comparator 3 who was surprised by the allegations. The Dignity at Work Policy was explained to him. Both Comparator 3 and Colleague B declined the offer of a joint meeting. Colleague B was content with the way the matter had been dealt with, no further issues were raised and she and Comparator 3 continued to have a professional relationship. Comparator 3's conduct was monitored and no further issues were raised.
215. The circumstances of Comparator 3 are materially different to those of the Claimant. Colleague B had not complained herself, rather the Claimant had done so on her behalf. She did not want the matter to be escalated and rather, she was content with the managerial intervention by ZJ so that the relevant behaviour ceased. There was no allegation of inappropriate touching, nor of any specific inappropriate sexual conduct.

Summary

216. Accordingly, none of the three initial Comparators relied on by the Claimant, Comparators 1, 2 and 3 match the definition of a statutory comparator as required under s.15 of the Equality Act 2010. Each of them, for the reasons set out above, were in materially different circumstances to the Claimant.

Further Comparators relied on by the Claimant

217. During the Hearing, when it became apparent that others had been complained about by the Complainants in the Claimant's case, the Claimant added three further Comparators: namely Colleagues J, L and N. These alleged Comparators had been identified in complaints by the Second Respondent (Colleague J) and Complainant 3 (Colleagues L and N) simultaneous with the complaints about the Claimant.
218. The Claimant had not been aware of this until, during the Hearing, full and unredacted copies of the written complaints from the Second Respondent and Complainant 3 were provided by the First Respondent. The fact of simultaneous complaints by two of the four individuals was clearly relevant and the First Respondent had no explanation or justification as to why documents had not been fully and properly disclosed during the normal process of disclosure.

Colleague J

219. The Second Respondent made complaint about Colleague J who was black British.

- 220. The Second Respondent complained that Colleague J had engaged in conduct which amounted to sexual harassment. He had made comments of an overtly personal and sexual nature.
- 221. A preliminary fact finding was conducted by the Matron, but this could not be completed because Colleague J was absent through sickness. This sickness absence continued until his resignation.
- 222. In the light of his absence and resignation, no further action was taken. DA was the Decision Maker in this case and he freely admitted in his evidence before the Tribunal that steps could have been taken to interview Colleague J whilst he was absent and that matters could have proceeded either through Grievance or Disciplinary processes without him, if he did not engage.
- 223. DA accepted that he had been in error by not taking action against Colleague J. He said that in his mind the First Respondent was waiting for a date for Colleague J to return to work before interviewing him, but Colleague J was not engaging in the process and then left the employment of the First Respondent. He said Colleague J was not particularly on his mind.
- 224. The circumstances of Colleague J are materially different to that of the Claimant. He was absent through the relevant period and then left the Trust. He did not engage in the investigation process which therefore did not formally commence. Whilst DA accepted that he, and the First Respondent generally, could and should have done more regarding the allegations against Colleague J, his absence and his resignation were the reasons why DA did not take those steps which he has accepted was an error.

Colleagues L and N

- 225. Complainant 3 made allegations against each of these individuals saying they engaged in the making of sexist remarks about women and they persisted, in an overtly personal nature, in particular discussing their sex lives and sexual activities.
- 226. JW had discussions with each of the individuals regarding misconduct in an effort to ensure that it stopped. Had it continued, we are told, further action would have been taken, but as the Decision Maker DA concluded this to be less serious than unwanted physical touching and that the matter would be resolved by reflective discussions with the individuals so no formal action was taken.
- 227. The Respondent relied on the material differences between the individuals and the Claimant as the absence of unwanted physical actions, the willingness to engage in a reflective process and to moderate the behaviour.

The Respondent's "Comparators"

228. The Respondent led evidence regarding six persons who were not said to be statutory comparators, but the information about them was provided because they were relevant as to any prima facie case the Claimant might establish for the shifting burden of proof and would assist in the creation of a hypothetical comparator and how they would be treated.
229. Whilst the information regarding these individuals was not in our view relevant to the issues before us, we have nonetheless considered the six individuals.

NW

230. NW is white British. He was accused of making inappropriate sexualised comments, unwanted physical contact, sexualised gestures and attending work smelling of alcohol.
231. A formal investigation was conducted by DA and on his recommendation the matter proceeded to a Disciplinary Hearing.
232. LD Chaired the Panel and all the allegations were upheld.
233. Whilst dismissal was complicated, LD's unchallenged evidence was that NW had not been given clear guidance on acceptable conduct. NW is dyslexic and reasonable adjustments were required to assist him in his role. NW expressed remorse regarding his activities and their impact and he assured the Disciplinary Panel that his conduct would not be repeated.
234. In those circumstances the disciplinary panel considered a Final Written Warning to be the appropriate sanction and NW was re-deployed away from the Complainant.
235. LD's unchallenged evidence was that race and nationality played no part in the decision to give the individual a sanction below dismissal.
236. The First Respondent pointed to NW's remorse and self-reflection as well as problems associated with his Dyslexia as reasons for a sanction short of dismissal in his case, considerations which did not apply to the Claimant.

GC

237. GC is black British. He was accused of unacceptable behaviour towards female staff, including sexual innuendo, sexual harassment, ridiculing a colleague over her stammer and his tone of voice engaged. He engaged in sexual conversations in the Nursing Station and coerced female staff to act "in an unwelcome manner" (e.g. by asking a female member of staff to bend down to pick something up whilst observing in a "lewd" fashion and making sexual and derogatory comments regarding female staff in front of patients).

238. The matters all proceeded to a Disciplinary Hearing after investigation. NC was a member of the Disciplinary Panel dealing with the allegations against GC.
239. GC was a flexible worker only. He was after the Disciplinary Panel upheld some of the allegations (in particular for unacceptable sexual and inappropriate conduct towards females) effectively dismissed because he was a sessional worker only the Panel removed him from the flexible working register so that he should no longer work for the First Respondent, therefore he was effectively dismissed.

FW, TH, AM and EA

240. These four men, all black British, were the subject of complaints related to sexual misconduct at around the same time as GC. They were all engaged in the same Ward within the First Respondent. NC reviewed the details of each case in her evidence.

FW

241. FW was found to have made abusive and threatening statements to a female colleague and behaved unacceptably towards female staff. He received a First Written Warning. There was no sexual element to the conduct found.

TA

242. TA was accused of engaging in inappropriate and unwelcomed conversations of a sexual nature using offensive and abusive language and behaviours which constituted bullying and harassment.
243. TA resigned during the investigation but the matter proceeded to a Disciplinary Hearing when, had he remained in post, he would have been issued with a First Written Warning.

JM

244. JM was accused, investigated for and disciplined after allegations of a failure to act on concerns of unacceptable behaviour and of unacceptable behaviour towards female staff at a social event and then via messaging. The allegations were all upheld. JM was in a Senior (Band 6) position and was demoted to Band 5 and given a Final Written Warning. Dismissal was contemplated, but JM's clinical good practice and other mitigating factors put forward, including his willingness to reflect and improve his conduct, led to the sanction being reduced to a Final Written Warning and demotion.

EA

245. Two female colleagues made complaint regarding EA alleging sexually motivated and inappropriate behaviour and conversations, unwanted

physical advances and on one occasion pulling one of the complainants into his groin. The allegations were upheld and EA was summarily dismissed.

Comparator Summary

246. Having considered all the above, we have universally concluded that the Comparators put forward by the Claimant were each in materially different circumstances to the Claimant. In particular:

246.1. Comparator 1

There was a single complainant who gave conflicting and unreliable evidence. Much of the other evidence was hearsay only and the complainant disengaged from the process. (In the Claimant's case there were four complainants and one of them did not disengage from the process). The allegations were historic, not immediately current and Comparator 1 was both remorseful and willing to reflect on his conduct.

246.2. Comparator 2

No misconduct of a sexual nature was found against Comparator 2. He was appropriately dealt with through the capability process and an Action Plan in relation to unrelated matters.

In Comparator 2's case, there was a single complainant and her evidence could not be corroborated. In the Claimant's case the First Respondent was satisfied that the four complaints demonstrated a pattern of behaviour which was not present in Comparator 2's case.

246.3. Comparator 3

The complainant here was the Claimant, apparently on behalf of Colleague B who did not wish to escalate the problem and was content with the outcome of management intervention.

246.4. Colleague J

Colleague J resigned, he had been absent through sickness and then resigned so that no further action was taken. DA accepted that this was an error, caused by his not considering Colleague J's position pending a return to work which never happened.

246.5. Colleagues L and N

There was no unwanted physical act by either Colleague L or N. Both understood the impact of their actions and engaged in reflection.

247. The Tribunal notes that at no stage did the Claimant suggest to any of the Witnesses concerned (DA, DB, ZJ or JW) that any difference in treatment between the Claimant and the six comparators he relied on was as a result of or influenced by race.
248. In the circumstances the Tribunal has accepted the reasons for the differences in treatment of the relevant individuals advanced by the Respondent. Thus if the comparators or any of them had been appropriate comparators under the Equality Act, and had the Claimant established facts sufficient to shift the burden of proof, the First Respondent had provided evidence to satisfy us that any difference in treatment was for a non-discriminatory reason.

Hypothetical Comparator

249. The Tribunal has determined that in this case a hypothetical comparator would be a black man or a white British man aged mid-forties who is accused of inappropriate conduct of a sexual nature by a number of younger female colleagues, where all but one of the Complainants failed to attend a Disciplinary Hearing, where the employee accused also disengaged from the process and resigned and did not consider his conduct (whether admitted or found) to be inappropriate or requiring any change.

Conclusions

250. The Claimant was employed by the Respondent from 5 March 2018, latterly as a Senior Support Worker on Ward K and carrying out additional sessional work as a Support Worker on Ward E.
251. In or about March 2021, the Claimant raised with ZJ alleged misconduct by Comparator 3 towards Colleague B who was a friend of the Claimant's partner. This was resolved informally through discussion by ZJ with Comparator 3 and Colleague B who was content with the outcome and did not wish the matter to be escalated further.
252. In May 2021, there was an incident between the Second Respondent and the Claimant when the Claimant says the Second Respondent tried to kiss him, or was "expecting a kiss" from him, to which he pulled back. The Second Respondent has completely denied this. She simply indicates that the event did not happen and we have accepted this.
253. The Claimant's description of the event has changed from time to time. Initially he said that he thought that maybe she was going to kiss him, but nothing happened (to RB on 13 July 2021), then
- "I had a feeling she was expecting a kiss"
- in writing to RB two days later on 15 July 2021.
254. On 2 September 2021, in an Investigation Meeting with DA he said,

“it felt like she was going to kiss me”

until finally in his Witness Statement he says,

“she made romantic advance towards me and I refused her advance”.

255. We have accepted the Second Respondent’s evidence. She was adamant that she “definitely” did not try to kiss the Claimant. She says the incident simply never occurred.
256. This is a crucial finding because the crux of the Claimant’s case against the Second Respondent is that in July 2021 she made false allegations against the Claimant and persuaded Complainants 2, 3 and 4 to do so, as a result of her advances towards the Claimant being rejected.
257. We reject this suggestion. The Second Respondent did not make any advance to the Claimant which he rejected. Indeed we find that had the Second Respondent done so the Claimant would have been all too willing to accept such advances based on his conduct towards the Second Respondent and indeed his conduct towards the other three Complainants.
258. The Claimant had not, prior to these proceedings, raised any complaint about this alleged incident and as is clear from the exchange between the Claimant and the Second Respondent via social media messaging after the event, that it was the Claimant that was pursuing the Second Respondent, not the other way around. He said in particular,

“I do find u attractive but I rather keep your friendship”

and

“I miss u”.

259. The Claimant says the Second Respondent’s attempt to kiss him (or expecting a kiss from him, or his thinking she might kiss him) amounts to harassment contrary to s.26 of the Equality Act 2010. That claim fails on the facts found as we have found that the Second Respondent made no such advance or attempt.
260. In July 2021, the Second Respondent and Complainants 2, 3 and 4 made complaints about the Claimant’s conduct towards each of them. The complaints all say that the conduct they experienced from the Claimant was directed at them individually and privately and that they felt at first as though they were the only recipients of the conduct in question. However, when a discussion about the Claimant began between two of them on a night out, overheard by another colleague – Colleague A who knew the Claimant well – Colleague A suggested that the place and time for the discussion were inappropriate and that any serious matter should be reported formally.

261. In due course all four Complainants agreed that this should be done and on 3 July 2021 Complainant 4 emailed JW (and copied in the Second Respondent, Complainants 2 and 3) that all four of them had been uncomfortable with the conduct of a Bank Staff member on Ward E and wanted to bring it up

“before anything worse happens”.

At that stage the Claimant was not named.

262. JW contacted all four individuals and obtained statements regarding the conduct they were referring to.
263. Complainant 2 gave details on 6 July 2021. In summary the Claimant was said to ask for hugs, message her outside of work, smacked her bottom on one occasion and engaged in sexual discussion asking the Complainant 2 intimate questions about her sex life. He asked about her underwear and stroked her hands. He regularly commented on her appearance and asked her to go to his house for drinks.
264. On the same day the Second Respondent set out her complaints in writing. She said he had,

“wished he was her boyfriend”

and said that

“the only thing wrong with you is that you are not with me”.

When the Claimant gave her a lift home from a staff night out and the Second Respondent was under the influence of alcohol he said he wanted to ask her something and the Second Respondent simply said,

“no”

and when he said she didn’t know what he was going to ask, she said she did

“but no”.

The Second Respondent said the Claimant continued to mouth

“I miss you”

to her at work and says he winks and blows kisses to her regularly.

265. On 8 July 2021, Complainant 3 sent her details to JW. She said on one occasion the Claimant had tried to touch her thigh, regularly asked personal questions about her family and friends, commented on her being petite and skinny and touching her as he did so. It was said that the Claimant had tried to push paper notes to her.

266. Complainant 4 wrote details of her complaints on 9 July 2021. The Claimant had allegedly said he was expecting a kiss from her when she high fived, said he was jealous of her boyfriend and wished he was with her. He offered her a lift with the words

“if you need a ride I’ll happily take you”

and asked her about body piercings in messages outside of work. He said he was jealous when she was going on holiday with her boyfriend because she would be with the boyfriend and not with him. He licked his lips and bit his lip facing her.

267. On 13 July 2021, RB spoke to the Claimant and told him that allegations had been made against him. The Claimant then began a period of sick leave. We have found as a fact that the Claimant left work on 13 July 2021 of his own volition, not on the instruction of RB as he alleges, because he felt unable to complete his shift. We have accepted RB’s evidence that the Claimant was able to return to work if he wished, but he did not do so and therefore she treated his absence as sick leave. Because she was concerned about the Claimant when he was “shocked” by the allegations and said he could not continue his shift, she made an immediate Referral to Occupational Health.
268. The allegations were all put to the Claimant at a Fact Finding Hearing on 27 July 2021 by VW. The day before that, the Claimant had spoken to KP and told her that he was looking for other jobs because he felt that he had lost his. He was told he had not lost his job and to “hang fire”.
269. The Claimant, in his written Statement of 15 July 2021, set out details of extraneous matters more than any answer to the allegations in question. When the Fact Finding discussion was held with VW on 27 July 2021, the Claimant effectively said that all the matters being complained of were consensual activities and that his behaviour was not incorrect at all. Effectively he was saying he was a “huggy” person and that he was like this with everyone.
270. The Claimant was on holiday from 27 July 2021 and had to quarantine for one week thereafter so he would be due to return to work on 10 or 11 August 2021.
271. In the meantime, the First Respondent was considering whether the Claimant should be suspended. Ultimately the decision was taken that there was no role that the Claimant could safely be placed in without patient contact and that given the nature of the allegations against him, he should be suspended. This was communicated to the Claimant on 10 August 2021.
272. At the same time the Claimant was told that there would be a formal investigation into the allegations against him and on 2 September 2021 he was interviewed by the Investigating Officer DA.

273. DA then interviewed Complainants 2 and 3 and thereafter he separately interviewed, on the same day, Complainant 2 and Complainant 3.
274. DA then interviewed the Second Respondent on 8 September 2021 and Complainant 4 on 24 September 2021.
275. The only complaint which the Claimant advanced in relation to the investigation process is that not all witnesses were interviewed. He identified one colleague (Colleague A) who was interviewed and Complainant 2 identified LK as a witness to the bottom slap (although she denied seeing or hearing anything of that nature). Other than to suggest that staff on Ward K, where the Claimant carried out his substantive role, should be interviewed to confirm that he had not behaved inappropriately towards them, the Claimant did not suggest any other witnesses of relevance.
276. DA did not interview individuals from Ward K. The complaints were limited to Ward E and all the Complainants were relatively new to working with the First Respondent and considerably younger (early to mid-twenties) than the Claimant (mid-forties). The fact that the staff on ward K made (or had) no complaints about the claimant's conduct did not seem relevant to DA who was investigating the claimant's conduct elsewhere. We find the claimant's criticism of the investigation (limited to that issue) to be misplaced.
277. DA completed his Report on 9 November 2021 and on 15 November 2021 the Claimant was told that the matters would proceed to a Disciplinary Hearing.
278. The Claimant resigned on 17 November 2021, two days after receiving the notification that the matter would proceed to a Disciplinary Hearing. He cited that the process had been stressful for him, further that it had damaged his mental health and that he was made to feel like
- “a criminal and abuser”.
279. In fact by then the Claimant had secured and probably started work with another employer. It is notable that he was still receiving salary under suspension from the First Respondent.
280. The Claimant had told KP in July 2021 that he was looking for other work, effectively as soon as he was made aware of the complaints.
281. He was contacted on 11 October 2021 by United Care UK for information to begin agency work through them. He was contacted by their payroll providers Quest PA for information on 21 October 2021 and according to his bank statements he received a payment from Quest PA on 19 November 2021, two days after his resignation.
282. We can unanimously have concluded, therefore, that the Claimant realised once the allegations against him were made that his job was at risk, that

he immediately began looking for work and had begun alternative work prior to, or at the same time, as he resigned.

- 283. Accordingly, we conclude that the claimant resigned because he was trepidatious as to the outcome of the investigation into allegations against him and once he secured a new role and was told that he would face a Disciplinary Hearing he resigned (possibly in the hope that that would be an end to matters).
- 284. The Respondent asked the Claimant to reconsider his resignation, but he did not do so.
- 285. At the Disciplinary Hearing on 5 January 2022, only the Second Respondent attended. Comparators 2, 3 and 4 did not attend and nor did the Claimant.
- 286. The Panel heard from DA as the Investigating Officer and from the Second Respondent. They accepted the Second Respondent's evidence as cogent and compelling. They considered the absence of the other individuals but felt that the evidence that they had put forward together with the evidence which they had heard from the Second Respondent, showed a pattern of behaviour by the Claimant.
- 287. The Claimant's evidence as submitted did not suggest any understanding or remorse for the impact of his actions (however innocent he considered them to be) and in the circumstances the Panel found him guilty of gross misconduct and said that he would be summarily dismissed, although he had already resigned.
- 288. The Claimant was invited to appeal but did not do so.

The Issues before the Tribunal

- 289. Turning now to the issues before the Tribunal.

Direct Sex and Race Discrimination

- 290. Did the Respondent decide that all the allegations against the Claimant were upheld and that the Claimant should be dismissed for gross misconduct?
- 291. Yes.
- 292. Was that less favourable treatment?
- 293. The Tribunal has had to construct a hypothetical comparator. We described that comparator as a black man, or a white British man, aged mid-forties who was accused of inappropriate conduct of a sexual nature by a number of younger (early to mid-twenties) female colleagues in circumstances where at any Disciplinary Hearing all but one of the complainants failed to attend and where the accused employee also failed to attend and disengaged from the process, resigning having secured

alternative employment and did not consider the conduct (whether admitted or found) to be inappropriate.

294. The comparators advanced by the Claimant were all, for reasons which are fully set out in this Judgment, in materially different circumstances to the Claimant.
295. We are satisfied that the hypothetical comparator which we have referred to would have been treated in the same way as the Claimant. The Claimant was subject to a number of complaints from four individuals regarding misconduct of a sexual nature.
296. The First Respondent was bound to investigate that matter and the investigation process was not one which we can find any criticism of. The matter was bound to proceed to a Disciplinary Hearing given that the Investigating Officer found that there was a case to answer in respect of each of the allegations.
297. Further, the Disciplinary Panel fairly concluded that the Claimant was guilty of gross misconduct on the basis of the evidence that was before it.
298. It is notable that when the individuals involved – DA (for whom the Claimant continued to express his respect), MC1 (Disciplinary Panel member) and JF (who Chaired the Disciplinary Panel) – gave their evidence, it was not put to any of them that they were motivated or influenced by race when they reached their decisions regarding the Claimant.
299. We are satisfied that the hypothetical comparator would have been treated in exactly the same way. One differentiating feature which, had it been present in the Claimant's case, could have made a difference to the finding of gross misconduct was some understanding of the impact of the impact of his conduct and a willingness to reflect and improve his conduct. That was not present in the Claimant's case and had it not been present in the hypothetical comparator's case the outcome would have been exactly the same.
300. The treatment which the Claimant received was not on the ground of race. It was appropriate in the light of the allegations against him and the evidence in relation thereto. He has not put to any of the decision makers in this case that his treatment was in any way connected to race or sex.
301. Accordingly the claims of direct sex discrimination and race discrimination fail on their merits.

Harassment Relating to Sex / Sexual Harassment

302. This claim fails on its merits. The Second Respondent did not try to kiss the Claimant and the Second Respondent did not make false accusations against the Claimant. Indeed, the Second Respondent gave compelling evidence before the Tribunal which we accepted that she had been in

receipt of the treatment about which she complains. Some of the treatment was recorded on social media messaging.

303. The Second Respondent did not persuade others to make false accusations against the Claimant. There was a discussion between the Second Respondent and others and it was Complainant 2 who first put forward to JW concerns about an (at that stage unnamed) Bank worker. Any persuasion would have had to take place before the first contact by Complainant 2 to JW on 5 July 2021. There is simply no evidence whatsoever of such persuasion. Indeed, the basis for the Claimant's allegation that the Second Respondent was somehow the ring leader of the group and persuaded others to act as they did and make false accusations is based on the Claimant's assertion – which we have not accepted – that this was motivated by his rejecting her attempts to kiss him. As that incident did not occur, the whole basis of the Claimant's argument that the Second Respondent had a motivation to make accusations against the Claimant and to persuade others to do so, is without any foundation whatsoever.

Victimisation

304. We are satisfied that when the Claimant made a verbal report to ZJ in the car park in or about March or April 2021, that Colleague B had been subject to sexual harassment by Comparator 3, that this was a protected act within the meaning of s.27 of the Equality Act 2010.
305. However, the suggestion that this influenced the Panel who decided that all the allegations against the Claimant were upheld and that the Claimant should be dismissed for gross misconduct, is without any evidential foundation whatsoever.
306. We are satisfied that the report to ZJ did amount to a protected act because it was a report of sexual misconduct towards a female colleague by a male, which would have been a breach of the Equality Act 2010.
307. The disciplinary process, however, did not involve ZJ in any substantive way. The investigation was carried out by DA and the Disciplinary Panel was MC1 and JF. It was not put to them that they were influenced by this previous disclosure. Their unchallenged evidence was that they did not know about the alleged protected act, it was not something that was discussed and it was not part of their decision making process. The suggestion that they were in any way influenced by it, or even aware of it, is without any evidential foundation whatsoever.
308. This claim fails on its merits.

Constructive Unfair Dismissal

309. No breach of contract has been established by the Claimant.

310. The Respondent investigated serious allegations that were made against the Claimant and did so properly. The Claimant identified at the commencement of the Hearing that the “final straw” was the fact that he was told that the allegations would proceed to a Disciplinary Hearing. That is not a breach of contract and cannot be said to damage in any way the implied term of mutual trust and confidence. It is an appropriate step in circumstances where serious complaints of a sexual nature have been made against an employee.
311. In any event, the Claimant did not resign because of any purported breach by the First Respondent. The Claimant resigned because he realised that when the allegations were made his conduct would be called into question. Despite his protestations to the contrary we are satisfied that he must have been aware that engaging in conversations with young female members of staff regarding their sexual preferences, their appearance, suggesting he was jealous because they were with their boyfriend and not with him and suggesting on one occasion that he was jealous of the Complainant’s heart because it was beating inside her and he wanted to be pulsating inside her, were wholly inappropriate, had no place in a working environment and were likely to result in serious disciplinary action. The suggestion that these comments and the discussions which he had were all consensual clearly is not the case as is evidenced by the Second Respondent and Complainants 2, 3 and 4.
312. The Claimant had begun looking for alternative work as soon as he was aware of the complaints against him. That supports our view that the Claimant realised that he was in substantial difficulty once the allegations had been formally made.
313. His resignation was contemporaneous with being told the matters were proceeding to a Disciplinary Hearing and further, contemporaneous with his having obtained alternative employment which on the face of the documents we have seen, he had already begun.
314. The five allegations which the Claimant makes as amounting to breaches of contract were:-
- 314.1. That RB told him to stay away from work when she first saw him (and effectively therefore suspended him on 13 July 2021), this allegation fails on its merits. We have found that the Claimant absented himself from work because he did not feel able to complete his shift and remained absent from work thereafter, although he could have come into work. He was not suspended. His absence was treated as sickness absence and RB was concerned for the Claimant’s well being so that she made an immediate Referral to Occupational Health.
- 314.2. The Claimant suggested that a colleague in the Low Secure Ward told Colleague B that he was aware that the Claimant was suspended for sexual harassment (before the Claimant was told of his suspension). This was said to have taken place in July / August

2021. We accept the First Respondent's view that this was simply gossip on the Ward or in the First Respondent's premises because the Claimant was absent from work.

- 314.3. The suspension on full pay pending investigation occurred, but this was not a breach of contract, it was in accordance with the First Respondent's Policies and Procedures.
- 314.4. The Investigator did not fail to interview relevant Witnesses as alleged. There were no relevant Witnesses to the incidents about which complaint was being made other than those that were interviewed in particular, as well as the four Complainants, Colleague A and LK.
- 314.5. The Claimant says the Respondent failed to investigate the Claimant's allegations about Complainant 2 which she made during the course of the allegations against him. The Claimant complained that Complainant 2 was flirtatious and was engaged in inappropriate behaviour on the Ward. We fail to see how not investigating that matter impacted on the Claimant's position. It was not raised until the Investigating Interview, and we find that he was actually seeking to do no more and no less than discredit Complainant 2. The allegation was not of an incident which he had observed, but was second hand hearsay from a colleague who was perhaps trying to be helpful to the Claimant.
315. Accordingly, the Claimant's complaint of constructive dismissal fails on its merits. He did not resign in the face of any breach of contract (there was none), in fact he resigned because he had secured alternative work which he began looking for when he realised that he was likely to face serious disciplinary action due to the complaints that were raised against him.
316. For all those reasons, the Claimant's complaints fail and the case is dismissed.

Approved by:

Employment Judge M Ord

Date: 21 March 2025

Sent to the parties on: 24 March 2025

For the Tribunal Office.

Public access to Employment Tribunal decisions

Judgments and Reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal Hearing has been recorded you may request a transcript of the recording, for which a charge is likely to be payable in most but not all circumstances. If a transcript is produced it will not include any oral Judgment or reasons given at the Hearing. The transcript will not be checked, approved or verified by a Judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>