EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Y Bhullar	v	Berkshire Healthcare NHS Foundation Trust

Heard at: Reading Employment Tribunal (face to face save that 12 & 14 February 2025 were fully remote by CVP)

On: 29, 31 January (tribunal reading day), 3 to 7 and 10 to 14 February 2025 (13 February deliberation in chambers – parties did not attend)

Before: Employment Judge George

Appearances
For the Claimant: Miss C Kelly, counsel
For the Respondent: Mr D O'Dempsey, counsel

JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.

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

3. The complaint of victimisation is not well founded and is dismissed.

REASONS

1. Before setting out my detailed findings and conclusions on the issues I would like to take the opportunity to say that in many ways this is a sad case. The respondent's witnesses either volunteered or agreed with the view that Mrs Bhuller is a good physiotherapist. The events of this dispute notwithstanding, there were no concerns about her clinical practice and, although she may not have felt this at all times, I accept that her employer valued her as an employee for her skills and experience. Against that background, the circumstances in which her 15-year employment ended are sad.

2. Following a period of conciliation which lasted between 29 April 2022 and 18 May 2022, the claimant presented a claim form on 17 June 2022. The response was presented late but an extension of time to 10 November 2022 was granted on 27 October 2022. The claim arises out of the claimant's

employment by the respondent Trust as a Band 7 Specialist Physiotherapist between August 2006 and February 2022. The claim originally included complaints of sex discrimination, protected disclosure detriment and automatic unfair dismissal as well as part-time worker detriment. Those were withdrawn and, by the time of the final hearing, the remaining complaints were unfair dismissal, direct race discrimination and victimisation.

3. The case was case managed over the course of three hearings on 13 October 2023, 2 August 2024 and 10 September 2024. The final hearing was listed to consider liability only. At the start of Day 1 this was clarified after discussion with the parties to mean that issues relating to contributory conduct and to whether, if the claimant was successful, there should be an uplift or reduction of compensation under s.207A Trade Union and Labour Relations Consolidation Act 1992 should also be considered in the first instance.

4. The hearing was originally listed to be conducted by a panel of three but, unfortunately, the non-availability of two non-legal members caused the regional employment judge to vary the listing so that it should be heard by a judge sitting alone rather than be postponed for lack of judicial resource.

5. I had the benefit of a joint hearing file to which documents were added by consent during the course of the hearing. Page numbers in that hearing file are referred to in these reasons as Page 1 to 1404 as the case may be. I had been sent in advance three audio files of recordings of three meetings relevant to the issues: happily the representatives were able while I was reading into the case to agree transcripts for those audios and there was no application for then to be played in full. Ms Kelly played some extracts from two of the meetings during cross-examination of some of the respondent's witnesses.

6. The claimant gave evidence in support of her own case and called one witness, Mrs Marcela Wiggins. The respondent called 12 witnesses to give oral evidence: Julia Prince – at the time the WAM Therapy Team Lead and the claimant's line manager; Joanne Evans – HR Lead, Policy & Transformation; Jenny Plummer – then the ARC and Therapies Manager; Rozeena Toheed – then an HR Manager with the respondent Trust; Helen Williamson – then the Head of Integrated Case for East Berkshire; Claire Williams – then the Divisional Director for Community Adult Health Services for the East Berkshire area; Sara Fantham – then Clinical Director and Lead Nurse for East Berkshire Physical Health division; Joanne Blackburn – then Integrated Services and Inpatient Lead; Heidi Illsley – Deputy Director of Nursing for Berkshire; Nathalie Zacharias – at the relevant time the Director of Equality, Diversity & Inclusion; Elizabeth Chapman – Head of Service Engagement and Experience; and Rosemary Martin – Lead for Specialist Services. All 14 witnesses had prepared written witness statements which had been exchanged in advance, which they adopted and on which they were cross-examined.

The Issues

7. By the time of the final hearing the issues had narrowed from those before Employment Judge Hawksworth at the various preliminary hearings. A current updated list of issues was sent to the tribunal before the start of the final hearing. After correction of a typographical error. It was agreed subject to one matter.

8. On Day one I heard and rejected an application by the claimant to amend the list of issues (and indeed her claim) to rely on a second additional protected act for the purposes of the victimisation claim. The following are my reasons which were given orally at the time:

    8.1 The claimant made an application to amend the list of issues. The proposed amendment is to add at what would be LOI 6.1.3 an additional alleged protected act for the purposes of the victimisation claim.

    8.2 When considering whether or not to exercise their discretion to permit an application to amend a claim the employment judge should consider all the relevant circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it: Selkent Bus Co. Ltd v Moore [1996] I.R.L.R. 661 EAT. Relevant circumstances include:

        8.2.1 The nature of the amendment;

        8.2.2 The applicability of statutory time limits;

        8.2.3 The timing and manner of the application;

    8.3 The Selkent principles form the basis of the Guidance Note 1 on amendments appended to the Presidential Guidance on General Case Management. However, properly understood, Selkent does not mean that the Tribunal should adopt a formulistic approach as though it prescribed a tick-box exercise.

    8.4 The Tribunal should consider whether the amendment sought is minor or whether it is a substantial alteration to the pleaded claim: principle (5)(a) of the Selkent principles at para.22 of the judgment of Mummery J as he then was. As Underhill LJ put it in Abercrombie v Aga Rangemaster [2014] I.C.R. 209 CA at paragraph 48:

> "the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

    8.5 More recently, in Vaughan v Modality Partnership (UKEAT/0147/20), HH Judge James Tayler referred to this as a focus upon the practical consequences of allowing the amendment at paragraph 21,

> "what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions."

8.6 The proposed additional protected act is that on 18 April 2019 in an informal meeting the claimant asked the HR Manager, Roheena Toheed whether

> "A grievance would uncover the fact that my manager has taken things and picked on me and that quite frankly there is an underlying current of bullying in that service anyway …" (see transcript at page 1351 for the context).

8.7 As Miss Kelly has argued that the list of issues is not a pleading, it is a case management tool. The pleadings - by which I mean the claim form and the grounds of response and any amendments to those documents - are the way in which the parties have set out the factual and legal complaints which they wish to bring to the tribunal. However the tribunal is entitled to proceed at a final hearing on the basis that the list of issues are the issues in the case particularly when it has been agreed by professional representatives. The point of agreeing a list of issues at as early a stage as possible is so that the parties can prepare disclosure of documents and draft witness statements of the evidence relevant to the issues.

8.8 On the other hand the list of issues is not sacrosanct. The tribunal has a core duty to hear and determine the case in accordance with the law and the evidence. So if a failure to depart from the list of issues would prevent the tribunal from determining the case in accordance with the law and the evidence then it should do so.

8.9 Miss Kelly has argued that this alleged protected act - the communication itself - is referred to in the claim form and also in additional information provided by the claimant in response to a request for further information and the early request for additional information from the tribunal. Both of those documents were prepared at a time when the claimant was not professionally represented. The claim form is in a narrative form. That is an observation and not a criticism of the claimant at all who makes the point in that claim form that she's not a lawyer but a physiotherapist. The claim form therefore needed focus and clarification in order for the parties and the tribunal to be able to see what the legal heads of claim were and which parts of the factual narrative were said to amount to unlawful acts within those legal heads of claim.

8.10 In the present case, that was done through three case management preliminary hearings. That is an above average number of such hearing even for a case of relative complexity covering a factual matrix that spans a number of years. The list of issues has been subject to revision and a considerable amount of correspondence between the

representatives. The claimant has been represented since approximately October 2023.

8.11 There was a case management hearing on 13 October 2023 (page 103 hearing file for the final hearing) . Further information was provided by the claimant through her solicitors as directed on that occasion. The additional information that I've been taken to at page 70 predates that. It describes the incident on 18 April 2019 more in terms of a factual allegation of detriment based on Ms Toheed's conduct than as a communication of a protected act. Contrary to what is now argued, it is not a fair reading of those particulars, either in the claim form or in that additional information, that the claimant was then alleging in her explanation of that incident that she communicated a protected act on the 18 April 2019.

8.12 At all times since the claimant became represented in this litigation, the complaint of victimisation was explained in terms that positively state that she is relying on another protected act and only that other act.

8.13 I'm not satisfied that this is simply a question of amending the list of issues. It is not stated in the previous documents that the claimant is relying on a protected act on 18 April 2019 - even if one takes a generous view of the language used, bearing in mind that the claimant was a litigant in person.

8.14 It is a different complaint to say that those who are responsible for the act said to be victimisation in 2021 were motivated by a verbal communication in April 2019. That is different to saying that they were motivated by the formal grievance that happened later.

8.15 It is also argued on behalf of the respondent that the way the communication is described cannot amount to a protected act. I have read the relevant part of the claimant's witness statement and it is not said that there was something in the context which means that it should have been obvious that the claimant was raising discrimination on that occasion. Therefore, there is some doubt about the merits of the proposed additional complaint both in terms of whether, if the facts are established, the claimant could show that she did a protected act on 18 April 2109 and in terms of the prospects that she will show any act caused the detriments relied on.

8.16 It is not a situation where it is plain and obvious that the list of issues is deficient. It is not the case that the tribunal will be unable to make a fair determination of the issues in the claim if I decide it on the basis of the agreed list of issues. This is a situation where there has been laborious case management and negotiation of the list of issues between representatives that led to one protected act being relied on. In all of those circumstances, I do not think there is substantial unfairness to the claimant in not being able to advance the argument that she wishes to add. There is greater risk of unfairness to the respondent were I to permit this change. I reject application.

9 The only amendment to the "current list of issues" document was therefore that the comparators listed against LOI 4.3 were relied on as providing evidence from which I might infer how a hypothetical comparator would be treated. The claimant did not continue to argue that any of the individuals were direct actual comparators.

10 The document "Current List of Issues" is added as an appendix to these reasons and was the decision making template I used.

Findings of Fact

11 I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgement all of the evidence which I heard but only my principal findings of fact, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

12 Among the services offered by the respondent Trust are Assessment and Rehabilitation Centre and Therapy Services. Mrs Plummer was, at the relevant time, the ARC Manager of services across East Berkshire. These included physiotherapy services at three clinics (including one in Maidenhead), in inpatient wards and community physiotherapy teams (see Mrs Plummer para.3)

13 Mrs Prince, the WAM Therapy Team Lead, reported to Mrs Plummer. At the relevant time she worked 15 hours a week for that service and also worked 3.75 hours as the Staff Side Chair which is now her sole role. At the relevant time as WAM Therapy Team Lead she managed a team of 17 people and was responsible for all their operational and employee relations issues (Mrs Prince para.2).

14 The claimant worked as a Band 7 Specialist Physiotherapist in the Maidenhead clinic and was one of those line managed by Mrs Prince working in the Short Term Support and Rehabilitation Team providing physiotherapy care to patients in the community. This is referred to as the STS&R team. It is a team run by an external third-party provider of social care in the Royal Borough of Windsor and Maidenhead called Optalis. The claimant explains in her para.8 that Optalis became the provider of social care during her 2015 maternity leave. As a physiotherapist employed by the Trust working in the STS&R team run by Optalis, the claimant had an operational manager in the team who was employed by Optalis for day-to-day operational issues and a line manager (Mrs Prince) employed by the Trust for employee relations including one-to-one's and appraisals.

15 Helen Williamson was the Interim Service Director at the relevant time. Claire Williams, who initially joined the Trust as a physiotherapist, was at the relevant time the Divisional Director for Community Health Services for East Berkshire (see her para.1). This means that Mrs Williamson was part of what

is referred to as the Service and Mrs Williams was outside the Service; the Interim Service Director reported to her in her role at the time.

16 The claimant started employment in August 2006 so at the time of her dismissal she had more than 15 years' service. During her employment she took two periods of maternity leave. She returned to work in April 2013 from the first period of maternity leave on reduced working hours (20 hours per week). Her mother passed away in July 2013 and she had three month's sick leave after that bereavement. Following her return to work her working days were established as Tuesday, Wednesday and Thursday. According to the claimant, Mrs Prince was her line manager from her return from her second period of maternity leave in March 2016.

17 The claimant worked part-time but, according to Mrs Prince, the Band 7 Specialist Physiotherapist post assigned to Optalis was a full-time post. A part-time Band 6 physiotherapist was assigned to cover the full-time role on a job share basis. When Mrs Prince joined the team this was being done via the bank and the individual covering the job share did not work Fridays. She explains in her para.6, and I accept, that the Intermediate Care service run from the Maidenhead clinic is a rapid service meaning that patients may need to be seen urgently or on the same day to avoid hospital admission. Therefore, the shared role needed to cover every weekday. The job share colleague was therefore on-boarded as an employee from bank with effect on 1 February 2016 working part-time to cover Monday, Tuesday and Friday.

18 Mrs Prince states, and I accept, that the job share colleague had expressed to her unhappiness about working both Mondays and Fridays. It seems that in her bank role she had not worked Fridays. However she had been employed specifically to cover the working days which the claimant was not contracted to cover. Furthermore the job share colleague did not at any time make an application to vary her contractual hours.

19 Mrs Prince spoke to Mrs Bhullar about changing her working days so that she worked one of Monday or Friday in response to the job share colleague expressing unhappiness about working both of those dates. The conversations appear to have taken place on more than one occasion but the specific allegation raised in these proceedings relate to November 2017.

20 The claimant's father had passed away in February 2017 and, following this bereavement, she had three months of sick leave. After her return, in September 2017, Dawn Cannon became her operational manager. She is employed by Optalis.

21 The claimant (para.12) relates a conversation in a supervision with Mrs Prince in November 2017 where she states that Mrs Prince insisted that it was a Trust requirement that part-time staff work either a Monday or Friday. Mrs Prince refutes this saying that she would not have made that statement as not all Trust services require cover five days a week. I accept that and think it more likely than not that on this occasion the claimant misunderstood what was said. However it is likely that Mrs Prince said that the *service* (i.e. the STS&R physiotherapy service) requires cover on both Monday and Fridays.

22 It is very clear that Mrs Prince thought it was unfair that one person in the job share arrangement should have to work both Monday and Friday and the other work neither of the days that bridge with the weekend. It is also clear that Mrs Prince did not regard the fact that Mrs Bhullar apparently had contracted working days as a barrier to raising the issue more than once even when the claimant made clear that she did not wish to change her working days.

23 When cross-examined about this, Mrs Prince repeated that she just thought it was not a fair arrangement and that a fair arrangement would be for each job share to work one of Monday or Friday. I accept that the claimant felt pressured about this issue. As will be seen, Mrs Prince, told the claimant when she took her year's unpaid leave that on her return she would be working Tuesday, Thursday and Friday. Whether or not this was strictly speaking a unilateral variation of contract has not been explored before me in great detail but Mrs Prince came across in oral evidence as unconcerned about the prospect that it was.

24 By contrast, she was responding to an informal request by someone who had been contracted expressly to work both Monday and Friday. Mrs Prince may not have said that it was Trust policy but I am satisfied that she made clear to the claimant that she was expected to go along with this change.

25 On 11 January 2018 the claimant explained to Mrs Prince in supervision that she was applying for one year's unpaid leave as a career break. I have not been taken to a specific policy but I understand that the request was made under an established process which entitles people in the claimant's position to make such an application. Mrs Bhullar had personal reasons for needing time away from the work environment including following the death of her father. These were known to Mrs Prince and acknowledged in the email of 10 April 2018.

26 The policy appears to provide for any unpaid leave that is granted to start three months after the date of the request. In Mrs Bhullar's case she gave slightly less than three months' notice. The claimant asked for consideration to be given to her leave starting on 1 April 2018. Mrs Prince managed to achieve that but was not able formally to confirm it until 13 March 2018 (page 515). In that email she stated "as we have discussed and agreed previously, on your return to work in 12 month's time one of your working days will be Friday." That was confirmed by Mrs Bhullar a couple of days later. They made an arrangement to meet on 21 March 2018 including so that the claimant could provide a signed paper copy of the agreement for the unpaid leave and other forms.

27 As the claimant explained in an email to HR on 6 March 2018 (page 510), her uncertainty about whether or not her leave would start on 1 April had consequences because she needed to arrange childcare for the Easter holidays if she herself was not going to be on leave. She explained that Mrs Prince was on annual leave and that she needed to know by the end of that week in order to book places for her children at a holiday club. She also contacted one of Mrs Prince's managers (not Mrs Plummer) which is why HR

are copied into the email of 14 March (page 511) by which Mrs Prince confirmed the start date.

28 The scheduled meeting on 21 March did not take place because the claimant was unwell and absent due to sickness. This was on her penultimate day at work before the break because she was taking some accrued annual leave at the end of March 2018. Although still unwell, she worked her usual hours on Thursday, 22 March 2018. She delivered the completed paperwork to Mrs Prince's place of work but did not see her because the latter was unavailable.

29 At some point between 22 March and 10 April Mrs Prince and the claimant's operational manager met, apparently as one of the regular catch up meetings. The latter told Mrs Prince some information about the circumstances of the claimant's last working day. On 10 April 2018 Mrs Prince sent an email to Mrs Bhullar's personal email address (page 520). In it, Mrs Prince referred to the cancelled meeting and states that she had wanted to discuss during it the concerns she understood Mrs Bhullar to have about the process under which her application for an employment break was considered. She sets out a timeline of her own actions.

30 It is clear from para.13 of Mrs Prince's statement that she understood the claimant to be unhappy about the time it had taken to confirm her career break. She accepted in cross examination that the email from the claimant at page 511 is seeking information for practical reasons. I think that email from the claimant to HR could reasonably be read as implying that she was unhappy at not having been told definitively when the career break is to start because she contrasts the lack of formal answer with having provided a reference for the candidate to cover her absence.

31 I accept that, rather than simply explain what had been going on in the background to explain the passage of time, there are words used in the first page of the 10 April email which caused me to infer that Mrs Prince was, as was suggested to her in cross examination, "peeved" at the challenge to the process when she saw herself as having worked hard to achieve what Mrs Bhullar wanted and indeed needed. There was some justification for her thinking this given the limited number of hours she worked a week in the Service, the total number of direct reports that she had at the time and the fact that she was grappling with the procedure that was unfamiliar to her. This is one of those instances where each side's perception of the situation can be justified. Mrs Bhullar would have benefited from more regular communication but Mrs Prince does appear to have worked hard in the time available to her to enable Mrs Bhullar to start her career break on first April. Nevertheless, the tone used by Mrs Prince in enumerating the hours she spent and how difficult that was to achieve, as well as her statement that there would be "a significant amount of time spent on inducting your replacement which will have an on-going impact on time available for treating patients" strike me as unnecessarily defensive.

32 Mrs Prince also stated that she anticipates that, on her return, Mrs Bhullar would be working Tuesday, Thursday and Friday. Friday working had been agreed already as stated above. Mrs Prince stated that she had intended to

discuss that at the intended meeting and wanted to enable the claimant to make arrangements for a return to work on those days. Against the background of the previous discussion, this communication seems unremarkable.

33 In two paragraphs, Mrs Prince relayed to Mrs Bhullar concerns which she stated had been relayed to her by the operational manager. As Mrs Prince says in her para 14, she stated that she was

> "incredibly concerned that you left the office on Thursday (your final day) without handing over 14 of the 16 patients remaining on your caseload, or organising cover for those patients".

She also relayed her understanding that Mrs Bhullar had left early without agreement, and had not returned her phone. She was asked to return it by 18 April 2018. Mrs Prince informed Mrs Bhullar that the team had been disappointed that she had left flowers behind and had left without saying goodbye.

34 To skip forward to the conclusion of Mrs Williams' grievance appeal (page 646), ultimately it was accepted by the respondent that:

34.1 The claimant had handed over the two active patients on her caseload in line with her previous practice by means of written handover notes at the front of the relevant folder;

34.2 She had carried out a verbal handover in respect of the 14 other patients allocated against her name on the PARIS database "for allocation process reasons" to an administrator. I read this as acceptance by Mrs Williams of the claimant's evidence that these 14 were patients on a waiting list awaiting allocation to a clinician and not patients who had received any treatment yet.

34.3 Both of these steps were consistent with the practice that she had followed in the past without any concerns being raised.

34.4 She had followed normal practice within the team for allocating active patients.

34.5 She had not left early but at the normal time for that day of the week. The operational manager accepted that she had been mistaken about that in an email to Mrs Prince (page 546).

34.6 There was no evidence that she left on anything other than good terms with her colleagues – although she had forgotten her flowers she was too unwell to return to collect them when reminded about them and explained that at the time.

35 As to the phone, the claimant had offered to return her phone earlier in the day and that offer had been declined by her operational maanger. Ultimately, Mrs Bhullar left without remembering to hand in her phone.

36 It is easy to be wise with the benefit of hindsight and I try to avoid falling into that error. Mrs Prince consulted with Mrs Plummer and with Joanne Evans (see her para.6) about the wording of the email. That conversation took place on about 4 April 2018 so the email was worked on over some time; it was not drafted and sent in haste.

37 I accept Mrs Evans' evidence that her reading of Mrs Prince's intentions were to raise the issues in a timely way rather than leave them for a year. She did accept in oral evidence that, had she been the manager, she possibly would not have sent an email.

38 In circumstances where a meeting had been arranged to discuss any remaining concerns of the claimant about the process or timeliness with which her request for leave was granted, it was reasonable for Mrs Prince to seek to follow that up in some way, notwithstanding the fact that the leave had started. In principle, her instinct that any disagreement or unhappiness should not fester during the leave was sound, in my view. Similarly, given previous discussions about working days, it was sensible to give the claimant as much time as possible to prepare for her working pattern on return. She had omitted to return her phone so a reminder about that would have been unexceptional.

39 There are a number of ways in which the opportunity to have those discussions or communicate that information to someone who has started unpaid leave for personal reasons could have been done. What I am particularly asked to consider is whether Mrs Prince sent the email about complaints received from the operational manager without first establishing the facts. It is clear that she did not take any steps to establish the facts – beyond her initial conversation with Ms Cannon. Mrs Williams accepted that in her grievance appeal outcome,

> "it is apparent from the evidence provided that the facts in the situation in relation to your last day had not been fully established."

40 It is argued on behalf of the respondent that the email of 10 April did not contain allegations but merely concerns and there was nothing in it to suggest that those concerns were being formally recorded or that there would be any consequences in relation to the claimant's employment as a result. The claimant describes the statements about her last day of work as allegations. The email does not state that it will be put on her personnel file and the evidence was that it was not intended to be. However when Mrs Prince in the email describes herself as incredibly concerned and explains in her witness statement (para 15) that she was particularly concerned with the potential patient safety and continuity of service issues presented by a failure to hand over or leaving early it is quite understandable that the claimant, believing with justification that what is said against her was untrue or unjustified, wanted to challenge what was said. The statement in respect of the handover in particular is recorded by Mrs Prince as a definitive statement of fact; she does not say that Mrs Bhullar may have failed to handover but that she did.

41 As I say it was ultimately accepted that Mrs Bhullar had handed over the inactive patients in the same way when leaving in March 2018 as she had

previously done. Nevertheless, the operational manager appears to have expected a handover to a manager. The documentation does not always distinguish between an administrative handover and clinical handover. I understand the inactive patients merely to require an administrative handover. Nevertheless, the emails at page 546 & 548 are evidence that the operational manager, who had been appointed since the claimant's return from her second period of maternity leave, and most recent long-term sick leave, expected a request for reallocation or an update on the situation to be made directly to a manager.

42 There is no evidence that that was expressly communicated to the claimant before her career break started. The respondent ultimately accepted that she had handed over in the way that had previously been acceptable. My reading of the grievance appeal outcome is that this amounted to an acceptance by Mrs Williams there was no valid criticism of what the claimant had done while acknowledging that the process needed to be clarified and improved. All of the relevant respondent's witnesses were of the view that a handover - even of patients who were not being actively treated - to a clinician or manager was best practice.

43 Mrs Prince did not have the benefit of the claimant's explanation that we now have. Nevertheless, she sent a written communication of serious concerns without establishing whether there was a reasonable basis for criticising the claimant's actions. Her oral evidence was that, had the claimant not been going away for so long, she would have raised concerns relayed to her by the Optalis operational manager informally in a supervision. She had to accept that her invitation (in the email of 10 April) for Mrs Bhullar to contact her if there were any continuing concerns was expressly worded to relate only to the process for granting the career break. She was sufficiently concerned about how the email would be received to consult with her manager and HR on the wording. When concerns of this nature are recorded as definitive fact in writing they take on a formality even if the manager intends them to be raised informally.

44 I do accept that Mrs Prince had no particular reason to disbelieve the operational manager. It was not until the second grievance in 2021 that the claimant even obliquely referred to any problems with her operational manager. Nevertheless, the principles of general fairness as a manager meant that she should try to look at both sides before writing her email of concern making a definitive statement that the claimant had failed to carry out a proper handover. After all, she had no particular reason to doubt the claimant's clinical competence. She seems to have assumed that the manager was correct about everything she relayed.

45 The matters raised by the claimant now against her operational manager (including Mrs Wiggins' evidence that the white South African locum's timekeeping was treated with indulgence) were not known to Mrs Prince. It is not for me in these proceedings to pass judgement on the operational manager's decision to report her concerns to Mrs Prince. It is clear that the latter was unaware of any specific concerns about the operational manager which might have caused her to reflect before acting what she had been told

without further investigation. In any event, it was poor practice to record in writing that she was "incredibly concerned" without first hearing the claimant's response to the allegation that she had failed to carry out a clinical handover.

46 The claimant contacted HR and met with a representative on 3 May 2018 to raise her concerns about the email. That individual contacted Mrs Prince who provided dates for a meeting but the initiative was not followed up by the Trust's HR department despite the claimant confirming in August 2018 that she did wish to meet with Mrs Prince. The individual concerned left the Trust and that was how things were left until Mrs Prince emailed the claimant at the end of January 2019 to plan the return to work.

47 Mrs Bhullar contacted HR and Ms Toheed became involved. A meeting was arranged between Mrs Bhullar and Mrs Prince at which Ms Toheed was to be present. This is one of the three meetings which were covertly recorded by Mrs Bhullar. I had the benefit of agreed transcripts and some sections were played during the cross-examination of some of the respondent's witnesses.

48 In general Mrs Bhullar was calm and articulate in the meetings. She was persistent and, at times, somewhat upset but I accept that she does not come across on the page or in the extracts which were played as aggressive. I say this because that is the way that her conduct in those meetings has been characterised from time to time by the respondent's managers who were present. Participants in the meetings did interrupt each other and voices may have been raised on occasion. I can understand why Mrs Prince received the impression that the claimant was angry with her but there is nothing to suggest that the claimant lost her temper.

49 Mrs Prince had asked her manager, Mrs Plummer, to attend to support her because she was anxious about meeting Mrs Bhullar whom she anticipated to have been upset about the email. The claimant is critical of Mrs Plummer having attended the meeting. It was unclear whether the allegation in LOI 4.2.3 is a complaint that Ms Plummer was present and it was clarified by the claimant in cross-examination that that was the case.

50 Mrs Prince did apologise at the start of the meeting when she said "I'm sorry to hear you felt upset" (page 1262).

51 Although both Mrs Prince and Mrs Plummer gave evidence that the latter was impartial and neutral during the meeting on 4 March 2019 I accept that in some respects Mrs Plummer took Mrs Prince's part. An example is, on page 1269 of the transcript when Mrs Plummer moves the discussion from Mrs Prince's defence of her email to an explanation of the impact on Mrs Prince of dealing with the application for the career break in shorter than usual time.

52 Although I accept that the claimant did not become aggressive in the meeting, that appears to have been the perception of Mrs Prince and Mrs Plummer to judge by their present descriptions of that meeting and of the way they described it during the investigations which follow. While finding that that is not objectively reliable as a statement of the claimant's demeanour it is informative about how they felt about it. I infer that they felt challenged. This seems to have been uncomfortable for Mrs Prince. Mrs Plummer was not

neutral - having been involved in writing the email it is hard to see how she could have been - I accept that her presence at the meeting was to support Mrs Prince.

53 The claimant was told that Mrs Plummer was present immediately before going into the meeting and did not object. I get no sense from reading the transcript that the claimant was overawed or unable to articulate why she was concerned about the fact that Mrs Prince had sent the email, and its contents and wanted an explanation about what lay behind it in order to clear the air before returning to work.

54 A meeting was then arranged between the claimant and her operational manager facilitated by Ms Toheed on 14 March 2019. The agreed transcripts are at page 1294. At the claimant's request, Mrs Price was not present. In relation to the patients that were open on Paris, Ms Cannon explained that she had expected an email to herself saying what had been done and what needed to be done; it had taken her a little while to pick through the patients' details. She said that she completely understood that the claimant not been well on her last day. She accepted that there had been a misunderstanding on her part as to which were the claimant's early days which had been why she had looked to see the claimant to say goodbye – forgetting that the claimant's working day had finished.

55 The operational manager set out her recollections of the meeting the following day in an email (page 546) to Mrs Prince. She finished the email by saying:

> "On reflection I acknowledge that Yogita obviously felt aggrieved by the situation and had focused on what she considered were negative comments on her professional reputation which was not the intention or case, however I am concerned at her level of response and that if these comments had caused such distress she didn't request they were addressed earlier rather than 11 months later to enable the career break to be more productive.
>
> At this time as her operational manager, given the evident strength of her feelings, there would be significant work required before further discussion around her return to this service could take place."

56 The claimant met again with Ms Toheed on 26 March 2019 and her views were set out in an email to Mrs Prince and Mrs Plummer the following day (page 549). She explained that Mrs Bhullar wanted the email retracted, an apology, and annual leave back. This appears to have been on the basis that she considered herself not to have had the full benefit of the career break because it was overshadowed by the email however she requested to be given back sickness absence from before the email was sent.

57 On 29 March Mrs Plummer sent a letter to the claimant (page 551) which she describes as being so that they could draw a line under the current situation and "move forward working together in an amicable way". The criticism of this email within the proceedings is that Mrs Plummer did not progress the claimant's complaints as a grievance and stated that the email could be deleted. There was no reason why Mrs Plummer should progress the complaints up to that point as a grievance because no formal grievance had

been brought. Those involved up to this point had been attempting to arrange an informal resolution through the two meetings. Mrs Plummer wrote the letter on the advice of Miss Toheed (JP para 24). She passed on apology from HR for not pursuing the 2018 initiative

> "With regards to an apology. I am of course very sorry that you have felt this level of impact over the communication that was sent to you, and I am sorry that you didn't feel able to come to any of us to talk about it. I do hope that in future if issues arise that you would be able to turn to your colleagues for support."

58 The claimant did not regard the advice to delete the email as sufficient, and presented a formal grievance on 24 May 2019.

59 The final allegation against Mrs Plummer is in relation to an email invitation to Part 2 of a Frailty course. Page 1404 was added to the hearing file on Day 6 by agreement. When Mrs Plummer wrote her witness statement in December 2024 she had no specific recollection of inviting people to attend a particular course in April 2019. She was unaware of the specific training and the Trust was not able to locate the email.

60 The claimant had returned to work on 3 April 2019. On 26 April 2019 Mrs Plummer emailed various people with an invitation to part two of the Frailty Series. These included the physiotherapist at Optalis who had been covering the claimant's role in her absence, the claimant's job share and Mrs Prince. She asked the recipients to forward the invite to other members of the team and said that the rooms had a set capacity but that they intended to Skype the course (which I understood to mean live stream it) and might be able to record it as a webinar.

61 The claimant was informed about this by Mr Vonk and he sent her the invitation. It seems improbable, given that it was sent to Mrs Prince, with an instruction to circulate it to all teams, that Mrs Plummer was actively seeking to exclude the claimant. Sight of the email prompted Mrs Plummer's recollection. She said that Part 1 of the course had been some 2 to 3 months previously and that, although it had not been done as a webinar, the link to the recording had been circulated after the event. She had included Mr Vonk, but she had omitted another Optalis team member who was white. She stressed that there was no intention to miss anyone off the aim had been to cascade it as much as possible. She explained that at the time email circulation lists were not generally used and that she frequently had problems missing people off; whom she intended to receive an email that was directed to a large group. I found her evidence on this point to be persuasive notwithstanding my conclusion that she had not behaved neutrally in the meeting of 4 March 2019.

62 It is now common ground that the meeting between the claimant and Miss Toheed which is the subject of LOI 4.2.6.2 took place on 18 April and not 24 April 2019. This was covertly recorded by the claimant and the agreed transcript is at page 1338.

63 In her statement for the capability hearing in March 2021 the claimant explained why she felt strongly that the way the Trust had handled things up to her return to work was inadequate. Page 1045

> "However, there was no acknowledgement from any of the managers of any wrongdoing on their part. Instead following on from these meetings Jenny Plummer sent a letter on 29th March 2019 summarising the meetings. In this letter Jenny Plummer indicated that she had investigated my concerns but concluded there was nothing more to say and advised that I delete the email.
>
> Jenny's email came at the very end of my unpaid leave. A year off to manage personal stress had instead been spent ruminating over false allegations and the quality of the relationships I had with my colleagues at Optalis.
>
> I returned to work on April 2nd 2019 meeting with Jenny Plummer on my first day. Once again, she told me to draw a line under the email. She indicated that her letter was final and there was no other action left for me to take. Jenny's behaviour was defensive. At this point I felt that JP, DC and Jenny had no consideration for how I felt receiving these emails. Telling me to delete the email was literally a dismissal of my concerns, further undermining my confidence. Deleting the email would not delete the allegations made within it, nor the lack of acknowledgement from all the managers involved of their mistakes.
>
> I had hoped to return to the team at Optalis and that I could settle in. However, Jenny Plummer's email indicated the allegations may have come from my colleagues and not just the managers. I felt like I was constantly fearful of upsetting someone in the team or that further false allegations would be made about me. During this time at work I was able to check that there was evidence available to be able to refute the allegations made against me in JP's email."

64 As with the transcripts of all three fully documented meetings, I take the transcript into account as a whole. It appears that the claimant was still, as she says in her statement still ruminating, two years later, on who in the team may have been sufficiently upset that her leaving her flowers and not saying goodbye would be mentioned, ultimately to her line manager. She feels that it's only going to be possible to move on if she get "an acknowledgement and an apology from the two managers who have made things up because all of those things that were mentioned in the original email were not true."

65 I am of the view that the email should not have been sent expressing as a definitive fact that the claimant had done something worthy of criticism without checking the facts. The most serious allegations in relation to the handover and leaving early, when investigated, did not show conduct by the claimant that merited criticism. However, it is not the case that all of the things were untrue. The evidence before me about the most serious matter - that of handover - does not involve two managers making things up but rather a difference of expectation about what was necessary and an apparent ignorance by the operation manager that the claimant had followed a different process in the past.

66 About 25 minutes into the 18 April 2019 meeting Ms Toheed said that the plan was to draw a line under it because everyone needs to move on and look forwards. The claimant says (page 1351):

"I agree we need to do so but it's not going to happen if…

RT: I just feel if you're going to take this in terms of going formal, it's going to uncover loads of other stuff and you might

YB: what kind of stuff do you think it might uncover?

RT: I don't know…

YB: the fact that my manager has taken things and picked on me and that quite frankly there is an underlying current of bullying in that service anyway will that just unpick that

RT: could be…

YB then maybe that's what I need to do…

RT: but in terms of the rest of the team I'm just trying to think about the impact on the rest of the team in terms of your perceptions against them and them thinking about this is what she thinks of us

YB: the impact on the rest of the team well maybe we'll find out which members of the team said this. And maybe they can see and hear the impact of their thoughts and their perceptions of me because this was uncalled for."

67 It is that passage relied on by the claimant as amounting to telling her not to submit a grievance (LOI 4.2.6.2). However, later on, Ms Toheed said "I think if you do want to make it formal that's fine as an outcome and what is your grievance basically about so put that in writing" (page 1354). Ms Toheed had already sent the grievance policy to the claimant by this point and reminded her where to find it. There is similar guidance about bringing a grievance at page 1356.

68 In my view, the highest this can be put is that Ms Toheed counselled the claimant to think about how a formal grievance would impact her working relations with the rest of the team before she put one in. Overall, the message she was sending out was that it was the claimant right to bring a formal grievance if she wished to do so.

69 Coaching sessions had been arranged for the claimant and the first of these took place on about 8 May 2019.

70 The claimant's first grievance was presented on 24 May 2019 (page 558). She complained about not being adequately updated with the progress of her application for one year unpaid leave, the email of 10 April 2018, the meetings of 4 March and 14 March 2019, the email from Mrs Plummer of 29 March 2019 and about an email sent by Mrs Prince on 23 May 2019 by which she apologised for the upset felt by the claimant and said it had not been her intention to cause her to be upset.

71 The claimant also hand-delivered a copy of the grievance to the then Optalis HR director who apparently assured the claimant that her concerns would be investigated.

72 To draw a line under that part of the story, the claimant was eventually sent a brief email on 3 September 2019 (742) which she did not find until 17 September because it had gone into her junk folder. It reads

> "My apologies for the delay in contacting you. I have now had an opportunity to review the information you passed to me when we met in the Town hall regarding your grievance and the associated compliant against Dawn Cannon. I have treated this as a complaint and investigated it as such within Optalis as a grievance can only be taken against employees of the same organisation. Based on the information supplied I cannot find a case to answer against Dawn which requires any further action on our part and so I am now closing this case down from our perspective."

73 The grievance investigation took place in the second half of June 2019 and July 2019 with the initial outcome being delivered on 5 August 2019. In the meantime, on 14 June 2019, the claimant started a period of annual leave but then became unwell and was certified unfit to work. That period of sickness absence continued until 6 May 2020 but she did not return to work with the STS & R team after June 2019. There were referrals to the occupational health team in that period which, where relevant, I refer to below.

74 The grievance was investigated by Katalin Walsby and the commissioning officer was Helen Williamson. Mrs Prince was interviewed on 8 July 2019 (page 583). Particular complaint is made about the following exchanges

74.1 At page 588 in answer to question 43, having said there had been no reply from the claimant to the email of 10 April 2018 Mrs Prince said "before going off on the career break Dawn had been noticing that she was sitting away from the team, it was a number of things that needed to be addressed."

74.2 At page 589, when asked how the claimant was working in the office now, Mrs Prince said "difficult for Dawn. I have not met with Yogita since. I have had some coaching with Lesley Wheeler and have arranged for Yogita to have coaching as well…"

75 It is fair to say that the first of these comments suggests that Mrs Prince had received information from the operational manager which she accepted without checking with the claimant. The claimant complains that the implication is that Mrs Prince was trying to paint a negative picture about her when, for example, she sat where she sat because of a hot desking policy. On the other hand, Mrs Prince had received the email from Ms Cannon on 15 March 2019 which referred to the need for significant work on the relationship and it's not an unreasonable inference from that date the operational manager would find re-establishing the relationship difficult in all the circumstances. I do not think it right to infer from that that Mrs Prince meant that the claimant was at fault in particular. Furthermore in the context of the investigation as a whole Mrs Prince was simply answering questions put to her. The claimant found out about these comments on 1 November 2019 when she received the grievance investigation pack.

76 That investigation report is at page 1192. Mrs Williamson's outcome is in two parts. Following the outcome at page 600 on 5 August 2019, claimant asked

for a review (page 607) on the basis that not all of issues had been dealt with. She asked for clarification and argued that that requirement should not prejudice her ability to appeal as well. Mrs Williamson agreed to provide clarification and did so on 23 September 2019 (page 616). That step was outside the standard grievance process.

77 Within this litigation the claimant has made reasonable criticisms of the stage 1 grievance outcome.

77.1 The terms of reference required an exploration of whether the allegations in the 10 April 2018 email were true. Although Mrs Williamson does adopt the conclusions of the investigator, she was the one tasked with reaching a conclusion on the issues. The outcome (page 600) does not determine whether the allegations were true or not.

77.2 The review at page 616 reached the conclusion that the claimant did leave work early which was surprising since the operational manager had by that stage accepted that she had been mistaken about that (as reflected in Ms Walsby's report at page 1196). Mrs Plummer had accepted that in her letter of 29 March 2019.

77.3 There was evidence before Mrs Williamson from which she could conclude that the claimant had not taken flowers and not return telephone as well as that she had not followed the handover process as the Department would expect. There was no evidence before her to support a finding that the process had been followed differently by the claimant on previous occasions although Ms Cannon had said that that the claimant should have been aware of the process.

78 Mrs Williamson did not appear to focus on the detail of why the claimant was aggrieved. However she did make practical recommendations that mediation take place and that there should be a review of how cases were handed over at the start of the period of leave. She accepted that it would have been better for there to be a face-to-face or telephone discussion before Mrs Prince sent the email of 10 April 2018 but ultimately did not uphold the grievance.

79 The evidence is that, at that stage, both Mrs Prince and Ms Cannon agreed to mediation. Initially the claimant did not agree to mediation. She expressed the view at the grievance appeal (page 641) that mediation can only work when the issues around the allegations had been resolved "until there has been some acceptance that people have raised concerns". I do not criticise her for that view; the relevant fact is that mediation could not take place at that time because that would require all necessary parties to consent.

80 Mrs Williamson was cross-examined about some internal emails. She had some later intermittent involvement in the case. On 13 May 2021 she had a conversation with Dawn Cannon's own line manager who reported that Ms Cannon was at that stage quite distressed about mediation - which is described as not possible at that time - based on her experience of the meeting on 14 March 2019. Mrs Williamson said "I recall Jenny Plummer's experience of the same meeting. It sounded like a terrible experience." In fact

Mrs Plummer and Ms Cannon were not present at the same meeting. Furthermore the evidence I heard led me to conclude that Mrs Plummer's description of the claimant's behaviour at the meeting she *was* present at was seen through the prism of her instinct of defensive Mrs Prince and was not objective.

81 On 26 August 2021 (page 997) Mrs Martin asked Mrs Williamson to confirm whether the recommendations from the grievance appeal hearing had been completed – including feeding back to Mrs Plummer about her attendance at the 3 March 2019 meeting. Mrs Williamson confirmed that it had but reported that "YB behaviour was very difficult at that meeting and others reported how aggressive it became". This is an illustration of Mrs Williamson being ready to repeat comments made to her by others and is evidence that, certainly by that stage, she was not open-minded about the claimant's complaints. I infer from that that Mrs Williamson was predisposed to accept that the managers within her service were justified in their actions.

82 In cross-examination the claimant was asked about a passage in her statement to the formal hearing on 2 November 2021 where she said she wanted to point out a discrepancy in how concerns raised by staff were dealt with compared with concerns raised by managers (page 1053). She also talked about a two tier level of employment between managers and the in-group and those who were not aligned with the in-group (page 1063). She was not aware of the emails from Mrs Williamson when she made those statements. However, the grievance outcome lacked intellectual rigour and that point was made at the time by the claimant. Those comments by the claimant lead me to infer that, at that stage, the claimant thought the evidence pointed to a difference based on managerial status rather than based on race.

83 The claimant appealed her first grievance on 30 September 2019 and there was a hearing conducted by Mrs Williams on 14 November 2019. The claimant was represented at that hearing by Mr Dale, her trade union representative, as she had been in the grievance interview (page 574).

84 Mrs Williams came across in evidence as independent minded and someone who approached her task with a genuine intention to do what she could to repair relationships. The claimant criticises her outcome as being unclear. In particular she argues that Mrs Williams failed to provide an adequate conclusion to the allegations that the claimant had failed to provide a handover.

85 I disagree. I have already outlined my reading of Mrs Williams' conclusions. Specifically, in relation to the handover, she concluded that:

85.1 The claimant had handed over the two active patients on her caseload in line with her previous practice by means of written handover notes at the front of the relevant folder;

85.2 She had carried out a verbal handover in respect of the 14 other patients allocated against her name on the PARIS database "for allocation process reasons" to an administrator. I read this as acceptance by Mrs Williams of the claimant's evidence that these 14

were patients on a waiting list awaiting allocation to a clinician and not patients who had received any treatment yet.

85.3 Both of these steps followed the same practice that she had followed in the past without any concerns being raised.

85.4 She had followed normal practice within the team for allocating active patients.

86 Other points which were clearly stated in the grievance appeal outcome (page 646) were

86.1 a clear statement that the respondent did not regard the email as raising performance or conduct concerns;

86.2 there was no standard operating practice (or SOP) for the handover of clinical patients and that needed to be remedied - in the jargon of the respondent "this gap has already been acknowledged and the learning shared with the service".

86.3 This passage is worth quoting:

> "Whilst the panel agree that it is was not unreasonable of [Mrs Prince] to accept another manager's account of concerns, and appreciate her views about the importance of raising concerns or outstanding issues, it is apparent from the evidence provided that the facts in the situation in relation to your last day had not been fully established. While it may have been helpful to give you the outstanding feedback on the employment break process and to remind you of the need to return equipment, we agree that consideration should have been given as to whether it was appropriate or necessary to raise the remaining issues at the start of your employment break. We also consider that it would have been beneficial to have asked for further clarification of the points in question before taking the decision to make you aware of them. We are also of the view that the feedback in relation to your last day of work was not well communicated and lacked sensitivity and that there was a lack of clarity about the purpose of the comments and of any next steps."

87 I have already commented on the use of jargon. In effect, by this passage, the grievance appeal decided that it was unnecessary and inappropriate to send the email of 10 April 2018. To judge by Mrs Prince's response to cross-examination that message appears to have been diluted by the time it reached her.

88 A specific criticism by the claimant is of a failure by Mrs Williamson and Mrs Williams to interview Ms Cannon as the operational manager. There were emails from her providing information of her perspective as I have already indicated. As an employee of third party organisation, the Trust could not require Ms Cannon to be investigated or interviewed in relation to the claimant's grievance. They have no duty of care towards the Optalis operationl manager and she had no obligation to comply with their management instructions. The tension that arises when employees of two different organisations work alongside one another or when employees of one

organisation work within a service provided by a different organisation is not unique to this case.

89 The claimant does not appear to accept that there are limits to what the respondent can do to investigate concerns raised against co-workers who are not their employees or, as in this case, against people with some managerial authority over their employees but with whom they are not in an employment relationship. Whether or not further or better attempts could have been made to seek clarification from the operational manager in the grievance investigation it is absolutely clear that the reason she was not approached was that she is not employed by the Trust.

90 One of the witnesses said that this case highlighted the gap in their internal procedures for their staff who were placed with external organisations and that having identified that gap the Trust formed a genuine intention to do better in future. For that reason I do not regard what happened in relation to Mrs Bhullar's complaints against her operational manager within her first grievance as being good evidence of how the trust would deal with a complaint in the future.

91 The recommendations for mediation and appropriate SOPs were repeated in the grievance appeal outcome.

92 The grievance appeal process was concluded on 25 November 2019 when the claimant was still absent due to ill-health. The respondent then started moves to bring her back to work from sickness absence.

93 A formal sickness review meeting appears to have been scheduled for 23 October 2019 to discuss an occupational health report from the previous month but the meeting was rearranged for 19 December 2019. Mrs Blackburn became involved in that part of the process when she joined the service. The claimant continued to be represented by her trade union although the actual representative changed to Ms Bromley. Details of vacancies that might provide a temporary solution to facilitate the claimant's return to work were provided to her (page 663). I understand that a total of three job descriptions were provided at that time. The claimant now takes issue with the suitability of some of those on grounds of location, for example. However, as Mrs Blackburn explained, it would have been wrong for the respondent to make that selection for the claimant; they were right to provide details of vacancies that would suit her skill set and leave it to the claimant to decide whether she wished to investigate them further.

94 It is clear from correspondence (including that of page 696-7) that Mrs Williamson was involved in discussing drafting of SOPs in early February 2020. A structure of bi-weekly meetings with both managers to support the claimant and for Mrs Williamson to chair a return to work meeting showed that she was investing time in trying to bring the claimant back to work in her substantive role at that stage. She stated that she would arrange mediation if the claimant decided to return to her current position.

95 An occupational health report from February 2020 reported that the claimant was temporarily unfit to work and recommended that a stress risk assessment be completed to identify “perceived workplace stressors”.

96 The details of the meeting on 10 February 2020 were recorded in a letter of 17 March (page 716). The details negotiated by Mrs Williamson were included in that letter to be implemented if the claimant returned to her substantive role. However the claimant had said that before she returned to her substantive role she needed to understand the new processes. She chose to return to a role at Upton because that was within the BHF team management and not with an external provider. She returned to work and was due to start work after accrued annual leave.

97 The first COVID-19 lockdown started on 23 March 2020 and the claimant returned to work at Upton on 6 May 2020. The funding for this particular role appears to have been made available as a result of COVID-19 measures. It seems likely that the disruption caused by COVID-19 generally meant that timescales slipped at this period. By July 2020, Mrs Blackburn wrote that she was following up on mediation and that Ms Fantham would be in touch. The claimant replied that she thought having a stress risk assessment was more important at that time

98 The stress risk assessment was ultimately carried out on 18 September 2020 (page 724). The List of Issues allegation is that on 21 September 2020 and 15 January 2021 Mrs Blackburn refused to commission an independent review of the investigation into the claimant’s grievance or implement any kind of procedure for complaints made by employees in external teams. The claimant’s statement evidence refers to a meeting on 19 September but that may in fact refer to the date when the stress risk assessment was carried out – which was 18 September. She does not allege that at that meeting she made a request of Mrs Blackburn for an independent review of her grievance. According to internal procedure the grievance process was now closed. It would not have been a decision for Mrs Blackburn to make in any event

99 Similarly the claimant’s witness statement evidence (para 141-142) of the meeting on 15 January 2021 does not state that she made a request for an independent review nor that one was refused by Mrs Blackburn at that meeting

100 In the meantime, an occupational health report was obtained. It records that a stress risk assessment has been completed and mediation offered which the claimant felt unable to participate in while issues were unresolved. The OH assessment was that there was not a medical solution to the issue, that there were no grounds for medical redeployment but “redeployment generally to an alternative team” may be a way to resolve the ongoing workplace issue. The claimant was advised to take advantage of the employee assistance programme (known as CIC). The opinion was that she was fit for work.

101 The report was discussed at the meeting on 15 January 2021. In the third paragraph of her letter which recorded the discussion (page 755), Mrs Blackburn pointed out that the claimant was in a supernumerary role “temporarily created to support the current Covid pandemic”. It was argued in

closing argument by Ms Kelly that, since the claimant in fact continued to see patients at the Upton Hospital until the termination of her employment despite having been told that funding ended at the end of June 2021, this could have continued. I accepted Mrs Blackburn's evidence that she had to manage the service within a budget and that this particular role was not in fact budgeted for. She was not expressly asked how it had been paid for the end of June 2021 but in principle it was made clear throughout and consistently that the funding for it was time-limited. I accept that.

102 There was clearly a further discussion at the meeting about how to assist the claimant to return to the SRS&T team with mediation still being on offer. The Trust restated that the internal grievance processes were at an end and that they had no control over the way that Optalis had investigated the complaint relayed to them by the claimant. A copy of the complaints procedure from Optalis was provided. The claimant was warned that if she was unwilling to return to her substantive role, the Trust would consider progressing to a Stage 4 Capability Hearing. She was told there would be the potential for redeployment to Band six roles although that would be without pay protection.

103 The claimant was invited to a capability hearing which was conducted on 22 March 2021 by Miss Fantham. Just before the hearing, on 17 March 2021, the claimant presented her second grievance. This is accepted to be a protected act. In it she included the statement that the grievance related to

> "BHFT's failure to safeguard my health and well-being by forcing me, under threat of capability procedures, to work under a manager who is renowned for her aggressive manner and one who has known race discrimination claims against her".

104 She also alleged that the management team of the STS&R department at Optalis displayed indirect and direct aggressive behaviour as well as racist undertones in their action and comments.

105 Section 4 of the grievance (page 788) sets out six matters said to be examples of comments made by the operational manager. One is that relayed by Mrs Prince in the grievance interview where she states that Mrs Bhullar was distancing herself from the team. The next is the presumption that the operational manager had said something to Mrs Prince to the effect that the claimant's presence in the team made it difficult for her (i.e. for Ms Cannon). The third is an alleged comment presumably said to date from shortly before the start of the career break said to have been made by the operational manager to the claimant. The fourth is a comment that was disparaging of the claimant said to have been made during the claimant's sickness absence by the operational manager to another member of the team at Optalis. And the fifth and sixth were general comments about the conduct of the Optalis manager, only the last of which implies a racist undertone but was not said to been directed to the claimant.

106 Racism in all its forms has no place in the workplace. In general, behaviour that excludes others risks creating division - whether or not it is unlawful or is related to a protected characteristic. Mrs Wiggins's evidence described a toxic workplace. However, I am concerned with specific allegations against this respondent and it is not necessary for me to make findings about the

reliability and credibility of the claimant's account about these allegations which are untested.

107 What the respondent did when receiving the second grievance was to commission a fact find into the degree of overlap between that grievance and the first grievance so that a decision could be made about whether it needed separately to be investigated. Miss Fantham said that she would take it into account as evidence relevant to the capability hearing (page 825)

108 She commissioned the fact find (see page 840) which is a step in the formal grievance process (see para 6.1.4 on page 390).

109 In the capability hearing, Ms Bromley apparently argued that the second grievance contained a number of new issues which related to the impact of the previous process on the claimant's ability to return to her substantive post. Viewed now, allegations of a predisposition by the operational manager to objectional behaviour would be relevant to the claimant's ability to return to her substantive post. However, that is all tied up with whether or not the process developed for complaints by Trust employees about Optalis employees was robust – and that was one of action points under review. The claimant's concern that she would be at risk of bullying if she were to return to her substantive role was acknowledged by the respondent (see the record of Mrs Blackburn's statement to the capability hearing at page 826).

110 The desired outcomes from the second grievance were apparently discussed at the capability hearing (see the top of page 827) where the panel particularly discussed the request for:

110.1 A written SOP for handover,

110.2 SOP's outlining how the Trust would ensure the safety of staff contracted to work in external teams in the event of a BHFT employee raising concerns or a complaint about an external line manager,

110.3 A different line manager, and

110.4 mediation with the operational manager.

111 At that time, the claimant confirmed that she felt she could return prior to mediation. Those action points were agreed on and times set for them (I note all the bullet points at the bottom of page 827). It was also apparently agreed that the written processes (the SOPs) would be for any new issues rather than for historic concerns.

112 The fact find was carried out by Ms Chapman (page 846). She concluded that it was not necessary to carry out a further investigation. She carried out a paper exercise and never met the claimant or any of the other people involved. Her rationale for doing so despite the references to race discrimination which are absent from the first grievance are set out at page 847. She says she has seen no evidence from which to identify the manager is referred to in the first quotation or any previous allegations of race discrimination. She saw that the claimant had been allocated a new line

manager for her substantive return. She stated that the concerns relating to the Optalis line manager did not fall within the remit of the original BHFT grievance investigation. However, the fact find is silent as to what the appropriate response should be in relation to concerns relating to the operational manager which were not in the first grievance.

113 What she seems to focus on is that the desired outcomes from the most recent grievance could be achieved by completing the actions identified in the existing processes (page 852).

114 The majority of the content of the second grievance overlaps with the first or amounts to complaints about the handling of the first grievance. Those were dealt with within the appeal. To the extent that they are particularised, the different allegations appeared to be directed towards the operational manager, who was not a Trust employee. The fact find does not expressly state that part of the reason there should be no further investigation is that the allegations are made against an individual over whom the trust does not have authority. However that was Ms Chapman's oral evidence.

115 My finding is that that was what she decided but the written document is poorly reasoned to the extent that there is no reference to section 4. Her conclusion that the desired outcomes of Grievance 2 could all be achieved within the existing processes, however, seems sound in principle. It was not Ms Chapman's decision to carry out a fact find - that was the step in the process that she was tasked with by others (see page 832). She gave evidence that she was unaware of the claimant's race because she did not meet her and it was not suggested to her that she would have known any other way. It was not alleged in Grievance 2 that the claimant herself had experienced race discrimination or harassment.

116 By the middle of May 2021 it was reported to Ms Fantham that, unfortunately, the operational manager would no longer agree to mediation. Ms Fantham informed the claimant of this on 1 June 2021 (page 890. As Ms Fantham says, mediation is a voluntary process and I accept that the Trust had sought to engage with Ms Cannon through her manager to try to support mediation, without success. It was confirmed that the claimant had already been provided with copies of the Working Practices SOP for trust staff working in the STS&R team and the SOP for Raising Concerns which had been agreed between BHFT and Optalis together with the Trust's Early Resolution Policy and the Optalis Compliments and Complaints Policy.

117 In broad terms the criticisms before me of the SOPs are:

117.1 that they were unfinished and the claimant had to make decisions about her future without sight of the final version

117.2 that they were unclear and

117.3 in the case of the SOP for Raising Concerns, that it cross-referred to a policy that was inapplicable.

118 The Working Practices SOP provided to the claimant in May 2021 is at page 875. It sets out respective areas of responsibility as between the line manager in the operational manager. It also contains a handover protocol (page 876-877). The claimant argues that it was still unclear what she should have done differently however, knowing the background against which this SOP was drafted, it seems clear to me that the requirement is for the practitioner to clinically review "all service users on their caseload" which must be a reference to active patients and provide a written handover using a standard pro forma placed in the handover folder. This is exactly what the claimant did. Then it is also the practitioner's responsibility when taking leave of a week or more to review their caseload allocation on Paris and notify the deputy manager or manager to arrange discharge or re-allocation. This seems to clearly state that, in like circumstances, the claimant would be expected to provide details to the manager or deputy manager of the cases against her name in Paris so that they could be discharged or reallocated.

119 The third paragraph of the Raising Concerns SOP says that if trust staff want to raise a concern within Optalis it would be dealt with informally initially using the options available in the bullet points. If it could not be resolved informally it would be resolved using the Optalis Complaints Procedure. More information is given in the final paragraph where it is made clear that the Optalis Grievance Policy and Procedure will not apply to Trust staff members but that Optalis would follow the Complaints Policy. It was agreed by BHFT that they would support their staff member in making the complaint.

120 Mrs Blackburn queried whether the Complaints Policy was the appropriate one and was reassured by the Optalis HR Director that it was. It is quite true that the Complaints Policy (page 378) talks about failings in respect of the level of service provided by Optalis (clause 3.3). However it does provide a flowchart procedure with an informal and formal stage, with timescales for acknowledgement of process and a commitment to communicate the outcome of the complaint including any learning for the organisation (see page 384). The point of the SOP seems to be an undertaking by Optalis that they would use this policy by analogy as a guide to the process to follow when investigating a formal complaint against their staff from a co-worker or direct report not employed by them but embedded within the workplace.

121 Ms Fantham concluded her letter by saying that they recognised that the claimant may not feel able to return to her substantive post in the light of her operational manager's decision on mediation and provided information about an alternative role. It was a Band 6 senior physiotherapist 0.53 full-time equivalent at Upton Hospital in Slough. The letter states that the job description is included. The claimant disputes that it was. Pay protection for 12 months was agreed in accordance with the pay protection policy. She was asked to communicate her decision by 18 June 2021 and told that the temporary post would come to an end on 30 June 2021 so her move back to her substantive role or to the alternative role would take effect on 1 July 2021.

122 The claimant replied by email to Mrs Blackburn on 18 June 2021 (page 911) declining both options. She said that she was unable to accept the Band 6 post which she regarded as an unacceptable demotion and did not feel safe

to return to her contracted role. The way in which she said the SOP was inadequate was that it did not explain how measures were put in place to prevent the same situation happening again. She provides further information about the solutions she seeks on 24 June 2021 (page 909).

123 Mrs Bhullar clearly wanted the safeguards to "ensure that in the event of a formal complaint against the external team manager, trust staff would be treated equally to staff based within the trust" which would require transparency about the external team's investigation. That was an unachievable aim. The Trust was not going to be able to guarantee the same level of transparency from an external team investigating one of their own members of staff as they would provide internally. It was not within their gift if Optalis were unwilling to agree to it.

124 The claimant also wanted clarification of her concluded grievances and an independent review of the same. Mrs Blackburn set out a detailed letter on 24 June 2021 (page 923) repeating and explaining the policies. She repeated that the claimant would receive support from her employer if she had to raise a concern against a member of Optalis staff and that they would work with Optalis to ensure any concern raised was heard. This was a real change to the situation that applied in April 2019. Mrs Blackburn provided information about a Band 6 vacancy in Reading and warned that if the alternative roles were not acceptable the Trust's expectation was that the claimant would return to her substantive role. The only other option would be could to consider the claimant's ongoing employment.

125 Although there is correspondence in the hearing file showing that, by this stage, the operational manager thought that the claimant's return was difficult or unachievable, there is also correspondence pointing out that there was no real basis for the SRS&T team to refuse to accept her.

126 There was further correspondence between the claimant and Mrs Blackburn at the end of June 2021 (see for example page 930 and the claimant's response at page 932). A change was apparently made to the drafting of the SOP but it did not satisfy the claimant (see her email of 2 July 2021 at page 934). The claimant's comments in that email involve repeated discussions about what happened in her case in 2018 and 2019. I accept that in this email, in particular, she appears to seek to write a process almost explicitly stating that what was done on the previous occasion was wrong. As the respondent's managers say, the SOP needed to be robust but sufficiently broad in application that it could be applied flexibly whatever the situation that arose and in other workplaces.

127 Mrs Blackburn invited the claimant to a meeting on 28 July when a detailed answer was provided to the point she had raised. That was followed up in writing (see page 958). By this stage Optalis had agreed to provide an outcome letter to any investigation they carried out and Mrs Blackburn recalled that this was a particular point that was added to the SOP.

128 It was also repeated in this letter if concerns are raised by an Optalis manager (in the way that Ms Cannon had raised concerns to Mrs Prince) they should be investigated by BHFT using the early resolution policy (see paragraph 2

at the top of page 960). This made clear that the member of staff against whom complaints were made would have a right of reply. Mrs Blackburn concluded by saying that Mrs Bhullar was expected to return to her substantive post the following day alternatively the offer of the Band 6 post with pay protection was still available and this was the Trust's final position.

129 The claimant replied stating she was disappointed that her request for an independent review had been declined that the processes were not robust, that the demotion to a Band 6 role was unacceptable and she was unable to return to working in her contracted role (page 956). She sought confirmation that she should not attend at Upton community physio the following day because she was rejecting both alternatives. Mrs Blackburn told the claimant to base herself at Upton.

130 On 2 August 2021 Mrs Williams wrote to the claimant to say that she had commissioned an investigation to consider whether any further steps could reasonably be taken by the Trust to support her to return to her substantive role or to identify an alternative role for her in another team. Mrs Martin was the investigating officer and the claimant was warned that the investigation could result in the hearing to consider her employment position with the Trust.

131 The claimants attended a meeting with Mrs Martin on 20 August 2021. Mrs Martin's outcome was that all reasonable steps have been taken and all options had been exhausted. Mrs Williams informed the claimant of that on 28 September 2021 (page 1029). Although Mrs Martin was cross examined along the lines that the terms of reference for her investigation did not include timescales and that that was contrary to policy, there was no suggestion to her that in fact there was unreasonable delay or that the claimant was disadvantaged by the time her investigation took given that she was continuing to work. I find that it was concluded with within a reasonable period of time.

132 Mrs Martin gave information about her employment by the trust in her paragraph 1. She had not met or come across the claimant before the investigation. I accept that she was independent from the other managers previously involved in the case. When, in due course, Mrs Williams appointed a decision maker for the formal hearing, she appointed Mrs Ilsley who was also someone who had not previously been involved in the case.

133 Although the claimant complains that she had not understood the purpose of the meeting with Mrs Martin it was made clear to her in the letter of 2 August 2021 from Mrs Williams. Nevertheless the claimant was able to explain to Mrs Martin that there were three issues that she regarded as being unaddressed (see Mrs Martin para 14). Those were that the SOP was insufficiently robust, she wanted the trust retrospectively to support her obtain a resolution to a formal complaint about her operational manager's behaviour and she wanted an independent review of the grievance. These were the same three issues she took forward to the formal hearing before Mrs Illsley.

134 On more than one occasion Mrs Bhullar has made clear that each of these three matters were essential for her to return to her substantive role. That was not just in the meeting with Mrs Martin. She repeated her position in her

statement for the formal hearing that starts on page 1041. It was argued on behalf of Mrs Bhullar that, in effect, she should not have been taken as her word. Both Mrs Martin and Mrs Illsley considered whether drafting amendments could be made to the SOP (Mrs Martin's are at page 986 and Mrs Illsley gave oral evidence that she thought it reasonable to include a line of escalation and a formal outcome). It was argued on behalf of Mrs Bhullar that they could have done more by finalising those amendments.

135 There was ample information before Mrs Martin and Mrs Illsley from which they could reasonably conclude that this Mrs Bhullar did not have faith that a process agreed between the respondent and Optalis would be operated in a way that protected her without an independent review of her grievances which she believed would hold managers accountable for the historic matters. Equally important to her was what she would accept to be a reasoned investigation and outcome into her allegations that her operational manager had acted improperly in passing on her concerns to Mrs Price. Again there was ample evidence from which Mrs Martin and Mrs Illsley could conclude that that was non-negotiable for the claimant and that Mrs Bhullar was unwilling to consider returning to her substantive post without it.

136 The claimant was invited to a formal hearing to consider her employment on 8 October 2021 (page 1035). Mrs Martin's management report was included along with the invitation. The claimant criticises the original notification of the investigation because it failed to set out the specific allegations or reasons that supported the decision to consider the claimant's continued employment. All that the respondent claimed had been said and done that led to the conclusion that they were at an impasse was set out in Mrs Martin's report. The claimant had had input into that and had plenty of time before the formal hearing on 2 November 2021 (at which she was represented by Mr Dale) to prepare arguments and information addressing those matters. She did so in the detailed statement already referred to.

137 It is said that the respondent failed to make clear the precise ways in which the disciplinary policy would apply. I disagree. The disciplinary policy was that at page 433. The claimant had been told that any investigation into her ongoing employment would be undertaken following the principles of the process outlined in that policy. Those are at section 7.3 (page 440). Apart from the failure to set clear timescales, that policy was complied with. There was regular communication between the investigating manager and the claimant, she was accompanied at the investigation meeting by her trade union representative, there was a report of the findings. The timescales were exceeded slightly but it was a relatively complex investigation covering a number of years. The principles of conducting a disciplinary hearing in section 7.4 were complied with. It was made clear to the claimant that it was not said that there was were any issues of conduct or performance in her case. It was the principles of the fair process which were followed. I reject the suggestion that the claimant did not have a fair opportunity to prepare for the final hearing before Mrs Illsley.

138 Mrs Illsley's findings and conclusions are in the letter dated 10 November in which she confirmed her decision (page 1070). Among other things, Mrs

Illsley states (HI para.24) that when she asked the claimant what more the Trust could do to achieve her return to her substantive role, she had said the only options were to resolve the three issues or terminate her contract. Mr Dale argued on behalf of the claimant that if she had an independent review she would accept the outcome whatever it was. Mrs Illsley's view was that independent managers have been involved in the process up to that point and the claimant had still not accepted the decisions.

139 I have already explained why the grievance appeal process carried out by Mrs Williams appears to have been thorough and undertaken with independence of mind. Although she is an employee of the Trust, she was not part of the specific Service within which the claimant worked and is independent of those whose actions she was considering. More to the point, her approach shows independence of mind and a willingness to uphold the grievance where that was justified by the information before her. Mrs Blackburn had been new to the Trust. Mrs Chapman and Mrs Martin were both engaged in different parts of the Trust. This is information which entitled Mrs Illsley to conclude that independent managers had been involved in the process but that the claimant did not accept their decisions.

140 The Trust has a large number of other employees and arguments of parity between employees and between different situations mean that while there is always discretion about whether or not to apply a particular policy, in general it is advisable to follow a policy in situations to which it applies. Not doing so risks unintended consequences. Often policies are agreed by joint negotiation between management and union(s).

141 The claimant has shown through cross-examination that it would have been possible to exercise discretion in respect of the length of pay protection (thus going outside the policy) or that it would have been possible to consider putting the claimant on the redeployment register even after she had accepted redeployment into a Band 6 role in order that she should have preference over any vacant Band 7 roles that arose when compared with people who were not on the redeployment register. That also would have been outside the redeployment policy.

142 Neither of those matters were argued at the formal hearing or the hearing of her appeal against dismissal. Furthermore, simply because it might have been reasonable to consider taking those steps is not sufficient evidence for a conclusion that no reasonable employer would have failed to take those steps. I reject the argument that it was outside the range of reasonable responses to fail to offer those adjustments to policy to the claimant. The pay protection policy and redeployment policy are likely to apply in a number of occasions - when there are reorganisations for example. It is not good industrial practice to disapply a policy on a case by case because it does not achieve a result that you want because that risks undermining the policy in general.

143 I accept that the set of facts known to the respondent which amounted to the reason to dismiss was that the claimant had said that she would not return to her substantive role on a number of occasions since about June 2021. She

may describe her reasons as not being safe or not feeling safe to return to her substantive role, but on two occasions in the Summer of 2021 she had been given a date by which she was to return and had said she would not. She also had rejected the alternative roles found for her.

144 It is clear from the correspondence and her arguments at the formal hearing that the claimant did not accept that reasonable alternatives to dismissal have been considered. The claimant's statement (page 1042) could not be clearer that, for her, all three of those matters needed to be put in place before she said she would feel safe to return to her substantive role.

145 A number of measures had been offered to try to increase the support available to the claimant if she were to return to the substantive role. Policies had been agreed between BHFT and Optalis. The first was about Working Practices including the handover. This of itself should have prevented the precise situation happening again in the future because the claimant and her operational manager would both have in writing the process that the claimant needed to follow when leaving for an extended period of leave.

146 Mediation have been offered a number of occasions but the relevant parties have not all agreed to participate at the same time and it had not been possible therefore to arrange it.

147 The respondent had offered all available vacancies to the claimant which might appeal on the basis of the skill set needed. Mrs Illsley gave oral evidence that she had checked for herself to see if there were any alternative roles available. Mrs Blackbird's efforts are described elsewhere in these reasons and also paragraphs 25 to 31 of her statement.

148 New written standard operating practices and procedures had been drawn up in consultation with Optalis which should have made the reasonable employee better informed about how to make a complaint and should have set the standard expected of the respondent to support their employees in that situation. The claimant wanted to be treated exactly the same in any complaint she made against an Optalis member of staff as an employed physiotherapist within a ward, say, in a complaint made by them against a BHFT team member of staff. This was unrealistic and ignored the realities of teams working within an external organisation. An undertaking to support their own workforce in complaints they made was realistic.

149 In this respect, the claimant argued on more than one occasion (see page 1056 para.7, for example) that if her operational manager was outside the remit of the Trust then perhaps they should rethink their relationship with external organisations. There will always be limits to what a respondent can do. This appears to suggest a renegotiation of the terms on which the service was provided which was not an argument explored in evidence and appears on the face of it to be impractical.

150 Mrs Illsley confirmed her decision to dismiss and said that the factual reason amounted to some other substantial reason of the kind that justified the decision to dismiss an employee in the position of the claimant. The claimant appealed the dismissal and Mrs Zacharias was appointed appeal officer. The

hearing was conducted on 13 January 2022 (page 1149). Again Mrs Zacharias made genuine attempts to get an outcome from Optalis that was more detailed than that previously obtained and to find an answer from HR about whether an external review was possible. See the email from Francisco Langan at page 1166 setting out his attempts to find out more about the 2019 investigation into the operational manager. It appears that the previous HR Director had left. Mrs Zacharias also enquired into the feasibility of an external review and was told that it was no grounds for an external investigation because investigators from different areas of the Trust had already been used to avoid potential bias.

151 Again the claimant had made clear that minor drafting amendments to the SOPs on their own were insufficient to enable her to feel safe returning to her role. Mrs Zacharias reasonably concluded that no amount of time would change the claimant's position on the items which were, for her, non-negotiable. She had been very firm in her position on those for some time by that stage.

152 The claimant sought to introduce a witness statement from an anonymous witness at the appeal stage. Mrs Zacharias was not in a position to investigate allegations from an anonymous witness. The question was whether the SO P on making a complaint against a member of Optalis star could reasonably be strengthened. Mrs Bhullar had received a letter from the Optalis CEO (page 1082) to the effect that when Mrs Bhullar had been told by the Optalis HR director that they had considered her complaint under the complaints policy this had been an error and in fact it had been considered under the whistleblowing policy. As Mrs Zacharias said, that did not contradict the current position namely that agreement had been reached since the time of the claimant's initial complaint that the complaints policy should provide the appropriate framework. Again Mrs Bhullar made clear that for her SOP needed to be applied retrospectively. This was something the Trust was not going to be able to achieve because it could not require Optalis to agree retrospectively to re-investigate events which were said to have happened now more than 3 years previously.

153 The claimant was notified of the outcome of her appeal on 21 January when she was told it was rejected and that was confirmed in writing on 24 January 2022 (page 1170). Mrs Zacharias explained that she was considering whether the decision taken by Mrs Ilsley to dismiss was fair and reasonable in all the circumstances. Mrs Ilsley's reasoning, which was considered by Mrs Zacharias, was that she had concluded that the claimant was not prepared to return to her substantive role, take an alternative role, or accept that the Trust had done all that it reasonably could do to resolve her issues. Mrs Zacharias upheld the decision on the basis that Mrs Bhullar remained "of the view that you cannot return to your substantive role or accept the alternative role that has been offered to you." (page 1177). On 2 February 2022 the claimant's employment ended, her last day at work having been 26 January.

Law applicable to the issues in dispute

154 At my request, the parties provided me with a list of cases relied on as setting out the applicable law for the purposes of my conclusions. Mr O'Dempsey in his written submissions, and both counsel in oral submissions, outlined the particular principles relied on and there was no difference of substance in their description of the relevant law. If I do not refer to a particular authority from the case list or cited to me in argument, that is not because I have not taken it into account. What I set out below are the principles most relevant to reaching a conclusion, given my findings of fact.

Unfair Dismissal

155 Once the Employment Tribunal has decided that there was a dismissal, or if, as in the present case, dismissal is admitted, they must consider whether it was fair or unfair in accordance with s.98 of the Employment Rights Act 1996 (hereafter referred to as the ERA).

> "Section 98 Employment Rights Act 1996
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it-
>
> (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) Relates to the conduct of the employee,
> (c) Is that the employee was redundant, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer

> acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

156 In the present case, the respondent has given evidence that the factual reason for the dismissal was that Mrs Bhullar was not prepared to return to her substantive role (as a Band 7 Specialist Physiotherapist working within the Short Term Support & Rehabilitation Team in Maidenhead), take an alternative role or accept that the Trust had done all it reasonably could do to solve her issues. The respondent argues that that set of facts falls within s.98(1)(b) ERA 1996, commonly referred to as "some other substantial reason" or SOSR. Although the facts of this case involve a breakdown in working relationships, this is not on all fours with the strand of SOSR cases involving a fundamental breakdown of trust and confidence between employer and employee. Nevertheless, both counsel have referred to cases of that kind by analogy as sources of the relevant legal principles to apply to this unfair dismissal complaint.

157 An example of a case in which the Employment Tribunal decided that a dismissal because of a fundamental breakdown of trust and confidence was the reason for dismissal is Ezsias v North Glamorgan NHS Trust [2011] I.R.L.R. 550 EAT. The EAT in Ezsias warned Tribunals about the risk that employers might use the concept of SOSR as a pretext to conceal the real reason and of the distinction between dismissing an employee for conduct which caused a breakdown in working relationships and dismissing them because those relationships had broken down. The tribunal should be alert to attempts to short-circuit a fair procedure in that way.

158 If I conclude that the reason for dismissal was that the employer genuinely believed that the claimant was not prepared to return to her substantive post, to take an alternative role or accept that the Trust had done all it reasonably could to solve her issues, and that that was a potentially fair reason, I need to go on to consider whether the decision to dismiss for that reason was fair or unfair in all the circumstances applying the test in s.98(4) ERA.

159 The well known case of Turner v Vesric Ltd [1980] ICR 528 was considered in Matthews v CGI IT UK Ltd [2024] EAT 38. The EAT considered the guidance in Turner v Vestric that it is necessary to find out whether the employers had taken reasonable steps to try to improve the relationship, that the employers had to show that the breakdown was irremediable or that there had been "some sensible, practical and genuine efforts to see whether an improvement can be effected". They held it did not mean that all reasonable steps must be taken by the employer (para.95 of the EAT judgment in Matthews).

160 However, where the reason or reasons for the breakdown in the relationship was a consequence of the employer's conduct that can be highly relevant to the reasonableness of a decision to dismiss the claimant because of that breakdown. That is consistent with the broad view to be taken by the Tribunal of whether a decision to dismiss was fair or unfair in all the circumstances:

Board of Governors of Tubbenden Primary School v Sylvester (UKEAT/0527/11). It is also what was said by the President of the Employment Tribunal in Scotland sitting in the EAT in Matthews - sitting on this occasion as a three person tribunal. "where an employer is to blame for the breakdown, it may be reasonable to expect them to do more to repair the relationship" (para.95)

161 There appears to be conflicting EAT authority on whether or not the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) applies to a dismissal for some other substantial reason. Phoenix House Ltd v Stockman [2017] ICR 84 EAT says that it does not. Although University of Exeter v Plaut [2024] EAT 159 appears to proceed on the basis that it did apply, the factual allegations in that case seem to have been misconduct which caused a breakdown in the relationship of trust and confidence with the claimant's colleagues. Furthermore, the appeal was disposed of without any need to consider expressly whether or not the ACAS Code applied to the circumstances of the case. Conversely, in Lund v St Edmund's School [2013] ICR D26 EAT (a decision of 23 April 2013 which was cited in Stockman) the EAT was of the view that the Code was intended to apply where an employee faces a complaint which may lead to disciplinary action or where an employee raises a grievance – which may not result in their dismissal at all. "The Code applies where disciplinary proceedings are, or ought to be invoked against an employee." (Lund para.12) Furthermore, the employer must still follow a process which is fair in all the circumstances and elements of the Code were capable of being applied.

162 For example, in Stockman, the claimant had "never had the opportunity to demonstrate in practice that she could work harmoniously with [the person who had beaten her to a particular role]." The claimant in Stockman had been absent from work from the moment that the relevant incidents occurred. The approach to the principles to be applied when considering the procedure and the applicability of the Code were said by the EAT (in paragraph 21) in that case to be that:

> "Certain of its provisions, such as for example investigation, may not be of full effect in any event in such a dismissal. What is required when a dismissal on that ground is in contemplation is that the employer should fairly consider whether or not the relationship has deteriorated to such an extent that the employee holding the position that she does cannot be re-incorporated into the workforce without unacceptable disruption. That is likely to involve, as here, a careful exploration by the decision maker, …, of the employee's state of mind and future intentions judged against the background of what has happened. Of course, it would be unfair, as it was found to be here to a marginal extent by the tribunal, to take into account matters that were not fully vented between decision maker and employee at the time that the decision was to be made. Ordinary commonsense fairness requires that. Clearly, elements of the code are capable of being, and should be, applied, for example giving the employee the opportunity to demonstrate that she can fit back into the workplace without undue disruption, but to go beyond that and impose a sanction because of a failure to comply with the letter of the ACAS code, in my judgment, is not what Parliament had I mind when it enacted section 207A"

163 In Stockman, the EAT upheld a finding by the Employment Tribunal that a dismissal was unfair, given that the claimant was unlikely to be brought into day-to-day contact with those with whom she had a difficult working relationship and that the employer had wrongly put the responsibility on her to show that the relationship had not broken down irretrievably.

164 In my view, it is clear that an employer considering whether or not to dismiss for a factual reason which they consider may be "some other substantial reason" within s.98(1) needs to follow a process which is fair in all the circumstances. That may involve applying elements of the ACAS Code of Conduct or considering elements of the Code as part of evaluating whether the process followed was fair in all the circumstances.

165 However, that is not to say that the ACAS Code of Conduct on disciplinary matters applied to this dismissal in terms and that an uplift under s.207A TULR(C)A could be considered because of a failure to comply with the letter of it in the event that compensation is awarded. I do not have to reconcile or make a decision between the two EAT authorities, because it is clear that the dismissal in the present case was not a procedure to which the ACAS Code of Conduct applied in terms, because no issues of conduct arose; the respondent expressly and repeatedly stated that to be the case.

166 According to Alexis v Westminster Drug Project [2024] EAT 159, an employer is only bound to consider length of service it if it relevant to the decision to dismiss. In a case where the decision was based upon the proposition (for which the employer had reasonable grounds) that trust and confidence had irretrievably broken down between the parties, length of service was not relevant to the decision on dismissal. On the other hand, it might be relevant to the question of whether the employer had taken reasonable steps to avoid dismissal, in my view.

Equality Act 2010 complaints – time limits

167 The tribunal may not consider a complaint under ss.39 or 40 Equality Act 2010 which was presented more than 3 months after the act complained (after taking account of any effect of early conciliation) of unless it considers that it is just and equitable to do so. The discretion to extend time for presentation of the claim is a broad discretion and the factors which are relevant to take into account depend on the facts of the particular case. Conduct extending over a period is to be treated as done at the end of the period. The principles under which it is judged whether individual acts can be so linked as to be regarded as amounting to an act extending over a period were considered in South Western Ambulance Services NHS Foundation Trust v King [2020] IRLR 168.

168 The tribunal may extend time for presentation of complaints if it considers it just and equitable to do so. The discretion in s.123 EQA to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not

have been brought in time and whether a fair trial is still possible. The tribunal should also consider the balance of hardship, in other words, the prejudice which would be suffered by the parties respectively should the extension be granted or refused. I have been taken to three cases in particular: HSBC Bank plc v chevalier Firescu [2024] EWCA Civ 1550; Barnes v Metropolitan Police Commissioner UKEAT/0474/05 and Jones v Secretary of State for Health and Social Care [2024] EWCA Civ 1568.

Race Discrimination and victimization

169 Employees, such as the claimant, are protected from discrimination by s.39 EQA the material parts of which provides that an employer must not discriminate against one of their employee (as relevant for the present claim) by subjecting them to a detriment. The claimant alleges that she was the victim of a number of acts of race discrimination contrary to s.13 EQA which prohibits direct discrimination. Direct discrimination contrary to s.13, for the present purposes, is where, by dismissing their employee (A) or subjecting them to any other detriment, the employer treats A less favourably than they treat, or would treat, another employee (B) in materially identical circumstances apart from that of race and does so because of A's race.

170 Victimisation is defined in s.27 EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. In this case it is accepted by the respondent that by bringing a written grievance on 30 November 2011, which was expanded upon by a letter of 13 December 2011, the claimant did a protected act. The question for me to decide is whether the acts complained of, including the failure to promote to the position of senior civil enforcement officer, were done because the claimant brought that grievance which alleged institutionalised racism.

171 The then applicable provision of the Race Relations Act 1976 were considered by the House of Lords in The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition has changed somewhat between the RRA and the Equality Act. However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done "because of" a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

> "The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"

172 Therefore when deciding whether or not the claimant suffered victimisation where (as in the present case) it is admitted that she did a protected act, the tribunal to consider whether she suffered a detriment and, finally, determine the mental element. What, subjectively, was the reason that the respondents acted as they did.

173 A person's subjective reasons for doing an act must be judged from all the surrounding circumstances including direct oral evidence and from such

inferences as it is proper to draw from supporting evidence and documentary evidence. For the purposes of a victimisation claim, the doing of a protected act does not have to be the sole or even the principal cause of the detrimental act, as long as it is a significant part of the respondent's reason for doing the act complained of. However, dismissal (or any other detrimental act) in response to a complaint of discrimination does not constitute victimisation for the purposes of s.27 EQA if the reason for it was not the complaint as such but some feature of it which can properly be treated as separable: Martin v Devonshires solicitors [2011] ICR 352, EAT; Page v Lord Chancellor [2021] ICR 912, CA.

174 In order to find that an act complained of was to the detriment of an employee, both for the purposes of a s.13 direct discrimination claim and a s.27 victimisation claim, the Tribunal must find that, by reason of the act or acts complained of a reasonable worker would or might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work: De Souza v Automobile Association [1986] IRLR 103, CA. This was explained in Shamoon to mean that the test should be applied from the point of view of the victim: if their opinion that the treatment was to their detriment was a reasonable one to hold, that ought to suffice, but an unjustified sense of grievance was insufficient for the claimant to have suffered a detriment.

Burden of Proof

175 Section 136, which applies to all claims brought before the Employment Tribunal under the EQA, reads (so far as material):

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

176 The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

177 When deciding whether or not the claimant has been the victim of direct race discrimination, I must consider whether she has satisfied me, on the balance of probabilities that the incidents occurred as alleged, and of facts from which I could decide, in the absence of any other explanation, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If I am so satisfied, I must find that discrimination has occurred unless the

respondent proves by cogent evidence that the reason for their action was not that of race.

178 Although the law anticipates a two-stage test to the issue of direct discrimination, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). I should consider the whole of the evidence when making my findings of fact and if the reason for the treatment is unclear following those findings then I will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

179 The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of, in the present case, race or a protected act. The burden of proof provisions may be of assistance if there are considerations of subconscious wrongdoing but the Tribunal needs to take care that findings of subconscious wrongdoing are evidence based.

180 More recently, in Field v Steve Pye & Co (KL) Ltd [2022] EAT 68; [2022] IRLR 948 EAT, HHJ James Tayler addressed the question of whether it is permissible to move directly to the second stage of the test for discrimination. He pointed out that where there is significant evidence that could establish that there has been discrimination (or victimization), it cannot be ignored and a decision to move directly to the question of the reason for a particular act that should be explained. In effect, the basis for doing so would be that the Tribunal had assumed that the claimant had passed the stage one Igen test. He recommended that were there is evidence that could indicate discrimination, there was much to be said for properly grappling with the evidence and deciding whether it is or is not, sufficient to switch the burden of disproving discrimination to the respondent.

Conclusions on the Issues

181 I now set out my conclusion on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but I have them all in mind in reaching those conclusions.

182 Although the first issues in the list of issues (hereafter LOI) concern whether or not the discrimination and victimisation complaints were made within the applicable time limit, it is only acts which are found to be unlawful that can form part of a continuing state of affairs. It is accepted on behalf of the claimant that, on any view, the last alleged act of discrimination and victimisation is said to have taken place on 2 August 2021. Contact to ACAS would ordinarily have to have been made no later than 1 November 2021

prior to commencing proceedings based on an act taking place on that date in order to take advantage of the extension of the time limit due to early conciliation. The claimant contacted ACAS nearly 5 months after the expiry of that primary limitation period. Therefore not only does she need to show that any acts she has proved to be unlawful amount to conduct extending over a period, but she also needs to show that it is just and equitable in all the circumstances for time to be extended for her to present those complaints.

183 Since it is only acts which have been found to be unlawful that are capable of being viewed as part of conduct extending over a period it is necessary for me to reach conclusions on whether any of the acts alleged were unlawful discrimination or victimisation before turning to the time-limit issues in LOI 1. I therefore start with the issues relevant to unfair dismissal contrary to section 94 Employment Rights Act 1996.

184 It is for the respondent to show the factual reason for the dismissal and that it is either one of the potentially fair reasons within s.98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held. This is commonly referred to as SOSR. The strand of SOSR outlined factually by Mrs Ilsley, who took the decision to dismiss, (page 1077) is that the claimant was not prepared to return to her substantive role, take an alternative role or accept that the Trust has done all it reasonably can do to solve her issues.

185 It is argued on behalf of the claimant that she had not refused to return to her substantive role but rather that she had always wanted to return to that role; she simply wanted to feel safe and be safe and know that she had the support of her employer before returning. It was argued that by seeking the implementation of adequate safeguards to deal with the gap in policy protection, it is not as simple as a judgment that she was refusing to return to her substantive role.

186 With respect, that is to confuse the reasons for the claimant's actions with those actions. Mrs Blackburn directed her to attend at her substantive role in letter of 18 June 2021 and again in the letter of 28 July, which reflected what she had been told in the meeting on the same day. The claimant had been offered an alternative to returning to her substantive role well and declined both options.

187 The argument that the claimant did not feel safe and did not know that she had the support of her employer is bound up in the question about whether the Trust had done all that it reasonably could to solve her issues. She clearly believed that it had not but, objectively, my view is that it had.

188 The claimant had refused the alternative role offered to her and had not shown interest in applying for the available roles. The only roles available were at Band 6, a band below the claimant's substantive role. However, it was appropriate for the respondent to offer them to the claimant under the provisions of their redeployment policy. It would have been appropriate for them to offer those alternatives notwithstanding the redeployment policy as a reasonable attempt to avoid dismissal. She regarded the offer as a demotion. My finding is that it was not intended as such but there were no Band 7 roles

available. There is no criticism of the claimant if I say that her domestic arrangements meant that she was limited in where she could work and for how many hours a week she could work. That had the consequence that there were fewer potentially suitable jobs available.

189 I accept that both Mrs Illsley and Mrs Zacharias (who conducted the appeal hearing) genuinely concluded on reasonable grounds that the claimant was refusing to return to her substantive role with the SRS & T team and had declined the available alternative. They both spent time trying to understand what more could be done to address the continuing concerns of the claimant. The claimant had stipulated in the strongest terms that three matters all needed to be addressed before she could consider returning to her substantive role. The discussions with the claimant and correspondence from her from the time of the capability hearing onwards show that she was not satisfied with the attempts made by the respondent to draw up written policies which would apply in her substantive role. Again, both Mrs Illsley and Mrs Zacharias genuinely and reasonably concluded that the claimant did not accept that the Trust had done all that it reasonably could.

190 When considering whether the respondent's decision to treat the factual reason as a sufficient reason to dismiss the claimant was fair or unfair in all the circumstances, I need to consider whether the employers had objectively taken reasonable steps to improve the relationship between them and their employee. In the present case that would also require them to take reasonable steps to improve the relationship between the claimant and her operational manager who was employed by a Third Party. I remind myself that the requirement that there should be some sensible practical and genuine efforts to see whether an improvement can be effected does not mean that all reasonable steps must be taken.

191 It is relevant that the claimant's view that she was unsafe in her substantive role seems to have been triggered by her line manager's (Mr Prince's) willingness to send a written email of concern in relatively strong terms without taking steps to hear the other side of the argument and without attempting a more informal first approach. An example might have been a short email saying something had arisen which she did not want to leave unaddressed for a year and inviting the claimant to a meeting notwithstanding her career break. Her line manager presumed that she had been given entirely accurate information by the operational manager and that that meant there was justifiable grounds for concern. When the information provided by the operational manager was investigated in the grievance, it provided no justification for the written email of concern.

192 The other actions for which the Trust can justifiably be said to be responsible are the presence at the first informal meeting of a senior manager who was not impartial and the failure of HR to act when asked by the claimant to set up a meeting with Mrs Prince in 2018, during the career break. Had they done so, there was at the least potential for a clearer recollection of the facts involved than there appeared to have bene in 2019. The stage one grievance outcome in respect of the claimant's 2019 (first) grievance was weak and did not answer all it had been asked to. That contributed to the claimant's sense

that her employer had not fully understood her perspective, and was part of the reason why she took these matters so seriously. All of those things are relevant, in my view when considering whether, over the next 2 ½ years before dismissal, the respondent acted reasonably or unreasonably in all the circumstances.

193 The reasons I consider that they did are as follows

193.1 Mrs Williams's grievance appeal outcome did provide a clear outcome to the points raised by the claimant. She was independent to the service and approached the task with an open mind.

193.2 There were limitations on what the Trust could reasonably be expected to do in the future to support a member of their staff who had grounds of complaint against a co-worker employed by a third party. The claimant's desire to be treated equally to staff based within the Trust in the event that she complained against her Optalis operational manager in the future was unrealistic. All that she could reasonably expect was a clear process to follow, an undertaking by Optalis that they would investigate and an undertaking by her employer that they would support her - including by using their manager-to-manager contacts - to ensure she had a reasoned outcome. The lack of a route to appeal against a decision in respect of a complaint does not seem to me to be fatal to the workability of the policy.

193.3 It is true that the letter from the CEO adds confusion about which policy had been used by Optalis originally. Furthermore, the SOP on Raising Concerns to deal with complaints to and by Optalis needed to be signed off and implemented. However, the CEO did not say that no policy was used and is not good evidence about the approach that would be taken in the future. The documents I have seen and, in particular, Mrs Blackburn's evidence causes me to think there was a firm commitment from both sides to create a flexible, binding policy to bridge the gap and that it was close to being finalised.

193.4 There was less focus on this aspect of the policy in evidence, but it is also noteworthy that the Trust was undertaking to consider complaints by the operational manager under their early resolution procedure (page 448). Reading that as though the Optalis manager is the person making the complaint, the first step would be for the line manager to seek informal resolution of the complaint between the operational manager and the Trust employee/claimant, and if that was not possible, there would be an investigation. This effectively addresses the error by Mrs Prince of writing in definitive terms without first establishing the facts.

193.5 Mediation had been offered and pursued but there was never a time when both parties agreed to participate. This was out of the hands of the Trust.

193.6 While I understand on a human level that the claimant was dissatisfied with the outcome received from Optalis, by the time of the capability hearing or formal SOSR hearing in 2021, there was no realistic prospect of a more detailed investigation of her operational manager's actions. The Trust could not have at any time ensured that that manager was held accountable for her actions – that would be for her own employer.

193.7 The claimant clearly regards it as unsatisfactory that an externally placed employee should be in what some might see as a more vulnerable position then had they been internally placed. Perhaps it is, but it is a feature of joint team working that many are familiar with; the duty to take reasonable steps to create a safe working environment does not require an employer to ensure that bad things do not happen to their employees; it is not a strict liability. There are always going to be limits to what the respondent can do in this situation. The details of what the operational manager was said to have done directly to the claimant were only particularised to a limited extend in section 4 of the second grievance and not before. I have explained Ms Chapman's reasoning and why she concluded that there was no need for a separate investigation by the Trust – predominantly because the outcomes then sought by the claimant within that grievance could be achieved within the formal capability process.

193.8 It is relevant that the Trust stepped back from dismissing at the Stage 4 capability hearing and a further attempt to make the SOPs more effective was made.

193.9 Mrs Blackburn's efforts to answer the claimant's questions show conspicuous care and attention to the issues she raises even where she was not able to change the answers provided by the respondent.

193.10 There are allegations made against the operational manager within these proceedings which were not explained to Mrs Illsley or Mrs Zacharias. In any event, the Trust could not change who the manager of the SRS&T was and could only offer those redeployment options available which met the claimant's skill set.

193.11 The respondent offered all redeployment options open to it.

193.12 The temporary role was supernumerary and there was no funding for that post long term. This had been made clear to the claimant on more than one occasion over a period of time.

193.13 The Trust changed the claimant's line manager so that she would not be managed by Mrs Prince.

193.14 The reality of dealing with a unionised workforce means that the circumstances in which it is appropriate to voluntarily disapply the provisions of policies (such as that on redeployment and pay protection) are very limited and more theoretical than actual. The

claimant did not ask for pay protection to be extended, she did not ask to remain on the redeployment register having accepted an alternative post. She made very clear that any Band 6 role would be regarded as a demotion and waste of her experience.

193.15 All of Mrs Chapman, Mrs Illsley and Mrs Zacharias were independent of the service and each other.

193.16 The principles of fairness embedded in the disciplinary policy informed the process followed in the formal dismissal process: There was an independent investigation. Any uncertainty by the claimant about what was relevant to Mrs Martin's investigation was clarified by the time of the dismissal hearing. She undoubtedly was able to and did put forward all her arguments at that hearing at which she was represented.

193.17 Mrs Illsley and Mrs Zacharias independently and reasonably reached the view that, although some "tweaking" of the SOP on Raising Concerns, Complaints and grievances between BHFT and Optalis was achievable, this was unlikely to satisfy the claimant. The way she describes the three outcomes she desires gives no indication that she would agree to return to work without issue 1 and 2 (page 1042) being resolved to her satisfaction, as well as issue 3.

193.18 The respondent reasonably refused to carry out an independent review of the grievances and could not require Optalis to provide more information than they already had about the investigation carried out into their operational manager in 2019. Mrs Blackburn was entitled to accept the assurances of the Optalis HR director that an investigation had been carried out – notwithstanding the succinct wording of the outcome email (page 742).

193.19 Ultimately, the respondent was not able to turn back time and make what had happened not happen; they could only take reasonable steps to support the claimant to move on in the light of what had happened. When she repeatedly declined to return to her substantive post or accept an alternative, they reasonably concluded that there were no other options than dismissal reasonably open to them.

194 It is therefore not necessary for me to reach a conclusion on whether the claimant contributed to her dismissal since the UDL claim is dismissed and no issues of remedy apply.

<u>Race discrimination</u>

195 The first allegation of race discrimination (LOI 4.2.1) is that in November 2017 "Julia Prince told the claimant that she had to change her working days, saying it was a Trust requirement and that part-time staff were expected to work either on a Monday or Friday."

196 I have found that Mrs Prince did not tell the claimant that it was a Trust requirement that she change her working days because part-time staff were expected to work either on Monday or Friday. However she certainly told the claimant that she (Mrs Prince) wanted her to change her working days. I'm not satisfied that in November 2017 Mrs Prince told the claimant that she had to change them by a particular time but Mrs Prince believed that, with enough notice, the claimant would be able to make alternative childcare arrangements for altered working days. I think it more likely than not that Mrs Prince phrased what she said as a change which was going to have to take place. It was not until March 2018 that Mrs Prince told the claimant that from her return to work after her unpaid leave her working days would have to include a Friday.

197 The facts as found therefore do not fully establish the allegation made. I do accept that in November 2017 the claimant was told that she would have to change her working days at some point. I also accept that the reasonable employee would reasonably regard themselves as disadvantaged by such a requirement when they had been working particular days since July 2013.

198 I bear in mind that Mrs Prince told the claimant that she would have to change her established days (which I presume were contractual) in order to accommodate the wishes of a colleague to change her own established days. I accept the claimant's argument that this is one sided in that it is giving more weight to the (white) colleague's informally expressed wish to change her regular days than to the claimant's contractual entitlement. I approach this therefore on the basis that the burden has transferred to the respondent needs to prove the reason why the claimant's contractual entitlement was not given more weight because it seems to me that that is something from which, in the absence of any other explanation, it might be inferred that had the claimant been white she would not have been told to change her working days and that race was a material factor in that requirement being made.

199 However I do accept Mrs Prince's explanation that she thought it fair that the perceived benefit of not working on a Monday and a Friday should be shared and that the job share colleague had expressed dissatisfaction with the arrangement. The latter had not worked both Mondays and Fridays before becoming directly employed. I am therefore satisfied that a white physiotherapist in the claimant's position would not have been treated any differently to her.

200 If I'm wrong about that then I'm quite satisfied that this incident is of a completely different kind to any of the other allegations in the case. Regardless of my conclusion on whether there is a course of conduct in respect of the other allegations, the request in November 2017 that the claimant change her working days is a different kind of action to the sending of the email on 10 April 2018. The mere fact that that email also includes a statement about her working days on return and that the claimant's line manager was responsible for the two actions is insufficient to make it a course of conduct. I have found that the decision to send an email to confirm the working days on return was uncontroversial; that is not the aspect of Mrs

Prince's actions in sending the 10 April 2018 email which is worthy of criticism.

201 My primary conclusion is that the race discrimination claim fails in respect of this allegation but, in any event, a complaint brought following contact to ACAS on 29 April 2022 in respect of an incident dated November 2017 is more than four years out of time. A claim of race discrimination could have be brought in respect of this action long since. Mrs Prince clearly struggled to remember the detail of conversations in supervisions given the passage of time and was disadvantaged by having to do so. This incident did not feature in the 2019 grievance and so there was no earlier notification that the claimant considered herself to have experienced race discrimination in relation to it. She has been represented throughout the formal proceedings from mid-2019 onwards by her trade union representatives. She was not unaware of any particular fact at any time which prevented her from making this complaint. I do not consider it would have been just and equitable to extend time in respect of this one incident - had that been something I needed to consider.

202 I have found that Mrs Prince did send an email on 10 April 2018 setting out complaints about Mrs Bhullar's behaviour received from her operational manager without first investigating whether the complaints were well-founded. She did take Ms Cannon's complaints at face value.

203 When considering this is as race discrimination complaint, I need to consider whether there are facts from which I might infer in the absence of any other explanation that had Mrs Prince received information from the SRS&T operational manager that a white physiotherapist had left on a career break without completing the necessary handover, had left early without permission, had not returned their phone and left without taking a leaving gift or saying goodbye she would not have written in equivalent terms. It is not a question about whether the operational manager would have made those complaints about a white physiotherapist. Therefore the alleged comparison with Mr Vonk (who's poor timekeeping Ms Cannon is alleged to have condoned) is not relevant.

204 Notwithstanding my concern about Mrs Prince's failure to give weight to the claimant's contract in relation to the working days, I do not see facts from which I might make such an inference. Alternatively, I am satisfied that race did not play any part in her conscious or subconscious mental processes. Although she failed to give her direct report a fair opportunity to comment on these matters before sending a written communication to express that serious concern, she had no particular reason to disbelieve Ms Cannon. The information that the claimant followed a practice that had previously raised no concerns came out following investigation but all the clinicians (including Mrs Prince and her manager Mrs Plummer) were of the view that even an administrative handover should be done to a clinician or manager and that was not done by the claimant. When Ms Cannon told Mrs Prince that she had not received an oral or email handover from the claimant, and had expected to do so in respect of all patients listed on the Paris database, Mrs Prince believed that in part because of her own judgment and thought it something that needed communicating to the claimant. On the face of it, an apparent

failure to follow established practice in relation to patient handover was something which needed to be looked into.

205 I also accept that, rightly or wrongly, Mrs Prince placed weight on the fact that she was being told this by someone she regarded as a senior manager. I accept that it was Ms Cannon's position as her opposite number that caused her to accept what she said at face value. The reason she did so by email rather than informally in a supervision was that the claimant had just commenced a period of leave and Mrs Prince's judgment was that an email which could be read and digested at a time of the claimant's choosing was less instrusive. The way the email as a whole was phrased was influenced by a range of factors; the degree of concern she felt at the report she had received and her defensiveness and sense of ill-usage at being criticised for delay in relation to the career break process. Those may not be good reasons for not finding a way to verify the facts before sending an email which she knew would be upsetting for the claimant and which the claimant understandably received as a notification of concern about her professionalism. However, I am satisfied that she would have included statements of concern about those matters in her email had been sent to a direct report in an equivalent situation who did not share the claimant's race.

206 As to LOI 4.2.3, I have accepted that Mrs Plummer was not neutral and impartial at the meeting. She had been invited to support Mrs Prince and had been involved in writing the email that the claimant is concerned about. However Mrs Prince was anxious about the prospect of meeting the claimant to discuss the email as she had been anxious about writing it in the first place. I accept as a matter of fact that this was the entire reason why Mrs Plummer was present. The claimant may have been taken by surprise by Mrs Plummer's presence. However I do not see that it had any real impact on the conduct of the meeting. I am also persuaded that Mrs Plummer's desire to support her own direct report was the entire reason for her presence and that precludes a finding that it was less favourable treatment on grounds of race.

207 As to LOI 4.2.4 my finding is that Mrs Plummer did not exclude the claimant from an email inviting her to Part two of the Frailty Course. I accept Mrs Plummer's evidence that the claimant was inadvertently missed off the circulation list and was not the only person in that position. I accept that her job share was included and her career break cover was included but Mrs Plummer took steps to encourage the invitation to be circulated widely and it was in fact circulated to the claimant. Given the lack of intention to exclude her the core facts underlying this complaint are not made out. In any event, I am satisfied that the reason for the omission was administrative oversight and was not influenced by race.

208 As to LOI 4.2.6.1 Mrs Plummer did not progress the claimant's complaint as a grievance because the claimant had not asked for that to happen and had not brought a formal grievance at that point. Notwithstanding any deficiencies in Mrs Plummer's letter of 29 March 2019 this was an attempt to resolve the claimant's concerns at an informal stage. Although in some respects Mrs Plummer took the part of her direct report in the meeting of 4 March 2019, in fact there was information available to her from which she could form the

views expressed in the letter of 29 March 2019. She was not a decision-maker and in any event I am satisfied that her presumption was that complaint by managers were well-founded. I see no evidence from which it might be inferred that this presumption or any of her actions were based on race

209 Reading the transcript as a whole, I do not accept that Ms Toheed sought to discourage the claimant from presenting formal grievance in their meeting of 18 April 2019. The claimant has therefore not made out the core facts underlying LOI 4.2.6.2. The words that are the subject of that particular complaint do amount to her counselling the claimant to consider what impact a grievance would have on working relations with the team. Arguably that was inadvisable, in that she went a little beyond merely encouraging the claimant to think of all other options before presenting a formal grievance. However, in other places in the conversation she reiterated words to the effect that the claimant was free to make a formal complaint, that it was for her to decide what to do and Ms Toheed provided her with information about how to do it. In any event there is no evidence from which it might reasonably be inferred that Ms Toheed would have acted differently in like circumstances had the claimant been white.

210 LOI 4.2.6.3 complains that Helen Williamson did not amend her grievance outcome when the claimant asked for a reconsideration. Although Mrs Williamson did not change the outcome, she did provide much more information about her reasoning and answer some of the specific questions in the terms of reference which have not been answered in the original outcome letter of 6 August 2019. Strictly speaking, the allegation is therefore not made out. However, as I have explained, there are deficiencies in the outcome even after the review. One conclusion was reached contrary to the available evidence and another was reached for which there was no supporting evidence.

211 There is documentation from 2021 which suggests that Mrs Williamson had partially closed her mind to the claimant's perspective. She accepted Mrs Prince and Mrs Plummer's descriptions of the claimant's behaviour in the meeting they attended and was willing to repeat them. I think it is reasonable to infer from that the willingness to support the managers in her service. I do not infer that the reason Mrs Williamson dealt with the grievance in a way that she did was that of race. The claimant has not shown facts from which it might be inferred that another employee in materially the same circumstances who did not share her race would have been treated more favourably.

212 The original conclusions mirror those of the investigating officer. Mrs Williamson went outside the standard practice to review her decision which is to her credit. Also she was not uncritical of management even if her outcome contain some obvious errors. Other correspondence from Mrs Williamson also shows apparently genuine attempts to lay the groundwork for the claimant to return to her substantive role.

213 Overall, this complaint fails because the claimant has not shown the core facts underpinning it. I do not think it right to expand the allegation or read it flexibility to mean a complaint about what the outcome actually was.

However, in fairness to a witness who has come to the tribunal to defend herself against an allegation that she was consciously or subconsciously motivated by race, I state that I do not think that is an inference which is reasonably made on the available evidence and I would have dismissed the complaint on the grounds that I am satisfied that there was no less favourable treatment on grounds of race.

214 I deal next with LOI 4.2.7 and 4.2.8 because those are allegations made against Mrs Prince for her answers in the grievance investigation meeting on that date. There was no particular reason why Mrs Prince should have investigated the comment made by the operational manager that the claimant was distancing herself from the team – apparently made in the run up to a year's leave for personal reasons. Mrs Prince did say in the contentious April 2019 email that she accepted that the claimant needed the career break. I reject the inference that she was attempting to portray the claimant in a negative light

215 Furthermore, she had an email from the operation manager as the basis for her comment that it was difficult for her. At least the email from Mrs Cannon said a lot of work was needed to reintegrate the claimant into the team. In the light of what Mrs Prince knew about the claimant's views that she had been the subject of false allegations it was not an unreasonable inference for Mrs Prince to draw. She did not tell Ms Walsby that the claimant was difficult or that the claimant's presence was difficult. The core facts underlying this allegation are not made out or alternatively this does not amount to an act or omission which the reasonable worker could consider to be a detriment.

216 In respect of LOI 4.2.9 my findings are that Mrs Williams did provide an adequate conclusion to the allegations that the claimant had failed to provide a handover. She concluded that the claimant had provided clinical handover in respect of two active patients in accordance with the standard practice of the Department. She concluded that the claimant had provided an administrative handover in respect of the rest of her nominal caseload in the way she had previously done when starting earlier periods of leave. She concluded that standard operational procedure for such a handover was unclear and needed to be the subject of a written SOP. She made clear that the claimant's conduct was not the subject of any concern or performance criticism in relation to her actions on handover. The facts underlying this allegation are not made out.

217 Furthermore, given that the claimant's complaint about being sent the email of 10 April 2019 was upheld, overall it seems that Mrs Williams carried out a balanced and independent minded appeal. There is no basis to conclude that she would have done otherwise than she did had the claimant been white.

218 The specific factual allegations set out in LOI 4.2.10 have not been evidenced by the claimant. Those are the allegations that Mrs Blackburn refused to carry out an independent review. The claimant did not in fact support the allegation in her evidence. The core facts are not made out and that complaint is dismissed. Alternatively, the available evidence demonstrates that it was not usual Trust practice to source external decision makers for a review. This

was confirmed by a number of people during the dismissal and appeal stages and it provides every reason to conclude that, had a request for an independent review been made by a white employee in like circumstances (particularly following an independent grievance appeal) they also would have been refused one.

219 The next allegation in time is LOI 4.2.6.4. Miss Chapman was not the individual who decided to carry out a fact-find rather than a full investigation. Mrs Fantham decided to appoint Miss Chapman to carry out the fact-find; the paper review which is the first step in the Trust grievance procedure. It would require an amendment to the worded issue to read it as a complaint that Miss Chapman recommended after her fact-find that there should not be a full investigation.

220 Strictly speaking, the facts underlying this complaint are not made out. However, were I minded to consider this allegation more broadly, I refer to my findings about Miss Chapman's reasons. I have accepted that, as a matter of fact, she was of the view that where Section 4 of the grievance set out particular or general allegations directed towards the Optalis operational manager, they did not raise issues which could be investigated by the Trust because she was not a Trust employee. However her fact find is poorly reasoned in that she does not state that that was part of her reasons which would give the impression that she had not had regard to Section 4. Notwithstanding that, her conclusion that the desired outcomes of the second grievance could all be achieved within the existing processes was, I accept, sound and that, together with the conclusion that the complaints against Trust staff had already been investigated or fell within the existing grievance were the reasons why she did not recommend a separate investigation. The race discrimination claim and the victimisation claim based on her fact find fail.

221 The final allegation is that LOI 4.2.11 that Mrs Williams commissioned an investigation against the claimant regarding her continued employment. Part of this allegation appears to be a complaint that the invitation to the investigation meeting did not set out the specific allegations that supported the decision to consider her continued employment.

222 Other than taking issue with the use of the word "against", in reality it is accepted that Mrs Williams did commission such an investigation. However, it is clear from her statement and oral evidence that this was done for a number of reasons, none of which had anything to do with the claimant's race or the inclusion of an allegation of race discrimination in Grievance 2. Mediation was known by them not to be possible because the operational manager was unwilling to participate. The funding for the supernumerary role that claimant occupied had come to an end. The substantive role was being filled by agency workers which was unsatisfactory fiscally, if for no other reason. The attempts by Mrs Blackbrun to negotiate SOPs which satisfied the claimant while being broad enough to be of generally application had not reached a satisfactory conclusion. The claimant had said on more than one occasion in June and July 2021 that she was not willing to agree to return to her substantive role and did not accept permanent redeployment to the vacancies which were available. An independent investigation about whether

there was any more that the Trust could reasonably do to support the claimant to return to her substantive role or to identify an alternative was the sensible step to see whether a fresh pair of eyes could see if there was anything that the Trust had so far not tried.

223 To the extent that the complaint is about a lack of clarity about the allegations, the reasons for the Trust's position that they had taken all reasonable steps were made clear to the claimant in the investigation officers report and the notification of the investigation contained a reasonable amount of information – besides it incorporated reference to the detailed explanation of the Trust's position in Mrs Balckburn's letter of 28 July 2021. This part of the allegation is not made out as a matter of fact.

224 For all of these reasons, the race discrimination and victimisation complaints are not well founded and are dismissed.

Approved by:

Employment Judge George

5 May 2025

JUDGMENT SENT TO THE PARTIES ON

6 May 2025

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

APPENDIX – CURRENT LIST OF ISSUES

1. Time limits
1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 30 January 2022 may not have been brought in time.

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

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

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

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

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

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

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

2. 'Ordinary' unfair dismissal
2.1 The claimant was dismissed on 10 November 2021 with effect from 2 February 2022.

2.2 What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason ('SOSR') capable of justifying dismissal, namely the claimant was refusing to return to her role, refusing to consider an alternative role, and refusing to accept that the respondent had done all it reasonably could to resolve her concerns.

2.3 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

3. Remedy for unfair dismissal
3.1 The claimant wishes to be reinstated to her previous employment.

3.2 The claimant does not wish to be re-engaged to comparable employment or other suitable employment.

3.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

3.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.4.1 What financial losses has the dismissal caused the claimant?

3.4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

3.4.3 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

3.4.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the

respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.4.5 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.4.6 Does the statutory cap apply?

3.5 What basic award is payable to the claimant, if any?

3.6 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Direct race discrimination (Equality Act 2010 section 13)
4.1 The claimant describes her ethnicity as Asian and non-white and compares herself with people who are white.

4.2 Did the respondent do the following things:

4.2.1 In November 2017 Julia Prince told the claimant that she had to change her working days, saying it was a Trust requirement and that part-time staff were expected to work either on a Monday or Friday;

4.2.2 On 10 April 2018 Julia Prince sent the claimant an email regarding a complaint allegedly received from Dawn Cannon, the team manager for Optalis, without first seeking verification as to the veracity of the facts contained in the complaint; Julia Prince choosing to believe the complaint submitted by a white manager at face value. The complaint included allegations that the claimant had left work early on her last day of work prior to a year of unpaid leave;

4.2.3 On 4th March 2019, the Claimant understood she was to meet with Julia Prince on her own to ask about the content of the e mail sent to her by Julia Prince on 10th April 2018. When the Claimant arrived at the venue, she was met by Rozeena Toheed who told her that Jenny Plummer had met with Julia Prince that morning prior to the meeting (to advise her) and that she would also be attending the meeting;

4.2.4 In April 2019 Jenny Plummer excluded the claimant from an email and so failed to invite the claimant to sessions of a course run by the respondent on 'Frailty';

4.2.6 The following persons refused to adhere to the grievance process and other policies preventing abuse by failing to investigate the claimant's grievance, thereby preventing the claimant from returning to work in her substantive role in a safe environment, resulting in her dismissal;

4.2.6.1 Jenny Plummer failed to progress the Claimant's complaints as a grievance, following a number of e mails sent by the Claimant to the Respondent's HR Team and Julia Prince between April 2018 and 4 March 2019 regarding the 10 April 2018 email sent by Julia Prince to the Claimant, finally resulting in a meeting of 4th March 2019, as in a letter dated 29th March 2019 (a copy of which was sent to Dawn Cannon) stated: "…this is only an e mail between yourself and Julia, it is not held on your personal record so both you and Julia delete the e mail…".

4.2.6.2 on 24 April 2019 in an informal meeting Rozeena Toheed told the claimant not to submit a grievance, questioned the claimant as to why she wanted to submit a grievance and why she wasn't worried about the impact a grievance might have on the managers involved and that it might uncover something;

4.2.6.3 Helen Williamson was the commissioning manager who sent the outcome letter of the Grievance on 6th August 2019. The Claimant sent a letter back on 13th August pointing out that there were errors and issues that had not been addressed and/or ignored. The Claimant asked her to reconsider the outcome and as she had one right of appeal, she did not want to waste that one appeal. Helen Williamson chose not to amend;

4.2.6.4 By a letter dated 14 May 2021 Elizabeth Chapman failed to investigate the claimant's second grievance dated 17 March 2021, and merely carried out a fact find.

4.2.7 On 8 July 2019 Julia Prince referred to an allegation made by Dawn Cannon that the claimant was distancing herself from the team without investigating the facts in that it was due to hotdesking in a busy office with multiple teams;

4.2.8 On 8 July 2019 Julie Prince reported to Katalin Walsby, grievance investigation officer, that Dawn Cannon said it had been difficult for her, implying the claimant's presence on the team had made it difficult for Dawn Cannon, and Julia Prince took that comment at face value without investigation;

4.2.9 By the appeal outcome letter dated 25 November 2019, Claire Williams failed to provide any adequate conclusion to the allegations that the claimant had failed to provide a handover;

4.2.10 Jo Blackburn on 21 September 2020 at a further meeting on 15 January 2021 refused to commission an independent review of the investigation into the claimant's grievance or implement any kind of procedure for complaints made when employed in external teams;

4.2.11 On 2 August 2021, Claire Williams commissioned an investigation against the Claimant regarding her continued employment and was subsequently invited to a meeting on 2nd November 2021. Although it stated that it would be conducted in line with the principles of a fair hearing as set out in the disciplinary policy it failed to set out the specific allegations/reasons that supported the decision to consider her continued employment but it did state that it could result in the termination of her employment which was confirmed on 10th November 2021.

4.3 If so, was the claimant treated less favourably than a real or hypothetical comparator?

Are there facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant? (EqA 2010, s 136(2)). If so, has the Respondent shown that it did not discriminate against the Claimant? (EqA 2010, s 136(3)).

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

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated (hypothetical comparator).

The claimant says she was treated worse than: RELIED ON AS EVIDENTIAL COMPARATORS

4.3.1 (in respect of 4.2.1) Jo Kelly, another female band 6 physiotherapist who is white and had been working Tuesday, Wednesday and Thursdays for several years and had never been pressured to change her days;

4.3.2(in respect of 4.2.1) Catherine Bray, a female Band 7 Physiotherapist who is white, changed her pattern of work from full-time to part-time working to Tuesday, Wednesday and Thursday;

4.3.3 (in respect of 4.2.4 and 4.2.6.2) Jeroen Vonk, a white male locum physiotherapist who was appointed as a full-time physiotherapist on the dismissal of the claimant, working on days of his choice;

4.3.4 (in respect of 4.2.1 to 4.2.11) multiple white managers who were not held accountable for failings, being Julia Prince, Jenny Plummer, Helen Williamson, Claire Williams, Joanne Evans, Stuart Overhill, Rozeena Toheed, Sarah Cargin, Fran Langan.

4.4 If so, was it because of race?

6. Victimisation (Equality Act 2010 section 27)
6.1 Did the claimant do a protected act?

6.1.1 The claimant asserts that she did the following protected act, which the respondent admits:

6.1.2 On 17 March 2021 the Claimant wrote in her grievance, emailed to Lydia Harrison and Penny Bromley, that she was "forced to work under a manager who was renowned for claims of being racist", and "the issue is the management team of the Short Term Support and Rehabilitation department at Optalis displaying indirect and direct aggressive behaviour as well as racist undertones in their actions and comments" (section 27(2)(d) Equality Act 2010).

6.2 Did the respondent do the things set out in paragraphs 4.2.6.4 and 4.2.11 above?

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

6.4 If so, was it because the claimant did a protected act?

6.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

7. Remedy for discrimination or victimisation
7.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

7.2 What financial losses has the discrimination caused the claimant?

7.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

7.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

7.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

7.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

7.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the respondent or the claimant unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

7.8 Should interest be awarded? How much?