EMPLOYMENT TRIBUNALS

Claimant:	**Mrs V. Okoh**
Respondent:	**North East London NHS Foundation Trust**
Heard at:	**East London Hearing Centre**
On:	**20-22, 26-27 and 29 November and 3 December 2019** **21 and 22 January 2020 (in Chambers)**
Before:	**Employment Judge Massarella**
Members:	**Ms L. Conwell-Tillotson** **Mr D. Ross**

Representation

Claimant:	Ms G. Cullen (Counsel)
Respondent:	Mr A. Hazlewood (Solicitor)

RESERVED JUDGMENT

1. **The Claimant's claim of unfair (constructive) dismissal succeeds.**

2. **The Claimant's claims of direct race discrimination, harassment related to race and victimisation are not well-founded and are dismissed.**

3. **The Claimant's claims of unauthorised deduction from wages (holiday pay) and breach of contract (notice pay) are dismissed on withdrawal.**

REASONS

Background

1. By a claim form presented on 4 September 2018, after an ACAS early conciliation period between 16 July and 8 August 2018, the Claimant complained of direct race discrimination, harassment related to race and unfair (constructive) dismissal.

2. At a preliminary hearing on 30 January 2019, before EJ Hyde, an application was made to amend the claim form. The Judge allowed the amendment in respect of one act of victimisation only ('RV1' in the agreed list of issues). She gave the Respondent permission to make consequential amendments to its ET3, which it did on 20 February 2019, and ordered that the full merits hearing would deal with liability only.

3. Also on 20 February 2019 a detailed, agreed list of issues was lodged with the Tribunal; a slightly amended version of that list was included in the bundle. Further minor amendments were made to it in discussion with the Tribunal at the beginning of the second day of the hearing. It then stood as the definitive list of issues for determination and is included as an appendix to this Judgment.

4. In the ET1 the boxes relating to holiday pay and notice pay had been ticked and the case file coded to include those claims. Ms Cullen, Counsel for the Claimant, confirmed at the beginning of the hearing that those claims were not pursued and they were dismissed on withdrawal.

The Hearing

5. The case had originally been listed for eight days, to include deliberation and judgment. Unfortunately, the Tribunal was unable to sit on 28 November 2019 and the listing was reduced to seven days. After discussion with the parties, it was agreed that the evidence could be completed by the end of the sixth day, that the parties would submit written closing submissions at the end of that day and would attend on the morning of the seventh day to make further oral submissions, limited by agreement to half an hour each. The rest of the seventh day was taken up with the Tribunal's initial deliberations. Further deliberation days took place on 21 and 22 January 2020, which were the earliest dates on which all three members of the panel could meet, when the Tribunal made its final decisions.

6. The Tribunal apologises to the parties for the length of time it has taken to draft and send out this judgment and reasons, which was the result of competing demands on judicial time.

7. We had an agreed bundle of documents, running to over 1000 pages, most of which was not referred to. The parties' representatives were reminded that the Tribunal would only look at those documents which were included in the essential reading list they provided, or to which they took us in the course of cross-examination.

8. We heard evidence from the Claimant and her husband. For the Respondent we heard from Ms Maria Thorn (Assistant Director until 2018, now retired); Ms Melody Williams (Integrated Care Director for Barking and Dagenham and Barnet Services); Mr Matthew Henshaw (Integrated Children's Services Manager); Ms Caroline Ward (Assistant Director for Children and Young People's Services for Barking and Dagenham until May 2018, when she resigned); Ms Jan Geddes (Interim Integrated Children's Targeted Services Manager between December 2017 in April 2018); and Ms Stephanie Dawe (Chief Nurse).

Findings of fact

9. The Respondent is a mental health and community services trust covering North East London and parts of Essex. For its core services it is divided into localities, which correspond with the London boroughs. Within each locality there is a variety of service streams.

10. The Claimant describes her race as Black British, of Nigerian national origin. She commenced employment with the Respondent on 5 June 2004. She worked initially as a Community Psychiatric Nurse but was promoted several times: in 2008 to Senior Community Psychiatric Nurse; in 2009 to Clinical Lead Nurse (Band 7); in 2013 to Interim Community Recovery Service Manager (Band 8a); and in December 2013 to Deputy Manager, Redbridge Access and Assessment Team ('RAAT') (Band 7).

11. In February 2014 the Claimant was interviewed for a Band 8a role as RAAT Manager but was unsuccessful. Maria Thorn was on the interview panel. In March of that year the Claimant brought a grievance against Ms Thorn, which led to mediation which, at least so far as Ms Thorn was concerned, successfully cleared the air. Shortly afterwards Ms Thorn was approached informally by Ms Sue Boone, head of the Respondent's BME unit, who told her that the Claimant was still upset. Ms Boone asked if a development opportunity to act in a Band 8a managerial role could be identified for the Claimant. It happened that a vacancy was becoming available for a Learning Disabilities Team Manager (Band 8a) and, in April 2014, the Claimant was appointed to the role on a developmental basis, with Ms Thorn as her line manager. As the Claimant did not have a great deal of experience in the field, she initially shadowed an experienced manager, but then stepped into the role on a full-time basis in June 2014.

12. Ms Thorn stated that she had some performance concerns about the Claimant in relation to prioritising and achieving targets and completing appraisals, but she did not raise those issues formally with her. Other matters intervened which soon put a strain on the relationship.

<u>The Sonia Hamza grievance</u>

13. Ms Sonia Hamza was a social worker, employed by the London Borough of Redbridge but managed by the Respondent in the person of the Claimant. On 15 April 2015 Ms Hamza lodged a grievance against the Claimant for bullying. The Claimant took the view that Ms Thorn did not support her sufficiently during that grievance. Ultimately it was not upheld, although some team members supported Ms Hamza's allegations.

14. The Claimant was unhappy that the grievance process was carried out by the London Borough of Redbridge, when she (the Claimant) was an employee of the Respondent. However, Ms Hamza was a Redbridge employee and it was agreed between the HR teams of the two boroughs that the Redbridge process should be followed; Ms Thorn was not involved in that decision. The Claimant believed that Ms Hamza's grievance was malicious and she thought that Ms Thorn should have intervened to stop the process. We accept Ms Thorn's evidence that that was not something which she either could, or should, have done.

The London South Bank University training course in 2015 (Issue UD2)

15. The Respondent has a policy in relation to external training courses costing more than £500, which requires the employee to seek the agreement of her manager, and to make an internal CPD application to the learning resources team, before submitting an application to the external provider.

16. In 2015 the Claimant, along with other employees at her level, had been doing a leadership course at South Bank University, which she completed in the Summer of that year. There was then an option to do additional modules leading to a Masters at an additional cost to the Trust of £4,500. The Claimant accepted in cross-examination that she told Ms Thorn about some additional modules at a supervision in September 2015, but not about the additional cost. Ms Thorn's evidence, which we accept, was that she believed the modules to be part of the existing course, which had already been approved, and was centrally funded, as opposed to coming from her own budget.

17. On 22 September 2015 the Claimant completed a Tuition Fee Sponsorship Form for the additional modules. In that form she inserted Ms Thorn's name as the authorising manager; at that point Ms Thorn had not authorised the additional cost. The Claimant completed a London South Bank Enrolment Form on 24 September 2015. We were also taken to a Tuition Fee Calculation Sheet, which contains a figure for 'sponsor contribution' of £4500. That form is signed by two members of London South Bank University staff.

18. The Claimant contacted Ms Sonya Newby, Head of Learning Services on 6 October 2015 to apply for CPD funding. Ms Newby instructed her to complete an internal Application for Continuous Professional Development Funding form, which she did, signing and backdating it 30 September 2015. On it she gave the start date of the course as 'September 2015'. The Claimant presented that form to Ms Thorn on 8 October 2015, who signed it. There was nothing on it to indicate the cost to the Respondent, as the Claimant had left the box for 'Cost of Course (Excluding VAT)' blank. We accept Ms Thorn's evidence that she would not have signed it, and approved the course, had she known its cost. The Claimant was on a fixed-term contract within the division, which was due to end in December 2015; Ms Thorn was effectively making a commitment on behalf of her successor manager. Had she known about the cost, she would have suggested the Claimant wait until she returned to her substantive post.

19. On 21 October 2015 Ms Thorn was told by Learning Resources that she (Ms Thorn) had signed a document committing the Respondent to covering the course fees of the Masters course, which came as a surprise to her. She spoke to the HR director, Mr Bob Champion, on 27 October 2015, who suggested she

speak with NHS Counter-Fraud. We find that she acted appropriately in the circumstances. NHS Counter-Fraud considered that there were grounds for investigating potential misconduct, including dishonesty. On 23 November 2015 a disciplinary investigation was initiated, not by Ms Thorn but Mr Champion. Ms Thorn was interviewed as part of that process on 10 December 2015; the Claimant on 22 January 2016.

20. The investigation was concluded on 28 February 2016 and the outcome was communicated to the Claimant in March. The conclusion reached was that there was no dishonesty on her part, but that she had failed to follow the correct procedures which, in the course of the investigation, she had accepted. No further disciplinary action was recommended. Because she had not followed the policy correctly, the Claimant had to cover the cost of part of the fees herself.

21. The Claimant accepted again in cross-examination that she had not followed the policy correctly. In her evidence to the Tribunal she initially sought to blame Ms Thorn for not reminding her of the policy; she then acknowledged that, as a senior manager, there was a responsibility on her to ensure her own compliance. We find that Ms Thorn was in no way to blame for the situation.

22. A separate issue arose in relation to a failure to follow procedure in relation to TOIL, which was investigated at the same time. The Claimant appeared to have taken TOIL which had not been formally approved by Ms Thorn. The conclusion on that issue was that neither the Claimant nor Ms Thorn had followed the applicable policy. On the evidence we heard, that was a reasonable conclusion.

<u>The appraisal meeting with Ms Thorn in November 2015 (Issue UD1)</u>

23. An appraisal meeting took place between the Claimant and Ms Thorn on 11 November 2015. As is usual, the practice was for the employee to complete the self-appraisal sections of the form and then submit it for the line manager to complete her own section. It ought to have taken place in April 2015; Ms Thorn had been chasing the Claimant to complete her sections so that it could be progressed.

24. In her part of the form the Claimant had responded to the questions 'Do you feel valued?' and 'Do you feel supported' by saying 'No'. She described some of the concerns that she had about Ms Thorn. These included the alleged lack of support in relation to Ms Hamza; the fact that Ms Thorn would sometimes miss emails from her and the Claimant would have to resend them; and the fact that '[Ms Thorn] had written to me with my name in capital letters indicating that she was shouting at me'. This referred to a practice of Ms Thorn's in emails sent to multiple recipients of highlighting a request to an individual by putting their name in capitals; it was not confined to the Claimant.

25. The Claimant set out her account of the meeting of 11 November 2015 in her grievance letter to Mr Edwards, which included the following passage:

> 'As you are aware, the STAR appraisal allows one to say if he/she feels valued by the organisation and by their line manager; when I said NO to both questions, I was made to feel unpleasantly stern for doing so.
>
> At the meeting I showed Maria that I want to give her the chance to listen and learn and to respond to some of the issues that I felt she didn't

> handle well, and had not supported me with. I wanted Maria to acknowledge the challenges that I face under her leadership and management and give her the opportunity to correct these issues.
>
> In my attempt to show Maria my evidence and be open and honest to explain each point and reasons for my discontent, Maria became very upset, defensive and antagonistic in her approach towards me.'

26. The Tribunal finds this language surprising from an experienced manager. It suggests that the Claimant regarded the process as primarily an opportunity for her to appraise her line manager.

27. Ms Thorn set out her account of the appraisal meeting in an email to Mr Edwards on 12 November 2015. She described the meeting as 'very intense'. Although she had anticipated that it would be difficult, she was taken aback by the extent of the Claimant's criticism of her. We accept her account that the Claimant came with a detailed agenda and did most of the talking. During the discussion Ms Thorn apologised to the Claimant if she had made her uncomfortable in any way. After about an hour Ms Thorn became upset and said that she needed a break. She spoke to HR who suggested that she adjourn the meeting.

28. The Claimant accepted in evidence that Ms Thorn became upset at the meeting and stated: 'We were both upset because she was not taking on board what I was saying to her'. The Claimant said that she felt aggrieved because Ms Thorn had left her in the room on her own for a time. Asked by the Tribunal whether she thought that anything in her own approach might have contributed to Ms Thorn's upset, she replied: 'I think [she was upset] in response to the fact that I was open and honest'. The Tribunal finds that the Claimant lacked insight into the effect her approach to the meeting had on Ms Thorn. She was entitled to raise concerns about Ms Thorn's management style, but she did so insensitively. We reject her allegation that Ms Thorn 'demonstrated hostile and threatening behaviour' at the meeting; we find that Ms Thorn sought to defuse a difficult situation in which she was subjected to sustained criticism by the Claimant.

29. It was put to Ms Thorn in cross-examination that she told the Claimant at the appraisal meeting that she was going to terminate the Claimant's secondment. We reject that suggestion: there is no mention of it in Ms Thorn's contemporaneous notes, nor in the Claimant's grievance, raised a few days later. We accept Ms Thorn's evidence that the opposite was the case. The Claimant's contract was due to expire on 31 December 2015. Ms Thorn, in consultation with other senior colleagues, considered that there was a good case for extending the Claimant's role to 31 March 2016. She attempted to meet with the Claimant to discuss this on more than one occasion. A diary invitation for a meeting on 16 December 2015 was eventually accepted by the Claimant, but she later declined it. Nonetheless it appears that the extension occurred and the Claimant remained in post until the end of March 2016.

30. The day after the appraisal meeting the Claimant cancelled all her appointments and supervision meetings with Ms Thorn and declined to rearrange the adjourned appraisal meeting.

The Claimant's grievance against Ms Thorn (Issue UD4)

31. The Claimant lodged a grievance against Ms Thorn on the weekend of 14/15 November 2015. On 24 November 2015 an investigator, Gordon Muvuti, was appointed to deal with it. The Claimant was interviewed on 22 January 2016; Maria Thorn was not interviewed until 13 April 2016. On 8 July 2016 the grievance investigation was concluded and sent to the Claimant.

32. On 15 August 2016 the Claimant appealed the grievance outcome. The appeal meeting took place on 13 February 2017, conducted by Ms Tania Sitch, Integrated Care Director for Thurrock. The outcome of the appeal was communicated to her by letter dated 23 February 2017. This letter stated that there had been 'some shortfalls in the original investigation' and 'unacceptable delays in the investigation', for which Ms Sitch apologised.

33. We find that taking fifteen months to deal with a grievance and appeal was manifestly excessive and in breach of the Respondent's grievance policy.

The CAMHS role and the provision of a reference (Issue UD3)

34. On 1 March 2016 the Claimant was offered a permanent Band 8a role as Child and Adult Mental Health Services ('CAMHS) Clinical Lead for Barking and Dagenham. This was a senior management position.

35. On 3 March 2016 Mr Matthew Henshaw, who had interviewed the Claimant for the new role, and would in due course become her manager, asked Ms Thorn to provide an internal reference, which she promptly did. One of the *pro forma* questions on the reference request was whether the Claimant 'was currently under investigation for any matter (inc. conduct, capability and performance) under any of your employment policies'. Ms Thorn referred to the investigation into the Claimant's application for the South Bank University modules and said that, so far as she was aware, it had been completed and was with the reporting manager. She set out the relevant policies under which the investigation was being conducted and accurately reflected the terms of reference of the investigation, including the fact that there was an allegation of fraud.

36. Mr Henshaw contacted the investigating officer, who told him that the report was with the commissioning officer and a final outcome was awaited. Shortly afterwards he was told that the matter had concluded and there would be no disciplinary action. The Claimant was then offered the role unconditionally; she accepted and took it up in April 2016.

37. We reject the Claimant's allegation that Ms Thorn provided a 'defamatory' reference. The information Ms Thorn provided was accurate and presented in a neutral way, making clear that no conclusion had yet been reached as to the substance of the allegation. There was no breach of confidentiality as there was no bar on referring to an internal process for the purposes of providing an internal reference. It would have been misleading to omit this information in response to an express question.

The decision in June 2017 that the Claimant should not attend an interview in her role as an Ethnic Minority Network Ambassador (Issue RD1)

38. As we have already indicated, between April 2016 and June 2017, in her new role as CAMHS Clinical Lead, the Claimant was managed by Mr Henshaw. He reported to Ms Caroline Ward, who in turn reported to Ms Melody Williams. Although the Claimant and Mr Henshaw appeared to have had a good relationship, he had concerns about some aspects of her performance. In particular, we accept his evidence that the Claimant left some tasks, which were part of her job description, for him to pick up, including the collection and submission of supervision data. It was also his experience that the Claimant struggled to accept criticism of her performance.

39. The Respondent has a programme to encourage diversity: the Ethnic Minority Staff Network ('EMN'). One of its initiatives was to include EMN Ambassadors on recruitment panels to provide input on the issue of diversity. The Claimant was an Ambassador and had sat on many interview panels, including with Mr Henshaw.

40. On 25 June 2017 she was asked by the Trust's Diversity Manager to sit on a panel with Mr Henshaw and Ms Ward for the role of Targeted Named Nurse, which was to take place on 28 June 2017 and she agreed. However, when she was already on her way to the interview Mr Henshaw contacted her and told her that she would not be sitting on the panel after all.

41. We find that this was Mr Henshaw's decision. His evidence was that he considered it inappropriate for the Claimant to sit on the panel because the only candidate (a white woman) was someone with whom the Claimant was already working closely. If that candidate was successful, they would be working in the same team at the same level as each other; if she was unsuccessful, he was concerned it might create an uncomfortable atmosphere between them. Ms Ward's involvement was confined to the fact that Mr Henshaw consulted her as chair of the panel; she saw the force of his concern and endorsed the decision.

42. The interview went ahead without an Ambassador on the panel. In fact, it later emerged that there was no policy bar on an EMN Ambassador sitting on a recruitment panel for roles in the same team on the same level, or even more senior, to her/him. Mr Henshaw did not know that at the time.

<u>The change of line management to Ms Forrest</u>

43. In the Spring of 2017 the CAMHS service was restructured. The Claimant and others were put at risk of redundancy; she had to reapply for her role and was successful.

44. In June/July 2017 Mr Henshaw moved to a new role and Ms Rachel Forrest was appointed to his role and became the Claimant's line manager. This was a significant step-up for Ms Forrest in terms of seniority and responsibility and she struggled in the role. She also found the Claimant difficult to manage: in particular, the Claimant resisted Ms Forrest's attempts to ask her to do aspects of her role which Mr Henshaw had previously covered for her; she responded negatively to criticism and was reluctant to acknowledge when she did not know something. In October 2017 matters came to a head and Ms Forrest agreed with Ms Ward that she would develop a performance action plan to address these and other issues.

45. In October 2017 one of the Claimant's subordinates, Ms Jill Downs raised a grievance against her, alleging bullying; the Claimant raised a counter-grievance against Ms Downs, including allegations that Ms Downs had 'displayed aggressive behaviour' towards her and 'lied and undermined' her. Neither grievance was upheld.

46. On 6 October 2016 the CAMHS team raised a complaint to the senior leadership team about the way that they were being managed.

Ms Ward's use of the expression 'cracking the whip' in October 2017 (Issue RD2)

47. The Claimant alleges that, at a group meeting in October 2017 when Ms Ward was reviewing the Claimant's team's performance targets, Ms Ward used the expression 'cracking the whip', accompanied by a hand gesture. Ms Ward could not recall whether she did so but we find on the balance of probabilities that she did: the Claimant's recollection was clear and there was some evidence that she complained about it at a meeting with Ms Williams on 21 November 2017, although she did not include it in her subsequent grievance. The first time she raised it in writing was in her ET1.

48. The Claimant said in her statement that the expression (and gesture) was used 'in relation to me getting my work done'. It was unclear whether this meant that Ms Ward used it in the context of the Claimant working harder herself or of her taking steps to ensure that others did so. We find the latter explanation more likely, given that the context was a meeting about team performance.

49. The Claimant's evidence, and that of her husband, was that they understood the expression to have connotations of slavery; we accepted that was their genuine understanding. The Claimant alleged during cross-examination that Ms Ward deliberately used the expression because she knew it had connotations of slavery. Ms Ward's evidence was that, to the extent that she had considered the meaning of the phrase, she thought it related to horses and was unaware of any connection with race/slavery; we also accepted that was her genuine understanding. Accordingly, we reject the Claimant's suggestion that Ms Ward was being deliberately offensive.

50. The Tribunal considered that it might be important to understand the origin of the expression and we asked to hear evidence on that issue.

51. The Claimant relied on the following.

    51.1. The 'Online Slang Dictionary', a resource which can be amended directly by online users, defines it as 'to be demanding of work. Originally used in slavery and horse-trading'.

    51.2. A Wikipedia article about the word 'cracker' which, the article states, is a racial epithet used for rural white people in the southern United States. The article states that 'it has been suggested that white slave foremen in the *antebellum* South were called "crackers" owing to their practice of "cracking the whip" to drive and punish slaves'. The footnotes cite three published sources for that assertion, although these were not before us.

52. The Respondent relied on the following:

52.1. The American Heritage Dictionary of Idioms (published 1997 by Houghton Miffin Harcourt) defines it thus: 'Behave in a domineering and demanding way towards one's subordinates. For example, *He's been cracking the whip ever since he got his promotion*. This expression, first recorded in 1647, alludes to drivers of horse-drawn wagons who snapped their whips hard, producing a loud cracking noise. Its figurative use dates from the late 1800s.'

52.2. The Collins COBUILD Idioms Dictionary (third edition, published 2012 by HarperCollins): 'If a person in authority cracks the whip, they make people work hard by being strict. *They've recently installed a new management team to crack the whip. Donna stayed at home and cracked the whip over her three girls and son.*'

53. We find the Respondent's sources to be the more reliable because they are published sources and a higher editorial standard can be inferred. That evidence suggests that the origin of the expression itself was in driving horses. On the other hand, the Wikipedia article, which referred indirectly to published sources and therefore carried some weight, suggests that the origin of a different expression, 'cracker', is related to the action of cracking a whip (as opposed to the expression 'cracking the whip') and that term has a connection with slavery. There was no evidence before us that 'cracker' is a term which is widely used, or understood, in the UK. Although the Judge had come across it, the lay members had not.

<u>The query about the Claimant's first language (Issue RD4)</u>

54. At some point in 2017, probably in the latter part of the year, Ms Williams and Ms Ward had a discussion about the Claimant's performance in their one-to-one meeting, in particular their perception that the Claimant sometimes did not provide a direct response to questions from management.

55. Ms Williams asked Ms Ward whether she thought this might be because of a potential language barrier; Ms Ward said she thought not and the discussion moved on. This issue was explored in the context of seeking an explanation for what might otherwise be regarded as unhelpful behaviour on Claimant's part.

56. The Tribunal was not surprised that the discussion took place: we were referred to a number of emails from Claimant in the bundle in which she responded partially, or not at all, to specific questions from the sender; it was a legitimate concern. The Claimant found out about this brief exchange much later, when the interview minutes in which Ms Williams recalled the exchange were disclosed to her in August 2018.

<u>The change to the Claimant's line management on 26 October 2017 (Issue UD5)</u>

57. On 26 October 2017 a supervision meeting was due to take place between the Claimant and Ms Forrest, at which Ms Forrest planned to raise the need for a performance action plan. On the morning of the meeting Ms Forrest phoned Ms Ward in a highly emotional state and told her that she could not face the meeting and intended to resign if she was required to continue managing the Claimant in addition to her other responsibilities.

58. A decision was taken by Ms Ward and Ms Williams that responsibility for CAMHS should be taken away from Ms Forrest and that the Claimant should report directly to Ms Ward. Ms Williams sent an email explaining the new arrangements to around twenty members of staff, including the Claimant, on 27 October 2017. This was presented neutrally, as a response to wider challenges within the service; there was no reference in the email to Ms Forrest's difficulties, nor any criticism of the Claimant, although it would have been apparent to those reading the email that she was the only person directly affected by the line management change.

59. The Claimant alleges that she was told that she 'would need to do another role as well as her own role increasing her workload'. That allegation is not substantiated in the Claimant's witness statement and we note that the highest Ms Cullen put it in submissions was that there was 'a lack of clarity about her role and the responsibilities that she would be doing'. There is nothing in the email of 27 October 2017 which suggests that her role would be altered as a result of this reorganisation and we find that it was not. The Claimant was required to perform her full range of duties, including those tasks which Mr Henshaw had previously covered for her, but that was not a change to the role. The decision of 26 October 2017 was solely an alteration to reporting lines.

60. The intention of Ms Williams and Ms Ward was that Ms Ward would speak to the Claimant before the email was sent out on the Friday. Ms Ward was distracted by other work and did not do so. She realised her mistake over the weekend and tried unsuccessfully to call the Claimant at 8 a.m. on the Monday morning.

61. This matter was badly handled by Ms Ward and Ms Williams: the change of line management should have been sensitively discussed with the Claimant before it was confirmed; she should certainly not have learnt about it by way of a group email.

<u>The phone conversation with Ms Ward on 30 October 2017 (Issue UD6)</u>

62. Ms Ward did manage to speak to the Claimant on the phone later on Monday 30 October 2017, when she apologised to her for the poor communication of the decision.

63. The Claimant alleges that during that conversation Ms Ward 'threatened' her, by saying: 'do you know the implication of reporting directly to me?' There was a dispute as to whether those words were used. We find that they were: the Claimant's account was unequivocal, whereas Ms Ward did not have a clear recollection. However, we find that the words were not used in a threatening way. We accept Ms Ward's explanation that this was probably a reference to the fact that she had multiple commitments and might not immediately be available to deal with queries from the Claimant.

64. We accept Mr Hazlewood's submission that the most likely explanation for the Claimant's unhappiness with the phone conversation was that, in response to a question from her, Ms Ward was clear that, although the Claimant would not be assigned additional duties which had formed part of Ms Forrest's role, she would be required to do the tasks within her own role which Mr Henshaw had previously covered for her. That was a legitimate observation and cannot

reasonably be characterised as a 'threat'; Ms Ward was seeking to be clear from the outset about an issue which both the Claimant's previous managers had not managed to resolve.

The meeting of 10 November 2017 (Issue UD7)

65. On 1 November 2017 the Claimant asked for a three-way meeting between Ms Williams, Ms Ward and her, which took place on 10 November 2017.

66. The Claimant prepared an agenda; in it she identified concerns she had about her conversation with Ms Ward on 30 October 2017, including the following [*original format retained*]:

> 'CW [Ms Ward] is asking VO [the Claimant] to do more responsibilities: the impact on VO feeling unsafe, not acknowledged and unsupported in her role.
>
> The manner in which CW communicates to VO in the i.e. the tone / content about VO to RF, and VO feeling targeted and unsupported to succeed
>
> VO unsure why this is happening? And what is behind these behavioural?'

67. The Claimant raised the phone conversation on 30 October 2017 and the use of the expression 'do you know the implications of reporting directly to me?' Ms Ward said that she did not recall using the expression. The Claimant broadened her criticism of Ms Ward's handling of the phone conversation. We find that her approach to the meeting was accusatory. Ms Ward became highly emotional and told the Claimant that she was 'a liar' and said: 'you are lying'. She also became physically agitated. The Claimant's note of the meeting record that Ms Ward was 'waving her finger pointing and aggressive towards VO'. We find that Ms Ward did gesture towards the Claimant in an agitated way.

68. Ms Ward accepted that her behaviour at this meeting was inappropriate and unprofessional, which it plainly was. Ms Williams' evidence was that Ms Ward had 'lost control'. Although Ms Ward subsequently accepted to the Claimant that she was at fault, she did not apologise for her behaviour at this meeting; no disciplinary action was taken against her.

69. It was originally part of this allegation that Ms Ward criticised her leadership skills at this meeting. This was not pursued by the Claimant in her statement, nor in Ms Cullen's submissions. We find this did not occur.

The meeting of 21 November 2017 (Issues RD3, RD5 and UD8)

70. Three allegations in the list of issues are made in relation to a meeting between the Claimant, Ms Ward and Ms Williams on 21 November 2017. The purpose of the meeting was to complete the discussion of the Claimant's agenda items from the meeting of 10 November 2017, to discuss future line management options and to consider mediation between the Claimant and Ms Ward. Neither party kept notes.

71. The Claimant alleges (UD8) that Ms Ward 'deliberately found fault in the Claimant's work resulting in the Claimant raising a formal grievance against

her'. Insofar as it is alleged that Ms Ward took the opportunity of the meeting to manufacture concerns about the Claimant's work and behaviour, which were not genuinely held by her, we reject that allegation. We have already found that concerns about the Claimant had been expressed to Ms Ward by both Mr Henshaw and Ms Forrest, who had ultimately felt unable to continue managing her. Ms Ward had told Ms Williams at a supervision meeting in April 2017 that she had her own concerns about the Claimant's attitude and behaviour. It would have been difficult for Ms Ward to respond to the Claimant's allegation that she was being 'targeted' by Ms Ward without articulating those concerns.

72. The Claimant also alleges (RD3 and RD5) that, at various points in the meeting, Ms Ward referred to the Claimant's behaviour as 'challenging, defensive and aggressive.' Ms Ward accepted in her statement that she used the terms 'challenging' and 'defensive'. She did not think she used the term 'aggressive' at the meeting but, given that she used it in her grievance against the Claimant, we find that it more likely than not that she did.

73. It was clear to Ms Williams that the working relationship between the Claimant and Ms Ward had broken down and at the end of the meeting she discussed how they might move forward: she suggested mediation, but neither was interested; she then suggested bringing in a 'buffer' manager to reduce direct contact between them (as we have already recorded, there had originally been a Band 8b manager - Mr Henshaw then Ms Forrest - between them). Both agreed and, in due course, Ms Geddes was engaged in that role.

<u>The grievances raised by Ms Ward and the Claimant on 23 November 2017 (UD9)</u>

74. At some point after the meeting, the Claimant told Ms Williams that she was considering raising a grievance against Ms Ward. On 22 November 2017 at 23:25 she emailed her grievance to Ms Williams. The next morning at 11:31 Ms Ward raised a grievance against the Claimant.

75. The Claimant believes that Ms Ward's grievance was a 'counter-grievance', i.e. an act of retaliation, and that Ms Williams must have warned Ms Ward that she was considering a grievance. Her suspicion was based on her belief that Ms Williams and Ms Ward shared an office and sat next to each other. They both gave evidence that neither has her own desk; they work in an open-plan office in which desk-booking arrangements apply. We accept that evidence and Ms Williams' evidence that she did not warn Ms Ward about the Claimant's intention. The fact that Ms Ward's grievance was ultimately not upheld does not show that it was made retaliatory or made in bad faith.

76. We deal separately with the Respondent's handling of the Claimant's grievance below.

<u>The appointment of Ms Geddes</u>

77. On 24 November 2017 Ms Williams wrote to Ms Ward, Ms Forrest and the Claimant. She recognised that this was a stressful period for all involved and proposed actions to address the various issues which had been raised with her. These included the appointment of a senior manager (via the Trust's bank) to an interim operational lead role to cover the CAMHS service, as she had

mentioned at the meeting on 21 November 2017. On 26 November 2017 Ms Jan Geddes was confirmed as the interim manager.

Alleged bullying of the Claimant by Ms Ward (UD10)

78. The Claimant alleges that, in the period after the meeting on 21 November 2017, Ms Ward 'continued to bully' her.

79. The principal matter the Claimant relies on is Ms Ward's handling of a group complaint made by the CAMHS team. As part of a CQC visit the team had completed a review of whether they considered the service was 'well-led' by senior management. They did not and they followed this up with an internal complaint. There was a dispute as to whether 'senior management' in this instance included the Claimant, or whether the complaint was directed solely against those above her in the structure (Ms Forrest, Ms Ward, Ms Williams etc.). We find that it did include the Claimant: the notes of a later interview conducted with one of the complainants, Ms Donna Estien (Senior Psychologist) as part of the investigation of the Claimant's grievance, support this.

80. A meeting was scheduled for 29 November 2017 to discuss the complaint with the team. Ms Ward postponed it on 28 November 2017 because Ms Forrest was unavailable and Ms Geddes had not yet taken up her post. The reaction of the team to the postponement was highly critical. Ms Elaine Williamson (Family Therapist) wrote angrily on 29 November 2017: 'yet again our voice has been silenced'. The Claimant also wrote, insisting on the team's behalf that the meeting be rescheduled as soon as possible. However, when Ms Ward rearranged the meeting for 5 December 2017, the Claimant objected, pointing out that she was on annual leave on that day. Ms Ward knew that but, given the team's (and the Claimant's) emphasis on the urgency of the meeting, she felt she had to proceed in her absence: the Claimant was on leave for two weeks and Ms Ward was then on leave over the Christmas break; if the meeting had not gone ahead in early December, it would not have happened until January 2018. Although it would have been preferable for the Claimant to attend, a meeting had already taken place on 8 November 2017 to discuss the issue, which she had attended. We find that Ms Ward did not set out to exclude the Claimant, as the Claimant alleges; she merely responded to competing practical considerations as best she could.

81. The Claimant also alleged that Ms Ward's emails to her around this time were bullying in tone or content. The Tribunal could find nothing in the emails to which we were referred to support that allegation. Although some of them reflect points of disagreement between Ms Ward and the Claimant, they are professional and appropriate.

82. It was further suggested that Ms Ward manipulated Ms Geddes, when she took up her post, to disadvantage the Claimant during this period. No specific instances of this were put to Ms Ward and it was touched upon only briefly with Ms Geddes. We find that this did not occur. Ms Geddes was a senior manager, with considerable experience of supporting more junior managers, who had not previously worked with the Claimant. We find she discharged her duties conscientiously, doing her best not to be drawn into any dispute between the

Claimant and Ms Ward. Insofar as she raised performance concerns with the Claimant, that was part of her role as her interim line manager.

Performance management of the Claimant by Ms Geddes

83. Ms Williams told Ms Geddes when she started that there had been some performance concerns about the Claimant, but Ms Williams was keen that Ms Geddes form her own view and did not go into details. Ms Geddes was optimistic that her ability to focus on the CAMHS service, and specifically on supporting the Claimant, would allow her to help the Claimant address any such issues. The Claimant was also positive about Ms Geddes' appointment: as she was about to go on leave between 4 and 18 December 2017 she suggested they meet before then. They met on 30 November 2018 and reviewed the Claimant's job description and work plan.

84. On the Claimant's return Ms Geddes had weekly, informal meetings with her and monthly one-to-one supervisions. January was a particularly busy month and the Claimant had been working beyond her contracted hours. She wanted to deal with this by taking TOIL but Ms Geddes did not think that a good long-term solution. At these meetings there were also ongoing, lengthy discussions about the Claimant's job description and work plan; they were finally agreed by the supervision meeting on 12 March 2018 and the Claimant signed and returned them on 14 March 2018.

85. The notes of the supervision meetings reflect a constructive dialogue on many issues, but they also raise significant concerns. For example, at the meeting on 16 January 2018 Ms Geddes told the Claimant that her conduct at a leads meeting earlier that day had been inappropriate and that she had 'presented as the only person who could deliver rather than a joint venture with her leads'. Ms Geddes stated that 'it was not pleasant to observe' and advised her to listen to her leads and not speak over them. The notes further record that the Claimant said that 'following all of her management experience and training, nobody could tell her anything new about managing and transforming a service', an observation which Ms Geddes questioned. She also raised with the Claimant the tone of an email the Claimant had sent her that morning.

86. During this period the Clinical Commissioning Group required the Respondent to conduct an audit in relation to child patients turning eighteen and transitioning into adult services ('the audit'). The audit required a report to be carried out for each service user; once the reports had been produced each service lead was then required to complete a form. A template was circulated in which the relevant data was to be entered before the final, external deadline of 31 March 2018.

87. There was an internal deadline for an interim audit of 31 January 2018, which the Claimant did not meet. She did not ask Ms Geddes for guidance until 30 January, which Ms Geddes provided, although she was concerned that the request for help came so late in the day. The Claimant then met a further, internal deadline of 5 February 2018, when a Commissioning for Quality and Innovation meeting was scheduled to take place. In an email to the Claimant of 1 February 2018 Ms Geddes emphasised that the final report, of 100% of the relevant cases, had to be completed on the audit template by the external deadline at the end of March.

88. There was a further internal deadline of 28 February 2018, which the Claimant did not meet; she sent her report through on 21 March 2018. Ms Geddes was dissatisfied with the quality of the report: not only did it not include 100% of the returns, the content suggested to her that the Claimant had misunderstood what was needed. She met the Claimant the following day, explained that a return rate of 80% was not sufficient and asked her to cancel her other work so she could focus on completing the report. The Claimant sent the amended report through later the same day with an apology. Ms Geddes was concerned that the Claimant had not grasped the requirements of the process. Her unchallenged evidence was that, when the results were checked later (by which time the Claimant was on sick leave) the audit results did not match the data provided by the Claimant and Ms Geddes was obliged to carry out the task herself.

89. By this point Ms Geddes had come to the view that there were aspects of the Claimant's performance, which needed to be formally addressed. At the meeting of 12 March 2018 Ms Geddes told her that a performance action plan would be completed with her.

90. On 15 March 2018 Ms Geddes emailed Ms Williams with a draft of the proposed performance plan. The plan itself is attached that email and comes under three headings: communication with management and staff; deadlines not always met; and time management. In an email of the same date Ms Geddes confirmed to the Claimant that the performance plan would be put in place to support her and meeting her job plan/job description and that, in accordance with the capability policy, an informal meeting would be required. Later the same day the Claimant replied, telling Ms Geddes that she was distressed by her reference to a performance plan and suggesting that a third party should be present at their meetings from then on.

91. A meeting scheduled to discuss the performance plan did not take place. On 23 March 2018 the Claimant was signed off sick until 13 April 2018. On 26 March 2018 Ms Geddes met with Ms Williams. They agreed that the performance concerns should not be raised with the Claimant until she returned from sick leave. In the event, the Claimant never returned to work.

'OA'

92. In around early April 2018 Ms Geddes was approached by Ms Sharon Colman, service lead for the Triage Team, who raised concerns about one of the triage workers the Claimant had recruited, who we will refer to as 'OA'. Among other things, Ms Colman was concerned that OA, who was not qualified, had been recruited into a qualified post. The job description for CAMHS Triage Worker, Band 6 expressly states that it was an essential criterion for the role that the individual have either Nursing and Midwifery Council ('NMC') or Health and Care Professions Council ('HCPC') registration.

93. Ms Geddes made enquiries of HR and discovered that the Claimant had been approached about this at the time of the recruitment. The email exchange was as follows [*original format retained*].

> On 14 August 2017 Ms Andonova of HR had emailed the Claimant asking whether she knew if OA had a professional registration. The

> Claimant replied: 'this post don't necessary require professional body - focus is on children experiences. Thanks.' Later the same day Ms Andonova wrote again pointing out that: 'on the person specification the professional registration for NMS or HCPC was identified is essential'. The Claimant replied: 'The Triage post wouldn't necessary require NMC/HCPC. Many thanks.'

94. The Claimant accepted, in cross-examination and in response to questions from the Tribunal, that OA was neither NMC nor HCPC registered. That she knew this at the time is implicit in her emails to HR quoted above: if she had thought OA was qualified, and met the essential criterion, she would simply have said so. Accordingly, OA had been appointed to a role with responsibility for triaging vulnerable children without the necessary training or experience. That was plainly wrong.

95. In her evidence before us, the Claimant sought to deflect responsibility for this onto her deputy, Mr Ian Torrance. In an interview with Mr Torrance, the notes of which were before us, he stated that he was not involved in the shortlisting process, and that the Claimant conducted that process alone. Whatever his involvement, the Claimant was the senior and appointing manager; it was with her that HR specifically queried the issue of qualification; and it was she who dismissed it as irrelevant. In her evidence before us, the Claimant did not resile from that position, which she might have been expected her to do if, for example, Mr Torrance had foisted a view on her with which she did not agree. On the contrary, she declined to accept that the lack of qualification ought to have ruled OA, stating: 'it was not needed'.

96. OA was suspended and the Respondent would have been obliged to dismiss her, had she not resigned. The Respondent conducted an audit of all 160 cases that OA had been involved in to ensure that they had been properly managed. Fortunately, no actual harm was identified, but the potential for harm was obvious. We record Ms Geddes' evidence:

> 'The patients we deal with were potentially suicide risks. If [OA] (through no fault of her own) had missed signs a trained professional would have noted and not taken protective steps accordingly, there could have been extremely serious consequences which would unquestionably have been the Trust's fault for having put a non-qualified individual into this post. That was a serious near-miss.'

97. On 5 April 2018 Ms Geddes had a meeting with the Claimant's team, who raised further concerns about the Claimant's management style, including a suggestion from some of them that the Claimant had instructed them not to speak out against her. Ms Geddes regarded that as a potentially serious disciplinary matter, which she discussed with Ms Williams.

98. On 9 April 2018 Ms Williams had a meeting with Sue Smyth (Director of Nursing) and Donna Sackey-Addoo (Senior HR Manager), at which they agreed that concerns about the Claimant should be formally investigated under the Respondent's disciplinary procedure. They also decided that the Claimant would be suspended from clinical duties on her return from sick leave and a suspension checklist was prepared. However, because the Claimant was

absent with stress, they decided not to inform her of this until she was fit to return to work.

The blocking of the Claimant's access to work emails (UD12)

99. On 16 April 2018 Ms Geddes in consultation with Ms Williams decided to block the Claimant's access to work emails while she was on sick leave. The Claimant says that this, together with being asked to return her laptop, made her feel 'as if she had been dismissed or suspended whilst off sick which further impacted on her well-being'.

100. We accept Ms Geddes' evidence that this was intended as a supportive measure. We have recorded below (para 109) OH's advice of 13 April 2018 that management refrain from discussing work matters with the Claimant. In the phone calls Ms Geddes had with the Claimant, she had formed the view that reading work emails was exacerbating the Claimant's anxiety. When the Claimant objected to not being able to access emails, Ms Geddes reversed the decision on 24 April 2018.

101. The Claimant was not asked to return her laptop; she was merely told that this might be required if an agile worker was appointed to cover her role. That was the usual practice in cases of long-term sickness absence. When Ms Geddes appreciated that this was making the Claimant anxious, she confirmed that it would not happen in her case.

The management of the Claimant's grievance and stress risk assessment and the Claimant's resignation (UD 11 and UD13)

The grievance

102. At this point in the judgment we group together our findings as to the chronology of the Claimant's grievance against Ms Ward and the stress risk assessment.

103. The Respondent's grievance policy provides that, for formal grievances, the initial meeting between the grievance manager and the complainant should normally take place within five working days of receipt of the grievance; the formal investigation should not normally be longer than thirty working days from the meeting; where timeframes need to be altered, all parties should be informed and reasons given; the complainant should be updated every two weeks as to the progress of the case. The Respondent did not adhere to any of those requirements.

104. The Claimant had presented her grievance on 23 November 2017. Not until 3 January 2018 (i.e. after the point at which the entire process ought to have been completed) did Ms Williams send an email to the Claimant, confirming that she had identified an independent investigating officer, Debbie Xavier. A target completion date was set for 26 February 2018. Ms Xavier interviewed the Claimant on 15 February 2018. On 2 March 2018 Ms Xavier told her that the date for submission of the investigation report had been extended to the week commencing 9 April 2018 'due to delays in securing appointments to meet and interview staff'.

105. An OH assessment took place on 12 March 2018, which reported that the Claimant was 'experiencing stress'. It contained a number of recommendations, including that the Respondent 'address and resolve the work-related issues in a timely manner' and 'carry out another work stress risk assessment'.

106. Sadly, in early March Ms Xavier's father died and she took four weeks' leave. On 13 March 2018 Ms Williams told the Claimant that the deadline for the report had been extended to the end of April 2018. She told her that Ms Xavier had already completed a number of interviews, which was not correct: the only interview Ms Xavier had done was with the Claimant.

107. As we have already recorded, on 23 March 2018 the Claimant was signed off sick and never returned to work.

108. On 9 April 2018 Ms Xavier withdrew as grievance investigator because of the illness of her sister. On 19 April 2018 Ms Williams told the Claimant that Ms Jacqui Phillips had been appointed to take over from Ms Xavier. On 3 May 2018 Ms Phillips interviewed Ms Ward; Ms Geddes and Ms Forrest were interviewed on 22 May 2018; Mr Henshaw and Ms Williams on 31 May 2018.

109. A further OH assessment had taken place on 13 April and 18 May 2018. The report included the following passage:

> 'Ms Okoh is struggling with most normal activities and on assessment she was very distressed and tearful. She is on medication which she is continuing to take … Ms Okoh is under the care of her GP. I have referred Ms Okoh for counselling support.
>
> […] At present, Ms Okoh is unfit to attend a meeting and I will review this in a few weeks. May I also ask that you consider refraining from discussing work issues or return dates when you ring her up as this seems to be causing her undue stress?
>
> […] I have looked at the stress risk assessment and am of the opinion that the recommendations within it, if followed, are a good start to reducing stress levels for Ms Okoh.'

110. The report of 18 May included the following:

> 'On assessment today, Ms Okoh seemed better but remains distressed and tearful. She has now taken up counselling and is finding it useful. Ms Okoh remains on medication and is still under close monitoring by her GP for blood pressure management. She expressed that the prolonged period of resolving the pending grievances is continuing to affect her.'

111. On 12 June 2018 Ms Williams informed the Claimant that it was not appropriate for her to continue as commissioning manager for the grievance, as she was a witness. That had always been the case. She arranged for Ms Caroline O'Donnell (ICD for the Acute and Rehabilitation Directorate) to take over as commissioning manager.

112. The Claimant resigned on 18 July 2018, giving three months' notice. We accept her evidence that the delay in providing her with a resolution of her November 2017 grievance was causing her considerable anxiety. We further find that she

resigned, in part at least, to the Respondent's failure to resolve her grievance in a timely manner.

113. On 20 July 2018 the grievance investigation report was finally completed.

114. On 24 July 2018 Ms Geddes responded to the Claimant's letter of resignation. She described the Claimant as a valued member of the organisation, whose knowledge and expertise would be a loss to it. She apologised for the delay in concluding the grievance investigation and offered the Claimant an exit interview 'so we can have some feedback and some insight into what more we could have done to prevent you from making this decision.' Ms Cullen submits that the absence of any reference to performance concerns in Ms Geddes' letter suggests they were not genuine. We reject that submission: it would have been inappropriate to raise them for the first time in that letter, especially in the light of the Respondent's failings over the grievance.

115. A panel was then set up to review the investigation report, consisting of Ms O'Donnell as Chair, Ms Chioma Eziomah (Acting HR Manager), Mr Ubaidul Hoquw (Union Representative) and Ms Claire O'Toole (Head of Inclusion, BHRUT). The Claimant was told of the panel's decision by letter dated 3 August 2018: it found that Ms Ward had acted unprofessionally towards the Claimant at the meeting of 10 November 2017 by calling her a liar; no other allegation was upheld.

116. On 15 August 2018 the Claimant appealed the grievance outcome. A grievance appeal hearing took place on 9 November 2018 and the grievance appeal outcome was provided on 14 November 2018, confirming the original panel's decision.

117. The Respondent's witnesses accepted that the delays to this process were unacceptable.

The risk assessment

118. Ms Geddes worked with the Claimant on a stress risk assessment in relation to her daily work. Ms Geddes drafted the original version in January 2018, but the final version was not completed until 13 March 2018. A separate 'safety' risk assessment dealing with the Claimant's concerns about the return of Ms Jill Downs to the team was conducted by Mr Chris Shaw. It was completed by 28 December 2017 but it did not reach Ms Williams until 26 March 2018, despite Ms Williams' repeatedly chasing Mr Shaw. The Respondent provided no satisfactory explanation as to why both processes were delayed.

<u>The decision to refer the Claimant to the NMC and to continue with an internal investigation (RV1)</u>

119. In mid-August 2018 the Claimant submitted a further fit note, by which she was signed off work until 26 September 2018. Given that her employment was due to end on 18 October 2018, management had to decide what to do about the outstanding performance and conduct concerns which had been identified earlier in the year. There was no sign of the Claimant returning to work and the Respondent would not be able to require her to take part in an internal process after termination. There was certainly no possibility of such a process being completed before the Claimant's employment terminated, at which point she

might secure employment with another Trust. Ms Williams discussed with Ms Geddes and Ms Smyth whether a referral to the NMC ought to be made and they concluded that it should. They took the view that the issue of the recruitment of OA was, in itself, enough to warrant a referral.

120. On 17 August 2018, Ms Williams drafted (but did not send) a letter to the Claimant informing her of the earlier decision to suspend her from clinical duties and to conduct a disciplinary investigation. An Appendix to the letter set out the performance and conduct concerns, which mirrored the suspension checklist prepared earlier in the year. The draft letter informed the Claimant that the Chief Nurse, Ms Stephanie Dawe, had decided to refer her to the NMC. Although it does not appear that Ms Dawe had been involved in the decision by that point, Ms Dawe explained in her evidence that there was nothing unusual in this. Although she was the ultimate decision-maker when it came to referrals to the NMD, she relied on the relevant senior management to make provisional recommendations, which she would then review. We accept Ms Cullen's submission that both Ms Williams and Ms Dawe played a part in these decisions.

121. Having reviewed the decision, Ms Dawe endorsed it. The letter which was sent to the Claimant on 10 September 2018 came from her:

> 'I write further to your letter dated 18th July 2018 in which you tendered your resignation from the post of Barking & Dagenham CAMHS Clinical Lead. I understand that your line managers have been in correspondence with you in regards to your particular contractual details.
>
> I need to inform you that whilst you have been on your period of long term sick leave there have been a number of concerns identified (please see the attached Appendix 1). As you were on sick leave for stress at the time it was decided by the Barking & Dagenham Leadership Team to delay informing you of the concerns and the requirement for an investigation process until such time as you were fit to return to work. As you remain on sick leave and have not given any indication that you will be returning to your post prior to leaving the Trust, the option to investigate internally under the Trust Disciplinary Policy at this point does not appear viable.
>
> Given the severity of concerns raised I have made a decision to make a referral to the NMC. As identified above, the summary of the concerns raised is detailed in Appendix 1, and you do have the option to agree to an internal investigation for these. Should this be an option you wish to take then these would form the basis of the terms of reference for this investigation.
>
> As you will appreciate, the Trust has a duty of care to the patients and staff and concerns affecting a registered nurse's practice always need to be taken seriously. In the absence of an internal investigation, there is a duty to refer to the professional body. If you feel that the concerns have no foundation and/or that they can be answered, then you have the option of having the matter internally investigated by the Trust as referred to above.

122. The Claimant responded by email of 13 September 2018.

> 'I write further to your letter dated 10th September 2018, which was received by post on 12th September 2018. I am surprised to receive it and more surprised at its contents. I'm also surprised that these allegations have been flagged now.
>
> Your letter is contradictory because I'm still off sick due to work related stress. I was working towards my rehabilitation back to work, until I received this letter, which has further exacerbated my stress levels, and has affected my health and recovery.
>
> My contractual requirement, in line with my three months' notice period, ends in five weeks (17th October 2018). Although, I would wish to cooperate in any investigation, given that I'm shortly to leave the Trust and given the inordinate length of time it has taken to investigate my grievance, I do not have any confidence or trust in the Trust's internal HR investigation processes. The last investigation is took more ten months [*sic*], and it is still ongoing.
>
> I refute and will not accept the retrospective allegations (in Appendix 1) brought against me. Thus, can specific details on the allegations be provided to me.'

123. Ms Dawe took this as an agreement on the Claimant's part to participate in an internal investigation, replying on 16 September 2018: 'I'm pleased to note your agreement to participate in an investigation'. The next day the Claimant wrote that she found that statement 'confusing'. However, the rest of her email then compounded the ambiguity as to whether she would, or would not, participate in an internal investigation. Ms Williams sought advice from HR; Ms Smyth responded that the NMC 'would expect us to investigate' and observed that the Claimant would be expected to cooperate by reason of the NMC Code of Practice. Ms Dawe drew this to the Claimant's attention; the Claimant replied, refusing to be involved and stating that she was not well enough to return to work or engage in meetings.

124. Ms Smyth made the NMC referral on 10 October 2018. An internal disciplinary investigator was appointed in January 2019 and interviews took place in January and February 2019. The Claimant did not engage with the internal process but, through her union, did engage with the NMC process.

125. On 4 April 2019 the internal investigation report, prepared by Mr Abayomi Alemoru of Vista Employer Services Ltd, was produced. He concluded that a number of the concerns about the Claimant's conduct were well-founded. In relation to the recruitment of OA he found as follows.

> '29. Having considered the evidence in respect of the allegation that VO showed a lack of leadership as demonstrated by employing a member of staff in Triage despite the staff member not holding the necessary qualification/registration, I find as follows:
>
> 29.1 I am satisfied that there is sufficient evidence from which to sustain a reasonable belief that VO showed a lack of leadership as demonstrated by employing a staff in Triage despite the staff member

not holding the necessary qualification/registration; and that VO was negligent in the carrying out of her duty to ensure that she employed staff with the required qualification/registration.

29.2 The evidence available is that VO was responsible for the selection of OA as a candidate for interview. Checking whether or not a candidate has the necessary qualification/registration could reasonably be regarded as a condition precedent to inviting he candidate to an interview. If the candidate does not have the necessary registration, then there would be no point in conducting an interview because there would be no chance of the candidate being considered suitable for the role. It is apparent from what transpired that VO could not have assured herself that OA had the necessary registration, given that OA did not have it. There is no suggestion in the evidence that OA at any stage claimed that she had the necessary registration or misled VO into believing that. Therefore, on the face of it there was a failure on VO's part to assure herself that VO had the necessary registration.

29.3 The evidence suggests that VO did not treat the requirement of registration for the post as significant, as she was duty bound to do, given that registration was a requirement of the role. That is demonstrated by the way in which VO responded to the question raised by Kristina Andonova about OA's registration. VO dismissed that concern and therefore seemed to disregard the Trust's requirements for appointment to the position and VO therefore failed her duty to uphold the Trust's requirement in that respect.

29.4 VO appears to have paid no regards to the damage that OA's appointment could cause. There was a risk of harm to vulnerable, child patients. Registration is an essential part of the entitlement to practice and the assurance that practitioners will practice safely. VO appears to have paid no regards to the potential consequences of action against/damage to the Trust. In the event of any harm arising to patients seen by OA then the Trust may have faced legal proceedings and the absence of registration to practice would in all likelihood have been a significant factor in determining liability. Should it have become apparent to the wider community that the Trust had employed a practitioner who did not have the necessary qualification/registration to practice then that would in all likelihood have caused damage to the Trust's reputation and could reduce the confidence of the community. VO appears to have paid no regards to the potential consequences for OA of being removed from a position that she believed she had secured, with the stress that could cause to OA.'

126. Mr Alemoru found that Mr Torrance did not know that OA lacked the relevant qualification, but assumed that the Claimant had conducted checks on registration before inviting her to interview.

127. Coincidentally, also on 4 April 2019 the NMC decided to end its investigation into the Claimant. It gave brief reasons for its decision. In relation to the recruitment of OA, it concluded as follows.

> 'Some of the concerns raised suggested that there could be a risk of patient harm as a result so we requested more details from NEFLT. One of these concerns was that Ms Okoh employed a member of staff knowing they didn't hold the correct qualification and ignored HR advice. They have advised that an audit of 160 cases was carried out, 1 patient was recalled to be seen by a qualified clinician but no harm was identified. The RCN told us that Ms Okoh recruited alongside her deputy and the member of staff's salary was approved by her line managers as well as HR. Given that there was no harm resulting from this and that Ms Okoh was not solely responsible, we don't consider this amounts to a serious concern we would need to investigate.'

128. Ms Williams' evidence, which we accept, was that once the NMC had decided not to investigate further, the Respondent decided not to continue its own process and no further action was taken on the internal report.

The law

Time limits in discrimination cases

129. S.123(1)(a) EqA provides that a claim for race discrimination must be brought within three months, starting with the date of the act to which the complaint relates. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

130. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances. They will usually include: the reason for the delay; whether the Claimant was aware of his rights to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194). The fact that the employee was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative (*Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR 116 at para 16).

131. Where it is alleged that the employee resigned in response to discrimination by the employer, and alleges that there was a discriminatory constructive dismissal, time runs from the effective date of termination of the contract, not from the (discriminatory) repudiatory acts: *Nottinghamshire County Council v Meikle* [2005] ICR 1 (at paras 49-53).

The burden of proof

132. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(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.**

133. The Tribunal had regard to the familiar guidance in *Igen v Wong* [2005] ICR 931 and *Madarassy v Nomura International plc* [2007] IRLR 246. The effect of these provisions, and that guidance, was conveniently summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 (at para 18):

> **'18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*. He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

134. In *Hewage v Grampian Health Board* [2012] ICR 1054 the Supreme Court held (at para 32) that the burden of proof provisions requires careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Harassment related to race

135. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> > **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> > **(b) the conduct has the purpose or effect of—**
> > > **(i) violating B's dignity, or**
> > > **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> > **(a) the perception of B;**
> > **(b) the other circumstances of the case;**
> > **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5)The relevant protected characteristics are—**
> **…**
> **race**
> **…**

136. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

137. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 (at para 22):

> **'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and Tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'**

138. Although intention is not determinative, it can be a factor (*Dhaliwal* at para 15):

> **'One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.'**

139. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at para 47) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

140. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ (at para 12), referring to the above, stated:

> **'We wholeheartedly agree. The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'**

141. S.212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment. Thus, an employee cannot succeed in a claim of both harassment and direct discrimination in respect of the same conduct. However, there is nothing in the statutory language to prevent him from advancing claims in respect of the same conduct by reference to these causes of action in the alternative.

Direct discrimination because of race

142. S.13(1) EqA provides:

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

143. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

144. More recently, the EAT has encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the proscribed ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see the comments of Underhill J in *Martin v Devonshire's Solicitors* [2011] ICR 352 at para 30.

145. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010, the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic (para 36).

146. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment': see per Lord Hope of Craighead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 (at para 35). An unjustified sense of grievance does not fall into that category.

Victimisation

147. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because—**
>
> > **(a) B does a protected act, or**
> > **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act—**

> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **…**

148. The test of causation in a victimisation complaint is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

Constructive dismissal

149. The Claimant relies on a breach of the implied term of trust and confidence. The law of constructive dismissal in a case where the employee relies on a cumulative breach of the implied term was reviewed by the Court of Appeal in *London Borough of Waltham Forest v Omilaju* [2005] IRLR 35 at para 14 onwards:

> **'14. The following basic propositions of law can be derived from the authorities:**
>
> **1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] 1 QB 761.**
>
> **2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example, *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 34H-35D (Lord Nicholls) and 45C-46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".**
>
> **3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, 672A. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship (emphasis added).**
>
> **4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at *objectively*, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).**
>
> **5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para [480] in Harvey on Industrial Relations and Employment Law:**
>
> > **"[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of**

> **conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."**
>
> **15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:**
>
> > **"(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (See *Woods v W. M. Car Services (Peterborough) Ltd.* [1981] ICR 666.) This is the "last straw" situation."**
>
> **16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application.**'

150. Those principles were further considered by the Court of Appeal in *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 at para 55:

> **'(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)**
>
> **(5) Did the employee resign in response (or partly in response) to that breach?'**

151. Where there are mixed motives for the resignation, the Tribunal must determine whether the employer's repudiatory breach was an effective cause of the resignation; it need not be the only, or even the predominant, cause: *Meikle* at para 29.

152. In *Bournemouth University Higher Education Corporation v Buckland* [2010] ICR 908, the Court of Appeal held that, when considering whether a breach of the implied term or any other fundamental term has occurred, it is not appropriate to ask whether the employer's actions lay within the band of reasonable responses available to an employer. That test is confined to

considerations of fairness for the purposes of the statutory claim of unfair dismissal and is not apposite to determining whether there has been a constructive dismissal, which is a purely contractual test.

153. The employee must not delay his resignation too long, or do anything else which indicates affirmation of the contract: *W.E. Cox Toner (International) Ltd. v Crook* [1981] ICR 823 at 828-829.

Submissions

154. Both representatives provided the Tribunal with very helpful and detailed written closing submissions, for which the Tribunal is grateful. We have had regard to these, referring to them where appropriate in our findings and conclusions. We mean no disrespect to the advocates by not summarising them further in what is already a lengthy judgment.

Conclusion: time limits

155. As Mr Hazlewood points out, a significant number of the alleged acts of discrimination are out of time, subject to arguments about 'conduct extending over a period' and extension of time. However, we accept Ms Cullen's submission that, in a case where the Claimant is alleging that she resigned in response to discriminatory acts, such that there was a discriminatory constructive dismissal, the Tribunal is bound to make findings as to whether there were earlier acts of discrimination in order to determine that claim, whether or not the earlier acts are in time. We consider that that follows from the Court of Appeal's decision in *Meikle* (see above at para 131).

Conclusion: Direct race discrimination and harassment related to race

RD1: Direct race discrimination – 'In June 2017 Caroline Ward and/or Matthew Henshaw decided the Claimant should not attend an interview in her role as an Ethnic Minority Network Ambassador'.

156. The Claimant alleges in her witness statement that she was excluded from this process 'purely because of Caroline [Ward's] preconceived racial hostility to me'. We reject that allegation.

157. Firstly, we have already found that this was Mr Henshaw's decision (albeit one which Ms Ward endorsed). We make a positive finding that he acted as he did because he genuinely believed it would be inappropriate and awkward, for the Claimant and for the candidate, for her to sit on this panel (see para 41). The Claimant's race played no part in his decision. It later emerged that that there was no policy bar on the Claimant's sitting on the panel, but Mr Henshaw did not know that at the time. It is right that he handled the matter insensitively, contacting the Claimant at the last moment, but he had a generally good working relationship with her, she had previously sat on panels with him as the EMN Ambassador, without any objection from him, and we find it implausible that he would exclude her on this single occasion because of her race.

158. We further conclude that Ms Ward was not influenced by race in endorsing Mr Henshaw's decision: she did so simply because she saw his point and agreed with it. Accordingly, this claim fails.

RD4: Harassment related to race - 'It is accepted that Melody Williams made a comment in the witness interview on 31 May 2018 which she gave with respect to the ongoing grievance investigation that she had raised the possibility with Caroline Ward previously that the Claimant might have a language barrier which may be contributing to ongoing performance concerns. The Claimant became aware of these comments when the meeting minutes were sent to her on 20 August 2018.'

159. Even though the Claimant discovered the fact that her written communications had been discussed by management long after the event, we accept her evidence that she was upset by the discovery; to that extent it was unwanted conduct. Insofar as the managers were speculating as to whether the Claimant's written communication skills might be related to English not being her first language (a factor which is impliedely related to her national origin) we accept that the conduct was related to race.

160. We conclude that it was not Ms Williams' purpose to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, nor to violate her dignity (which we will refer to as 'the proscribed environment'): her purpose was to seek a benign explanation for what otherwise might be regarded as unhelpful behaviour by the Claimant; moreover, she was not to know that the Claimant would ever become aware that she had raised the matter.

161. We then considered whether the raising of the matter had the effect of creating the proscribed environment. We accept that, subjectively, the Claimant was upset when she learnt of the conversation. However, we reject her evidence that she felt 'degraded, offended and humiliated' by the discovery; we find that evidence to be exaggerated; we also find Ms Cullen's submission that it 'violated [the Claimant's] dignity' to be overstated.

162. We considered whether, viewed objectively, the raising of the matter created an offensive environment for the Claimant and concluded that it did not. It was a passing reference, discovered the Claimant long after the event, which had no practical consequences for her and had never been raised again. Ms Cullen submitted that it was particularly offensive because the Claimant has a degree in nursing and a Masters degree. That does not follow: many people who have those qualifications also have English as a second language. It ought to have been clear to the Claimant that the context was one in which Ms Williams was seeking an explanation for concerning behaviour. We concluded that this was a minor incident which, although it caused the Claimant some upset, did not cross the statutory threshold into harassment.

RD2: Harassment related to race – 'In or around October 2017, did Caroline Ward make a comment to the Claimant about 'cracking the whip', accompanied by a hand gesture?'

163. The Tribunal has already found that the remark and the gesture were both made. We accept the Claimant's evidence that she found this conduct objectionable and we conclude that it was 'unwanted'.

164. We then considered whether the unwanted conduct was 'related to race'. We accept Mr Hazlewood's submission that the expression/gesture are not inherently related to race. The fact that in the US there is an indirect connection,

through the expression 'cracker', with slavery and therefore with race does not mean that the expression will always have a racial connotation when it is used in the UK. We have concluded that many people in the UK will be quite unaware of that indirect connection. The evidence we heard suggests that the expression originated in the context of driving horses and, in the UK at least, we conclude that that is how it is more commonly understood and used.

165. On the other hand, we accept that the Claimant herself perceives the expression to have connotations of slavery and that others may share that perception; her husband certainly does. However, we do not accept Ms Cullen's submission that, on this issue at least, the subjective understanding of the complainant is determinative of the issue.

166. The answer must depend on the context in which the expression/gesture were used: Ms Ward was encouraging the Claimant to improve standards of performance within her team; she was not making her point by reference to the Claimant's (or anyone else's) race; indeed, considerations of race were wholly immaterial to that point. Nor were Ms Ward's mental processes tainted in any way by considerations of race: they could not have been, since we have already found (para 49) that it had not occurred to her that the expression had any connection with slavery or race.

167. Taking all these considerations into account, we have concluded that Ms Ward's conduct was not 'related to race' and this claim fails.

168. For completeness, we have gone on to consider whether Ms Ward's actions in using the expression/gesture crossed the threshold into harassment. It is implicit in our earlier findings that it was not her purpose to create the proscribed environment; her purpose was to encourage the Claimant to improve team performance.

169. Did the conduct have the effect of creating the relevant environment? We had regard in particular to the Claimant's perception. We accept her evidence that she found the conduct objectionable. However, in her witness statement she said that she felt humiliated by the conduct and, in her oral evidence, that it contributed to her feeling ill and fearful for her position. We consider that that part of her evidence was exaggerated. Had her reaction to the conduct been as strong as she now says, we have no doubt that she would have raised it in her grievance, yet she did not mention it at any stage in that long process. The Claimant was unable satisfactorily to explain that omission. We conclude that the remark/gesture did not have the effect of creating the proscribed environment for her. It was a transitory remark, to which she initially objected and then did not raise again until she lodged her claim.

170. Alternatively, we conclude that, viewed objectively, it was not reasonable for the conduct in question to have she claimed. We have already found that it was no part of Ms Ward's intention to be racially offensive and we further conclude that a reasonable person would have realised from the context that Ms Ward was using the expression/gesture in an entirely non-racial way. A suggestion that workplace standards could be improved by maintaining discipline is so far from concepts of slavery that no such allusion could reasonably have been inferred.

RD5: Harassment related to race – 'Caroline Ward's comments that the Claimant was challenging, defensive and aggressive on 21 November 2017 and 23 November 2017'.

RD3: Direct race discrimination – 'During the 21 November 2017 meeting and in her grievance of 23 November 2017, Caroline Ward referred to the Claimant variously as challenging, defensive and aggressive when describing alleged behaviours of the Claimant at work'.

171. These two allegations are essentially one and the same, viewed through different causes of action. We deal first with the harassment claim (RD5).

172. We have already found (para 72) that Ms Ward did describe the Claimant as challenging, defensive and aggressive during the meeting of 21 November 2017 and/or in her grievance of 23 November 2017. The Claimant found this objectionable and, to that extent, we conclude that it was 'unwanted conduct'.

173. Applying the burden of proof provisions, the Tribunal considered whether the Claimant has proved facts from which a reasonable Tribunal could properly conclude that this conduct was 'related to race', thereby shifting the burden to the Respondent to show that it was not. Ms Cullen pointed to three factors: the fact that the language was used; the fact that a racial stereotype exists of the 'angry black woman'; and the fact that the words have not been used to describe white members of staff.

174. The first of those factors takes the matter no further: the fact that the language was used is not itself probative of the fact that race played a part in it.

175. As for the second factor, Ms Cullen submitted that:

> 'there is a racial stereotype of the "angry black woman". When black women are assertive, they are described in negative terms, such as "aggressive" or "defensive" or "challenging".'

176. In support of this submission, she referred us to a BBC news article by Ms Ritu Prasad from 2018 about the tennis player Serena Williams, who was penalised by the umpire during a match in the US Open Tournament for breaking her racquet and calling the umpire a "thief". She was later fined $17,000 and negatively portrayed in the media. The thrust of the article - that the penalties, and the media response, were disproportionate to the offences, and would not have been applied to a white female player - is captured in a quotation from an American law professor, Trina Jones, who is quoted as saying:

> 'Black women are not supposed to push back and when they do, they are deemed to be domineering. Aggressive. Threatening. Loud.'

177. Although the focus of the article, and all its sources and cultural reference points, are exclusively US-based, the article does provide evidence of the existence of such a stereotype of black women. The Tribunal observes that similar stereotypes exist of assertive women, irrespective of their race. This material is not itself probative, without more, of the fact that Ms Ward was using this language in a racially stereotyping way and it is on her conduct that we must focus.

178. Thirdly, Ms Cullen submits that 'these words have not been used to describe other members of white staff, e.g. [Ms Ward], even where it was admitted that [Ms Ward] acted in a way that could be described as challenging, defensive or aggressive.' In fact, when asked by Ms Cullen in cross-examination whether she would describe herself as challenging, defensive and aggressive, Ms Ward replied: 'I can be' and accepted that her conduct at the meeting of 10 November 2017 'could have been perceived' as such. If it is being suggested that such language was never used of white employees in the Respondent's organisation, that is also not correct: the Claimant described Ms Downs as 'aggressive' (see para 45); Ms Thorn as 'defensive' (see para 25); and in cross-examination she described Ms Ward's behaviour at the meeting of 10 November 2017 as 'aggressive' and 'challenging'. The Claimant accepted that the use of this language is not inherently discriminatory.

179. In addition, and by way of a more general submission, Ms Cullen referred us to the case of *Rihal v London Borough of Ealing* [2004] IRLR 642 and in particular para 52 of the judgment of Sedley LJ, in which he held that ethnic audit figures portrayed:

> 'an almost complete racial divide between upper management and the remainder of the staff. With the single exception of Ms Gomer (whose elevation the tribunal found explicable without negativing their general finding) the entire managerial team was white: this in a borough 40% of whose population is from ethnic minorities, and in a local authority whose other departmental senior management teams typically contain about 25% from ethnic minorities. These figures in themselves rightly put the tribunal on inquiry, because they suggested a clear possibility that there was a culture of white elitism in the upper echelon of the housing department. Such a culture, as the tribunal will have been well aware, can exercise a potent influence on individual decision-makers, of which they themselves may be aware faintly or not at all.'

180. However, no evidence was led of such ethnic audit figures in the present case. Although evidence of this sort used to be elicited through the questionnaire procedure (now abolished), there was nothing to prevent those representing her from making a request for further information from the Respondent; they did not do so. The Tribunal was not in a position to make any general findings as to ethnic diversity across the Respondent organisation.

181. Taking all these matters into consideration, the Tribunal is not satisfied that the Claimant has discharged the burden on her to prove facts from which a reasonable Tribunal could properly conclude that Ms Ward's use of this language at the meeting of 21 November 2017, and in her subsequent grievance, was related to race. The claim of harassment accordingly fails.

182. If we are wrong about that, we went on to consider whether the use of this language by Ms Ward was sufficient to create the proscribed environment. The Claimant's perception was that it did; however, we do not find that it was reasonable for it to do so. The Tribunal concludes that being described as aggressive, defensive or challenging, even in circumstances where the Claimant considered those criticisms to be unfounded, cannot reasonably be regarded as a violation of her dignity, nor as creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Looking at the wider

circumstances, that is all the more true in an organisation in which the use of such language appears to be so prevalent, including by the Claimant herself: as we have already recorded, she has applied it on a number of occasions to others, both above and below her in the hierarchy, presumably unconcerned that it risked violating their dignity. We conclude that Ms Ward's use of that language, at the meeting and in the grievance, did not cross the threshold into harassment.

183. As for the direct discrimination claim (RD3), having found that the Claimant has not proved facts from which we could reasonably conclude that Ms Ward's use of this language was 'related to' race (the broader of the two tests) it follows that she has not proved facts from which we could reasonably conclude that it was 'because of' race and the claim of direct discrimination also fails.

RV1: Victimisation - the decision to refer the Claimant to the NMC and to continue with an internal investigation

The alleged protected acts

184. The Claimant relies on three protected acts: contacting ACAS on 16 July 2018; her resignation letter of 18 July 2018; and her issuing of Tribunal proceedings on 4 September 2018. Mr Hazlewood accepts in his closing submissions that the communication with ACAS was a protected act. As for the resignation letter, it makes no reference to discrimination, nor to a potential discrimination claim; we conclude that it did not amount to a protected act. The issuing of Tribunal proceedings, containing as it does express allegations of discrimination, plainly did.

185. Although the ultimate decision to refer the Claimant to the NMC was Ms Dawe's, we have already found that Ms Williams recommended that course of action. Ms Dawe denied knowing about any of the protected acts when she sent her letter of 10 September 2018, and we accept her evidence. She appears to have had had little involvement with the Claimant before Ms Williams came to her with the recommendation. The Tribunal notes that the Tribunal claim was not served on the Respondent until 3 October 2018. We conclude that neither Ms Williams nor Ms Dawe knew about it when Ms Dawe wrote to the Claimant in September, informing her of the decision to refer her to the NMC. Therefore, the only protected act which could have influenced the decision was the Claimant's approach to ACAS. Ms Williams accepted that that she was aware in August 2018, when she drafted a letter to the Claimant, that the Claimant had contacted ACAS.

186. The Tribunal considers that it is in a position to make positive findings as to the reason why Ms Williams and Ms Dawe referred the Claimant to the NMC. We conclude that it was the potentially serious performance and conduct concerns, which the Respondent had identified earlier in the year, in particular the issue relating to the recruitment of OA. The reason Ms Williams decided to make the referral in August 2018, rather than earlier in the year, was because the Claimant had been on long-term sick leave, suffering with work-related stress, and her managers thought it would be inappropriate to raise such issues with her until she was well enough to return to work. In that they were prescient: when Ms Dawe eventually did raise these concerns with the Claimant in September 2018, her response was that this had further exacerbated her stress

levels and affected her health and recovery. The reason why Ms Dawe endorsed the decision when she did was because the concerns had not been drawn to her attention before then.

187. We accept Ms Williams' evidence that there was no benefit to the Respondent in pursuing the matter once the Claimant had resigned; they could simply have allowed her employment to terminate and dropped the matter. However, they concluded that, given the serious nature of their concerns, it would be contrary to their professional obligations to allow a nurse to resign, and potentially to move to another trust, without a proper enquiry into those concerns having taken place. Ms Williams and Ms Smyth came to the conclusion that a referral to the NMC would be appropriate in the circumstances and Ms Dawe agreed. The Tribunal concludes that this decision was in no sense influenced by the Claimant's decision to contact ACAS, or indeed to issue proceedings in the Employment Tribunal, nor by the fact that she had by then complained of discrimination.

188. As for the decision to initiate an internal investigation, the Tribunal concludes that Ms Williams took that decision on the advice of Ms Smyth, which was that the NMC would still expect the Trust to conduct its own internal investigation, notwithstanding the fact that a referral was being made. Although no allegation was made against Ms Smyth, we find that she gave her advice in good faith and based on her understanding of good practice in relation to NMC referrals and there is no evidence that she was influenced by the fact that the Claimant had done the protected acts.

RD6: Discriminatory constructive dismissal

189. Given our conclusions above, it follows that there was no discrimination in response to which the Claimant could resign and her claim that there was a discriminatory constructive dismissal fails. We go on to consider whether there was an unfair constructive dismissal.

Conclusion: Unfair (constructive) dismissal

Constructive dismissal

190. The Tribunal concludes that the following allegations are not well-founded and did not contribute to the alleged breach of the implied term of trust and confidence.

    190.1. UD1: we have already found that Ms Thorn did not 'demonstrate hostile and threatening behaviour' towards the Claimant at an appraisal meeting in November 2015 (para 23 onwards). This allegation fails on its facts.

    190.2. UD2: the Claimant was not 'wrongly accused of not following Trust policy' in relation to funding for her Masters course and TOIL in 2015. She accepted that she had not followed policy correctly (para 15 onwards). This allegation fails on its facts. Moreover, the fact that these matters were not progressed to a disciplinary hearing does not mean that they should not have been investigated in the first place. The Respondent had reasonable and proper cause for doing so: these

were potentially serious disciplinary matters, which required investigation.

190.3. UD3: we have already found (para 34 onwards) that the reference which Ms Thorn provided on 3 March 2016 did not defame the Claimant. The information it contained accurately represented the position as it was at the time, nor did it breach confidentiality. We concluded that Ms Thorn had reasonable and proper cause for providing the information she did.

190.4. UD6: we have found (para 62 onwards) that Ms Ward did not threaten the Claimant in a phone conversation on 30 October 2017.

190.5. UD8: we have found (para 71) that Ms Ward did not deliberately find fault with the Claimant at the meeting of 21 November 2017.

190.6. UD9: we have found (para 74 onwards) that Ms Ward did not raise a 'counter-grievance' against the Claimant on 23 November 2017; the Claimant and Ms Ward raised grievances against, and independently of, each other. The fact that Ms Ward's grievance was ultimately not upheld does not show that it was made in bad faith.

190.7. UD10: we have found (para 78 onwards) that Ms Ward did not bully the Claimant after the meeting of 21 November 2017.

190.8. UD12: it is right that Ms Geddes blocked the Claimant's access to work emails for a period of nine days in April 2018 (para 99 onwards). However, she had reasonable and proper cause for doing so: she believed that accessing work emails during sickness absence was causing the Claimant anxiety. The Claimant was not required to return her laptop.

191. In relation to the alleged breach, the Tribunal has upheld the following allegations, in whole or in part.

191.1. UD4: we have already found (para 31 onwards) that the Respondents' delay in dealing with the Claimant's grievance (and appeal) against Ms Thorn, one year and three months, was manifestly excessive.

191.2. UD5: we have found (para 57 onwards) that there was no change to the Claimant's role and responsibilities in October 2017, only a change to reporting lines. Although we accept that there was reasonable and proper cause for the change itself, the same is not true of the handling of the change: there was no prior discussion with the Claimant before a general announcement was made, which was insensitive and upsetting to her.

191.3. UD7: we have already found (para 65 onwards) that at a meeting on 10 November 2017, Ms Ward became agitated, pointed at the Claimant and accused her of lying on two occasions. Her behaviour was inappropriate and unprofessional; there was no reasonable or proper cause for it.

191.4. UD11 and UD13: the delay in dealing with the Claimant's grievance against Ms Ward, which had already taken over six months by the

date at which the Claimant resigned, was excessive and unreasonable. The Respondent was in breach of all aspects of its grievance policy: all the timescales were breached; the communication with the Claimant was sporadic and inadequate, leaving her in a state of considerable uncertainty; there was no effective oversight of the process by Ms Williams; this, despite a clear warning from OH that the failure to resolve the grievance in a timely manner was causing the Claimant considerable anxiety in circumstances where she was already signed off with work-related stress and experiencing serious health difficulties. With the exception of the delay caused by Ms Xavier's bereavement, there was no reasonable or proper cause for the Respondent's failures. The unexplained delay in concluding the stress risk assessment was also unreasonable.

192. The most recent omission on the part of the Respondent was the ongoing failure to resolve the Claimant's grievance in a timely manner. Viewed objectively, we conclude that this was in itself so egregious that it was likely seriously to damage the relationship of trust and confidence, all the more so against the background of the manifestly excessive delay in dealing with her earlier grievance between 2015 and 2017.

193. The Claimant did not affirm the contract before she resigned: the omission was ongoing at the point of her resignation. Any breach of the implied term of trust and confidence is a repudiatory breach (*Omilaju* at para 14(3)). We have already found (para 112) that the Claimant resigned, in part at least, in response to the Respondent's failure.

194. Alternatively, we conclude that the failure to resolve the grievance, taken together with the other adverse treatment we have found (UD4, UD5 and UD7), was likely seriously to undermine the Claimant's confidence in those managing her and was conduct which, cumulatively, was likely to destroy or seriously damage the relationship of trust and confidence, with the failure to resolve the grievance in a timely manner amounting to a 'last straw'. We find that the Claimant had all those matters in mind when she resigned.

195. The Respondent has not proved that the Claimant was dismissed for one of the potentially fair reasons within s.98 Employment Rights Act 1996. Accordingly, the Claimant's claim of unfair (constructive) dismissal succeeds.

Remedy

196. An issue arises as to whether the Claimant would have been fairly dismissed in any event, having regard to her conduct in recruiting OA (as Mr Hazlewood submits), and whether there ought to be a reduction of compensation under the *Polkey* principle. We have heard evidence on the issue and both representatives made brief submissions, but the Tribunal considers that it would be right for them to have an opportunity to address us further in argument at the remedies hearing before we decide the issue. To be clear: no further evidence on the matter will be admitted.

197. The Tribunal expects that the parties will also address us further on the issue of a possible ACAS uplift.

198. The case will be listed for a remedies hearing, with a time estimate of one day, unless the parties consider that longer will be required. By no later than 14 days after this judgment is sent out, they are to provide the Tribunal with their dates to avoid for three months from September 2020 onwards (which is the earliest likely listing, given the Covid-19 situation), marked for my attention. The hearing will then be listed and I will give directions in preparation for the hearing.

Employment Judge Massarella
Date: 1 May 2020

APPENDIX: LIST OF ISSUES

1. The parties agree that any allegation which pre-dates 17 April 2018 is *prima facie* out of time.

2. The issues for determination by the Tribunal are as follows.

Direct race discrimination (s.13 Equality Act 2010 ('EqA'))

1. The Claimant is Black British, of Nigerian national origin.

2. The acts of direct race discrimination alleged by the Claimant are as follows.

   - RD1: In June 2017 Caroline Ward and/or Matthew Henshaw decided the Claimant should not attend an interview in her role as an Ethnic Minority Network Ambassador.

   - RD3: During the 21 November 2017 meeting and in her grievance of 23 November 2017, Caroline Ward referred to the Claimant variously as challenging, defensive and aggressive when describing alleged behaviours of the Claimant at work.

   - RD6: The Claimant was (constructively) dismissed.

3. With regard to time limits:

   a. are any of the allegations out of time?

   b. If so, do they form part of conduct extending over a period?

   c. If not, is it just and equitable to extend time?

4. Did the alleged acts occur?

5. Did the Respondent thereby treat the Claimant less favourably than it would treat others of a different racial group in the same material circumstances?

6. Who is the correct comparator? If there is no actual comparator, how does the Claimant define the hypothetical comparator?

7. Did the Respondent treat the Claimant in this way because of her race?

8. In so doing, did it subject the Claimant to a detriment?

Harassment related to race (s.26 EqA)

9. The alleged acts of harassment related to race are as follows.

   - RD2: In or around October 2017, did Caroline Ward make a comment to the Claimant about 'cracking the whip', accompanied by a hand gesture?

   - RD4: It is accepted that Melody Williams made a comment in the witness interview on 31 May 2018 which she gave with respect to the

ongoing grievance investigation that she had raised the possibility with Caroline Ward previously that the Claimant might have a language barrier which may be contributing to ongoing performance concerns. The Claimant became aware of these comments when the meeting minutes were sent to her on 20 August 2018.

- RD5: Caroline Ward's comments that the Claimant was challenging, defensive and aggressive on 21 November 2017 and 23 November 2017.

10. With regard to time limits:

    a. are any of these allegations out of time?

    b. If so, do they form part of conduct extending over a period?

    c. If not, is it just and equitable to extend time?

11. Did RD2 occur? If so, did it amount to unwanted conduct?

12. With regard to RD4, did Ms Williams' comments on 31 May 2018 as communicated to the Claimant on 20 August 2018 amount to unwanted conduct?

13. Were the comments related to the Claimant's race?

14. If so, did they have the purpose or effect of violating the Claimant's dignity or creating a humiliating, offensive or hostile environment for her?

15. If so, was it objectively reasonable for them to have that effect.

Victimisation (s.27 EqA)

16. The protected acts are as follows:

    a. the Claimant contacted ACAS on 16 July 2018;

    b. the resignation letter of 18 July 2018;

    c. the Claimant issued Tribunal proceedings on 4 September 2018.

17. The alleged act of victimisation is as follows:

    - RV1: It is accepted that Ms Dawe, the Chief Nurse, wrote to the Claimant on 10 September 2018 in relation to a referral to the NMC and an internal disciplinary investigation. Ms Williams took steps in furtherance of that. It is the Claimant's case that it was a joint decision.

18. Did the Respondent thereby subject the Claimant to a detriment?

19. If so, was such detriment because the Claimant had done the alleged protected acts?

Constructive unfair dismissal

20. It is not disputed that the Claimant resigned on 18 July 2018, her employment terminating on 18 October 2018.

21. The Claimant claims constructive dismissal. It is for the Claimant to prove that there was a repudiatory breach of contract by the Respondent. She relies on a breach of the implied term of trust and confidence.

22. The alleged acts of the Respondent which she contends, singly or cumulatively, amounted to such a breach are set out below. For the avoidance of doubt, she relies on these acts, whether or not the Tribunal finds that any of them amounted to discrimination.

- UD1: In November 2015, during the Claimant's annual appraisal meeting, Maria Thorne demonstrated hostile and threatening behaviour towards her.

- UD2: In October / November 2015, the Claimant was wrongly accused of not following Trust Policy and procedure when seeking authorisation of funds to cover her training course for the value of £4500. The Claimant was also wrongly accused of not following Trust Policy and procedure for authorisation for periods of time owing in lieu. No action was taken against Maria Thorne.

- UD3: On 3 March 2016, Maria Thorne provided a reference which defamed the Claimant and included confidential information relating to the fraud allegation made against her. The fraud allegation was not upheld.

- UD4: On 23rd February 2017, the Claimant received the Grievance Appeal Outcome against Maria Thorne. A majority of the allegations were not upheld. The grievance process as a whole had been unacceptably delayed.

- UD5: In October 2017, after starting her new role as a Barking and Dagenham CAMHS Clinician Lead, the Claimant was informed of the change in her role by Caroline Ward and Melody Williams. The Claimant was informed that she would need to do another role as well as her own role increasing her workload. There was no prior discussion about this. The Claimant was told that she had not been informed of the changes to her role due to an oversight (without explanation or apology).

- UD6: On 30th October 2017, the Claimant was threatened by Caroline Ward who stated: 'do you know the implications of reporting directly to me as an Assistant Director.'

- UD7: On 10th November 2017, the Claimant had a three-way meeting with Caroline Ward and Melody Williams and tried to resolve her concerns informally. Ms Ward waved her fingers at the Claimant, pointed at her and accused her of lying on two occasions. Ms Ward blamed the Claimant's leadership skills and did not listen to or support the Claimant.

- UD8: On 21st November 2017, the Ms Ward deliberately found fault in the Claimant's work resulting in the Claimant raising a formal grievance against her.

- UD9: On 23rd November 2017, Ms Ward raised a counter-grievance against the Claimant stating that she was working below the NELFT standards and her behaviour is detrimental to her and the service. These allegations are not upheld.

- UD10: The Claimant continued to be bullied by Ms Ward as set out at paragraphs 30 and 46 of the Claimant's witness statement. The meeting referred to in para 30 took place on 5 December 2017 and no support or protection was offered by any Manager to the Claimant. This resulted in the Claimant being signed off with Stress at Work.

- UD11: The Respondent failed to follow the recommendations and advice of Occupational Health Reports of 12th March, 13 April and 18 May 2018 by expediting the grievance and stress risk assessment.

- UD12: In April 2018, Ms Jan Geddes blocked the Claimant's emails without her knowledge and consent. The Claimant was then asked to return all of her working devices and was left to correspond with her employers from a personal email account. This was in breach of the Management of Attendance at Work Policy and Procedure. The Claimant felt as though she was being treated as if she had been dismissed or suspended whilst off sick which further impacted on her well-being.

- UD13: In June and July 2018 the Claimant was informed that there would be further delays in finalising the grievance outcome, at which point she attended her GP and was prescribed anti-depressants.

23. The matter set out at UD13 is relied on by the Claimant as the last straw, which triggered her resignation.

24. The issues for the Tribunal are as follows:

    a. did the acts / omissions complained of by the Claimant occur?

    b. If so, did the Respondent have reasonable and proper cause for its actions?

    c. If not, viewed objectively, were those actions likely to destroy or seriously to damage the relationship of trust and confidence between the Claimant and the Respondent?

    d. Was it a repudiatory breach of contract?

    e. If so, did the Claimant waive the breach / affirm the contract?

    f. Did the Claimant resign in response to the breach?

    g. If so, what was the reason for the dismissal and was it potentially fair?

h. If so, was the constructive dismissal unfair, having regard to the band of reasonable responses?

25. If it is found that the Claimant was unfairly dismissed, did the Claimant, through her own blameworthy conduct, contribute to the dismissal? If so, should a reduction for contributory conduct be made?

26. If it found that the Claimant was unfairly dismissed, or that the dismissal was discriminatory, would her dismissal have occurred in any event and should any *Polkey/Chagger* reductions be made?

ACAS Code

27. The Claimant raised a grievance on 22 November 2017. The grievance raised some, but not all, of the matters identified as the grounds for constructive dismissal. Were any of the acts identified as amounting to repudiatory breach identified in the grievance? If so, did the Respondent breach the ACAS Code in the way the grievance was handled? If so, is it just and equitable to make any uplift of the award and if so, by how much?

28. If the Respondent is found to have discriminated against the Claimant on any of the grounds alleged, did the Claimant raise those particular grounds in her grievance?

29. If she did, did the Respondent breach the ACAS Code in the way it dealt with the grievance?

30. If so, should any award in respect of those allegations be uplifted and if so, by what amount?