



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Shaikh

**Respondent:** Moorfields Eye Hospital NHS Foundation Trust

**Heard at:** Central London Employment Tribunal

**On:** 6 – 10 February 2023

**Before:** Employment Judge Keogh, Ms Plummer, Ms Went

## Representation

Claimant: In person

Respondent: Ms K Moss (Counsel)

# JUDGMENT

1. The claimant's claims of direct race discrimination succeed in relation in incidents e, g, h, l, j, l, m, n and p as set out in the List of Issues;
2. The claimant's claims of harassment related to race succeed in relation to incidents a, b, c, e, g, l, j, l, m and p as set out in the List of Issues;
3. The claimant's claims of victimisation succeed in relation to incidents e, g, h, i, l, n and p as set out in the List of Issues;
4. The claimant's claim of constructive dismissal arising from discrimination succeeds.

# REASONS

1. In reaching this decision we considered those documents referred to us by the parties in their written and oral evidence and those flagged to be read in the respondent's chronology. We heard oral evidence from the claimant, Ms Mounia Chekar and Mr Andrew Bakr, and for the respondent Mr Peter Holm, Ms Kerry Tinkler, Ms Sarah Martin and Ms Kirsten Malcolmson. We also received a witness statement on behalf of the claimant from Miss Sowmia Muthuswamy, who did not attend the hearing. We heard oral submissions from both parties and received a note on the law from Ms Moss, Counsel for the respondent. We took into account all the evidence

before us and submissions in reaching our decision. Only the key points are referenced in the judgment below. We did not in the end find any assistance in the witness statement of Miss Muthuswamy, who was not present to be cross examined, and placed no weight on it.

### **The claims**

2. By a claim form dated 22 February 2021 the claimant brought claims of constructive unfair dismissal and race discrimination. It was confirmed at a preliminary hearing on 4 October 2021 that a claim for ordinary unfair dismissal was not pursued as the claimant lacked the requisite two years' service, however constructive dismissal as a result of discrimination was pursued. Further and better particulars of claim were ordered and were produced. Within that document the claimant made new allegations of sex discrimination. No application to amend the claim was made. On 23 January 2023 an application was made to amend the claim to include further acts of race and sex discrimination related to the grievance process. The respondent objected to that application.
3. At the outset of this hearing, having taken some time to read the pleadings, we considered the claimant's application to amend the claim to include (i) sex discrimination and (ii) the additional acts related to the grievance process.
4. We considered the guidance set out in ***Selkent Bus Company Ltd v Moore*** [1996] ICR 836 and took into account all relevant circumstances, balancing the injustice and hardship of allowing the amendment against the injustice of refusing it. We took into account in particular the nature of the amendments, the timing and manner of the application, the applicability of time limits and the prejudice which may be caused to the parties by granting or refusing the amendment, and the overriding objective.
5. In respect of the application to add sex discrimination we considered that while the claim form references the claimant being stereotyped as a 'loud ethnic female' it otherwise does not make any reference to sex or a difference in treatment because of sex. The box for sex discrimination is not ticked. There was no reference made to sex discrimination in the discussion of the claims at the preliminary hearing in October 2021. While the claimant was ordered to provide further and better particulars of her claim this did not give her free licence to add additional claims and an application to amend the claim ought to have been made at that time. The respondent produced a list of issues which includes the sex discrimination allegations but with a caveat that these were not included in the claim and ought to be dismissed. The amendments now sought do require a substantive change in the evidence to be adduced before the Tribunal and we considered that time limits were relevant. Even if the application had been made in November 2021 when the further and better particulars of claim were produced the claims would have been out of time, and there is no good reason why they should not have been brought at the outset, even bearing in mind that the claimant is a litigant in person. The respondent will be prejudiced by the

introduction of the claims at this stage as it would need to adduce further evidence to counter the allegations and Counsel would need to take instructions in that regard. The overriding objective was also relevant. The production of further witness evidence would increase the time required for this hearing and it is unlikely it could be dealt with in the 5 days allocated. In the circumstances we found that the balance of prejudice fell in favour of the respondent and it was not in the interests of justice to allow the application.

6. In respect of the application to add new allegations relating to the grievance process, these are wholly new allegations which the claimant accepts were not included in the claim form. The application was made less than two weeks before the start of the hearing and the claims are therefore significantly out of time. While the respondent had produced witnesses relevant to the grievance process that evidence was not tailored to countering allegations of discrimination and once again further evidence would be required which would impact on the time allocated for the hearing. In the circumstances this part of the application was also refused.

### **The issues**

7. Following consideration of the application to amend the parties were able to finalise an agreed list of issues as follows (we added the question of ACAS uplift or reduction as this was referenced in Ms Moss' legal note):

#### Introduction

1. *The Claimant brings claims of:*
  - a. *Direct race discrimination (s.13 Equality Act 2010 ('EqA'));*
  - b. *Harassment on the ground of race (s.26 EqA);*
  - c. *Victimisation (s.27 EqA)*
  
2. *The Claimant relies on the protected characteristic of race. The Claimant describes her race and ethnicity as British Asian.*

#### Factual Issues

3. *The Claimant relies on the following alleged acts for each head of claim:*

- a. *On 17 September 2020, Peter Holm (Chief Ophthalmic and Vision Science Practitioner) mimicked the Filipino accent by imitating the way a Filipino nurse spoke, and kept repeating mispronounced words and belittling the nurse. (Direct (Race) Discrimination/Harassment)*
- b. *On 22 September 2020, Peter Holm mimicked an Indian doctor when asked for a request of imaging, mimicked her accent, laughing at the way they pronounced “will” due to their accent, and imitated that the doctor was of Indian descent. (Direct (Race) Discrimination/Harassment)*
- c. *On 23 September 2020, 4 members of staff (MC, NJ, SM, MA) addressed how they felt discriminated towards their skin colour and gender, PH ignored all comments and made jokes throughout the meeting (Direct (Race) Discrimination / Harassment)*
- d. *On 23 September 2020, the Claimant queried management’s plan of action following discrimination claims from 4 other members of staff, to which PH responded “I didn’t realise they felt so strongly” (Direct (Race) Discrimination/Harassment)*
- e. *On 23 September 2020, the Respondent moved the Claimant out of the adult department and into paediatrics following her querying management’s plan of action following discrimination claims from 4 other members of staff. (Direct (Race) Discrimination/Harassment/Victimisation)*
- f. *On 23 September 2020, Peter Holm said to Naomi James that he would put the Claimant through disciplinary action because of her having raised concerns that day (Direct (Race) Discrimination/Harassment/Victimisation)*
- g. *On 24 September 2020, Peter Holm texted Hemali Ranaaka (Ophthalmic and Vision Science Assistant Practitioner/Technical Lead) (Direct (Race)Discrimination/Harassment/Victimisation)*

- h. On 22 October 2020, Peter Holm emailed the Claimant to state that she had been moved away from her previous department because of her allegations on 23 September 2020. **(Direct (Race) Discrimination/Victimisation)**
- i. On 22 October 2020, Peter Holm emailed the Claimant and said that the Claimant's allegations were made audible to patients and staff. **Direct (Race) Discrimination/Harassment/Victimisation)**
- j. On 23 October 2020, the Respondent released minutes of the 23 September meeting which attributed comments to the Claimant on points such as "political agenda" and portraying the Claimant as an "aggressive loud ethnic female". **(Harassment, Direct (Race) Discrimination)**
- k. On 2 November 2020, Sarah Martin (HR Business Partner) told the Claimant that she should understand how Peter Holm felt as a white male because she was an ethnic female who could be seen as attacking him. **(Direct (Race) Discrimination/Harassment/Victimisation)**
- l. On 2 November 2020, Peter Holm told the Claimant during a team meeting out loud that she had been moved because patients could hear the allegations raised on 23 September 2020; **(Direct (Race) Discrimination/Harassment/Victimisation)**
- m. On 2 November 2020, the Respondent brushed off additional concerns raised by the Claimant regarding BAME progression. **(Direct (Race) Discrimination, Victimisation, harassment)**
- n. Following the Claimant's return to work on 1 December 2020, the Respondent failed to follow its return-to-work policies and failed to support the Claimant, causing her to go on further

sick.

(Direct

(Race)

**Discrimination/Victimisation/harassment)**

- o. On 3 December 2020, Kerry Tinkler told the Claimant “two months in the NHS is not a long time” in response to the Claimant’s queries regarding previous concerns about BAME discrimination, following from the first team meeting 23/09/2020. **(Direct (Race) Discrimination/Harassment)**
  
- p. On 15 December 2020, Kerry Tinkler called the Claimant and informed her that Katie Mitchell was suffering from stress because of the Claimant’s aggression and would no longer be able to line manage her. **(Direct (Race) Discrimination/Harassment/Victimisation)**

Legal Issues

*Jurisdiction*

- 4. In respect of those of the Claimant’s claims that arose prior to 17 September 2020 which the Respondent asserts are out of time:
  - i. Do any or all of those matters form part of a course of conduct by the Respondent extending over a period of time such as to render them in time?
  - ii. If not, is it just and equitable to extend time in respect of those allegations?

*Constructive Dismissal*

- 5. If the Respondent is found to have discriminated against the Claimant in the ways alleged above, did the Respondent thereby commit a fundamental breach of the Claimant’s contract of employment amounting to a repudiation of that contract? The Claimant relies on the act set out at paragraph 4(p) above as a “last straw” after an alleged breach of the implied term of trust and confidence.
  
- 6. Did the Respondent act reasonably in respect of the alleged acts at paragraph 4(p), namely informing the Claimant that there would be a change in line management, or did this contribute to an undermining of trust?

7. *Did the alleged last straw itself or the alleged acts complained of prior to the alleged “last straw” amount to an undermining of mutual trust and confidence by the Respondent, such that the C’s contract was repudiated?*
8. *Did the Claimant nevertheless delay in resigning and thereby affirm her contract of employment?*
9. *Did the Claimant resign because of an alleged breach of contract comprising of discrimination?*

*Direct Race Discrimination*

10. *The Claimant relies on a hypothetical white comparator. For each allegation of discrimination, the comparator must be in materially the same set of circumstances but treated differently.*
11. *The Claimant relies on each of the alleged acts as set out paragraphs 4(a , b, c, e, f , g , h, i, j, k, l, m, n, o , p ) above.*
12. *In respect of each of the claims of direct discrimination, did the Respondent act as alleged?*
13. *If so, did the Respondent:*
  - a. *Treat the Claimant less favourably than it treated or would have treated her comparators; and*
  - b. *if so, was the less favourable treatment because of the Claimant’s race?*

*Harassment related to race*

14. *Did the Respondent act as alleged at paragraphs 4(a, b, c, e, f, g, i, j, k, l, m, o, p) above?*
15. *If so, did the Respondent engage in unwanted conduct related to the Claimant’s race?*
16. *If so, did the unwanted conduct have the purpose or effect of violating the Claimant’s dignity, and/or did the conduct create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?*

17. *Was it reasonable for this conduct to have that effect?*

*Victimisation*

18. *It is admitted that the Claimant did a protected act, namely by raising concerns in relation to BAME progression within the Medical Imaging Department immediately after the meeting of 23 September 2020.*

19. *Did the Respondent act as alleged at paragraphs 4(d, e, f, g, h, j, k, l, m, n, p)?*

20. *If so, did the Respondent subject the Claimant to a detriment by doing so?*

21. *If so, did the Respondent subject the Claimant to a detriment because of the protected act?*

*Remedy*

22. *If the Claimant was constructively dismissed:*

a. *What compensatory award would be just and equitable in all the circumstances?*

i. *Has the Claimant reasonably mitigated her loss?*

ii. *Should any compensatory award be reduced to take account of the chance that the Claimant would have been dismissed or resigned in any event ('Polkey'); and*

iii. *Should any basic and/or compensatory awards be reduced by reason of the Claimant's own conduct?*

23. *What award should be made for non-financial loss (injury to feelings) in relation to claims brought under the EqA?*

24. *Should any award be increased or reduced by up to 25% as a result of a failure by either party to comply with the ACAS Code of Conduct?*

8. The hearing was due to consider both liability and, if the claims were successful, remedy. It became apparent there would be insufficient time and



that judgment on liability would have to be reserved with a further hearing if necessary to deal with remedy. It was concluded that due to time constraints and a continued lack of disclosure in relation to the claimant's mitigation that we should consider issues of *Polkey*, contribution and ACAS uplifts or decreases at any remedy hearing.

## **The Law**

### **Direct discrimination**

9. Section 13 Equality Act 2010 ("*EA 2010*") provides:

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

10. Section 23 EA 2010 provides that when making a comparison, "there must be no material difference between the circumstances relating to each case".

11. The burden of proof is set out at section 136 EA 2010:

"(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."

12. In ***Madarassy v Nomura International plc*** [2007] ICR 867 Mummery LJ stated:

*"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"*

13. For discrimination to be made out, race only need be an effective cause for the treatment; it does not need to be the only reason or even the main reason for the treatment. As long as race had a "*significant influence on the outcome, discrimination is made out*" (***Nagarajan v London Regional Transport*** [1999] ICR 877, HL).

14. The Tribunal must ask, (i) why did the alleged discriminator act as they did; and (ii) what, consciously or unconsciously, was their reason (***Chief Constable of West Yorkshire v Khan*** [2001] ICR 1065).

15. Direct discrimination may be made out where an assumption about the claimant based on a racial stereotype can be shown. There must be evidence from which the Tribunal could properly infer that wrong assumptions were being made about the claimant's characteristics and that

those assumptions were operative in the detrimental treatment (***Stockton on Tees Borough Council v Aylott*** [2010] ICR 1278).

16. We were also referred to ***Aitken v Commissioner of Police for the Metropolis*** [2012] ICR 78, CA.

### Harassment

17. Section 26 EA 2010 provides:

“(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.”

18. We were referred to ***Richmond Pharmacology v Dhaliwal*** 2009 ICR 724.

### Victimisation

19. Section 27 EA 2010 provides:

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because—  
(a) B does a protected act, or  
(b) A believes that B has done, or may do, a protected act.  
(2) Each of the following is a protected act—  
(a) bringing proceedings under this Act;  
(b) giving evidence or information in connection with proceedings under this Act;  
(c) doing any other thing for the purposes of or in connection with this Act;  
(d) making an allegation (whether or not express) that A or another person has contravened this Act.  
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.”

20. We were referred to ***In re York Truck Equipment Ltd*** EAT 0109/88.

### Constructive dismissal

21. Section 39 EA 2010 provides:

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

...

(c) by dismissing B;

...

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

...

(c) by dismissing B;

...

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

...

(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.”

22. It is for the claimant to show that there has been a fundamental breach of contract, she resigned because of that treatment and she did not affirm the contract by waiting too long before resigning. The tribunal must consider, whether individually or cumulatively, acts upheld as discrimination were sufficiently serious to undermine the trust which should exist between employers and employees.

### **Findings of fact**

23. The claimant was employed by the respondent as an ophthalmic technician (Band 3) from 8 April 2019 to 21 December 2020 when she resigned from the respondent's employment.

24. From 3 August 2020 the claimant increased her hours and covered paediatrics for two days and adult medical imaging for two days. At this point paediatrics was overstaffed and medical imaging required cover. Working in the paediatrics department would also enhance the claimant's skill base because, for example, she could use slit lamps more often. Mr Holm suggested that the claimant was given 'ad hoc' shifts in the medical imaging department. We do not accept this. The email sent confirming the change suggests the claimant was placed permanently on the rota for two days, with paediatrics for two days. Ms Tinkler accepted in her cross examination that from then on the claimant's base role was two days in paediatrics and two days in adult imaging.

25. On 24 August 2020 the claimant emailed her line manager Ms Katie Mitchell complaining that her pay was incorrect. She was still being paid for 12 hours per week instead of 30 hours per week. We were shown a chain of emails running to 8 September 2020 where the claimant explains her frustration that the pay issue had not been resolved. Eventually the claimant contacted payroll herself and resolved the issue.

26. On 23 September 2020 at around 8am the claimant emailed Mr Holm regarding her career progression. She had been told that the department's

budget could not accommodate a promotion to a higher banding for her. She noted that she was partaking in tasks including managing imaging requests for clinic 11 by herself as well as other requests from the hospital. She requested a discussion with Mr Holm and feedback on why she was not progressing.

27. That morning the claimant and Mr Holm had a one to one meeting to discuss her email. There is a dispute as to whether, in that meeting, in a discussion about budgets Mr Holm referred to another colleague who was Filipino and how people in the department believed he had not progressed due to his ethnicity. Mr Holm denies saying this. We accept the claimant's evidence as to what was said in this conversation. She had clear recall of this point and was able to expand on it in cross examination.
28. That afternoon there was a group meeting for the Medical Imaging team, which the claimant attended. It is not in dispute that at the meeting various concerns were raised, including potential racism in the promotion of in house staff, with some members of staff feeling they could not apply for roles or that there was no point as the outcome was pre-determined. The claimant herself said very little in the meeting.
29. The claimant says that Mr Holm did not take these concerns seriously. Rather than responding he made jokes about scrubs, talking about the colour of scrubs and that staff shouldn't leave dirty scrubs in the office. Mr Holm says that he stated he would take the concerns to the rest of the management team and feed back the outcome to staff within a timescale to be determined. He expressed sympathy with how progression had been handled prior to his arrival in April 2020 and stated that whilst he could not speak to why progression had been an issue previously, he would be able to deal with matters moving forward. We prefer the claimant's account of the general tone and nature of the meeting and what was said by Mr Holm. Her account is supported by Ms Chekar, who gave clear evidence as to what was said. Mr Holm in his cross examination accepted that he may have talked about scrubs, though he thought this would have been at the beginning of the meeting. When asked about his impression of the meeting he explained how people were shouting, it got heated, and 'I wasn't able to get a word in edgeways'. If that was the case, we find it unlikely that he gave the assurances he now says he gave. We also note Mr Holm's evidence as to what was said after the meeting. He recalls that he told another colleague who remained in the room that he did not think the meeting had gone well and was concerned that things would escalate. Although the minutes of the meeting record an action point that Mr Holm would take concerns to management and feed back to staff, for reasons we will go on to explain we do not consider that the minutes are accurate or representative of what was said at the time. Finally, if the meeting went in the way that Mr Holm suggests it is unlikely that the claimant would have felt the need to confront him afterwards.
30. An allegation is made by Mr Holm that towards the end of the meeting Ms Chekar left the meeting, saying 'I'm not listening to this bullshit'. This is

denied by Ms Chekar and the claimant, who say that she excused herself to go to the bathroom. While we note the dispute we do not need to make a finding on this point.

31. A discussion took place between staff immediately after the meeting. We accept Ms Chekar's account of this, that she was talking with a colleague in a private room behind the reception desk which was not audible to patients. The claimant came in briefly and spoke to her. All present were wearing masks and visors and it is unlikely that their conversations would have been audible. Mr Holm did not witness any discussions outside the meeting, as he remained in the meeting room.
32. Shortly after the meeting the claimant returned to the meeting room and confronted Mr Holm. There is a significant dispute about what was said. The claimant says she asked what Mr Holm's plan of action was following issues staff had raised, to which Mr Holm responded, 'I didn't realise they felt so strongly.'
33. Mr Holm has given different accounts of the conversation. In his witness statement he says that the claimant burst into the office, entered his personal space and in a raised voice stated, 'Three or four staff have raised issues with discrimination and equal opportunities and you're brushing it off! You and senior management have done nothing about it, it's fucking bullshit!' He amended this at the outset of his evidence to say it was four staff. In his interview for the claimant's grievance he recalled the conversation as follows: 'Five members of staff have made allegations of racism from senior management and you are brushing it off and doing nothing about it. Arrggh it's fucking bullshit.'" In answer to a judicial question as to what Mr Holm's response was to the suggestion he had said 'I didn't realise they felt so strongly' he said he didn't recall saying that, but went on to say he had said he didn't realise things had got to that level, didn't realise they felt so strongly, the claimant asked what he was going to do about it, he said he was going to do something about it. She didn't come in calmly, he was surprised. Then she swore, that's how it was. He was taken aback, he was stuttering because she swore at him, he didn't know what to do.
34. There are a number of reasons why we prefer the claimant's account of what was said.
  - (i) The claimant's account has been consistent throughout and she has not been swayed as to what was said;
  - (ii) Mr Holm's account has changed over time. He did eventually accept in answer to a judicial question that he said something to the effect that he didn't realise people felt so strongly;
  - (iii) The respondent has chosen not to call any of the three other individuals who were present at the time to support Mr Holm's account. We did receive during the course of the hearing grievance notes from Ms Chekar's grievance where Ms Mitchell is asked to

recall what happened. It is recorded that she said that the claimant had come back into the office and was really angry and swearing at Mr Holm. However when asked if anyone swore during or after the meeting she said she was not aware of anyone swearing during the meeting but afterwards she was in the office so would not know. This is at best ambiguous. We note Ms Mitchell did not mention what happened after the meeting when she was interviewed for the claimant's grievance. As she has not been called to give evidence at all we give no weight to her original comment in the grievance notes;

- (iv) After the incident Mr Holm spoke to both Ms Tinkler and Ms Martin. Both Ms Tinkler and Ms Martin recall in their evidence that they were told the claimant was shouting. There is no mention of swearing, which we would expect to be the first thing that Mr Holm reported and for them both to recall had that occurred.
- (v) We note Mr Holm attributes the same word 'bullshit' to both Ms Chekar and the claimant. We find it unlikely that they would both use the same word independently. We accept the claimant's evidence that this is not language she would use;
- (vi) There is no contemporaneous account in writing of the claimant swearing at Mr Holm, which is surprising. We note in the grievance investigation meeting Mr Holm says, 'To me, it was a conduct issue. I went to the office at the back of Medical Imaging; I put down some notes and contacted Kerry Tinkler to escalate the issues raised.' No notes have been disclosed.

35. It alleged by the claimant that at some point on 23 September 2020 Mr Holm said to her colleague Ms Naomi James that he was going to put the claimant through disciplinary actions because of the concerns the claimant had raised that day. Ms James is said to have relayed this conversation to her. In the interview with Ms James for the claimant's grievance Ms James is asked whether after the first meeting Mr Holm or anyone else mentioned that the claimant would be put forward for disciplinary action. It is recorded she confirmed this. Mr Holm gives a different version of events. He says that after the meeting Ms James approached him to say that the claimant was worried he may take disciplinary action against her. We accept that there was some conversation between Mr Holm and Ms James. The question for us is whether the claimant has shown on a balance of probabilities that her version of the conversation is the correct one. Neither party has called Ms James to give evidence. The claimant's account of the conversation is hearsay and in the absence of direct evidence from Ms James we can give little weight to what she is reported to have said during the grievance investigation. We find it unlikely the conversation would have been to the effect that the claimant was concerned she would have been put through disciplinary action as Mr Holm says, however neither is there sufficient evidence on balance to support the claimant's version of what is alleged. We find the claimant has not proven this allegation.

36. The conversation between Mr Holm and Ms Tinkler that we have already referred to about what happened after the meeting took place early evening on 23 September 2020 according to Ms Tinkler.

37. On 24 September 2020 Mr Holm emailed Ms Tinkler forwarding emails from the claimant about incorrect pay. He stated (*sic*):

“I’m forwarding emails from Sam which lead up to her outburst at yesterday’s meeting accusing me/us of being racist & management brushing over issue’s & treating her & other B3 unfairly. It really hasn’t sat well with me both hers & Mounia’s behaviours of being vocal about racism & discrimination still being present in department”

38. On the same day Mr Holm sent a text message to Ms Ranaaka who was working from home due to personal circumstances, saying:

“Staff meeting got very heated yesterday I’ll send you minutes. Mounia & Sam made serious allegations of past & present racism & favourable treatment to senior & non-BAME staff. If you’re down as HW (*home working*) please have evidence of work uploading, email trail you’re doing from home as she’s targeting Katie & you...”

39. Also on 24 September 2020 Ms Tinkler sent an email to senior HR asking for advice, saying:

“Peter Holm, our head of medical Imaging held a team meeting yesterday. He called me afterwards quite upset. There were several staff members complaining about unfair treatment and unfair training and promotional opportunities. Several junior members of staff apparently accused me/Peter of being racist, sexist and having favourites. I am deeply concerned that this is their perception and to be honest I am very upset and offended to be accused of behaviours that I despise in others...  
...Given the nature of some of the accusations I would appreciate some HR support as I feel a bit vulnerable here and I am not comfortable with the conversation that appears to have taken place in my absence.”

40. At some point between the meeting on 23 September 2020 and 25 September 2020 there was a conversation between Ms Tinkler and Mr Holm as to what action to take following the meeting. We accept Mr Tinkler’s account given in cross examination that she gave advice to Mr Holm to move staff ‘back to the job they were paid to do’. She was concerned about the complaints which had been raised by staff about them doing work above their remit and not being paid for it. She did not know who this would affect. We find it was Mr Holm’s decision how to implement this.

41. On 25 September 2020 a new rota was released. The claimant and Ms Chekar were moved on the rota. The claimant was now rostered to work only in paediatrics and not in medical imaging, while Ms Chekar was moved to the hub. Mr Holm initially suggested that four people had been moved, but in cross examination accepted that the rota only showed Ms Chekar and the claimant being moved.

42. We have considered carefully the reason why Mr Holm chose to move the claimant from the medical imaging department, and whether this was for the same reason as given by Ms Tinkler. For a number of reasons we conclude that the claimant was not moved because of concern she was doing work outside of her remit, but because she had raised the issue of how Mr Holm was going to deal with the issues of racism raised by staff:

- (i) In his witness statement Mr Holm says that the claimant was simply asked to undertake her original substantive role shift patterns in RDCEC Paediatrics then rotation of ad hoc shifts could be reviewed and reconsidered after issues were addressed. While the claimant's job description (which the Tribunal did not see) may have referred to paediatrics, as we have already found by this point the claimant's role had changed and her base role was in both paediatrics and the medical imaging department. She had never been appointed to work 30 hours per week in paediatrics alone. In those circumstances there was no reason to move her in accordance with Ms Tinkler's advice;
- (ii) It did not make operational sense to move the claimant as there was less demand for staff in paediatrics than in adult imaging;
- (iii) The email sent to Ms Tinkler on 24 September 2020 states in terms that it had not sat well with Mr Holm that the claimant and Ms Chekar had 'been vocal' about racism and discrimination still being present in the department. We conclude that he was uncomfortable with the accusations made and took them personally, and Ms Tinkler gave evidence to that effect;
- (iv) When the claimant asked why she had been moved Mr Holm sent her an email dated 22 October 2020 which stated (emphasis added):

"Due to the serious nature of allegations both historical & present raised at the staff meeting I chose to rota yourself along with another colleague away from the main clinic for a cooling off period until staff meeting with HR takes place on the 2<sup>nd</sup> of November which I hope you will attend. The historical & current allegations made on the day of the meeting and afterwards are unfounded but were made audible to patients & staff from other departments which were reported back to me and upsetting to hear as regardless of evidence they are very damaging. I have tried my best to accommodate your requests since I started in post in 14<sup>th</sup> of April 2020 by extending your hours and supporting your educational development and will continue to do so with all staff once issues has been addressed with HR present. The rota is always subject to change and it's important to investigate serious incidences and investigate why they happened"

This email does not refer at all to the reason given by Ms Tinkler for staff to be moved. It suggests on its face that the reason the claimant and Ms Chekar were moved was because they had raised concerns about racism and discrimination.



- (v) When first challenged as to why the claimant had been moved out of the department in cross examination, Mr Holm stated: 'It's because there was an outburst. They weren't giving me a chance to explain myself and there was an allegation I didn't care which wasn't the case.' Again this suggests the fact that the claimant had made a complaint was the real reason she was moved.
43. We accept the claimant's evidence that her removal from the department caused a direct decline in her mental and physical health and she was signed off sick with stress from 25 September 2020. Over the next month she had panic attacks every day, she could not bring herself to do anything, she questioned her career, and had suicidal thoughts and depressive episodes. She was subsequently diagnosed with depressive disorder and was put on a series of medications.
44. On 22 October 2020 the claimant emailed Mr Holm, copying in Ms Tinkler, asking for clarification why she had been moved from the department, as that had had a direct impact on her mental well-being. The email refers to a further rota being sent round on 20 October 2020 which still had the claimant in paediatrics only. The response to this email was the email from Mr Holm on 22 October 2020 which we have already referred to above, where Mr Holm states that the claimant had been moved due to serious allegations made. The claimant responded asking what the allegations were which she personally had made, with various other queries as to Mr Holm's email. Mr Holm's only response is to say, 'I look forward to answering your questions upon your return to work. Please reference the minutes from the staff meeting. In regards to the rota it is always subject to change and not set in stone.' The claimant emailed again on 26 October 2020 seeking answers to her questions, and received no response from Mr Holm. Ms Tinkler did send a response, asking if the claimant had been referred to occupational health and saying that she had advised Mr Holm not to have email exchanges with the claimant as she was not well. The email does not seek to address any of the questions the claimant had posed but suggested a meeting on the claimant's return to work.
45. The claimant noted during cross examination that in his grievance investigation interview Mr Holm had said that she had started to send aggressive emails. He accepted in cross examination that the email thread from 22 October 2020 to 26 October 2020 was not aggressive. He said it was reasonable language, and that his email was poorly worded and a mistake. He was feeling a bit threatened after the outburst. He didn't deny that he wrote it and understood how it must have made the claimant feel.
46. On 23 October 2020 'minutes' were circulated for the meeting on 23 September 2020 in advance of the second meeting due to be held on 2 November 2020. The minutes amount to a brief summary rather than a detailed account of what was said in the meeting.
47. Under the heading 'AOB' it is noted concerns were raised by several members of staff:

- “1) Progression opportunities, specifically for 83 (MC, SS) and B4 staff (NJ, MA)
- 2) Racism and/or sexism in the promotion of in house staff -- some members of staff feel that they cannot apply for roles, or that there is no point as they feel outcome is predetermined.
- 3) Fairness of duties, doing tasks above banding/contracted duties with no rewards and/or financial recognition for the employee (MC, SS)
- 4) A political agenda (MC, SS)
- 5) Management using budget as an excuse not to promote in-house (SS)

Action 3: PH to take concerns about racism etc. higher, with input and investigation from HR and Clinical Director. Feedback to staff at the next Medical Imaging meeting”

48. The claimant is attributed to four of the five concerns, including ‘political agenda’. She subsequently complained that the minutes were not accurate, as she had not spoken in the meeting. She was told that amendments could be made at the following meeting.
49. We have considered how the claimant’s name came to be included in the minutes in this way. In Ms Mitchell’s investigation meeting in relation to Ms Chekar’s grievance we note that she suggests minutes had not been taken during the meeting and she wrote down some brief minutes or bullet points afterwards so that there was a summary of what was said. She sent these to Mr Holm in an email on the afternoon of 23 September 2020 asking if there were any changes he wished to make. Mr Holm accepts that he read that email. When asked in cross examination how the claimant’s name had become attached to the item ‘political agenda’ Mr Holm stated, ‘I think the only reason I put that initial in was I was asked if I wanted to document the outburst in the minutes. That’s my only conjecture why it was added.’ We conclude nothing was said about a ‘political agenda’ in the meeting and the claimant’s name was deliberately added to this false item and to other items because she had challenged Mr Holm after the meeting.
50. A second team meeting was held on 2 November 2020. The claimant attended even though she was on sick leave at the time. Mr Bakr, Ms Chekar and Miss Muthuswamy also attended. We accept Ms Martin’s evidence that towards the beginning of the meeting she discussed avenues available for staff to raise concerns. This included discussions with her. This was followed by a presentation by Ms Tinkler on the new structure of the department. There was discussion of the structure of the department, how recruitment could work, acting up and how it applied, training courses and how people could progress.
51. The claimant contends that during the meeting BAME concerns were not addressed at all. This is supported by Ms Chekar and Mr Bakr. When asked about this in cross examination Mr Holm stated, ‘I think they planned to be... They attempted to be but I don’t think it came across.’ Ms Tinkler accepted that her slides did not include reference to BAME though she said she did mention BAME during the conversation. There were technical difficulties

throughout the meeting. Ms Martin said that she was not there to address the BAME issues herself but to provide support. Ms Tinkler attempted to address the issues. We find that specific BAME concerns were not addressed at this meeting, despite the meeting having been held for that purpose.

52. The claimant alleges that during the meeting, after a question by Ms Chekar as to why they had been separated, Mr Holm made a comment that this was because what had been said on 23 September 2020 was audible to patients. Mr Holm accepted in cross examination that he said this. He meant outside the meeting when there was discussion with Ms James. He felt it was audible because other people were asking what was going on.
53. It was agreed during the meeting that the previous meeting's minutes would be changed to remove the initials.
54. After the meeting the claimant and Ms Chekar had a conversation with Ms Martin. It is alleged that during this conversation Ms Martin told the Claimant that she should understand how Mr Holm felt as a white male because she was an ethnic female who could be seen as attacking him. This is not in the claimant's claim form. In her witness statement the claimant says Ms Martin said, "Imagine how PH must feel, as a white male it can be intimidating to be asked about racial issues from two strong ethnic females." "It can come across as you are attacking him" MC said, "this is a stereotype." Ms Chekar gives a slightly different account in her witness statement, saying Ms Martin said, "You should put yourself in Peter's shoes as having two strong ethnic females can be intimidating and I could see that he felt very upset as he was looking down." Ms Martin denies this conversation and specifically denies referring to them as "strong ethnic females". She said in cross examination that she was she was a black female herself and extremely conscious of stereotyping. It was not language she would use. She did accept that she mentioned Mr Holm was intimidated and fearful. He was fearful of the meeting and how he would be addressed. We prefer Ms Martin's evidence as to this conversation. The claimant and Ms Chekar have given different accounts as to the wording used. We accept that Ms Martin was and is conscious of stereotyping. While she may have said that Mr Holm was intimidated, she is unlikely to have used language referring to him as a 'white male' or to the claimant and Ms Chekar as 'strong ethnic females'.
55. On occupational health report was produced on 10 November 2020. This noted the reasons for the claimant's anxiety was her perception of a breakdown in the relationship between herself and her line manager. It was recommended there should be a conversation to re-establish a good working relationship and a short (two week) phased return to work if the claimant felt this was necessary.
56. On 19 November 2020 the claimant emailed Katie Mitchell to say that she would be returning to work week commencing 30 November 2020. Ms Mitchell acknowledged this email on 23 November 2020.

57. On 29 November 2020 the claimant was sent an invitation by Ms Mitchell to a meeting regarding her long-term sickness absence scheduled for 7 December 2020.

58. On 1 December 2020 the claimant's fit note had expired and she returned to work. She sent an email at 10.32am to Ms Martin, Mr Holm and Ms Tinkler indicating that she had returned to work and asking why a meeting had not already been held to support her return. There was also confusion as to who her line manager was.

59. The respondent's Managing Sickness Absence Policy defines long term absence as more than 4 weeks. The policy states that on return to work there should be a meeting within 48 hours. A flow chart on long term absence states that there should be a long term sickness absence meeting no later than the 5<sup>th</sup> week of absence with reviews every six weeks. The policy goes on to say:

"In all cases, employees must be treated with sympathy and understanding with regard to their individual circumstances. Managers must involve Occupational Health and Employee Relations at the earliest possible opportunity, particularly if the sickness absence is due to work related stress. Appropriate advice can then be obtained regarding likely duration of absence, and appropriate support to facilitate a return to work."

60. At 10.55am Mr Holm wrote to Ms Martin and Ms Tinkler in response to the claimant's email (emphasis added):

"I didn't on any occasion offer to compensate Sam for travelling in to a staff meeting she could dial in for, I offered to put her day off as a different day and it was her choice to travel in while she was signed off with stress. Very aggressive behavior again."

61. Mr Holm said in cross examination that he deeply regretted the email. It was an extremely poor use of words and he should not have used that wording. He sympathised that it could come across as a stereotype of an aggressive ethnic female.

62. The claimant went to work on 1 December 2020 without any adjustments having been put in place as suggested by occupational health. We accept her evidence that she was not greeted by management on her first day. She was by herself in a new department and did not know how to operate the machines and her login was not working. No return to work meeting was organised. Ms Mitchell did come to speak to her just before 10am to ask her for a favour (covering the hub the following day) but did not ask how she was or say anything about her return to work or ask if the claimant needed additional help. The claimant asked when her return to work would be done and Ms Mitchell said she wasn't dealing with it. She called Ms Martin who said that a return to work should be done before she started interacting with patients. The claimant started to have a panic attack due to her heightened

anxiety. Ms Martin advised that she go home, which she did. We accept that as a result of this she had a mental health set back and had to take further sick leave.

63. There was a series of emails between Ms Mitchell, Ms Martin and Ms Tinkler after the claimant left work on 1 December 2020. Ms Tinkler thought that Mr Lawrence Lane was going to deal with the claimant's return to work. Ms Mitchell said she had intended to do it that afternoon. Ms Martin indicated:

"The meeting scheduled for next week is an informal stage 1 long term sickness absence meeting, in line with the Trust sickness absence policy, at which we would discuss Sam's likely return to work and the occupational health report. As Sam returned to work today, that meeting would not have been appropriate and should have been addressed at her return to work meeting, to ensure she is safe to work.

A member of staff has been on long term sick, they should have a return to work meeting before they commence any work to ensure they are well enough to do so and that the appropriate support has been put in place."

64. During her absence the claimant asked if her sickness absence could be treated as annual leave, which she understood to be discretionary. This was refused by Ms Martin.

65. A third team meeting was held on 3 December 2020. The claimant joined by telephone. During the meeting the claimant asked how management was addressing the BAME concerns raised in the September meeting. Ms Tinkler replied, "Two months is not a long time within the NHS". Ms Tinkler accepts that she made this comment.

66. A Stage 1 sickness absence meeting was held on 7 December 2020. Ms Martin chaired the meeting and Ms Mitchell took notes.

67. On 7 December 2020 Ms Chekar raised a grievance. On 8 December 2020 the claimant raised a grievance detailing her complaints.

68. On 9 December 2020 Mr Holm emailed Ms Tinkler in relation to Ms Mitchell. The email noted that Ms Mitchell had serious health issues. He goes on to say:

"The increased levels of stress and aggression she is having to endure since the first Medical Imaging meeting from Samirah Shaikh have had some very distressing consequences to her physical & mental health...

...Following a meeting with Katie this morning with her blessing as from today I wish Katie to be removed from any further telephone/email or video conference interaction with Samirah Shaikh. I understand Sam's frustration about allocated line manager but her continued behaviour towards Katie in & out of office hours is unacceptable and cannot continue..."

69. We accept the claimant's evidence that in fact she hardly had any contact with Ms Mitchell. She updated her with sickness slips. She never spoke with Ms Mitchell outside office hours. When asked about the change of line management during a grievance interview Ms Mitchell said that when it was

made clear she was to manage the claimant she had a couple of hospital appointments around that time and so discussed this with Mr Holm, who agreed to see if line management could be transferred back to Mr Lane. The most she says about stressors from the claimant was:

“Explained that SS was quite antagonistic when she would email or speak to her. Explained that whenever she and SS would email it would seem like SS was picking up on details and saying things weren't in the policy. Explained that she felt like she had to be really careful and if there was anything that was slightly off SS would "go off at you"”

70. In an email on 15 December Ms Mitchell states that the situation with the claimant was causing her ‘some anxiety’. We are mindful we have not heard evidence from Ms Mitchell herself. We note that nowhere does Ms Mitchell suggest that the claimant’s behaviour was ‘aggressive’ or that there had been communication out of hours. We have not been referred to any email where it is suggested the claimant has been antagonistic.

71. An outcome to the sickness absence meeting was provided on 14 December 2020. The claimant was offered mediation or the option of a formal grievance. She was offered a further occupational health referral.

72. On 15 December 2020 Ms Tinkler emailed Ms Mitchell asking:

“I will be calling Sam to let her know that Laurence will be her line manager. Are you comfortable for me to say that you have been feeling some anxiety dealing with her and have been advised to avoid stress by your doctor? I do not want to share anything you are uncomfortable with.”

73. On the same day she called the claimant to inform her that she would no longer be line managed by Ms Mitchell. The claimant says in her witness statement that during this conversation she was told by Ms Tinkler that Ms Mitchell would not be managing her any more ‘due to her behaviour’. Ms Tinkler denies this. We prefer the claimant’s account of this conversation. She is supported by Ms Chekar who recalls a call afterwards with the claimant where the claimant told her that Ms Tinkler had made serious allegations towards her saying that she would no longer be managed by Ms Mitchell because she felt anxious dealing with her, and it was alleged that she was aggressive and demanding towards her. It is also not in dispute that in this conversation the claimant indicated she was going to resign. If the conversation had been bland as Ms Tinkler suggests with no mention of the claimant’s conduct it is unlikely to have triggered the claimant to have discussed resignation. In an email dated 16 December 2020 Ms Tinkler recaps the conversation, stating:

“*[Ms Mitchell]* has expressed that she feels some anxiety when dealing with you and that she would appreciate being moved away from your line management at this time.”

74. The claimant then did resign by email dated 18 December 2020. The claimant references the conversation she had with Ms Tinkler regarding Ms Mitchell's anxiety in dealing with her in this email.
75. On 21 December 2020 the claimant sent a formal resignation email to her new line manager, Mr Lane.
76. On 19 January 2021 a listening event took place. On the same day the claimant together with her former colleagues Ms Chekar, Ms James and Ms Muthuswamy raised further grievance in respect of Mr Holm imitating accents.
77. The claimant's grievance was dealt with by Ms Malcomson. She produced an investigation report in May 2021. In short, Ms Malcomson concluded that it was evident that there were some failings in terms of how the claimant was supported by the management team, however the claimant was not discriminated against on the basis of race. An outcome letter was provided on 19 July 2021 which reflected the conclusions reached in the report.
78. In September 2021 the claimant made a Subject Access Request. While not raised by the claimant as an issue in this claim, we felt it important to note that Mr Bakr alleged in his evidence that in September 2021 Mr Holm came to the office while people were having lunch and advised everyone to start deleting emails as emails between staff members can be incriminating and can be used against them. He showed people how to delete emails and offered to assist. He gave further detail in cross examination that Mr Holm looked stressed, and showed people how to start with the inbox and then go to the backup and delete this. He said there was no discussion about saving or storing emails. Mr Holm denies this. In cross examination he said that he was telling people to be mindful of Trust policy. If someone said should I delete it, he was saying be mindful of policy. We prefer Mr Bakr's evidence as to what occurred. He is supported by Ms Chekar, who recalls a conversation with another colleague about how at the time of the SAR Mr Holm was directing colleagues by actively trying to find bad emails regarding her and the claimant's character and telling colleagues not to keep certain emails in their inbox and that IT could never recover them. This is completely opposite to the approach which ought to be taken to a Subject Access Request.
79. We also note that in January 2022 Mr Holm was given a final written warning for emails sent between himself and a colleague in June 2020 which were derogatory towards another employee and found to be discriminatory.
80. The final allegations the claimant makes are that on 17 September 2020 Mr Holm mimicked the Filipino accent by imitating the way a Filipino nurse spoke, and kept repeating mispronounced words and belittling the nurse, and on 22 September 2020, Mr Holm mimicked an Indian doctor when asked for a request of imaging, mimicked her accent, laughing at the way they pronounced "will" due to their accent, and imitated that the doctor was of Indian descent.

81. The claimant confirmed in cross examination that she was present for both incidents. She also recalls other occasions when accents have been mimicked. Her evidence is supported by Ms Chekar who also says she was present at both and other incidents. Mr Bakr recalls incidents where Mr Holm mimicked accents in 2021, and said this was not the first time he had done this. Mr Holm recalled a conversation where he said he knew a few words in Arabic but denied mimicking accents.
82. We prefer the claimant's evidence in relation to these two incidents. We note multiple individuals (including the claimant) complained about Mr Holm mimicking accents after the listening event in January 2021. Mr Holm's use and acceptance of derogatory language is seen in the emails which led to his final written warning. Both the claimant and Ms Chekar have given clear examples of the language said to have been used.

### **Conclusions**

83. Although jurisdiction was raised as an issue in these proceedings, it is noted that the earliest incident complained of was on 17 September 2020, which is in time. No submissions were made by the respondent on time limits. We conclude that the claims pursued were brought within the appropriate time limits.
84. We approached our conclusions by considering each incident alleged in paragraph 3 of the List of Issues in turn and determining whether discrimination had occurred, before turning to the issue of discriminatory constructive dismissal.
85. The first allegation (a) was that on 17 September 2020, Mr Holm mimicked the Filipino accent by imitating the way a Filipino nurse spoke, and kept repeating mispronounced words and belittling the nurse. The second allegation (b) was that on 22 September 2020, Mr Holm mimicked an Indian doctor when asked for a request of imaging, mimicked her accent, laughing at the way they pronounced "will" due to their accent, and imitated that the doctor was of Indian descent. We took these incidents together. As discussed above, we found that both these incidents occurred.
86. We did not consider that these incidents amounted to direct discrimination of the claimant. While the claimant was present, there is no evidence to suggest that Mr Holm treated the claimant herself less favourably than he would have treated a white comparator, nor did he make the comments because of the claimant's race. Direct discrimination is not proven.
87. However, we do consider that the comments were unwanted conduct related to race and had the effect of violating the claimant's dignity, and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. We take into account the natural offense that is likely to be caused (and was in fact caused) by imitating accents, which



is made more serious by Mr Holm's comparative seniority. Harassment is proven.

88. The next incident alleged (c) was that during the meeting on 23 September four members of staff addressed how they felt discriminated towards their skin colour and gender. Mr Holm ignored all comments and made jokes throughout the meeting. As discussed above, we found that this incident occurred as described by the claimant.
89. We considered first whether this incident could amount to direct discrimination towards the claimant. We find that it did not. Mr Holm was not a sophisticated manager. He was out of his depth in this meeting and did not know how to manage himself or the situation. It is likely he would have responded in a similar way to any challenge by a small group. Moreover the claimant herself did not raise concerns during the meeting itself and was not a direct target of Mr Holm's behaviour. In short, his behaviour was not because of her race or ethnicity. Direct discrimination is not proven.
90. However, we do consider that Mr Holm's behaviour amounted to unwanted conduct related to race and had the effect of violating the claimant's dignity, and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant was one of the non-white members of the team present when concerns about discrimination were raised. While it may not have been Mr Holm's purpose, ignoring those concerns and making jokes was likely to have the effect of causing discontent and offense among those members of the team, including the claimant. Harassment is proven.
91. The next incident alleged (d) is that on 23 September 2020, the claimant queried management's plan of action following discrimination claims from four other members of staff, to which Mr Holm responded "I didn't realise they felt so strongly." As discussed above, we concluded that this incident occurred as described by the claimant.
92. We considered first whether this comment could amount to direct discrimination. A hypothetical comparator in this situation would be a white member of staff who took issue with the way in which a discrimination complaint had been handled. We find this was an honest comment by Mr Holm as to his reaction to the complaint. We find it likely that Mr Holm would have made a similar comment in a comparable situation involving a white member of staff and there is therefore no less favourable treatment. Nor was this comment made because of the claimant's race. Direct discrimination is not proven.
93. We then considered whether the comment could be capable of amounting to harassment. While the comment is linked to race, given the complaint about discrimination, it is not in itself the type of comment which would naturally cause offence. We bear in mind the guidance in ***Richmond Pharmacology v Dhaliwal***, 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. We conclude that the comment itself was not racially slanted, and was trivial in nature. It cannot reasonably have been perceived to be harassment. Harassment is not proven.

94. The next matter alleged (e) is that on 23 September 2020, the respondent moved the Claimant out of the adult department and into paediatrics following her querying management's plan of action following discrimination claims from four other members of staff. As discussed above, we have concluded that the claimant was deliberately removed from the department by Mr Holm because of the complaint that she made after the meeting.

95. We first considered whether there were facts from which it could be concluded that direct discrimination towards the claimant had occurred. The evidence generally points strongly towards Mr Holm stereotyping the claimant as a 'loud ethnic female', in particular the email sent to Ms Tinkler on 24 September 2020, the fact that Mr Holm indicated the move was to allow for a 'cooling off period' and Mr Holm's evidence in cross examination that the move was because of the perceived 'outburst'. This conclusion is also supported by the subsequent references made by Mr Holm to the claimant being 'aggressive' when she was not in fact displaying any aggressive behaviour, coupled with the false allegation that the claimant was audible to patients after the meeting. We also take into account that the reason for the move was that a complaint about discrimination had been made, and only the claimant and Ms Chekar were moved. In the circumstances there was a wealth of evidence to suggest that direct discrimination may have occurred. The burden of proof therefore shifts to the respondent to show that there was no contravention. The respondent has provided no reasonable explanation for the way in which the claimant was treated. We conclude that the reason for the treatment was Mr Holm falsely stereotyping the claimant because of her race, and that a white comparator would not have been treated in this way. Direct discrimination is proven.

96. We then considered whether the treatment could amount to harassment. We conclude that this treatment was unwanted conduct and did relate to the claimant's race. The claimant was unfairly singled out (along with Ms Chekar) and her removal from the department had an adverse effect on her. We find that it was reasonably to be expected that the conduct would violate the claimant's dignity, and create an intimidating, hostile, degrading, humiliating or offensive environment for her. Harassment is proven.

97. We considered whether the treatment could amount to victimisation. It is not in dispute that the concerns raised by the claimant after the meeting on 23 September 2020 amounted to a protected act. The removal of the claimant from the department was undoubtedly detrimental treatment. We have already concluded that the main reason for the removal was because the claimant raised these concerns. In the circumstances victimisation is proven.

98. The next allegation (f) is that on 23 September 2020, Peter Holm said to Naomi James that he would put the claimant through disciplinary action because of her having raised concerns that day. As discussed above we did not find that this incident was proven to have occurred. In the circumstances no discrimination is proven in relation to this allegation.
99. The next allegation (g) surrounds the text message sent on 24 September 2020 by Mr Holm to Ms Ranaaka. The content of the text message is not in dispute. Given the wording of the text message and the context in which it was sent, we consider it is reasonable for the claimant to conclude that the text message indicated she was targeting Ms Ranaaka, which was not true.
100. This is another example of Mr Holm singling out the claimant and Ms Chekar, providing evidence from which we could conclude that Mr Holm would not have treated a white comparator in the same way. The burden therefore falls on the respondent to show that no contravention has occurred. Mr Holm has not given any reasonable explanation why the claimant was mentioned in this text message at all. We conclude that this was targeted behaviour against the claimant, perpetuating the false narrative Mr Holm had adopted in relation to her because of the concerns she had raised. Direct discrimination is proven.
101. We also consider that this was unwanted conduct related to race, in that the text message directly references the claimant making *“serious allegations of past & present racism & favourable treatment to senior & non-BAME staff”*. In suggesting that the claimant was targeting the recipient of the text, Mr Holm was creating a false narrative over which the claimant had no control and which inevitably would affect her image in the eyes of other staff. Harassment is proven.
102. As a result of our conclusion that this was targeted behaviour because of the concerns the claimant had raised, we also find victimisation proven.
103. The next allegations (h) and (i) relate to the email sent by Mr Holm on 22 October 2020 in which he stated that the claimant had been moved away from her previous department because of her allegations on 23 September 2020 and that the claimant’s allegations were made audible to patients and staff. The content of the email is not in dispute.
104. We first considered whether these comments amounted to direct discrimination. We find that this was a continuation of Mr Holm stereotyping the claimant because of her race, and that a white comparator would not have been treated in this way. Direct discrimination is proven.
105. In relation to the comment that the claimant’s allegations were audible to patients, we have already concluded that this was false. It continues the narrative of the claimant as a ‘loud ethnic female’ and in that sense is related to race. We find that it was reasonably to be expected that

this conduct would violate the claimant's dignity, and create an intimidating, hostile, degrading, humiliating or offensive environment for her. Harassment is proven in relation to (i).

106. We then considered whether the comments amounted to victimisation. The respondent invited us to conclude that these comments were because of the manner in which the claimant had made allegations, not because of the allegations themselves, and therefore do not constitute victimisation (applying *In re York Truck Equipment Ltd*). We preferred the claimant's version of events as to the conversation after the meeting on 23 September 2020 and do not find that the claimant shouted or swore at Mr Holm. We find that Mr Holm did not take well to allegations of discrimination being raised and from that point on perpetuated a stereotype of the claimant as a 'loud ethnic female'. The suggestion that the claimant needed a 'cooling off period' away from the department and that her concerns were audible to patients and staff were the direct result of her raising such allegations, and not because of the manner in which they were raised. Victimisation is proven.
107. The next allegation (j) is that on 23 October 2020, the Respondent released minutes of the 23 September meeting which attributed comments to the Claimant on points such as "political agenda" and portraying the Claimant as an "aggressive loud ethnic female". We have already concluded that the claimant's name was deliberately added to this false item and to other items because she had challenged Mr Holm after the meeting.
108. We first considered whether the addition of the claimant's name to the minutes amounted to direct discrimination. We conclude that the addition of the claimant's name amounted to a continuation of the false narrative being portrayed about the claimant and that a white comparator would not have been treated in the same way. Direct discrimination is proven.
109. We also conclude that the addition of the claimant's name to the minutes was related to race as it perpetuated that false narrative. The addition of an item 'political agenda', which was not even raised in the meeting let alone by the claimant, is particularly pointed and was likely to cause the claimant to feel that her dignity was violated, and to create an intimidating, hostile, degrading, humiliating or offensive environment for her. Harassment is proven.
110. The next allegation (k) is that on 2 November 2020, Ms Martin told the Claimant that she should understand how Mr Holm felt as a white male because she was an ethnic female who could be seen as attacking him. We have found that this incident was not proven to have occurred, therefore no discrimination arises.
111. The next allegation (l) is that on 2 November 2020, Mr Holm told the claimant during a team meeting out loud that she had been moved because

patients could hear the allegations raised on 23 September 2020. Mr Holm admitted that he said this.

112. We conclude that, in the same way as the comment in the email on 22 October 2020 that the claimant's allegations were audible to patients, this also amounts to direct discrimination, harassment and victimisation. This incident was worse than the email sent because the comment was made in front of other staff rather than in private correspondence.
113. The next allegation (m) is that on 2 November 2020, the respondent brushed off additional concerns raised by the claimant regarding BAME progression. We find that, despite this meeting having been convened to deal with the previous allegations raised, BAME issues were not mentioned at all in this meeting. If there was an attempt to address such concerns it was wholly ineffective.
114. We first considered whether the failure to address the allegations raised in this meeting amounted to direct discrimination. We bear in mind that the whole point of the meeting was to address such concerns, and that the falsely adapted minutes from the previous meeting were now placed before this meeting, perpetuating the stereotyped narrative against the claimant. We find that the respondent did not take action or make any real attempt to understand what the issues were. Management was by this point so sensitive about allegations that discrimination had occurred that rather than dealing with such allegations head on they did not touch on the issues at all. We conclude that a white colleague raising such concerns would not have been ignored in this manner and that the claimant was treated in this way because of her race and because of the false stereotyped narrative that had been created. Direct discrimination is proven.
115. We then consider whether this conduct amounted to harassment. We conclude that the claimant's concerns related to race and were ignored. It is understandable that the claimant, and other BAME staff, felt disrespected as a result. This conduct was likely to cause the claimant to feel that her dignity was violated, and to create an intimidating, hostile, degrading, humiliating or offensive environment for her. Harassment is proven.
116. We then considered whether the conduct amounted to victimisation as a result of the claimant having raised concerns on 23 September 2020. We find that it does not. Rather, at this point management was concerned about any allegation of discrimination being made. The claimant was not treated in this way specifically because she had raised concerns previously. Victimisation is not proven.
117. The next allegation (n) is that following the claimant's return to work on 1 December 2020, the respondent failed to follow its return-to-work policies and failed to support the claimant, causing her to go on further sick. We conclude that the respondent did not comply with its own policies in this regard. A meeting ought to have been arranged with the claimant prior to

her return to work, or at the very least she should have been provided with support on her first day.

118. We first considered whether this conduct could amount to direct discrimination. This must be considered in the context of the false narrative that was being perpetuated about the claimant, including in Mr Holm's email on 1 December 2020 suggesting that she was 'aggressive'. There is sufficient evidence on which we could conclude that direct discrimination occurred. The burden of proof therefore falls to the respondent to show that there was no contravention. The respondent's explanation for this treatment is that it was short staffed and that Ms Mitchell was inexperienced as a manager. We reject this explanation. The claimant was ignored for nearly two months and ignored on her return to work. We conclude that management had formed a view of the claimant because of way she had been stereotyped by Mr Holm. The claimant was being passed around from one manager to another and there was and no clear indication of who line manager was. We conclude that a white colleague would not have been treated in the same way, and that the claimant was treated in this manner because of her race and the false narrative which had been created.
119. We then considered whether the conduct amounted to harassment. We conclude that this conduct was insufficiently related to race itself for harassment to be made out.
120. We then considered whether the conduct amounted to victimisation. We find that the stereotyping of the claimant and the resulting poor treatment of her was a direct result of her having raised concerns on 23 September 2020. The way the claimant was now being treated was ultimately because of that protected act. Victimisation is proven.
121. The next allegation (o) is that on 3 December 2020, Ms Tinkler told the claimant "two months in the NHS is not a long time" in response to the claimant's queries regarding previous concerns about BAME discrimination, following from the first team meeting. Ms Tinkler accepts that she made this comment (or words to that effect).
122. We first considered whether this comment amounted to direct discrimination. In her witness statement Ms Tinkler states that she regrets this flippant remark, but that it was true. Ms Tinkler accepted in evidence that she should have been more compassionate. However, she said that things take time and addressing the concerns was not something that could be done overnight. While there are factors from which we could conclude that there was discrimination, namely the way in which the claimant had been stereotyped up to this point, we find that the respondent has proven that no discrimination occurred. We accept that Ms Tinkler genuinely believed that it would take time to address the concerns raised and that the remark was an honest one. A similar remark would have been made to a white colleague raising such concerns. While somewhat tactless, the comment does not amount to direct discrimination.

123. We also conclude that the comment is insufficiently related to race for harassment to be made out.
124. The next allegation (p) is that on 15 December 2020, Ms Tinkler called the claimant and informed her that Ms Mitchell was suffering from stress because of the claimant's aggression and would no longer be able to line manage her. We find that Ms Tinkler did not mention the word 'aggression' but did say that Ms Mitchell would not be managing her any more 'due to her behaviour' as alleged in the claimant's witness statement.
125. We first considered whether this could amount to direct discrimination. We note that when interviewed Ms Mitchell first said that the reason for a change in line management was because of hospital appointments. We have not seen any evidence that the claimant acted in a manner which was inappropriate towards Ms Mitchell. That the claimant's behaviour was mentioned is a clear continuation of the false narrative which had been created that the claimant was an aggressive, loud ethnic female. We are supported in this conclusion by Mr Holm's email on 9 December 2020 regarding Ms Mitchell's management of the claimant which mentioned 'stress and aggression' and which asserted that the claimant's behaviour was unacceptable, none of which was true. There is therefore evidence from which we could conclude that discrimination occurred. The burden of proof therefore passes to the respondent to show that there was no contravention. The respondent has not provided any reasonable explanation why the claimant's alleged behaviour was mentioned in this conversation. Ms Tinkler could have simply told the claimant that her line management needed to be changed for reasons related to Ms Mitchell's health, but instead she places blame on the claimant for causing Ms Mitchell stress and anxiety at a time when the claimant herself was absent due to stress. We conclude that a white comparator would not have been treated in the same way, and that the claimant's treatment was because of her race and the continued false narrative being portrayed.
126. We then considered whether this conduct could amount to harassment. We conclude that the reference to behaviour was a stereotype and was therefore related to the claimant's race. It was reasonable for the claimant to feel that her dignity was violated, and to create an intimidating, hostile, degrading, humiliating or offensive environment for her. Harassment is proven.
127. We then considered whether this incident amounted to victimisation. As with previous incidents, we find that the stereotyping of the claimant and the resulting poor treatment of her was a direct result of her having raised concerns on 23 September 2020. The way the claimant was now being treated was ultimately because of that protected act. Victimisation is proven.
128. In summary, we find that there was direct race discrimination in relation to incidents e, g, h, l, j, l, m, n and p; harassment related to race in relation to incidents a, b, c, e, g, l, j, l, m and p; and victimisation in relation to incidents e, g, h, i, l, n and p.

129. Finally, we turn to the issue of constructive dismissal. We conclude that the numerous acts of discrimination which occurred, culminating in the telephone call on 15 December 2020, amounted to serious breaches of the implied term of trust and confidence between employer and employee. The claimant's character was repeatedly attacked and there was a direct impact on the claimant's work in removing her from the department.
130. We accept that the claimant resigned in response to this repudiatory breach, and did so promptly without affirming the breach. She indicated her intention to resign during the telephone call on 15 December 2020 and within days emailed a resignation, which was formally followed up with her new line manager Mr Lane on 21 December 2020.
131. We therefore find that the claimant was constructively dismissed as a result of discrimination.
132. Further directions will be given in relation to remedy.

Employment Judge Keogh

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Date 11 May 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/05/2023

FOR THE TRIBUNAL OFFICE